

ENTREPRENEURSHIP, ECONOMY and LAW

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

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

Chief Editor
Makhinchuk
Vitalii
Mykolaiovych

Editorial Board:

Bakalinska O.O.
Berestova I.E.
Bobyk V.I.
Vavzhenchuk S. Ya.
Vasylieva V. A.
Derevianko B.V.
Kalaur I. R.
Kostruba A.V.
Krupchan O. D.
Patsuriia N.B.
Stefanchuk M.O.
Fedorchenko N.V.
Robert Tabashevskiy
(Poland)

CIVIL LAW AND PROCESS

Ruslan Basenko, Hennadii Avanesian, Dmytro Strilko

Institute of compensation for moral damage: international legal experience
and legislative innovations.....5

COMMERCIAL LAW AND PROCESS

Haiane Babadzhanian

The concept of self-regulation of economic and trade activities.....11

Anhelina Riabtsova

Sustainable development as a vector of economic and legal use
of natural resources.....17

LABOR LAW

Serhii Lukash

Place and significance of ILO regulatory documents in the system
of labour law sources of Ukraine.....23

Leonid Mohilevskiy

Theoretical and methodological approaches to defining concepts
of the labour law system.....28

ADMINISTRATIVE LAW AND PROCESS

Oleg Baschuk

Administrative and legal framework for prevention and counteraction
of discrimination by district police officers.....33

Andrii Lohvyn

Terms of tax credit formation: genesis and problems of today.....39

Vita Moroz

Administrative and legal status of private executors authorised
to enforce judgements.....47

Yevhenii Skrypa

Foreign experience in road transport safety and main areas of its
introduction in Ukraine.....53

FINANCE LAW

Kateryna Nedostup

The transformation of local taxes in the tax system of Ukraine.....58

THEORY OF STATE AND LAW

Vira Kachur, Sergey Kozin

Methodological function of the state and law theory.....68



HELVETICA
PUBLISHING HOUSE

Monument to
the Magdeburg Rights
in Kyiv is on the cover

Inna Pidbereznykh

U.S.-Philippine national security and defence relations in the early
XXIst century.....74

CRIMINAL LAW

Natalya Miroschnichenko, Iryna Radkowska

Subjects of criminal offences in the field of traffic safety
and operation of water transport..... 80

Khrystyna Stetska

Social measures to prevent lucrative violent crimes committed by children....89

CRIMINALISTICS

Vladyslav Nehrebetskyi

Tactical and psychological bases of neutralization of counteraction to the
investigation of a criminal offense during an investigative experiment.....96

ADVOCACY

Lyubov Krupnova

Legal counseling as an essential part of attorney practice..... 101

INTERNATIONAL LAW

Polina Korneva

Temporary restriction of patent rights in the context of compulsory
licensing of medicinal products: national and foreign experience.....107

Olesia Trebina

The control mechanism of the international treaty: essence and components....114

PHILOSOPHY OF LAW

Sviatoslav Skliar

Do human rights have the ability to overcome selfish interests?.....121

Co-founders:

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

ISSN 2663-5313 (print)

ISSN 2663-5321 (online)

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

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

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

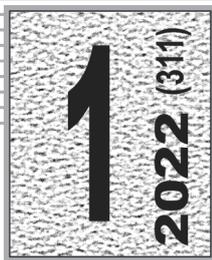
Certificate of the state registration of the print media: KV 15779-4251 IIP dated 02.11.2009

The journal is recommended for printing and distributing over the Internet by the Academic Council
of Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship
of the National Academy of Legal Sciences of Ukraine
(Minutes No. 2 dated 23.02.2022)

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

Passed for printing 25.02.2022. Format 70×108 1/16. Offset paper.
Offset printing. Conventional printed sheet 9,63. Published sheets 12,70.
Print run – 255 copies. Order No. 0322/090
Publisher: Publishing House "Helvetica"
6/1 Ingulezi St., Odesa, 65101
Certificate of publishing business entity ДК № 6424 dated 04.10.2018

© Garantia Ltd, 2022.
Certificate of the state registration of the print media
Series KB No. 15779-4251 IIP dated 02.11.2009
Postal address of the editorial office: 7-B Nazariivska St., office 4, Kyiv, 01032
Tel./fax (044) 513-33-16.



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

ПІДПРИЄМНИЦТВО, ГОСПОДАРСТВО і ПРАВО

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

Головний редактор

Махінчук
Віталій
Миколайович

Редакційна
колегія:

Бакалініська О.О.
Берестова І.Е.
Бобрик В.І.
Вавженчук С.Я.
Васильєва В.А.
Деревянко Б.В.
Калаур І.Р.
Коструба А.В.
Крупчан О.Д.
Пацурія Н.Б.
Стефанчук М.О.
Федорченко Н.В.
Роберт Табашевський
(Польща)



ГЕЛЬВЕТІКА
ВИДАВНИЧИЙ ДІМ

ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС

Руслан Басенко, Геннадій Аванесян, Дмитро Стрілко

Інститут компенсації моральної шкоди:
зарубіжний правовий досвід та законодавчі інновації..... 9

ГОСПОДАРСЬКЕ ПРАВО І ПРОЦЕС

Гаяне Бабаджанян

Поняття саморегулювання господарсько-торговельної діяльності..... 16

Ангеліна Рябцова

Сталий розвиток як вектор господарсько-правового використання
природних ресурсів..... 22

ТРУДОВЕ ПРАВО

Сергій Лукаш

Місце та значення нормативних документів МОП у системі джерел
трудоного права України..... 26

Леонід Могілевський

Теоретико-методологічні підходи до визначення інститутів системи
трудоного права..... 32

АДМІНІСТРАТИВНЕ ПРАВО І ПРОЦЕС

Олег Бащук

Адміністративно-правове підгрунття запобігання
та протидії дискримінації дільничними офіцерами поліції..... 37

Андрій Логвин

Строки формування податкового кредиту:
генезис та проблеми сьогодення..... 46

Віта Мороз

Адміністративно-правовий статус приватних виконавців, уповноважених на
примусове виконання судових рішень..... 52

Євгеній Скрипа

Зарубіжний досвід забезпечення безпеки на автомобільному транспорті та
основні напрямки запровадження його в Україні..... 57

ФІНАНСОВЕ ПРАВО

Катерина Недоступ

Трансформація місцевих зборів у податковій системі України..... 67

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

ТЕОРІЯ ДЕРЖАВИ І ПРАВА

- Віра Качур, Сергій Козін**
Методологічна функція теорії держави і права.....73
- Підберезних Інна**
Американсько-філіппінські відносини у сфері національної безпеки
і оборони на початку ХХІ ст.....79

КРИМІНАЛЬНЕ ПРАВО

- Наталія Мирошниченко, Ірина Радковська**
Суб'єкти кримінальних правопорушень у сфері безпеки руху
та експлуатації водного транспорту.....87
- Христина Стецька**
Загальносоціальні заходи запобігання корисливим насильницьким
злочинам, що вчиняються дітьми.....94

КРИМІНАЛІСТИКА

- Владислав Негребецький**
Тактико-психологічні основи нейтралізації протидії розслідуванню
кримінального правопорушення під час слідчого експерименту.....100

АДВОКАТУРА

- Любов Крутнова**
Консультування як складова практичної адвокатської діяльності.....106

МІЖНАРОДНЕ ПРАВО

- Поліна Корнева**
Тимчасове обмеження патентних прав в контексті примусового
ліцензування лікарських засобів: національний та зарубіжний досвід.....112
- Олеся Требіна**
Контрольний механізм міжнародного договору: сутність і складові.....120

ФІЛОСОФІЯ ПРАВА

- Святослав Скляр**
Чи можуть права людини подолати егоїстичні інтереси?.....126

Співзасновники:

Науково-дослідний інститут приватного права і підприємництва ім. академіка Ф. Г. Бурчака
Національної академії правових наук України, ТОВ «Гарантія», Адвокатське об'єднання «Gestors»
ISSN 2663-5313 (print)
ISSN 2663-5321 (online)

На підставі Наказу Міністерства освіти та науки України № 409 від 17.03.2020 р. (Додаток 1)
журнал внесений до переліку фахових видань категорії "Б" у галузі юридичних наук
(081 "Право", 293 "Міжнародне право")

Журнал включено до міжнародної наукометричної бази Index Copernicus International (Республіка Польща)

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

Свідоцтво про державну реєстрацію друкованого засобу масової інформації
серія КВ № 15779-4251ПР від 02.11.2009 р.

Журнал рекомендовано до друку та поширення через мережу Internet вченою радою
Науково-дослідного інституту приватного права і підприємництва ім. академіка Ф. Г. Бурчака НАПрН України
(Протокол № 2 від 23.02.2022 року)
Офіційний сайт: pgr-journal.kiev.ua

Підписано до друку 25.02.2022. Формат 70x108 1/16. Папір офсетний.
Друк офсетний. Ум. друк. арк. 9,63. Обл.-вид. арк. 12,70.
Тираж – 255. Замовлення № 0322/090
Видавць: Видавничий дім «Гельветика»,
65101, м. Одеса, вул. Інглезі, 6/1
Свідоцтво суб'єкта видавничої справи ДК № 6424 від 04.10.2018 р.

© Товариство з обмеженою відповідальністю «Гарантія», 2022.
Свідоцтво про державну реєстрацію друкованого засобу масової інформації
серія КВ № 15779-4251 ПР від 02.11.2009 р.
Поштова адреса редакції: 01032, м. Київ, вул. Назарівська, 7-Б, оф. 4.
Тел./факс (044) 513-33-16.

UDC 347.426

DOI <https://doi.org/10.32849/2663-5313/2022.1.01>**Ruslan Basenko,**

PhD in Pedagogy, Associate Professor, Head of the Department of Jurisprudence and Finance, Deputy Director for Academic Affairs of Poltava Institute of Economics and Law, Open International University of Human Development "Ukraine", 6 Monastyrskaya street, Ukraine, postal code 36000, basenko_ruslan@ukr.net

ORCID: 0000-0001-9760-6321**Hennadii Avanesian,**

Senior Lecturer at the Department of Jurisprudence and Finance, Poltava Institute of Economics and Law, Open International University of Human Development "Ukraine", 6 Monastyrskaya street, Ukraine, postal code 36000, nikolaevich9103@ukr.net

ORCID: 0000-0003-3258-3215**Dmytro Strilko,**

Assistant Professor at the Department of Jurisprudence and Finance, Poltava Institute of Economics and Law, Open International University of Human Development "Ukraine", 6 Monastyrskaya street, Ukraine, postal code 36000, strilko.d@gmail.com

ORCID: 0000-0002-1781-9069

Basenko, Ruslan, Avanesian, Hennadii, Strilko, Dmytro (2022). Institute of compensation for moral damage: international legal experience and legislative innovations. *Entrepreneurship, Economy and Law*, 1, 5–10, doi: <https://doi.org/10.32849/2663-5313/2022.1.01>

INSTITUTE OF COMPENSATION FOR MORAL DAMAGE: INTERNATIONAL LEGAL EXPERIENCE AND LEGISLATIVE INNOVATIONS

Abstract. The purpose of the article is to present and analyze the conceptual review of the provisions of international legal experience in dealing with compensation for moral (non-property) damage in the context of priorities for the protection of democratic rights and freedoms of citizens. **Research methods.** Research toolset is the unity of general scientific dialectical research methods and the comparative method, which allow the authors to conceptually analyze the international legal experience of the development of the institute of compensation for moral damage. **Results.** The study analyzes the legal tradition of advanced countries to solve the issue of compensation for moral damage to citizens. The authors distinguish between the English, American, German, and French legal tradition of developing the institute of moral damage; determine relevant problems; outline promising ways to solve them. It is stated that most of the advanced countries of the world address compensation for moral and pecuniary damage in unity. It has been found that foreign law, when characterizing the institute under study, uses terms that are more focused on an individual and are humanized. **Conclusions.** The article notes that the foreign experience of developing the institute of compensation is important to Ukraine, which faces significant difficulties in building a well-managed way to compensate for moral damage. It has been established that in European law, the concept of "moral damage" is part of the institute of compensation for moral damage, which is of a civil-law nature but exists at the level of other law branches. Therefore, it can be considered interbranch that, in turn, leads to diversity and heterogeneity of the definition of the concept of "moral damage" in various regulations. The authors believe that in the context of the future evolvement of domestic law, the English experience, which is based on the assessment of possibilities of losing life, is of much interest: it is estimated the degree of reduction of the victim's life expectancy due to harm to his health compared to the average life expectancy in the country. The authors have justified the expediency of introducing other analyzed instruments of compensation for moral damage into the Ukrainian judicial practice, which would not only contribute to strengthening the integrity of the European legal space but also significantly humanize the legal system of modern Ukraine.

Key words: moral (non-pecuniary) damage, compensation, recovery, legal institute, extent of moral damage, international experience, non-property nature.

1. Introduction

The conceptual analysis of the legal experience of modern Ukraine shows that the issue of compensation for moral (non-property) damage at the present day is poorly regulated by the legislator, which significantly limits the protection and implementation of human rights and freedoms. In addition, it should be noted that the legal system is concerned about finding legal methods of compensation for moral damage. It is driven by the emergence of new legal rules that regulate the activities of the relevant institute. Thus, guaranteeing human rights and freedoms effectively requires solving the mentioned problem.

The purpose of the study is to present and analyze the conceptual review of the provisions of international legal experience of dealing with compensation for moral (non-property) damage in the context of priorities for the protection of democratic rights and freedoms of citizens. As a result, it is essential to complete some research tasks, i.e., to identify the specifics of the development of the institute of moral (non-property) compensation in the world's major economies, determine innovative directions, and outline the prospects for their implementation in Ukraine. The research toolkit is based on the unity of general scientific dialectical research methods and the comparative method, which allow the authors to conceptually analyze the international legal experience of developing the institute of compensation for moral damage.

The study's theoretical framework comprises scholarly contributions on the issue concerned by M. Aharkov, S. Bieliatskii, V. Hliantsev, O. Hryshchuk, V. Dubrivnyi, O. Kuchynska, Ye. Machulska, Ye. Mikhno, V. Nor, V. Paliuk, I. Poteruzha, P. Rabinovych, et al. At the same time, despite the essential academic popularity of the institute of compensation for moral damage, the search for ways of its evolution is still poorly studied, especially with regard to methods for defining compensation for moral damage.

2. Institute of compensation for moral damage in Ukraine and abroad

According to the Constitution of Ukraine and the current legislation, individuals and legal entities are entitled to compensation for moral (non-property) damage caused by the violation of their rights and freedoms and legitimate interests. Following Art. 23 of the Civil Code of Ukraine, moral damage caused to a legal entity involves humiliating its business reputation. It is almost the only legislative reference to the nature of moral damage that may be caused to a legal entity. The authors also note that under para. 3 of Art. 23 of the Civil Code of Ukraine, moral damage is compensated by

money, other property, or otherwise (*Civilnij kodeks Ukraini, 2022*).

The court determines the amount of monetary compensation for moral damage given the nature of the offense, the extent of physical and mental suffering, the deterioration of the victim's abilities or deprivation of his ability to implement them, the degree of guilt of the person who caused moral damage, if guilt is the basis for compensation, as well as considering other circumstances that are of the essence. In assessing the amount of compensation, the requirements of reasonableness and fairness are taken into account (Kohanovska, 2010, p. 144).

Modern researchers mark that moral damage should be regarded as the unlawful destruction (or attempt to destroy) of human dignity, which triggers negative processes and states in the psyche. It consists of the very losses, negative consequences of a non-property nature that have arisen due to suffering. For instance, it refers to some changes in a person's life: 1) inability to realize his habits and desires; 2) deterioration of relations in the team or family; 3) loss of work, career opportunities; 4) loss of trust of close people, potential contractual counterparties, etc. The mental suffering which a person experiences because of encroachment on his personal non-property rights and benefits can be manifested in confusion, fear (for example, for the afterlife of the family, career, property), worries, disturbances, emotional anxiety, etc. Consequently, a person is not able to make the right decisions and continue keeping his usual lifestyle. These changes force a person to make additional efforts to organize his life and indicate the presence of moral damage (Petrenko, 2019, p. 64).

In general, moral damage means non-property losses due to moral or physical suffering or other adverse phenomena caused to a natural or legal person by illegal actions or omissions of other persons. A legal entity may also be subject to non-property damage, e.g., losses of a non-property nature because of the degradation of its business reputation, violation of the company name, trademark, disclosure of trade secrets, as well as actions aimed at lowering prestige or undermining confidence in its activities. The issue of compensation for moral damage resides in the infeasibility of assessing the amount of compensation that coincides with the damage caused, since it is impossible to determine the scope of pain and suffering experienced by a person. Thus, the court decides at its discretion, observing the principle of reasonableness (Pushkina, 2019, p. 63).

General aspects of compensation for moral damage in foreign countries have some differ-

ences and peculiarities. Thus, English law has no substantial difference between property and non-property damage in terms of the grounds and remuneration procedure. The American legal system, as it befits common law, has a similar situation. However, there is a so-called institute of torts – “privacy”, the creators of which regard its function as protecting the inviolability of a person and everything that helps the person to preserve himself as an individual (for example, the violation of privacy or the right to privacy, dissemination of information besmearing the plaintiff, appropriation of the plaintiff’s name, and use of his image for profit).

In Germany, damage is divided into property and non-property; there is a single principle of liability for both types of damage. At the same time, the German civil legislation lacks a list of interests protected by law in terms of the inviolability of a person; specially conditioned ones comprise causing damage to the body or health, deprivation of liberty, a woman’s inclination to cohabitation by deceit or threats. However, German civil law has the concept of “*Personlichkeit*” which is equivalent to “privacy” in American law. Interesting point is that monetary compensation is not the only remedy; the basic principle of liability is restitution, that is, the return of the injured party to the position it would have had if the offence had not been committed; if restitution is fully or partially impossible, the damage is compensated by money (Kohanovska, 2010, p. 144).

The French civil legislation does not distinguish between pecuniary and non-pecuniary damage as well. Thus, in defining damages, the French Civil Code means compensation for damage or loss in general, not limited only to monetary damage which includes the option of compensation for moral damage (Slipchenko, 2014, p. 21)

As shown by the above analysis of the current international legislation of the most progressive countries from the legal point of view, all regulatory systems do not contain such term as “moral damage”; although, there are institutions similar in essence and more developed than in Ukraine. Moreover, when characterizing these institutions, the terms are more focused on the concept of individual and everything related to him.

It is worth mentioning that in every country, compensation for moral damage has its own particularities that reflect the need of the state and society for an adequate system of legal rules regulating compensation for moral damage. Thus, the general aspects of compensation for moral damage are quite relevant to civil legislation today, because these issues have begun to be implemented in practice quite recently. In

addition, with the adoption of the current CC of Ukraine, the rules governing the issue under study are characterized by specific features (Reznik, 2014, p. 54).

3. Implementation of the international experience of the functioning of the institute of compensation for moral (non-pecuniary) damage in the legal framework of Ukraine.

Researchers assert that when choosing the most optimal domestic model of compensation (reimbursement) for moral damage to a person and bringing national legislation in line with international standards in human and civil rights, it is advisable to take into account the best practices of the advanced countries: the United States, England, France, Germany, New Zealand, the Netherlands, Canada, Switzerland, and Belgium. Nowadays, there is an urgent need to develop and adopt an individual law in Ukraine that would clearly define and designate the concept of moral damage and regulate the procedure, grounds, conditions, and mechanisms for compensation for moral damage to victims. Among other things, state support for victims, who are unable to obtain compensation from the accused, should be strengthened if compensation cannot be provided otherwise. Based on the international experience of effective mechanisms of compensation for moral damage by litigation, the above can be realized by creating and achieving the proper functioning of the State Fund for the Crime Victims’ Compensation and establishing a state mediation organization to introduce “restorative justice” (Rudenko, 2021, p. 15).

It is interesting to note that some countries encounter a so-called problem of competition of contract and tort claims. For example, in the United States, if a railway passenger is injured due to the negligence of railway employees, the company may be held liable for damage that is both a breach of contract and a tort. As a general rule, the court is not bound by any rules, and it can only determine whether the competition of claims in a particular case is allowed. In some world countries, the qualification of relations to be contractual or non-contractual significantly affects the scope of liability.

Scientists draw attention to the fact that American legislation has an entirely different judicial practice in addressing the issue of the extent of moral damage. The jury, which predominantly favors the plaintiff, decides on the extent of moral damage. Another way is to undergo a psychological examination, which allows the court to understand as clearly as possible the degree of suffering of the person and amount in controversy. The authors believe that the introduction of expertise will be very appropriate and based on specific facts (the

victim's psychological state after mental suffering), and not only interpreted at the discretion of the court (Pushkina, 2019, p. 63).

In the European Union, particularly in the countries of Anglo-Saxon law, the extent of moral damage is set given the defendant's guilt. In addition, there are even special commissions for compensation for moral damage that calculate the appropriate amount of compensation. France and Germany deal with such matters by analogy with previous cases but considering the specifics of the relevant case. Under German law, compensation for suffering must be fair: the general principle of benefit equalization is taken into account. The victim should be restored to the state before the violation of his rights or interests, but he should not benefit from compensation for the damage caused to him. In France, the court satisfies claims for compensation for moral damage being guided by the plea of justice. This means that the judge does not refer to arithmetic calculations but has regard to the specifics of relations. It will also depend on the specific nature of individual cases of compensation for moral damage and compensation that can indirectly alleviate the victim's condition. The court considers and assesses all merits of a case, e.g., the genuine needs of the victim, the evil intent of the person who caused the damage, the reasons that moved the victim to make claims for damages (Pushkina, 2019, p. 63).

Moreover, in France, exclusively direct damages are compensated under a contractual obligation. The debtor is liable for losses that were foreseen or could have been foreseen at the time of contracting, unless the obligation was not fulfilled due to the debtor's intent. A non-contractual obligation comprises both direct and indirect ones. However, the rigidity of the rule on the compensation of direct and indirect damages under tortious liability is mitigated by the fact that the extent of damages is ultimately determined by the court. From the perspective of German civil law, the distinction between contractual and non-contractual obligation to determine the scope of liability is irrelevant, since compensation for direct and indirect dam-

ages is provided both in the case of the breach of a contract and in the case of non-contractual damage (Dzery, 2010, p. 89).

In general, France, Germany and England recognize the possibility of applying compensation for non-pecuniary damage in the interests of unconscious persons ("vegetative", comatose, or similar states). The German Federal Court of Justice emphasizes that the extent of appropriate compensation should be more than nominal, since it should convey the losses caused to the victim's individuality and human dignity (Stefanchuk, 2010, p. 68). At the same time, it seems that German law is characterized by a rather restrained attitude to the overall trend among other European states to compensate for non-pecuniary damage caused to "secondary" victims – close relatives of deceased individuals who have suffered significant bodily harm (Van Dam, 2013, p. 366).

4. Conclusions

One can state that the international experience of developing the compensation institute is of great importance to Ukraine, which faces significant difficulties in building a clear way to compensate for moral damage. In European law, the concept of "moral damage" is part of the institute of compensation for moral damage, which is of a civil law nature but exists at the level of other law branches. Therefore, it can be considered interbranch that, in turn, leads to diversity and heterogeneity of the definition of "moral damage" in various regulations. The authors believe that in the context of the future development of domestic law, English experience, which is based on the assessment of the possible loss of life, arises strong interest: it is estimated a degree of the reduction of the victim's life expectancy due to harm to his health compared to the average life expectancy in the country. Consequently, it is advisable to introduce other analyzed instruments of compensation for moral damage into the Ukrainian judicial practice, which would not only contribute to strengthening the integrity of the European legal framework but also significantly humanize the legal system of modern Ukraine.

References:

- Civilnij kodeks Ukraini** [The Civil Code of Ukraine]. (2022, January 01). *Vidomosti Verhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*. Kyiv: Parlam. vyd-vo (in Ukrainian).
- Dzery, O. V., Kuznecovoi, N. S. Majdanyka, R. A.** (Eds.) (2010). *Cyvilne pravo Ukrainy. Zagalna chastyina* [Civil law of Ukraine. The general part]. Kyiv: Jurinkom Inter (in Ukrainian).
- Kohanovska, O.** (2010). *Ponjattja ta vydy osobystyh nemajnovykh prav u cyvil'nomu pravi Ukrainy* [Concepts and types of personal non-property rights in the civil law of Ukraine]. *Visnyk Kyivskogo nacionalnogo universytetu im. T. Shevchenka – Bulletin of Kyiv National University T. Shevchenko*, 84, 7–10 (in Ukrainian).
- Omelchuk, O. M., Grynko, S. D., Ivanovska, A. M., Misinkevych, A. L. & Antonjuk, V. V.** (2021). *Zahyst prav ljudyny v konteksti formuvannja pryncypu verhovenstva prava: mizhnarodnyj aspekt* [Protection of human rights in the context of the formation of the rule of law: the international aspect]. *Visnyk Nacionalnoi*

akademii pravovoyh nauk Ukrainy – Bulletin of the National Academy of Legal Sciences of Ukraine, 28, 1, 32–43. DOI: 10.37635/jnalsu.28(1).2021.32–42 (in Ukrainian).

Petrenko, V. (2019). Ponjattja ta zmist moralnoi shkody za chynnym zakonodavstvom [The concept and content of non-pecuniary damage under current law]. *Pidpryjemnyctvo, gospodarstvo i pravo – Entrepreneurship, Economy and Law*, 4, 60–64 (in Ukrainian).

Pushkina, O. V., Todoroshko, T. A. & Bocharova, M. O. (2019). Problemni aspekty vidshkoduvannja moralnoi shkody v ukraini [Problematic aspects of compensation for moral damage in Ukraine]. *Aktualni problemy vitchyznjanoi jursyprudencii – Current issues of domestic jurisprudence*, 1, 62–65 (in Ukrainian).

Reznik, G. (2014). Osoblyvosti vidshkoduvannja moralnoi shkody, sprychynenoj posjagannjam na osobysti nemajnovi prava dytyny [Features of compensation for moral damage caused by encroachment on the personal inalienable rights of the child]. *Jurydychna Ukraina – Legal Ukraine*, 8, 53–58 (in Ukrainian).

Rudenko, Ju. I. (2021). Osoblyvosti jurydyko-psyhologichnyh mehanizmiv vidshkoduvannja (kompensacii) moralnoi shkody v kryminalnomu procesi Ukrainy [Features of legal and psychological mechanisms of compensation (compensation) for moral damage in the criminal process of Ukraine]. Mykolaiv (in Ukrainian).

Slipchenko, S. O. (2014). Mehanizm pravovogo reguljuvannja osobystyh nemajnovykh vidnosyn z oboro-tozdatnymy ob'ektamy [The mechanism of legal regulation of personal non-property relations with negotiable assets]. *Extended abstract of Doctor's thesis*. Kharkiv (in Ukrainian).

Stefanchuk, R. O. (2010). Kompensacija moralnoi shkody jak sposib zahystu osobystyh nemajnovykh prav: problemy ta shljahy vyrishennja [Compensation for moral damage as a way to protect personal non-property rights: problems and solutions]. *Universytets'ki naukovy zapysky – University scientific notes*, 1 (21), 67–83 (in Ukrainian).

Van Dam C. (2013). *European tort law*. Oxford, United Kingdom: Oxford University Press (in English).

Руслан Басенко,

кандидат педагогічних наук, доцент, завідувач кафедри правознавства та фінансів, заступник директора з науково-педагогічної роботи Полтавського інституту економіки і права ЗВО «Відкритий міжнародний університет розвитку людини «Україна», вулиця Монастирська, 6, Полтава, Україна, індекс 36000, basenko_ruslan@ukr.net

ORCID: 0000-0001-9760-6321

Геннадій Аванесян,

доцент кафедри правознавства та фінансів Полтавського інституту економіки і права ЗВО «Відкритий міжнародний університет розвитку людини «Україна», вулиця Монастирська, 6, Полтава, Україна, індекс 36000, nikolaevich9103@ukr.net

ORCID: 0000-0003-3258-3215

Дмитро Стрілко,

старший викладач кафедри правознавства та фінансів Полтавського інституту економіки і права ЗВО «Відкритий міжнародний університет розвитку людини «Україна», вулиця Монастирська, 6, Полтава, Україна, 36000, strilko.d@gmail.com

ORCID: 0000-0002-1781-9069

ІНСТИТУТ КОМПЕНСАЦІЇ МОРАЛЬНОЇ ШКОДИ: ЗАРУБІЖНИЙ ПРАВОВИЙ ДОСВІД ТА ЗАКОНОДАВЧІ ІННОВАЦІЇ

Анотація. Мета – представити та проаналізувати концептуальний зріз положень зарубіжного правового досвіду з проблеми відшкодування моральної (немайнової) шкоди у контексті пріоритетів захисту демократичних прав і свобод громадян. **Методи дослідження.** В основі дослідницького інструментарію – єдність загальнонаукових діалектичних методів дослідження та порівняльно-компаративного методу, які дають змогу концептуально проаналізувати зарубіжний правовий досвід розвитку інституту компенсації моральної шкоди. **Результати.** У дослідженні проаналізовано правову традицію провідних країн з вирішення проблеми відшкодування моральної шкоди громадян. Виокремлено особливості англійської, американської, німецької та французької правової традиції розвитку інституту моральної шкоди, з'ясовано проблеми та окреслено перспективні шляхи їхнього вирішення. Констатовано, що у більшості провідних країн світу відшкодування моральної і матеріальної шкоди розглядається у єдності. З'ясовано, що у зарубіжному праві при характеристиці зазначеного інституту використовуються терміни, більше орієнтовані на поняття особистості та гуманізовані. **Висновки.** У дослідженні констатовано, що для України, де є значні складнощі з побудовою чіткого способу відшкодування моральної шкоди, велике значення має зарубіжний досвід розвитку інституту компенсації. Виявлено, що у європейському праві поняття «моральна шкода» входить

до складу інституту відшкодування моральної шкоди, що носить цивільно-правовий характер, але існує і на рівні інших галузей права, а тому може вважатися міжгалузевим, що, у свою чергу, призводить до строкатості та неоднорідності в визначенні поняття «моральна шкода» у різних нормативних актах. Виснувано думку про те, що у контексті перспектив розвитку вітчизняного права значний інтерес становить англійський досвід, в основі якого лежить оцінка перспектив втрати життя: приблизно розраховується, наскільки знижується тривалість життя потерпілого за рахунок шкоди для його здоров'я порівняно із середньою тривалістю життя в країні. Доведено, що доцільно запровадити в українську судову практику й інші проаналізовані інструменти відшкодування моральної шкоди, що не лише сприяло б зміцненню цілісності європейського правового простору, а й суттєво гуманізувало б правову систему сучасної України.

Ключові слова: моральна (нематеріальна) шкода, компенсація, стягнення, правовий інститут, розмір моральної шкоди, зарубіжний досвід, немайновий характер.

The article was submitted 15.02.2022

The article was revised 10.03.2022

The article was accepted 30.03.2022

UDC 346.1/9

DOI <https://doi.org/10.32849/2663-5313/2022.1.02>**Haiane Babadzhanian,**

Postgraduate Student, Assistant at the Department of International, Civil and Commercial Law of the State University of Trade and Economics, Kyiv National University of Trade and Economic, 19, Kyoto street, Kyiv, Ukraine, postal code 02156, tenca@ukr.net, g.babadzhanian@knute.edu.ua

ORCID: 0000-0002-6048-8787

Babadzhanian, Haiane (2022). The concept of self-regulation of economic and trade activities. *Entrepreneurship, Economy and Law*, 1, 11–16, doi: <https://doi.org/10.32849/2663-5313/2022.1.02>

THE CONCEPT OF SELF-REGULATION OF ECONOMIC AND TRADE ACTIVITIES

Abstract. The *purpose* of the article is to define the concept of self-regulation of economic and trade activities.

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

Result. The author has studied theoretical principles of self-regulation of economic and trade activity, i.e., concept, signs, types, and means.

It is established that self-regulation of economic and trade activities is a unique, complex, and isolated system of rules under which the parties themselves choose and enforce conduct rules by relying on mutual good faith and integrity. During the analysis of the essence of “self-regulation”, the following types are distinguished: by the nature of interaction with the state (delegated, voluntary, and mixed), by means (contractual, corporate, and institutional), by consolidation forms (regulatory, organizational, and/or institutional).

The research marks that most European countries, such as Poland, France, Italy, Germany, and others, legislatively settled the activities of self-regulatory organizations and the issue of self-regulation as a whole. The effectiveness of the functioning of self-regulation and the activities of self-regulatory organizations has been proved based on the legislative practice of the European Union countries. The author has studied contractual self-regulation and emphasized that the parties themselves can act as a kind of “legislators”, but within the limits determined by law. It is specified that the contract of delivery and the sale of goods are means of self-regulation, because they implement the principle of free will and allow the parties to determine convenient rules of conduct in contractual relations.

Conclusions. It is stated that a systematic regulatory legal act which would clearly regulate social relations related to self-regulation as a whole has not yet been adopted. It is proposed to amend and/or supplement the Commercial Code of Ukraine and/or adopt the Law of Ukraine “On Trade” which would enshrine the term “self-regulation”, “self-regulation of economic and trade activities” and determine the principles of state regulation and self-regulation, as well as other issues of organization and implementation of economic and trade activities.

Key words: self-regulation, economic and trade activities, state self-regulation, self-regulatory organization, contractual self-regulation, contractual obligation.

1. Introduction

The self-regulation of economic and trade activity is an important aspect of state development, given the European integration vector and commitments to build good governance. The legal support of economic and trade activities in Ukraine is far from perfect. Many issues are solved through self-regulatory means, the use of which is also poorly managed. In addition, the balance of state regulation and self-regulation deserves particular attention. There is still no systematic normative legal act that would expressly govern social relations related to self-regulation as a whole.

The idea that the best way to allow eco-

nomical and trade activities to function properly is to allow entities to create their own rules, which establish additional responsibility, has been increasingly used. It will result in reduced state intervention and contribute to the effective development of some economic sectors. In this context, such concepts as regulation, self-regulation, and co-regulation of economic activity have become the hot-bottom issues for discussion among scientists and practitioners: O. Belianevych [2], O. Vinnyk [4], O. Honcharenko [5, 6], V. Dobrovolska [10], V. Milash [16], et al.

The purpose of the article is to define the concept of self-regulation of economic and trade activity.

2. Theoretical basis of the concept of self-regulation of economic and trade activities

The self-regulation of economic and trade activity is a unique, complex, and relatively separate system of rules under which the parties undependably choose (create, agree) conduct rules and adhere to them by relying on mutual good faith and integrity.

In general, self-regulation is a way of governance that implies minimum state intervention, and participants (at their discretion) determine rules for relevant activities, monitor compliance with the rules, and use specific methods to affect violators. State regulation is not excluded – on the contrary, it may manifest itself in various forms, depending on the applied means of self-regulation and other approaches.

Part 1 of Art. 5 of the Commercial Code of Ukraine (the CC of Ukraine) establishes that legal economic order in Ukraine is based on the optimal combination of the market self-regulation of economic relations of business entities and state regulation of macroeconomic processes (Commercial Code of Ukraine, 2003). O. Goncharenko, in his monographic research, considers the concept and essence of self-regulation of economic activity but, first of all, it is worthwhile to set the ratio and interaction of state regulation and self-regulation of economic and trade activity (Goncharenko O.M., 2019).

O. Goncharenko holds that “the state regulation of economic activity uses the particularities of self-regulation of economic activity, its internal and external manifestations and effects – to achieve the public goal – ensuring legal economic order within the state” (Goncharenko O.M., 2018, p. 42). It is worth agreeing with the above opinion because effective self-regulation should maintain the progress of various types of economic activity, which will increase the confidence of civil society in the state.

V. Dobrovolska analyses state regulation and self-regulation from the entrepreneurship perspective. She believes that state regulation and self-regulation should not exclude each other, and their cohesion is one of the manifestations of combined public and private interests in entrepreneurship and is a necessity” (Dobrovolska V.V., 2005, p. 305).

In turn, M. Sibilov notes that the concept of legal regulation and its mechanism is grounded on such principles as recognition of the exclusive state nature of legal regulation, that is, in practice, legal regulation is realized from one center, which is the state power; recognition of the internal unity of legal regulation and its mechanism conditioned by unity of the economic basis of society, social relations subject to legal regulation, and the entire sys-

tem of law. The author also states that slogans in the totalitarian regime created obstacles even for promoting the idea of the probable existence, in addition to external, of internal legal regulation (self-regulation) of social relations; in fact, recognition of the legal norm is the only regulator of social relations (Sibilov M., 2014, p. 38-40). Developing the opinion, the scientist points out that the concept of self-regulation is inherent in private contractual relations, which conduct decentralized regulation within the scope of the dispositive principles of civil relations based on legal equality, free expression of will, and property independence of subjects (Sibilov M., 2014, p. 40).

O. Zaliyev believes that “the concept of self-regulation, as an alternative to state regulation, allows minimizing public spending for regulating and ensuring maximum flexibility to market participants and respecting their interests....thus, the effective development of the economy requires a well-developed system of interaction between the institutions of self-regulation and state regulation of the economy in general and the relevant industry, in particular, given its specifics” (Zaliyev O.M., 2013, p. 238-239). One should agree with the above statement, extrapolating the following to the self-regulation of economic and trade activity: the effective development of economic and trade activity (hereinafter – “ETA”) requires a developed system of interaction between the institutions of self-regulation and state regulation, given the specific structure of ETA, peculiarities of its implementation, and the legal status of subjects.

Yu. Ostapenko holds that “although self-regulation is understood as the establishment of certain rules by subjects (at their discretion), creation and control over their implementation, the state keeps setting the limits for actions of business entities” (Ostapenko Y.I., 2018, p.9).

O. Goncharenko, in his monographic study, considers the concept and essence of self-regulation of economic activity. Therefore, the author interprets the concept of self-regulation of economic activity as an independent organization by economic entities (by their organizational associations) of relations in public production, manufacturing, and sale of products, the performance of works, or provision of services of a cost nature, which have price determinacy, using elaborated and established rules in order to meet economic and social needs (Goncharenko O.M., 2019, p.66). O. Belyanovich assures the following: “...self-regulation may be deemed to be taking of managerial decisions by an individual entity/entities of economic (business) activity on its own economic activity, which is conducted independently and at its own risk

following available regulatory information (in the form of legal rules)" (Belyanovich O.A., 2016, p. 40).

When analyzing the essence of "self-regulation", it is expedient to distinguish its types depending on specific criteria:

by the nature of interaction with the state (delegated, voluntary, and mixed) (Zeidel M.I., 2011, p. 160);

by means (contractual, corporate, and institutional) (Goncharenko O.M., 2016, p.69);

according to the forms of consolidation (regulatory, organizational, and/or institutional) (Goncharenko O.M., 2016, p.69).

Under the first criterion, each type of self-regulation is linked with the format of interaction with the state. For example, voluntary self-regulation allows subjects to establish rules and control their implementation without state intervention, while delegated one allows self-regulatory organizations to control specific sectors by delegating functions determined by law from the state.

Thus, with the help of self-regulation of economic activity, a range of statutorily unregulated social relations can be well-arranged and settled, or it can be implemented relations that have not been fixed, proceeding from the principle "everything which is not forbidden is allowed". The studied contributions pay key attention to the self-regulation of economic activity in general or sectors other than economic and trade activity despite the essential and accessible nature of ETA to meet the economic and social needs of citizens of Ukraine. However, the self-regulation of the industry concerned is a poorly studied problem.

The concept of economic and trade activity provided for in Article 263 of the Commercial Code of Ukraine, which states that economic and trade activity is the activity carried out by business entities in the turnover of commodities and focused on selling industrial products and consumer goods, as well as supporting activities that ensure their sale by providing appropriate services (Commercial Code of Ukraine, 2003). In other words, economic and trade activity is an independent, voluntary activity of business entities, the prime objective of which is to make a profit through buying and selling goods and providing services related to commodity turnover.

According to K. Khrimli: "... economic and trade activity is an independent type of economic activity, which has its subject composition, object, subject matter, and procedure of implementation. Economic and trade activity involves the sale of industrial products and consumer goods and the implementation of supporting activities that ensure their sale by pro-

viding appropriate services (Hrymly K.O., 2014, p.220). The regulation of economic and trade activity should be based on an organic combination of market self-regulation and public administration to keep the social focus of the economy using economic and legal levers.

Considering the essence of economic and trade activity, it is worth referring to the features of economic activity proposed by V. Shcherbyna, as follows: economic activity involves manufacturing products, performing works, providing services not only for the private needs of a manufacturer but also of other persons; economic activity is carried out professionally, and the result should be achieved for a fee; economic activity combines both the manufacturer's private interests and public interests (state, society, large segments of the population, etc.)" (Shcherbina V.S., Pronskaya G.V., & Vinnyk O.M., 2003).

O.M. Vinnyk discusses economic activity through the prism of entrepreneurial activity, noting that its objective is manufacturing, the performance of works, the provision of services for their sale for a fee (as a product). Therefore, it is possible to distinguish such characteristics of economic activity as social utility, professionalism, and social orientation (Vinnyk O.M., 2004).

Extrapolating the general features of economic activity to the specification of the ETA features, one can draw the following conclusions: 1) economic and trade activity is an independent type of economic activity, which has its subject composition, object, subject matter, and procedure of implementation; 2) during the implementation of ETA, it is covered private interests of business entities, public interests of society and the state, consumer interests, which generates self-regulation and the need for its legal support.

The development of self-regulation is now chaotic enough. Self-regulatory organizations basically exist only in some markets: the market of appraisers, the securities market, and the financial services market. However, even in the mentioned areas, self-regulation is carried out under different rules.

The current legislation does not enshrine the definition of the terms "self-regulation" and "self-regulation of economic and trade activity". The Commercial Code of Ukraine uses "regulation of economic activity", "state regulation of economic activity", "market self-regulation", etc. Therefore, it is relevant to supplement the economic laws of Ukraine with modern approaches to maintaining economic activity in general and ETA, in particular. That sort of adequate legal regulation can take place through extending the Commercial Code of Ukraine by

provisions on the further development of self-regulation of economic activity and self-regulation of economic and trade activity.

Compared to Ukraine, the vast majority of European states, such as Poland, France, Italy, Germany, and others, legislated the activities of self-regulatory organizations and the issue of self-regulation as a whole. Self-regulation and self-regulatory associations have taken their proper place and play an important role in controlling professional activities, entrepreneurship, creating activity standards for particular professions, industries, or businesses, etc. At the same time, their activity is transparent and predicted (Zaletov O.M., 2013, p. 236).

Thus, the current legislation of the Member States of the European Union prioritizes the idea of the effectiveness of self-regulation. Directive 2006/114/EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising establishes does not exclude the voluntary control, which Member States may encourage, of misleading or comparative advertising by self-regulatory bodies and recourse to such bodies is additional measure of pre-trial or administrative proceedings (Directive EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising, 2006). One can conclude that the legislative practice of the EU countries demonstrates the effectiveness of the functioning of self-regulation and activities of self-regulatory organizations since they are treated as bodies that provide additional support for pre-trial or administrative proceedings.

3. The importance of negotiated self-regulation to the development of economic and trade activities

According to part 1 Art. 263 of the Commercial Code of Ukraine, economic and trade activity is mediated by economic contracts of supply, purchase and sale, lease, barter, leasing, etc., contracting for delivering agricultural products and energy supply (Commercial Code of Ukraine, 2003).

A contract is a central element of the system of self-regulation at the doctrinal level, and the right of the parties to recede from the current legislation is one of the manifestations of self-regulation in the contractual sphere. Following V. Milash, “a range of legal rules directly provides for the possibility of self-regulation in the specification form – “...unless otherwise provided in the contract” (Milash V., 2014, p.64-65). The choice of conduct rules during the contractual self-regulation

in economic and trade relations is expressed in such forms as the parties’ choice of such conditions as: the form of the contract, subject-matter, term, and responsibility for its violation. Consequently, the parties are not allowed to recede from the mandatory rules enshrined in legislative acts hereby ensuring self-regulation in contractual relations within relevant limits (Babadzhanian H.B., 2021, p. 57). A contract may be considered a means of self-regulation in economic and trade relations if the rules enshrined by the state “allow” the parties to be self-regulated, that is, establish that they have the right to do so (Vasilev, V.V. 2018. p. 13–14).

Thus, a contract acts as a set of legal means, both of a dispositive and imperative nature, designed to achieve an optimal outcome that should meet the interests of the parties to the contract and society.

The parties to the economic contract, entering into contractual relations, voluntarily incur obligations and responsibilities before counterparties and third parties not only for the result but also the entire contract performance. The process of concluding an economic contract, under specific conditions, is an opportunity for the parties to influence each other’s economic activities.

The contracts of supply and purchase and sale, as means of self-regulation, adhere to the principle of free will and allow the parties to outline convenient rules of conduct in the contractual relationship. At the same time, the above contracts may be concluded both orally and in writing, that is also a manifestation of self-regulation of the parties to the relationship.

4. Conclusions

Having analyzed the legal nature of self-regulation of economic and trade activity, the author defines it as follows: the self-regulation of economic and trade activity is an independent arrangement of behavior by economic entities, given their commercial interests, using developed and established rules to improve the organization and performance of economic and trade activity.

Nowadays, the current legislation has not yet enshrined the concepts of “self-regulation of economic activity” and “self-regulation of economic and trade activity”. Therefore, the author considers it essential to supplement modern commercial legislation or adopt a new, comprehensive regulatory act – the Law of Ukraine “On Trade” – which would fix the mentioned concepts and determine the principles of state regulation and self-regulation, as well as the organization and performance of economic and trade activities.

References:

- Babadzhanian, H.B.** (2021). Dogovor kupivli-prodazhu tovariv: zagal'ni obmezhenja samoreguljuvannja [Contract of purchase and sale of goods: general restrictions on self-regulation]. *Zovnishnja torgivlja: ekonomika, finansy, parvo. Serija. Jurydychni nauky – Foreign trade: economics, finance, law Series. Legal sciences*, 1, 54–62. (in Ukrainian).
- Belyanovich, O.A.** (2016). Pitannya samoregulyuvannja gospodarskoyi diyalnosti. Ctabilnist tsivilnogo oborotu v Ukraini: problemi zabezpechennja: zbirnik naukovih prats; [Self-regulation issues of economic activity. The stability of civil turnover in Ukraine: problems of providing: collection of scientific works], 4. Kyiv: NDI privatnogo prava i pidpriemnitstva NAPrN Ukraini (in Ukrainian).
- Vasilev, V.V.** (2018). Dyspozytyvnist' norm cyvil'nogo prava z tochky zoru formal'no-dogmatychnogo pidhodu. [Dispositiveness of civil law norms from the point of view of formal-dogmatic approach]. *Pidpryjemnyctvo gospodarstvo i pravo – Entrepreneurship economy and law*, 12, 10–14 (in Ukrainian).
- Vinnyk, O.M.** (2004). Hospodarske pravo: kurs leksii [Commercial law: a course of lectures]. Kyiv: Atika (in Ukrainian).
- Goncharenko, O.M.** (2019). Samoregulyuvannja gospodarskoyi diyalnosti: pitannya teorii ta praktiki: monografiya. [The self-regulation of economic activity: issues of theory and practice: monograph]. Kyiv: NDI privatnogo prava i pidpriemnitstva imeni akademika F. G. Burchaka NAPrN Ukraini (in Ukrainian).
- Goncharenko O.M.** (2018). Derzhavne rehuliuвання ta samorehuliuвання hospodarskoi diialnosti: poshuk balansu, [State regulation and self-regulation of economic activity. Search for balance]. *Pidpryjemnyctvo gospodarstvo i pravo – Entrepreneurship, economy and law*, 3, 42–43 (in Ukrainian).
- Goncharenko, O.M.** (2016). Vydy samorehuliuвання hospodarskoi diialnosti. [Types of self-regulation of economic activity]. *Pidpryjemnyctvo gospodarstvo i pravo – Entrepreneurship, economy and law*, 11, 68–72 (in Ukrainian).
- Gospodars'kyj kodeks Ukrainy: Zakon Ukrainy vid 16 sichnja 2003 roku № 436-IV** [Commercial Code of Ukraine: Law of Ukraine of January 16, 2003 № 436-IV]. Retrieved from <https://zakon.rada.gov.ua/laws/show/436-15>. (in Ukrainian).
- Directive EC of the European Parliament and of the Council of 12 December 2006 concerning misleading and comparative advertising. Retrieved from: <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32006L0114> (in English).
- Dobrovolska, V.V.** (2005). Derzhavne rehuliuвання ta samorehuliuвання u sferi pidpryemnytstva [State regulation and self-regulation in the field of entrepreneurship]. *Aktualni problemy derzhavy i prava – Current issues of state and law*, 25, 305 (in Ukrainian).
- Zaletov O.M.** (2013). Sutnist i pryntsyipy samorehuliuвання na strakhovomu rynku. [The essence and principles of self-regulation in the insurance market.] *VISNYK ZhDTU – ZhDTU Publishing House*, 2, 236–239 (in Ukrainian).
- Zeidel, M.I.** (2011). Samorehuliuвання yak mekhanizm skorochennja derzhavnogo vtruchannja v rozvytok biznesu. [Self-regulation as a mechanism to reduce government intervention in business development]. *Visnyk KhNU im. V.N. Karazina – V. N. Karazin Kharkiv National University Bulletin*, 949, 160–162 (in Ukrainian).
- Milash, V.** (2014). Dohovirni zasady pravoporiadku u sferi hospodariuvannja. [Contractual principles of law and order in the field of management]. *Yurydychnyi Visnyk – Legal Bulletin*, 1, 64–65 (in Ukrainian).
- Sibilov, M.** (2014). Tsyvilno-pravovyi dohovor yak rehuliator suspilnykh vidnosyn. [Civil Contract as a Regulator of Social Relations]. *Pravo Ukrainy – Law of Ukraine*, 2, 38–39 (in Ukrainian).
- Ostapenko, Y.I.** (2018). Samorehulivna diialnist u sferi hospodariuvannja-zavdannja hospodarsko-pravovoho zabezpechennja [Self-regulatory activity in the sphere of business: task of economic legal supply]. *Teoriia i praktyka pravoznavstva – Theory and practice of jurisprudence*, 2, 9–11 (in Ukrainian).
- Hrymly, K.O.** (2014). Poniattia hospodarsko-torhovelnoi diialnosti [Notion of economic and trade activities]. *Aktualni problemy derzhavy ta prava – Current issues of state and law*, 217–222 (in Ukrainian).
- Shcherbina V.S., Pronskaya G.V., & Vinnyk O.M.** (2003). Hospodarske pravo: praktykum [Commercial law: workshop]. Shcherbina V.S. (Ed.). Kyiv: *Yurinkom Inter* (in Ukrainian).

Гаяне Бабаджанян,

аспірантка, асистент кафедри міжнародного, цивільного та комерційного права Державного торговельно-економічного університету, Київський національний торговельно-економічний університет, вулиця Кіото, 19, Київ, Україна, поштовий індекс 02156, tenca@ukr.net, g.babadzhanian@knu.edu.ua

ORCID: 0000-0002-6048-8787

ПОНЯТТЯ САМОРЕГУЛЮВАННЯ ГОСПОДАРСЬКО-ТОРГОВЕЛЬНОЇ ДІЯЛЬНОСТІ

Анотація. Мета – визначення поняття саморегулювання господарсько-торговельної діяльності.

Методи дослідження. Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. Досліджено теоретичні засади саморегулювання господарсько-торговельної діяльності, зокрема поняття, ознаки, види, засоби. Встановлено, що саморегулювання господарсько-торговельної діяльності – це унікальна, складна та виокремлена система правил, в якій самі сторони обирають для себе правила поведінки та виконують їх, покладаючись на взаємну добросовісність та добросовісність. Під час аналізу сутності «саморегулювання» виділено такі види: за характером взаємодії з державою (делеговане, добровільне та змішане), за засобами (договірне, корпоративне та інституційне), за формами закріплення (нормативне, організаційне та/або інституційне).

Зазначено, що переважна більшість європейських держав, таких як Польща, Франція, Італія, Німеччина та інші, законодавчо врегулювали діяльність саморегулювних організацій та питання саморегулювання в цілому. Доведена ефективність функціонування саморегулювання та діяльності саморегулювних організацій на базі законодавчої практики країн Європейського Союзу. Досліджене договірне саморегулювання, акцентовано, що сторони самі можуть виступати своєрідними «законодавцями», проте у визначених правових межах. Зазначено, що договір поставки та купівлі-продажу товарів є засобами саморегулювання, адже реалізують принцип свободи волі та дають змогу сторонам визначити для себе зручні правила поведінки у договірних відносинах.

Висновки. Зазначено, що досі не прийнято системного нормативно-правового акта, який би чітко врегулював суспільні відносини, пов'язані із саморегулюванням загалом. Запропоновано внесення змін та/або доповнень до Господарського кодексу України та/або прийняття Закону України «Про торгівлю», котрий закріпив би термін «саморегулювання», «саморегулювання господарсько-торговельної діяльності», визначив би засади державного регулювання та саморегулювання та інші питання організації та здійснення господарсько-торговельної діяльності.

Ключові слова: саморегулювання, господарсько-торговельна діяльність, державне саморегулювання, саморегулювальна організація договірне саморегулювання, договірне зобов'язання.

The article was submitted 10.02.2022

The article was revised 03.03.2022

The article was accepted 24.03.2022

UDC 349.6/ 346.11

DOI <https://doi.org/10.32849/2663-5313/2022.1.03>**Anhelina Riabtsova,***Postgraduate Student, V. Mamutov Institute of Economic and Legal Research of the National Academy of Sciences of Ukraine, 60, Tarasa Shevchenka boulevard, Kyiv, Ukraine, postal code 01032*
*angelinaa.tsmok@gmail.com***ORCID:** orcid.org/0000-0001-5817-7026Riabtsova, Anhelina (2022). Sustainable development as a vector of economic and legal use of natural resources. *Entrepreneurship, Economy and Law*, 1, 17–22, doi: <https://doi.org/10.32849/2663-5313/2022.1.03>

SUSTAINABLE DEVELOPMENT AS A VECTOR OF ECONOMIC AND LEGAL USE OF NATURAL RESOURCES

Abstract. The aim of the article is to identify and analyze the system of principles of nature management in the historical aspect and to clarify the role of the principle of sustainable development in this system. General scientific (dialectical, formal-logical, system-structural) and special *methods* of scientific cognition (comparative, historical, etc.) were used in the research. Thus, with the help of the dialectical method, an attempt was made to overcome disagreement through rational discussion, and, finally, to find the truth. Using the formal-logical method, the system of principles of nature management is formulated. The system-structural method is applied to determine the place of sustainable development among other principles. The comparative legal method of research facilitated the analysis of the norms of Ukrainian and international law. The historical method of research provided an opportunity to determine the genesis of legal regulation of nature management. **Results.** The basic general and special principles of the use of natural resources in economic activity are analyzed. **Conclusions.** There are general principles of nature management typical to all subjects of law and special principles that are specific only to the use of natural resources in the field of economic law. The general principles include the principle of rational use of nature, the origin of the right to use natural resources from the right of ownership; targeted use of natural resources; stability of the right to nature use, ecosystem, complex nature use, gratuitousness of general nature use.

The special principles of nature management, which are characteristic of economic entities, should include payment for special nature usage, limitation of nature use, licensing of nature use, ecologization of manufacture, striking a balance between economic and social and environmental interests.

The principle of sustainable development is a complex concept that comprises many other related concepts, including complexity, care, rationality, economy and efficiency of nature management; stability of the right to use nature; stimulating efficient nature management.

Key words: principles of nature management, sustainable development, sustainable nature management, economic activity, legal regulation.

1. Introduction

The principles of the use of natural resources in economic activity and the principles of legal regulation of economic relations have long been the subject of research by legal scholars. I.I. Karakash attributes the following to the general principles of natural resource management: the origin of the right to use natural resources from the right of ownership of natural objects; intended use of natural resources; rational and effective natural resource management; complexity of natural resource management; stability of the right to use natural wealth; gratuitousness of general and fee-based special use of natural resources; the ecosystem approach to the regulation of natural resource manage-

ment, and some other principles (Karakash, 2005, p. 96). K.A. Riabets considers such principles of the right to use natural resources: the origin of the right to use natural resources from the right to own them; intended and rational use of natural resources; charging for special use of natural resources; reproduction of natural resources; limitation of natural resource use; licensing of natural resource use (Riabets, 2009, p. 127). Agreeing with the above positions of representatives of environmental law science, it should be added that the mentioned principles do not cover all the peculiarities of natural resource use by economic entities and, therefore, there is a need to develop an approach from the economic-legal point of view.

The authors of the commentary to the Commercial Code of Ukraine distinguish principles of the right to use natural resources: 1) environmental safety of natural resource management; 2) fee-based special and gratuitous general natural resource management; 3) multifaceted nature of intended natural resource management; 4) normative and limiting nature of natural resource management; 5) differentiation and plurality of legal forms of natural resource management; 6) complexity, care, rationality, economy, and efficiency of natural resource management; 7) payment for deterioration of the quality of natural resources; 8) stability of the right to use natural resources and its inalienability without personal will; 9) stimulation of effective natural resource management; 10) standardization of specific natural resource management (Mamutov, 2004, p. 178).

To conduct a critical scientific analysis of the above positions, it is essential to consider the content of each principle of natural resource management, assess it properly, and develop its system of principles. *The purpose* of the article is to identify and analyze the system of environmental management principles in the historical aspect and clarify the role of the principle of sustainable development in it. When performing the study, the author has applied traditional for jurisprudence scientific *methods of cognition*, which are grounded on the method of materialistic dialectics that allows ensuring the comprehensiveness of the analysis of the processes concerned in their historical conditionality and correlation.

2. General and special principles of natural resource management in economic activity

The classical principle of the use of natural resources is the “principle of rational nature management”, which was studied in the legal literature of Ukraine in the 70s. The understanding of rational nature management changed during the development of the science of environmental law: at the initial stage, it was based on the prevention of consumer attitude to nature and was reduced, first of all, to economic and saving, scientifically proper use of natural forces in compliance with scientific and technical rules and norms. According to the modern understanding, rational nature management is the most effective use of natural resources during production and economic and other activities, keeping in mind the regularities of functioning of interdependent natural systems, maintenance of constant restoration, improvement, and protection of the environment.

The principle of rational nature management is implemented by means of environmental and legal requirements: setting limits on the use of natural resources; use of low-waste, energy,

and resource-saving technologies; taking measures for the reproduction of renewable natural resources; planning the location of production and other economic facilities, given the ecological capacity of the relevant territory, the conservation of biological and landscape diversity; prevention of environmental pollution; use of biological, chemical, and other methods of improving the quality of natural resources, economic incentives for measures ensuring the sustainable use of natural resources, and the introduction of other measures that guarantee environmentally sound nature management (Shemshuchenko, 2003, p. 327). Rational nature management is an indispensable element of sustainable development, which the author interprets as balanced development opportunities for different groups, individuals, humanity, and future generations. Legal regulation provides the concept of sustainable development in four dimensions: environmental, economic, social, and cultural. The term “sustainable development” has become popular in the Ukrainian legal terrain (in Russian “устойчивое развитие”, in Ukrainian “сталій розвиток”). The term “balanced development” would be more relevant. The adjective “sustainable” means permanence, stability, while “development” implies inevitable changes.

The next principle of natural resource management is the origin of the right to use natural resources from the right of ownership, which refers to the dependence of natural resource use on the owner’s will. The most absolute real right under the Civil Code of Ukraine is the right of ownership, and the right of possession and the right of use belong to the real rights to property of another. The competence of natural resource users relies on the owner’s right of use.

The principle of the intended use of natural resources is common to land, mining, water, and forestry laws. The purpose of the use of a natural object is recorded in such documents as the state title act, a user contract, special permits (licenses) for the right of the special use of natural resources, forestry orders, or forest tickets. The list of objectives of the economic use of a natural resource is clearly defined at the level of the relevant regulations and can be specified in the contract. For example, water bodies can be leased for fishery, cultural, therapeutic, and recreational purposes; forest lands are provided for hunting, recreational, sports, tourism, and educational purposes; hunting lands are contracted only for hunting; production sharing agreements stipulate the provision of subsoil plots for prospecting, exploration, and mining. The use of natural resources by an economic entity with deviations from

the intended purpose is an offense and may be the basis for deciding to suspend or terminate the right to use natural resources. For example, in accordance with para. 6.7 of the Rules for the Use of Forest Values (Order of the Ministry of Agrarian Policy and Food of Ukraine dated August 14, 2012 No. 502), the termination of the right to use forest values under the conditions of short-term temporary use of forests is carried out by a permanent forest user (forest owner) by canceling the forest ticket under the procedure established by law.

The principle of stability of the right to use natural resources implies the provision of natural resources on the right of ownership in long-term or permanent use. For example, it concerns long-term subsoil use up to 20 years (Art. 15 of the Subsoil Code), the lease term of the land plot is up to 50 years (Part 4 of Art. 93 of the Land Code of Ukraine). The above does not exclude short-term uses of natural resources mentioned in natural resources laws, in particular, legislation on flora and fauna. The principle of stability of the right to use natural resources can be regarded as a separate principle or a structural element of the more general concept of sustainable development, sustainable use of natural resources.

The principle of gratuitousness general and fee-based special use of natural resources is enshrined in the framework Law of Ukraine “On Environmental Protection” (Art. 38) and specific codes and laws. The use of natural resources by economic entities usually takes the form of special natural resource management. For example, the fee for the subsoil use for geological study of subsurface resources is a form of implementation of economic relations regarding tax and non-tax revenues between the owner of subsoil resources represented by the state and the subsoil user represented by the business entity (Filatova, 2008, p. 6). The fee-based usage of natural objects implies imposing the obligation to pay for the use of the relevant types of natural resources on the subjects of special nature management. The rent for using subsoil for mining is widely applied in economic practice (Art. 252 of the Tax Code of Ukraine, Art. 28 of the Subsoil Code of Ukraine), taxation of land plots (Arts. 273, 274, 277 of the Tax Code of Ukraine), water bodies (Art. 255 of the Tax Code of Ukraine, Art. 30 of the Water Code of Ukraine), forest resources (Art. 256 of the Tax Code of Ukraine, Art. 77 of the Forest Code of Ukraine), NRF objects – Art. 47 of the Law of Ukraine “On the Natural Reserve Fund of Ukraine”, wildlife resources (Arts. 9, 28, 31 of the Law of Ukraine “On the Animal World”), flora resources (Art. 12 of the Law of Ukraine “On the Plant World”), taxes and fees (manda-

tory payments) during the execution of the production sharing agreement (Art. 25 of the Law of Ukraine “On Production Sharing Agreements”). Payments and fees for the special use of natural resources flow to the national and local budgets and are means of increasing the interest of economic entities – users of natural resources – in the effective and rational use of natural resources, the preservation and restoration of the natural environment, which, in turn, is an element of the principle of sustainable development.

The principle of an ecosystem-based, integrated approach to the regulation of natural resource management by economic entities is determined by the interrelations of natural processes and the interdependence of phenomena that arise in the natural environment. When using natural objects, such as lands, there may be harmful effects on water bodies, flora and fauna, and other natural objects. The use of natural resources should be conducted given the objective laws of the unity of nature, the universal interrelations of processes and phenomena occurring in nature. It is necessary to shift away from a differentiated approach of clarifying a particular type of nature management and proceed to an integrated definition of the concept. Comprehensive contracts are used in economic practice when there is a need to use several natural resources at the same time. Most often, such a complex character of nature management is based on objective natural connection of individual resources with the land plot where they are located. The most common legal basis for such integrated use of natural resources is the economic agreement, the subject of which should cover the activity of using not a separate land plot, subsoil, or water object but an integral natural complex. That sort of contracts may be concluded in the case of recreational, therapeutic use of natural resources, the use of natural resources in the NRF territories and objects (Adam, 2019, pp. 170–171).

The principle of reproduction of natural resources covers a continuous restoration of natural resources, and its ignoring can lead to depletion or degradation of natural resources. The mentioned problem is the most urgent in special nature use by economic entities. It is not enough to protect and rationally use natural resources – it is necessary to carry out active measures for their restoration. Natural resource use for economic purposes has, first of all, economic essence but a consumer, predatory approach to nature, neglect of its social value, ignoring environmental norms causes negative consequences for all subjects. It is essential to focus on the ecological (environmental) component of economic activity on

the use of natural resources, which is manifested in the general principle of sustainable development. H. D. Dzhumaheldiieva attributes the environmentalization of legislation on the economic use of natural resources to the mainstream in the revision of the existing paradigm of further development of legal regulation (Dzhumaheldiieva, 2014, p. 178). Neglect of the environmental vector in all human activities (including economic activities) pose risk to the very future existence of mankind.

The principle of limiting environmental management is a manifestation of environmental protection and defense due to the fact that natural resources are limited and need to be used rationally. Natural resource limits are set by specially authorized bodies of the state environmental department under law. Nature use limits are established for a certain period for each type of used (withdrawn) natural resources and can be revised given the development of technology, improvement of technological processes, changes in the need for the relevant type of resource and its state, as well as other factors.

The principle of environmental licensing is a type of state control over rational, effective, feasible nature management, which meets the general principle of sustainable development. Environmental licensing is an administrative relationship between the state represented by its designated bodies and economic entities, which authorizes the entities to carry out specific activities in the field of environmental management by relying on their compliance with a set of requirements imposed by the state. A natural resource license (permit) is a legal form of transfer by state authorities and local self-government bodies of the right to use a specific part of a natural object to business entities, i.e., it is a form fixing the right to use natural resources. Obtaining a license is required when the economic entity has the right to the special use of a subsoil plot; forest fund plot; fauna objects; the right of integrated nature management. The license for the right to natural resource management is a roadmap for the use of the relevant natural resource. In particular, it contains data on the object and subject of the right, the purpose and methods of use of the natural object, terms and conditions of use, requirements for the rational use of the natural resource and ensuring its restoration, etc.

3. Sustainable development as a basis for the economic-legal use of natural resources

The general and special principles of environmental management considered above are, on the one hand, individual manifestations of sustainable development and, at the same time, structural elements of the principle of sustainable development. Ukraine's strategic aspiration is to shape its future based on the principles

of sustainable development to turn European standards into reality and achieve leading positions in the world (Lelechenko, 2020).

The foundation for socio-economic sustainable development comprises the decisions of the United Nations Conference on Environment and Development (Rio de Janeiro, 1992), the World Summit on Sustainable Development (Johannesburg, 2002), and other international forums on environment and sustainable development. The Rio Conference resulted in five documents: the Rio Declaration on Environment and Development; Agenda 21; the United Nations Framework Convention on Climate Change; the Convention on the Conservation of Biological Diversity; and the Declaration on Forests. The outcomes of the World Summit on Sustainable Development, Johannesburg, included two documents: the Johannesburg Declaration on Balanced Development; the Plan of Implementation (PoI). In addition, Ukraine has been a Party to the United Nations Framework Convention on Climate Change since August 11, 1997 and the Kyoto Protocol since February 16, 2005, the ultimate goal of which is to stabilize greenhouse gas concentrations "at a level that would prevent dangerous anthropogenic (human induced) interference with the climate system. In September 2015, the UN Summit on Sustainable Development was held in New York. It resulted in the document "Transforming Our World: the 2030 Agenda for Sustainable Development", which laid 17 sustainable development goals: end poverty, end hunger, ensure healthy lives, ensure inclusive and equitable quality education, achieve gender equality, ensure sustainable management of water and sanitation for all, renewable energy, decent work and economic growth, innovation and infrastructure, reduce inequality, make cities and human settlements sustainable, ensure sustainable consumption, combat climate change, conserve marine ecosystems, preserving terrestrial ecosystems, promote peace and justice, strengthen partnership for sustainable development. The above list shows that all objectives are directly or indirectly related to the rational use of natural resources. The 17 goals are represented in the Decree of the President of Ukraine dated September 30, 2019 "On the 2030 Sustainable Development Goals of Ukraine", which confirms that our country is following world trends. Sustainable development is of global importance and is regarded as a human right (Ivankiv, 2020, p. 158). Although the legal regulation of sustainable development has its own peculiarities in the European, African, Asian, and American system, what remains common is that sustainable development as a new philosophy of global, regional and local

development is opposed to economic growth which is interpreted in a narrow sense.

The science of economic law contains inventions on the need to consider the impact of sustainable development on economic legislation. In particular, O.V. Shapovalova substantiated the concept of a functional-target subsystem for promoting sustainable development by economic-legal means and directions of modernization of economic legislation for its implementation and formulated a methodology for adapting economic legislation to the requirements of sustainable development (Shapovalova, 2007). The concept should be applied in using natural resources in economic activities.

The term “sustainable development” is not yet widely used in legal acts and at the doctrinal level of economic law, although its essence is conveyed in other related or complex concepts. For example, the general legal principle of justice, which is also studied at the level of its influence on the formation of state economic policy (Dzhabrailov, 2019), is directly associated with the principle of sustainable development. The category of “justice” is multifaceted and can be discussed as a philosophical, political, or legal phenomenon. The Constitutional Court of Ukraine interpreted justice as the very legal phenomenon in the case of imposing a milder sentence by the court dated 02.11.2004 No. 15-rp/2004: “Justice is one of the basic principles of law, is decisive in determining it as a regulator of social relations, one of the universal dimensions of law”. Extrapolating the concept of “justice” to the subject of economic-legal use of natural resources, the term “environmental justice”, which aims to combat environmental discrimination, has appeared. Environmental justice consists of several components: the equality of all legal subjects in the distribution of environmental benefits; the correspondence of an environmental offense and punishment; the proportionality of the legislator’s goals and the means chosen to achieve them.

T.S. Gudima paid attention to the principle of environmental justice as a fundamental basis for sustainable development, in particular, the unequal distribution of environmental risks and the exercise of the human right to a sustainable and healthy environment (Gudima, 2018). The principle of sustainable development and sustainable use of natural resources, which is primary in the legal regulation of the economic use of natural resources, includes the search for and balance between economic, social, and environmental factors during the economic use of natural resources. The economic needs for the withdrawal of the values of land, subsoil, water, etc. are in contrast with the need to ensure sustainable development and environmental protection – there is competition of public and private interest.

4. By relying on the above, the author draws the following conclusions:

1. There are general principles of natural resource management inherent in all legal subjects and special principles that are characteristic only for the economic use of natural resources. The general principles cover the principle of rational use of natural resources, the derivation of the right to use natural resources from the right to own them; the intended use of natural resources; the stability of the right to use natural resources, an ecosystem, integrated use of natural resources, the gratuitousness of general use of natural resources.

The special principles of nature resource management, which are typical for economic entities, should include a fee-based nature of special nature management, limitation of nature management, licensing of nature management, environmentalization of material production, striking a balance between economic, social, and environmental interests.

2. The principle of sustainable development is a complex concept that comprises other related concepts, including complexity, care, rationality, economy and efficiency of environmental management; stability of the right to use natural resources; stimulation of effective environmental management.

References:

- Karakash, I.I.** (2005) Pryrodoresursove pravo Ukrainy. Navchalnyi posibnyk. [Natural resource law of Ukraine] Kyiv: Istyna (in Ukrainian).
- Riabets, K.A.** (2009) Ekolohichne pravo Ukrainy. Navchalnyi posibnyk. [Ecology Law of Ukraine] Kyiv: Tsentri uchbovoi literatury. (in Ukrainian).
- Naukovo-praktychnyi komentar Hospodarskoho kodeksu Ukrainy. Za red. V.K. Mamutova.** (2004). [Scientific and practical commentary on the Economic Code of Ukraine] Kyiv: Yurinkom Inter. (in Ukrainian).
- Yurydychna entsyklopediia : v 6 t.** [Legal Encyclopedia]. Shemshuchenko Yu.S. (Ed.). Kyiv: Ukr.entsykl., 2003.V. 5. (in Ukrainian).
- Filatova V.K.** (2008). Pravove rehuliuвання heolohichnoho vyvchennia nadr. Avtoref dys...k.iu.n. [Legal regulation of geological study of subsoil] 12.00.06 Natsionalna yurydychna akademiia Ukrainy imeni Yaroslava Mudroho. Kharkiv (in Ukrainian).

Adam V.M. (2019). Problemy pravovoho rehuliuвання dohovirnykh vidnosyn sub'ektiv hospodariuvannya: monohrafiia [Problems of legal regulation of contractual relations of business entities]. Lviv: TOV «Halytska vydavnycha spilka». (in Ukrainian).

Dzhumaheldieva H.D. (2014). Pravove rehuliuвання hospodarskoho vykorystannia pryrodnykh resursiv. [Legal regulation of economic use of natural resources]. NAN Ukrainy, Instytut ekonomiko-pravovykh doslidzhen. Kyiv, Vydavnytstvo «Iurydychna dumka» (in Ukrainian).

Lelechenko A.P., Lebedinska O.Y., Somin S.V., Vakulenko V.M., Pikh N.S. (2020). Introduction of the concept of sustainable development in the context of the constitutional reform of Ukraine. Journal of the National Academy of Legal Sciences of Ukraine, Vol. 27, 4, 53–65 (in English).

Ivankiv I. (2020). Prava liudstva [Human Rights]. Monohrafiia. Kyiv: Vaite. (in Ukrainian).

Shapovalova O.V. (2007) Adaptatsiia hospodarskoho zakonodavstva do vymoh staloho rozvytku [Adaptation of economic legislation to the requirements of sustainable development]. *Doctor's thesis*. 12.00.04. Luhansk (in Ukrainian).

Dzhabrailov R.A. (2019). Pryntsyp spravedlyvosti i yoho vplyv na formuvannia derzhavnoi ekonomiky ta sotsialnoi polityky [The principle of justice and its impact on the formation of public economy and social policy]. *Ekonomika ta pravo – Economics and Law*, 2 (53). doi.org/10.15407/econlaw.2019.02.003 (in Ukrainian).

Hudima T.S. (2018). Problema zabezpechennia pryntsypu ekolohichnoi spravedlyvosti yak fundamentalnoi zasady staloho rozvytku [The problem of ensuring the principle of environmental justice as a fundamental principle of sustainable development]. *Ekonomika ta pravo – Economics and Law*, 3 (51). doi: https://doi.org/10.15407/econlaw.2018.03.031 (in Ukraine).

Ангеліна Рябцова,

аспірантка, Інститут економіко-правових досліджень імені В.К. Макутова Національної академії наук України, бульвар Тараса Шевченка, 60, Київ, Україна, індекс 01032, angelinaa.tsmok@gmail.com

ORCID: orcid.org/0000-0001-5817-7026

СТАЛИЙ РОЗВИТОК ЯК ВЕКТОР ГОСПОДАРСЬКО-ПРАВОВОГО ВИКОРИСТАННЯ ПРИРОДНИХ РЕСУРСІВ

Анотація. Метою статті є виявлення та аналіз системи принципів природокористування в історичному аспекті та з'ясування ролі принципу сталого розвитку в цій системі. При виконанні дослідження було використано загальнонаукові (діалектичний, формально-логічний, системно-структурний тощо) і спеціальні методи наукового пізнання (порівняльний, історичний та ін.) Так, за допомогою діалектичного методу була зроблена спроба подолання незгоди через раціональну дискусію і, зрештою, відшукати істину. За допомогою формально-логічного методу сформульовано систему принципів природокористування. Системно-структурний метод застосовано для з'ясування місця сталого розвитку серед інших принципів. Порівняльно-правовий метод дослідження використано для аналізу норм українського та міжнародного законодавства. Історичний метод дослідження надав можливість визначити генезис правового регулювання природокористування. **Результати.** Проаналізовано основні загальні та спеціальні принципи використання природних ресурсів у господарській діяльності. **Висновки.** Існують загальні принципи природокористування, притаманні всім суб'єктам права, і спеціальні принципи, що характерні тільки для використання природних ресурсів у сфері господарювання. До загальних принципів належать принцип раціонального природокористування, похідність права користування природними ресурсами від права власності на них; цільового використання природних ресурсів; стабільності права природокористування, екосистемного, комплексного природокористування, безоплатності загального природокористування.

До спеціальних принципів природокористування, які характерні для суб'єктів господарювання, слід відносити платність спеціального природокористування, лімітування природокористування, ліцензування природокористування, екологізацію матеріального виробництва, дотримання балансу між економічним, соціальним та екологічним інтересом.

Принцип сталого розвитку є комплексним поняттям, що включає в себе низку інших споріднених понять, зокрема комплексність, дбайливість, раціональність, ощадливість та ефективність здійснення природокористування; стабільність права природокористування; стимулювання ефективного природокористування.

Ключові слова: принципи природокористування, сталий розвиток, стає природокористування, господарська діяльність, правове регулювання.

The article was submitted 25.01.2022

The article was revised 15.02.2022

The article was accepted 10.03.2022

UDC 349.2

DOI <https://doi.org/10.32849/2663-5313/2022.1.04>**Serhii Lukash,***Doctor of Law, Professor, Director, Sumy Branch of Kharkiv National University of Internal Affairs, 24, Myru street, Sumy, Ukraine, postal code 40007, Serhii_Lukash@ukr.net***ORCID:** orcid.org/0000-0003-2957-8052

Lukash, Serhii (2022). Place and significance of ILO regulatory documents in the system of labour law sources of Ukraine. *Entrepreneurship, Economy and Law*, 1, 23–27, doi: <https://doi.org/10.32849/2663-5313/2022.1.04>

PLACE AND SIGNIFICANCE OF ILO REGULATORY DOCUMENTS IN THE SYSTEM OF LABOUR LAW SOURCES OF UKRAINE

Abstract. Purpose. The purpose of the article is to establish the place and significance of regulatory documents of the International Labour Organisation in the system of labour law sources of Ukraine. **Results.** The article, based on the analysis of scientific views and provisions of current international law, proves the importance and necessity of regulatory activity by the International Labour Organisation. It is stated that the problem of action and application of sources of international labour law in the legal system of Ukraine is only part of another larger problem – the ratio of international and domestic law. The author emphasized that a special procedure for the denunciation of conventions has been established. Any State may denounce the ratified Convention after the expiration of ten years from the date it enters into force in that State. If a State does not exercise its right of denunciation within one year after the end of the ten-year period, it shall remain bound by this Convention for a further period of ten years. **Conclusions.** It is concluded that the recommendations of the International Labour Organisation differ from other recommendatory acts. In particular, in accordance with para. 6 of Art. 19 of the Constitution of the International Labour Organisation, each of undertakes that it will, within a period of one year at the moment of its adoption at the General Conference of the International Labour Organisation, bring the Recommendation before the competent authority or authorities. A Member of the International Labour Organisation shall inform the Director-General of the measures taken in accordance with this obligation. At the request of the Governing Body of the International Labour Organisation, the State is obliged to submit reports on the position of the law and practice in their country in regard to the matters of recommendation. Therefore, without binding the Member States of the International Labour Organisation to comply with the Labour standards contained in these recommendations, they do, however, provide for actions that contribute to the impact of these rules on national law. Legal specificities of conventions and recommendations of the International Labour Organisation are reflected in the procedure for implementation of their provisions in domestic labour law. However, the problem of action and application of sources of international labour law in the legal system of Ukraine is only part of another larger problem – the ratio of international and domestic law, which requires further substantive research in this area.

Key words: international legal act, conventions, recommendations, International Labour Organisation.

1. Introduction

Each sovereign State creates its own system of legislation with its own forms of law. This system has a limited scope and operates only within the territory of the State. However, it is not independent of the forms of law that exist outside its territory. Interstate cooperation, as a result of joint legal settlement, is reflected and sometimes has a significant impact on national legislation. The sources of international labour law are numerous international legal instruments that are the result of coop-

eration between States and include international labour standards. Taking into account the general theory of international labour law and the theory of classification, the sources of international labour law can be classified according to different criteria. However, an important place in the system of relevant sources is given to the regulations of the International Labour Organisation (ILO).

Some problematic issues related to determining the nature and content of the labour law sources are considered in the scientific works

by: M.Y. Baru, V.S. Venediktov, R.Z. Livshyts, A.M. Lushnikova, V.I. Prokopenko, O.I. Protsevskiy, K.L. Tomashewskiy, and many others. However, despite the considerable number of scientific achievements, the issue of determining the place and significance of international regulations in the system of labour law sources is poorly studied, in particular, this applies to acts issued by the ILO.

For the above reason, the purpose of the article is to establish the place and significance of regulatory documents of the International Labour Organisation in the system of labour law sources of Ukraine.

2. Specificities of international regulations

Starting the research, it should be noted that international regulations are generally designed to promote a better understanding of the object of study. In particular, the following types of sources of international labour law can be distinguished by the following criteria.

Depending on the legal force, there are:

1. Contractual international legal instruments. These include international treaties concluded by States with a view to establishing international organisations dealing with labour issues, and international treaties governing fully or in part the issues of labour and labour relations;

2. Non-contractual international legal documents.

Specificities of the first group of sources are that they constitute legal obligations for Member States, usually enshrine certain means of international control over the implementation of these obligations and provide for a form of liability for non-compliance. Sources of the second group are not legally binding and therefore do not have any legal effects for the Member States. They contain declarative, recommendatory provisions, arising from their very designations (most documents of this kind are called declarations or recommendations).

The constituent documents of international organisations, involved fully or partially in solving labour issues, are multilateral international agreements. This is primarily the Constitution of the International Labour Organisation, as well as certain provisions of the UN Charter and the constituent documents of some other international universal and regional organisations. For example, Art. 1 of the ILO Constitution of 1919 declares that the purpose and objectives of the International Labour Organisation are set out in the preamble to the Constitution and in the Philadelphia Declaration on the Purposes and Objectives of the ILO of May 10, 1944, as a supplement to the Statute. The program provisions of the ILO Constitution are not only a "political directive" for the Organisation

and its members, according to British lawyer, who at one time held the position of Director General of the ILO, C.W. Jenks (Jenks, 1958, p. 299), but also represent the established legal obligations of members States of the International Labour Organisation.

Therefore, ILO conventions have a special place among the sources of international Labour law. They are international treaties subject to ratification by ILO Member States with subsequent implementation in the laws and practices of those countries. According to the definition of the Vienna Convention on the Law of Treaties between States and International Organisations or between Organisations of March 21, 1986, a treaty means an international agreement governed by international law and concluded in written form: between one or more States and one or more international organisations; or between international organisations, whether that agreement is embodied in a single instrument or in two or more related instruments and whatever its particular designation. According to Art. 5 of the Convention, the Convention applies to any treaty between one or more States and one or more international organisations which is the constituent instrument of an international organisation and to any treaty adopted within an international organisation. The ILO Constitution defines some of the legal specificities of conventions enabling their more effective implementation in the legal systems of ILO Member States. The conventions are adopted by a qualified majority (two-thirds) of the delegates at the session of the ILO General Conference. Since the ILO structure implements the principle of tripartism, such a voting procedure ensures a balance of interests between employees' and employers' representatives. The convention is then signed by the Director-General of the ILO. The Convention twelve months after the date on which the ratifications of two or three Members have been registered with the Director-General. Each adopted convention is sent to all ILO Member States to decide on its ratification. However, even before ratification, ILO Member States acquire some obligations under the conventions on the basis of their membership. Each State is obliged to bring the convention before the competent State authorities within one year of its adoption at the ILO General Conference to decide whether to give it the force of law or to take other measures. The ILO Member State shall inform the Director-General of the measures taken in accordance with this obligation. Even if the competent authorities do not agree to ratification, the State is obliged to submit reports on the status of its law and practice on non-ratified conventions at the request of the ILO Governing Body, indi-

cating the measures taken by the State authorities to bring the convention into force.

3. Legislative activity of the International Labour Organisation

The implementation of conventions is facilitated by a control mechanism. Each State that has ratified the convention is obliged to submit annual reports on the measures taken to effectively implement the convention. In addition, the State should send such reports to the representative organisations of workers and employers of their country, which, as noted in the literature, favourably distinguishes the ILO control mechanism from other control mechanisms in the field of international human rights protection (Kolosov, 2016, p. 79). Article 24 of the ILO Constitution gives these organisations the right to submit submissions to the International Labour Office if the ILO Member State has not properly ensured the implementation of the Convention to which it is a party. There are other methods of monitoring the implementation of international conventions (Kopylev, 1980).

A special procedure for denunciation of conventions has been established. Any State may denounce the ratified Convention after the expiration of ten years from the date on which it enters into force in that State. If a State does not exercise its right of denunciation within one year after the end of the ten-year period, it shall remain bound by this Convention for a further period of ten years.

It should be noted that ILO law-making activities always focus on the issues of the legal validity of conventions. The main question is whether the convention adopted by the ILO is a multilateral international agreement that binds States before or regardless of its ratification, or whether it becomes binding only after its ratification and only for those States that have ratified it. Even during the establishment of the ILO, proposals were made for mandatory ratification of adopted conventions by ILO Member States (Lukashuk, 1966, p. 21). In 1930, in his book *The International Labour Organisation*, J. Sel argued that the ILO Convention was not an international treaty but an "international law enacted by an international legislature," that is, he recognized the conventions as supranational acts of direct action in respect of ILO Member States (Ametistov, 1982, p.49).

This issue is particularly important in connection with the adoption of the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up on 18 June 1998. The Declaration states that all Members, even if they have not ratified the Conventions on Fundamental Rights, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realize,

in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation. Thus, notwithstanding the consent of the Member State to be bound by the convention, it is obliged to comply with the provisions of the conventions concerning fundamental rights and principles in the field of labour. It should be noted here that this contradicts the Soviet theory of international law. For example, G.I. Tunkin argues that the harmonisation of the freedoms of States to recognise treaty provisions as provisions of international law consists of individual actions of States (signing a treaty, ratification, depositing instruments of ratification or ratification notification), without which a treaty adopted by an international organisation cannot become legally binding (Tunkin, 1979, p. 88).

The question arises regarding the legal nature of the Declaration under consideration. First, this type of document is not provided for in the ILO Constitution, which means that the ILO, in adopting the Declaration, went beyond its competence established by the Constitution. Second, in the practice of international law, declarations are usually resolutions of international organisations that are policy statements. Meanwhile, the Declaration under study establishes very specific obligations for States. Therefore, the Declaration on Fundamental Principles and Rights at Work should be referred to as the sources of so-called "soft law", which do not contain firm obligations of States to implement their provisions but give only a general statement of which State are obliged to comply (Lukashuk, 1996, p. 112).

The ILO's law-making process is characterised by the adoption of recommendations. The relevant procedure is largely identical to the procedure for adopting conventions. Recommendations are adopted on the same list of issues as the conventions, accompanying them, detailing their provisions, offering a wider range of rights and a higher level of guarantees. However, the question of the legal nature of these acts is still unresolved. The problem is whether to consider ILO recommendations as a source of international labour law. There is a wide variety of opinions: from complete non-recognition of recommendations as a source of international law (it is believed that in most cases recommendations are acts of international law application by international organisations)

(Lukashuk, 1966, p. 124) to recognition of recommendations as such. The most reasonable, in our opinion, is the perspective of S.O. Ivanov, who considers the recommendations as ancillary sources of international law, which, although do not establish the will of States in the agreement, but help in law application (Ivanov, 1964, p. 107; Bilous, 2017). The recommendations are to serve as a standard, model provision in the preparation of national provisions in the field of labour regulation, without being mandatory for the State (Kiselev, 1995, p. 85; Pohrebniak, 2015).

4. Conclusions

To sum up, it should be stated that the recommendations of the International Labour Organisation differ from other recommendatory acts. In particular, in accordance with para. 6 of Art. 19 of the Constitution of the International Labour Organisation, each of undertakes that it will, within a period of one year at the moment of its adoption at the General Conference of the International Labour Organisation, bring the Recommendation before the competent authority or authori-

ties. A Member of the International Labour Organisation shall inform the Director-General of the measures taken in accordance with this obligation. At the request of the Governing Body of the International Labour Organisation, the State is obliged to submit reports on the position of the law and practice in their country in regard to the matters of recommendation. Therefore, without binding the Member States of the International Labour Organisation to comply with the Labour standards contained in these recommendations, they do, however, provide for actions that contribute to the impact of these rules on national law.

Thus, the legal specificities of conventions and recommendations of the International Labour Organisation are reflected in the procedure for implementation of their provisions in domestic Labour law. However, the problem of action and application of sources of international labour law in the legal system of Ukraine is only part of another larger problem – the ratio of international and domestic law, which requires further substantive research in this area.

References:

- Amethyst, E.M.** (1982). *Mezhdunarodnoe pravo i trud: faktory implementatsii mezhdunarodnykh norm o trade [International Law and Labour: Factors in the Implementation of International Labour Standards]*. Moscow: Mezhdunar. otnosheniia (in Russian).
- Bilous, O.Yu.** (2017). Konventsii Mizhnarodnoi orhanisatsii pratsi yak dzherela trudovoho prava Ukrainy [Convention of the International Labour Organisation as a source of Labour law of Ukraine]. *Candidate's thesis*. Odesa (in Ukrainian).
- Ivanov, S.A.** (1964). *Problemy mezhdunarodnogo regulirovaniia truda [Problems of international Labour regulation]*. Moscow: Nauka (in Russian).
- Jenks, C.W.** (1958). *The Common Law of Mankind*. London (in English).
- Kiselev, I.Ia.** (1995). *Mezhdunarodno-pravovoe regulirovanie truda (mezhdunarodnye standarty truda) [International legal regulation of Labour (international Labour standards)]*. Moscow: Moscow. univer (in Russian).
- Kolosov, Iu.M.** (Eds.). (2016). *Mezhdunarodnoe pravo v sovremennom mire [International law in the modern world]*. Moscow: Mezhdunar. otnosheniia (in Russian).
- Kopylev, B.C.** (1980). Problems of control over the application of international Labour standards [Problems of control over the application of international Labour standards]. Moscow (in Russian).
- Lukashuk, I.I.** (1966). *Istochniki mezhdunarodnogo prava [Sources of international law]*. Kiev (in Russian).
- Lukashuk, I.I.** (1996). *Mezhdunarodnoe pravo [International law]*. Moscow: BEK (in Russian).
- Pohrebniak, O.Iu.** (2015). Recommendations MOP yak dzherela trudovoho prava [ILO recommendations as a source of Labour law]. *Pravovi ta instytutsiini mekhanizmy zabezpechennia staloho rozvytku Ukrainy – Legal and institutional mechanisms for ensuring sustainable development of Ukraine*, 603–605 (in Ukrainian).
- Tunkin, G.I.** (1979). *Teoriia mezhdunarodnogo prava [International law theory]*. Moscow: Iurid. lit. (in Russian).

Сергій Лукаш,

доктор юридичних наук, професор, директор, Сумська філія Харківського національного університету внутрішніх справ, вулиця Миру, 24, Суми, Україна, індекс 40000, Serhii.Lukash@ukr.net

ORCID: orcid.org/0000-0003-2957-8052

МІСЦЕ ТА ЗНАЧЕННЯ НОРМАТИВНИХ ДОКУМЕНТІВ МОП У СИСТЕМІ ДЖЕРЕЛ ТРУДОВОГО ПРАВА УКРАЇНИ

Анотація. Мета. Мета статті – встановити місце та значення нормативних документів Міжнародної організації праці в системі джерел трудового права України. **Результати.**

У статті, спираючись на аналіз наукових поглядів вчених та норм чинного міжнародного законодавства, обґрунтована важливість та необхідність здійснення нормотворчої діяльності Міжнародною організацією праці. Констатовано, що проблема дії й застосування джерел міжнародного трудового права в правовій системі України є лише частиною іншої більшої проблеми – співвідношення міжнародного й внутрішньодержавного права. Наголошено, що встановлено особливий порядок денонсації конвенцій. Будь-яка держава може денонсувати ратифіковану конвенцію після закінчення 10 років з моменту набуття нею законної сили в цій державі. Якщо держава протягом року після закінчення десятилітнього періоду не скористається своїм правом на денонсацію, то вона залишається пов'язаною цією конвенцією ще на 10 років. **Висновки.** Зроблено висновок, що рекомендації Міжнародної організації праці відрізняються від інших актів рекомендаційного характеру. Зокрема, відповідно до п. 6 ст. 19 Статуту Міжнародної організації праці кожна держава зобов'язана представити рекомендацію компетентним державним органам протягом року з моменту її прийняття на Генеральній конференції Міжнародної організації праці. Держава-член Міжнародної організації праці зобов'язана інформувати Генерального директора про заходи, вжиті відповідно до зазначеного зобов'язання. Держава зобов'язана за запитом Адміністративної ради Міжнародної організації праці представляти доповіді про стан свого права й практики стосовно питань рекомендації. Таким чином, не накладаючи на держави-члени Міжнародної організації праці обов'язку щодо виконання норм про працю, що містяться в цих рекомендаціях, вони, проте, передбачають вчинення дій, що сприяють впливу цих норм на національне право. Юридичні особливості конвенцій і рекомендацій Міжнародної організації праці відображаються на порядку реалізації їхніх положень у вітчизняному трудовому праві. Однак проблема дії й застосування джерел міжнародного трудового права в правовій системі України є лише частиною іншої більшої проблеми – співвідношення міжнародного й внутрішньодержавного права, яка потребує проведення подальших змістовних досліджень у даному напрямку.

Ключові слова: міжнародний нормативно-правовий акт, конвенції, рекомендації, Міжнародна організація праці.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 349.2

DOI <https://doi.org/10.32849/2663-5313/2022.1.05>**Leonid Mohilevskyi,***Doctor of Law, Professor, Honoured Lawyer of Ukraine, Vice-Rector of Kharkiv National University of Internal Affairs, 27 Lev Landau Avenue, Kharkiv, Ukraine, postal code 61080, mogilevskiu@gmail.com***ORCID:** orcid.org/0000-0002-6994-6086

Mohilevskyi, Leonid (2022). Theoretical and methodological approaches to defining concepts of the labour law system. *Entrepreneurship, Economy and Law*, 1, 28–32, doi: <https://doi.org/10.32849/2663-5313/2022.1.05>

THEORETICAL AND METHODOLOGICAL APPROACHES TO DEFINING CONCEPTS OF THE LABOUR LAW SYSTEM

Abstract. Purpose. The purpose of the article is to generalise theoretical and methodological approaches to defining concepts of the labour law system. **Results.** The article, by relying on the literature review, reveals the essence, content and meaning of concepts in the system of labour law. It is argued that the system of labour law consists of a large number of elements, which are both specific (inherent in the labour law only) and general (typical for almost all branches of the system of national law of Ukraine). The author proved that the main purpose of the structure of the labour law system is to ensure effective and efficient functioning of the regulatory-educational and protection mechanisms of the given branch of law. It is found that the constituent part of the concepts of the labour law system is sub-concepts, which also represent unity and commonality of a certain number of uniform legal provisions within a given concept. Sub-concepts, unlike concepts, do not possess the holistic subject-matter detachment and have no specific methods and principles of regulation. The labour collective, without any doubt, is the basis of activity of any enterprise, because the efficiency of activity of the whole organisation depends on its coordinated work. Collective labour law is the name of the block of legal provisions of the labour law, which regulates relations between the labour collective and the employer (or authorised body) of the enterprise, organisation, institution. **Conclusions.** Therefore, we consider it possible to define the structure of the labour law system as an internal structure of this system, which is determined by the order of placement and the nature of links between its structural elements, chains. The system of labour law consists of a large number of elements, which are both specific (inherent in the labour law only) and general (typical for almost all branches of the system of national law of Ukraine). In our opinion, the main purpose of the structure of the labour law system is to ensure effective and efficient functioning of the regulatory-educational and protection mechanisms of the given branch of law.

Key words: legal concept, labour law, functions, individual labour law, collective law.

1. Introduction

The fact that labour law is an important branch in the system of national law of Ukraine is uncontroversial. Its main role is to regulate the conduct of people in the process of their work by means of provisions. At the same time, they (provisions) should also protect the employee's legal rights and interests, provide an enabling environment for work, etc. Implementation of these tasks is impossible without the effective structure of the system of labour law of Ukraine. It should be noted that the most characteristic structural parts of the labour law system are concepts. Thus, their study is relevant and requires further consideration by both domestic and foreign scientists. In general, the structure of the labour law system is the internal organisation of the law branch, objectively determined, manifested in

unity, coordination and distribution of legal provisions by concepts and other branch phenomena, structural formations (Chanysheva, Bolotina, 1999, p. 35). Therefore, the structure of the labour law system is presented in the form of its construction, which is first of all the composition, set of components, parts of this legal entity. The literature review traditionally reveals that the concepts are an important element of the structure of the law system.

The labour law structures have been regarded by scientists such as A.M. Kolodii, H.I. Chanysheva, N.B. Bolotina, Y.Y. Ivchuk, O.V. Zaichuk, A.P. Zayets, V.S. Zhuravskyi, O.L. Kopylenko, A.M. Kolodii, V.V. Kopieichykov, S.L. Lysenkov, V.M. Syrykh, et al. However, the scientists have emphasised that the concepts are the main structural parts of the labour law system. At the same time, the majority of scientists have

quite a superficial approach to the definition of the range and content of these concepts.

Consequently, the purpose of the article is to generalise theoretical and methodological approaches to defining concepts of the labour law system.

2. Determination of the specificities of the concept of labour law.

According to S.S. Alekseev, the concept of law is a separate group of legal provisions that regulate social relations of a particular kind. As examples, the author underlined the concept of property rights in civil law, the concept of liability of officials in administrative law, the concept of election law and the provisions regulating the status of a deputy in the constitutional law. The author argued that the concepts can be branch-related and inter-branch (complex) (Alekseev, Arkhipov, Ignatenko, 2004, 305). As for labour law concepts, they cover a set of legal provisions, smaller than the branch, and differ from each other in the subject of regulation, i.e., the peculiarities of certain types of social relations or individual parties (elements) of a particular kind of public relations (Ivchuk, 2004, pp. 25-26). In Y.Y. Ivchuk's opinion, labour law concepts are objectively formed structural subdivisions, designed, within the subject-matter of the branch of law, to regulate with the necessary detail a separate kind of social-labour relations or a separate element (side) of complex single labour law relationship (Ivchuk, 2004, p. 68). The author argues that specificities of the labour law concepts include:

1. The nature and specificities of the concept of labour law can be get straight on the basis of the fact that it is a unity of legal provisions, which in turn is an element of the next structural unit - the subbranch of labour law. Labour law concepts are aimed at regulating a certain sector, part of labour and associated relations. Each concept of labour law is a relatively separate "block", "assembly" of labour law.

2. The following three features act as the legal criterion for defining a particular set of legal provisions in a specific concept of labour law: a) the legal unity of legal provisions. As an integral formation, the concept of labour law is characterised by the unity of content, which is expressed in general provisions, legal principles or a combination of legal notions used, unity of legal regime of regulated social-labour relations; b) the full regulatory mechanism for a certain combination of labour and associated relations; c) definition of the provisions forming the legal concept in chapters, sections, parts and other structural elements of legal regulations, which are intended to regulate labour and closely associated relations.

3. The features that identify the concept of labour law as an independent subdivision of the branch system are determined by the decision-making functions of a particular legal concept, its role in the integral, relatively completed regulating of social and labour relations. With regard to regulatory properties, each concept of labour law provides an independent regulatory effect on a certain area of labour and associated relations. This is the main characteristic that represents the unity of labour law provisions in its concept.

4. The concept of labour law is distinguished by a certain internal organisation of the regulatory material covered by it. "Outside," in relations with other subdivisions of the labour law branch, the legal concept is a system-integral, indivisible formation, a single legal unity. However, this integrity, indivisibility exists because certain legal provisions are connected not only with the homogeneity of the actual content, intellectual-volitional, legal unity, but also with certain internal organisation. In other words, the concept of labour law has its own structure. Its structure is characterised by: a) the existence of a set of "equal" regulatory provisions; b) certain legal differences in provisions. Therefore, they are linked in a single complex that comprehensively affect this sector of social and labour relations; c) combination of all provisions with the stable legal relations, which are expressed in the general provisions, and most importantly in the legal structure. The last of these features is decisive.

5. Labour law concepts receive an external, special consolidation in the system of labour legislation. Sometimes the legal concept is fixed in a separate legal regulation (Ivchuk, 2003, p. 84).

To sum up, the concepts are the main structural elements of the labour law system, because they are, first, more precise, specific and uniform in their subject matter of regulation, and second, they are logically completed and relatively independent subsystems of the labour law system, that allows them to make certain structural and substantive changes without affecting other components of the system of the legal branch under investigation.

The important point of grouping into concepts is that:

- uniform provisions are grouped according to the subject-matter and methods of regulatory mechanism, which contributes to a clearer definition of the main areas of the regulatory impact of labour law;
- more substantive and operative regulation of labour relations is provided;
- the internal integrity and autonomy of the labour law system is ensured.

The constituent part of the concepts of the labour law system is sub-concepts, which

also represent unity and commonality of a certain number of uniform legal provisions within a given concept. Sub-concepts, unlike concepts, do not possess the intended subject separation, and have no specific regulatory methods and principles.

Moreover, according to N.B. Bolotina, the structure of the system of labour law of Ukraine, except the above-mentioned one, has the form of three parts, in particular: general provisions, individual labour law, collective labour law, since labour law provisions regulating collective labour relations are united in a relatively separate part of labour law – collective labour law (Bolotina, 2003, p. 587). The general provisions contain the provisions defining the subject-matter, scope, functions of labour law, principles of legal regulatory framework, unity and differentiation, subjects of labour law, their legal status (Bolotina, Chanysheva, 2000).

3. Definition of labour law functions

Traditionally, the legal literature distinguishes the following basic functions of labour law:

– Regulatory. The regulatory function of labour law is aimed at the regulation of social relations in the field of labour and at ensuring their purposeful and most expedient development. This function is fulfilled by defining specific trends of people's conduct, realisation of their labour rights and duties (Mykhailov, 2007). The regulatory function of labour law is the main one, because it regulates the legal conduct of the parties of labour legal relations. Due to the positive influence on the conduct of participants of the mentioned legal relations, this function is called to promote the increase of labour productivity, production efficiency, strengthening of labour discipline and improvement of working conditions and living conditions of workers;

– Social. The mentioned function of labour law is reflected in the provisions concerning employment, freedom of labour and other labour constitutional rights, in the provisions concerning safe working conditions, labour protection, limitation of working time, measures of labour, payment and compensation, etc. (Kiselev, 1996, p. 123). A striking manifestation of the social function is a set of legal measures for pregnant women and women who have children of a certain age. In addition to the prohibition of their dismissal on the initiative of the employer, there is a duty to employ them in cases of complete liquidation of the enterprise, institutions, organisations, and in cases of their dismissal after the termination of the fixed-term employment contract. During the period of employment, average wages are kept.

– Protective. The existence of this function is conditioned by the need to protect public relations that form the subject-matter of the given branch of law. In protecting these relations, labour law prohibits actions that interfere with their normal appearance and functioning, providing for them legal liability. We advocate the perspective of P.D. Pylypenko that the essence of the protective function of labour law is a generic category. The protective function of labour law is that labour law creates equal opportunities for citizens to realise their ability to work, establishing uniform provisions on working conditions at enterprises of different forms of ownership. By limiting the degree of operation and fixing the minimum level of guarantees of wages, rest, social security, etc., the labour law guarantees the person the opportunity to feel themselves as a full-fledged citizen of the State (Pylypenko, 1999, p. 76). Therefore, the protective function is important in terms of protection of the rights and legitimate interests of both hired workers and employers, ensuring the proper level of legality of occurrence, leakage, change and/or termination of their relations with respect to the use of hired labour;

– Production. The production function of labour law is a function of protection of interests of owners-entrepreneurs, i.e. employers. Labour law, despite its social nature, cannot but protect the interests of the second party in labour relations, because otherwise it will either enter into conflict with other laws or the employers themselves will have to ignore labour legislation and seek other legal ways to use labour outside of those laws, provided by this legislation. The production function of labour law is also aimed at protecting property rights of employers, their interests as property owners (Pylypenko, 2007). Thus, the mentioned function of labour law promotes the protection of rights of the parties to labour relations directly in the process of production. It contributes to normal and continuous work of the entire organisation.

– Educational. The status of a person in the workplace is significantly determined by his/her mental abilities, though physical abilities are an important component of the labour force. It is due to thinking, consciousness, mental abilities that a person plays an active role in social production (Prokopenko, 2000). This function is designed to ensure that employees are disciplined when they perform their functions. It should be noted that this function is not unique to labour law, and it is characteristic for almost all branches of law in the system of national law of Ukraine.

The next part in the structure of the labour law system, according to the above-men-

tioned position of N.B. Bolotina, is an individual labour law. It is based on individual legal labour relations, which in turn are voluntary, free, bilateral, continuous, regulated by labour law relations, which arise between individual employee and employer as a result of the right to work and conclusion of the employment contract (Bolotina, 2003, p. 3). Individual labour law includes, for example, individual rights of employed workers to pay wages and to implement labour protection standards and employer rights to perform work and careful treatment of materials. It includes such legal concepts as: a labour contract; labour standards; labour remuneration; working hours; rest time; health care of employees at production; labour discipline; evaluation of labour results and certification of employees; vocational training and advanced training of employees; disciplinary responsibility of employees; material responsibility of the parties to the labour contract (Bolotina, Chanysheva, 2000). Therefore, individual labour law consists of such structural groups, which are aimed at regulating relations of the individual employee with the employer. However, it should be noted that in modern conditions individual labour legal relations can-

not exist without collective agreements, as for all employers the provision of collective agreements is obligatory.

The labour collective, without any doubt, is the basis of activity of any enterprise, because the efficiency of activity of the entire organisation depends on its coordinated work. Collective labour law designates the block of labour law provisions, which regulates relations between the labour collective and the employer (or authorised body) of the enterprise, organisation, institution.

4. Conclusions

Thus, we consider it possible to define the structure of the labour law system as an internal structure of this system, which is determined by the order of placement and the nature of links between its structural elements, chains. The system of labour law consists of a large number of elements, which are both specific (specific to the labour law only) and general (typical for almost all branches of the system of national law of Ukraine). In our opinion, the main purpose of the structure of the labour law system is to ensure effective and efficient functioning of the regulatory-educational and protection mechanisms of the given branch of law.

References:

- Alekseev, S.S. Arkhipov, S.I., Ignatenko, G.V. (2004). *Theory of state and law [Theory of Government and Rights]*. Moscow: Norma (in Russian).
- Bolotina, N.B. (2003). *Trudove pravo Ukrainy [Labor law of Ukraine]*. Kyiv: Vikar (in Ukrainian).
- Bolotina, N.B., Chanysheva, H.I. (2000). *Trudove pravo Ukrainy [Labor law of Ukraine]*. Kyiv: «Znannia», KOO (in Ukrainian).
- Chanysheva, G.I., Bolotina, N.B. (1999). *Trudove pravo Ukrainy [Labor law of Ukraine]*. Kharkov: Odissei (in Russian).
- Ivchuk, Yu.Yu. (2003). Instytuty trudovoho prava [Institutes of labor law]. *Pravo i bezpeka – Law and security*, 3, 80–84 (in Ukrainian).
- Ivchuk, Yu.Yu. (2004). Teoretychni pidkhody do systemy trudovoho prava Ukrainy v umovakh rynkovoï ekonomiky [Theoretical approaches to the system of labor law of Ukraine in a market economy]. *Candidate's thesis*. Kharkiv: Nats. un-t vnutr. sprav (in Ukrainian).
- Kiselev, I.Ia. (1996). Trudove pravo stran Zapada na rubezhe XXI veka [Labor law of Western countries at the turn of the XXI century]. *Gosudarstvo i pravo – State and law*, 2, 123–127 (in Ukrainian).
- Mykhailov, O.V. (2007). *Hospodarske zakonodavstvo (pravo) [Economic legislation (law)]*. Poltava: RVV PUSKU (in Ukrainian).
- Prokopenko, V.I. (2000). *Trudove pravo Ukrainy [Labor law of Ukraine]*. Kharkiv: Konsum (in Ukrainian).
- Pylypenko, P.D. (1999). *Problemy teorii trudovoho prava [Problems of the theory of labor law]*. Lviv: Vyd-vo Lviv. nats. un-tu imeni Ivana Franka (in Ukrainian).
- Pylypenko, P.D. (2007). *Trudove pravo Ukrainy [Labor law of Ukraine]*. Kyiv: Istyna (in Ukrainian).

Леонід Могілевський,

доктор юридичних наук, професор, заслужений юрист України, проректор, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, mogilewskiu@gmail.com

ORCID: orcid.org/0000-0002-6994-6086

ТЕОРЕТИКО-МЕТОДОЛОГІЧНІ ПІДХОДИ ДО ВИЗНАЧЕННЯ ІНСТИТУТІВ СИСТЕМИ ТРУДОВОГО ПРАВА

Анотація. Мета. Метою статті є узагальнення теоретико-методологічних підходів до визначення інститутів системи трудового права. **Результати.** У статті, спираючись на аналіз наукових поглядів вчених, розкрито сутність, зміст та значення інститутів в системі трудового права. Аргументовано, що система трудового права складається з великої кількості елементів, які є як специфічними (властивими лише для галузі трудового права), так і загальними (характерні майже для всіх галузей системи національного права України). Доведено, що головною метою структури системи трудового права є забезпечення ефективного та дієвого функціонування регулятивно-виховного та охоронного механізмів даної правової галузі. З'ясовано, що складовою частиною інститутів системи трудового права є підінститути, які також являють собою єдність та спільність певної кількості однорідних правових норм у межах того чи іншого інституту. Підінститути, на відміну від інститутів, не володіють цільною предметною відособленістю і не мають специфічних прийомів і принципів регулювання. Трудовий колектив, беззаперечно, є основою діяльності будь-якого підприємства, адже від його злагодженої роботи залежить ефективність діяльності всієї організації. Колективне трудове право – найменування блоку правових норм галузі трудового права, що регулює взаємовідносини між трудовим колективом та роботодавцем (або уповноваженим ним органом) підприємства, організації, установи. **Висновки.** Таким чином, вважаємо можливим визначити структуру системи трудового права як внутрішню будову даної системи, що визначається порядком розміщення та характером зв'язків між її структурними елементами, ланками. Система трудового права складається з великої кількості елементів, які є як специфічними (властивими лише для галузі трудового права), так і загальними (характерні майже для всіх галузей системи національного права України). Головною метою структури системи трудового права, на нашу думку, є забезпечення ефективного та дієвого функціонування регулятивно-виховного та охоронного механізмів даної галузі права.

Ключові слова: правовий інститут, трудове право, функції, індивідуальне трудове право, колективне право.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 342.95

DOI <https://doi.org/10.32849/2663-5313/2022.1.06>**Oleg Baschuk,***Postgraduate Student at the Department of Police Law, National Academy of Internal Affairs, 1, Solomyanska square, Kyiv, Ukraine, postal code 03035, Bashchuk_Oleh@ukr.net***ORCID:** orcid.org/0000-0001-9121-8485

Baschuk, Oleg (2022). Administrative and legal framework for prevention and counteraction of discrimination by district police officers. *Entrepreneurship, Economy and Law*, 1, 33–38, doi: <https://doi.org/10.32849/2663-5313/2022.1.06>

ADMINISTRATIVE AND LEGAL FRAMEWORK FOR PREVENTION AND COUNTERACTION OF DISCRIMINATION BY DISTRICT POLICE OFFICERS

Abstract. Purpose. The purpose of the article is to clarify and thoroughly reveal the specificities of the administrative and legal regulatory mechanism for prevention and counteraction of discrimination by district police officers. **Results.** The article elaborates on the specificities of the administrative and legal regulatory mechanism for prevention and counteraction of discrimination by district police officers. Persons with disabilities are found to be one of the most vulnerable segments of the population and are subject to a wide range of discrimination forms. In view of this, the provisions of the Convention on the Rights of Persons with Disabilities, the Law of Ukraine “On Fundamentals of Social Protection of Persons with Disabilities in Ukraine” and a number of other legal regulations are being implemented at the legislative level. The focus should be on recent introduction of evaluation methodologies for ensuring the rights of persons with disabilities by all central executive authorities that guarantees an increase in the quality and efficiency of implementing the relevant State anti-discrimination policy of Ukraine. **Conclusions.** The study makes proposals on five clusters of legal regulations, among which a general cluster provides for the framework for the exercise of powers by public authorities against discriminatory acts; reveals the specificities of implementing basic administrative and legal relations between public institutions, the population, etc.; a competence cluster provides for the powers of executive authorities and individual officials regarding the implementation of State anti-discrimination policy; human rights cluster concerns administrative and legal regulations, organizational and steering documents of the Human Rights Commissioner of the Verkhovna Rada; a sectoral cluster enshrines guidelines to ensure the principle of non-discrimination in the implementation and protection of specific groups of citizens; an expert-analytical cluster represents the organization of anti-discrimination and gender-based legal examination of draft laws and other materials provided for in the legislation in force.

Key words: administrative and legal regulations, anti-discrimination examination, discrimination, district police officers, National Police, human and civil rights and freedoms.

1. Introduction

The authorized actors implement measures to prevent and combat discrimination within the framework of the relevant public policy of Ukraine, considering their specific competence. This legal relationship is regulated by a certain general and specific frame of anti-discrimination legislation, which should be carefully considered and grouped into clusters in the context of administrative law.

What is needed now is a thorough exposition of the issue from the perspective of performance of the police and district police officers. Indeed, in specific areas, these officials play an exclusive role in the organization of observance of the principle of non-discrimination and the protection of the rights and freedoms of a particular cat-

egory of citizens at the local level, when other public institutions are not provided with the necessary administrative coercion means and other similar legal instruments.

The purpose of the article is to clarify and thoroughly reveal the specificities of the administrative and legal regulatory mechanism for prevention and counteraction of discrimination by district police officers.

2. Administrative and legal regulations defining the basic powers of the central and local executive authorities to guarantee the principle of non-discrimination

The first cluster is general, represented by a number of legal regulations, such as the Law of Ukraine On the Principles of Prevention and Counteraction of Discrimination in

Ukraine, On Ensuring Equal Rights and Opportunities for Women and Men, On Education, On the Fundamentals of Social Protection of Persons with Disabilities in Ukraine, Fundamentals of Health Care Legislation of Ukraine, Labour Code of Ukraine, etc. These documents provide for the framework for the exercise of powers by public authorities against discriminatory acts at different levels of the public and State life; outlines the foundations and specificities of implementing basic administrative and legal relations between public institutions, the population, and representatives of civil society, etc.

The second cluster is a competence one that consists of administrative and legal regulations, which provide for the powers of executive authorities and individual officials regarding the implementation of State anti-discrimination policy. Such documents have been analysed in the context of the system and powers of the actors authorised to combat discrimination, so to make the logic of the text more visible and consistent, we will only present their list, which is not exhaustive. Initially, these instruments are:

1) Authorized officials appointed by the Cabinet of Ministers: Regulations on the Government Plenipotentiary on Gender Policy, approved by Resolution 390 of the Cabinet of Ministers of 7 June 2017, Regulations on the Government Commissioner for the Rights of Persons with Disabilities, approved by Resolution 125 of 21 February 2017, Regulations on the Education Ombudsman, approved by Resolution 491 of the Cabinet of Ministers of 06 June 2018;

2) Centralexecutive authorities: Regulations on the Ministry of Internal Affairs of Ukraine, approved by Resolution 878 of the Cabinet of Ministers of 28 October 2015, Regulations on the Ministry of Justice of Ukraine, approved by Resolution 228 of the Cabinet of Ministers of Ukraine on 02 July 2014, Regulations on the Ministry of Reintegration of the Temporarily Occupied Territories, approved by Resolution 376 of the Cabinet of Ministers of Ukraine on 08 June 2016, Regulations on the Ministry of Social Policy of Ukraine, approved by Resolution 423 of the Cabinet of Ministers of 17 June 2015, Regulations on the State Labour Service of Ukraine, approved by Resolution 96 of the Cabinet of Ministers of 11 February 2015, Regulations on State Service of Ukraine for Ethnopolitics and Freedom of Conscience, approved by Resolution 812 of the Cabinet of Ministers of 21 August 2019.

The third one, human rights cluster, concerns administrative and legal regulations, organizational and steering documents of the Human Rights Commissioner of the Verkhovna Rada, having a significant and continuous

positive impact on all the structural elements of the human rights machinery in the country, on the law-making and law application by the public authorities, and promote a sustainable social environment in accordance with the general requirements of the principles of non-discrimination. The key areas of implementation of the official's orders are: the organization of the work of his/her secretariat and structural units; the work of the advisory and coordinating councils by the areas of activity; establishment of working groups by areas of activity; regulations on the organization and monitoring visits by areas of activity (Official site of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine 'ombudsman.gov.ua').

The focus should be on the Regulations for Organizing and Conducting Monitoring Visits on Observance of the Rights of the Child and the Family by Public Authorities, Local Self-Government Bodies, Enterprises, Institutions, Organizations Regardless of Ownership, approved by Order 83.15/19 of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights of 05 September 2019 (Order of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights On Approval of the Regulations for Organizing and Conducting Monitoring Visits on Observance of the Rights of the Child and the Family by Public Authorities, Local Self-Government Bodies, Enterprises, Institutions, Organizations Regardless of Ownership, 2019).

Considering that the Commissioner of the Verkhovna Rada of Ukraine for Human Rights, the structural units of his/her secretariat and regional offices have not only monitoring and information-analytical functions but also specific supervisory, administrative and jurisdictional powers, the Procedure for Carrying Out Proceedings of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, approved by Order 18/02-13 of the Commissioner of the Verkhovna Rada for Human Rights of 12 August 2013, Procedure for Registration of Materials on Administrative Offences, approved by Order 3/02-15 of the Commissioner of the Verkhovna Rada for Human Rights of 16 February 2015 have entered into force (Order of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights On Approval of the Procedure for Carrying Out Proceedings of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, 2013). Specifically, these measures provide for the preparation of reports on misconduct, governed by articles 188³⁹, 188⁴⁰ and 212³ of the Code of Administrative Offences. When a person commits more than one separate

offence, records are drawn up for each offence (Order of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine on the Procedure for Registration of Materials on Administrative Offenses, 2015).

3. Legal regulations guaranteeing the principle of non-discrimination in the implementation and protection of specific groups of citizens

The fourth one, sectoral cluster, comprises a set of administrative and legal regulations that provide guidelines to ensure the principle of non-discrimination in the implementation and protection of specific groups of citizens. Certain areas of State anti-discrimination policy in Ukraine have a clearly defined specialty, due to steady trends towards the implementation of international law in domestic legislations. This includes ensuring gender equality, particularly in the security and defence sectors. (Volobuieva, Viatkina, Hanaba, Honcharenko, Hushchyn, Zhukovska, et al., 2021, p. 16), therefore, a significant regulatory framework deals with this issue. Article 12 of the Law of Ukraine “On Ensuring Equal Rights and Opportunities for Women and Men” stipulates that the executive authorities and local self-government bodies within their competence (Law of Ukraine On Ensuring Equal Rights and Opportunities for Women and Men, 2005):

1) ensure equal rights and opportunities for women and men, prevent and combat gender-based violence; implement national and regional programmes to ensure equal rights and opportunities for women and men; prevention and counteraction of gender-based violence;

2) create conditions for combining professional and family responsibilities by women and men; provide accessible social and household services; carry out educational activities on gender equality, prevention and counteraction of gender-based violence;

3) cooperate with voluntary associations and foreign non-governmental organizations to ensure equal rights and opportunities for women and men and to prevent and combat gender-based violence; submit proposals for improving legislation on gender equality, prevention and counteraction of gender-based violence; collect and disseminate information on gender-based violence; as well as general and specialized victim support services;

4) participate in the training of specialists in the realization of equal rights and opportunities for women and men, in the prevention and combating of gender-based violence; promote scientific developments in the field of gender research; observe the principle of equal rights and opportunities for women and men in their activities; take positive action.

These legislative requirements are specified in certain methodological materials, such as the Methodological Recommendations on introducing provisions, aimed at ensuring equal rights and opportunities for women and men in labour relations, into collective agreements and contracts, approved by Order 56 of the Ministry of Social Policy of Ukraine of 29 January 2020, in order to ensure gender equality in the workplace by respecting the principle of non-discrimination, aimed at resolving conflicts caused by inappropriate acts or omissions.

The logical follow-up to the document under consideration are the Methodological Recommendations on Identification of Cases of Gender Discrimination and the Mechanism of Legal Aid, approved by Order 33 of the Ministry of Justice of 12 March 2019, aimed at identifying cases of gender-based discrimination and determining a legal aid scheme, in particular free legal aid (Order of the Ministry of Justice of Ukraine On Approval of Methodological Recommendations on Identification of Cases of Gender Discrimination and the Mechanism of Legal Aid, 2019). At the same time, the Methodological Recommendations on Gender Audits by Enterprises, Institutions and Organizations, approved by Order 448 of the Ministry of Social Policy of 09 August 2021, specify that the purpose of such an audit may be to evaluate the state of gender equality ensured by legal persons, to identify problems, to determine ways of reducing inequalities, to analyse changes in this field, as well as raising awareness of employees on the application of an integrated gender approach in their activities.

Persons with disabilities are one of the most vulnerable segments of the population and are constantly subjected to various forms of discrimination. In view of this, the provisions of the Convention on the Rights of Persons with Disabilities, the Law of Ukraine “On Fundamentals of Social Protection of Persons with Disabilities in Ukraine” and a number of other legal regulations are being implemented at the legislative level. The focus should be on recent introduction of evaluation methodologies for ensuring the rights of persons with disabilities by all central executive authorities that guarantees an increase in the quality and efficiency of implementing the relevant State anti-discrimination policy of Ukraine.

For example, the Methods for evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Justice of Ukraine, its territorial bodies, enterprises, institutions and organizations within the scope of its management, approved by Order 1646/5 of the Ministry of Justice of 29 May 2018, outlines that the evaluation shall be carried out by the heads

of structural subdivisions, territorial bodies, enterprises, institutions and organizations of the Ministry by submitting written answers to the questions, which have been compiled in the form of tests on 11 incendiary issues. A structural unit is considered to be one in which the rights of this category of persons are not fully protected if, on the basis of an evaluation, the overall evaluation is less than the required minimum score (Order of the Ministry of Justice of Ukraine On approval of the Methodology for evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Justice of Ukraine, its territorial bodies, enterprises, institutions and organizations within the scope of its management, 2018). Similar documents are available in all other ministries, such as the Working Group on evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Internal Affairs and central executive bodies, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine, approved by Order 294 of the Ministry of Internal Affairs of Ukraine of 11 April 2018 (Order of the Ministry of Internal Affairs of Ukraine On approval of the Methodology for evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Internal Affairs of Ukraine and central executive bodies, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine, 2018).

The fifth cluster, expert-analytical cluster, represents constitutes an important part of the procedural component of the National legal mechanism for prevention and counteraction of discrimination in Ukraine in the context of implementing administrative and legal relations in the field under consideration, regulated by a set of legal instruments providing the proper organization of the examination of draft laws and other materials provided for in the legislation in force by authorized actors.

According to the Law of Ukraine "On Fundamentals of Prevention and Counteraction of Discrimination in Ukraine", anti-discrimination examination is analysis of draft laws,

on the results of which an opinion is given on their conformity with the principle of non-discrimination. In order to identify provisions with the signs of discrimination in the draft laws, the examination is carried out. Its results are subject to mandatory review when a decision is taken to issue (adopt) the document. Draft laws of Ukraine, acts of the President of Ukraine, and legal regulations drawn up by executive authorities, oblast and Kyiv city State administrations are subject to mandatory review (Law of Ukraine On Principles of Prevention and Counteraction of Discrimination in Ukraine, 2012). The procedure for this examination is specified in the Procedure for an anti-discrimination examination of draft laws by the executive authorities, approved by Resolution 61 of the Cabinet of Ministers of Ukraine of 30 January 2013.

4. Conclusions

To sum up, domestic administrative legislation in the field of prevention and counteraction of discrimination implies five clusters of legal regulations:

1) General cluster provides for the framework for the exercise of powers by public authorities against discriminatory acts at different levels of public and State life; outlines the specificities of implementing basic administrative and legal relations between public institutions, the population, etc;

2) Competence cluster provides for the powers of executive authorities and individual officials regarding the implementation of State anti-discrimination policy;

3) Human rights cluster concerns administrative and legal regulations, organizational and steering documents of the Human Rights Commissioner of the Verkhovna Rada;

4) Sectoral cluster enshrines guidelines to ensure the principle of non-discrimination in the implementation and protection of specific groups of citizens on certain discriminatory grounds;

5) Expert-analytical cluster represents the organization of anti-discrimination and gender-based legal examination of draft laws and other materials provided for in the legislation in force.

References:

Nakaz Ministerstva vnutrishnikh sprav Ukrainy Pro zatverdzhennia Metodyky otsiniuvannia roboty iz zabezpechennia prav osib z invalidnistiu v Ministerstvi vnutrishnikh sprav Ukrainy ta tsestralnykh orhanakh vykonavchoi vlady, diialnist yakyykh spriamovuietsia ta koordynuietsia Kabinetom Ministriv Ukrainy cherez Ministra vnutrishnikh sprav Ukrainy : pryiniaty 11 kvit. 2018 roku № 294 [Order of the Ministry of Internal Affairs of Ukraine On approval of the Methodology for evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Internal Affairs of Ukraine and central executive bodies, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine from April 11 2018, № 294]. (2018). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/z0496-18#Text> (in Ukrainian).

Nakaz Ministerstva yustytzii Ukrainy Pro zatverdzhennia Metodychnykh rekomendatsii shchodo identyfikatsii vypadkiv gendernoi dyskryminatsii ta mekhanizm nadannia pravovoi dopomohy : pryiniaty 12 berez. 2019 roku № 33 [Order of the Ministry of Justice of Ukraine On Approval of Methodological Recommendations on Identification of Cases of Gender Discrimination and the Mechanism of Legal Aid from March 12 2019, № 33]. (2019). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/rada/show/v0033419-19#Text> (in Ukrainian).

Nakaz Ministerstva yustytzii Ukrainy Pro zatverdzhennia Metodyky otsiniuvannia roboty iz zabezpechenia prav osib z invalidnistiu v Ministerstvi yustytzii Ukrainy, yoho terytorialnykh orhanakh, pidpriemstvakh, ustanovakh ta orhanizatsiiakh, shcho nalezhat do sfery yoho upravlinnia : pryiniaty 29 trav. 2018 roku № 1646/5 [Order of the Ministry of Justice of Ukraine On approval of the Methodology for evaluating the work on ensuring the rights of persons with disabilities in the Ministry of Justice of Ukraine, its territorial bodies, enterprises, institutions and organizations within the scope of its management from May 29 2018, № 1646/5]. (2018). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/z0660-18#Text> (in Ukrainian).

Nakaz Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny Pro zatverdzhennia Rehlementu orhanizatsii ta provedennia monitorynhovykh vizytiv z pytan dotrymannia prav dytyny ta simi orhanamy derzhavnoi vlady, orhanamy mistsevoho samovriaduvannia, pidpriemstvamy, ustanovamy, orhanizatsiiamy nezalezhno vid formy vlasnosti : pryiniaty 5 veres. 2019 roku № 83.15/19 [Order of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights On Approval of the Regulations for Organizing and Conducting Monitoring Visits on Observance of the Rights of the Child and the Family by Public Authorities, Local Self-Government Bodies, Enterprises, Institutions, Organizations Regardless of Ownership from September 9 2019, № 83.15/19]. (2019). *ombudsman.gov.ua*. Retrieved from <https://www.ombudsman.gov.ua/ua/page/secretariat/docs/organizacijno-rozporyadchi-dokumenty/> (in Ukrainian).

Nakaz Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny Pro zatverdzhennia Poriadku zdiisnennia provadzhennia Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny : pryiniaty 12 serp. 2013 roku №18/02-13 [Order of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights On Approval of the Procedure for Carrying Out Proceedings of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine from August 12 2013, № 18/02–13]. (2013). *ombudsman.gov.ua*. Retrieved from <https://www.ombudsman.gov.ua/ua/page/secretariat/docs/> (in Ukrainian).

Nakaz Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny Pro Poriadok oformlennia materialiv pro administratyvni pravoporushennia : pryiniaty 16 liut. 2015 roku №3/02-15 [Order of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine on the Procedure for Registration of Materials on Administrative Offenses from February 16 2015, № 3/02–15]. (2015). *ombudsman.gov.ua*. Retrieved from <https://www.ombudsman.gov.ua/ua/page/secretariat/> (in Ukrainian).

Ofitsiinyi sait Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny [Official site of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine]. *ombudsman.gov.ua*. Retrieved from <https://ombudsman.gov.ua/ua/page/secretariat/representatives-of-the-commissioner/> (in Ukrainian).

Volobuieva, O., Viatkina, A., Hanaba, S., Honcharenko, O., Hushchyn, O., Zhukovska, H., et al. (2021). *Metodychni rekomendatsii z intehratsii gendernykh pidkhodiv v systemu pidhotovky fakhivtsiv dlia sektoru bezpeky i oborony Ukrainy [Methodical recommendations on the integration of gender approaches into the system of training specialists for the security and defense sector of Ukraine]*. Kyiv (in Ukrainian).

Zakon Ukrainy Pro zabezpechennia rivnykh prav ta mozhlyvostei zhinok i cholovikiv : pryiniaty 8 veres. 2005 roku № 2866-IV [Law of Ukraine On Ensuring Equal Rights and Opportunities for Women and Men from September 8 2005, № 2866-IV]. (2005). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2657-12#Text> (in Ukrainian).

Zakon Ukrainy Pro zasady zapobihannia ta protydii dyskryminatsii v Ukraini : pryiniaty 6 veres. 2012 roku № 5207-VI [Law of Ukraine On Principles of Prevention and Counteraction of Discrimination in Ukraine from September 6 2012, № 5207-VI]. (2012). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/5207-17#Text> (in Ukrainian).

Олег Бацук,

ад'юнкту кафедри поліцейського права, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Bashchuk_Oleh@ukr.net

ORCID: orcid.org/0000-0001-9121-8485

АДМІНІСТРАТИВНО-ПРАВОВЕ ПІДГРУНТЯ ЗАПОБІГАННЯ ТА ПРОТИДІЇ ДИСКРИМІНАЦІЇ ДІЛЬНИЧНИМИ ОФІЦЕРАМИ ПОЛІЦІЇ

Анотація. Мета. Метою статті є з'ясування та ґрунтовне розкриття особливостей адміністративно-правового регулювання запобігання та протидії проявів дискримінації дільничними офіцерами поліції. **Результати.** У статті детально розкрито особливості адміністративно-правового регулювання запобігання та протидії проявів дискримінації дільничними офіцерами поліції. З'ясовано, що особи з інвалідністю є однією з найбільш незахищених верств населення, що постійно

піддаються різноманітним проявам дискримінації. З огляду на це на законодавчому рівні реалізуються у практичну площину положення Конвенції про права осіб з інвалідністю, Закону України «Про основи соціальної захищеності осіб з інвалідністю в Україні», низки інших нормативно-правових актів. На особливу увагу заслуговує впровадження останніми роками методик оцінювання роботи із забезпечення прав осіб з інвалідністю всіма центральними органами виконавчої влади, що гарантує підвищення якості та ефективності реалізації відповідного спрямування державної антидискримінаційної політики України. **Висновки.** Запроновано п'ять блоків відповідних нормативно-правових актів, де загальний блок визначає основи реалізації владних повноважень публічними органами у сфері боротьби з дискримінаційними проявами, розкриває особливості здійснення базових адміністративно-правових відносин між публічними інституціями, населенням тощо; компетентнісний блок – визначає повноваження органів виконавчої влади, окремих посадових осіб у сфері реалізації державної антидискримінаційної політики; правозахисний блок – стосується адміністративно-правових актів та організаційно-розпорядчих документів Уповноваженого Верховної Ради України з прав людини; галузевий блок – закріплює керівні приписи щодо забезпечення принципу недискримінації у сфері реалізації та захисту окремих груп громадян; експертно-аналітичний блок – репрезентує забезпечення організації здійснення антидискримінаційної та гендерно-правової експертизи проектів нормативно-правових актів, інших матеріалів, передбачених чинним законодавством.

Ключові слова: адміністративно-правові акти, антидискримінаційна експертиза, дискримінація, дільничні офіцери поліції, Національна поліція України, права і свободи людини та громадянина.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 342.9

DOI <https://doi.org/10.32849/2663-5313/2022.1.07>**Andrii Lohvyn,***PhD in Law, logvin.andrey80@gmail.com***ORCID:** orcid.org/0000-0003-4373-375X

Lohvyn, Andrii (2022). Terms of tax credit formation: genesis and problems of today. *Entrepreneurship, Economy and Law*, 1, 39–46, doi: <https://doi.org/10.32849/2663-5313/2022.1.07>

TERMS OF TAX CREDIT FORMATION: GENESIS AND PROBLEMS OF TODAY

Abstract. *The purpose of the article* is to study the problematic issues of a regulatory and legal nature related to the formation of value added tax credit, in particular, the formation of terms of attributing the relevant amounts of tax to its composition, their regulation and compliance with the realities of today from the legal point of view. **Research methods.** The work was carried out based on the general scientific and special methods of scientific cognition. **Results.** The possibility of attributing the corresponding amounts of value added tax to the composition of tax credit, both in the current and subsequent tax periods, affects both the reduction of tax payment liabilities and the possibility of receiving a budget refund. Thus, the property benefit of obtaining the right to tax credit (especially on the actually paid value added tax in the price of goods /services) is obvious. At the same time, the introduction of a reduction in stocks from 01.01.2022 (up to 365 days), during which a taxpayer has the right to attribute value added tax amounts to composition of tax credit, leads to the violation of the balance of relations between tax legal entities. **Conclusions.** The performed analysis of the provisions of normative legal acts regulating the procedure for the formation of value added tax credit, including determining the terms for attributing the relevant amounts of tax to its composition, made it possible to identify urgent legal issues. These issues are related to the reduction of the terms for the tax credit formation from the beginning of 2022, which in some way affects the possibility of attributing the relevant tax amounts to its composition based on registered tax invoices, in particular, on those actually registered on the basis of the entry into force of a court decision. In addition, the article made scientifically based conclusions on the identified issues and proposed possible solutions.

Key words: value added tax, VAT electronic administration system, system of automatic monitoring the criteria of risk level assessment, tax credit, tax invoice, Unified Register of Tax Invoices.

1. Introduction

The main legal issue of the tax sphere is mainly determining and effective ensuring the limits of freedom and the necessity in the behavior of tax entities through relevant legal, legislative norms, the protection of ownership rights of individual payers and public interests that are implemented in the financial and tax activities of the state.

The main normative legal act regulating the general principles of rights and obligations (limits of obligatory/ possible behavior) of tax entities (taxpayers and regulating bodies), including the administration of value added tax in Ukraine (determining tax liabilities and the formation of tax credit), is the Tax Code of Ukraine (Tax Code of Ukraine, 2010) (hereinafter – the Tax Code). Besides, this normative act determines the terms, within which the amount of value added tax (hereinafter referred to as VAT) for purchased goods/services based of received and registered tax invoices may be attributed by a taxpayer to the composition of tax credit.

In addition, the system of electronic administration of value added tax (hereinafter referred to as VAT SEA) was introduced from 01.01.2015 (Law of Ukraine No. 71-VIII, 2014), and from 01.07.2017, the system of automated monitoring of compliance of tax invoices / adjustment calculations with the risk assessment criteria sufficient to stop the registration of a tax invoice / adjustment calculation in the Unified Register of Tax Invoices (hereinafter referred to as the Monitoring system) (Law of Ukraine No. 1797-VIII, 2016). These systems in totality (most of all the Monitoring system) in some way affect the procedure and terms of formation of tax liabilities and the value added tax credit, including attributing tax amounts to tax credit through registered tax invoices, which, taking into account the suspension of their registration and the “unblocking” procedure, may be registered on the date of their actual submission for registration, however, after a certain period of time (may be more than 365 days).

Since the amounts of value added tax attributed to the composition of tax credit in future may reduce tax liabilities to be paid or reimbursed, the property benefit from obtaining the right to a tax credit, especially on the actually paid value added tax in the price of goods/services, is obvious. In this regard, there is a need for scientific research into the issue of legal regulation of the mechanism of tax credit formation, in particular, the terms for attributing the amounts of value added tax to the composition of tax credit based on drawn up (registered) tax invoices.

At present, taking into account the introduction of new terms from 01.01.2022 (reduction from 1095 to 365 days) of attributing the amounts of value added tax to the composition of tax credit based on registered tax invoices, research into this issue has not been carried out.

Based on analysis of the provisions of the relevant normative legal acts, the paper explores the formation of the terms for the tax credit formation, as well as identifies problematic issues of legal regulation on the formation of tax credit, in connection with a decrease in the terms of attributing to its composition of the relevant amounts of value added tax, and the ways to solve them. In addition, scientifically based conclusions on the outlined issues have been made.

2. Establishment of terms of tax credit formation

As already mentioned, the Tax Code regulates the issue of administration of value added tax, including the terms for attributing the amounts of tax in received tax invoices to tax credit. In our previous publications, we have repeatedly focused on the issues related to the study of the legal mechanism of value added tax (tax liability, tax credit, legal personality of taxpayers, etc.). In this paper, we will dwell solely on the terms of tax credit formation.

Currently (from 01.01.2022), taking into account the amendments to the Tax Code introduced by the Law of Ukraine No 1914-IX of 30.11.2021 (Law of Ukraine No. 1914-IX, 2021) (hereinafter referred to as Law No. 1914-IX), in case a taxpayer did not include in the corresponding reporting period the amount of value added tax based on received tax invoices/ adjustment calculations to such tax invoices, registered in the Unified Register of Tax Invoices (hereinafter referred to as URTI), he has the right to do it within 365 calendar days from the date of drawing up a tax invoice /adjustment calculation.

It will be appropriate to pay attention that since the Tax Code was enacted (from 01.01.2011), it is the third time there has

been a change in the terms, within which a taxpayer can exercise the right to attribute the VAT amounts for purchased goods/services to the composition of tax credit.

Since the Tax Code was enacted (from 01.01.2011), this term made up 180 days. Given the amendments to the Tax Code based on the Law of Ukraine No. 643-VIII of 16.07.2015 (hereinafter referred to as Law No. 643-VIII) (Law of Ukraine No. 643-VIII, 2015), this term was increased from 180 to 365 days. Subsequently, under the Law of Ukraine No. 2198-VIII of 09.11.2017 (hereinafter referred to as Law No. 2198-VIII) (Law of Ukraine No. 2198-VIII, 2017), the term of attributing the amount of value added tax to the composition of tax credit by received (registered) tax invoices was increased from 365 to 1095 days.

As we can see, since enacting the Tax Code, by the corresponding changes (Law of Ukraine No. 643-VIII, 2015; Law of Ukraine No. 2198-VIII, 2017), the legislator has gradually introduced an increase in the term (from 180 to 365 and from 365 to 1095 days), within which a taxpayer has the right to attribute the relevant amounts of value added tax to tax credit. This is quite logical in terms of the statute of limitations under Article 102 of the Tax Code (Tax Code of Ukraine, 2010), and the elimination of relevant contradictions between the term for the possibility of clarifying tax reporting indicators and the term of attributing the relevant VAT amounts to the composition of tax credit.

At the same time, from 01.01.2022, taking into account the amendments to the Tax Code (Law of Ukraine No. 1914-IX, 2021), a reduction in the term (from 1095 to 365 days) was introduced, during which a taxpayer, in case he did not attribute the amount of VAT based on received tax invoices / adjustment calculations to such tax invoices, registered in the URTI, to tax credit in the relevant reporting period, may attribute VAT amounts to the composition of tax credit in the following tax (reporting) periods.

In this case, it should be noted that an increase in terms took place for the first time on the ground of the *“improvement of VAT administration”*, and for the second time as *“stabilization of calculations in the electricity market”*. In turn, the current reduction (by three times) of the terms for the possibility of attributing VAT amounts to tax credit based of registered tax invoices was solely due to the good intentions of *“ensuring the balance of budget revenues”*. That is, every time amendments to the Tax Code are introduced, the legislator finds an appropriate worthy substantiation (justification) for his actions. Apparently, payments on the electricity market have already been stabi-

lized, so it is necessary to take care of the balance of budget revenues.

As one can see, the terms of attributing the corresponding VAT amounts to tax credit in the following tax periods based on tax invoices drawn up and, first of all, registered in previous periods is limited to 365 days.

In our opinion, these changes (reduction of the relevant terms) may and will affect (in the short-term prospect) the balance of budget revenues (in a certain sense, will lead to an increase in revenues from value added tax), but are unlikely to lead to balanced relationships between tax entities (taxpayers and regulatory authorities). This mainly concerns the issues of attributing to the composition of tax credit of VAT amounts on tax invoices, the registration of which in the URTI is suspended in the current period, since it implies the need for the procedure of their “unblocking”, which may take some time, and registration will take place after a period of 365 days (although by the previous date of actual submission for registration).

3. Suspension of registration of tax invoices and influence on the terms of tax credit formation

As already mentioned, a system of automated monitoring of compliance of a tax invoice / calculation of adjustments with the risk assessment criteria sufficient to stop the registration of a tax invoice / calculation of adjustments in the URTI, which is part of the VAT SEA, was introduced in Ukraine from 01.07.2017. The above-mentioned automated system in some way affects the procedure and terms of formation of tax liabilities and the tax credit from the value added tax, including the terms of attributing VAT amounts to tax credit based on registered tax invoices, which, taking into account the suspension of their registration and the “unblocking” procedure, may be registered, by the date of their actual submission for registration, however, after a certain period of time (may be of more than 365 days).

At the same time, it should be noted that the relevant amendments to the Tax Code (Law of Ukraine No. 1914-IX, 2021) also stipulate that in case of suspension of registration of a tax invoice / calculation of adjustments in the URTI in accordance with point 201.16 of Article 201 of this Code, the course of the terms specified in this paragraph is interrupted for the period of suspension of registration of such tax invoices / adjustment calculations in the URTI. Will this provision really somehow eliminate problematic issues? We will dwell on the worst-case scenario, which involves making a decision to refuse to register a tax invoice by the commission of the controlling body.

In addition, we draw attention to the fact that until this time (until 01.01.2022), the Tax Code had no warning that the course of the relevant period (1095 days) is stopped for the period of suspension of registration of a tax invoice / calculation of the adjustment and the procedure for their unblocking, including for the period of judicial or administrative appeal of the decision of the tax authority to refuse to register a tax invoice. Although even in this case, taking into account the terms of 1095 days for the possibility of attributing the relevant VAT amounts to the composition of tax credit and the unblocking procedure, it might be impossible to meet such deadlines.

Thus, considering the provisions of the relevant regulations (Decree of Cabinet of Ministers of Ukraine No. 1165, 2019; Order of the Ministry of Finances of Ukraine No. 520, 2019), in case of suspension of registration of a tax invoice / calculation of adjustments in the URTI, a taxpayer can exercise his right and within 365 days (from the date of drawing up a tax invoice) to submit written explanations and copies of primary documents for consideration of the commission to make decision on registration / refusal to register a tax invoice / calculation of adjustments in the URTI.

It would be appropriate to note that preparation of written explanations and copies of the documents necessary to consider the decision of the controlling authority to register such a tax invoice takes some time (involvement of labor and material resources), since it involves writing explanations (description of the circumstances of a certain economic operation) and grouping the associated significant number of primary documents, scanning and submitting them electronically. In addition, take into account the routine activities of the personnel of the financial (accounting) department. Even assuming the situation that provides for timely (prior) submission for the registration of a tax invoice and its subsequent suspension, prompt preparation of the necessary explanations and copies of documents, their submission to the commission for consideration, the deadlines for consideration and adoption of the relevant decision on refusal, as well as its subsequent administrative appeal, which is unlikely to be positive, such terms can include from one to two months.

And if, for example, we assume that a taxpayer also has a decision on his meeting the risk criteria (inclusion in the risk list), it is not enough to count on a positive decision upon the fact of submitting explanations and documents to unblock the tax invoice. Although in our opinion, taking into account the events of December 2021 (*spreading certain informa-*

tion in business circles and in relevant information sources (Telegram channels) regarding the incomprehensible actions of tax authorities on including in the list of risky taxpayers of almost all taxpayers of the real sector of economy, meeting the risk criteria can be considered a certain quality mark (*in a good sense*).

It should be noted that this applies to one tax invoice and only the procedure of its administrative (not judicial) appeal, and if there are several such invoices and they relate to various business transactions and counterparties, you will have to “*live at work*”.

In turn, taking into account the decision to refuse to register a tax invoice, as well as the negative result of an administrative appeal, there remains one way out – an appeal to the court with an administrative claim on the recognition of an unlawful decision to refuse to register a tax invoice and an obligation to take certain actions (register a tax invoice by the actual date of its submission for registration).

In this case, we must hope for a quick and positive consideration of the case for a taxpayer, which in certain cases may not be so prompt, given the fact that, as a rule, before a court decision (a positive decision for a taxpayer) enters into force, the court case will be considered in the first and second instances, since the tax authorities (in case of satisfaction of the taxpayer's claim) will appeal the correspondent decision in the appeal court (Resolution of the Third Appeal Administrative Court on case No. 160/10398/20, 2021) (even in the absence of funds to pay the court fee), and if a payer is also included in the risk list, they will find funds to pay court fees. And here it is not necessary that they will be limited only to the second instance, in case of repeated loss (Resolution of the Supreme Court of Ukraine on case No. 160/6665/20, 2021).

At the same time, the entry into force of a court decision does not guarantee its mandatory and immediate implementation, as provided for by the relevant regulatory documents (Constitution of Ukraine, 1996; Code of Administrative Legal Proceedings of Ukraine No. 2747-IV, 2005), and the registration of tax invoices (Decree of the Cabinet of Ministers of Ukraine No. 1246, 2010), taking into account the study conducted in 2021 by the Business Ombudsman Council on the timeliness of implementation of relevant court decisions by the State Tax Service of Ukraine (hereinafter – the State Tax Service of Ukraine, STS bodies) (Research of the Business Ombudsman Council regarding non-implementation of court resolutions concerning the registration of tax invoices, 2021).

Thus, it can be argued that a tax invoice may be registered by the actual date of its submission

for registration, however, after 365 days. This will lead to disputes between tax entities (taxpayers and tax authorities) regarding attributing value added tax amounts to tax credit based on tax invoices, the registration of which is suspended in the URTI and are subsequently registered on the basis of a court decision, given the outright reluctance of the STS bodies to implement court decisions in a timely manner. Since not attributing VAT amounts to tax credit leads to the inability of a payer to reduce tax liabilities (the amount of tax payable) and the need to replenish the VAT account for registration of tax invoices, which, in turn, is additional revenues to the state budget. Perhaps, tax authorities have some other “*charitable*” intentions that we do not know about, however, only they know about it.

4. Discussion

The absence of registration (suspension) of a tax invoice does not entitle a taxpayer (buyer) to attribute VAT amounts to the composition of tax credit by such a tax invoice in the current (reporting) period, but this right is retained by him after its unblocking. At the same time, the absence of registration of a tax invoice not only affects the possibility of forming tax credit by a taxpayer and further reducing the tax liability (the amount of tax payable as a result of the current reporting period), but also the existence of a registration limit for the possibility of further registration of tax invoices, since it leads to the need to replenish the account in the VAT SEA (reduction of working capital for current financial and economic activities of a taxpayer).

That is, in case of stopping the registration of a tax invoice (for a supplier, these are tax liabilities, which in any case should be reflected in the reporting for the corresponding period and taxes paid), the main burden rests on a taxpayer (buyer), because he is most interested in the registration of a tax invoice (the possibility of attributing tax amounts to tax credit and, accordingly, determining the amount of tax payable to the budget, that can be reduced), however, under the considered conditions, he is less protected, since he is not involved in the process of unblocking and appealing.

It would be appropriate to pay attention to the fact that the provisions of the Tax Code (Tax Code of Ukraine, 2010) (as amended before 03.12.2017) provided for the right of a payer to register a tax invoice and/or calculation of adjustments in the URTI within 365 calendar days following the date of occurrence of tax liabilities reflected in the relevant tax invoices and/or adjustment calculations. That is, the legislator determined the period (365 days), during which a tax invoice/ adjustment

calculation can be registered in the URTI even in violation of the established terms (violation of which provides for liability in the form of penalties), and after the expiration of which registration is not possible, and the corresponding period (365 days) was provided for the formation of a tax credit. At the same time, taking into account the amendments to the Tax Code introduced by Law No. 2198-VIII (Law of Ukraine No. 2198-VIII, 2017), the specified norm (paragraph 18 p. 201.10 of Art. 201) is set forth in a new edition, which does not refer to the period, during which a tax invoice/adjustment calculation can be registered, even after legally established terms (violation of which leads to occurrence of negative consequences in the form of financial liability). However, taking into account that the relevant amendments (Law of Ukraine No. 2198-VIII, 2017) enshrined the right of a taxpayer to attribute the VAT amounts to the composition of tax credit under the tax invoice drawn up in previous periods within 1095 days from the date of drawing up such a tax invoice, including tax invoices registered in violation of the established period, as well as taking into account the existing liability for violation of the terms of registration of tax invoices and the statute of limitations, determined by the Tax Code (Art. 120¹ and Art. 102, respectively) (Tax Code of Ukraine, 2010), we can conclude that a tax invoice can be registered in the URTI within 1095 days, even in violation of the legally established term.

Thus, taking into account the provisions of the Tax Code (Tax Code of Ukraine, 2010), at present (from 01.01.2022) we have a legal collision regarding the possible terms of registration of tax invoices (1095 days) and the terms, during which the relevant VAT amounts can be attributed to tax credit (365 days) on the basis of registered tax invoices. That is, a VAT invoice can be registered (even in violation of the established terms, the violation of which causes the application of penalties) within 1095 days, however, VAT amounts on such an invoice can be attributed to tax credit only within 365 days. It would be logical in this case, taking into account the reduction of terms (up to 365 days) for the possibility of attributing the corresponding amounts of value added tax to tax credit, to provide similar 365 days for the possible registration of a tax invoice in the URTI (even despite the established legislative terms for its registration, violation of which provides for financial liability).

It should be noted that the norms of the Tax Code (Tax Code of Ukraine, 2010) determine the general terms of registration for tax invoices (depending on the date of drawing up in the relevant period), however, a tax invoice according

to the general rule can be registered within 1095 days from the date of its drawing up (even in violation of the established terms and of course will have legal consequences in the form of penalties). In addition, the issue of timely registration of a tax invoice is still the responsibility of a taxpayer (violation of registration terms is a kind of inaction of a taxpayer). Thus, there may be different circumstances that cause violations of the terms of registration of tax invoices. At the same time, the situation regarding the need to carry out the procedure of “unblocking” a tax invoice is more specific and depends entirely on certain circumstances, even regarding timely measures by a taxpayer.

In addition, the legislator does not specify how the amounts of value added tax can be attributed to the composition of tax credit on the tax invoices, which (taking into account their suspension) were registered based on the court decision by the actual date of their submission, but still after a certain period of time (365 days after). Besides, the legislator does not indicate from which day to extend the countdown (365 days) to attribute VAT amounts to tax credit after the procedure of “unblocking” a tax invoice:

- from the date of entry into force of the relevant court decision;
- from the date of actual submission by the controlling authority of the relevant information to the URTI on the registration of a tax invoice on the basis of a court decision.

In our opinion, there are two possible options for attributing tax amounts to tax credit:

- 1) in the current (reporting) period, taking into account the receipt of information on the registration of the relevant tax invoice from the URTI based on a court decision;
- 2) by submitting a clarifying calculation to tax reporting for the previous tax period of drawing up a tax invoice and sending it for registration (the tax invoice is registered after 365 days, but still, taking into account the provisions of the Tax Code, by the date of its actual submission for registration).

Both options are reasonable and logical, however, there are certain nuances related to how each of them will affect the indicators of VAT SEA of a particular payer.

It is a positive fact that though the existence of a registered tax invoice, even after 365 days, taking into account the “unblocking” procedure, does not allow exercising the right to a tax credit, it will at least extend the registration limit.

At the same time, it is necessary to pay attention to the judicial practice regarding attributing value added tax amounts to tax credit after 365 days based on clarifying calculations submitted within 1095 days. Of course,

it concerns the previous version of the Tax Code, but it is appropriate to take into account the introduced changes. Thus, the Supreme Court in the resolution of 26.04.2018 in case No. 803/839/14 (Resolution of the Supreme Court of Ukraine on case No. 803/839/14, 2018), taking into account the fact that Art. 50 of the Tax Code is a general norm that determines the procedure for amending tax reporting on any tax, and Art. 198 of the Tax Code is a special norm regulating the procedure for referring the amounts of value added tax to tax credit, concluded that the right of a taxpayer to attribute the amount of value added tax to tax credit on the basis of the received tax invoices is limited to a period of 365 calendar days from the date of drawing up tax invoices, that is, to the term specified in p. 198.6 of Art. 198 of the Tax Code.

In turn, it can be argued unquestionably that these changes and reduction of the terms during which the right to attribute VAT amounts to the composition of tax credit in subsequent tax periods will lead to an increase in conflicts and tax disputes between taxpayers and tax authorities.

5. Conclusions

Taking into consideration all mentioned above, it can be stated that:

1. The introduced restriction (365 days) on the possibility of attributing the relevant amounts of value added tax to tax credit will apply to the tax invoices, which are drawn up from 01.01.2022, taking into account the provisions that laws and other regulations have no reverse effect in time. The amounts of value added tax on tax invoices drawn up before 01.01.2022 may be attributed to tax credit within 1095 days from the date of their drawing up (taking into account compliance with the registration procedure).

2. The peculiarity of the existence of regulatory and legal support for the administration of value added tax in Ukraine was and still is the legal collisions of certain provisions of regulatory legal acts that lead to disputes between regulatory authorities and taxpayers. Thus, at present (from 01.01.2022), we have a legal collision, which consists in the fact that a tax invoice under the general rule can be registered within 1095 days from the date of its drawing up (even in violation of the established terms and, of course, will have negative consequences in the form of financial liability), however, the amount of value added tax based on registered tax invoices can be attributed to tax invoice only within 365 days.

3. The main burden of introducing a reduction (limitation) of terms (up to 365 days) for the possibility of attributing to tax credit

the VAT amounts by registered tax invoices in subsequent tax periods, in case they were not attributed in the current period (drafting), in particular, due to suspension of registration of such a tax invoice, rests with a taxpayer (Buyer), since he is most interested in the registration of a tax invoice (the possibility of attributing tax amounts to the composition of tax credit and, accordingly, determining the reduced amount of tax payable to the budget).

4. It is necessary to amend the relevant normative legal acts (the Tax Code of Ukraine, the Procedure for maintaining the Unified Register of Tax Invoices) in order to bridge the gap as for the legal personality of both taxpayers and regulatory authorities mentioned above, in particular:

- elimination of discrepancies regarding the possibility to register a tax invoice (even after the expiration of the statutory terms, violation of which provides for liability in the form of penalties), actually within 1095 days, and from 01.01.2022 within the period (365 days) for the attribution of value added tax amounts to tax credit;

- the procedure of actions (limits of necessary/possible behavior) for the controlling authority and a taxpayer regarding the attribution of value added tax amounts to the composition of tax credit by the tax invoices, the registration of which (taking into account their suspension) took place based on the court decision by the actual date of their submission, but still after a certain period of time (365 days);

- determining the terms during the suspension of a tax invoice, in particular, from which the countdown period (365 days) continues to attribute VAT amounts to the composition of tax credit after the procedure of “unblocking” a tax invoice (from the date of entry into force of the relevant court decision or still from the date of actual submission by the controlling authority of the relevant information to the URTI on the registration of such a tax invoice based on a court decision);

- procedure and terms of implementation by the STS bodies (determining the necessary behavior of the relevant officials of the controlling authority) of decisions of judicial bodies that entered into force on the recognition of illegal actions of the controlling authority to stop the registration of a tax invoice / calculation of adjustments and the obligation to register them in the URTI.

5. Obviously, these changes and reduction of the terms during which it is possible to exercise the right to attribute VAT amounts to tax credit in subsequent tax periods will lead to an increase in conflicts and tax disputes between tax payers and tax authorities.

References:

Doslidzhennia Rady biznes-ombudsmena stosovno nevykonannia sudovykh rishen shchodo reiestratsii podatkovykh nakladnykh [Research of the Business Ombudsman Council regarding non-implementation of court resolutions concerning the registration of tax invoices]. (2021). *boi.org.ua*. Retrieved from <https://boi.org.ua/publications/press/1420-doslidzhennya-radi-biznes-ombudsmena-stosovno-nevikonannya-sudovih-rishen-shchodo-reyestratsiyi-podatkovih-nakladnih/> (in Ukrainian).

Kodeks administratyvnoho sudochynstva Ukrainy: pryiniaty 6 lyp. 2005 roku № 2747-IV [Code of Administrative Legal Proceedings of Ukraine of July 06, 2005 No. 2747-IV]. (2005). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2747-15#Text> (in Ukrainian).

Konstytutsiia Ukrainy: pryiniata 28 cherv. 1996 roku [Constitution of Ukraine of June 28, 1996]. (1996). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text> (in Ukrainian).

Nakaz Ministerstva finansiv Ukrainy Pro zatverdzhennia Poriadku pryiniattia rishen pro reiestratsiiu/vidmovu v reiestratsii podatkovykh nakladnykh/ rozrakhunkiv koryhuvannia v Yedynomu reiestri podatkovykh nakladnykh: pryiniaty 12 hrud. 2019 roku № 520 [Order of the Ministry of Finances of Ukraine On Approval of the Decision Making Procedure on Registration / Refusal to Registration of Tax Invoices / Adjustment Calculations in the Single Register of Tax Invoices of December 12, 2019 No. 520]. (2019). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/z1245-19#Text> (in Ukrainian).

Podatkovyi kodeks Ukrainy: pryiniaty 2 hrud. 2010 roku № 2755-VI [The Tax Code of Ukraine of December 2, 2010 No. 2755-VI]. (2010). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2755-17#Text> (in Ukrainian).

Postanova Kabinetu ministriv Ukrainy Pro zatverdzhennia poriadku vedennia Yedynoho reiestru podatkovykh nakladnykh: pryiniata 29 hrud. 2010 roku № 1246 [Decree of the Cabinet of Ministers of Ukraine On Approval of the Procedure of Maintaining the Unified Register of Tax Invoices of December 29, 2010 No. 1246]. (2010). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1246-2010-%D0%BF#Text> (in Ukrainian).

Postanova Kabinetu ministriv Ukrainy Pro zatverdzhennia poriadkiv z pytan zupynennia reiestratsii podatkovoi nakladnoi/rozrakhunku koryhuvannia v Yedynomu reiestri podatkovykh nakladnykh: pryiniata 21 hrud. 2019 roku № 1165 [Decree of Cabinet of Ministers of Ukraine On Approval of Procedures for Suspension of Registration of Tax Invoice/Adjustment Calculation in the Single Register of Tax Invoices of December 11, 2019 No. 1165]. (2019). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1165-2019-%D0%BF#Text> (in Ukrainian).

Postanova Verkhovnoho Sudu Ukrainy: pryiniata 26 kvit. 2018 roku po spravi № 803/839/14 [Resolution of the Supreme Court of Ukraine of April 26, 2018 on case No. 803/839/14]. (2018). *court.gov.ua*. Retrieved from <https://reyestr.court.gov.ua/Review/73734532> (in Ukrainian).

Ukhvala Tretoho apeliatsiinoho administratyvnoho sudu: pryiniata 1 lyp. 2021 roku po spravi № 160/10398/20 [Resolution of the Third Appeal Administrative Court of July 2, 2021 on case No. 160/10398/20]. (2021). *court.gov.ua*. Retrieved from <https://reyestr.court.gov.ua/Review/98053258> (in Ukrainian).

Ukhvala Verkhovnoho Sudu Ukrainy: pryiniata 21 lyp. 2021 roku po spravi № 160/6665/20 [Resolution of the Supreme Court of Ukraine of July 21, 2021 on case No. 160/6665/20]. (2021). *court.gov.ua*. Retrieved from <https://reyestr.court.gov.ua/Review/98493459> (in Ukrainian).

Zakon Ukrainy Pro vnesennia zmin do Podatkovooho kodeksu Ukrainy ta deiakykh zakonodavchykh aktiv Ukrainy shchodo podatkovoi reformy: pryiniaty 28 hrud. 2014 roku № 71-VIII [Law of Ukraine On Amendments to the Tax Code of Ukraine and Some Legislative Acts of Ukraine of the Tax Reform of December 28, 2014 No. 71-VIII]. (2014). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/71-19#Text> (in Ukrainian).

Zakon Ukrainy Pro vnesennia zmin do Podatkovooho kodeksu Ukrainy shchodo pokrashchennia investytsiinoho klimatu v Ukraini: pryiniaty 21 hrud. 2016 roku № 1797-VIII [Law of Ukraine On Amendments to the Tax Code of Ukraine Concerning the Improvement of the Investment Climate in Ukraine of December 21, 2016 No. 1797-VIII]. (2016). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1797-19#Text> (in Ukrainian).

Zakon Ukrainy Pro vnesennia zmin do Podatkovooho kodeksu Ukrainy ta inshykh zakonodavchykh aktiv Ukrainy shchodo zabezpechennia zbalansovanosti biudzhetykh nadkhodzen: pryiniaty 30 lystop. 2021 roku № 1914-IX [Law of Ukraine On Amendments to the Tax Code of Ukraine and certain Legislative Acts of Ukraine Concerning Ensuring Balance of Budget Revenues of November 30, 2021 No. 1914-IX]. (2021). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1914-20#Text> (in Ukrainian).

Zakon Ukrainy Pro vnesennia zmin do Podatkovooho kodeksu Ukrainy shchodo udoskonalennia administruvannia podatku na dodanu vartist: pryiniaty 16 lyp. 2015 roku № 643-VIII [Law of Ukraine On Amendments to the Tax Code of Ukraine Concerning Improvement of Administration of Value Added Tax of July 16, 2015 No. 643-VIII]. (2015). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/643-19#Text> (in Ukrainian).

Zakon Ukrainy Pro vnesennia zmin do Podatkovoho kodeksu Ukrainy shchodo stabilizatsii rozrakhunkiv na Optovomu rynku elektrychnoi enerhii Ukrainy: pryiniaty 9 lystop. 2017 roku № 2198-VIII [Law of Ukraine On Amendments to the Tax Code of Ukraine Concerning Stabilisation of Settlements on Wholesale Market of Electric Energy of Ukraine of 9 November, 2017 No. 2198-VIII]. (2017). *rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/2198-19#Text> (in Ukrainian).

Андрій Логвин,
доктор філософії з права, logvin.andrey80@gmail.com
ORCID: orcid.org/0000-0003-4373-375X

СТРОКИ ФОРМУВАННЯ ПОДАТКОВОГО КРЕДИТУ: ГЕНЕЗИС ТА ПРОБЛЕМИ СЬОГОДЕННЯ

Анотація. *Метою статті* є необхідність дослідження проблемних питань нормативно-правового характеру, пов'язаних із формуванням податкового кредиту з податку на додану вартість, зокрема, становлення строків для віднесення відповідних сум податку до його складу, їх урегульованість та відповідність з правової точки зору реаліям сьогодення. **Методи дослідження.** Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання. **Результати.** Можливість віднесення відповідних сум податку на додану вартість до складу податкового кредиту, як в поточному, так і наступних податкових періодах, впливає як на зменшення податкових зобов'язань до сплати, так і на можливість отримання бюджетного відшкодування. Таким чином, майнова вигода від отримання права на податковий кредит (тим більше за реально сплаченим податком на додану вартість у ціні товару/послуги) очевидна. При цьому запровадження з 01.01.2022 р. зменшення строків (до 365 днів), протягом яких платник податку має право на віднесення сум податку на додану вартість до складу податкового кредиту, призводить до порушення збалансованості взаємовідносин між суб'єктами податкових правовідносин. **Висновки.** Проведений аналіз положень нормативно-правових актів, якими регламентовано порядок формування податкового кредиту з податку на додану вартість, в тому числі визначено строки для віднесення відповідних сум податку до його складу, дозволив виявити нагальні проблемні питання правового характеру. Вказані питання пов'язані зі скороченням з початку 2022 року строків для формування податкового кредиту, які певним чином впливають на можливість віднесення до його складу відповідних сум податку на підставі зареєстрованих податкових накладних, зокрема, реєстрація яких фактично відбувається на підставі набрання законної сили судовим рішенням. Крім того, у статті зроблено науково обгрунтовані висновки з окресленої проблематики та визначено можливі шляхи вирішення.

Ключові слова: податок на додану вартість, система електронного адміністрування ПДВ, система автоматичного моніторингу критеріїв оцінки ступеня ризиків, податковий кредит, податкова накладна, Єдиний реєстр податкових накладних.

The article was submitted 14.02.2022

The article was revised 09.03.2022

The article was accepted 29.03.2022

UDC 352/354-043.5(477)

DOI <https://doi.org/10.32849/2663-5313/2022.1.08>**Vita Moroz,**

Doctor of Law, Associate Professor, Associate Professor at the Department of Administrative Law, Procedure and Administrative Activity, Dnipropetrovsk State University of Internal Affairs, 26 Haharin Avenue, Dnipro, Ukraine, postal code 49005, 067546316777@ukr.net

ORCID: orcid.org/0000-0003-4433-3731

Moroz, Vita (2022). Administrative and legal status of private executors authorised to enforce judgements. *Entrepreneurship, Economy and Law*, 1, 47–52, doi: <https://doi.org/10.32849/2663-5313/2022.1.08>

ADMINISTRATIVE AND LEGAL STATUS OF PRIVATE EXECUTORS AUTHORISED TO ENFORCE JUDGEMENTS

Abstract. Purpose. The aim of the article is to make important practical and theoretical conclusions on the introduction of the institution of private executors regarding the enforcement of judgements. **Research methods.** The article studies requirements for private executors as one of the elements of determining their administrative and legal status. The focus is on the absence of legal requirements to high personal and professional qualities of private executors, which is a significant gap in modern legislation. The author argues that the introduction of the institution of private executors in Ukraine has come a long way, and arguments justifying the competence of public executors in comparison with private executors are established in accordance with statutory requirements, but the issues are open and need to be improved. The current discussions at various hearings and conferences on the reform of the system of enforcement of judgements, where participants are representatives of the Ministry of Justice, scientists in the field of enforcement of judgements, representatives of the Legal Policy Committees, and judges, who note that newly established institutions of enforcement of judgements work imperfectly and there are many problems. Some of the stakeholders have taken a position on the advisability of returning the institution of bailiffs, but the author disagrees with the position of the latter, so the analysis of the administrative and legal status of private executors through the prism of legislative requirements is covered. One of the main means of ensuring legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement or other interested persons, and therefore, such cases require the prompt restoration of their rights and the elimination of violations. **Conclusions.** The control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e., maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

Key words: persons of private executors, requirements, administrative and legal status, enforcement of judgements, executors of decisions.

1. Introduction

Dealing with the administrative status, we underline requirements as part of the administrative status of private executors, as our research focuses on the administrative and legal framework for the enforcement of judgements, where the private executor is the main enforcer of judgements.

With regard to legislative regulation, the following legal regulations standardise this issue: Law of Ukraine “On bodies and persons who enforce judgements and decisions of other bodies”, Law of Ukraine “On enforcement pro-

ceedings”, Law of Ukraine “On execution of judgements and application of the case-law of the European Court of Human Rights”, Law of Ukraine “On guarantees of the State on execution of judgements”, Instruction on the organization of enforcement of judgments, approved by Order 512/5 of the Ministry of Justice of Ukraine of 02 April 2012, Order 2432/5 of the Ministry of Justice of Ukraine of 05 August 2016 on approval of Regulations on automated system of enforcement procedure, Order 2831/5 of the Ministry of Justice of Ukraine of 29 September 2016 on approval of the Procedure for seized property.

However, in our opinion, before outlining the scope of requirements imposed by the legislator on the private executor, the administrative and legal status should be defined generally, as the requirements under study are a key element in its definition.

For example, V.B. Averianov disclosed the legal status in a broad and narrow sense, noting that competence, such as rights and obligations, is the main component of the content of the status of each body, which is complemented by elements such as tasks, function, nature of relationships with other bodies (Averianov, 2002).

According to S.V. Kivalov, the administrative and legal status of an executive body, which includes a private executor, includes the following elements: functions, tasks, competence (Kivalov, 2003).

We partially agree with the position of the above scientists, since the administrative and legal status should include rights, duties, powers through which they exercise the provisions of law, as well as legal liability, as a means of terminating and educating in compliance with the law in the relations it covers.

2. Specificities of the legal status of private executors

According to A.M. Avtorhov, the administrative and legal status of a private executor is an independent type of the legal status of a person, predetermining the specificities of his/her individual constitutional rights and freedoms, based on the legal status of a person (Avtorhov, 2008, p. 11).

D.V. Severin argues that the administrative and legal status of private executors is a legal category, characterising the place of this service in the system of public administration and defines limits of activity of its employees in relation to other actors of executive legal relations (Siverin, 2014, p. 10).

Following L.V. Krupnova's studies on the administrative and legal status of an employee of the State Executive Service, this status is a manifestation of the personal status, describing the position of an employee of the State Executive Service in the system of public division of labour as a subject of legal relations regulated by administrative and legal provisions (Krupnova, 2008, p. 9). It should be noted that in her scientific work, L.V. Krupnova reveals the shortcomings of the modern reform of the enforcement proceedings system (the lack of effective control mechanisms for the actors of delegated authority) (private executors); defines the development trends of the system of enforcement proceedings, which include: further institutional implementation of the combined system of enforcement of judgments,

improvement of certain aspects of the executive procedure, improvement of administrative procedures for executive proceedings, introduction of mediation in executive proceedings; systematises and characterises factors, influencing the development of the enforcement proceeding system in Ukraine; develops a system of criteria for the effectiveness of administrative procedures for enforcement proceedings, reflecting the proportionality of resources and human potential; substantiates the concepts of a two-level system of enforcement proceedings.

Attention should be drawn to the fact that the administrative and legal status of a private executor, who enforces judgements and those of other bodies, has a complex legal and regulatory framework that includes a number of elements: its purpose and missions; principles and jurisdiction of activities; tasks and functions performed by the private executor; the scope and nature of State powers; forms and means of activities; legal rights and obligations; responsibility of an authorised actor in connection with the performance of duties.

The review of the scientific perspectives on the concept and content of the administrative and legal status enables to reveal the content, to analyse thoroughly the issue of the administrative and legal status of the private executor, authorised to enforce judgements.

Therefore, taking into account the above and the fact that the definition of any administrative and legal status begins with the definition of the range of requirements, we consider it appropriate to analyse the main legislative requirements for the private executors.

According to art. 18, only a citizen of Ukraine may be a private executor. Thus, the general requirement to a private executor is the acquisition of Ukrainian citizenship. Citizenship is the basis of the legal status and determines the permanent political and legal relationship between the individual and the State, whereby the individual is subject to the sovereign rights of the State and its rights and legitimate interests are protected (Kolb, Khodyriev, & Bondar, 2000, p. 26). It should be noted that private executors, as well as public ones, represent the State in the enforcement of judgements and decisions of other bodies, they should be nationals of the State they represent, and therefore, such a requirement is legitimate.

The next requirement for private executors is the requirement to have a legal education of not less than 2nd level (arts. 10, 18 of the Law of Ukraine "On bodies and persons enforcing judgements and decisions of other bodies") (Law of Ukraine "On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies", 2016).

Under the Law of Ukraine 1556-VII “*On Higher Education*” as of July 01, 2014, the second level of higher education is the master’s level, which corresponds to the eighth level of the National Qualifications Framework and provides for that the person has in-depth theoretical and/or practical knowledge, skills in a chosen specialty (or specialisation), the general basis of the methodology of scientific and/or professional activity, other competencies sufficient for the effective performance of innovation tasks of the corresponding level of professional activities (Law of Ukraine on Higher Education, 2014).

Therefore, persons with a master’s degree in law can be private executors. At the same time, the question arises as to “law degree” to determine the requirements for private executors, since there is no clear opinion on this issue in the regulatory and doctrinal field of Ukraine.

In addition, in the context of the above, it should be noted that, unlike public executors, the legislature does not set requirements for individuals to be of high personal and business qualities, which is a significant gap in modern legislation. The introduction of the institution of private executors in Ukraine has come a long way, and arguments justifying the competence of public executors in comparison with private executors are established in accordance with the requirements of the legislation, but the issues are open and need to be improved.

The current discussions at various hearings, conferences on the reform of the system of enforcement of judgements, where participants are representatives of the Ministry of Justice, scientists in the field of enforcement of judgements, as well as representatives of the Legal Policy Committees, judges, who note that newly established institutions of enforcement of judgements work imperfectly, there are many problems. And some of the stakeholders have a position on the advisability of restoring the institution of bailiffs, but we disagree with the position of the latter.

It should be noted that the institution of private executors was introduced in Ukraine in accordance with adopted on June 2, 2016 by the Verkhovna Rada of Ukraine the Law of Ukraine *On bodies and persons enforcing judgements and decisions of other bodies*, which came into force on 5 October 2016. Since then, the enforcement of judgements and decisions of other bodies (officials) has been entrusted both to then existing bodies of the State Executive Service and to new actors – private executors. The provisions of the Law reveal that the legal status of public and private executors differ clearly from each other. And while the work of public

executors has recently become undisputed, the activities of private executors are increasingly under focus of both scientists and practising lawyers in terms of the legality of their individual executive actions and the integrity of their legal status. Possible abuses of powers by private executors have already been mentioned in the pages of the legal periodical. One of the remedies of the rule of law regarding their activities is monitoring. Without resorting to an analysis of the procedure and effectiveness of the so-called ‘departmental’ control over the activities of private executors, which, under this Law, is carried out by the Ministry of Justice of Ukraine through planned and unscheduled inspections, as well as the control by the Council of Private Executors of Ukraine, we believe that the focus should precisely be on the control of legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement (and persons who are involved in the enforcement actions) or other interested persons, and therefore such cases require the prompt restoration of their rights and the elimination of violations. Such control is exercised through appeals against decisions, actions and omissions of the private executor. It should be noted that the control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e. maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

3. Financial security for private executors

The activities of private executors are financially motivated and differ significantly from those of public servants. However, while the decisions, actions or omissions of the public executor can be appealed to the Head of Department, to whom the public executor is directly responsible (decisions, actions and omissions of this head may be appealed to the head of the higher body of the State Executive Service), decisions, actions and omissions of the private executor can be appealed only to the court. Here, problems arise at the stage of determining the court of appropriate jurisdiction to appeal the decisions, acts or omissions of the private executor in a particular enforcement proceeding. This is what determines the relevance of the problem

of judicial control over private executors' performance (Koroied & Loshytskyi, 2018).

The institution of private executors should also enable persons, who will do so within their individual professional activity not related to public service, to enforce judgments. Consequently, the burden on public executors should be substantially reduced, and private executors themselves would have an interest in the timely and full enforcement of judgements (Malyshev, 2017).

The introduction of private executors is an innovation in the practice of enforcing jurisdictional decisions, which cannot help provoking controversy among scholars. The scientific literature review shows that today the debate on this issue is simultaneously taking place in several ways. In particular, a number of scientists focus on the study of positive and negative factors in the functioning of private executors, while others study the legal nature and essence of a definition of "private executor". For example, L. Saiko and V. Liashenko argue that the advantages of the introduction in Ukraine of the institution of private executors are: the improved quality of the provision of enforcement services to the population, a new higher quality level of the enforcement procedure, budget expenditures significantly reduced, the increased revenue to the budget due to the payment of taxes by private executors, reduction in the corruption component in the enforcement system (Meshcheriakov, 2011, p. 77).

According to A. Solonar and V. Vasilieva, the introduction of private executors is a significant step ahead in the system of public administration reform, because it is represented by a number of advantages. The law vests a wide range of powers and the status of self-employed to private executors, delimits the competence of public and private executors in certain cases and establishes a reasonable and balanced mechanism of accountability for violations and abuse of their rights for the latter (Meshcheriakov, 2011, p. 63).

Therefore, the idea of institution of private executors has no alternative and initiates an irrevocable mechanism to reduce the corruption component in the system of the State Executive Service of Ukraine in general.

It should be noted that the legislator has provided fairly high requirements to the professional level of candidates for a private executor, so the risks of entering the field of incompetent lawyers or persons with fraudulent intentions are minimised.

Pursuant to the Law of Ukraine *On Enforcement Proceedings*, a private executor has the right to enforce all decisions, except:

1) Decisions to remove and transfer the child, to establish a visit with him or her or to remove obstacles to visiting the child;

2) Decisions, according to which the debtor is the State, State bodies, the National Bank of Ukraine, local self-government bodies, their officials, State and communal enterprises, institutions, organisations, legal entities with a share of the authorised capital exceeding 25 per cent and/or financed exclusively from the State or local budget;

3) Decisions in which the debtor is a legal person whose forced sale of property is prohibited by law;

4) Decisions for which the State or public authorities are collectors;

5) Judgements of administrative courts and decisions of the European Court of Human Rights;

6) Decisions providing for the enforcement of actions on the property of State or municipal property;

7) Decisions on the eviction and settlement of natural persons;

8) Decisions in which the debtors are children or natural persons who have been declared legally incapable or whose civil capacity is limited;

9) Decisions on seizure of property;

10) Decisions, enforcement thereof is directly attributed by the Law to the powers of other bodies that are not enforcement bodies;

11) Other cases provided for by this Law and the Law of Ukraine *On bodies and persons enforcing judgements and decisions of other bodies* (Law of Ukraine on Enforcement Proceedings, 2016).

It should be noted that, despite the fact that the public executor, unlike the private executor, is a representative of the authorities, during the enforcement of judgments private and public executors, according to Art. 18 of the Law of Ukraine *On Enforcement Proceedings*, have equal opportunities to cooperate with the State authorities (Law of Ukraine on Enforcement Proceedings, 2016).

4. Conclusions

Research conducted and the analysis of certain aspects of the administrative and legal status of bodies and persons authorised for the enforcement of judgements allow concluding that the idea of the institution of private executors laid a non-refundable mechanism to reduce the corruption component in the system of the State Executive Service of Ukraine in general. Domestic legislation sets high standards for the professional level of candidates for private executors, so the risks of incompetent lawyers or persons with fraudulent intentions entering this area are minimised. However, the current legislation does not provide for a separate article with a list of the rights and obligations of private executors, these provisions are not specific and dispersed by law, allowing for various manipulations and clarifications,

complaints both ungrounded and vice versa, on the abuse of powers by a private executor.

One of the main means of ensuring legality in the activities of private executors should be to control the lawfulness of the executive action taken by the private executor, which can violate the rights and interests of participants in the enforcement (and persons who are involved in enforcement) or other interested persons, and therefore, such cases require the prompt restoration of their rights and the elimination of violations. Such control is exercised through appeals against decisions, actions and omissions of the private executor.

The control mechanism of the Private Executors Council is quite promising: first, in terms of self-monitoring and optimising the use of budget funds; second, a distinction should be drawn between the subjective abuse by individual unscrupulous private executors and the purification of the private executor system by the Private Executors Council, for survival in the fierce competition for the “customer” in so far as the business component, i.e. maximum profit, which is impossible without growth of the quality of services of private executors and growth of their professional competence.

References:

- Averianov, V.B.** (2002). *Vykonavcha vlada i administratyvne pravo [Executive power and administrative law]*. Kyiv : Vydavnychiy dim «In-Yu-re» (in Ukrainian).
- Avtorhov, A.M.** (2008). Administratyvno-pravovyi status derzhavnoho vykonavtsia [Administrative and legal status of the state executor]. *Extended abstract of candidate's thesis*. Kyiv (in Ukrainian).
- Kivalov, S.V.** (2003). *Administratyvne pravo Ukrainy [Administrative law of Ukraine]*. Odessa: Yurydychna literatura (in Ukrainian).
- Kolb, O.H., Khodyriev, V.A., & Bondar, I.Ia.** (2000). *Pravovi aspekty hromadianstva v Ukraini [Legal aspects of citizenship in Ukraine]*. Lutsk (in Ukrainian).
- Koroied, S.O., & Loshytskyi, M.V.** (2018). Sudovyi kontrol za diialnistiu pryvatnykh vykonavtsiv [Judicial control over the activities of private executors]. *Naukovyi visnyk publichnogo ta pryvatnoho prava – Scientific Bulletin of Public and Private Law*, 6 (in Ukrainian).
- Krupnova, L.V.** (2008). Administratyvno-pravovyi status pratsivnyka derzhavnoi vykonavchoi sluzhby [Administrative and legal status of an employee of the state executive service]. *Extended abstract of candidate's thesis*. Irpin (in Ukrainian).
- Malyshev, B.** (2017). Pryvatni vykonavtsi: nova yurydychna profesiia i holovnyi zasib reformuvannia systemy vykonavchoho provadzhennia [Private executors: a new legal profession and the main tool of reform enforcement proceedings]. *pravo.org.ua*. Retrieved from <http://pravo.org.ua/ua/news/20871615-privatni-vikonavtsi-nova-yuridichna-profesiya-i-golovniy-zasib-reformi-sistemi-vikonavchogo-provadgeennya> (in Ukrainian).
- Meshcheriakov, O.** (2011). Shchodo vyznachennia elementiv administratyvno-pravovoho statusu uchastnykiv operatsii OON z pidtrymky myru [On determining the elements of the administrative and legal status of participants in UN peacekeeping operations]. *Forum prava – Forum of Law*, 2 (in Ukrainian).
- Siverin, D.V.** (2014). Administratyvno-pravovyi status orhaniv derzhavnoi vykonavchoi sluzhby Ukrainy [Administrative and legal status of the bodies of the state executive service of Ukraine]. *Extended abstract of candidate's thesis*. Kharkiv (in Ukrainian).
- Zakon Ukrainy** Pro orhany ta osib, yaki zdiisniuiut prymusove vykonannia sudovykh rishen i rishen inshykh orhaniv : pryiniaty 27 cherv. 2016 roku № 1403-VIII [Law of Ukraine On Bodies and Persons Enforcing Judgments and Decisions of Other Bodies from June 27 2016, № 1403-VIII]. (2016). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1403-19#Text> (in Ukrainian).
- Zakon Ukrainy** Pro vykonavche provadzhennia: vid 2 cherv. 2016 roku № 1404-VIII [Law of Ukraine on Enforcement Proceedings from 2 June 2016 № 1404-VIII]. (2016). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1404-19#Text> (in Ukrainian).
- Zakon Ukrainy** Pro vshchu osvitu : pryiniaty 01 lyp. 2014 roku № 1556-VII [Law of Ukraine on Higher Education from July 1 2014, № 1556-VII]. (2014). *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1556-18#Text> (in Ukrainian).

Vіta Moroz,

доктор юридичних наук, доцент, доцент кафедри адміністративного права, процесу та адміністративної діяльності, Дніпропетровський державний університет внутрішніх справ, проспект Гагаріна, 26, Дніпро, Україна, індекс 49005, 067546316777@ukr.net

ORCID: orcid.org/0000-0003-4433-3731

АДМІНІСТРАТИВНО-ПРАВОВИЙ СТАТУС ПРИВАТНИХ ВИКОНАВЦІВ, УПОВНОВАЖЕНИХ НА ПРИМУСОВЕ ВИКОНАННЯ СУДОВИХ РІШЕНЬ

Анотація. Мета. Метою статті є сформулювати важливі в практичному та теоретичному аспектах висновки стосовно запровадження інституту осіб приватних виконавців щодо примусового виконання судових рішень. **Методи дослідження.** Стаття присвячена дослідженню вимог до приватного виконавця як одного з елементів визначення їх адміністративно-правового статусу. Акцентовується увага на відсутності законодавчо-закріплених вимог до високих особистих і ділових якостей до осіб приватних виконавців, що є суттєвою прогалиною сучасного законодавства. Автором зазначається, що запровадження інституту приватного виконавця в Україні пройшло тривалий шлях, аргументи, що обґрунтовують компетентність державних виконавців у порівнянні з приватними виконавцями, є встановленими відповідно до вимог законодавства, однак проблемні аспекти є відкритими та потребують удосконалення. Дискусії, які ведуться на сьогодні на різних слуханнях, конференціях, що присвячені реформуванню системи примусового виконання судових рішень, де учасниками є як представники Міністерства юстиції, науковці у сфері дослідження виконання судових рішень, так і представники Комітетів з питань правової політики, судді, які в тому числі зазначають, що новостворені інститути примусового виконання судових рішень працюють недовільно, є багато проблем. А деякі із стейкхолдерів висловлюють позицію щодо доцільності повернення інституту судових виконавців, однак з позицією останніх автор не погоджується, у зв'язку із чим для дослідження обрано аналіз адміністративно-правового статусу осіб приватних виконавців крізь призму законодавчих вимог. Одним із основних засобів забезпечення законності в діяльності приватних виконавців повинен стати контроль за законністю вчинених приватним виконавцем виконавчих дій, якими можуть порушуватись права та інтереси учасників виконавчого провадження чи інших зацікавлених осіб, а отже, такі випадки вимагають швидкого поновлення їхніх прав і усунення порушень. **Висновки.** Механізм контролю з боку Ради приватних виконавців є досить перспективним: по-перше, в плані самоконтролю та оптимізації використання бюджетних коштів; по-друге, слід розмежувати суб'єктивні зловживання з боку окремих недобросовісних приватних виконавців і складову частину самоочищення системи приватних виконавців з боку Ради приватних виконавців для виживання в жорсткій конкурентній боротьбі за «замовника» в частині бізнесової складової частини, тобто максимального отримання прибутку, що неможливо без зростання якості послуг приватних виконавців та росту їхньої професійної компетенції.

Ключові слова: особи приватних виконавців, вимоги, адміністративно-правовий статус, виконання судових рішень, суб'єкти виконання рішень.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 342.9

DOI <https://doi.org/10.32849/2663-5313/2022.1.09>**Yevhenii Skrypa,***Doctor of Law, Deputy Director of Educational and Scientific Institute on Material Support, National Academy of Internal Affairs, 1, Solomyanska square, Kyiv, Ukraine, postal code 03035, Skrypa_Yevhenii@ukr.net*

ORCID: 0000-0002-1643-8194

Skrypa, Yevhenii (2022). Foreign experience in road transport safety and main areas of its introduction in Ukraine. *Entrepreneurship, Economy and Law*, 1, 53–57, doi: <https://doi.org/10.32849/2663-5313/2022.1.09>

FOREIGN EXPERIENCE IN ROAD TRANSPORT SAFETY AND MAIN AREAS OF ITS INTRODUCTION IN UKRAINE

Abstract. Purpose. The article is aimed at studying the European experience in road transport safety and identifying ways of its introduction into domestic practice. **Results.** The author studies foreign experience in road transport safety. The main areas of transport policy of some European States are analysed. It is underlined that the problem of reducing road traffic injuries is being addressed through the development and adoption of interdepartmental programmes, the follow-up thereof involves various State authorities and administrations. The main areas of introducing positive international experience in domestic practice are determined. It is established that priority areas for road safety can be grouped into: 1) compliance with traffic rules. The main measures in this area are: eradication of legal nihilism, raising of legal awareness, promotion of road safety, improvement of supervision and control of the use of seat belts, child restraints and other protective equipment, speed control and the detection of drunk driving; 2) increased safety of vehicles. This requires increasing the visibility of the vehicle on the road; improving vehicle design, equipment and systems; 3) road traffic risk reduction and a safe road environment. This area proposes to give priority to public transport; to strengthen the system of issuing driver's licences; to use innovations in urban planning and land use; 4) medical care improvement. To this end, medical units should quickly come to the scene of the accident and provide immediate assistance to the injured; treatment and rehabilitation of the injured in accidents. **Conclusions.** It is concluded that in order to improve the system of road transport safety, the following tasks should be solved in Ukraine: to expand the regulatory and legal framework for road transport safety in accordance with the progressive standards of developed European States; to identify transport policy priorities that shall meet high safety standards; to introduce innovative technologies in the field of in road transport safety; to implement an effective system of control and supervision of road transport safety in accordance with European standards.

Key words: transport, road transport, safety in transport, road traffic safety, transport safety, road transport safety.

1. Introduction

The problem of road traffic safety and effective protection of the life and health of Ukrainians have become particularly acute in recent years. The main reason is that every year the quality of roads is deteriorating, and no progress in expanding the road network and infrastructure of our State is made. Moreover, problems in road safety are related to the inadequacy of the legislation governing these relations.

It should be noted that road traffic injuries are much lower in most developed European countries because transport safety policies are more efficient and effective. For example, the United Nations characterises road safety as a global crisis.

The analysis of the European experience in road transport safety allows for the effective use

of experience of other countries and its implementation in the modern realities of Ukraine.

The article is aimed at studying the European experience in road transport safety and identifying ways of its introduction into domestic practice.

Some specificities of foreign experience in road transport safety have been studied by scientists such as O.V. Berest, Y.L. Bryndikov, M.M. Dolhopolova, V.V. Yehupenko, V.A. Kashkanov, M.P. Klymchyk, N.I. Kozhukhovska, M.V. Lazarenko, P.P. Lutsiuk, V.V. Masliuk, M.A. Mykytiuk, V.A. Myslyvyi, O.L. Milenin, O.M. Moisiuk, A.M. Podoliaka, O.Y. Salmanova, L.I. Sopilnyk, M.M. Stetska, Y.I. Kho-miak, and others. However, they all reveal only certain aspects of the administrative and legal framework in this field.

2. World experience in road transport safety

The advisability of implementing foreign, in particular European, experience in the field of transport and in road transport safety is stated in National Transport Strategy of Ukraine up to 2030 No. 430-r of 30 May 2018. According to the law-makers, the introduction of European standards will create modern infrastructure, fair market conditions and free market competition, effective development and coordination of the activities of the different transport modes together with the implementation of an effective system of State regulatory mechanism and management, which will provide the basis for the development and functional growth of the national transport system of Ukraine. In addition, improving the efficiency and quality of transport services will enable its competitiveness, stimulate Ukrainian exports and contribute to the development of domestic production and trade (Cabinet of Ministers of Ukraine, 2018).

It should be noted that in Europe, international organisations play a major role in the development and implementation of road safety policies, and the World Health Organisation has been identified as the coordinator for road safety.

Therefore, taking into account the pan-European level, it is advisable to cover the experience of the organisation operating in the EU territory, such as the Euro Contrôle Route (ECR). It was established by the four Ministers of Transport of the Benelux countries and France, as well as their inspection services, to cooperate effectively in the implementation of control measures for the transport of goods and passengers by road. The ECR brings together European road traffic control organisations and aims to improve road safety, harmonise control procedures, share experience and skills, comply with road transport legislation and promote fair competition (State Service of Ukraine for Transport Safety, 2018).

The constituent document of the organisation is the administrative agreement establishing the Euro Contrôle Route. The main objective of this administrative agreement was to create and maintain a high level of transport safety in connection with the use (at its own expense and at the expense of others) of road vehicles in Europe. In addition, the administrative agreement provides for:

- Introduction of regular and reliable exchange of information;
- Development and implementation of joint and coordinated activities among member countries and with other stakeholders through the optimal use of available technologies;

- Joint training programmes for inspection bodies and encouraging cross-border exchanges of experience;

- A single control procedure;
- Development of a common standard for equipment, including the promotion of joint technological development;

- Introduction of ongoing consultations on the relevant situation, proposals and recommendations (State Service of Ukraine for Transport Safety, 2018).

A positive factor in the work of this Ministry for Ukraine should be considered, first of all, the integration of the national transport control bodies into the system of this organisation, which will allow to adopt and implement most of the European standards in the field of road transport safety, as well as to improve the monitoring and supervising presence of the State in this sector (Skrypa, 2018, p. 41).

The problem of reducing road traffic injuries is being addressed through the development and adoption of interdepartmental programmes, the follow-up thereof involves various State authorities and administrations. In most European countries, road safety programmes are an autonomous act, and in a number of countries the programme is part of larger projects. Programmes are adopted and approved at the highest level of government. For example, in Mexico the programme is approved by the President; Resolutions are adopted by the Government in Bulgaria, Finland, by the Parliament in Denmark, Italy, Sweden, etc. In addition to national road safety programmes, many States have regional and even local programmes approved by regional or local executive authorities (Kashkyna, 2008).

With regard to funding, each State determines the sources for the programmes to be funded. In most countries, the measures are implemented from the State budget (Finland) or from public authorities and extrabudgetary sources (Italy).

For example, the German Federal Ministry of Transport includes the Central Office, which deals with personnel policy, social security, finance, security and law, management, transport policy and economics, rail and inland navigation, maritime transport, air transport, roads and waterways. An advisory body, the Conference of Ministers of Transport of the Länder, coordinates federal and regional transport policy in Germany (Ovchar, 2017, p. 20).

In addition, the Ministry of this country has a Federal Motor Transport Authority whose tasks are:

- Licensing of new types of vehicles and their parts;

- Inspection of technical control and quality assurance departments, motor vehicles provided by manufacturers;

- Maintenance of a central register of vehicles, a central register of traffic violations on the transport and central register of driving licences;

- Issuance of certificates and publications of statistical materials (Tovstukha, 2011, p. 177).

British experience in road transport safety is specific. It is noticeable due to the involvement of both public and private actors in this sector. On the part of official bodies, the Ministry of Transport is responsible for transport safety, the main tasks of which are:

- Development and implementation of public policy;

- Improvement of English bus transport through State regulation and financing of this industry;

- Maintenance high standards of safety and security in transport, in particular road transport, etc. (British government, 2019).

In Sweden, the use of photo radars for road surveillance has proved to be an effective way to combat speed violations. Photo radars are widely used on Swedish highways. In this case, sections of the road, where there are photo radars, have appropriate warning signs, reacting to which, drivers automatically reduce the speed to avoid penalties. Public opinion polls indicate that the majority of drivers have a positive attitude towards photo radars, considering them to be assistants in traffic (Koniaev, 2013).

In Germany, the system of video and photo recording of road behaviour and traffic violations, as well as penalty points, has a long history. According to the principles of German traffic rules, video and photographic radar monitoring should primarily educate drivers, not punish them. In addition, its use is necessary in particularly dangerous areas with a large number of accidents. In Germany, about 3,500 fixed radars are used to record traffic violations both on motorways and in built-up areas. A board with a special inscription informs motorway participants about the control and observation. At the same time, there is no need for warning in localities. The technique is constantly improving, for example, there are systems photographing motorcycles, that is, from the back. In addition to fixed radars, the police make extensive use of mobile stations and hand-held devices. Mobile stations are placed both on tripods on both sides of the road in inconspicuous places, and in the very police cars (Saakov, 2016).

In fact, automated traffic control can be considered one of the most effective mechanisms for ensuring road transport safety. In Ukraine, the so-called TruCAM radar have

only recently been introduced. Cameras for recording speeding on Ukrainian roads began to be installed on October 8, 2018. TruCam Laser Radar Patrol monitors roads in difficult areas and high accident risk areas. These radars are located at accident concentration points and accident-prone sections of roads of international importance. TruCam devices will be used only with the placement of road signs reporting photo-video recording of violations, on sections of roads of international importance and in cities with an increased rate of accidents due to speeding. To prevent abuse and corruption risks, TruCam contains an AES encryption algorithm, making it impossible to interfere with the system and any data correction.

At the level of national legislation, many countries reduce the problem of road safety regulation to codified provisions. Positive examples exist in Bulgaria, Denmark, Finland, Spain and other foreign countries. The French experience is of particular interest, where the main document is the Traffic Rules, consisting of 5 volumes, the Rules on Road Maintenance, the Departmental Instruction on Road Signs and Signals and the Criminal Code. The five volumes of the French Traffic Rules, which are divided into legislative and regulatory parts, contain a set of provisions governing all traffic-related matters (Machulskaia, 2006, p. 11).

Estonia has adopted laws on each mode of transport (public, freight, etc.) and on roads. Moreover, separate laws regulate: violation of administrative law; transport insurance; liability of road owners or administrators and road users for the maintenance, use and protection of roads, and parking of vehicles (Koniaev, 2013).

Furthermore, a European mechanism for establishing a fine for traffic offences is specific. The amount of the fine may be determined on the basis of the offender's annual earnings, monthly salary, general financial situation and minimum wage established in the State. As a result, drivers for the same violations can get different fines, but in reality, they will have the same "material" and psychological effect.

3. Priority areas for road safety in Ukraine.

For Ukraine, this experience is quite unusual, and its adoption in the domestic experience requires providing a regulatory definition of the procedure and conditions for determining the amount of fines.

Therefore, priority areas for road safety can be grouped into:

- 1) Compliance with traffic rules. The main measures in this area are: eradication of legal nihilism, raising of legal awareness, promotion of road safety, improvement of supervision and control of the use of seat belts, child restraints and other protective

equipment, speed control and the detection of drunk driving;

2) Increased safety of vehicles. This requires increasing the visibility of the vehicle on the road; improving vehicle design, equipment and systems;

3) Road traffic risk reduction and a safe road environment. This area proposes to give priority to public transport; to strengthen the system of issuing driver's licences; to use innovations in urban planning and land use;

4) Medical care improvement. To this end, medical units should quickly come to the scene of the accident and provide immediate assistance to the injured; treatment and rehabilitation of the injured in accidents

In support of this grouping, three basic principles can be identified to develop national road safety programmes: analysis of the causes of accidents; development of cost-effective measures, aimed at achieving the goal; monitoring the results of measures, modifying the chosen areas.

Since January 2015, the implementation of the project Twinning "Support to the Ministry of Infrastructure of Ukraine on improving the level of road transport safety" has begun in Ukraine to increase the level of road transport safety and bring national legislation into line with EU provisions and requirements. The aim of the project is to improve the safety of commercial road transport in Ukraine in accordance with EU technical requirements and best international practices in order to reduce the number of accidents and fatalities caused by them. With the participation of experts, a draft Regulations

on the Safety Management System has been made on the basis of draft Model Regulation on the Traffic Safety Management System for Road Transport and elaborated in accordance with European practices. A number of seminars were held during which experts presented best practices in accident investigation in EU countries, including the use of modern technologies. Moreover, the experts provided Ukrainian colleagues with information on the operation of accident databases in Europe and examples of relevant encryption books (Ministry of Infrastructure of Ukraine, 2016).

Therefore, the review of foreign experience in road transport safety on the example of the European Union and individual member countries (Germany, Sweden, Great Britain, Norway) as well as other States (Belarus, Uzbekistan and the United States) enables to identify a number of positive factors that could be replicated and introduced into the State's legal system.

4. Conclusions

Thus, to improve the system of road transport safety in Ukraine, taking into account the experience of European States, the following tasks should be accomplished: to expand the regulatory and legal framework for road transport safety in accordance with the progressive standards of developed European States; to identify transport policy priorities that shall meet high safety standards; to introduce innovative technologies in the field of in road transport safety; to implement an effective system of control and supervision of road transport safety in accordance with European standards.

References:

- Cabinet of Ministers of Ukraine** (2018). Pro skhvalennia Natsionalnoi transportnoi stratehii Ukrainy na period do 2030 roku : rozporiadzhennia vid 30 trav. 2018 r. № 430-r. [On approval of the National Transport Strategy of Ukraine for the period up to 2030: order of May 30, 2018 № 430-r.]. (2018). *zakon.rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/show/430-2018-%D1%80> (in Ukrainian).
- State Service of Ukraine for Transport Safety**. Yevropeiska orhanizatsiia dorozhnogo kontroliu [European Road Control Organization]. (2018). *dsbt.gov.ua*. Retrieved from: <http://dsbt.gov.ua/storinka/yevropeyska-organizaciya-dorozhnogo-kontrolyu> (in Ukrainian).
- Skrypa, Ye.V.** (2018). Zarubizhnyi dosvid zabezpechennia bezpeky na avtomobilnomu transporti ta mozhlyvosti yoho vykorystannia v Ukraini [Foreign experience in ensuring road transport safety and the possibility of its use in Ukraine]. *Visegrad journal on human rights*, 6, 39–43 (in Ukrainian).
- Kashkyna, E.V.** (2008). Natsionalnaia prohramma obespechenia bezopasnosti dorozhnogo dvyzhenia [National Road Safety Program]. *Admynstratyvnoe y munitsypalnoe pravo – Administrative and municipal law*, 8, 22–26 (in Russian).
- Ovchar, P.A.** (2017). Zarubizhnyi dosvid derzhavnoho rehuliuвання u sferi transportnykh posluh [Foreign experience of state regulation in the field of transport services]. *Ynternauka – Internauka*, 6(28), 17–21 (in Ukrainian).
- Tovstukha, S.** (2011). Zastosuvannia yevropeiskoho dosvidu derzhavnoho upravlinnia bezpekoiu dorozhnogo rukhu v Ukraini [Application of European experience of state management of road safety in Ukraine]. *Derzhavne upravlinnia ta misteve samovriaduvannia – Public administration and local self-government*, 2(9), 175–182 (in Ukrainian).
- British government** (2019). Department for Transport: about us. *Ofitsiyni veb-portal uriadu Velykoi Brytanii – The official web portal of the British government*. Retrieved from: <https://www.gov.uk/government/organisations/department-for-transport/about> (in Ukrainian).

Koniaev, S.A. (2013). Ob zffektivnosti ispolzovaniia sredstv avtomatizirovannoi fiksatsii administrativnikh pravonarushenii v preduprezhdenii DTP i sokhraneni zhizni i zdorovia uchastnikov dorozhnogo dvizheniia [On the effectiveness of the use of means of automated recording of administrative offenses in preventing road accidents and preserving the life and health of road users]. *Vestnik Voronezhskogo instituta MVD Rossii – Bulletin of the Voronezh Institute of the Ministry of Internal Affairs of Russia*, 3, 136–137 (in Russian).

Saakov, V. (2016). Yak pratsiuie systema baliv ta shtrafiv i videofiksatsiia porushen PDR u Nimechchyni [How the system of points and fines works and video recording of traffic violations in Germany]. *Deutsche Welle*. Retrieved from: <https://www.dw.com/uk/iak-pratsiuie-systema-videofiksatsii-porushen-pdr-u-nimechchyni/a-18634452> (in Ukrainian).

Machulskaiia, I.G. (2006). Pravovoe regulirovanie i organizatsiia dorozhnogo dvizheniia: zarubezhnyi opyt [Legal regulation and traffic management: foreign experience]. *Analiticheskii vestnik Soveta Federatsii RF – Analytical Bulletin of the Federation Council of the Russian Federation*, 15, 10–13 (in Russian).

Ministry of Infrastructure of Ukraine (2016). Mizhnarodna tekhnichna dopomoha YeS u sferi transportu [EU international technical assistance in the field of transport]. *mtu.gov.ua*. Retrieved from: <https://mtu.gov.ua/content/mizhnarodna-tehnichna-dopomoga-es-u-sferi-transportu.html> (in Ukrainian).

Євгеній Скрупа,

доктор юридичних наук, заступник директора Навчально-наукового інституту з матеріального забезпечення, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Skrupa_Yevhenii@ukr.net

ORCID: 0000-0002-1643-8194

ЗАРУБІЖНИЙ ДОСВІД ЗАБЕЗПЕЧЕННЯ БЕЗПЕКИ НА АВТОМОБІЛЬНОМУ ТРАНСПОРТІ ТА ОСНОВНІ НАПРЯМКИ ЗАПРОВАДЖЕННЯ ЙОГО В УКРАЇНІ

Анотація. Мета. Мета статті полягає в дослідженні європейського досвіду забезпечення безпеки на автомобільному транспорті та визначення шляхів його запровадження у вітчизняну практику.

Результати. У статті автором досліджується зарубіжний досвід забезпечення безпеки на автомобільному транспорті. Проаналізовано основні напрямки транспортної політики низки європейських держав. Вказано, що проблема зниження дорожнього травматизму вирішується шляхом розробки та прийняття програм, які мають міжвідомчий характер, у її реалізації беруть участь різні органи структури державної влади управління. Визначено основні напрямки запровадження позитивного міжнародного досвіду у вітчизняну практику. З'ясовано, що пріоритетні напрямки забезпечення безпеки дорожнього руху можна розділити на такі групи: 1) дотримання правил дорожнього руху. Основними заходами, що забезпечують цей напрямок, є: викорінення правового нігілізму, підвищення рівня правосвідомості, пропаганда безпеки дорожнього руху; вдосконалення нагляду та контролю за використанням ременів безпеки, дитячих утримувальних пристроїв та інших захисних засобів, дотримання швидкісного режиму та виявлення осіб, які керують транспортним засобом у стані сп'яніння; 2) підвищення рівня безпеки транспортних засобів. І тому необхідно забезпечити підвищення видимості транспортного засобу на дорогах, удосконалення конструкцій, обладнання та систем транспортного засобу; 3) зниження ризику дорожнього руху та створення безпечного дорожнього середовища. У цьому напрямі мається на увазі: надання пріоритету громадському транспорту; посилення системи видачі посвідчень водія; використання інновацій у містобудуванні та землекористуванні; 4) удосконалення системи медичної допомоги. Для цього слід забезпечити оперативність прибуття медичних підрозділів на місце ДТП та надання невідкладної допомоги потерпілим; організацію та забезпечення лікування та реабілітації осіб, які постраждали під час дорожньо-транспортних пригод. **Висновки.** Зроблено висновок, що в Україні з метою удосконалення системи забезпечення безпеки на автомобільному транспорті необхідно вирішити такі завдання: розширити нормативну-правову базу у сфері забезпечення безпеки на автомобільному транспорті у відповідності із прогресивними нормами розвинених європейських держав; визначити пріоритетні напрями транспортної політики, які повинні відповідати високим стандартам безпеки; забезпечити впровадження інноваційних технологій у сфері забезпечення безпеки на автомобільному транспорті, запровадження дієвої системи контролю та нагляду за безпекою на автомобільному транспорті у відповідності до європейських стандартів.

Ключові слова: транспорт, автомобільний транспорт, безпека на транспорті, безпека дорожнього руху, транспортна безпека, забезпечення безпеки на автомобільному транспорті.

The article was submitted 10.02.2022

The article was revised 03.03.2022

The article was accepted 24.03.2022

UDC 347.73: 336.22

DOI <https://doi.org/10.32849/2663-5313/2022.1.10>

Kateryna Nedostup,

Ph.D Student at the Department of Civil, Economic and Environmental Law, National Technical University Dnipro Polytechnic, 19, D. Yavornytskyi avenue, Dnipro, Ukraine, postal code 49005, nedostup.k.k@nmu.one

ORCID: <https://orcid.org/0000-0003-0122-7007>

Nedostup, Kateryna (2022). The transformation of local taxes in the tax system of Ukraine. *Entrepreneurship, Economy and Law*, 1, 58–67, doi: <https://doi.org/10.32849/2663-5313/2022.1.10>

THE TRANSFORMATION OF LOCAL TAXES IN THE TAX SYSTEM OF UKRAINE

Abstract. *The purpose* of the article is to study the transformation of types of local taxes in the tax system based on a retrospective analysis of their legal regulation; to identify the shortcomings and positive experience of taxation lawmaking. **Research methods.** The general scientific (comparison, generalization) and special (retrospective analysis, content analysis, logical-legal method) methods of scientific knowledge were used to achieve the goal. **Results.** The experience of delegation of legislative powers by the Verkhovna Rada of Ukraine to the Cabinet of Ministers of Ukraine and the legal grounds for conducting a taxation experiment were analyzed. The author examined the sequence of adoption of normative legal acts, which regulate the establishment and procedures for collecting local taxes, by legislative and executive bodies. As a result of comparison of the lists of local taxes that are simultaneously enshrined in two legal acts (The Law of Ukraine “On the Taxation System” and the Decree “On Local Taxes and Fees”), which were in force from October 1, 1994 until the adoption of the Tax Code of Ukraine, the non-identity of the names and terms enshrining individual local taxes was revealed. The local taxes collected to attract the additional funds to local budgets in the short term and in order of the experiment were emphasized. It is noted that for the first time the concept of “tax agent” was legally fixed and the intended use of their tax revenues was settled in the legal acts which established the procedure for collecting of local taxes by experiment. **Conclusions.** The Ukrainian tax system is characterized by the reduction of local taxes. Since 2015, it comprises two local taxes. The decision on their collection in a particular territory is made by the local government. The mechanism of legal regulation of local taxes, which started working after the proclamation of Ukraine’s independence in 1991, is constantly evolving and being improving. However, the rulemaking process requires the following: 1) to improve the coordination of actions of legislative and executive authorities; 2) to take into account the norms enshrined in interrelated documents; 3) executive authorities to comply with the limits of tax authority established by law.

Key words: decree, law, local taxes, tax code, tax system.

1. Introduction

The public purpose of local taxes is conveyed by their fiscal function. It is known that they are a component of tax revenues of the local budget, one of the sources of income of the general budget fund of rural, settlement, city, and amalgamated territorial communities (hromadas). The availability of local taxes in the tax system contributes to the formation of financial resources necessary to ensure the functioning of local self-government authorities. Therefore, the improvement of legal regulation of procedures for their introduction and collection holds sway over time and is constantly of interest to lawyers and economists. In particular, the legal regulation of local taxes was discussed by Bokshorn A.V. (Bokshorn, 2021), Viktorchuk M.V. (Viktorchuk, 2016), Dumchykov M.O. (Dumchykov, 2018), Ryzhiy A.V. (Ryzhiy, 2021), Skorobahach V.I. (Skoroba-

hach, 2015), et al. Its features were studied by Pabat O.V. (Pabat, 2020, p. 44–47). The stages of formation and development of legal groundwork for local taxes were analyzed by Kmit V.M., Vovchanskyi Yu.V. (Kmit', Vovchans'kuy, 2018, p. 656–662), Shapoval V.O. (Shapoval, 2019, p. 101–105). In order to identify contradictions and gaps in tax legislation, a retrospective analysis of the regulatory framework governing the administration of local taxes was carried out by Bokshorn A. V. (Boxgorn, 2017, p. 38–47), Mushenok V. V. (Mushenok, 2017), and Ryzhiy A. V. (Ryzhiy, 2021, p. 64–74). Khrystoforov A.B. (Khrystoforov, 2017, p. 127–133) provided the legal assessment of the norms of the Tax Code of Ukraine (TCU) for compliance with the principle of stability of tax legislation and the Budget Code of Ukraine (BCU) in terms of regulating the procedure of putting local taxes in force.

The purpose of the article is to study the transformation of types of local taxes in the tax system based on a retrospective analysis of their legal regulation; to identify shortcomings and best practices in taxation law-making.

To achieve the above, the author has used general scientific (comparison, generalization) and special (retrospective analysis, content analysis, logical-legal) methods of scientific cognition.

2. Legal grounds for the availability of local taxes in the tax system

It is known that the Verkhovna Rada of Ukraine (VRU) – the sole body of legislative power in the state – adopts all laws, including those relating to taxation. However, the history of domestic law-making has the case of temporary (from 30.12.1992 to 21.05.1993) delegation by the parliament of its powers, enshrined in para. 15 of Art. 97 of the Constitution of Ukraine in effect at that time [the Constitution (Basic Law) of Ukraine dated 20.04.1978, No. 888-IX], to the Cabinet of Ministers of Ukraine (CMU) “for making prompt decisions on matters related to the introduction of a market economy and concentrating their legislative solution in a single pair of hands” (Law of Ukraine dated 18.11.1992, No. 2796-XII).

The sole body of legislative power delegated its constitutional authority in the following way. First, on 18.11.1992, the Parliament adopted the Law of Ukraine No. 2796-XII “On Temporary Suspension of the Powers of the Verkhovna Rada of Ukraine provided for in paragraph 13 of Article 97 of the Constitution of Ukraine and the Powers of the President of Ukraine provided for in paragraph 7–4 of Article 114-5 of the Constitution of Ukraine”. Thus, it ruled to temporarily, “for 6 months”, suspend the effect of “paragraph 13 of Article 97 of the Constitution of Ukraine in terms of the legislative regulation of property relations, entrepreneurial activity, social and cultural development, state, customs, scientific and technological policy, financial and credit system, taxation, state policy on remuneration and pricing, as well as the effect of paragraph 7-4 of Article 114-5 of the Constitution of Ukraine. The Cabinet of Ministers of Ukraine was entitled to exercise the mentioned powers.

On the same day (18.11.1992), the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 2796-XII “On Temporary Delegation of the Powers to Issue Decrees on Legislative Regulation to the Cabinet of Ministers of Ukraine” to resolve issues related to implementing market reform promptly.

Further, on 21.11.1992, the VRU adopted Law No. 2813-XII specifying legislative acts which the CMU is authorized to adopt, their

legal status, etc. On 22.11.1992, the VRU determined (Resolution of the Verkhovna Rada of Ukraine No. 2814-XII dated 22.11.1992) the effective date of the Law of Ukraine “On Temporary Suspension of the Powers of the Verkhovna Rada of Ukraine provided for in paragraph 13 of Article 97 of the Constitution of Ukraine and the Powers of the President of Ukraine provided for in paragraph 7–4 of Article 114-5 of the Constitution of Ukraine” and instructed the Legislation and Legitimacy Commission of the Verkhovna Rada of Ukraine to draw up and submit the relevant amendments and additions to the Constitution of Ukraine for the VRU consideration. As a result, on 19.12.1992, the Parliament adopted two legal acts:

1) the Law of Ukraine No. 2885-XII “On Supplementing the Constitution (Basic Law) of Ukraine with Article 97-1 and Amendments and Additions to Articles 106, 114-5, and 120 of the Constitution of Ukraine” (enacted on 10.01.1993);

2) the Law of Ukraine No. 2886-XI “On Amendments and Additions to the Law of Ukraine “On Temporary Suspension of the Powers of the Verkhovna Rada of Ukraine provided for in paragraph 13 of Article 97 of the Constitution of Ukraine and the Powers of the President of Ukraine provided for in paragraph 7–4 of Article 114-5 of the Constitution of Ukraine” (enacted on December 30, 1992).

After reading the Law of Ukraine No. 2886-XI, the author states that it does not make any additions but completely modifies the content declared in its title. Consequently, it becomes identical to the Law of Ukraine dated 18.11.1992 No. 2796-XII “On the Temporary Delegation of the Powers to Issue Decrees on Legislative Regulation to the Cabinet of Ministers of Ukraine”. Analyzing the history of the latter legal act published on the VRU official portal, one can see that this document has two editions today: the primary edition, which was adopted by the VRU on 18.11.1992, and the current one, the content of which was enshrined by the Law of Ukraine No. 2886-XII and which fully duplicated its original edition. In other words, both versions of the aforementioned law of Ukraine are the same.

It is apparent that the publication of two different laws in title and content with the same number 2796-XII by the Verkhovna Rada of Ukraine on 18.11.1992 affected further law-making activities.

The official web portal of the Parliament of Ukraine currently lacks the text of the Law of Ukraine No. 2796-XII as of 18.11.1992 “On Temporary Suspension of the Powers of the Verkhovna Rada of Ukraine provided for in paragraph 13 of Article 97 of the Constitution

of Ukraine and the Powers of the President of Ukraine provided for in paragraph 7–4 of Article 114-5 of the Constitution of Ukraine”. A scanned copy of the relevant legal act is available on the official web portal of the State Archival Service of Ukraine. Therefore, it is impossible to have a look at its latest edition and reliably establish whether the document has legal force at the moment.

Given the chronology of adopting the above-mentioned legal acts and their enactment, the author asserts the following:

1. The Parliament became entitled by law “to delegate the powers to issue decrees on legislative regulation of specific matters under paragraph 13 of Article 97 of the Constitution of Ukraine to the Cabinet of Ministers of Ukraine for a specified period”, and the CMU – to issue decrees from the moment of introducing appropriate amendments to the Basic Law [Constitution (Basic Law) of Ukraine dated 20.04.1978 No. 888-IX], that is, after the enactment of the Law of Ukraine No. 2885-XII.

2. As of 18.11.1992, the Verkhovna Rada of Ukraine was not authorized to adopt the Law of Ukraine No. 2796-XII “On Temporary Delegation of Powers to Issue Decrees on Legislative Regulation to the Cabinet of Ministers of Ukraine”.

It should be noted that from 24.11.1992 to 21.05.1993, the Cabinet of Ministers of Ukraine adopted 83 decrees, among which was Decree No. 56-93 “On Local Taxes and Fees”, which entered into force on 05.06.1993 and was in effect until the enactment of the Tax Code of Ukraine (until 01.01.2011). The legal act was “focused on strengthening the budgets of local self-government” and specified “the types of local taxes and fees, their maximum amount, and the calculation procedure” (Decree of the Cabinet of Ministers of Ukraine “On Local Taxes and Fees” dated May 20, 1993, No. 56–93).

It is known that in Ukraine, from 01.10.1991 to 01.04.1994, the Law of the Ukrainian Soviet Socialist Republic No. 1252-XII dated 26.06.1991 regulated principles of the tax system construction. The legal act established types of republic-wide “taxes, fees, and mandatory payments, the sources of their remittance, taxpayers and taxation objects, and liability for violation of tax legislation”.

Later, as a result of the adoption of the Law of the Ukrainian Soviet Socialist Republic dated 02.02.1994 No. 3904-XIII by the Verkhovna Rada of Ukraine, the Law of the Ukrainian SSR dated 26.06.1991 No. 1252-XIII was issued in a new wording, which came into force on 01.04.1994. Thus, for the first time, it was enshrined the legal definition of the concept

of the “taxation system” and types of national taxes and mandatory payments, local taxes and fees”.

At the time of the adoption and enactment of the Decree of the CMU No. 56–93, the availability of local taxes and fees in the tax system was not legally enshrined, but it was determined that tax legislation comprises the Law of the Ukrainian SSR No. 1252-XII “and other acts of the legislation of the Ukrainian SSR issued in accordance with it”.

The author emphasizes that, being an act of law-making, Decree No. 56–93, which was adopted by the supreme body in the system of executive bodies based on the Law “On Temporary Delegation of Powers to Issue Decrees on Legislative Regulation to the Cabinet of Ministers of Ukraine”, has the force of law.

Taking into account the above, the author holds that from June 5, 1993, to April 1, 1994, under the Law of the Ukrainian SSR No. 1252-XII, there were no local taxes and fees in the tax system. However, they were collected pursuant to the Decree of the Cabinet of Ministers of Ukraine No. 56-93. The Parliament eliminated legal conflict by adopting Law No. 3904-XII (Law of the Ukrainian Soviet Socialist Republic “On Amendments and Additions to the Law of the Ukrainian SSR “On the Taxation System” dated 02.02.1994 No. 3904-XIII).

3. Types of local taxes available in the tax system before the adoption of the Tax Code of Ukraine

From 01.01.1994 to 01.01.2011, types of local taxes were identified by two legal acts – the Law of Ukraine “On the Taxation System” (Table. 1) and the Decree of the CMU No. 56–93 (Table 2). During that period, the tax system was modified many times.

Ryzhiy (Ryzhiy, 2021, p. 45) studied the transformation and development of local taxes and fees. However, by relying on the content analysis of versions of the Law “On Taxation System” and the Decree “On Local Taxes and Fees” available on the official web portal of the Parliament “Legislation of Ukraine”, somewhat different results from comparing local taxes fixed in these legal acts were obtained.

In particular, the following was established.

1. Non-identity of the names of individual local taxes.

1) During the entire validity period of Decree No. 56-93, the list of local taxes, enshrined in its Art. 1, included a *parking* fee. According to sub-para. b of para. 1 of Art. 15 of the Law of Ukraine No. 1252-XII, the fee entitled as above was available in the domestic tax system until 20.03.1997. As a result of alteration of the mentioned legal act based on the Law of Ukraine No. 77/97-VR dated

Table 1

**Types of local taxes according to para. 1 of Art. 15 of the Law of Ukraine
“On the Taxation System” dated 26.06.1991 No. 1252-XII**

Law revision as of the following date					
01.04.1994	20.03.1997	12.07.2000	26.06.2001	01.01.2004	01.01.2011
Hotel tax				–	–
Parking fee ²	Vehicle parking fee				
Market fee					
Housing allocation fee					
Resort fee					
Entry fee for a horse race					
Tax on winning from a horse race.					
Track take					
Fee for the use of local symbols					
Filming fees					
Local auction and lottery fees					
Cross-border tax				–	–
Retail license fee	Retail and service license fee				
–	Dog tax				
–	–	Excursion and tourist tax ³	–	–	–

¹Invalidation.

²Hereinafter author's marks.

³ Collected from 01.01.2001 to 26.06.2001

Source: summarized by the author.

18.02.1997, it was revised. Thus, the list of local taxes enshrined by the Law of Ukraine “On the Taxation System” began to contain a “*vehicle parking fee*”. This name of the local fee was retained until the repeal of Law No. 1252-XII because of the enactment of the Tax Code of Ukraine.

2) The Law of Ukraine No. 1252-XII fixes a “tax on winning from a horse race”. Instead, Decree No. 56-93 fixes “a track rate”. In order to understand which “runs” are referred to in the name of the local tax mentioned in the decree, it is necessary to read Art. 9 of this legal act.

3) As you can see (Table 1), until March 20, 1997, there was a retail license fee in the tax system. After amending the Law of Ukraine “On the Taxation System”, based on the Law of Ukraine No. 77/97-VR, the name of the concerned local fee has changed. Since then, it has been called “a retail and service license fee”. However, no corresponding changes were made to para. 17 of Art. 1 of Decree No. 56-93. Therefore, the procedure for collecting the relevant local fee from its payers, who carry out their service activities, was not regulated. The author draws attention to the fact that legal conflict was not settled before the decree's abolition.

The analysis of regulations and legal acts approved by local self-government bodies

that establish the mechanism for charging a retail and service license fee (<http://parus-consultant.com/?doc=03R3147185>, <http://consultant.parus.ua/?doc=01SCY7AAFD>, etc.) indicates that they were developed under Art. 17 of Decree No. 56-93. In other words, local self-government bodies independently determined the procedure for charging retail and service license fee by relying on the procedure established by the law for charging a retail license fee.

2. Difference in the terms of legal confirmation of a dog tax.

The local fee under study, in accordance with Decree No. 56-93, was charged from 20.05.1993 to 01.01.2011. However, it was included in the list of local fees, enshrined in the Law of Ukraine No. 1252-XII, as of 20.03.1997 VR by relying on the Law of Ukraine No. 77/97.

3. Short-term existence of some local taxes.

“To attract additional funds to settle the arrears of wages and social benefits for employees of educational institutions of the general secondary education system”, based on the Law of Ukraine dated 17.09.1999 № 1065-XIV, Art. 1 of Decree No. 56-93 was supplemented with the following paragraph: “a fee for the right of business entities to use premises located in the central part of the settlement and buildings that are monuments of history

Table 2
Types of local taxes according to Art. 1 of the Decree of the Cabinet of Ministers of Ukraine dated May 20, 1993, No. 56-93

Decree revision as of the following date							
20.01.1993 ¹	16.07.1993	17.09.1999	13.05.2000	12.07.2000	20.06.2001	01.01.2004	01.01.2011 ²
		Hotel fee				-	-
		Parking fee					
		Market fee					
		Housing allocation fee					
		Dog tax					
		Resort fee					
		Entry fee for a horse race					
		Tax on winning from a horse race					
		Track take					
		Fee for the use of local symbols					
		Filming fee					
		Local auction and lottery fees					
		Cross-border tax				-	-
		Retail license fee					
-	-	Fee for the right of business entities to use premises located in the central part of the settlement and buildings that are monuments of history and culture ³	-	-	-	-	-
-	-	-	-	Excursion and tourist tax	-	-	-

¹Original version.

²Invalidation.

³Collected from 01.01.2000 to 13.05.2000

Source: summarized by the author.

and culture” and Art. 17-2, which determined the procedure for its collecting. The fee was effective from 01.01.2000 to 13.05.2000. Due to the abolition of the Law of Ukraine No. 1065-XIV, para. 19 of Art. 1 and Art. 17-2 (the Law of Ukraine No. 1661-III dated 20.04.2000) were excluded from Decree No. 56-93.

Let's pay attention to the fact that the Verkhovna Rada of Ukraine, deciding to make the above additions to Decree No. 56-93, ignored the need to amend the interrelated document – the Law of Ukraine No. 1252-XII. Consequently, the relevant local fee could not be collected because it had not been introduced into the tax system of the state.

In addition to the above fee, there was another short-term local fee in the domestic tax system.

Pursuant to the Law of Ukraine No. 1805-III dated 08.06.2000, para.1 of Art. 15 of the Law of Ukraine “On the Taxation System” was supplemented with [26] sub-para. 15, and Art. 1

of the Decree “On Local Taxes and Fees” – with paragraph 20: “excursion and tourist fee”. The decree was also supplemented with Article 17-2, which defines the payers and the maximum fee amount. The excursion and tourist fees were available from 01.01.2001 to 26.06.2001. It was canceled by the Law of Ukraine dated 07.06.2001 № 2515-III.

4. Local taxes collected during the taxation experiment

Analyzing the legal regulation of local taxes, one cannot disregard the taxes that were collected from 2003 to 2006 solely on the territory of the Autonomous Republic of Crimea (ARC). “Given the specifics of the socio-economic development of the region”, the taxes were introduced by the Verkhovna Rada of the Autonomous Republic of Crimea (VR of the ARC) in agreement with the Cabinet of Ministers of Ukraine.

Pursuant to Art. 39 of the Law of Ukraine No. 380-IV dated 26.12.2002 “On the State Budget of Ukraine for 2003”, resolution No. 434-3/03

dated 19.02.2003 of the VR of ARC approved four provisions that establish the mechanism for the collection of the following local fees in the Autonomous Republic of Crimea: 1) for the development of municipal public transport; 2) resort; 3) for the development of the recreational complex; 4) from the owners of real estate for the use of engineering infrastructure and improvement of cities and settlements.

However, on May 28, 2003, the Cabinet of Ministers of Ukraine decided "to agree with the proposal of the Verkhovna Rada of the Autonomous Republic of Crimea relating to the introduction of local fees in 2003 as an experiment, i.e., the fee for the development of the recreational complex in the Autonomous Republic of Crimea and the fee for the development of passenger e-transport in the Autonomous Republic of Crimea" (Resolution of the Cabinet of Ministers of Ukraine dated 28.05.2003, No. 875). That kind of parliament decision encouraged the VR of the ARC to make specific amendments to the prior resolution No. 434-3/03 dated 19.02.2003 (see sub-paras. 1.3–1.4, para. 1 of the Decree of the VR of the ARC as of 05.06.2003 No. 587-3/03). Consequently, the mentioned statutory act was expanded by para. 30¹, and para. 30 was recognized as invalid. Thus, the Regulation on the fee for the development of the recreational complex in the ARC and the Regulation on the fee for the development of passenger e-transport in the ARC were approved.

Initiated in 2003, the experiment on collecting the abovementioned two local fees in the ARC, based on the Law of Ukraine No. 1344-IV dated 27.11.2003 and the Resolution of the CMU No. 875 dated 28.05.2003, lasted until 01.01.2005.

During the experiment, the concept of "tax agent" was used for the first time – its definition was also enshrined. Thus, para. 4.1. para. 4 of the Regulation on the fee for the development of the recreational complex in the AR of Crimea determined that "the fee is collected by tax agents – legal entities or individuals who, regardless of their organizational and legal status and their methods of payment of other taxes, are obliged under this Regulation to accrue, deduct or collect and pay the fee to the budget on behalf and at the expense of a taxpayer, to keep tax records and submit tax reports to tax authorities following the current legislation, as well as to be responsible for violation of the provisions of this Regulation".

The normative legal acts regulating the procedure for collecting the aforementioned local fee enshrined their intended use. Thus, tax revenues from the fee for the development of the recreational complex, which was collected from

organized holidaymakers and unorganized holidaymakers who arrived in the Autonomous Republic of Crimea in their vehicles, were to be allocated to implement joint projects with local governments for the development of resort cities, finance activities related to reconstruction, maintenance of the infrastructure of the resort and tourism complex and preparation for the resort season, and obtained revenues from the fee, which was collected from other unorganized holidaymakers, to cover the costs specified by local councils during the approval of budgets for the relevant year.

The fee for the development of passenger electric transport was an additional source of funds for developing public transport, first of all, intercity passenger electric transport, the purchase of school buses. As you can see, the statutory purposes of the concerned local fee were not fully consistent with its name.

The procedure for collecting fees defined the budget type for their crediting, payment name, and the code of income budget classification (Table. 3).

At the same time, the order of the Ministry of Finance of Ukraine (MFU) No. 441 dated 09.07.2003 additionally introduced code 16011800 "Fee for the development of a recreational complex in the Autonomous Republic of Crimea and code 16011900 "Fee for the development of passenger electric transport in the Autonomous Republic of Crimea" into the systematized grouping of income (Order of the Ministry of Finance of Ukraine No. 604 dated 27.12.2001 "On Budget Classification and its Implementation").

As we can see, the MFU did not fix a budget classification code for analytical accounting of revenues from the fee for the development of the recreational complex in the ARC. However, the VR of the ARC did not amend sub-paras. 4.7–4.8 of the normative legal act establishing the procedure for the collection of the relevant fee throughout the period of its validity.

During the study of the legal regulation of the collection of the fee for the development of the recreational complex and the fee for the development of passenger electric transport in the ARC, it was found that the experiment on their collection in the ARC was not agreed with the Cabinet of Ministers of Ukraine after 2004. In addition, the fees were administered in the ARC throughout 2005 and for some time in 2006.

Therefore, there raised a logical matter of the legal grounds for conducting a taxation experiment in the Autonomous Republic of Crimea. It is known that:

1. Only the laws of Ukraine establish the taxation system, taxes, and fees. From 01.04.1994

Table 3
Conditions for the transfer of local fees approved by the Verkhovna Rada of the Autonomous Republic of Crimea

Type of local fee	Type of local budget	Purpose of payment	Code of budget classification
Fee for the development of the recreational complex in the ARC	Budget of local self-government	Fee for the development of recreational complex from unorganized holidaymakers in the ARC	16011801
	Budget of the Autonomous Republic of Crimea	Fee for the development of recreational complex from organized holidaymakers in the ARC	16011800
		Fee for the development of recreational complex in the ARC*	16011802
Fee for the development of passenger electric transport in the ARC		Fee for the development of passenger electric transport in the ARC	16011900

*The fee is paid by unorganized holidaymakers who arrived in the Autonomous Republic of Crimea in own vehicles.

Source: summarized by the author by relying on sub-paras. 4.7–4.8, para. 4 of the Regulation on the fee for the development of the recreational complex in ARC, and sub-para. 6.2, para. 6 of the Regulation on the fee for the development of passenger electric transport in the ARC.

to 01.01.2011, the role of that kind of a legal act was the Law of Ukraine “On the Taxation System”. Art. 1 of the Law determined that “taxes and fees (mandatory payments), the payment of which is not prescribed by this Law, are not payable” (from 20.03.1997 to 17.02.2000) and “any taxes and fees (mandatory payments) introduced by the laws of Ukraine must be included in this Law” (from 20.03.1997 to 01.01.2011).

2. The Budget Code of Ukraine (BCU) in force at that time enshrined that tax revenues are considered only “... local ... fees stipulated by the tax laws of Ukraine” (para. 2 of Art. 9) and regulated the indicators and provisions of the law on the State Budget of Ukraine (para. 2 of Art. 38). According to the BCU, the mentioned law cannot make changes in the tax system and amend the powers of the Cabinet of Ministers of Ukraine.

3. The Autonomous Republic of Crimea is authorized, pursuant to the legislation of Ukraine, ... to conduct taxation experiments, set local taxes and fees, ... exercise other powers in the field of taxation” (Constitution of the Autonomous Republic of Crimea dated 23.12.1998). The Constitutional Court of Ukraine [decision No. 1-rp/2003 as of 16.01.2003 (case No. 1-3/2003)] recognized the provision of the Constitution of the Autonomous Republic of Crimea, approved by the Law of Ukraine “On Approval of the Constitution of the Autonomous Republic of Crimea” as of December 23, 1998, as complying with the “Constitution of Ukraine (constitutional):

“in accordance with the legislation of Ukraine ... conducting taxation experiments”.

4. The list of issues in respect of which the Autonomous Republic of Crimea carries out statutory regulation is enshrined in Art. 137 of the Constitution of Ukraine (Constitution of Ukraine dated June 28, 1996, No. 254k/96-BP) – taxation issues are out of its scope.

5. “Normative legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea ... may not contradict the Constitution and laws of Ukraine and are adopted in accordance with the Constitution of Ukraine, laws of Ukraine, acts of the President of Ukraine and the Cabinet of Ministers of Ukraine and for their implementation” (Constitution of Ukraine dated June 28, 1996, No. 254k/96-VR).

In view of the above, we must state that the Verkhovna Rada of the Autonomous Republic of Crimea, having set local fees on the territory of the ARC that are not prescribed by the laws of Ukraine and having approved the regulations governing the procedure for their collection, exceeded its authority.

Thus, violations of the above rules called into question the legality of the experiment on collecting local fees in the ARC.

By the way, in 2006, the Commercial Court of the ARC declared para. 30.1 of the Resolution of the Verkhovna Rada of the Autonomous Republic of Crimea No. 434-3/03 dated 19.02.2003 “On the Budget of the Autonomous Republic of Crimea for 2003” illegal and invalid: it concerns the part of the approved Regulation on the fee for the development

of passenger electric transport in the Autonomous Republic of Crimea (15.03.2006, case No. 2-28/5895-2006A [45]) and the part of the Regulation on the fee for the development of the recreational complex in the AR of Crimea (Resolution of the Commercial Court of the Autonomous Republic of Crimea dated 17.08.2006, case No. 2-10/11684-2006A).

The Sevastopol Commercial Court of Appeal dismissed the appeals of the VR of the ARC and upheld the above rulings of the Commercial Court of the ARC (Rulings of the Sevastopol Commercial Court of Appeal dated 22.05.2006, case No. 2-28/5895-2006A and dated 15.11.2006, case No. 2-10/11684-2006A). The Verkhovna Rada of the Autonomous Republic of Crimea, in accordance with the procedure established by law, did not appeal the court rulings.

However, despite the fact that the aforementioned court rulings of the Sevastopol Commercial Court of Appeal entered into force on November 30, 2006, the Parliament adopts the Law of Ukraine No. 398-V, sub-para. 8, para. 3 of the final provisions of which, in 2007, “extended the experiment on the introduction of some local fees consolidated in 2003 by the Verkhovna Rada of the Autonomous Republic of Crimea in agreement with the Cabinet of Ministers of Ukraine (fee for the development of the recreational complex in the Autonomous Republic of Crimea and fee for the development of passenger electric transport in the Autonomous Republic of Crimea)”. In this regard, the order of the Cabinet of Ministers of Ukraine dated 07.02.2007, No. 36-r instructed “the Council of Ministers of the AR Crimea ... to quarterly inform the Ministry of Finance about the experiment’s progress, the receipt of funds to the budget and their use”. It should be noted that, the resolution of the VR of the ARC No. 315-5/06 dated 28.12.2006 annulled the legal acts establishing the procedure for collecting the relevant fees in 2007. Based on the information provided by the State Tax Administration in the Autonomous Republic of Crimea (the letter of the State Tax Administration in the Autonomous Republic of Crimea “On Regulation of the Recreational Fee” dated 18.10.2007 No. 1206/G/15-3),

throughout 2007, that is, at the time of adoption of the CMU order, both fees were not collected.

Regulations on the fee for the development of the recreational complex in the Autonomous Republic of Crimea and Regulations on the fee for the development of passenger electric transport in the Autonomous Republic of Crimea became null and void pursuant to the decree of the VR of the ARC dated 16.01.2008 № 728-5/08.

Thus, due to the study of legal acts regulating tax relations, the author holds that from 01.01.2004 to 31.12.2010, the tax system of Ukraine included (Table. 1) 12 local fees, of which five were subject to mandatory collecting (a fee for vehicle parking, a market fee, a housing allocation fee, a fee for a trade and service license, a dog tax). Village, settlement, and city councils decided to set local fees, the list of which was enshrined in para. 2 of Art. 15 of the Law of Ukraine “On the Taxation System”; developed and approved the collection mechanism for each established fee guided by the relevant norms of Decree No. 56–93.

5. Local fees collected on the basis of the Tax Code of Ukraine

With the enactment of the Tax Code of Ukraine, the powers of local self-government bodies in terms of establishing local taxes have been preserved in full, while the list of local taxes has changed. Three local fees began to be administered from 01.01.2011, namely: a vehicle parking fee, a tourist fee, and a fee for a business license (Table 4). The latter was mandatory for establishment by local self-government bodies and was collected until 01.01.2015. The fee for a commercial activity license was excluded from the tax system due to the entry into force of the Law of Ukraine dated 08.12.2014 No. 71-VIII, which modified para. 10.2 of Art. 10 and Art. 267 of the TCU.

As you can see (Tables 1–3), the parking fee has been collected since 20.05.1993 until the present. However, during this time, not only the mechanism of its collection changed, but also the name: from 01.04.1994 to 20.03.1997 – *parking fee*, from 20.03.1997 to 01.01.2011 – *automobile parking fee*, from 01.01.2011 and until now – *a vehicle parking fee*.

Table 4

Types of local fees under sub-para. 10.2 of Art. 10 of the Tax Code of Ukraine

The TCU text as of the following date	
01.01.2011 (enactment)	from 01.01.2015 to the present
Vehicle parking fee	
Fee for a trade activity license	–
Tourist fee	

Source: summarized by the author.

6. Conclusions

The mechanism of collecting local taxes, which started working after the proclamation of Ukraine's independence in 1991, is constantly developed and being improved. The Verkhovna Rada of Ukraine Legal adopt acts which regulate tax relations and have the status of a law. However, there is the case of the Parliament's delegation of its legislative powers to the Cabinet of Ministers of Ukraine. As a result, the Government adopted the Decree "On Local Taxes and Fees" which laid the groundwork for the collection of local taxes. The process of application of delegated legislation was accompanied by hasty decision-making: the delegation of powers by the Verkhovna Rada of Ukraine to the Cabinet of Ministers of Ukraine and the beginning of their implementation by the latter took place before amending the Constitution (Basic Law) of Ukraine; the Parliament adopted two laws of Ukraine, different in name and content, which had the same number that subsequently adversely affected modification of one of them.

From 01.10.1994 until the adoption of the Tax Code of Ukraine, the tax system included 12 local fees, of which 5 were subject to mandatory charging. Amendments to their structure, simultaneously enshrined in the Law of Ukraine

"On the Taxation System" and the Decree "On Local Taxes and Fees", resulted in the non-identity of the names and terms of fixing individual local fees. The tax system of that period was characterized by the short-term existence of some local fees, which were introduced to attract additional funds to local budgets. For the same purpose, during 2003–2006, an experiment on fee collection was carried out on the territory of the Autonomous Republic of Crimea. In the normative legal acts regulating the procedure for collecting the fees in the ARC, the intended use of their tax revenues was established and the legal consolidation of the concept of "tax agent" was implemented for the first time. The modern tax system has two local fees. The local self-government body decides on their collection in a particular territory.

A retrospective analysis of the legal regulation of the collection of local fees in Ukraine has allowed concluding that the rulemaking process requires the following: 1) to improve the coordination of actions of legislative and executive authorities; 2) to take into account the norms enshrined in interrelated documents; 3) executive authorities to comply with the limits of tax authority established by law.

References:

- Bokshorn, A. V.** (2021). Administruvannya mistsevykh podatkov i zboriv yak ob'ekt pravovoho rehulivannya [Administration of local taxes and fees as an object of legal regulation]. *Candidate's thesis*. Odesa: Odesa State University of Internal Affairs (in Ukrainian).
- Bogorn, A. V.** (2017). Henezys mistsevoho opodatkovannya za chasiv nezaleznoi Ukrainy [The Genesis of Local Taxation in Ukrainian Independence Time]. *Lex Portus*, 6, 38–47 (in Ukrainian).
- Dumchikov, M. O.** (2018). Administratyvno-pravovi zasady reformuvannya systemy zahalnodержavnnykh ta mistsevykh podatkov i zboriv v Ukraini [Administrative and legal principles of reforming the system of national and local taxes and fees in Ukraine]. *Candidate's thesis*. Sumy: Sumy State University (in Ukrainian).
- Khrystoforov, A. B.** (2017). Mistsevi podatky ta zbory: deiaki problemy vvedennia v diiu [Local taxes and fees: some implementation problems] *Nauka i pravookhorona – Science and law enforcement*, 4(38), 127–133. (in Ukrainian).
- Kmit', V. M., Vovchans'kuy, Yu. V.** (2018). Otsinka mekhanizmu administruvannya ta rehulivannya mistsevykh podatkov ta zboriv v Ukraini [Assessment of the mechanism of administration and regulation of local taxes and fees in Ukraine]. *Ekonomika i suspilstvo – Economy and society*, 15, 656–662. (in Ukrainian).
- Mushenok, V. V.** (2017). Heneza systemy mistsevoho opodatkovannya v Ukraini [Genesis of local taxation in Ukraine] *Mizhnarodnyi naukovyi zhurnal "Internauka". Seriya: "Iurydychni nauky" – The International scientific journal "Interscience". Series: "Legal Sciences"*, 1, 33–36 (in Ukrainian).
- Pabat, O. V.** (2020). Osoblyvosti pravovoho rehulivannya mistsevykh podatkov i zboriv [Specific features of legal regulation of local taxes and fees]. *Pravo i bezpeka – Law and Safety*, 4 (79), 44–47 (in Ukrainian).
- Ryzhiy, A. V.** (2021). Pravove rehulivannya mistsevykh podatkov ta zboriv v umavakh detsentralizatsii [Legal regulation of local taxes and fees in terms of decentralization]. *Candidate's thesis*. Zaporozhye: Classical Private University (in Ukrainian).
- Shapoval, V. O.** (2019). Instytut mistsevykh podatkov i zboriv v Ukraini: pravovi zasady ta tendentsii rozvytku [Institute of local taxes and fees in Ukraine: legal bases and trends of development] *Aktualni problemy vitchyznianoi yurysprudentsii. Spetsvypusk – Actual problems of domestic jurisprudence. The Special Issue*, 3, 101–105. (in Ukrainian).
- Skorobahach, V. I.** (2015). Pravove rehulivannya mistsevykh podatkov ta zboriv [Legal regulation of local taxes and fees]. *Candidate's thesis*. Kharkiv: Yaroslav the Wise National University of Law (in Ukrainian).
- Viktorchuk, M. V.** (2016). Administratyvno-pravove rehulivannya mistsevykh podatkov i zboriv v Ukraini v umovakh yevrointehratsii [Administrative and Legal Regulation of Local Taxes and Fees in Ukraine in Terms of European Integration]. *Candidate's thesis*. Kharkiv: V. N. Karazin Kharkiv National University (in Ukrainian).

Катерина Недоступ,

аспірантка кафедри цивільного, господарського та екологічного права, Національний технічний університет «Дніпровська політехніка», проспект Д. Яворницького, 19, Дніпро, Україна, індекс 49005, nedostup.k.k@nmu.one

ORCID: <https://orcid.org/0000-0003-0122-7007>

ТРАНСФОРМАЦІЯ МІСЦЕВИХ ЗБОРІВ У ПОДАТКОВІЙ СИСТЕМІ УКРАЇНИ

Анотація. Мета. Метою статті є вивчення трансформації видів місцевих зборів в податковій системі на основі ретроспективного аналізу їх правового регулювання; виявлення недоліків та позитивного досвіду правотворчої діяльності в сфері оподаткування. **Методи дослідження.** Для досягнення поставленої мети під час дослідження застосовано загальнонаукові (порівняння, узагальнення) і спеціальні (ретроспективний аналіз, контент аналіз, логіко-юридичний метод) методи наукового пізнання. **Результати.** Проаналізовано досвід делегування Верховною Радою України законодавчих повноважень Кабінету Міністрів України, правові підстави проведення експерименту в сфері оподаткування. Розкрито послідовність прийняття органами законодавчої та виконавчої влади нормативно-правових актів, які регулюють встановлення та процедури справляння місцевих зборів. В результаті порівняння переліків місцевих зборів, одночасно закріплених у двох правових актах (Закон України «Про систему оподаткування» і Декрет «Про місцеві податки і збори»), які, в період з 01.10.1994 р. й до прийняття Податкового кодексу України, мали силу закону, виявлено неідентичність назв і строків закріплення окремих місцевих зборів. Виокремлено місцеві збори, які справлялися з метою залучення додаткових коштів у місцеві бюджети короткостроково та у порядку проведення експерименту. Відмічено, що у нормативно-правових актах, що встановлювали порядок справляння місцевих зборів в порядку експерименту, вперше відбулось правове закріплення поняття «податковий агент» і було врегульовано цільове використання їх податкових надходжень. **Висновки.** Українській податковій системі характерне скорочення кількості місцевих зборів. З 2015 р. у ній налічується два місцеві збори, рішення щодо справляння на певній території яких приймається органом місцевого самоврядування. Механізм правового регулювання місцевих зборів, який запрацював після проголошення в 1991 р. незалежності України, постійно розвивається й удосконалюється. Втім, під час нормотворчого процесу пропонується: 1) покращити координацію дій органів законодавчої й виконавчої влади; 2) враховувати норми, закріплені у взаємопов'язаних документах; 3) органам виконавчої влади дотримуватись меж повноважень у сфері оподаткування, встановлених законом.

Ключові слова: декрет, закон, місцеві збори, податковий кодекс, податкова система.

The article was submitted 10.02.2022

The article was revised 03.03.2022

The article was accepted 24.03.2022

UDC 340.1

DOI <https://doi.org/10.32849/2663-5313/2022.1.11>**Vira Kachur,***PhD in Law, Associate Professor, Head of the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, Kachur_Vira@ukr.net***ORCID:** orcid.org/0000-0002-4372-491X**Sergey Kozin,***Doctor of Law, Associate Professor at the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, kozinsergey2010@ukr.net***ORCID:** orcid.org/0000-0001-7640-4579

Kachur, Vira, Kozin, Sergey (2022). Methodological function of the state and law theory. *Entrepreneurship, Economy and Law*, 1, 68–73, doi: <https://doi.org/10.32849/2663-5313/2022.1.11>

METHODOLOGICAL FUNCTION OF THE STATE AND LAW THEORY

Abstract. Purpose. The purpose of the article is to consider the content of the methodological function of the theory of State and law in the system of vectors of impact of law. **Results.** The authors study the content of the methodological function of the State and law theory in the system of fits vectors. The approaches available in modern legal literature to the definition of the functions of the State and law theory, as well as their features are analysed. It is established that the functions of the State and law theory are the main vectors of its scientific and educational impact on the State and legal reality, defining and characterising the essence, content, social purpose, objectives and the aim of the State and law theory in the system of legal sciences. The functions of the State and law theory are classified on the basis of different doctrinal positions. Traditionally, the literature review reveals that the functions of the State and law theory are political, ideological, methodological, interpretive, heuristic, prognostic, ontological, systemically important, practically organisational, information, and communication. It is established that a particular place in the system of functions of the State and law theory is occupied by a methodological function, reflected in making of a conceptual and categorical apparatus of the system of legal sciences, a universal legal language, which ensures uniformity in the classification and assessment of phenomena by experts from different branches of law. Moreover, the specificities of the methodological function are that the theories of State and law provide general scientific methods with the legal content, make a system of special methods, use sectoral methods, facilitates the exchange of information between the legal sciences on methodological knowledge. **Conclusions.** It is concluded that the State and law theory as a science studies objective regularities of the advent, functioning and development of the State and law, dialectics of the theory of knowledge of State and legal existence, the logic of discovering new regularities and legal practice, etc. The subject matter of the State and law theory is closely related and correspondingly determined by the functions performed by this legal science. All functions of the State and law theory are interrelated and can produce a positive result only if they are carried out in a single, integrated manner. The State and law theory performs a variety of functions in respect of its subject matter, using both its elaboration and the work of other social and legal sciences.

Key words: State and law theory, subject matter of State and law theory, functions of State and law theory, methodological function of State and law theory, conceptual and categorical apparatus of State and law theory.

1. Introduction

The progressive development of domestic legal science and higher legal education is directly linked to the detailed elaboration of methodological problems of the State and law. At present, the State and law theory, which has a general theoretical status in the system of legal sciences, is faced with the important

tasks of updating its content and reorienting itself towards the study of State legal reality, taking into account universally recognised models of democracy, of functioning of social and legal statehood and of mechanisms for ensuring and protecting human and civil rights and freedoms. To that end, State and law scholars should critically rethink the achievements

of the previous period and propose new, scientifically based approaches to solving current problems of State and legal development and ways of solving them (Tsvik, 2011, p. 11).

First, changes in the world, especially in the post-Soviet area, over the past two decades have had a significant impact on State and legal phenomena that are the subject of the study by general theoretical jurisprudence. This requires a higher level of knowledge, the search for new paradigms, methods and approaches, the involvement of other sciences, and the study of new linkages and properties of these phenomena. Second, for decades, the views of many legal theorists on legal science and its general theoretical part have been bound by orthodox Marxist-Leninist ideology. It gave rise to an *Étatist* (State) and sometimes overtly authoritarian and even totalitarian interpretation of law, which, despite the efforts of many scholars to get rid of it, has survived to this day. Legal theorists express diverse, sometimes controversial, views not only on the science of the general State and law theory and the relevant academic discipline, but even on its name. Third, the need to rethink the subject matter and structure of general theoretical jurisprudence and the relevant academic discipline is due to not only internal but also external factors, decisive among these is the rapid development of global inter-State integration processes, which, together with the economic, political and legal sectors, cover science and education as well.

Predominantly, the subject matter of the general State and law theory is considered as a science of the general patterns of the advent, development and functioning of the State and law. It is obvious that reducing the subject matter of State and law theory to the patterns of the advent, development and functioning of State and legal phenomena narrows the scope of the study and extracts from it the most important processes of knowledge and reform of various phenomena of political and legal reality. This also applies to the set of methods of the State and law theory. In modern legal literature, the methodology of the State and law theory is interpreted purely from the epistemological perspective, ignoring the systemic approach. Such perspective is one-sided, simplifies and narrows the understanding of the essence and functions of the State and law theory, since it performs, in addition to solving cognitive problems, ontological, methodological and other functions (Kotsiubynska, 2012, p. 1).

The State and law theory as a science has a considerable number of traditions that differ from each other in their content, functions and way of existence. Political and legal knowl-

edge terminates outdated traditions, but retain everything positive and viable, without which further development of theoretical system is impossible, because borrowing of positive is the very "continuity in the interrupted". The development of the State and law theory is possible because of the invisible mechanisms of continuity of tradition and innovation (Zharovska, 2016, p. 253). The definition of the functions of the State and law theory as a science provides a methodological basis for a comprehensive and complete interpretation of its subject matter. In this context, it is particularly important to understand the methodological function of the State and law theory in the system of vectors of impact of the latter, which is the purpose of this scientific article. It is proposed to put it in effect through successful implementation of tasks such as: first, to analyse the current legal literature's approaches to defining the functions of the State and law theory and to identify their characteristics; second, to classify the functions of the State and law theory on the basis of different doctrinal perspectives; third, to explain the methodological function of the State and law theory, its place and role in the system of legal knowledge and practice.

The scientific and theoretical basis of this article consists of the scientific works of domestic legal theorists, such as Y.V. Bilozorov, S.D. Husariev, I.M. Zharovska, A.M. Zavalnyi, M.I. Koziubra, A.M. Kolodii, Y.V. Kryvytskyi, S.L. Lysenkov, O.V. Petryshyn, P.M. Rabinovych, O.F. Skakun, O.D. Tykhomirov, M.V. Tsvik, etc.

2. Defining the functions of state and law

The transformation of the basic sectors of social life allows increasing the substantially of the role of scientific research in the field of the State and law. This is particularly true for fundamental general theoretical studies, which are of basic importance for objective knowledge of State and legal phenomena and ways of improving them. The advent, essence, functioning and significance of the State and law in the life of society, as well as their reflection in the minds of people, are among the complex and key issues in the legal science. Theoretical understanding of State and legal reality and trends in the development of political and legal processes is an objective necessity and a vital condition for scientific knowledge. Under the integrative and globalised changes in the modern existence of mankind, the world economic crisis, political conflicts, ecological cataclysms and other transformational phenomena, the State and law theory is undergoing a stage of renewal and development. The causes for the development of the State and law theory can be divided into external and internal ones.

External causes include: the needs of other legal sciences, forms of legal consciousness, legal practice that set defined objectives for the State and law theory as a basic legal science with, stimulate and guide scientific research, as well as new facts that cannot be explained by the existing theory. Internal causes are contradictions in the very theory of the State and law, or problems arising from the internal logic of the development of the theoretical system of the field of knowledge, caused by the performance of its functions (Zharovska, 2016, p. 17).

The functions of any science reveal its tasks to solve, its social purpose. The advent of science is related to the social need to know the world and systematise knowledge of it. This knowledge is essential for sustaining life in a changing human environment. Therefore, every science has certain, intrinsic functions. The essence and content of the State and law theory, its specificities, place and role in the system of social and legal sciences are most fully and concretely revealed through the concepts and types of functions of this legal science which it performs, affecting the State and legal reality. These functions enable to trace the development of the system of general theoretical knowledge, its influence on the totality of social relations, the scientific and practical significance of the results of scientific research, the tasks for State theory and the law (Hida, 2011, p. 35). The term "function" (from Latin *functio* "performance, execution") means the area of activity, the way of action of an object aimed at achieving a certain result. Each of the legal sciences, including the State and law theory, has specific functions, defined by the subject matter of this legal science, and, on the other hand, relies on public life and practice, interacting with other legal sciences (Tymchenko, 2008, p. 32).

The literature review reveals various doctrinal approaches to the definition of the functions of the State and law theory, such as:

- The main vectors of its theoretical and practical use in society for the purpose of progressive transformation (O.F. Scacun);
- The main vectors of its impact on the State and law reality of and the development of other legal sciences (M.V. Tsvik, D.O. Volk);
- The tasks to perform when researching its subject matter (S.L. Lysenkov, A.M. Kolodyi, O.D. Tykhomyrov, V.S. Kovalskyi);
- The main vectors of its impact on the development of legal science, legal practice and legal education (Y.M. Oborotov, N.M. Krestovska, A.F. Kryzhaniivskyi, L.H. Matvieieva);
- The main vectors of its scientific and educational impact on the State and legal reality, defining and characterising the essence, content, social purpose, objectives and the aim of the State

and law theory in the system of legal sciences (S.D. Husariiev, A.Y. Oliinyk, O.L. Sliusarenko, Y.V. Krivitskyi).

The functions of the State and law theory are determined by the specificities of the subject matter of this science and its place and role in the system of legal sciences. However, the specificity of the State and law theory is that it has both functions inherent in the legal science in general and functions inherent only in the State and law theory. According S.D. Husariiev, A.Y. Oleinik and O.L. Sliusarenko, the features of the functions of the State and law theory are as follows: first, they are the vectors of scientific, cognitive and educational purpose; second, they express the essence and content of the State and law theory; and third, they define the social purpose of the State and law theory in the system of legal sciences; fourth, they characterise objectives and the aim of the State and law theory as a legal science (Husariiev, Oliinyk, & Sliusarenko, 2008, p. 24). According to Y.V. Kryvytskyi, the features of the functions of the State and law theory are as follows: 1) these are the main vectors of scientific and educational action in the field of the study of the subject matter of the State and law theory, aimed at obtaining, systematising knowledge of the State and law, as well as other State and legal phenomena; 2) they are vectors of basic scientific activity, the content of which is the development of professional knowledge, skills and abilities of a future lawyer; 3) these are the vectors of impact that define and characterise the essence, content, purpose, objectives and goals of the theory of the State and of law as a legal science. It should be agreed that the functions of the State and law theory as a fundamental science in the legal study system ensure its full and comprehensive transformation into a sound theoretical and methodological basis for the solution of current political and legal problems in the field of science and practice. The functions of the State and law theory characterise social purpose, define the nature of this science and its features as an independent type of scientific activity (Hida, 2011, p. 36).

There are different classifications of the functions of the State and law theory. For example, according to the Encyclopaedic juridical literature, the State and law theory have main functions, such as: ontological – knowledge and explanation of the phenomena and processes of the State and legal life of society; heuristic – deep knowledge of the basic regularities of State and legal existence and the discovery of new regularities ("build-up" of knowledge); prognostic – anticipating the further development of the State and law on the basis of an adequate reflection of its objective regularities and fortu-

itous phenomena. Other functions of the State and law theory are: methodological – formation of the conceptual apparatus of the system of legal sciences; ideological – development of fundamental ideas on ways of progressive development of the State and law; political – impact on shaping the State's political course and ensuring its scientific integrity; applied – formulation of recommendations for practical solutions to the problems of State and legal construction (Skakun, 2004, p. 38). According to P.M. Rabinovych, the general State and law theory performs the following functions: 1) declaratory – identification and recording of existing legal State phenomena; 2) interpretive – explanation of the nature of legal State phenomena and the reasons for their occurrence and change, their structure, functions, etc.; 3) heuristic – discovery, detection of previously unknown legal State regularities; 4) prognostic – formulation of hypotheses and predictions of the development of legal State phenomena; 5) methodological – the use of legal science's achievements as research tools to form, “build up” new knowledge both in jurisprudence and in other sciences (the provisions of the general State and law theory are of particular importance in this area); 6) applied-practical – recommendations and proposals for the improvement of legal and State institutions and entities; 7) ideological and educational – impact on the formation and development of legal, as well as moral and political, consciousness, universal worldview and general culture of actors, and on the strengthening of prestige and authority of law and the State. The use of interpretive, heuristic and prognostic functions by the general State and law theory is linked to the study of the mechanism of legal State regularities, while the exercise of its applied-practical function is linked to the determination of the mechanism of their use (Rabinovych, 2017, p. 137).

3. Features of the methodological function of the theory of state and law

The list of basic functions of the State and law theory varies from five (epistemological (cognitive), systemically important, methodological, prognostic, practical-indicative) (Krestovska, & Matvieieva, 2015, p. 21) to 11 or more vectors of action (political, ideological, methodological, interpretive, heuristic, prognostic, ontological, systemically important, practically-organising, informational, communicative) (Husariev, Oliinyk, & Sliusarenko, 2008, p. 24). A specific function is the unity of the content, forms and methods, and it is characterised by a certain autonomy, homogeneity and repetition. With regard to the available views on this matter, Y.V. Kryvytskyi concludes that the functions of the State and law theory

as a fundamental legal science are: ontological, gnoseological, heuristic, prognostic, axiological, methodological, ideological, educational, communicative, applied (practical, applied-scientific, applied-practical, practical-indicative), integrative (systemically important). In addition to these main vectors of impact of the State and law theory, the literature review reveals political, (political and managerial), interpretive, educational and information functions (Hida, 2011, p. 40).

The functions of the State and law theory, which reflect the specificities of its scientific status and the specificity of the subject matter, should include, first of all, methodological one. The latter takes the form of a conceptual apparatus and a methodological tool for the system of legal sciences, construction of a universal legal language, which ensures uniformity in the classification and assessment of State and legal phenomena by experts from different branches of law.

In the context of the issues raised, the scientific heritage of prominent legal scholars of previous historical generations should be mentioned, in particular, O.V. Surilov, who focuses on the study of the functions of the State and law theory. The functions of science generally refer to the main vectors of impact of science on society in general and on its individual sectors. The scientist argues that functions of the State and law theory express both the essence, content, social, scientific-cognitive and educational purpose. The functions of the State and law theory are determined by the characteristics of the subject matter. Among the functions of the State and law theory, O.V. Surilov underlines the methodological function. He considers that the State and law theory in the system of legal science has a methodological function. O.M. Vasyliiev wrote about the methodological nature of the State and law theory in the late 1970s. On the contrary, D.A. Kerimov argued that there could not be a separate methodological science in the legal system. The dialogue on the topic whether the general theory of the State and of law is a methodological science or a science of methodological significance seems to be unimportant, according to O.V. Surilov, because the State and law theory is considered the methodological science due to its methodological significance in the system of legal research at different levels. Furthermore, he considered attempts to contrast the methodological aspect of the State and law theory with its theoretical aspect as unsubstantiated, because the theory implies methodology, which is inconceivable beyond the theory. It is impossible to imagine methodological knowledge outside the theoretical form of its pres-

entation. O.V. Surilov argues that an opposing view, according to which general theory in general acts as a methodological science, as a creative method of scientific knowledge of reality in all its manifestations, is inadmissible. The scientist states two objections: first, the theory as a system of knowledge is not limited to methodology; it is broader; second, although it has a rich methodological content in the legal science system, it cannot fully assume the function of methodological support (maintenance). Any field of legal knowledge has a methodological component without which special scientific research would be meaningless (Arnautova, 2012, p. 218).

According to M.V. Tsvik and D.O. Volk, the general theory of the State and law performs a methodological function. The provisions on development patterns of State and legal phenomena, considered by this science, its theoretical schemes and scientific forecasts form the methodological basis for all other legal sciences to study their subjects. The system of legal concepts developed by the State and law theory is of extraordinary importance for the entire science. Without the scientific categories of the form of the law, the system of law and its components, legal relations, their actors and objects, legal fact, offence, etc., sectoral legal sciences will not be able to perform their scientific tasks fruitfully. Moreover, a unified conceptual apparatus is a prerequisite and an integral part of successful law-making, law-enforcement, interpretation and other legal activities (Tsvik, 2011, p. 23). According to S.L. Lysenkov, the methodological function is manifested primarily in the fact that the general State and law theory formulates a system of concepts related to State and legal phenomena and develops methods of studying these phenomena, used by all other legal sciences. The success cognitive law research depends mainly on the mastery of using the appropriate methodology for the study of State and legal phenomena, on

the correct understanding and proper application of the conceptual apparatus. Theoretical knowledge is a prerequisite for the correct solution of any practical law-making, law-enforcement or law-enforcement problem. Indeed, it is the methodology developed by the general theory that enables to interpret properly facts, to group them according to certain links and relations, and contributes to the unmistakable finding of the applicable legal provision (Lysenkov, 2006, p. 17).

4. Conclusions.

Therefore, the above-mentioned allows the author to assert that the State and law theory as a science studies objective regularities of the advent, functioning and development of the State and law, dialectics of the theory of knowledge of State and legal existence, the logic of discovering new regularities and legal practice, etc. The subject matter of the State and law theory is closely related and correspondingly determined by the functions performed by this legal science. All functions of the State and law theory are interrelated and can produce a positive result only if they are carried out in a single, integrated manner. The State and law theory performs a variety of functions towards its subject matter, drawing on both its heritage and the work of other social and legal sciences. A particular place in the system of functions of the State and law theory is taken by a methodological function, reflected in making of a conceptual and categorical apparatus of the system of legal sciences, a universal legal language, which ensures uniformity in the classification and assessment of phenomena by experts from different branches of law. The specificities of the methodological function are that the theories of State and law provide general scientific methods with the legal content, make a system of special methods, use sectoral methods, facilitates the exchange of information between the legal sciences on methodological knowledge.

References:

- Arnautova, L.P.** (2012). O.V. Surilov pro pryznachennia ta funktsii teorii derzhavy i prava [Surilov on the purpose and functions of the State and law theory]. *Aktualni problemy derzhavy i prava – Current issues of state and law*, 67, 214–221 (in Ukrainian).
- Hida, Ye.O.** (2011). *Teoriia derzhavy ta prava [Theory of state and law]*. Kyiv : FOP O.S. Lipkan (in Ukrainian).
- Husariiev, S.D., Oliinyk, A.Yu., & Sliusarenko, O.L.** (2008). *Teoriia prava i derzhavy [State and law theory]*. Kyiv : Pravova yednist (in Ukrainian).
- Kotsiubynska, O.Iu.** (2012). *Teoriia derzhavy i prava: systemnyi analiz suchasnoho stanu ta perspektyv rozvytku [Theory of state and law: a systematic analysis of the current state and prospects]*. *Extended abstract of candidate's thesis*. Lviv (in Ukrainian).
- Krestovska, N.M., & Matvieieva, L.H.** (2015). *Teoriia derzhavy i prava [Theory of state and law]*. Kyiv : Yurinkom Inter (in Ukrainian).
- Lysenkov, S.L.** (2006). *Zahalna teoriia derzhavy i prava [General theory of state and law]*. Yuryskonsult (in Ukrainian).

Rabinovych, P. (2017). *Zahalna teoriia prava i derzhavy [General theory of law and state]*. Kharkiv : Pravo (in Ukrainian).

Skakun, O.F. (2004). *Teoriia derzhavy i prava [Theory of state and law]*. Ukr. Entsyl (in Ukrainian).

Tsvik, M.V. (2011). *Zahalna teoriia derzhavy i prava [General theory of state and law]*. Kharkiv : Pravo (in Ukrainian).

Tymchenko, S.M. (2008). *Aktualni problemy teorii derzhavy ta prava [Current problems of the State and law theory]*. Kyiv : KNT (in Ukrainian).

Zharovska, I.M. (2016). Suchasna teoriia derzhavy i prava: tradytsiinizm ta novatorstvo pidkhodiv [Modern theory of state and law: traditionalism and innovation of approaches]. *Visnyk Natsionalnoho universytetu «Lvivska politekhnika» – Bulletin of the National University "Lviv Polytechnic"*, 837, 252–257 (in Ukrainian).

Zharovska, I.M. (2016). Teoriia derzhavy i prava yak fundamentalna ta svitohliadna dystsyplina [The State and law theory as a fundamental and ideological discipline]. *Chasopys Kyivskoho universytetu prava – Journal of Kyiv University of Law*, 3, 15–18 (in Ukrainian).

Віра Качур,

кандидатка юридичних наук, доцентка, завідувачка кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, Kachur_Vira@ukr.net

ORCID: orcid.org/0000-0002-4372-491X

Сергій Козін,

доктор юридичних наук, доцент кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, kozinsergey2010@ukr.net

ORCID: orcid.org/0000-0001-7640-4579

МЕТОДОЛОГІЧНА ФУНКЦІЯ ТЕОРІЇ ДЕРЖАВИ І ПРАВА

Анотація. Мета. Метою статті є осмислення змісту методологічної функції теорії держави і права в системі напрямів дії права. **Результати.** У статті автор досліджує зміст методологічної функції теорії держави і права в системі напрямів її дії. Проаналізовано наявні в сучасній юридичній літературі підходи до визначення поняття функцій теорії держави і права, а також виокремлено їх ознаки. Встановлено, що функції теорії держави і права – це основні напрями її наукової та навчальної дії на державно-правову дійсність, що визначають і характеризують сутність, зміст, соціальне призначення, завдання і мету теорії держави та права в системі юридичних наук. Здійснено класифікацію функцій теорії держави і права на підставі різних доктринальних позицій. Традиційно у фаховій літературі виокремлюють такі функції теорії держави і права: політичну, ідеологічну, методологічну, інтерпретаційну, евристичну, прогностичну, онтологічну, системоутворюючу, практично-організаторську, інформаційну, комунікативну. З'ясовано, що особливе місце в системі функцій теорії держави і права займає методологічна, яка виражається у формуванні поняттєво-категоріального апарату системи юридичних наук, створенні універсальної юридичної мови, що реально забезпечує одноманітність у класифікації та оцінці явищ фахівцями різних галузей права. Особливості методологічної функції полягають також у тому, що теорія держави та права надає юридичного змісту загальнонауковим методам, створює систему спеціальних методів, використовує галузеві методи, сприяє обміну інформацією між юридичними науками стосовно методологічних знань. **Висновки.** Зроблено висновок, що теорія держави і права як наука вивчає об'єктивні закономірності виникнення, функціонування і розвитку держави і права, діалектику теорії пізнання державно-правового буття, логіку відкриття нових закономірностей і юридичну практику тощо. Предмет теорії держави і права тісно пов'язаний і відповідним чином обумовлений функціями, які виконує ця юридична наука. Усі функції теорії держави і права взаємопов'язані між собою і можуть забезпечити позитивний результат лише за умови, що будуть здійснені в єдності, комплексі. Теорія держави і права виконує різноманітні функції щодо свого предмета, використовуючи як власний доробок, так і напрацювання інших суспільних та юридичних наук.

Ключові слова: теорія держави і права, предмет теорії держави і права, функції теорії держави і права, методологічна функція теорії держави і права, поняттєво-категоріальний апарат теорії держави і права.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 342.156

DOI <https://doi.org/10.32849/2663-5313/2022.1.12>**Inna Pidbereznykh,***Candidate of Historical Sciences, Associate Professor, Applicant, Scientific Institute of Public Law, 2a, H. Kirpy str., Kyiv, 03035 Domuschi_Liudmyla@ukr.net***ORCID:** orcid.org/0000-0002-5124-8514

Pidbereznykh, Inna (2022). U.S.-Philippine national security and defence relations in the early XXIst century. *Entrepreneurship, Economy and Law*, 1, 74–79, doi: <https://doi.org/10.32849/2663-5313/2022.1.12>

U.S.-PHILIPPINE NATIONAL SECURITY AND DEFENCE RELATIONS IN THE EARLY XXIst CENTURY

Abstract. Purpose. The aim of the article is the historical and legal study of U.S.-Philippine relations in national security and defence in the early XXIst century and its impact on the internal development of the country. **Results.** The article forms the state of affairs in U.S.-Philippine relations in national security and defence at the beginning of the XXIst century. The author describes the content of U.S.-Philippine problems, the degree of conflict and contradictions in the field of military security. The focus is on the disclosure of the dynamics and direction of U.S. military doctrine towards the Philippines and its impact on the internal development of the country. In the study, the author analyses the trends and prospects of development of the U.S. strategy in relation to the military influence of the Philippines on the dynamics of processes in the Asia-Pacific region. It is noted that the joint activities of the United States and the Philippines in the international arena by harmonising the interests of administrative and legal framework of the national security of the countries under study provide opportunities for strengthening their positions and better internal development. However, we should not forget the individual challenges to the national security of countries that arise from time to time. U.S. politicians regard the Philippines as a major outpost off the coast of the PRC, as the key to increasing domination over the Pacific Ocean. Maintaining a sustainable relationship with Washington provides the Philippines with opportunities to strengthen its international standing, which could be an indicator of the success of independent foreign policy. **Conclusions.** It is concluded that the U.S.-Philippine Military Alliance on National Security and Defence has become a credible guarantee of peace and security in the region. All instruments of the administrative and legal framework were aimed at military strategic goals, expanding the geographical boundaries of democracy and increasing the joint global fight against terrorism and countering terrorist activities and propaganda. That is why the joint activities of the United States and the Philippines in the international arena by harmonising the interests of administrative and legal framework of the national security of the countries under study provide opportunities for strengthening their positions and better internal development. However, we should not forget the individual challenges to the national security of countries that arise from time to time. It should be noted that U.S.-Philippine relations in national security and defence are one of the possible aspects of ensuring stability and prosperity in the Asia-Pacific region.

Key words: administrative and legal framework, fight against terrorism, military doctrine, internal relations, external relations, instruments, national security, defence, USA, Philippines.

1. Introduction

The relationship between the U.S. and the Philippines is classified as a special relationship. The countries were together during World War II, defending freedom from fascism and having common foundations for what the future world should be. The Washington administration acted as a protector of the external and internal security of the Philippines and took active measures to stabilise the political situation, preserving the democratic system of the country. After the terrorist attack

of September 11, 2001, Washington began to form an international anti-terrorist coalition, in which the Philippines, with its example of domestic threats and traditions of cooperation with the U.S. has become almost an ideal partner. This was translated into new military assistance tranches and the active involvement of U.S. military and social experts in the process of dismantling terrorist bases and developing infrastructure on the island of Mindanao, Participation of Philippine peacekeepers and community leaders in the Iraq campaign and other

joint projects. The mutual interests of both States are important enough to maintain cooperation between the two countries in the field of security and defence.

General theoretical issues of the administrative and legal regulatory mechanism for security have been studied, including by legal experts in administrative law, but taking into account the current state and development of national security of Ukraine and its permanent transformation. It is necessary to consider the foreign experience of the national security genesis using elements of diachronic and synchronous comparison. Our considerations are based on the scientific works by scientists such as O.M. Bandurka, A.I. Berlach, Y.P. Biytiak, I.P. Holosnichenko, V.V. Verkhohliad, R.A. Kaliuzhnyi, V.H. Komziuk, O.V. Kuzmenko, V.Y. Nastiuk, A.V. Nosach, V.I. Olefir, A.A. Starodubtsev, V.V. Sokurenko, M.M. Tyshchenko, M.V. Tsvik, and others. Some aspects of U.S.-Philippine relations development have been covered by N. Horodnia and I. Pidbereznykh. The aim of the article is the historical and legal study of U.S.-Philippine relations in national security and defence in the early XXIst century and its impact on the internal development of the country.

2. The areas of Philippine-U.S. National Security and Defence Cooperation

It should be noted that, according to V.A. Antonov, the functioning of the security system is carried out within the framework of the State's security policy. Thus, security measures, designed to protect the national interest of the country, are foreseen, planned, organised and implemented (doctrines, strategies, concepts and programmes). In particular, the history of the formation and development of the Ukrainian statehood confirms that the institution of security is determined by factors such as the social division of labour, social differentiation of members of society, the struggle for economic and political power, the National Liberation Movement for the Affirmation of the Nation State. In the scientific knowledge of the category of security, the study of the latter as a specific legal concept and the development of an appropriate methodology of this study are very important. As a matter of principle, the approach to defining security should consider it from the human security perspective, which is the fundamental constitutional and legal basis of this concept, which regulates security relations (Antonov, 2018, pp. 25–26).

The close ties between the Philippines and the United States in the area of national security and defence in Southeast Asia are based on the Mutual Defence Treaty between the United States and the Republic

of the Philippines of August 30, 1951 (Mutual Defence Treaty Between the United States and the Republic of the Philippines, 1951), which established and strengthened U.S.-Philippine Military Alliance to "act to meet the common dangers, armed attack on the metropolitan territory of either of the Parties, or on the island territories under its jurisdiction in the Pacific or on its armed forces, public vessels or aircraft in the Pacific" (Valencia, 2019). Growing concerns about maritime security, especially China's actions in the South China Sea, have led the Philippine leadership to re-emphasise its security and defence relations with the United States. Furthermore, the achievements of cooperation in the field of security and defence include the establishment of a bilateral strategic dialogue, in particular through the signing of the Enhanced Defence Cooperation Agreement (EDCA), aimed at Philippines maritime security, its ability to participate in counter-terrorism and counter-insurgency operations and to respond to natural disasters (Greitens, 2016, pp. 3–4).

The United States of America has consistently noted the need to protect vital national security and defence interests in South-East Asia, in particular in support of naval and air bases, bilateral cooperation in national security and defence and the global fight against terrorism since 2001.

The administrative and legal framework for U.S. national security and defence policy involved supporting the U.S.-Philippine alliance and stability in Southeast Asia, namely providing assistance to the Armed Forces of the Philippines (AFP) in the fight against terrorism, modernisation and administrative reforms; supporting the peace process in Western Mindanao; promoting broad-based economic growth and human rights; helping the Philippines to build stable and flexible democratic institutions; strengthening democratic governance and supporting the efforts of the Government of the Philippines to promote comprehensive development and security and defence cooperation in the Indo-Pacific region. United States aid to the Philippines contributed to broad-based economic growth, security, improved health and education for Filipinos, promoted democratic values, strengthened regional and global partnerships between the State Department, Ministry of Defence, United States Agency for International Development (USAID). Moreover, the aid is aimed at enhancing cooperation through a State-wide approach that supports a free and inclusive Indo-Pacific region. Over the past decade, the United States has provided more than \$143 million to the people of the Philippines, deployed more than 50 U.S.

ships and aircraft, about 1,040 U.S. troops for humanitarian relief operations in the aftermath of Typhoon Haiyan/Yolanda, which ravaged the country in 2013 (Philippine-United States Bilateral Relations Fast Sheet, n.d.). Therefore, historical lessons enable to state that the United States of America has long streamlined its relations with the Philippines through the implementation of statutory activities of national security and defence actors to strengthen its cooperation and training, including how to further optimise processes in case of disasters.

In addition, since 2002, the United States of America has provided non-military assistance through the Joint Special Operations Task Force-Philippines (JSOTF-P). Philippine-U.S. counter-terrorism efforts have enabled to significantly reduce the number of terrorist threats from several Islamist organisations, including the New People's Army, Abu Sayyaf, Jemaah Islamiyah. Joint activities include a significant non-military component and help reduce incentives for civilians and insurgents to join separatist and terrorist organisations (Lum, 2012). That is, through the administrative and legal framework of the activities of national security and defence entities, national security and defence are being established.

An individual component of the administrative and legal framework for national security and defence are the meetings of the heads of powers of the USA and the Philippines, including the global war against terrorism, support of operations in Iraq by Philippines, U.S. economic assistance, successful deployment of U.S. troops in the southern Philippines, giving the Philippines greater access to U.S. defence equipment and materials. Therefore, the President of the Philippines commented: "We believe that U.S. leadership and interaction with the USA makes the world safer for all of us" (Garamone, 2003).

In 2014, U.S. President Barack Obama directed U.S. policy to restore balance with Asia through defence and security cooperation, human trafficking and exchange, Philippine membership in the Trans-Pacific Partnership, etc. (Philippines. Office of the Historian, n.d.).

In order to provide access to U.S. ships, U.S. aircraft transferred two ships to the Philippine Navy: Weather High Endurance Cutter (WHEC) – BRP Gregorio Del Pilar (formerly USCGC Hamilton) and Weather High Endurance Cutter (WHEC) – BRP Ramon Alcaraz (formerly USCGC Dallas) (Philippine-United States Bilateral Relations Fast Sheet, n.d.). These vessels were utilised to patrol Philippine waters, conduct search and rescue operations as well as deliver relief supplies to typhoon victims. The White House noted that Obama's meeting

with Aquino would "highlight economic relations and security cooperation between the two countries, including through the modernisation of the defence alliance, efforts to expand economic ties and spark economic growth through the Partnership for Growth, and through our deep and enduring people-to-people ties" (Obama to arrive in Manila April 28, 2014).

3. U.S. National Security and Defence trends

The National Security Strategy, the most comprehensive document of the Presidential Administration of B. Obama, which set out the principles and priorities for how America will continue to lead the world to greater peace and new prosperity (The 2015 National Security Strategy, 2015; Jennings, 2018).

That document affirmed the value of joint actions, particularly in addressing the problems of aggression, terrorism and disease. Building on the unique capacity of the United States to mobilise and lead the international community, the 2015 National Security Strategy argued that strong and sustainable U.S. leadership contributes to global security and prosperity, dignity and human rights. The Washington administration has called for strategic patience and perseverance, given the fact that the country does not have infinite resources. This confirmed that difficult choices were made among many competing priorities, warning against over-coverage, as many security problems did not have quick and easy solutions. The implementation of the Strategy is a combination of military power and diplomacy. What others regard as indecisiveness, Obama explained as calculated choices to avoid being drawn into unnecessary conflicts and wars. Coalition-building and partnerships, rather than the use of force, were touted as better strategies in addressing threats of terrorism and aggression (Pabeliña, 2015).

Moreover, the deterioration in U.S.-Philippine relations following the election of President Rodrigo Duterte in June 2016, whose policy was based on stopping the sale of illegal drugs, human rights organisations accused him of allowing the police to shoot suspects without a trial, resulting in the death of more than 7,000 people (The 2015 National Security Strategy, 2015; Jennings, 2018).

According to Richard Javad Heydari, Duterte pursues pragmatic foreign policy, defined by "strategic rebalancing" between the United States of America and China (Watts, 2016).

In administering national security, the Philippines has sought to preserve its security benefits from the United States of America, as well as to increase commercial and economic benefits from China. But the practical advantage of this long-standing alliance has been to the advan-

tage of both the U.S. and the Philippines.

The Armed Forces of the Philippines, as one of the weakest military forces in the region, relied heavily on the United States to address its security concerns, including tensions in the South China Sea, terrorism and natural disasters. The military has played an important role in the security of the country and has been vital to peace processes with communist rebels and rebel groups. Defence Secretary Delphin Lorenzana has expressed clear support for the U.S. Mutual Defence Treaty. The United States continued to enjoy great support among ordinary Filipinos despite these developments. According to the 2016 Philippine Public Opinion Poll, 76% of respondents stated that they had “strong confidence” in the United States, and only 22% gave the same answer for China. In addition, the military remained largely pro-U.S., despite growing nervousness in the defence bureaucracy (Khzmalyan, 2019).

Therefore, the historical facts prove not only the clearly regulated activities of national security actors has a significant impact on the administrative and legal framework for national security, but also have the political situation between countries, the peculiarities of their zones of influence.

In 2018, the National Defence Strategy (NDS) was developed based on two earlier strategic documents – the National Security Policy (NSP) for 2017 and the National Security Strategy for 2018 (National Security Policy for Change and Well-Being of the Filipino People, n.d.). The NSP outlined, in broad strokes, the overall national security objectives of the government. The NSS, on the other hand, categorized the Philippines’ national security interests into “core,” “important,” and “other.” These interests were then harmonized into national security goals from which broad strategic courses of action were identified. The NDS “maps the planning, prioritization, and resourcing processes in line with the identified priorities and outcomes of the NSS” (The Philippines National Defence Strategy – Analysis, 2019).

Indeed, the NDS identified six of the twelve national security goals which are most relevant. Among others, these national security goals included: safeguarding and preserving national sovereignty and territorial integrity, ensuring maritime and airspace security, strengthening international relations. Anchored on the relevant national security goals, the NDS identified two categories of defence missions: external, and internal. The external defence missions are: Maritime and Air Defence Mission (MarAD), Cyber Security Mission (CS), and Security Cooperation and Engagement Mission (SCE) (The Philippines National Defence Strategy –

Analysis, 2019).

Recognising the interrelatedness between national security and defence instruments, it appeared that the NDS has three major implications. First, the NDS strategic environment assessment situated the country’s external politico-security challenges within the broader purview of the U.S.-China geostrategic competition that will likely shape the dynamics of Asia-Pacific in the foreseeable future. The instrument emphasized that the “overall strategic backdrop and geopolitical landscape of the Asia-Pacific lies on the U.S.-China rivalry, which proves to be a vital consideration for the strategic decisions of the country” (The Philippines National Defence Strategy – Analysis, 2019).

It should be noted that the bilateral strategic dialogue was the main forum for discussing the range of political, economic cooperation between the Philippines and the United States: defence and security; economy, development and prosperity; regional and global diplomatic engagement; rule of law and law enforcement [17]. Both sides recognized the importance of a strong Philippines-U.S. alliance in enhancing security cooperation and promoting regional stability and prosperity. The Philippines and the United States pledged to strengthen security and defence cooperation, including by improving defence infrastructure, personnel and logistics procedures, as well as increasing mutual communication and coordination on the operational elements of regional security. In this context, both sides commit to begin planning on a range of activities to improve maritime domain awareness. In this context, both sides reaffirmed their commitment to plan a range of actions for freedom of navigation, overflight, and other lawful uses of the South China Sea, and stressed the importance of peacefully resolving disputes in accordance with international law, as reflected in the Law of the Sea Convention. Both sides also emphasized the importance of concluding an effective and substantive Code of Conduct (COC) that would not prejudice the rights under international law of both claimant States and non-claimant States in the South China Sea (8th Philippines-United States Bilateral Strategic Dialogue (BSD) Joint Statement, 2019). High-level officials committed to deepening their work against terrorism and violent extremism by improving information-sharing and port and aviation security to prevent terrorist attacks in the Philippines and the transit of foreign terrorist fighters into and within the country. In addition, both delegations committed to upholding international best practices to detect and combat money laundering and the financing of terrorism, to deepen their

cooperation in expanding legal aid services (8th Philippines-United States Bilateral Strategic Dialogue (BSD) Joint Statement, 2019). High-level officials committed to continue working together to effectively eradicate trafficking in persons and in this regard noted the 1st rate maintained by the Philippines in the Trafficking in Persons Report 2019 (Trafficking-in-Persons-Report, 2019).

4. Conclusions

To sum up, U.S. Philippine National Security and Defence Relations in the early XXIst century reveal that the U.S.-Philippine Military Alliance on National Security and Defence has become a credible guarantee of peace and security in the region. All instruments of the administrative and legal framework were aimed at mil-

itary strategic goals, expanding the geographical boundaries of democracy and increasing the joint global fight against terrorism and countering terrorist activities and propaganda. That is why the joint activities of the United States and the Philippines in the international arena by harmonising the interests of administrative and legal framework of the national security of the countries under study provide opportunities for strengthening their positions and better internal development, however, we should not forget the individual challenges to the national security of countries that arise from time to time. It should be noted that U.S.-Philippine relations in national security and defence are one of the possible aspects of ensuring stability and prosperity in the Asia-Pacific region.

References:

- 8th Philippines-United States Bilateral Strategic Dialogue (BSD) Joint Statement.** (2019). July 17. U.S. Embassy in the Philippines. Retrieved from <https://ph.usembassy.gov/8th-philippines-united-states-bilateral-strategic-dialogue-bsd-joint-statement/> (in English).
- Antonov, V.O.** (2018). Konstytsiino-pravovi zasady natsionalnoi bezpeky Ukrainy [Constitutional and legal principles of national security of Ukraine]. *Extended abstract of Doctor's thesis*. nauk. Kyiv (in Ukrainian).
- Garamone, J.** (2003). Philippines to Become Major non-NATO Ally, Bush Says. May 19. U.S. Department of Defence. Retrieved from <https://archive.defence.gov/news/newsarticle.aspx?id=28968> (in English).
- Greitens, Sh.** (2016). The U.S.-Philippine Alliance in a Year of Transition: Challenges and Opportunities. Order from Chaos Foreign Policy in a Troubled World (in English).
- Jennings, R.** (2018). Turnaround Seen for U.S.-Philippine Ties; China Wary. February 02. Voice of America. Retrieved from <https://www.voanews.com/east-asia-pacific/turnaround-seen-us-philippine-ties-china-wary> (in English).
- Khzmalyan, E.** (2019). U.S.-Philippines Relations at the Root of China's SCS Power Play. June 21. Geopolitical Monitor. Retrieved from <https://www.geopoliticalmonitor.com/author/erikkhzmalyan/> (in English).
- Lum, T.** (2012). The Republic of the Philippines and U.S. interests? October. Research Gate. Retrieved from <https://www.researchgate.net/publication/291132118> (in English).
- Mutual Defence Treaty Between the United States and the Republic of the Philippines.** (1951). August 30. Lillian Goldman Law Library. Retrieved from https://avalon.law.yale.edu/20th_century/phil001.asp (in English).
- National Security Policy for Change and Well-Being of the Filipino People.** 2017-2022. National Security Council. Retrieved from <http://www.nsc.gov.ph/attachments/article/NSP/NSP-2017-2022.pdf> (in English).
- Obama to arrive in Manila April 28.** (2014). April 11. Rappler. Retrieved from <https://www.rappler.com/nation/55242-obama-visit-philippines-april> (in English).
- Pabeliña, K.** (2015). U.S. National Security Strategy and Implications for the Philippines. Vol. II, Issue 2, February. Republic of the Philippines. Foreign Service Institute. Retrieved from <http://www.fsi.gov.ph/us-national-security-strategy-and-implications-for-the-philippines-by-karla-mae-g-pabelina-issue-14-february-2015/> (in English).
- Philippines.** Office of the Historian. Retrieved from <https://history.state.gov/departmenthistory/travels/president/philippines> (in English).
- Philippine-United States Bilateral Relations Fast Sheet.** Republic of the Philippines. Department of Foreign Affairs. Retrieved from <https://dfa.gov.ph/dfa-news/dfa-releasesupdate/2695-philippine-united-states-bilateral-relations-fast-sheet> (in English).
- The 2015 National Security Strategy** (2015). Fact Sheet. February 06. The White House President Barak Obama. Retrieved from <https://obamawhitehouse.archives.gov/the-press-office/2015/02/06/fact-sheet-2015-national-security-strategy> (in English).
- The Philippines National Defence Strategy – Analysis.** (2019). Eurasia Review News & Analysis. Dec 20. ADAS 2020. Retrieved from <https://www.adas.ph/the-philippines-national-defence-strategy-analysis/> (in English).
- Trafficking-in-Persons-Report.** (2019). June. U.S. Department of State. Retrieved from <https://www.state.gov/wp-content/uploads/2019/06/2019-Trafficking-in-Persons-Report.pdf> (in English).
- Valencia, M.** (2019). To renew the U.S.-Philippines relationship, start with ditching the U.S.-centric lens. 1 Feb. South China Morning Post. Retrieved from <https://www.scmp.com/comment/insight-opinion/united-states/article/2184430/renew-us-philippines-relationship-start> (in English).

Watts, A. (2016). Duterte and the Future of U.S.-Philippines Relations. September 26. Georgetown Security Studies Review. Retrieved from <https://georgetownsecuritystudiesreview.org/2016/09/26/duterte-and-the-future-of-us-philippines-relations/> (in English).

Підберезних Інна,

кандидат історичних наук, доцент, здобувач, Науково-дослідний інститут публічного права, вулиця Г. Кірта, 2А, Київ, Україна, індекс 03035, Domuschi_Liudmyla@ukr.net

ORCID: orcid.org/0000-0002-5124-8514

АМЕРИКАНСЬКО-ФІЛІПІНСЬКІ ВІДНОСИНИ У СФЕРІ НАЦІОНАЛЬНОЇ БЕЗПЕКИ І ОБОРОНИ НА ПОЧАТКУ ХХІ СТ.

Анотація. Мета. Метою статті є історико-правове дослідження американсько-філіппінських відносин у сфері національної безпеки і оборони на початку ХХІ ст. та її впливу на внутрішній розвиток країни. **Результати.** У статті сформовано стан американсько-філіппінські відносини у сфері національної безпеки і оборони на початку ХХІ ст. Автор характеризує зміст американсько-філіппінських проблем, ступінь конфліктності та протиріч у сфері військової безпеки. Особлива увага приділяється розкриттю динаміки і спрямованості американської військової доктрини щодо Філіппін та її впливу на внутрішній розвиток країни. У своєму дослідженні автор аналізує тенденції і перспективи розвитку американської стратегії відносно військового впливу Філіппін на динаміку процесів в Азійсько-Тихоокеанському регіоні. Зауважено, що спільна діяльність США та Філіппін на міжнародній арені шляхом узгодження інтересів адміністративно-правового забезпечення національної безпеки досліджуваних країн дає можливість для зміцнення їхніх позицій та кращого внутрішнього розвитку, однак не варто забувати про окремі виклики національній безпеці країн, що час від час виникаю. Американські політики розглядають Філіппіни як своєрідний найважливіший форпост біля берегів КНР, як ключ до наростаючого панування над Тихим океаном. Підтримка стійких відносин з Вашингтоном дає Філіппінам можливість для зміцнення позицій на міжнародній арені, що може стати показником успішності реалізації незалежної зовнішньої політики. **Висновки.** Зроблено висновок, що американсько-філіппінський військовий союз у сфері національної безпеки і оборони став надійною гарантією миру та безпеки у регіоні. Усі інструменти адміністративно-правового забезпечення були спрямовано на військово-стратегічні цілі, розширення географічних меж демократії та нарощування спільної глобальної боротьби з тероризмом і протистояння терористичній діяльності й пропаганді. Саме тому спільна діяльність США та Філіппін на міжнародній арені шляхом узгодження інтересів адміністративно-правового забезпечення національної безпеки досліджуваних країн дає можливість для зміцнення їхніх позицій та кращого внутрішнього розвитку, однак не варто забувати про окремі виклики національній безпеці країн, що час від час виникаю. Зауважимо, що американсько-філіппінські відносини у сфері національної безпеки і оборони є одним із можливих аспектів забезпечення стабільності і процвітання в Азійсько-Тихоокеанському регіоні.

Ключові слова: адміністративно-правове забезпечення, боротьба з тероризмом, військова доктрина, внутрішні відносини, зовнішні відносини, інструменти, національна безпека, оборона, Сполучені Штати Америки, Філіппіни.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 34

DOI <https://doi.org/10.32849/2663-5313/2022.1.13>**Natalya Miroshnichenko,**

PhD in Law, Associate Professor, Professor at the Department of Criminal Law of National University "Odesa Law Academy", 2, Akademichna Street, Odesa, Ukraine, postal code 65009, mir.job.2021@gmail.com

ORCID: <https://orcid.org/0000-0003-3693-6815>

Iryna Radkovska,

PhD Student at the Department of Criminal Law of National University "Odesa Law Academy", 2, Akademichna St., Odesa, Ukraine, postal code 65009, radkovskairyna@gmail.com

ORCID: <https://orcid.org/0000-0003-0125-7521>

Miroshnichenko, Natalya, Radkovska, Iryna (2022). Subjects of criminal offences in the field of traffic safety and operation of water transport. *Entrepreneurship, Economy and Law*, 1, 80–88, doi: <https://doi.org/10.32849/2663-5313/2022.1.13>

SUBJECTS OF CRIMINAL OFFENCES IN THE FIELD OF TRAFFIC SAFETY AND OPERATION OF WATER TRANSPORT

Abstract. Purpose. The article is devoted to the research of peculiarities and kinds of subjects of criminal offences in the field of traffic safety and operation of water transport, as well as differences in the composition and the place of this group of criminal offences in the current Criminal Code of Ukraine (hereinafter – CC of Ukraine), the Criminal Code of the USSR of 1960 (hereinafter – CC of the USSR) and the draft Criminal Code of Ukraine (hereinafter – draft CC of Ukraine). **Research Methods.** The paper is executed by applying methods of classical, non-classical and post-non-classical methodology.

Results. General characteristic of criminal offences in the field of traffic safety and operation of water transport, included into the CC of Ukraine, is provided. Description of general subjects of criminal offences in the mentioned field is studied. Features of special subjects are analyzed. The following is determined: the reference to a special subject may be contained as at the title (article 285 of the CC of Ukraine), as at the disposition (article 284 of the CC of Ukraine). It is illustrated, that determination of features of special subjects of the present kind of criminal offences requires research of significant volume of legal acts (international treaties, laws of Ukraine, as well as subordinate legislation), governing public relations in the field of traffic safety and operation of water transport, as well as respective judicial practice and scientific literature. The significance of the category of special (professional) sanity is considered. Particular attention is drawn to the issues of criminal liability of a master as a person, who bears increased liability for ensuring traffic safety and operation of vessels.

Conclusions. The following tendency is discovered: criminal infractions provide liability, as a rule, of special subjects, whereas crimes, majorly, do not contain additional requirements regarding subjects, namely provide liability of general subjects. Discovered tendency is grounded, obviously, by increased degree of public danger of this category of crimes. Available scientific approaches to the definition of the term "water transport worker" are analyzed, and it is proposed to define it for the purposes of criminal legislation as a natural person, who conducts activity regarding ensuring traffic safety and operation of water transport.

Key words: general subject of a criminal offence; special subject of a criminal offence; criminal offences in the field of traffic safety and operation of water transport; special (professional) sanity; water transport worker; master of a vessel.

1. Introduction

Relevance. Water transport is a crucial component of contemporary life, one of the main arteries of the global economy. The importance of this field can be proved by acknowledge of seafarers as "key workers" (International Maritime Organization, 2021) within COVID-

19 pandemic conditions, along with medical personnel. At the same time, water transport, as any other means of transport, is the source of increased danger to life, health and property of persons (Kostadinova, 2011, p. 29), and criminal offences in the present field, as a rule, are resulted in human deaths and millions of dam-

age worth. Criminal offences in the field of traffic safety and operation of water transport are contained in the distinct Section XI of the Special Part of the current Criminal Code of Ukraine (hereinafter – CC of Ukraine). For comparison, the Criminal Code of the USSR of 1960 (hereinafter – CC of the USSR) did not unify criminal offences against traffic safety and operation of transport into the separate group.

Purpose. The article aims to research peculiarities and kinds of subjects of criminal offences in the field of traffic safety and operation of water transport, as well as to determine differences in the composition and the place of the mentioned group of criminal offences in the CC of Ukraine, the CC of the USSR as well as the draft Criminal Code of Ukraine (hereinafter – draft CC of Ukraine). To reach the purpose, the following **goals** shall be achieved: 1. To provide general description of criminal offences in the field of traffic safety and operation of water transport. 2. To characterize general subjects of the mentioned criminal offences. 3. To analyze special subjects of the present group of criminal offences. 4. To pay attention to some other criminal offences relating traffic safety and operation of water transport.

Methodology. Both methods of classical, non-classical and post-non-classical methodology were used during the research. Thus, hermeneutics and Aristotelian methods were used at interpreting the texts of legislative acts. Method of analysis was used to research judicial practice. Historical and comparative methods were used to determine the development of the system of criminal offences in the field of traffic safety and operation of water transport. The tendency of dependence of the kind of subject of criminal liability on the degree of public danger was discovered by mathematical method.

Presentation logic of research material. Results of the research are presented in general-to-specific order. Firstly, general characteristic of criminal offences in the field of traffic safety and operation of water transport is provided. Secondly, issues regarding general subjects of criminal offences are presented. Finally, special subjects of the mentioned group of criminal offences are researched.

General characteristic of criminal offences in the field of traffic safety and operation of water transport

Section XI of the Special Part of the CC of Ukraine includes 19 articles, and 7 of them relate to traffic safety and operation of water transport (Verkhovna Rada of Ukraine, 2001). It shall be noted, that articles 276 of the CC of Ukraine, 277 of the CC of Ukraine, 278 of the CC of Ukraine, 279 of the CC

of Ukraine, and 280 of the CC of Ukraine provide liability for the violation of rules of traffic safety and operation of different modes of transport, including water, while articles 284 of the CC of Ukraine and 285 of the CC of Ukraine relate to water transport only.

Comparing the list of criminal offences in the field of traffic safety and operation of water transport, contained in the CC of Ukraine, with the list, included into the CC of the USSR as well as in the draft CC of Ukraine, the following shall be noted. Firstly, the CC of Ukraine for the first time provides liability for piracy (article 446 of the CC of Ukraine), which is significant step forward considering its international character.

Meanwhile, the CC of the USSR contained a range of important articles, which were not included into the current law of Ukraine on criminal liability (Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1960). For instance, article 205 of the CC of USSR provided liability for damage to marine telegraph cable. It is notable, that Special Part of the draft CC of Ukraine as of 18 January 2022 includes article 5.4.7. providing liability for damage to submarine cable or pipeline.

Criminal offences, provided by clause 1 of article 276 of the CC of Ukraine, clause 1 of article 279 of the CC of Ukraine, clause 1 of article 280 of the CC of Ukraine, article 284 of the CC of Ukraine, as well as article 285 of the CC of Ukraine, are criminal infractions, and all other criminal offences belong to the category of crimes. Herewith, criminal offences, provided by clause 1 of article 277 of the CC of Ukraine, and clause 2 of article 280 of the CC of Ukraine, belong to minor crimes. Grave crimes include criminal offences, prescribed by clauses 2 and 3 of article 276 of the CC of Ukraine, clause 2 of article 277 of the CC of Ukraine, clauses 1 and 2 of article 278 of the CC of Ukraine, and clause 2 of article 279 of the CC of Ukraine. Especially grave crimes are those provided by clause 3 of article 277 of the CC of Ukraine, clause 3 of article 278 of the CC of Ukraine, clause 3 of article 279 of the CC of Ukraine, as well as clause 3 of article 280 of the CC of Ukraine.

Concluding general characteristic of criminal offences in the field of traffic safety and operation of water transport, it is noteworthy that one of the features of the present category of criminal offences is blanket character of dispositions of the respective articles, which cause the necessity to research and analyze significant volume of legislative acts, such as: international treaties (for instance, International Convention for the Safety of Life at Sea, 1974 (SOLAS 1974); International Convention

for the Prevention of Pollution from Ships, 1973 (MARPOL); International Convention on Standards of Training, Certification and Watchkeeping for Seafarers, 1978 (STCW 1978); United Nations Convention on the Law of the Sea, 1982 (UNCLOS); Convention on the International Regulations for Preventing Collisions at Sea, 1972, (COLREG 1972); national laws (for example, the Merchant Shipping Code of Ukraine; the Laws of Ukraine "On transport", "On Ukrainian Sea Ports", "On Environmental Protection", "On Transportation of Dangerous Cargos", "On Inland Waterway Transport"), as well as subordinate legislation (for example, the Decrees of the Cabinet of Ministers of Ukraine "On Approval of the Rules for the Protection of Inland Waters and the Territorial Sea against Pollution and Clogging" No. 269 dated 29 February 1996; "On Approval of the Procedure for the Elaboration of the Standards of Maximum Permissible Discharge of Pollutants to Water Objects, and the List of Pollutants Discharge of Which to Water Objects is Regulated" No. 1100 dated 11 September 1996; Orders of the Ministry of Infrastructure of Ukraine "On Approval of the Procedure for Determination of the Minimum Vessel's Crew Composition" No. 575 dated 10 November 2014, "On Approval of the Regulation on the Procedure of a Small/Small Size Vessel Navigator Certificate Issue" No. 283 dated 07 May 2013).

As of subject's composition of the above-mentioned criminal offences, generally, Ukrainian and overseas citizens, as well as stateless persons bear liability for the criminal offences, committed within the territory of Ukraine. Moreover, citizens of Ukraine, as well as stateless persons, permanently living in Ukraine, who committed criminal offences abroad, are subjects of criminal liability under the CC of Ukraine, unless otherwise expressly stated in international treaties, approved by the Verkhovna Rada of Ukraine (clause 1 of article 7 of the CC of Ukraine). Hence, taking into consideration the mentioned, this article is useful not only for Ukrainian audience, but also for international community.

3. Characteristic of general subjects of criminal offences in the field of traffic safety and operation of water transport

Considering features of general subjects of criminal infractions in the field of traffic safety and operation of water transport, it may be concluded that criminal infractions, provided by clause 1 of article 279 of the CC of Ukraine, and clause 1 of article 280 of the CC of Ukraine may be committed by a general subject, namely a natural sane person, who has reached the age of criminal liability. Thus, from

all criminal infractions in the mentioned field the quantity of infractions which may be committed by a general subject is 40 %.

As of *general subjects of crimes in the present field*, the following shall be noted. Firstly, attention should be drawn to the circumstance, that crimes prescribed by articles 277 of the CC of Ukraine and 278 of the CC of Ukraine provide liability from the age of 14. Such legislative solution is, obviously, based on the possibility to realize socially dangerous character of the mentioned actions prior to the attainment of the general age of criminal liability.

Clause 1 of article 277 of the CC of Ukraine and clause 2 of article 280 of the CC of Ukraine constitute minor crimes and provide criminal liability of general subjects. Thus, all minor crimes in the field of traffic safety and operation of water transport are committed by general subjects.

With respect to criminal liability of general subjects for grave crimes in the mentioned field, such liability is provided by clause 2 of article 277 of the CC of Ukraine, clauses 1 and 2 of article 278 of the CC of Ukraine, and clause 2 of article 279 of the CC of Ukraine. Thus, from 6 corpus delicti of grave crimes, 4 of them provide liability of general subjects, which is equal to 66.7 %.

It is remarkable fact that especially grave crimes in the field of traffic safety and operation of water transport provide liability for general subjects only, omitting any additional requirements in dispositions. So, all 4 corpus delicti, namely: clause 3 of article 277 of the CC of Ukraine, clause 3 of article 278 of the CC of Ukraine, clause 3 of article 279 of the CC of Ukraine, and clause 3 of article 280 of the CC of Ukraine, provide liability of general subject of a criminal offence.

Therefore, the revealed tendency regarding the increase of a percent of general subjects of criminal offences with the increase of the degree of public danger allows presuming that the legislature thoroughly considered social danger at definition of the subject's composition of criminal offences in the field of traffic safety and operation of water transport.

As to the subject's composition of criminal infractions, it is noteworthy that the majority of infractions with a special subject in the mentioned field are contained in the Code of Ukraine on Administrative Offences (Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1984).

4. Characteristic of special subjects of criminal offences in the field of traffic safety and operation of water transport

In the context of special subjects of criminal offences in the mentioned field the category

of special (professional) sanity is commensurate. It is not fixed in the criminal legislation, however is actively used in the scientific literature. Appearance of this term is connected with the name of M.S. Greenberg, who defined it as an ability of a person to ensure conscientiously-volitional control over own actions in specific, extreme conditions, requiring skills, abilities, experience, and sometimes even inborn abilities for particular activity. L.P. Brych and V.O. Navrotskyi proposed an idea that “a sanity of a special subject of a crime shall be determined not only on the basis of those volitional and intellectual criteria, which shall be used to define a sanity of any person, but taking into consideration additional features, which determine the ability of such person to realize factual and social aspects of the behavior with consideration of additional assigned duties” (Brych, Navrotskyi, 2001, p. 61). Thus, a special (professional) sanity is connected with the peculiarities of realization and operation of actions by persons, whose profession or activity is connected with the necessity to withstand significant psychoemotional and nervous pressures, to make critical decisions within such conditions and short time.

Scientific and technical progress, the development and improvement of transport, including water, require particular changes in understanding and legislative regulation of some issues, connected with a sanity. At the same time, within the contemporary conditions, when all fields of social life are in crises due to COVID-19 pandemic, a great deal of attention is drawn to mental health of “key” professions representatives, including water transport workers. International Maritime Organization (IMO) and the International Transport Workers' Federation (ITF) numerous times expressed their concern regarding the mental health of seafarers, for a long time working on board the vessels due to the impossibility to conduct repatriations in time, caused by the cancelation of flights and borders closing by the majority of countries (Luchenko, Georgiievskiy, 2021, p. 8). The given circumstances led to significant increase of suicide cases, caused by mental disorders due to fatigue. Thus, within such conditions, it has become more difficult to water transport workers, first of all seafarers, to withstand psychoemotional and nervous pressures and make balanced and critical decisions, which, in its turn, lead to increased amount of accidents involving water transport. On 11 March 2021 one of the last tragedies in the Black Sea near the Romanian Port of Constanța happened, namely an accident of the vessel “Volgo Balt 179”, with 13 crew members – citizens of Ukraine onboard, two of them (the

master and the electrician) were not survived. Adverse weather conditions, the age of the vessel (which was built in 1973) and possible violation of the vessel operation rules are among possible causes of the accident (Vozmozhnye prichiny korablekrushenija Volgo-Balt 179 [Possible reasons of Volgo Balt 179 accident], 2021). However, in our opinion, it is obviously that human factor, namely fatigue and increased level of psychoemotional and nervous pressures, also played the part.

Determining criminal liability for particular criminal offences, the legislature narrows down the range of possible subjects. This solution is based on the fact, that some criminal offences may be committed not by every sane person, who has reached the age of criminal liability, but by the persons who perform special functions caused by the character of their profession or occupied position. Corpus delicti of criminal offences, which provide liability of the mentioned persons, are corpus delicti with a special subject. The peculiarity of a special subject is his/her official position or profession (water transport worker, a soldier, an official), demographic data (but not innate features of a person, not psychological qualities, created during the life). Herewith, the recognition of particular categories of persons as special subjects is caused not by their position (the principle of equality excludes unequal liability for similar criminal offences), but by the fact that those persons, due to occupied position, may commit such criminally wrongful acts which cannot be committed by other persons. Corpus delicti with a special subject emphasizes a close relationship between an object, objective side, and a subject of a criminal offence.

Narrowing down the range of liable persons in corpus delicti with a special subject, the legislature usually indicates it in the disposition of an article. Otherwise, the content of an article reveals that a subject of a criminal offence is special.

Nonconformity between the features, characterizing a subject of a criminal offence, with ones, provided by the disposition of an article, excludes liability under the present article. For instance, disposition of article 284 of the CC of Ukraine precisely defines that liability for failure to provide assistance to a vessel or persons in peril may bear only a master of a vessel. Thus, any other person may not be brought to criminal liability on the basis of the mentioned article. Liability of other persons for failure to provide assistance to a person who is in a condition dangerous to life shall arise on the basis of article 136 of the CC of Ukraine.

The mentioned is the evidence that legal significance of general and special features

of a subject of a criminal offence are not equal. The absence of at least one of general features of a subject means the absence of a *corpus delicti*. The features of a special subject are limiting to some extent, since they define that particular criminal offence may be committed not by any person, but by a person with particular features. Thus, persons who do not have such features, may not bear liability under the particular law, since they are not subjects of this criminal offence. Those persons either do not bear criminal liability at all, or are liable for criminal offence, which may be committed by any person, namely a general subject.

Only persons with additional features (special subjects) may be liable for criminal offences, provided by article 276 of the CC of Ukraine, article 284 of the CC of Ukraine, as well as article 285 of the CC of Ukraine. They shall be considered thoroughly.

A subject of the criminal offence, provided by article 276 of the CC of Ukraine, is a railway, water or air transport worker. Currently, there is no legal definition of the term “water transport worker”. N.G. Orlova, who researches peculiarities of the legal regulation of labor relations of water transport workers, proposes wide and narrow approaches to the definition of the mentioned term. Thus, according to the wide approach, “water transport worker” means a natural person, who engages in labor activities at an enterprise, an establishment, an organization, or a structural subdivision in the field of water transport. In accordance with the narrow approach, “water transport worker” means a natural person, who conducts activity on ensuring traffic of vessels on seagoing and river transport (that is to say the person engaged in the main activity of water transport) (Orlova, 2019). While generally agreeing with the proposed definition, we would like to offer one small, but crucial remark, which is that water transport worker means a natural person, who conducts activity on ensuring traffic *safety* and *operation* of water transport.

Notwithstanding the fact that there is no legal definition of the term, the judicial practice in this regard is quite unified. Courts convict navigators of respective vessels being in accident regardless of the presence of written employment agreement, concluded between a navigator and a ship-owner. The fact of the actual work on board the vessel subject to the presence of respective qualification documents is sufficient to declare a respective person to be “water transport worker”.

Within the context of criminal liability for criminal offences, provided by article 276 of the CC of Ukraine, the following two cases shall be analyzed.

On 07 December 2004 the person, who is a citizen of Ukraine, being the master of cargo vessel “G-Lubica”, flying the flag of Serbia, violated the rules of safe navigation of the ship at the territory of the port of Belgrade, which resulted in sinking of the vessel. On 03 September 2010 the case was considered by the court of Ukraine, following which the master was absolved of criminal liability due to the expiration of the term of the prosecution (Izmailskiy District Court of Odesa Region, 2010). This case is a vivid example of the application of the principle of a citizenship.

The following case shows grave effects, which may be caused by violations of the rules of safe navigation and operation of water transport. On 17 October 2015 the boat “Ivolga” (which according to registration documents may place only 12 passengers and 3 crew members) being occupied by 40 passengers put out for fishing during the storm and overturned, which resulted in deaths of 20 passengers and millions of hryvnias of damage. The investigation established violation of 27 rules related to traffic safety and operation of water transport. On 18 October 2019 (four years after the tragedy) the court of the first instance convicted the navigator of the mentioned vessel and sentenced to 9 years of imprisonment (Suvorovskiy District Court of the City of Odesa, 2019). On 03 July 2020 the court of appeal altered the verdict of the previous court as of the punishment and sentenced the convicted to 10 years of imprisonment (Odesa Court of Appeal, 2020). As for material and moral damage, caused to survived passengers and relatives of deceased, the mentioned persons filed claims against the ship-owner (a legal entity, registered in Ukraine) within the criminal proceedings, which were sustained by the court.

Criminal offences, prescribed by articles 284 of the CC of Ukraine and 285 of the CC of Ukraine, may be committed only by masters of respective vessels. Article 58 of the Merchant Shipping Code of Ukraine (hereinafter – MSC of Ukraine) obliges a master to conduct operation of a vessel, including navigation, taking all measures which are necessary to ensure safe navigation, marine pollution prevention, maintaining order on a vessel, prevention any damage to a vessel, persons or cargo on board. Articles 59 of the MSC of Ukraine and 60 of the MSC of Ukraine particularly provide master’s obligations, violations of which lead to liability prescribed by articles 284 of the CC of Ukraine and 285 of the CC of Ukraine. Besides, article 61 of the MSC of Ukraine obliges a master to provide emergency medical care to a person on board a vessel who needs such care, which cannot be provided at sea. In such case a master

is obliged to enter the nearest port, inform the ship-owner, and in case of entry into a foreign port – to inform a consul of Ukraine (Verkhovna Rada of Ukraine, 1995). Failure to perform this duty, entrusted to a master of a vessel, leads to the liability prescribed by article 136 of the CC of Ukraine.

5. Some other criminal offences relating traffic safety and operation of water transport

Besides Section XI, Special Part of the CC of Ukraine contains other criminal offences, which also relate to the present field subject to their additional optional objects include social relations in the field of traffic safety and operation of water transport. Piracy and marine pollution are among them.

Currently, the judicial practice of Ukraine has only one, but meaningful case regarding the prosecution of a person committed piracy. Thus, on 06 September 2021, Shevchenkivskyi District Court of the City of Kyiv considered guilty a person to have committed criminal offences provided by clause 1 of article 446 of the CC of Ukraine; clause 5 of article 27 of the CC of Ukraine, clause 3 of article 358 of the CC of Ukraine; clause 4 of article 358 of the CC of Ukraine, and sentenced him to 5 years of imprisonment without forfeiture of property, and discharged from punishment on probation (Shevchenkivskyi District Court of the City of Kyiv, 2021). A person who is not acquainted with the text of the verdict, may have quite significant doubts regarding the objectiveness and equity of the court. However, upon familiarization with the verdict, the judgement becomes clear. During the trial it was established that on 03 October 2019 Subject_1 concluded a contract with “Alphard Marine Pte. Ltd” according to which this Subject undertakes to provide services on vessel guard at High Risk Area. However, upon Covid-19 spread and lockdown establishment, the ship-owner began to delay payment of wages, did not pay it for the last 5 months. Herewith, all his requests addressed to the employer were ignored. At that time the person was on board unarmed vessel “Grey Palm”, belonging to “Alphard Marine Pte. Ltd”, in inhuman conditions, since the mentioned vessel is equipped for placement of 50 persons, but actually there were approximately 200 persons. People slept on deck and ate rotten meal. Such conditions were unchanged for 2 months. All mentioned has taken him to breaking point. Thus, being driven to despair, at the group of three guardians with weapons, namely Browning Bar Match 308, and ammunition, on 21 July 2020 the Subject_1 boarded on vessel “Jaeger”, flying the flag of Marshall Islands, which was at the Western Indian Ocean region.

At the bridge, the Subject_1 informed a master of the vessel, a citizen of Ukraine, on hijacking the vessel and required to stop movement (“drifting”), clarified the circumstances with unpaid wages by the “Alphard Marine Pte. Ltd” and asked the master to contact the company and informed the situation. Thus, the Subject_1 aimed to attract “Alphard Marine Pte. Ltd” attention and obtain payment of wages.

Subsequently, negotiations with the representatives of the ship-owner lasted till 25 July 2020, when there was agreed to pay remuneration for vessel release in the amount of USD 6,000.00 (which is equal to unpaid wages for 5 months). The mentioned funds were handled by the master to the Subject_1, upon which the latter transferred weapons and ammunition to the master, and on 30 July 2020 boarded on “Golden Palm” vessel, which is used as depot ship and arsenal of “Alphard Marine Pte. Ltd”.

The verdict indicates that civil claim was not filed, and there are not victims within the criminal proceedings. Thus, taking into consideration circumstances which led to the commitment of the criminal offence, provided by clause 1 of article 446 of the CC of Ukraine, the court finds it possible to reform the person without isolation from society.

Obviously, no circumstances may justify actions of a person committed a piracy, however, in our opinion, there are two crucial lessons, that may be learned from this case. Firstly, circumstances, in which seafarers are placed due to Covid-19 pandemic, especially when they are going hand in hand with inhuman treatment by an employer, may significantly involve distortion of lawful conduct of seafarers. Secondly, considering cases, a court shall establish not only the form of the guilt, but motives and aims of a person, committed an offence. As it can be seen, in the particular case namely the motive and aim played the role at the imposition of punishment, since there is almost unprecedented case when a person, committed especially grave crime, is reasonably discharged from punishment on probation!

In respect to the issues of the marine pollution, the following shall be mentioned. Firstly, the attention shall be drawn to the construction of article 243 of the CC of Ukraine. The content of the dispositions of clauses 1 and 2 does not contain any direct references to a special subject, however, sanctions of these clauses provide such additional kind of a punishment, as deprivation of the right to occupy certain positions or engage in certain activities, which in addition to the reference to the special rules provides the opportunity to affirm that liability under the present article may be borne by a special subject. Clause 3 of the present article contains direct reference to the subject, who is

especially responsible persons on seagoing vessels and aircraft or other facilities or constructions, situated at sea.

As regards the judicial practice concerning criminal offences provided by article 243 of the CC of Ukraine, there are few convictions, thus it is quite complicated to establish particular tendencies. However, there is criminal proceeding No. 42020161330000015 dated 06 May 2020 regarding the criminal offence, prescribed by clause 2 of article 243 of the CC of Ukraine. Pre-trial investigation established that on 30 April 2020 at the water area of the commercial seaport "Pivdennyi" the fact of pollution of internal sea waters of Ukraine was established. As a result of unloading operations more than 8 (eight) tones of contaminant (palm oil) were released from the vessel "Stavander", flying the flag of Tuvalu, that caused grave consequences. On 14 May 2020 a prosecutor applied to the court with the motion to arrest the vessel, grounded the arrest by the necessity to protect evidence, to conduct inspection of the vessel as well as sampling of substance, release of which occurred at the water area of the commercial seaport "Pivdennyi". On 15 May 2020 an investigating judge granted the motion and arrested the mentioned vessel, which belongs to the oversea company, registered under the legislation of the Republic of Singapore, by the prohibition to leave the anchorage No. 357, berth No. 12 at the roadstead, without the permission of an investigator or a prosecutor in the case. It is crucial that the judge, granting the motion, "takes into consideration that the master of the mentioned vessel was brought to administrative liability, however simultaneously states that this fact does not exclude the possibility to reveal other guilty person whose actions or inaction caused overflow of containment and pollution of maritime waters during the pre-trial investigation and who further may be brought to criminal liability under clause 2 of article 243 of the CC of Ukraine" (Kominternivskiy District Court of Odesa Region, 2020). In the light of the mentioned two important conclusions may be made. Firstly, the CoAO of Ukraine and the CC of Ukraine are in close cooperation regarding the protection of public relations in the field of traffic safety and operation of water transport, thus thorough examination of legislative acts in this field is crucial for precise

distinction of duties of authorized persons and, respectively, definition of the grounds for administrative and criminal liability. Secondly, as it can be seen, the present proceeding is prime example of the realization of territorial principle of criminal liability.

6. Conclusions

Given the above-mentioned, it can be concluded that the importance of public relations in the field of traffic safety and operation of water transport can be proved by the presence of the distinct XI Section of the Special Part of the CC of Ukraine. Both general and special subjects may bear liability for criminal offences in the present field. Thereby, the reference to a special subject may be contained as at the title (article 285 of the CC of Ukraine), as at the disposition (article 284 of the CC of Ukraine). In any case, determination of features of special subjects of this kind of criminal offences requires research of significant volume of legal acts, regulating public relations in the field of traffic safety and operation of water transport, as well as respective judicial practice and scientific literature.

The following tendency is also noteworthy: criminal infractions in the mentioned field provide liability, as a rule, of special subjects, whereas crimes, majorly, do not contain additional requirements regarding subjects, namely provide liability of general subjects. Discovered tendency is grounded, obviously, on the increased degree of public danger of this category of crimes.

The significance of the category of special (professional) sanity is analyzed on the basis of the examples of special subjects of criminal offences in the field of traffic safety and operation of water transport.

Available scientific approaches to the definition of the term "water transport worker" are analyzed, and it is proposed to define it for the purposes of criminal legislation as a natural person, who conducts activity regarding ensuring traffic *safety* and *operation* of water transport.

Further researches in this field will be connected with the aim, motive and emotions of persons committed criminal offences in the field of traffic safety and operation of water transport.

References:

- Brych, L.P., Navrotskyi, V.O.** (2001). Oznaky posadovoi osoby ta kvalifikatsiia hospodarskykh zlochyniv, vchynenykh neiu [Features of officials and qualification of economic crimes committed by them]. *Kryminalne pravo* – Criminal Law, 1, 61 (in Ukrainian).
- International Maritime Organization** (2021). Circular Letter No. 4204/Add.35/Rev.4 dated 5 February 2021. *The official website of the International Maritime Organization*. Retrieved from <https://bit.ly/3rXhAG4>.
- Izmailskiy District Court of Odesa Region** (2010). Ukhvala u spravi No. 1-454/10 (provadzheniia 1-454/10) vid 03 veresnia 2010 roku [Ruling in the case No. 1-454/10 (proceeding 11-454/10) from 03 Septem-

ber 2010]. *Yedynyi derzhavnyi reiestr sudovykh rishen* [United State Register of Court Decisions]. Retrieved from <https://reyestr.court.gov.ua/Review/49497896> (in Ukrainian).

Kominternivskiy District Court of Odesa Region (2020). Ukhvala u spravi No. 504/1535/20 (provadzhennia 1-кк/504/596/20) vid 04 chervnia 2020 roku [Ruling in the case No. 504/1535/20 (proceeding 1-кк/504/596/20) from 04 June 2020]. *Yedynyi derzhavnyi reiestr sudovykh rishen* [United State Register of Court Decisions]. Retrieved from <https://reyestr.court.gov.ua/Review/89640533> (in Ukrainian).

Kostadinova, R. (2011). Traffic Crimes under Bulgarian Criminal Law. *Acta Universitatis Danubius. Juridica*, 1, 29–36 (in English).

Luchenko, D., Georgievskiy, Iu. (2021). Administrative Restrictions in Ports: Practice of Crew Rotations During COVID-19 Pandemic. *Lex Portus*, 7(3), 7–31. <https://doi.org/10.26886/2524-101X.7.3.2021.1> (in English).

Odesa Court of Appeal (2020). Vyrok u spravi No. 495/2071/16-к (provadzhennia 11-кп/813/1134/20) vid 03 lipnia 2020 roku [Verdict in the case No. 495/2071/16-к (proceeding 11-кп/813/1134/20) from 03 July 2020]. *Yedynyi derzhavnyi reiestr sudovykh rishen – United State Register of Court Decisions*. Retrieved from <https://reyestr.court.gov.ua/Review/90194464> (in Ukrainian).

Orlova, N. (2019). *Osoblyvosti pravovoho rehulivannia trudovykh vidnosyn pratsivnykiv vodnoho transportu* [Features of legal regulation of labor relations of water transport employees]. Retrieved from https://dspace.nlu.edu.ua/bitstream/123456789/16861/1/Orlova_2019.pdf (in Ukrainian).

Shevchenkivskiy district court of the city of Kyiv (2021). Vyrok u spravi No. 761/30085/21 (provadzhennia 1-кп/761/2798/2021) vid 06 veresnia 2021 roku [Verdict in the case No. 761/30085/21 (proceeding 1-кп/761/2798/2021) from 06 September 2021]. *Yedynyi derzhavnyi reiestr sudovykh rishen – United State Register of Court Decisions*. Retrieved from <https://reyestr.court.gov.ua/Review/101863602> (in Ukrainian).

Suvorovskiy District Court of the City of Odesa (2019). Vyrok u spravi No. 495/2071/16-к (provadzhennia 1-кп/523/105/19) vid 18 zhovtnia 2019 roku [Verdict in the case No. 495/2071/16-к (proceeding 1-кп/523/105/19) from 18 October 2019]. *Yedynyi derzhavnyi reiestr sudovykh rishen – United State Register of Court Decisions*. Retrieved from <https://reyestr.court.gov.ua/Review/85034757> (in Ukrainian).

Verkhovna Rada of the Ukrainian Soviet Socialist Republic (1960). Kryminalnyi kodeks Ukrainskoi RSR: Zakon Ukrainy vid 28 hrudnia 1960 roku [The Criminal Code of the Ukrainian SSR: Law of Ukraine of 28 December 1960]. *Vidomosti Verkhovnoi Rady URSSR – Statements of Verkhovna Rada of the USSR*, 2, 14 (in Ukrainian).

Verkhovna Rada of the Ukrainian Soviet Socialist Republic (1984). Kodeks Ukrainy pro administratyvni pravoporushennia: Zakon Ukrainy vid 07 hrudnia 1984 roku No. 8073-X [The Code of Ukraine on Administrative Offences: Law of Ukraine of 07 December 1984 No.8-73-X]. *Vidomosti Verkhovnoi Rady URSSR – Statements of Verkhovna Rada of the USSR*, 51, 1122 (in Ukrainian).

Verkhovna Rada of Ukraine (1995). Kodeks torhovelnoho moreplavstva Ukrainy: Zakon Ukrainy vid 23 travnia 1995 roku No. 176/95-BP [Merchant Shipping Code of Ukraine 1995: Law of Ukraine of 23 May 1995 No. 176/95-BP]. *Vidomosti Verkhovnoi Rady URSSR – Statements of Verkhovna Rada of the USSR*, 47–52, 349 (in Ukrainian).

Verkhovna Rada of Ukraine (2001). Kryminalnyi kodeks Ukrainy: Zakon Ukrainy vid 05 kvitnia 2001 roku No. 2341-III [The Criminal Code of Ukraine: Law of Ukraine of 05 April 1960 No. 2341-III]. *Vidomosti Verkhovnoi Rady URSSR – Statements of Verkhovna Rada of the USSR*, 25, 131 (in Ukrainian).

Vozmozhnye prichiny korablekrusheniya Volgo-Balt 179 [Possible reasons of Volgo Balt 179 accident] (2021). *Assol*. Retrieved from <http://assol.org.ua/2021/03/12/vozmozhnye-prichiny-krusheniya-volgo-balt-179/> (in Russian).

Наталія Мирошниченко,

кандидат юридичних наук, доцент, професор кафедри кримінального права, Національний університет «Одеська юридична академія», вулиця Академічна, 2, Одеса, Україна, індекс 65009, mir.job.2021@gmail.com

ORCID: <https://orcid.org/0000-0003-3693-6815>

Ірина Радковська,

аспірантка кафедри кримінального права, Національний університет «Одеська юридична академія», вулиця Академічна, 2, Одеса, Україна, індекс 65009, radkovskairyna@gmail.com

ORCID: <https://orcid.org/0000-0003-0125-7521>

СУБ'ЄКТИ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ У СФЕРІ БЕЗПЕКИ РУХУ ТА ЕКСПЛУАТАЦІЇ ВОДНОГО ТРАНСПОРТУ

Анотація. Мета статті – дослідження особливостей та різновидів суб'єктів кримінальних правопорушень у сфері безпеки руху та експлуатації водного транспорту, а також встановлення відмінностей у складі та місці даної групи кримінальних правопорушень у чинному Кримінальному

кодекси України (далі – КК України) порівняно із Кримінальним кодексом УРСР 1960 року (далі – КК УРСР) та проектом нового Кримінального кодексу України (далі – проект КК України). **Методи дослідження.** При написанні даної роботи використовувалися методи як класичної, так і неklasичної та постнеklasичної методології. **Результати.** Надано загальну характеристику кримінальних правопорушень у сфері безпеки руху та експлуатації водного транспорту, наявних у чинному КК України. Охарактеризовано загальних суб'єктів кримінальних правопорушень у даній сфері. Проаналізовано особливості спеціальних суб'єктів кримінальних правопорушень. Встановлено, що вказівка на спеціального суб'єкта може міститися як у назві статті (стаття 285 КК України), так і в диспозиції (стаття 284 КК України). Проілюстровано, що встановлення ознак спеціального суб'єкта даної категорії кримінальних правопорушень потребує вивчення значного масиву нормативно-правових актів (міжнародних договорів, законів України та підзаконних актів), які регламентують суспільні відносини у галузі водного транспорту, а також відповідної судової практики та наукової літератури. Досліджено значення категорії спеціальної (професійної) осудності. Окрему увагу приділено питанням кримінальної відповідальності капітана судна як особи, на яку покладено підвищену відповідальність за забезпечення безпеки руху та експлуатації судна. **Висновки.** Встановлено таку тенденцію: за кримінальні проступки передбачена відповідальність, як правило, спеціальних суб'єктів, у той час як склади злочинів, в основному, не ставлять додаткових вимог до суб'єктів, тобто передбачають відповідальність загальних суб'єктів. Виявлена тенденція обґрунтована, очевидно, підвищеним ступенем суспільної небезпечності даної категорії злочинів. Проаналізовано наявні в науці підходи до визначення поняття «працівник водного транспорту» та запропоновано трактувати його для цілей кримінального законодавства як фізичну особу, яка здійснює діяльність із забезпечення безпеки руху та експлуатації суден на водному транспорті.

Ключові слова: загальний суб'єкт кримінального правопорушення, спеціальний суб'єкт кримінального правопорушення, кримінальні правопорушення у сфері безпеки руху та експлуатації водного транспорту, спеціальна (професійна) осудність, працівник водного транспорту, капітан судна.

The article was submitted 14.02.2022

The article was revised 09.03.2022

The article was accepted 29.03.2022

UDC 343.851

DOI <https://doi.org/10.32849/2663-5313/2022.1.14>**Khrystyna Stetska,***External PhD Student at the Department of Criminology and Criminal Executive Law, National Academy of Internal Affairs, 1 Solomianska square, Kyiv, Ukraine, postal code 03035, stetskakristina@gmail.com***ORCID:** orcid.org/0000-0001-9305-2720

Stetska, Khrystyna (2022). Social measures to prevent lucrative violent crimes committed by children. *Entrepreneurship, Economy and Law*, 1, 89–95, doi: <https://doi.org/10.32849/2663-5313/2022.1.14>

SOCIAL MEASURES TO PREVENT LUCRATIVE VIOLENT CRIMES COMMITTED BY CHILDREN

Abstract. Purpose. The purpose of the article is to characterize and formulate the tasks of general social measures to prevent lucrative violent crimes committed by children. **Results.** The article establishes that the general social trend of prevention of lucrative violent crimes committed by children is a purposeful activity of State and non-State structures of society related to identifying, studying, and eliminating the causes of such actions, conditions conducive to their commitment. The actors of these activities are, first and foremost, educational institutions, guardianship and custody authorities, healthcare, employment bodies, cultural institutions, and the mass media. The adoption of the Strategy to combat crime in Ukraine until 2025 and follow-up development of forms and methods of result-oriented approach based on improvement of relevant processes, to significantly expand the range of law enforcement activities and the State Comprehensive Plan for the Prevention of Criminal Offences Committed by Children in Ukraine, which is medium-term and is the basis for the development of regional plans for the prevention of child delinquency. **Conclusions.** It is concluded that the system of measures of general social prevention of lucrative violent crimes committed by children should ensure: to include special sections aimed at concentrating the available forces and means to prevent poverty and unemployment, differentiated approach to the provision of social assistance to low-income families and those temporarily stranded that for objective reasons cannot emerge from the crisis on their own in the socio-economic development programmes of the regions; to provide of guaranteed level of legal, medical, cultural and domestic, etc. services for such families; to establish a network of State family planning centres, to provide socio-psychological assistance to families on the culture of family relations, intergenerational relations; to strengthen work with children and young people who neither work nor study; to maintain existing educational institutions and out-of-school children's institutions, prevention of their re-profiling; to develop and create new types of educational institutions; to establish a system of legal education and training and to involve not only police officers but also lawyers and prosecutors, courts and public and private legal services; to organise full-fledged recreational activities and to make cultural and recreational facilities accessible to families with children, to find the usage of State physical education and sports facilities for purposes other than those intended inadmissible; to restore the network of sports sections and facilities at the place of residence, in educational establishments and in rural areas; to establish medical and social rehabilitation centres for children in the health-care system; to prevent violence against children and to provide assistance to victims of violence.

Key words: child, lucrativity, violence, crime, lucrative violent crime, prevention.

1. Introduction

In modern Ukrainian society, a priority is to minimise and reduce the real level of such socially dangerous phenomenon as crime. This approach to the problem of combating crime in general and its prevention in particular is based on the concept of the integrated use of all the possibilities of society, the State, citizens in the implementation of measures to prevent criminal developments at the national, regional levels and in specific crime situations.

In criminology, general social measures to prevent crime are a set of promising socio-economic and cultural-educational measures aimed

at further development and improvement of social relations and the elimination or neutralization of the causes and conditions of crime (Holina, Holovkin, & Valuiska, 2014, p. 57).

According to O.M. Dzhuzha, this level of crime prevention is characterized by the fact that its components are an integral part of socio-economic development and improvement of the moral, psychological and spiritual spheres of society (Dzhuzha, Vasylevych, & Kolb, 2009, pp. 53–54). At the same time, in V.V. Holina's opinion, the main objectives of this

preventive area are to overcome or limit criminogenically dangerous contradictions in society, to gradually eradicate the negative phenomena known from biblical times and created by political, economic, psychological, ideological and other factors that contribute to the emergence of criminal potential in society (economic and political crises, dangerous material stratification of the population, unjustified, even criminal prevention of certain groups of citizens, unemployment, wage arrears, existence on the verge of survival of an overwhelming part of the population, moral decline, prostitution, drug addiction, alcoholism, homelessness, etc.) (Holina, 2011, p. 19). In turn, O.M. Lytvynov argues that the measures of general social (state) prevention are a set of effective socio-economic, legal, ideological, organizational and managerial, cultural and educational measures to further develop and improve social relations and to eliminate or neutralize the determinants of crime (Lytvynov, 2008, p. 116).

2. Ways to prevent crimes committed by children

General social crime prevention is, first of all, a set of promising socio-economic, cultural and educational measures aimed at further developing and improving social relations and eliminating or neutralizing the causes and conditions of crime. Therefore, a decisive role in the gradual reduction of social contradictions in all sectors of social life plays sound economic, organizational, cultural and educational activities of State bodies, enterprises, institutions, firms and public organizations (Bandurka, Davidenko, 2003, p. 177).

In 2020, the National Security Strategy of Ukraine was adopted (Decree of the President of Ukraine on the National Security Strategy of Ukraine, 2020); it focuses on human and civil rights and freedoms, a new quality of economic, social and human development and integration of Ukraine into the European Union and the creation of conditions for joining NATO. Next, the Law of Ukraine “*On Basic Principles of Youth Policy*” was adopted (Law of Ukraine On Basic Principles of Youth Policy, 2021).

The best solution is to ensure:

- Strengthening the role and responsible attitude of State and local self-government bodies at all levels of government and partner organizations to the implementation of the Program’s objectives, intensifying vertical and horizontal cooperation, exchange of experience between them for self-realization and development of youth potential in Ukraine;

- Raising the level of competence of youth and civil society institutions in the youth sector, development of youth centres, youth work, clubs, scouts, youth and children’s social move-

ments; assistance in the education and development of youth advisory bodies, bodies of student self-government, training of specialists who work with young people, including youth workers;

- Dissemination of existing and introduction of new models for the development, integration and participation of the youth in public life, using digital tools and taking into account the reform of local self-government and territorial organization of power;

- Development of civil society, introduction of civil education at all levels, extension of non-formal and information education;

- Promoting an inclusive approach and equal rights, as well as access to services and opportunities, information for different categories of youth, especially youth with disabilities.

This modality of implementation of the Programme involves the application of conceptually updated approaches and the use of a wide range of innovative mechanisms and tools introduced to work with young people by disseminating the best practices of recent years, implementing the recommendations of Ukrainian and international experts, the youth sector of the Council of Europe, the use of the experience of youth work of the European Union countries, UN recommendations related to supporting young citizens in all fields of life.

Moreover, the focus should be on the approved National Strategy for Reforming the Justice System for Children until 2023 (2018) (Order of the Cabinet of Ministers of Ukraine On approval of the National Strategy for Reforming the Justice System for Children until 2023, 2018) for the prevention of criminal offences committed by children, including lucrative and violent crimes. The Programme sets out a number of measures to prevent delinquency among children, such as: to establish an inter-agency coordination mechanism to prevent delinquency among children, which will include a procedure for information exchange; to agree on tasks for the prevention of delinquency among children between State authorities and local authorities; to develop recommendations for the territorial communities on the need to create such landscapes that contribute to a safe environment and reduce crime; to increase the number of preventive measures in the course of social and economic development programmes aimed at ensuring employment, education, health care, social services, beautification and poverty alleviation; to introduce assessment of the risk of delinquency by children and remedial programmes aimed at addressing the factors contributing to delinquency by children prone to misbehaviour, in difficult living circumstances, etc.

It should be noted that an essential component of social prevention consists of measures to enable citizens to fully exercise their political and personal rights, freedoms and legitimate interests. It is obvious that the dissatisfaction of interests in this sphere as a result prevents the establishment of an atmosphere of stability in the society, civil activity, public trust in the authorities, and readiness to support its efforts to protect the rule of law. At the same time, the success of prevention measures in the social sector is the most effective way to establish and maintain cooperation between the authorities and the population in the prevention, detection and suppression of crime.

At the same time, the absence of a unified national concept for the prevention of criminal offences, the lack of coordination between the national, regional and sectoral State targeted social prevention programmes in the relevant areas do not contribute to the prevention of lucrative and violent crime in the country. This situation is not in keeping with the constitutional provisions on a social, democratic and legal State, since the situation does not take into account the realities of today, because the fight against crime has long become a global problem which is not only national but also international, transnational (Verbenskyi, 2009, p. 7).

3. Current status of State programmes to prevent crimes committed by children

To date, the key to effective combating of crime in the State, countering external and internal threats that can affect the crime situation, raising children and young people depends on the quality programming of this activity at all levels. Therefore, development of a *State comprehensive programme to combat crime* is crucial, which, as of 2021, has not yet been developed.

Unfortunately, today there are no good reasons to emphasize significant changes in this field. The above analysis reveals that the policy documents reflecting public policy on combating crime have been mostly declarative, in some cases there is still a formalism of their implementation, however, the absence of a medium-term State comprehensive programme to combat crime is a significant problem. The increasing use of the result-oriented approach in crime prevention is indicative of a trend towards a change in the established scientific paradigm and towards a more substantive and effective form of knowledge on crime prevention programming (Tytarenko, 2019).

At the same time, the absence of such a programme is due to many economic, social, political, legal and other specificities and contradictions in the development of market rela-

tions in the country: the criminal justice system has not been completed; law enforcement bodies are being reformed; national legislation is being further developed; State institutions are being introduced to meet the best European and world standards in this field of public relations. Its absence also removes from the Government the obligation to report on the work done in this field, and this deprives the Verkhovna Rada of Ukraine, the President of Ukraine and the people of Ukraine, as the only source of power, of the opportunity to assess the work of the highest executive body in matters of organization, coordination and control regarding crime prevention. To a certain extent, one can speak of ineffective organization of public policy on crime prevention, and, consequently, the failure of State bodies to fulfil their obligations under the Constitution of Ukraine to protect the highest social value - the human being, his life and health, honour and dignity, inviolability and security (Svitlychna, 2019, pp. 8–9).

Youth programmes to prevent lucrative and violent crime among youth should cover three levels of formation and implementation: 1) General social prevention measures; 2) Improvement of the legal mechanism for the prevention of lucrative and violent crimes among young people and implementation of public policy on the youth in this field; 3) Special criminological measures to prevent lucrative and violent crimes.

The measures of the youth programme on the prevention of lucrative and violent crime among youth should be aimed at overcoming the objective and subjective causes of crime among youth. These are:

Factors shaping the personality of the young offender (family dysfunction, asocial environment, deficiencies in moral and legal education, criminal influence on adolescents by informal youth groups, involvement of minors in criminal activity by adults with criminal experience, difficulties in vocational training and employment, etc.);

Circumstances conducive to youth crime (inadequate protection of material assets, organizational shortcomings that help persons with established anti-social orientation to realize criminal intentions, victimization behaviour of the victim of crime, etc.) (Ianytska, 1998, p. 104; Holovkin, 2011, pp. 310-311);

Increasing the material, economic and psychological dependence of young people on society and parents, and the difficulty of acquiring the status of an independent autonomous person, that is, of attaining the status of adulthood;

Motivation for the commission of a crime (mental state of the person, his or her views

and attitudes, needs and value orientations, which were formed under the influence of preliminary objective reasons);

Low level of legal awareness and legal culture among young people;

Lack of visible social advancement and social status growth, insufficient incentives for continuing education.

Measures for the social prevention of crimes among young people are not aimed at immediate prevention but help to eliminate the objective causes of crime among young people and to reduce the overall level of crime.

General social measures for the prevention of crimes from the Youth Crime Prevention Programme are: 1) development of social and economic development programmes for specific categories of youth (for example, rural youth, "street children", etc.); 2) provision of social assistance to low-income families, targeted approach to ensuring the subsistence minimum income of families, observance of social guarantees and benefits established by legislation; 3) preservation of educational institutions, creation of new types of educational institutions for children of all ages, organization of their leisure time; 4) restoration of the network of sports clubs and sections at the place of residence, education in rural areas; 5) establishment of various advisory centres for young people, provision of psycho-correctional assistance to adolescents and their family members to resolve family conflicts (Ianytska, 2000, p. 142); 6) creation of a system to increase youth employment; 7) creation and implementation of public service announcements at the State level; 8) provision of financial support to youth and children's public organizations and the implementation of State-wide programmes and measures for children and young people; 9) implementation of public policy, aimed at overcoming children's neglect and homelessness; 10) identification and development of children's creative and intellectual abilities and the organization of their meaningful leisure time, etc.

Measures to improve the legal mechanism for the prevention of crimes among young people and the implementation of the State's youth policy in this field are: 1) improvement of legislation on the prosecution of juveniles not only for crimes, but also for administrative, disciplinary and civil offences (for example: the use of various types of community service aimed at correcting the harm caused by the unlawful actions of young people); 2) round tables with representatives of youth organizations in the course of formation of youth crime prevention programmes; 3) involvement of not only law enforcement bodies, but also public organizations in the implementation of measures

(including children and youth ones), the wide involvement of citizens (for example, in public patrolling in situational prevention of crime among youth); 4) introduction of subjects on legal education into the general education programme; 5) involvement of local executive authorities and local self-government in the measure of prevention, etc.

The typical model of a youth crime prevention programme is characterized by a strong link between the legal system of crime prevention and the realms of the extra-legal system and a balance between social and situational crime prevention.

The development and implementation of a targeted comprehensive education programme will help to fundamentally influence the solution of the problem of forming a positive legal awareness of citizens, since information provided in the right manner through journalism, analysis of specific court cases, statistics and materials, specific criminological research, consultations and televised messages can have a social impact.

The development of a legal framework to monitor the behaviour of those categories of persons who belong in one way or another to potential risk groups, and the prevention of such activities is a sufficiently effective measure to combat crime. At present, the risk group includes: persons who are without permanent sources of income for a long time; unemployed; those who systematic abuse alcohol and drugs; convicted, those of immoral or illegal lifestyle and others.

To date, the real steps of general social prevention are:

1) Adoption of the *Strategy to combat crime in Ukraine until 2025* and follow-up development of forms and methods of result-oriented approach based on improvement of relevant processes, to significantly expand the range of law enforcement activities.

There are some prerequisites for the development of such a Strategy to combat crime in Ukraine, but it requires: criminological forecasting of the state of crime in Ukraine, taking into account possible national threats, for the next 5-10 years (Law of Ukraine On State Forecasting and Development of Economic and Social Development Programs of Ukraine, 2000); integration of the strategic framework for crime prevention, strategy or criminological policy in law enforcement with the tactical framework for crime prevention that should be provided by this document; provision of real resources for the Strategy rather than general annual funding from the State budget for relevant crime prevention entities; public expertise on the draft Strategy; periodic (milestone) monitoring

of the implementation of the Strategy; exclusion of declarative character of the Strategy and its formation under “ambitions” of individual political forces (Tytarenko, 2012, pp. 375-376).

2) *Adoption of a State comprehensive plan for the prevention of criminal offences committed by children in Ukraine.* The specificity of the plan is that: it is a medium-term plan, since it will be adopted for a period of five years; it will serve as a basis for the development of regional crime prevention plans; the development of the plan should involve, in addition to law enforcement officials, psychologists, teachers, specialists in crime prevention theory, criminologists, juvenile scientists, victimologists and other experts whose knowledge will allow a qualitative change in the existing models of such documents, as well as contribute to the achievement of the objective of the Plan; unlike the Strategy, this document should not contain measures generally formulated, tasks with declarative tone such as “to improve”, “to advance”, “to promote”, “to provide”, etc.; the State Plan for the Prevention of Child Delinquency as a guide to the tactics of preventing certain types of crime and reducing the criminogenic impact of various negative social phenomena at the State level, should contain concrete and doable measures; it should provide for the possibility of introducing changes and additions depending on changes in the crime situation in the State, on the basis of which the forces and means of prevention of certain types of crime will be adjusted.

Criminological analysis of the legal framework for the prevention of crime by children at the national level during the period of Ukraine’s independence shows that an important stage in the development of approaches to preventing crime by children is activities of the State and its social institutions, aimed at an enabling environment for children, in which dignified development and protection of their rights are ensured in accordance with the principles of democracy, equality and social justice, taking into account the moral foundations and traditional values of Ukrainian society, aimed at strengthening the family and the moral health of children in Ukraine.

4. Conclusions

Therefore, the system of measures of general social prevention of lucrative violent crimes committed by children should ensure: to include special sections aimed at concentrating the available forces and means to prevent poverty and unemployment, differentiated approach to the provision of social assistance to low-income families and those temporarily stranded that for objective reasons cannot emerge from the crisis on their own (loss of breadwinner, forced relocation, etc.) in the socio-economic development programmes of the regions (oblasts, districts); to provide of guaranteed level of legal, medical, cultural and domestic, etc. services for such families; to establish a network of State family planning centres, to provide socio-psychological assistance to families on the culture of family relations, intergenerational relations; to strengthen work with children and young people who neither work nor study; to maintain existing educational institutions and out-of-school children’s institutions (both State and municipal), prevention of their re-profiling; to develop and create new types of educational institutions; to establish a system of legal education and training and to involve not only police officers but also lawyers and prosecutors, courts and public and private legal services; to organise full-fledged recreational activities and to make cultural and recreational facilities accessible to families with children (theatres, cinemas, concert halls, summer recreation bases, sports and recreation camps, etc.), to find the usage of State physical education and sports facilities for purposes other than those intended inadmissible; to restore the network of sports sections and facilities at the place of residence, in educational establishments and in rural areas; to establish medical and social rehabilitation centres for children in the health-care system; to prevent violence against children and to provide assistance to victims of violence; to provide social protection and assistance (financial, legal, psychological) to children who have lost their family or are left without care (street children, vagrants, lost, abandoned), who are in extreme psychological and material conditions.

References:

- Bandurka, A.M., Davidenko, L.M.** (2003). *Prestupnost v Ukraine: prichiny i protivodeistvie [Crime in Ukraine: causes and counteraction]*. Kharkov : Osnova (in Russian).
- Dzhuzha, O.M., Vasylevych, V.V., & Kolb, O.H.** (2009). *Kryminolohiia [Criminology]*. Kyiv: Pretsedent (in Ukrainian).
- Holina, V.V.** (2011). *Zapobihannia zlochynnosti (teoriia i praktyka) [Crime prevention (theory and practice)]*. Kharkiv : Nats. yuryd. akad. Ukrainy (in Ukrainian).
- Holina, V.V., Holovkin, B.M., & Valuiska M.Iu.** (2014). *Kryminolohiia [Criminology]*. Kharkiv : Pravo (in Ukrainian).
- Holovkin, B.M.** (2011). *Koryslyva nasylnytska zlochynnist v Ukraini: fenomen, determinatsiia, zapobihannia [Selfish violent crime in Ukraine: phenomenon, determination, prevention]*. Kharkiv: Pravo (in Ukrainian).

Ianytska, N.V. (1998). Napriamy borotby z pravoporushenniamy molodi [Areas of combating youth crime]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav Ukrainy - Scientific Bulletin of the National Academy of Internal Affairs of Ukraine*, 3, pp. 103–107 (in Ukrainian).

Ianytska, N.V. (2000). Hrupova koryslyvo-nasylnytska zlochynnist molodi ta yii poperedzhennia [Group selfish and violent crime of youth and its prevention]. *Candidate's thesis*. Kyiv (in Ukrainian).

Lytvynov, O.M. (2008). Zahalnosotsialnyi vektor u mekhanizmi protydii zlochynnosti ta factory, shcho yoho obumovliuiut [General social vector in the mechanism of combating crime and the factors that determine it]. *Visnyk Kharkivskoho natsionalnoho universytetu vnutrishnikh sprav - Bulletin of Kharkiv National University of Internal Affairs*, 41, 111–117 (in Ukrainian).

Rozporiadzhennia Kabinetu Ministriv Ukrainy Pro skhvalennia Natsionalnoi stratehii reformuvannia systemy yustyttsii shchodo ditei na period do 2023 roku: pryniatie 18 hrud. 2018 roku № 1027-p [Order of the Cabinet of Ministers of Ukraine On approval of the National Strategy for Reforming the Justice System for Children until 2023 from December 18 2018, № 1027-p]. *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1027-2018-p#Text> (in Ukrainian).

Svitlychna, Yu.O. (2019). Stan i perspektyvy prohramuvannia u sferi protydii zlochynnosti [Status and prospects of crime prevention programming]. Proceedings of the International Conference: *Mizhnarodna nauko-vo-praktychna konferentsiia «Criminal and criminological means of counteracting crimes against public safety and public order» - International Scientific and Practical Conference «Criminal and criminological means of counteracting crimes against public safety and public order»* (pp. 8–9). Kharkiv : KhNUVS (in Ukrainian).

Tytarenko, O.O. (2012). Peredumovy formuvannia derzhavnoi kompleksnoi prohramy protydii zlochynnosti v Ukraini. *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav - Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs*, 4, 370–377 (in Ukrainian).

Tytarenko, O.O. (2019). *Derzhavne prohramuvannia protydii zlochynnosti v Ukraini [State programming of crime prevention in Ukraine]*. Kharkiv : Promart (in Ukrainian).

Ukaz Prezydenta Ukrainy Pro Stratehiu natsionalnoi bezpeky Ukrainy : vid 14 veres. 2020 roku № 392/2020 [Decree of the President of Ukraine on the National Security Strategy of Ukraine from September 14 2020, № 392/2020]. (2020). *president.gov.ua*. Retrieved from <https://www.president.gov.ua/documents/3922020-35037> (in Ukrainian).

Verbenskyi, M.H. (2009). *Transnatsionalna zlochynnist [Transnational crime]*. Dnipropetrovsk: Dnipropetr. derzh. un-t vnutr. sprav; Lira LTD (in Ukrainian).

Zakon Ukrainy Pro osnovni zasady molodizhnoi polityky: pryiniaty 27 berez. 2021 roku № 1414-IX [Law of Ukraine On Basic Principles of Youth Policy from April 27 2021, № 1414-IX]. *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1414-20#Text> (in Ukrainian).

Zakon Ukrainy Pro derzhavne prohnozuvannia ta rozroblennia prohram ekonomichnoho i sotsialnoho rozvytku Ukrainy: pryiniaty 23 berez. 2000 roku № 1602-III [Law of Ukraine On State Forecasting and Development of Economic and Social Development Programs of Ukraine from March 23 2000, № 1602-III]. *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/1602-14#Text> (in Ukrainian).

Христина Стецька,

здобувач кафедри кримінології та кримінально-виконавчого права, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, stetskakristina@gmail.com
ORCID: orcid.org/0000-0001-9305-2720

ЗАГАЛЬНОСОЦІАЛЬНІ ЗАХОДИ ЗАПОБІГАННЯ КОРИСЛИВИМ НАСИЛЬНИЦЬКИМ ЗЛОЧИНАМ, ЩО ВЧИНЯЮТЬСЯ ДІТЬМИ

Анотація. Мета. Метою статті є охарактеризувати та сформулювати завдання загальносоціальних заходів запобігання корисливим насильницьким злочинам, що вчиняються дітьми. **Результати.** У статті з'ясовано, що загальносоціальний напрям запобігання корисливим насильницьким злочинам, що вчиняються дітьми, є цілеспрямованою діяльністю державних і недержавних структур суспільства з виявлення, вивчення та усунення причин таких діянь, умов, що сприяють їх вчиненню. Суб'єктами цієї діяльності, насамперед, є заклади освіти, органи опіки та піклування, органи охорони здоров'я, зайнятості населення, установи культури, засоби масової інформації. У рамках загальносоціального запобігання корисливим насильницьким злочинам, що вчиняються дітьми запропоновано прийняття Стратегії боротьби зі злочинністю в Україні до 2025 року та подальший розвиток форм і методів програмно-цільового підходу на основі удосконалення відповідних процесів, аби суттєво розширити арсенал правоохоронної діяльності та Державного комплексного плану запобігання кримінальним правопорушенням що вчиняються дітьми в Україні, який характеризується середньостроковістю й є основою розробки регіональних планів запобігання злочинності дітей. **Висновки.** Зроблено висновок, що система заходів загальносоціального запобігання корисливій насильницькій злочинності дітей повинна забезпечувати: передбачення у програмах соціально-

економічного розвитку регіонів спеціальних розділів, спрямованих на концентрацію наявних сил і засобів щодо запобігання бідності та безробіттю, диференційований підхід до надання соціальної допомоги малозабезпеченим сім'ям і таким, які тимчасово опинилися у скрутному становищі та з об'єктивних причин не можуть вийти з кризи власними силами; забезпечення гарантованого рівня правового, медичного, культурно-побутового та ін. обслуговування таких сімей; створення мережі державних центрів планування сім'ї, надання соціально-психологічної допомоги сім'ям щодо культури сімейних стосунків, взаємовідносин різних поколінь; посилення роботи з дітьми та молоддю, яка не працює і не навчається; збереження існуючих закладів освіти та дитячих позашкільних закладів, недопущення їх перепрофілювання; розвиток і створення нових типів навчально-виховних закладів; створення системи правового навчання і виховання та залучення до цієї роботи не лише працівників міліції, й адвокатури та прокуратури, суду, державних та приватних юридичних служб; організацію повноцінного дозвілля, доступність закладів культури та відпочинку для сімей з дітьми, недопустимість використання державних об'єктів фізкультури і спорту не за прямим призначенням; відновлення мережі спортивних секцій та споруд за місцем проживання, у навчальних закладах, у сільській місцевості; створення центрів медико-соціальної реабілітації для дітей у системі органів охорони здоров'я, організацію профілактики насильства над дітьми та надання допомоги постраждалим від насильства.

Ключові слова: дитина, користь, насильство, злочин, корислива насильницька злочинність, запобігання.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 343.985

DOI <https://doi.org/10.32849/2663-5313/2022.1.15>**Vladyslav Nehrebetskyi,***Ph. D. in Law, Associate Professor at the Department of Criminalistics, Yaroslav Mudryi National Law University, 84, Pushkinska street, Kharkiv, Ukraine, postal code 61024, vladislavnegrebetsky@gmail.com***ORCID:** orcid.org/0000-0003-0478-6533

Nehrebetskyi, Vladyslav (2022). Tactical and psychological bases of neutralization of counteraction to the investigation of a criminal offense during an investigative experiment. *Entrepreneurship, Economy and Law*, 1, 96–100, doi: <https://doi.org/10.32849/2663-5313/2022.1.15>

TACTICAL AND PSYCHOLOGICAL BASES OF NEUTRALIZATION OF COUNTERACTION TO THE INVESTIGATION OF A CRIMINAL OFFENSE DURING AN INVESTIGATIVE EXPERIMENT

Abstract. The purpose of the article is to develop tactical and psychological bases for meeting the suspect's opposition, incl. false testimony, while conducting an investigative experiment and elaborating tactical recommendations for overcoming such opposition. **Research methods.** The work is based on general scientific and special methods of scientific knowledge. **Results.** The behavior of a suspect during an investigative experiment on checking his testimony at the scene is subject to the laws of psychology. A significant factor determining the behavior of a suspect is the psychological impact of the environment. The latter can cause changes in the suspect's behavior, both positive and negative. Personal presence at the crime scene results in strong emotional feelings in the suspect that can complicate and even make it impossible to continue the investigative (search) action. The paper studies the refusal of a suspect to participate in the verification of testimony at the crime scene as well as former testimony at various stages of the investigative (search) activity. The risk of refusal exists both before starting the investigative action and in the course of its implementation.

Conclusions. The author draws attention to the fact that the participation of a suspect in an investigative experiment must be voluntary. Therefore, the effectiveness of an investigative (search) action depends on the suspect's position, his desire to take part in demonstration actions, and give explanations. The paper focuses on the role of the protective dominant as a factor that significantly affects the suspect's behavior. The protective dominant determines the features driving the suspect's behavior when verifying his testimony at the crime scene, among which the author highlights the mental state. During the investigative experiment, the suspect may have various mental states: fear, frustration, stress, and so on. In this regard, it is advisable to opt for observing the suspect's behavior. To reduce the risk that the suspect will refuse to participate in the investigative action, it is proposed to conduct an investigative experiment and verify testimony at the crime scene immediately after receiving it.

Key words: counteraction, investigative action, verification of testimony at crime scene, mental state, protective dominant, self-incrimination, psychological impact.

1. Introduction

The priority tasks of criminal proceedings are to improve the efficiency of investigating criminal offenses. At the same time, modern crime takes more dangerous organized forms. Thus, there is a problem of combating counteraction from persons who try to hinder the investigator in solving the investigation tasks.

One of the ways to meet the opposition to the investigation is to reveal false testimony. The modern stage of the evolution of criminalistics is characterized by the transition from the study of counteraction to the investigation as a phenomenon to the creation of a system

of methods, techniques, and means for overcoming and neutralizing it. The latter is the subject matter of investigative tactics. According to Prof. V. Yu. Shepitko, one of the areas of counteraction tactics is tactical means of meeting perjuries and exposing false testimony (Shepitko (2010), p. 167; Shepitko (2021), p. 180; Shepitko (2020), p. 177).

One of the effective procedural ways of exposing false testimony is an investigative experiment, in particular, in the form of checking the suspect's testimony at the crime scene. In the practice of investigation, there often arises the need to check information or

the investigative version based on the evidence. An investigative experiment belongs to a group of so-called “check” investigative actions. The verification of testimony at the scene is a specific kind of investigative experiment. On-scene verification is the process of comparing information obtained during interrogation and (or) ideal traces of memory with the tangible ambience of the crime scene through the narrative, demonstration, and explanations of the person whose testimony is being verified to reveal his awareness of the data being verified or refined, as well as to hold new factual data.

The feasibility of using the patterns of the suspect's behavior when conducting an investigative experiment to overcome counteraction to the investigation remains poorly studied. Some literary sources have only dealt with individual psychological aspects of the investigative (search) action. At the same time, the problem under consideration has been highly analyzed in terms of interrogation, face-to-face confrontation, and search (Large Ukrainian legal encyclopedia, p. 689-692).

2. Psychological patterns of the suspect's behavior

The participation of the suspect in an investigative experiment must be voluntary. Therefore, the effectiveness of an investigative action largely depends on the suspect's position and his desire to participate in the verification of testimony at the scene. The psychology of the suspect can be used to: 1) diagnose his position, 2) predict his behavior, 3) choose the appropriate psychological impact, and 4) evaluate the information received.

The factors affecting the formation of the suspect's position and his behavior should be taken into account. The psychological literature singles out the following: a) the suspect's mental state; b) motives that guide him in performing certain actions; c) unfavorable conditions for the suspect due to his evident role in crime commission; d) influence on the suspect by others (Ratinov (1967), pp. 196–217, 272–285; Glazyrin (1983) p. 293–299).

The suspect's mental state is characterized by the supremacy of a defensive (protective) dominant. In psychology, a dominant means the temporarily predominant reflection system, which determines the work of nerve centers at the moment and thereby takes a bearing of behavior. The defensive dominant determines the focus of the suspect's mental activity and forms special mechanisms of his psychological protection. Psychological literature interprets psychological protection as a specific regulatory system of personality stabilization aimed at eliminating or minimizing anxiety associated with conflict consciousness

(Large Ukrainian legal encyclopedia, p. 321). According to the author, when checking testimony at the scene, one should regard the possible influence of the psychological mechanism of repression. Repression refers to neutralization, non-acceptance, and rejection of information that contradicts some personally significant attitudes of the subject. Thus, there are particular requirements for the communication form between the investigator and the suspect while checking testimony at the scene. V.L. Vasyliiev believes that regardless of the severity of the committed crime, the investigator is obliged to treat the suspect as an individual equal to other participants in the investigative action. It is inadmissible for the investigator to express irritation, contempt for the suspect, skeptical remarks, etc. No matter how audacious the suspect may be, the investigator must remain restrained and balanced (Vasil 'ev (2000), p. 472–473).

The protective dominant identifies the features driving the suspect's behavior when checking his testimony at the scene, namely: 1) his mental state; 2) his desire to avoid responsibility; 3) interest in the investigation course; 4) the suspect's tendency to exaggerate the investigator's informational “armament”; 5) the tendency to adapt his justifying position (Glazyrin (1983), p. 293–299). Psychological literature highlights the need to take into account the mental state of the person whose testimony is being checked (Ratinov, Efimova (1988), pp. 15–20). A mental state is a holistic characteristic of mental activity stable over a specific time segment, which conveys the peculiarity of mental processes depending on the reflection of reality, previous condition, and mental properties of an individual (Large Ukrainian legal encyclopedia, p. 781).

During an investigative experiment, there is a wide amplitude of mental states. The suspect may feel, for instance, fear, frustration, stress, etc. (Ratinov, Efimova (1988), p. 15–20). It is worth mentioning that the suspect's mental state may affect his refusal to participate in checking testimony at the scene or of former testimony. Psychological literature interprets fear as a negative mental state that occurs under circumstances when an individual has a motive and a conscious goal to quit the situation associated with the influence of an external stimulus but is forced to get into it for external reasons (Large Ukrainian legal encyclopedia, p. 784). In checking testimony at the scene, both a person involved and not involved in the crime commission may experience fear. Fear not only shackles memory but also hampers the entire human psyche and intellectual activity. It can suppress the will, moral self-control and critical abilities,

prevent the correct assessment of the situation, make a person more inclined to undesirable influences. In verifying testimony at the scene, it is possible to diagnose a mental state, which, in the author's opinion, is relevant.

During the verification of testimony at the scene, a person who repeatedly visits the crime scene is subject to the psychological impact of the surrounding environment (Konovalova (1997), p. 110–115). Consequently, he may have a specific change in his mental state when perceiving the places which keep evidence exposing him. Psychological literature always highlights the need to monitor the suspect's behavior when checking testimony at the scene (Glazyrin (1983), p. 134). In particular, it is about such features of an external manifestation of the state as confidence in the choice of movement direction, the display of objects, a sudden change in the movement direction, speed, stop, etc. The significance of the observation method in the testimony's verification at the scene resides in the fact that it allows the investigator to effectively control the suspect's behavior and maintain an optimal mode of communication, contributes to the choice of appropriate tactical techniques and their systems. Observation helps to identify the suspect's position, reveal whether he conceals information crucial to the investigation. Thus, in terms of conducting the investigative action, the observation method assists the investigator in finding material evidence. There are known cases in investigative practice when observation facilitated to find material evidence the location of which the suspects tried to hide from the investigation while checking testimony at the scene (Drobyniak (2000), pp. 12 (24%))

The protective dominant makes the perpetrator seek to carry out specific actions which, according to his calculations, should help him to avoid exposing the crime and hence evade responsibility (Ratinov (1967), p. 196). This can explain the suspect's refusal to participate in the testimony's verification at the scene and provision of false testimony during the interrogation.

The defensive dominant and the mechanism of psychological protection can be inherent not only in a guilty person also innocent who wants to defend himself from an unfair accusation (Ratinov (1967), p. 199). Therefore, in the psychological context, the verification of the suspect's testimony cannot be reduced to creating any artificial barriers for him, psychological restrictions for refusing from pretrial testimony given during the interrogation. It is also inadmissible to conduct the investigative action for the psychological fixation of the suspect on the testimony that is true in the investigator's opinion.

3. Tactical bases for overcoming the suspect's opposition during an investigative experiment

The investigative practice pays special attention to the fact that suspects tend to change their positions and adapt their justifying position as evidence is presented (Drobyniak (2000), p. 20). Therefore, in verifying the suspect's testimony, the tactics of the investigative action should be primarily aimed at detailing testimony, clarifying its interrelation with the situation and then eliminating contradictions, if they occurred. Such a tactic allows disposing of the untruth in the testimony of the interrogated person gradually and purposefully.

External influence is among the factors affecting the suspect's position (Vasil'ev (2000), p. 29). The considered factor is quite essential when conducting an investigative experiment. No influence on the suspect should be a prerequisite determining the reliability of findings of the investigative action. Thus, before checking testimony at the scene and in the process of its conducting, it is necessary to take measures to prevent the suspect from contacts with unauthorized persons. If there is any suspicion of the latter, the testimony's verification must be carried out immediately.

In the process of analyzing the position of the suspect during the investigative action under study, it is important to keep in mind specific motives for his consent to participate in the verification of testimony at the scene. Psychological literature distinguishes the following: fear of social condemnation, shame of realizing the immorality and illegality of own act, fear of revenge from interested persons, fear of consequences for the suspect's loved ones or separation from them (Ratinov (1967), p. 202). F.V. Glazyrin believes that even in the case of a pronounced readiness of the suspect to participate in the verification of testimony at the scene, it is worthwhile to puzzle out the true motives of such consent in detail (Glazyrin (1983), p. 31).

In the practice of law enforcement agencies, there are cases when suspects, having declared their consent to participate in the verification of testimony at the scene, in the course of the investigative action, show completely different places that are not related to the crime (Drobyniak (2000), pp. 20–24). Consequently, the awareness of the motives guiding the suspect allows the investigator to timely influence the latter in such a way that he changes his false position.

The suspect can also can also pursue the motive to check the reliability of concealment of crime traces and circumstances that may expose him. The investigative practice has

cases when persons suspected of committing particularly serious crimes agreed to check testimony at the scene to try escaping from custody during the investigative action or using the help of their accomplices (Ratinov, Efimova (1988), p. 132). Thus, when checking testimony at the scene, it is necessary to take measures towards the suspect's protection and ensure the safety of all participants in the investigative action.

There is a risk that the suspect may refuse to participate in the verification of testimony at the scene or quit his former testimony. Forensic literature has recommendations for reducing the risk of the suspect's refusal to participate in the investigative action. In addition, some authors propose to check testimony at the scene immediately after obtaining the consent of the interrogated person to take part in it. The timely verification of testimony at the scene is also recommended by investigative practitioners and follows from the analysis of investigative practice (Drobyniak (2000), p. 23; Verdict of the Ivanovo District Court of the Kherson region (2021)). Other recommendations were also offered: establishing and maintaining psychological contact with the suspect by the investigator, considering the motives that guided him while expressing the consent to take part in the verification of testimony at the scene, applying the method of reflective management (Vasil 'ev (2000), p. 472; Glazyrin (1983), pp. 132–133).

In order to reduce the risk of the suspect's refusal to participate in the investigative action or quitting former testimony, it is essential to check it at the scene after receipt. This requirement-recommendation is driven by the fact that the delay in verifying the suspect's testimony at the crime scene makes it impossible to verify the existing and obtain new evidence.

The risk of the suspect's refusal to participate in the verification of testimony at the crime scene also exists during its conduct. The psychological impact of the situation may be the reason for the suspect's refusal to keep participating in the verification of testimony at the scene (Note that forensic literature mainly marks the positive effect of the situation on the interrogated person, who visits the crime scene for a second time (Konovalova (1997), pp. 114–115). In the author's opinion, the perception of the crime scene or its individ-

ual episodes and the narrative of the crime assist the suspect in recollecting not only the circumstances of the event but also the emotions that prevailed in his psyche at the time under study. Therefore, personal presence at the crime scene triggers strong emotions in the suspect, which can complicate and even make it impossible to continue the investigative action. The psychological impact of the scene is a relevant factor that affects the person whose testimony is being verified.

The suspect's struggle of opposite motives to participate in the verification of testimony at the scene and their reorientation may take place both in the process of preparation for the investigative action and during its conduct. For this very reason, throughout the verification of testimony at the scene, the investigator must take measures aimed at maintaining the suspect's positive motives for participation in the investigative action. The interaction between the investigator and the suspect in verifying testimony at the scene is characterized by the need for constant control over the behavior of the latter.

4. Conclusions. The investigative experiment to verify the suspect's testimony at the scene is marked by the possibility of opposition in the form of false testimony. The investigative (search) action has the following features: 1) complex psychological relationship between the investigator and the suspect; 2) the ability of the investigator to psychologically influence the suspect to obtain the necessary information; 3) the conditionality of the suspect's position and behavior due to the interrogation that preceded testimony verification; 4) mutual reflection between the investigator and the suspect; 5) the possibility of the suspect's effect on the process of obtaining information. The investigator should use the psychology of the suspect while checking his testimony at the scene to overcome opposition of the latter. A thorough examination of the suspect's identity by the investigator is a compulsory condition. When conducting the investigative action, it is worthwhile to pay regard to all factors that somewhat affect the position and behavior of the suspect. To reduce the risk of the suspect's refusal to participate in the investigative (search) action and quitting former testimony, the investigative experiment must be conducted immediately after interrogation.

References:

- Drobyniak M.K.** (2000). Vid Kyieva do Leshno internatsionalnym vbyvtsiam – mizhnarodnyi sud [From Kiev to Lesno international murderers-the International Court of Justice]. *Investigative practice of Ukraine. Based on the experience of investigative work of the prosecutor's office*, no.2, pp. 12–24 (in Ukrainian).
- Glazyrin F.V.** (1983). *Psikhologiya sledstvennykh dejstvii* [Psychology of investigative actions]. Volgograd: NII RIO VSSH MVD USSR (in Russian).

- Konovalova V.E.** (1997). Pravovaya psikhologiya [Legal psychology]. Kharkiv: Consum, 160 p.
- Kryminalistyka, sudova ekspertyza, yurydychna psykholohiia** [Criminalistics, forensic expertise, legal psychology]. Velyka ukrainska yurydychna entsyklopediia (2018) [Large Ukrainian legal encyclopedia]. Kharkiv : Pravo, 952 p. (in Ukrainian).
- Ratinov A.R.** (1967). Sudebnaya psikhologiya dlya sledovatelej [Forensic psychology for the investigator]. Moscow : NI i RIO VSH MOOP USSR (in Russian).
- Ratinov A.R., Efimova N.I.** (1988). Psikhologiya doprosa obvinyaemogo [Psychology of interrogation of the accused]. Moscow : VNII problem ukrepleniya zakonnosti i pravoporyadka, 114 p. (in Russian).
- Shepitko V.** (2010). Problemy formirovaniya taktiki preodoleniya protivodejstviya rassledovaniyu [Problems of formation of tactics of overcoming counteraction to the investigation]. Kharkiv : Apostil, pp. 163–172 (in Russian).
- Shepitko, V.Y., Shepitko, M.V.** (2021). The role of forensic science and forensic examination in international cooperation in the investigation of crimes. Journal of the National Academy of Legal Sciences of Ukraine, no. 28(1), pp. 179–186 (in English).
- Shepitko, V.Y., Olkhovsky V.O., Shepitko M.V.** (2020) The process of scientific knowledge integration in crime prevention and trends of medical criminalistics development in ukraine in XIX – early XX century. Wiadomosci lekarskie (Warsaw, Poland: 1960), no. 73(1), pp. 176–179 (in English).
- Vasil'ev V.L.** (2000) Yuridicheskaya psikhologiya [Legal psychology]. SPb: Piter, 624 p. (in Russian).
- Verdict of the Ivanovo District Court of the Kherson region** (24.12.2021) Case No. 655/821/19. Register of court decisions. URL: <https://data-ua.com/doc/133247727/persons> (in Ukrainian).

Владислав Негребецький,

кандидат юридичних наук, доцент, доцент кафедри криміналістики, Національний юридичний університет імені Ярослава Мудрого, вулиця Пушкінська, 84, Харків, Україна, індекс 61024, vladislavnegrebetsky@gmail.com

ORCID: orcid.org/0000-0003-0478-6533

ТАКТИКО-ПСИХОЛОГІЧНІ ОСНОВИ НЕЙТРАЛІЗАЦІЇ ПРОТИДІЇ РОЗСЛІДУВАННЮ КРИМІНАЛЬНОГО ПРАВОПОРУШЕННЯ ПІД ЧАС СЛІДЧОГО ЕКСПЕРИМЕНТУ

Анотація. Мета. Розроблення тактико-психологічних основ подолання протидії підозрюваного, зокрема у формі повідомлення неправдивих показань, при проведенні слідчого експерименту та розробці тактичних рекомендацій, спрямованих на подолання такої протидії. **Методи дослідження.** Робота виконана на підставі загальнонаукових та спеціальних методів наукового пізнання. **Результати.** Поведінка підозрюваного під час слідчого експерименту з метою перевірки його показань на місці події підпорядковується законам психології. Істотним чинником, що визначає поведінку підозрюваного, є психологічний вплив оточуючої обстановки. Останній може викликати зміни у поведінці підозрюваного, причому як в позитивному, так і в негативному напрямку. Особиста присутність на місці злочинної події приводить до значних емоційних переживань у підозрюваного, що може ускладнити і навіть унеможливити продовження слідчої (розшукової) дії. У роботі досліджується проблема відмови підозрюваного від участі у перевірці показань на місці, а також від раніше даних показань на різних етапах проведення цієї слідчої (розшукової) дії. Ризик відмови існує як до початку слідчої дії, так і безпосередньо при її проведенні.

Висновки. Автором звернуто увагу, що участь підозрюваного у проведенні слідчого експерименту обов'язково має добровільний характер. Тож ефективність слідчої (розшукової) дії залежить від позиції підозрюваного, його бажання брати участь у демонстраційних діях і давати пояснення. В роботі акцентовано увагу на ролі захисної домінанти як чинника, який істотно впливає на поведінку підозрюваного. Захисна домінанта визначає особливості, що зумовлюють поведінку підозрюваного при перевірці його показань на місці, серед яких автор виділяє психічний стан. Під час слідчого експерименту в підозрюваного можуть мати місце різні психічні стани: страх, стрес, фрустрація, тощо. У зв'язку із цим доцільно використовувати спостереження за поведінкою підозрюваного. З метою зниження ризику відмови підозрюваного від участі в цій слідчій дії пропонується проводити слідчий експеримент та перевіряти показання на місці негайно після їх одержання.

Ключові слова: протидія, слідча дія, перевірка показань на місці, психічний стан, захисна домінанта, самообмова, психологічний вплив.

The article was submitted 14.02.2022

The article was revised 09.03.2022

The article was accepted 29.03.2022

UDC 347.965.4

DOI <https://doi.org/10.32849/2663-5313/2022.1.16>**Lyubov Krupnova,**

Doctor of Law, Professor, Honored Lawyer of Ukraine, Attorney, Chairwoman of the Krupnova & Partners Attorneys Association, Deputy Chairwoman of the Higher Qualification and Disciplinary Bar Commission of Ukraine, 41b, M. Boychuka street, of. 243, Kyiv, Ukraine, postal code 01014, krupnova.zakhist@gmail.com

ORCID: 0000-0003-1789-0647

Krupnova, Lyubov (2022). Legal counseling as an essential part of attorney practice. *Entrepreneurship, Economy and Law*, 1, 101–106, doi:<https://doi.org/10.32849/2663-5313/2022.1.16>

LEGAL COUNSELING AS AN ESSENTIAL PART OF ATTORNEY PRACTICE

Abstract. The article studies the approach defining counseling, establishes its connection with allied concepts of legal consultancy and legal advice, analyzes the structure and models of counseling. The author considers amendments to The Rules of Legal Ethics based on comparative legal analysis of the Model Rules of Professional Conduct of American Bar Association. The research relies on analytical, logical-semantic, hermeneutic, and comparative **research methods. Results.** The author analyses counseling as a distinct type of advocacy, defines legal consultancy, counseling, counseling structure, legal advice as legal notions, emphasizes counseling stages. The essence of counseling models is analyzed, indicating the role of a lawyer in each of them. An essential part of this research paper is the Model Rules of Professional Conduct of American Bar Association analysis. **Conclusions.** Counseling is an integral and vital part of attorney practice characterized by the following features: 1) performed on a professional basis; 2) conducted through direct communication of the attorney with the client; 3) may be carried out both ex-ante and ex-post. Counseling is a comprehensive attorney practice, which consists of finding and presenting to the client possible solutions to his legal problem, the consequences of choosing one of them, as well as determining the legal position and proper remedies. The consultation process results in providing comprehensive and professional advice on the client's legal issue. The concept of counseling structure may be defined as the sequence of actions of an attorney to determine the client's legal issue and formulate proposals for its solution. There are the following models of counseling: "traditional", client-centered model, and collaborative decision-making model. The author proposes to amend Art. 8 of the Rules of Legal Ethics with provisions on the requirements for counseling, namely that lawyers shall comply with the client's requirements for the means to achieve the representation or defense purpose.

Key words: legal consultancy, counseling, legal advice, counseling structure, models of counseling.

1. Introduction

Most empirical studies, the object of which is the implementation of legal practice, deal with the participation of an attorney in the trial, defense tactics, challenging aspects of the attorney's interaction with the court, other public authorities, local self-government, etc. Much less scholarly research discusses legal counseling. According to para. 1, p. 1 of Article 19 of the Law of Ukraine "On the Bar and Practice of Law", one of the key aspects of legal practice entails giving legal information, advice, and clarifications on legal issues. In addition, scientists, incl. S. O. Ivanytskyi, consider the provision of legal advice and explanations as one of the tasks of the bar, as the institute as a whole (Ivanytskyi, 2017, p. 148).

Counseling is rightly deemed to be the beginning of the attorney's interaction with the client because in requesting legal assistance,

the person primarily intends to receive advice to determine a subsequent algorithm of actions. Following an outcome of the initial consultation, the person decides on his representation or defense by a specific attorney.

Relationship in the "attorney-client" system is based on effective communication. At the same time, legal counseling is a fundamental element, so the quality of provided pieces of advice and their effective use are of paramount importance for achieving the goals of such relationship.

In this context, it is worth agreeing with L. V. Slyva's opinion: legal practice requires not only proficient knowledge of law rules but also good communication skills, the ability to qualitatively build communication with the client to accomplish the goal of the relevant activity – the protection of the rule of law (Slyva, 2020, p. 21).

2. Correlation of counseling with related concepts

The professional literature on the relevant subject matter contains the concepts of “legal consultancy”, “counseling”, “legal advice”, which indicates their different content. In this regard, it seems expedient to analyze the essence of each of the above concepts separately.

S. D. Husariev defines legal consultancy as the professional activity of lawyers specializing in different law branches; their main function is the legal support of various forms and methods of activity of the organizational structure that employs a legal adviser (Husariev, 2008, p.386).

L. V. Slyva considers legal consultancy as a systematic professional activity of an attorney, which combines a set of actions aimed at solving the client’s legal problem through explanations, recommendations, drafting of procedural documents (Slyva, 2016, p. 81).

According to K. Yu. Surovova, legal consultancy is the transfer of specific legal data to the client at his initiative or at the initiative of the attorney, which involves informing the client about legal norms and counselling, during which the attorney explains how to deal with the client’s legal problem on their basis (Surovova, 2015, p.54-55).

It is worth mentioning that in defining the concept of legal consultancy through informing and counseling, it is said that although these two components differ in structure, they are equal and interrelated elements in the system of legal counseling. Thus, the structure of informing comprises two stages: the attorney’s actions to transfer information and the client’s actions to receive it. Instead, counseling is supplemented by another stage – acceptance of instructions. Before giving legal advice, an attorney shall listen to clients and get at the heart of the problem. The subsequent flow of information from the attorney to the client structurally coincides with similar actions within informing. However, the difference between counseling and informing is in the targeted nature of the latter, given the specific life situation and the presentation of clear recommendations for choosing legal remedies to address the problem (Surovova, 2015, p.55).

It goes without saying that an attorney conducts counseling professionally since it is the professional nature of legal assistance that determines the special place of the bar in the mechanism of providing it to citizens, which is fixed in Art. 131² of the Constitution of Ukraine (Shandula, 2017, p. 166).

Thus, it is advisable to distinguish the following essential features of legal consultancy: (1) is a type of legal practice; (2) is carried out on a professional basis; (3) is complex, because

it can be realized through explanations, possible options for addressing the legal problem of clients, drafting the necessary legal documents, that is, it contains both an informative and an advisory component. Consequently, consultancy is the professional activity of an attorney, which implies informing and advising clients on law rules, the regulatory scope of which extends to the legal relationship to which they are parties, rendering them intelligibly, and formulating a proposal for solving a legal problem.

Counseling is defined in professional literature as the direct interaction between an attorney and a client (principal) to provide the latter with qualified legal assistance (Slyva, 2020, p.27). That kind of approach does not outline the main specific features of counseling in comparison with other types of legal assistance. As a result, it does not allow distinguishing it from other types of legal practice.

R. S. Redmount believes that legal counseling is that group of particular attitudes, skills, and strategies that a lawyer utilizes to help individual clients to meet specific needs and resolve specific problems. (Redmount, 2008, p.181). It is worthwhile stressing that the client’s protection or representation is not considered in this context. This means that the lawyer presents possible options for solving a specific legal problem or agreeing on an algorithm of actions under individual circumstances.

It seems reasonable that when advising the client, the lawyer should both suggest ways to deal with the legal problem and make sure that the client gets them straight (Zeikan, Safulko, 2013, p.26).

The author emphasizes that counseling can be ex-ante, that is, before the client commits legally significant actions, and ex-post, that is, after them. The considerable difference between them is that ex-ante counseling can steer the client on the right legal course, and ex-post counseling excludes the beforementioned but affects the client’s subsequent conduct (Shavell, 1998, p. 1).

Thus, counseling has the following characteristics: (1) it is a set of actions aimed at solving a specific legal problem of the client; (2) it is carried out through the communication between the client and the attorney, not defense or representation in judicial and other public authorities. Therefore, it is advisable to regard legal consultancy as the attorney’s comprehensive activity, which involves finding and presenting the client with possible solutions to his legal problem, ensuing consequences, and determining the legal position and defensive means.

L. V. Slyva proposes to define legal advice as an outcome of the attorney’s communication with the client, which is to find options for

a legal solution to the client's problems, explain potential consequences, and formulate a further action strategy (Slyva, 2016, p.81)

S. Chavell has a similar position and understands legal advice as specific information, which an attorney gives a client, about the essence of legal rules, the possibility and extent of punishment for their violation, the course of the trial, etc. (Shavell, 1998, p. 1).

The above positions truly convey the essence of legal advice, which can be regarded as an outcome of counseling, which includes the provision of specific legal information on the legal problem and the set of measures necessary to solve it.

Therefore, "legal consultancy", "legal counseling" and "legal advice" are interrelated concepts and illustrate the movement from general to specific. Consultancy comprises a counseling process that results in comprehensive and professional advice.

3. Structure of counseling

The structure of counseling is the sequence of actions of the attorney to determine the client's legal problem and formulate proposals for its solution.

Given the frequency of counseling, it is expedient to distinguish between one-step and multi-step counseling (Slyva, 2020, p. 35). One-step counseling is a one-time interaction of the client with the attorney, which means communication about legal norms and their clarification, and multi-step counseling includes comprehensive systemic communication, which generates a sequence of actions to solve a specific legal problem of the client.

It should be noted that under one-step counseling, the content of the concepts of "legal advice" and "legal counseling" coincides.

According to Y. Zeikan and S. Safulko, legal counseling consists of the following stages: (1) establishing the client's requirements; (2) interviewing; (3) summarizing the information received from the client; (4) specifying options for solving the problem (Zeikan, Sarsfulka, 2013, pp.27-28). That kind of presentation of counseling stages seems incomplete because the result, which means the final determination of the legal position and the way of its defense, is decisive for any process that legal counseling undoubtedly is.

L. V. Slyva puts forward a more complex structure and marks eight stages, as follows: (1) preparatory; (2) interviewing; (3) preliminary assessment of facts of the case; (4) obtaining information and its further analysis; (5) analysis of the facts of the case; (6) analysis of the regulatory framework of the case: material and procedural qualification of the case; (7) formation of a legal position in the case, analy-

sis of its pros and cons; (8) legal advice (Slyva, 2020, p. 36-37).

The above structure of counseling has some drawbacks – the duplication of individual stages of counseling. In particular, it concerns the stages of analysis of the information acquired and analysis of the circumstances of the case. It seems inappropriate to single out two different stages that have the same purpose – assessment of the circumstances of the case.

Based on the analyzed approaches to the structure of counseling and taking into account their shortcomings, it is expedient to present the following structure of counseling: (1) obtaining facts while interviewing the client to identify the legal problem; (2) obtaining details (incl. by sending lawyer requests); (3) interpreting the problem using legal terminology; (4) finding and clarifying alternatives to solve the legal problem; (5) determining, together with the client, the procedure for solving the problem.

4. Counseling models

When advising clients, attorneys should consider the essence of the legal problem, whether the client is an individual or a legal entity, and the time of counseling, i.e., its implementation in the course of initial counseling or the ongoing fulfilment of the terms of the legal aid agreement. It makes sense to highlight three models of counseling: (1) the traditional or "authoritarian" model, (2) the client-oriented model, (3) the collaborative decision-making model (McGinnis, 2018, p. 279). It is recommended to examine each of the models in more detail.

– Traditional model

This model entails that when a lawyer advises a client, the client is expected to shift responsibility for the outcome onto the lawyer to exercise complete control over solving legal problems (McGinnis, 2018, p. 279). At the same time, the client's role is passive and is limited to sharing information on the case with the lawyer. Remarkably, the literature describes this model as "lawyer-oriented", "paternalistic", or "model of best interest" (Cochran, DiPippa, Peters, 1999, p. 9). It should be noted that Art. 8 of the Rules of Professional Conduct states that "subject to observance of the principle of legality, an attorney must in his/her professional activity act on the basis of the dominance of clients' interests". At the same time, neither the mentioned article nor further indicates whether the attorney is obliged to discuss his/her actions with the client, or whether he/she is obliged to consult with the client on taking specific measures (2017).

Regardless of the words chosen for its designation, this model is strongly criticized for

several reasons. First, the emphasis on the lawyer's control over counseling relations does not respect the dignity of clients as individuals who must be able to address all issues affecting their lives and make moral choices about them (McGinnis, 2018, pp. 279–280). Second, because clients are likely to have the best understanding of their needs, values, and interests, legal counseling using the traditional model creates a greater risk of making decisions and achieving outcomes that are not consistent with those values and interests (McGinnis, 2018, pp. 279–280). Thirdly, the active involvement of the client, who is recognized as a victim in criminal proceedings, in the counseling and decision-making process contributes to better legal results for the client (McGinnis, 2018, pp. 279–280).

In addition, it seems obvious that clients themselves should determine the purpose of legal assistance, which requires lawyers to consult with clients on the means to an end. Therefore, the implementation of legal counseling under the traditional model poses risks of failed expectations about its results.

– *Client-centric model*

According to this model, the client's position is decisive; it has the following characteristics: (1) perception of the lawyer exclusively as an expert who assists clients in determining legal problems; (2) active involvement of the client in the discussion of possible solutions, including consideration of the consequences arising from each available option; (3) consulting based on clients' values and providing relevant advice, given non-legal aspects, i.e., moral compulsions. N. S. Nelson believes that one of the possible methods of counseling related to this model holds that lawyers should avoid asking their clients "why?" as they may perceive it as skepticism or obtrusiveness. Alternatively, they should ask questions beginning with "what?". For example, "What do you think it was? What made them do it?" instead of "Why do you think they did it?" (Nelson, 1996, p. 30). The relevant method of communication of the lawyer with clients illustrates that the lawyer needs to use not only knowledge of jurisprudence but also psychology, sociology, etc.

When counselling following the client-centric model, lawyers should maintain the appearance of neutrality and refrain from providing direct advice to their clients (Cochran, DiPippa, Peters, 1999).

– *Collaborative decision-making model*

This model allows clients to control the process of solving a legal problem and concurrently rely on the reasonable recommendations of lawyers who structure the process and hence provide advice that the decisions made are legiti-

mate and effective (Cochran, DiPippa, Peters, 1999, p. 6).

Supporters of this model recognize that its effectiveness requires significant commitments and efforts of lawyers, who must be "trusted advisers, moral advisers, servants, and managers of decision making" (Cochran, DiPippa, Peters, 1999, p. 9).

Of the three main models, counseling based on the collaborative model takes the most resources of both the lawyer and the client. Interaction in this model stipulates some degree of mutual engagement and cooperation, which may prove challenging in practice but will have the best prospects for achieving mutual satisfaction in the consulting relationship for counsel and client (Cochran, DiPippa, Peters, 1999). Collaboration is most effective when lawyers care about creating and maintaining trust in their relationships with clients.

In the collaborative model, the lawyer is to: 1) identify the client's own preferences of how to deal with the legal problem; 2) outline the (legal) options that are realistic for the client; 3) inform the client about the pros and cons and the conditions of employing various options; 4) elicit the client's preference for this or that legal option; 5) devise an "action" plan, together with the client, of implementing the option chosen by the latter.

5. Challenging aspects of counseling

The rules of professional conduct clearly establish the principles of legal practice and define the general features of the lawyer's interaction with the client, public authorities, etc. At the same time, there are no specific provisions for giving legal advice by a lawyer.

However, the American Bar Association's Model Rules of Professional Conduct are worded differently, and individual provisions strongly affect the counseling process. First, Rule 1.2 of the Model Rules deals with representation and states that a lawyer shall abide by a client's decisions concerning the objectives of representation as to the purpose of representation and consult with the client as to the means by which that purpose will be achieved.

Secondly, Rule 1.4 sets out requirements for lawyers to communicate with the client, including the duty to explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Thirdly, Rule 2.1, entitled "Advisor", consolidates that in representing a client, a lawyer shall exercise independent professional judgment and render candid advice. It is further specified that in rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and politi-

ical factors, that may be relevant to the client's situation.

Thus, the Rules are designed to ensure that lawyers provide their clients with adequate and complete information to assist them in their decision-making.

Based on the analysis of the Model Rules of Professional Conduct and foreign professional literature, it seems expedient to supplement Art. 8 of the Rules of Legal Ethics as follows: "A lawyer shall consult independently and professionally, properly explain the essence of legal norms to the extent necessary for the client to make informed decisions. A lawyer shall consult with the client on the means of achieving the purpose of the representation or defense". Therefore, the predominant position of counseling among the types of legal practice is rendered. In addition, the principle of "preference for the client's interests" requires his involvement in the decision-making process.

6. Conclusions

As you can see from the analyzed literature, the proposed approaches to understanding counseling do not fully convey its specific features as a component of legal practice. Considering the above comments, the author suggests defining counseling as a complex activity of a lawyer, which involves finding and presenting the client with possible solutions to his legal problem and consequences arising from each available option.

The analysis of professional literature, incl. the opinions of Y. Zeikan, S. Safulka, and L. V. Slyva, allows structuring counseling as follows: (1) obtaining facts during the interview with the client to identify

the legal problem; (2) acquiring additional data (incl. by sending lawyer requests); (3) interpreting the problem using legal terminology; (4) searching for and explaining alternatives to solve the legal problem; (5) identifying, together with the client, the procedure for solving the problem. At the same time, the structure of counseling should be considered as a sequence of actions of the lawyer to determine the client's legal problem and formulate proposals for its solution.

Anglo-American doctrine regards counseling models as types of interaction in the "lawyer-client" system, the main of which are (1) traditional, the essence of which is the lawyer's absolute control over the process and choice of legal remedies solving the client's legal problem; (2) client-oriented: the lawyer acts as an advisor, and the client makes all final decisions by relying on the lawyer's professional advice; (3) the collaborative decision-making model, under which the purpose and means of solving the legal problem are a subject of collective discussion and actions of the lawyer and the client.

As part of this study, the author proposes to supplement Art. 8 of the Rules of Legal Ethics with the provisions on counseling, as follows: "A lawyer shall consult independently and professionally, properly explain the essence of legal norms to the extent reasonably necessary to permit the client to make informed decisions. A lawyer shall consult with the client on the means of achieving the purpose of representation or defense". Such changes seem necessary in view of the priority position of counseling among other types of legal practice.

References:

- Cochran, R.F., Jr., DiPippa, J.M.A., and Peters, M.M.** (1999). The counselor-at-law: A collaborative approach to client interviewing and counseling. New York, NY : Matthew Bender & Company (in English).
- Husarev, S.D.** (2008). Jurydychna deontologhija [Legal deontology]. Kyiv : Znannja (in Ukrainian).
- Ivanyckyj, S.O.** (2017) Teoretychni osnovy orghanizaciji advokatury v Ukrajinii: pryncypy ta systema [Theoretical grounds of the advocacy organization in Ukraine: principles and system]. Kyiv : Interservis (in Ukrainian).
- McGinniss, M.** (2018). Advice in the Lawyer-Client Relationship. Oxford Handbook of Advice, 277–298 (in English).
- Model Rules of Professional Conduct.** American Bar Association. Retrieved from: https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents/
- Nelson, N.C.** (1996). Connecting with your client: Success through improved client communications techniques. Chicago, IL : American Bar Association (in English).
- Pravyla advokatsjkoji etyky, zatverdzeni z'jzdom advokativ Ukrainy vid 09.06.2017** [Rules of Legal Ethics, approved by the Congress of Attorneys of Ukraine from June 06 2017]. [zakon.rada.gov.ua](https://zakon.rada.gov.ua/rada/show/n0001891-17#Text). Retrieved from: <https://zakon.rada.gov.ua/rada/show/n0001891-17#Text>
- Shaffer, T.L., Cochran, R.F., Jr.** (1994). Lawyers, clients, and moral responsibility. St. Paul, MN: West Publishing Co (in English).
- Shavell, S.** (1998). Legal Advice. The New Palgrave Dictionary of Economics and the Law, edited by Peter Newman. London: Macmillan Publishers; New York : Stockton Press. Pp. 1–16 (in English).
- Shandula, O.O.** (2017). Rol advokatury v realizaciji prava osoby na profesijnu pravnychu dopomoghu [The Role of the Bar in Realization of the Right of the Personality on the Professional Legal Aid]. *Visnyk Nacionalnoji*

akademiji pravovykh nauk Ukrainy – Journal of the National Academy of Legal Sciences of Ukraine, 3(90), 110–119. Kyiv (in Ukrainian).

Slyva, L.V. (2020). Konsuljtativna robota advokata u spravakh, shho vynykajutj z administratyvnykh pravovidnosyn [Advisory work of an attorney in cases arising from administrative legal relations]. Kyivskij nacionaljnij universytet imeni Tarasa Shevchenka, Kyiv (in Ukrainian).

Slyva, L.V. (2018). Konsuljtuvannja advokatom jak stadijnij proces [Attorney counselling as staged process]. *Pidprijemnyctvo, ghospodarstvo i pravo – Entrepreneurship, Economy and Law*, 7, 184–190. Kyiv. (in Ukrainian).

Surovova, K.Y. (2015). Vidy deyatelnosti advokata kak yuridicheskogo konsultanta [The activities of a lawyer as a legal adviser]. *European journal of law and political sciences*, 53–58 (in Russian).

Zakon Ukrainy Pro Advokaturu i advokatsjku dijajnistj vid 05.07.2012 roku № 5076-VI [Law of Ukraine on the Bar and Legal Practise from July 05 2012 № 5076-VI]. *zakon.rada.gov.ua*. Retrieved from <https://zakon.rada.gov.ua/laws/show/5076-17/conv#n300> (in Ukrainian).

Zeikan J., Safulko S. (2013). *Nastiljna knygha advokata v kryminaljnij spravi* [Attorney Handbook in Criminal Proceedings]. Kyiv : VD Dakor (in Ukrainian).

Любов Крупнова,

доктор юридичних наук, професор, заслужений юрист України, адвокат, Голова адвокатського об'єднання «Крупнова і партнери», заступник голови Вищої кваліфікаційно-дисциплінарної комісії адвокатури України, вулиця М. Бойчука, 41-Б, оф. 243, Київ, Україна, індекс 01014, krupnova.zakhist@gmail.com

ORCID: 0000-0003-1789-0647

КОНСУЛЬТУВАННЯ ЯК СКЛАДОВА ПРАКТИЧНОЇ АДВОКАТСЬКОЇ ДІЯЛЬНОСТІ

Анотація. *Метою* статті є узагальнення підходів до визначення поняття «консультування», його співвідношення із такими суміжними поняттями, як «консультативна діяльність» та «консультація», аналіз його структури та моделей консультування, а також внесення пропозиції внесення змін до Правил адвокатської етики на підставі порівняльно-правового аналізу положень про консультування у законодавстві США. **Методи.** У даній статті були використані аналітичний, логіко-семантичний, герменевтичний та компаративістський. **Результати.** У статті продовжується дослідження консультування як окремого виду адвокатської діяльності. Наведено поняття консультування, визначено поняття структури консультування та узагальнено підходи до визначення його етапів. Проаналізовано сутність моделей консультування із зазначенням ролі адвоката у кожній з них. Важливою частиною даної статті є аналіз положень Типових правил професійної поведінки Асоціації адвокатів США та формулювання на його підставі пропозиції внесення змін до Правил адвокатської етики, що стосуються консультування адвокатом. **Висновки.** Консультуванням доцільно вважати комплексну діяльність адвоката, що полягає у процесі пошуку та представленні клієнту можливих шляхів вирішення його правової проблеми, наслідків, що впливають з вибору одного з них, а також визначення правової позиції та способів її відстоювання. Констатовано, що результатом процесу консультування є надання вичерпної та професійної консультації щодо правової проблеми клієнта. Визначено поняття структури консультування як послідовності дій адвоката щодо визначення правової проблеми клієнта та формулювання пропозицій щодо її вирішення. Проаналізовано такі моделі консультування: «традиційна», клієнто-орієнтована, та модель спільного прийняття рішень. Запропоновано внести зміни ст. 8 Правил адвокатської етики, додавши положення про вимоги щодо здійснення консультування, а саме, що адвокати повинні дотримуватися вимог клієнта щодо засобів досягнення мети представництва або захисту.

Ключові слова: консультаційна діяльність, консультування, консультація, структура консультування, модель консул.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 341.9

DOI <https://doi.org/10.32849/2663-5313/2022.1.17>**Polina Korneva,**

PhD in Law, Assistant Professor at the Department of Private International Law and Comparative Law, Yaroslav Mydryi National Law University, 77, Pushlinska Street, Kharkiv, Ukraine, postal code 61024, korneva91@ukr.net

ORCID: 0000-0002-7901-9008

Korneva, Polina (2022). Temporary restriction of patent rights in the context of compulsory licensing of medicinal products: national and foreign experience. *Entrepreneurship, Economy and Law*, 1, 107–113, doi: <https://doi.org/10.32849/2663-5313/2022.1.17>

TEMPORARY RESTRICTION OF PATENT RIGHTS IN THE CONTEXT OF COMPULSORY LICENSING OF MEDICINAL PRODUCTS: NATIONAL AND FOREIGN EXPERIENCE

Abstract. *The purpose* of the article is to study the mechanism of temporary restriction of property patent rights to medicines, which is called “compulsory licensing”, based on the analysis of the relevant national and foreign experience. **Research methods.** To achieve the study’s goal, the author has used general scientific and special methods of cognition; the comparative law method, which has allowed comparing the domestic and international experience of legal regulation of compulsory licensing of medicines, plays an important role in the research process. **Results.** The legal categories denoting the procedure for compulsory licensing of medicines in the world practice are examined. The international legal formation of the institution of restriction of patent rights by issuing compulsory licenses in general, incl. medicines, is covered. The research has analyzed the experience of introducing the legal institution of compulsory licensing of medicines in individual countries (the case of the USA, Germany, Great Britain, France, and China). The author has separately elucidated the fact that compulsory licensing of medicines received a new impetus to development in the context of the world’s fight against the COVID-19 pandemic. The cases of many countries which adopted specific legal regulation in the area concerned have been analyzed (Australia, Brazil, Canada, Chile, Colombia, Ecuador, Hungary, Indonesia, and Russia). **Conclusions.** As a result of the study of the experience of the above countries, the author concludes that compulsory licensing of medicines is used primarily to protect the national interests of the state, in particular economic ones, as well as to ensure the protection of public health. Based on the analysis of the current legislation of Ukraine, the author asserts that the institution of compulsory licensing of medicines is at the stage of initial development: today there is no proper legal regulation of this group of legal relations, which makes its functioning impossible, and the recently introduced legal institution of managed entry agreement does not have the legal nature of compulsory licensing – it does not limit the patent rights of holders to medicines.

Key words: compulsory licensing, medicines, patent, property rights of patent owner, temporary restriction of patent rights.

1. Introduction

Research relevance. Human rights to life and health remain the highest social values and benefits in Ukraine and the world, as proclaimed in major international human rights treaties and the constitutions of many states. Life quality and expectancy are of paramount importance. In this regard, it should be noted that according to the UN, over the past 70 years, the global average life expectancy has increased by 23 years, which is mainly due to medical advances (UN, 2018). The invention of a vaccine for (black) smallpox based on

the cowpox virus, which had been described in detail in 1798 in the study by English physician and naturalist Edward Jenner “An Inquiry into the Causes and Effects of the Variolae Vaccinae, a Disease Discovered in Some of the Western Counties of England, particularly in Gloucestershire, and Known by the Name of Cow-pox (Jenner, 1798), was a considerable step towards the human struggle for life using medicines. Since that time, medicine has continued to develop, offering the advanced means to overcome and prevent diseases. Thus, it is difficult to overestimate the significance of medicine,

vaccination, and pharmaceuticals to save people's lives, improve their condition, and increase their duration.

At the same time, modern medical and pharmaceutical achievements are closely related to intellectual property rights, which are driven by a high level of commercialization of these industries in the world and the need to protect property and personal intellectual non-property rights in the relevant field. The rights of inventors of pharmaceutical products are often protected within the patenting institute. In addition, it is possible to protect medicines as objects of copyright that, according to A. O. Kodynets, is less effective, since it protects the form of expression of the creative result, not the chemical composition of a medicinal product, and does not extend to the application technique or the production of a substance (Kodynets, 2016, p. 167).

Patenting of medicines also takes place in our country. The Law of Ukraine "On Medicines" consolidates the right of authors (co-authors) of a medicinal product to obtain a patent by applying to the central executive body that implements state policy on intellectual property (Verkhovna Rada of Ukraine, 1996).

Moreover, it is socially important for each state to guarantee a possibility to use medicines with certain temporary violations of patent rights in "emergency" cases stipulated by law, when it is a choice between life and death, or the state economic security and the property rights of a patent holder. Such a mechanism in the world system of legal regulation of intellectual property relations – the article's case study is a medicinal product – is called *compulsory licensing*, although there are other related terms.

Subject novelty. The issue of compulsory licensing of pharmaceuticals was studied by N. P. Baaji, O. V. Basay, I. P. Volynets, O. Yu. Kashentseva, T. Yu. Klochko, A. O. Kodynets, O. O. Ponomaryova, et al. However, most studies of the above authors were carried out before 2020 and hence, they did not take into account new life realities associated with the rapid spread of coronavirus in the world, the need to make new flexible and operational decisions in terms of providing public access to medicines. Therefore, the institute under consideration has gained new and even greater social significance in the context of the global fight against the COVID-19 pandemic.

The purpose of this article is to study the mechanism of temporary restriction of proprietary patent rights to medicines, which is called "compulsory licensing"; the research task is to analyze the national and international experience of temporary restriction of patent rights while implementing the procedure of compul-

sory licensing of medicines. The research methodology relies on general scientific and special methods of cognition; the comparative law method, which allows comparing the domestic and international experience of legal regulation of compulsory licensing of medicine, plays an important role in the research process.

2. Definition of the concept of "compulsory licensing"

According to World Trade Organization terminology, several related terms mean, in their essence, compulsory licensing of medicines. Thus, the most common term is "*Compulsory Licensing*", when the authorities license companies or individuals other than the patent owner to use the rights of the patent – to make, use, sell or import a product under patent (i.e., a patented product or a product made by a patented process) – without the permission of the patent owner (Navarro, Vieira, 2021, p. 3). This term is widely used in foreign legal literature and regulations that will be further clear in the article text.

"*March-in Rights*", which was introduced by the Beye-Dole Act of 1980, is a kind of compulsory license and used exclusively in the United States. It allows the U.S. Federal Agency to interfere with owners' rights to patented inventions created with federal funding assistance. Should this request for a license be denied, the Federal agency may issue a compulsory license. In this case, the government uses the invention free of charge, in particular, by granting a non-exclusive, non-transferable, irrevocable, paid-up license that permits using the patented invention by the Government itself or on its behalf anywhere in the world (Navarro, Vieira, 2021, p. 3).

"*Government Use*" means the procedure or process under which the government uses a patented product on its own or by authorizing others to use the rights to the patented product for state or public purposes without the permission of the patent holder (Navarro, Vieira, 2021, p. 3).

Ukrainian legislation lacks a concept of compulsory licensing even though such a legal institution is enshrined in Ukraine at the regulatory level.

As O. Yu. Kashyntseva notes, domestic legislation now provides three legal mechanisms ensuring access to innovative and generic medicines capable of mitigating the patent monopoly on the latter: managed entry agreements (MEAs), defined in Art. 79-1 of the Fundamentals of the Legislation of Ukraine on Health Care; compulsory licensing of inventions relating to medicinal products enshrined by Art. 30 of the Law of Ukraine "On Protection of Rights to Inventions and Utility Models"; the use of a patented medicinal product

in the form of its generic version in the interests of the state in emergency cases following Art. 31 of the Law of Ukraine “On Protection of Rights to Inventions and Utility Models” (Kashyntseva, 2020, p. 36). It should be emphasized that the author’s position on the first paragraph is quite controversial. According to Article 79-1 of the Fundamentals of the Legislation of Ukraine on Health Care, the central executive body, which ensures the development and implementation of state policy on health care, authorizes a person to carry out healthcare procurement on his/her own initiative or on its behalf, and the person is entitled to conclude a managed entry agreements with the applicant on the initiative of the marketing authorization holder or its authorized representative (applicant) in order to maintain the availability of relevant medicinal products for patients at budget expense (hereinafter referred to as “a managed entry agreement”) (Verkhovna Rada of Ukraine, 1992). The content of the mentioned norm and the provisions of the Negotiation Procedure on Managed Entry Agreements and the Procedure for Conclusion, Execution, Amendment and Termination of Managed Entry Agreements approved by the Resolution of the Cabinet of Ministers of Ukraine No. 61 dated January 27, 2021 (Cabinet of Ministers of Ukraine, 2021), do not indicate the availability of any restrictions of patent rights to medicinal products, since it is stipulated only the contractual relationship between the state represented by the entitled state authorities as the buyers of specific medicinal products and the marketing authorization holders of the original (innovative) medicinal product as its suppliers. This procedure excludes any coercion or restriction of the rights of the patent holder to a medicinal product, although it provides citizens with access to certain medicinal products because they are purchased for budgetary funds.

The restriction of patent rights to medicines in Ukraine can occur within the legal institution of compulsory licensing, the legal basis of which is the above-mentioned Laws of Ukraine “On Medicines” and “On the Protection of Rights to Inventions and Utility Models”. At the same time, Article 9 of the Law of Ukraine “On Medicines” stipulates that in order to ensure the public health when registering a medicinal product, the Cabinet of Ministers of Ukraine may allow an authorized person to use a patented invention (utility model) related to such a medicinal product without the consent of the patent holder, although the relevant law was not adopted, only the resolution of the Cabinet of Ministers of Ukraine “On Approval of the Procedure for Granting Permission by the Cabinet of Ministers of Ukraine to Use a Patented Invention

(Utility Model) Relating to a Medicinal Product” dated 04.12.2013 No. 877 (Cabinet of Ministers of Ukraine, 2013).

The lack of proper legal regulation of the issue under study blocks the implementation of the mechanism of compulsory licensing of medicines in Ukraine and necessitates its improvement. In this regard, it is apt to discuss specific international and foreign practices.

3. International and foreign experience of temporary restriction of patent rights to medicines

The legal grounds for the temporary restriction of patent rights were first laid by the Paris Convention for the Protection of Industrial Property of 20.03.1883, which enshrines the right of each country of the Union for the Protection of Industrial Property to take legislative measures providing for the issuance of compulsory licenses to prevent abuses that may arise from the exercise of the exclusive right granted by the patent (League of Nations, 1883). An important document of the World Trade Organization, which defines the legal grounds for temporary limitation of patent rights, is the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), which is the 1C annex to the Marrakesh Agreement Establishing the World Trade Organization, signed in Marrakesh, Morocco, on 15.04.1994. The TRIPS Agreement was amended by the Protocol dated 06.12.2005, which entered into force on 23.01.2017. The mentioned protocol supplemented the Agreement with Article 31bis and an annex, which determined, in the context of compulsory licensing of medicines, the peculiarities of limiting patent rights to manufacture and export pharmaceutical products (pharmaceutical product) for countries that cannot manufacture them in sufficient quantities for their patients (World Trade Organization, 2017).

The Doha Declaration, adopted in 2001 at the WTO annual ministerial meeting in Doha, Qatar, is also an essential international instrument in this area. The Declaration affirmed the primacy of health over commercial interests and reaffirmed the members’ rights to use TRIPS guarantees, such as compulsory licenses, to overcome patent barriers in order to promote access to medicines (World Trade Organization, 2001).

The above documents have led to the development of relevant legislation in many countries. Thus, in Germany, patent law, namely section 24 of the German Patent Act, is the legal basis for compulsory licensing of pharmaceutical products. The German Patent Act meets the requirements of the Agreement on Trade-Related Aspects of Intellectual Property

Rights (TRIPS) and the implementation of the Directive 98/44/EC of the European Parliament and of the Council of 6 July 1998 on the legal protection of biotechnological inventions. A request for a compulsory license may also arise from the provisions of competition law and Regulation (EC) No 816/2006 on compulsory licensing of patents relating to the manufacture of pharmaceutical products for export to countries with public health problems. (Martinez, 2021). In this case, the issuance of a compulsory license does not mean the use of the invention free of charge, an adequate royalty, which is standard for commercial practice, is paid. In event of a dispute between the parties, the Federal Patent Court determines the amount of royalties at the parties' request (Höhne, 2019).

In the US, as previously noted, compulsory licensing is stipulated by the "March-In Rights" legal institute introduced by the Beye-Dole Act of 1980. The U.S. government is entitled to "march-in rights" if a patent holder has failed to take steps to: practically apply the invention; reasonably meet the health and safety needs of the country; reasonably comply with the general use requirements defined by federal regulations; or granted the exclusive right to use the patented invention to a third party without obtaining a binding promise that the invention will be substantially manufactured in the U.S., or if the licensee breaches the promise (Shah, 2021).

In China, compulsory licensing of patented medicines was stipulated by the *Patent Law of the People's Republic of China* in 2008, after introducing specific amendments authorizing the issuance of compulsory licenses for the manufacture of medicines and their export to countries and regions under the international treaties of China. In general, the legal basis for compulsory licensing in China is quite complex and is represented by legal documents of different legal effects, such as *Implementing Rules of the Patent Law of the People's Republic of China* of 2010, *Measures on Compulsory Licence of Patent Exploitation* of 2012, *Opinions of the General Office of the State Council on Reforming and Improving Policies on the Guaranteed Supply and Use of Generic Drugs* of 2018, and others (CMS, 2021).

In the United Kingdom, compulsory licensing is regulated by the *Patents Act 1977*. According to the regulation, the grounds and procedure for obtaining compulsory licenses vary depending on whether the patent holder belongs to the World Trade Organization member states or not. For example, in the former case, the grounds for granting a compulsory license under Article 48a are: 1) the patented inven-

tion is a product, that a demand in the United Kingdom for that product is not being met on reasonable terms; 2) by reason of the refusal of the proprietor of the patent concerned to grant a licence or licences on reasonable terms – (i) the exploitation in the United Kingdom of any other patented invention which involves an important technical advance of considerable economic significance in relation to the invention for which the patent concerned was granted is prevented or hindered, or (ii) the establishment or development of commercial or industrial activities in the United Kingdom is unfairly prejudiced;; 3) by reason of conditions imposed by the proprietor of the patent concerned on the grant of licences under the patent, or on the disposal or use of the patented product or on the use of the patented process, the manufacture, use or disposal of materials not protected by the patent, or the establishment or development of commercial or industrial activities in the United Kingdom, is unfairly prejudiced (Intellectual Property Office, 1977).

In France, matters of compulsory licensing, in addition to the international documents defined above, are regulated by separate sections of the French Intellectual Property Code. The grounds for granting a compulsory license in France may be: 1) insufficient use of the patent by its holder; 2) the impossibility of using the patent by the patent holder without infringing the previous patent in case of impossibility of voluntary obtaining a license from the holder of the previous patent, provided that the invention is of significant technical advance or is of great economic interest; 3) protection of the interests of the national economy or national security (CMS, 2020).

4. Compulsory licensing in the fight against coronavirus disease (COVID-19)

In the fight against coronavirus disease (COVID-19), governments of some countries of the world have adopted regulations aimed at simplifying procedures for compulsory licensing. For example, in March 2020, the German government amended a set of legislative acts focused on simplifying the procedure for compulsory licensing of pharmaceuticals. In particular, section 5 of the German Infection Protection Act was modified to consolidate that all inventions of pharmaceuticals and medical devices necessary for disinfection and laboratory diagnostics are used in the interests of public welfare or safety. Moreover, it was adopted the Law on the Prevention and Control of Infectious Diseases which granted the Federal Ministry of Health powers that allow issuing a compulsory license and enshrined the legal basis for limiting drug patents. At the same time, the party initiating obtaining a compul-

sory license must prove the existence of two circumstances: 1) within a reasonable period of time, the party tried to obtain permission from the patent holder to use the invention on reasonable commercial terms; 2) obtaining a compulsory license is conditioned by the public interest (Martinez, 2021).

In addition to Germany, similar legislative changes have been introduced in Australia, Brazil, Canada, Chile, Colombia, Ecuador, Hungary, Indonesia, and Russia (Access Campaign, 2021, p. 4-5). Hungary, for example, even implemented the procedure for issuing a compulsory license for Remdesivir. The Hungarian company Richter, to which the government requested to ensure domestic manufacture of the drug during the first wave of the pandemic, obtained a compulsory license (Access Campaign, 2021, p. 5).

In March 2020, Israel became the first government to grant a compulsory license for antiretroviral therapy drugs lopinavir/ritonavir, which were undergoing testing and repurposing for treating COVID-19. Israel granted a compulsory license and addressed the manufacturer of alternative generic drugs from India because the patent holder, AbbVie, was unable to secure sufficient supplies of Lopinavir/Ritonavir at the time (Access Campaign, 2021, p. 5).

5. Conclusions

The following can be highlighted as the research findings:

- states in their interests and the interests of society provided for the legal possibility of temporary restriction of property rights of patent holders, incl. to medicines, long ago;

- the settlement of the procedure for compulsory licensing of medicines varies significantly; the legal regulation of these relations is most often conducted by general patent norms. However, against the background of the ongoing COVID-19 pandemic around the world, some countries have begun to introduce special legal regulations of the procedure for temporary restriction of patent rights in terms of compulsory licensing of medicines;

- in Ukraine, the institute of compulsory licensing of pharmaceutical products is at the initial development – there is no proper legal regulation of relevant legal relations that makes its functioning impossible;

- areas of improvement of the legal regulation of compulsory licensing of medicinal products should be based on international instruments, i.e., the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement), the Doha Declaration, as well as consider the experience of individual countries that are characterized by a proper legal regulation of the area concerned and practical implementation of procedures for the issuance of compulsory licenses (for example, France, Israel, Germany, the United Kingdom, and others).

References:

Access Campaign (2021). Compulsory Licenses, The TRIPS Waiver and Access to COVID-19 Medical Technologies. MSF Briefing Document. Retrieved from: <https://msfaccess.org/compulsory-licenses-trips-waiver-and-access-covid-19-medical-technologies> (in English).

Cabinet of Ministers of Ukraine (2021). Postanova Kabinetu Ministriv Ukrainy «Deyaki pytannia shchodo dogovoriv kerovanogo dostupu ta zupynennia dii abzatzu pershogo punktu 1² postanovy Kabinetu Ministriv Ukrainy vid 25 bereznia 2009 r. №333» [Resolution of the Cabinet of Ministers of Ukraine «Some Aspects of the Agreements of Controlled Access and the Suspension of the First Paragraph of the Item 1² of the Resolution of the Cabinet of Ministers of Ukraine dated March 25, 2009. No. 333»]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/show/61-2021-п#Text> (in Ukrainian).

Cabinet of Ministers of Ukraine (2013). Postanova Kabinetu Ministriv Ukrainy «Pro zatverdzhennia Poryadku nadannia Kabinetom Ministriv Ukrainy dozvolu na vykorystannia zapatentovanogo vynakhodu (korysnoi modeli), shcho stosuetsia likarskogo zasobu» [Resolution of the Cabinet of Ministers of Ukraine «On the Approval of the Order of the Granting by the Cabinet of Ministers of Ukraine the Permission for Use of Patented Invention (Utility Model), Regarding to the Medical Products»]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/show/877-2013-п#Text> (in Ukrainian).

CMS (2021). Compulsory Licensing in China. Retrieved from: <https://cms.law/en/int/expert-guides/cms-expert-guide-to-compulsory-licensing/china> (in English).

CMS (2020). Compulsory Licensing in France. Retrieved from: <https://cms.law/en/int/expert-guides/cms-expert-guide-to-compulsory-licensing/france> (in English).

Höhne C. (2019). Compulsory licenses in Germany: a tool for licensing negotiations? Retrieved from: <https://www.europeanpharmaceuticalreview.com/article/84768/compulsory-licenses-in-germany-a-tool-for-licensing-negotiations/> (in English).

Intellectual Property Office (1977). The Patent Act 1977 (as amended). Retrieved from: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/950221/consolidated-patents-act-1977.pdf (in English).

Jenner E. (1798). An Inquiry Into the Causes and Effects of the Variolae Vaccinae, a Disease Discovered in Some of the Western Counties of England, Particularly in Gloucestershire, And Known by the Name of

Cow-pox. London. Retrieved from: https://books.google.com.ua/books?id=tj3h3ZA0ppAC&printsec=frontcover&source=gbs_ge_summary_r&redir_esc=y#v=onepage&q&f=false (in English).

Kashyntseva O. & Trofymenko M. (2020). Pravovi mekhanizmy rozshyrennia dostupu do likuvannia za umov pandemii v Ukraini ta sviti [Legal Mechanisms for Expanding Access to the Treatment within the Conditions of the Pandemic in Ukraine and in the World]. *Medychne parvo – Medical Law*, 2, 34-48 (in Ukrainian).

Kodynets A. (2016). Pravo intelektualnoi vlasnosti na likarski zasoby: okremi aspekty pravovoi okhorony [The Right of Intellectual Power in Health Care: Some Aspects of Legal Protection]. Proceedings from Vseukrainskaia naukovo-praktychna konferentsiia «Innovatsiini aspekty systemy bezpeky pratsi, zakhystu intelektualnoi vlasnosti» – All-Ukrainian Scientific and Practical Internet Conference «Innovative Aspects of Security Systems, Protection of Intellectual Power», 161-169. Poltava: PDAA. (in Ukrainian).

League of Nations (1883). Paryzhska konventsiia pro okhoronu promyslovoi vlasnosti [Paris Convention for the Protection of Industrial Property]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/995_123#Text (in Ukrainian).

Martinez L. (2021). Compulsory Licensing Germany. Retrieved from: <http://patentblog.kluweriplaw.com/2021/05/10/compulsory-licensing-germany/> (in English)

Navarro D. & Vieira M. (2021). Research Synthesis: Compulsory Licensing. Global Health Centre at the Graduate Institute. Geneva. Retrieved from: https://www.knowledgeportal.org/_files/ugd/356854_85069c0455194d21b5feda60d6aae9ad.pdf (in English).

Shah R. (2021). Compulsory License: United States of America. 2021. Retrieved from: <http://patentblog.kluweriplaw.com/2021/08/23/compulsory-license-united-states-of-america/> (in English).

UN (2018). Za poslednie 70 let srednyaya prodolzhitel'nost zhisni v mire uvelichilas na 23 goda [Site of UN]. Retrieved from: <https://news.un.org/ru/story/2018/04/1327321> [in Russian].

Verkhovna Rada of Ukraine (1996). Zakon Ukrainy «Pro likarski zasoby» [The Law of Ukraine «On Medical Products»]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/show/123/96-вр#Text> (in Ukrainian).

Verkhovna Rada of Ukraine (1992). Zakon Ukrainy «Osnovy zakonodavstva Ukrainy pro okhoronu zdorovia» [The Law of Ukraine «Fundamentals of the Legislation of Ukraine on Healthcare»]. (n.d.). *zakon.rada.gov.ua*. Retrieved from: <https://zakon.rada.gov.ua/laws/show/2801-12#Text> (in Ukrainian).

World Trade Organization (2017). Agreement on Trade-Related Aspects of Intellectual Property Rights. Retrieved from: https://www.wto.org/english/docs_e/legal_e/31bis_trips_01_e.htm (in English).

World Trade Organization (2001). Declaration on the TRIPS agreement and public health. Retrieved from: https://www.wto.org/English/thewto_e/minist_e/min01_e/mindecl_trips_e.htm (in English).

Полина Корнева,

кандидат юридичних наук, старший викладач кафедри міжнародного приватного права та порівняльного правознавства, Національний юридичний університет імені Ярослава Мудрого, вулиця Пушкінська, 77, Харків, Україна, індекс 61024, korneva91@ukr.net

ORCID: 0000-0002-7901-9008

ТИМЧАСОВЕ ОБМЕЖЕННЯ ПАТЕНТНИХ ПРАВ В КОНТЕКСТІ ПРИМУСОВОГО ЛІЦЕНЗУВАННЯ ЛІКАРСЬКИХ ЗАСОБІВ: НАЦІОНАЛЬНИЙ ТА ЗАРУБІЖНИЙ ДОСВІД

Анотація. Мета. Метою статті є дослідження механізму тимчасового обмеження майнових патентних прав на лікарські засоби, який отримав назву «примусове ліцензування», на підставі аналізу національного та зарубіжного досвіду у цій сфері. **Методи дослідження.** Для досягнення мети дослідження застосовувалися загальнонаукові та спеціальні методи пізнання, особливе значення в процесі дослідження мав порівняльно-правовий метод, що дозволив порівняти досвід правового регулювання України та зарубіжних країн у сфері примусового ліцензування лікарських засобів. **Результати.** Досліджуються правові категорії, що позначають процедуру примусового ліцензування лікарських засобів в світовій практиці. Висвітлені питання міжнародно-правового становлення інституту обмеження патентних прав шляхом видачі примусових ліцензій в цілому, а також саме щодо лікарських засобів. Аналізується досвід окремих країн запровадження правового інституту примусового ліцензування лікарських засобів, зокрема, наводяться приклади США, Німеччини, Великої Британії, Франції, Китаю. Автором окремо висвітлено той факт, що примусове ліцензування лікарських засобів отримало новий поштовх до розвитку в контексті боротьби всього світу з пандемією COVID-19. Наводиться приклад ряду країн, в яких було прийнято спеціальне правове регулювання у вказаній сфері (Австралія, Бразилія, Канада, Чілі, Колумбія, Еквадор, Угорщина, Індонезія, Росія). **Висновки.** В результаті проведеного дослідження досвіду вказаних країн автором робиться висновок, що примусове ліцензування лікарських засобів використовується, в першу чергу, для захисту національних інтересів держави, зокрема економічних, а також з метою забез-

печення захисту здоров'я населення. На підставі аналізу чинного законодавства України автором робиться висновок, що інститут примусового ліцензування лікарських засобів знаходиться на стадії початкового розвитку, на сьогодні відсутнє належне правове регулювання цієї групи правовідносин, що унеможлиблює його функціонування, а запроваджений нещодавно правовий інститут договорів керованого доступу не є за своєю правовою природою примусовим ліцензуванням, ним не обмежуються патентні права власників патентів на лікарські засоби.

Ключові слова: примусове ліцензування, лікарські засоби, патент, майнові права власника патенту, тимчасове обмеження патентних прав.

The article was submitted 13.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022

UDC 341.244.7

DOI <https://doi.org/10.32849/2663-5313/2022.1.18>**Olesia Trebina,***Postgraduate student at the Department of International Law, Yaroslav Mudryi National Law University, 77, Pushkinska street, Kharkiv, Ukraine, postal code 61024, olesyatrebina@gmail.com***ORCID:** orcid.org/0000-0002-1985-9646

Trebina, Olesia (2022). The control mechanism of the international treaty: essence and components. *Entrepreneurship, Economy and Law*, 1, 114–120, doi: <https://doi.org/10.32849/2663-5313/2022.1.18>

THE CONTROL MECHANISM OF THE INTERNATIONAL TREATY: ESSENCE AND COMPONENTS

Abstract. *The purpose* of the work is to clarify the essence and main components of the control mechanism to ensure the implementation of international agreements. **Research methods.** Methodologically, the work is based on a systematic approach in the analysis of international legal relations and international treaties, on the formal-logical and comparative methods of interpretation of international law used at both theoretical and empirical levels, content analysis of international treaties. **Results.** It has been proven that international monitoring as a means of securing international obligations is becoming increasingly important, becoming the norm and a necessary condition for the functioning of international law. It is substantiated that, like any legal relationship, international control legal relations have the necessary elements: object, subjects and content. The object of international control is the fulfillment of obligations under an international treaty. The subjects of control activities may be international organizations and their bodies, specially created control bodies and states. The content of the legal relationship of international control includes the mutual rights and obligations of the subjects, although the main and general obligation in any control legal relationship is the need to comply with generally accepted principles and norms of international law. It is determined that based on the structure of international legal relations, we can identify three components in the control mechanism of international agreement: 1) the contractual component related to the object of legal relations, 2) the institutional component related to the subject (subjects) of international legal relations and 3) the substantive component related to the whole spectrum of ensuring the requirements of international agreements (principles, norms, forms, methods, means of control activities, etc.). **Conclusions.** The study of the phenomenon of international control over the observance of international treaties is of great practical importance, directly affecting the quality and degree of development of provisions on the control mechanism of international treaties. An effective control mechanism, in turn, makes a significant contribution to ensuring proper compliance with international treaty obligations, which ultimately affects the state of compliance with international law and improving the effectiveness of international law in general.

Key words: international treaty (convention), international monitoring, control mechanism of an agreement (convention), subject of international law, international legal relations.

Introduction

International monitoring as means of securing international obligations in the modern world is becoming increasingly important. In international treaties concluded in the second half of the XX century, considerable attention has been given to the implementation of international monitoring. This tool is increasingly used in international treaty practice. There are a large number of treaty norms of international law, which more or less clearly regulate the issues of international monitoring over their observance. It is very important among this conglomerate of norms to identify general guidelines, patterns and trends that reflect

the specifics of the regulatory impact of international law on modern interstate relations, that consists of international monitoring activities over compliance with international treaties in various areas of international cooperation. Monitoring the implementation of international treaties (conventions) today has become the norm and a necessary condition for the functioning of international law. The study of theoretical and practical aspects of international monitoring of compliance with international treaties is currently of great importance for both the doctrine of international law and international practice. International monitoring is more or less inherent in all branches of inter-

national law, the study of various mechanisms of international monitoring over the observance of obligations by states is of considerable scientific interest and meets the requirements of time.

Both Ukrainian and foreign scholars in the field of international law have studied the problems of international monitoring and the observance by states of their obligations under international treaties: D. Abbakumova, T. Antsupova, S. Cocan, M. Cremona, W.H. von Heinegg, R. Valeev, A. Goltyaev, I. Kotlyarov, S. rochkin, N. Onishchenko, M. Pejčinović Burić, K. Pieragostini, J. Rikhof, M.N. Schmitt, O. Serdiuk, N. Simonova, S. Suniehin, A. Thies, O. Tiunov, I. Yakovyuk, R.A. Wesse, etc (Medvedieva, 2012; Onishchenko, Suniehin, 2021; Pieragostini, 1986; Rikhof, Cocan, 2019; Schmitt, von Heinegg, 2012, et al.). Some foreign scholars have studied the control mechanism of the international agreements implementation (Cremona, Thies, Wesse, 2017; Li, Qi, Bian, 2020, et al.), unfortunately, Ukrainian lawyers are not very active in defining the essence, distinguishing the main components of the control mechanism for ensuring the implementation of international agreements. Given the above, the purpose of the article is to clarify the essence and main components of the control mechanism to ensure the implementation of international agreements.

2. International monitoring: basic approaches to understanding

At present, in the practice of international relations and the doctrine of international law there is no single approach to defining and understanding the essence of the phenomenon of international monitoring and the mechanism for ensuring the implementation of treaty obligations, although international monitoring is today the most important means of ensuring the implementation of international treaties and the international legal institution established after World War II (Trebina, 2022).

According to the American scientist Karl Pieragostini, the purpose of international control is to identify serious mistakes, misunderstandings and miscalculations in the implementation of the international treaty and thus encourage the parties to long-term rational cooperation. If a state becomes a party to a treaty to pursue its interests, according to Pieragostini, it will remain a party to that treaty as long as the treaty norms are able to protect the aforementioned interests. Accordingly, a party to the treaty will not knowingly violate an international treaty, as it acts in favor of that party (Pieragostini, 1986, p. 424-425). Another American scholar, William Jackson, believes that an international treaty is designed to assess equally the risks and benefits to international

security, as well as the political risks and benefits for each party involved in the treaty. In this approach, international control should be perceived not only as an assessment of the activities of the parties to the agreement in relation to possible violations, but also have a deeper meaning (Jackson, 1982, p. 345). International control, according to the author, should be considered not only from a technical but also from a political point of view: "measures of international control, which are properly understood, can also be a measure to strengthen trust" (Jackson, 1982, p. 346).

Russian international law expert O. Tiunov emphasizes that "international legal monitoring is designed to maintain the relationship regulated by the treaty on certain actions or to refrain from them, to maintain the status quo within the legal regime agreed by the parties. The control is used to determine the fulfillment of the international legal obligation or the departure from it. In the latter case, the state party to the treaty is obliged to eliminate the situation that threatens the implementation of the agreement and to take measures to ensure its strict implementation» (Tiunov, 2012). Ukrainian lawyer M. Medvedieva notes that «the essence of international control is to verify, on the basis of an international treaty, by the subjects of international law or the bodies the bodies of conformity of the activity of the states to the observance established by them in order to ensure their compliance» (Medvedieva, 2012, p. 25).

We propose to consider international control as an activity of subjects of international law based on generally accepted principles of modern international law through established special control mechanisms in order for states to comply with the treaty international legal obligations and take measures to implement them.

Consideration of international control as an institution of international law involves the study of international law, each of which has a specific purpose – to regulate international (interstate) relations. The influence of international law on the conduct of subjects of international law is the reason for the emergence of the relevant legal relationships. Analysis of recent research and publications shows that in foreign and Ukrainian science of international law, the issue of international legal relations has not been comprehensively studied (Zabara, 2016, p. 185). I. Lukashuk defines international legal relations as a specific form of international relations, their special variety, a relatively independent element in the system of international relations (Lukashuk, 1980, p. 109).

In the context of the question of the structure of international legal relations, their elements and connections between them are usually considered. The initial position is that in the legal doctrine, according to Lukashuk, "there is no unity on the structure of legal relations" (Lukashuk, 1980, p. 111). Summarizing the approaches to this problem, I. Zabara notes that "in the vast majority of cases, the position is held that legal relations can be considered as a relationship of subjects – holders of rights and responsibilities, as well as the relationship of rights and responsibilities owned by the subjects" (Zabara, 2016, p. 186). At the same time, quite often, despite the controversial issue, the object of legal relations is among the main elements (Lukashuk, 1980, p. 111). V. Butkevych emphasizes, that "given the long discussion on understanding the nature and essence of international legal relations, the analysis of their features should include research: a) subjects of law, in particular at the level of legal relations, ie participants in the legal relationship; b) the content of legal relationship; a distinction should be made between the substantive content, ie the behavior of the subjects (including "sanctions" in protective legal relations), as well as the legal content, ie subjective legal rights and obligations; c) objects of legal relations" (Butkevych, 2002, p. 447).

When we talk about the control mechanism for ensuring the implementation of international agreements, we must first address the essence of the concept of mechanism. "New dictionary of foreign words" defines "mechanism" from Latin *mechanismus*, from Greek *μηχανή* (*mēkhanē*, "machine") – : 1) a device inside the machine, instrument, apparatus that sets them in motion, 2) an internal structure, system of something, 3) a set of processes that make up any mental, physical or chemical and other phenomenon. (Shevchenko, 2008, p. 383). That is, the mechanism involves the systematic and orderly nature of any activity or process. We believe that this understanding is fully correlated with the need to develop a mechanism to ensure the implementation of obligations under international treaties as a systematic and orderly activity of subjects of international law.

Attempts to define the concept and essence of such mechanism in the science of international law have been made, but it cannot be said that such studies are comprehensive. Thus, M. Medvedieva considers the international convention mechanism for the implementation of international law as one that includes the following components: "lawmaking, interpretation, control and law enforcement." (Medvedieva, 2012, p. 24). In the compendium "Theory and practice of application of the Convention

for the Protection of Human Rights and Fundamental Freedoms" O. Serdiuk emphasizes that "the control mechanism of the ECHR should be considered in three aspects: contractual, substantive, institutional" (Serdiuk, Yakoiviuk, 2019, p. 52). S. Marochkin understands the mechanism of ensuring the implementation of international law as a system of means of security (guarantees, control, etc.), each of which is part of a common mechanism (Marochkin, 1988, p. 79). O. Tiunov adheres to the position that the essence of the mechanism for ensuring the implementation of international treaty obligations are international legal means of security. They are understood as a system of measures aimed at the most effective implementation of international obligations agreed upon by the states concerned and enshrined in the form of norms of international law (Tiunov, 1981, p. 27-28). N. Simonova proposes to unite in the concept "mechanism for ensuring the implementation of obligations under international agreements" the following institutional components: 1) institutions of the obligation and integrity of the implementation of international legal obligations; 2) international and domestic means of ensuring the implementation of international treaties (which are separate legal institutions); 3) judicial institutions; 4) institutes of international organizations; 5) the institution of liability for non-fulfillment of obligations under international agreements (Simonova, 2013, p. 63).

Based on the structure of international legal relations, we propose to identify three components in the control mechanism for the implementation of international agreements, namely, contractual component, related to the object of legal relations, the institutional component, related to the subject (subjects) international legal relations and a content component, related to the whole spectrum of ensuring the requirements of international treaties (principles, norms, forms, methods, means of control activities, etc).

3. Contractual component of the control mechanism for ensuring the implementation of international agreements

The legal object of international control should be the fulfillment of obligations under an international treaty (ie conduct). In this regard, the opinions of most scholars coincide, although they contain some theoretical nuances. Thus, I. Kotlyarov, S. Marochkin as the object of international control call the compliance of the behavior/actions of states with the accepted obligations/legal orders. R. Valeev, P. Radoinov, A. Talalaev, O. Tiunov, O. Ustinova talk about the observance by states of their obligations under international legal/treaty obliga-

tions. A. Ibragimov, L. Busa use the term "fulfillment" of obligations. Interesting is the opinion of A. Gaverdovskii, who considers violations of the principles and norms of international law as an object of international control, and also A. Fastov ra S. Nistratova, who propose to consider violations of international law as an object of international control. Foreign authors are even more interested in theorizing and as the object of international control call the functioning of an international treaty (K. Pieragostini), as well as risks and benefits for international security and the parties to the treaty (W. Jackson).

International treaty practice provides a fairly clear answer to the question of the object of international control. Thus, the norms of "Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof" of February 11, 1971 the object of international control is called "compliance with the provisions of this Treaty", "the fulfillment of the obligations assumed under the Treaty" (para. 1, 2, 4 of Art. III). The Statute of the International Atomic Energy Agency stipulates that the object of control activities of the Agency's inspectors is the fulfillment of the obligations of the states, as well as to comply with health and safety standards (part A6, Art. XII of the Statute of the IAEA). The "Treaty on the Non-Proliferation of Nuclear Weapons" of 1 July 1968 contains the norm according to which the fulfillment of obligations under the Treaty is also a subject to international control (Part 1, Article III). Thus, international treaty practice allows us to conclude that the first component of the control mechanism to ensure the implementation of international agreements is the fulfillment / compliance with contractual obligations by the parties to an international agreement.

4. Institutional component of the control mechanism for ensuring the implementation of international agreements

O. Tarasov proved that in the post-Soviet space, including in Ukrainian literature, there are three distinct areas of research on the issue of international legal personality: "The first direction continues the Soviet tradition of ignoring the international legal personality of man within a closed interstate system, defending the position of anthropological nihilism in the science of international law. The circle of subjects of international law in this direction is rigidly dogmatized. ... The second direction ... has a compromise nature, which tries to lavish between traditional statism and the gradual (with a lot of reservations) admission of the individual and INGOs into

separate, strictly established areas of interstate cooperation. The third area of research, which is just emerging in the post-Soviet space, defends the independent nature of the international legal personality of man within an open international legal system, where each of the subjects of the international law has its own, often unique, international legal status" (Tarasov, 2014, p. 353). Therefore, among the main subjects of international control (controlling subjects) it is possible to distinguish: 1) states; 2) international organizations and their bodies, 3) specially created control bodies. However, it should be borne in mind that the subject composition of the legal relations of international control is expanding with the help of controlled entities, which may be any subject of international law - participants in certain international treaties, as well as civil society institutions that are involved in control activities.

International treaty practice confirms our thesis on the subjects of legal relations on the implementation of international control and is evidence of the formation of an appropriate international legal institution. Thus, in the international humanitarian law of the Geneva Conventions of 1949 and their Additional Protocols of 1977 and 2005 stipulates that international monitoring of the implementation of the provisions of the Geneva Conventions and Additional Protocols shall be carried out by: 1) *the belligerent parties*: "at the request of a Party to the conflict, an enquiry shall be instituted, in a manner to be decided between the interested Parties, concerning any alleged violation of the Convention" (Art. 132 Convention III); 2) *the Protecting Powers*: "representatives or delegates of the Protecting Powers shall have permission to go to all places where prisoners of war may be, ... and shall have access to all premises occupied by prisoners of war" (Art. 126 Convention III); 3) *the International Fact-Finding Commission*: in accordance with paragraph "a" of Part 1 of Art. 90 of Additional Protocol I establishes an International Fact-Finding Commission that is competent to «enquire into any facts alleged to be a grave breach as defined in the Conventions and this Protocol or other serious violation of the Conventions or of this Protocol» (para. "i" of P. 2 Art. 90 Protocol I); 4) *International Committee of the Red Cross*: Representatives of the International Committee of the Red Cross enjoy the same rights as representatives or delegates of the Protecting Powers (Art. 126 Convention III). Thus, in the legal relationship of international control over the implementation of treaty obligations under international humanitarian law, such subjects of control as the state, a specially created

international control body and an international (non-governmental) organization.

5. Substantive component of the control mechanism for ensuring the implementation of international agreements

The control mechanism of the international treaty functions in strict accordance with the generally accepted principles of modern international law, which are fully reflected in the Helsinki Final Act, in addition, the principles directly related to the organization and conduct of international control are applied. The control mechanism uses various methods of international control over compliance with international agreements (conventions), ie specific methods of carrying out control activities, a set of techniques and methods of carrying out control measures. Sharing the opinion of representatives of Ukrainian and foreign science of international law, they include the exchange of information, reviews, reports, consultations, observations, inspections, questionnaires, monitoring, verification, investigation, arbitration and judicial control, etc (Valeev, 2001, p. 15–16). The specific functioning of the substantive component of the control mechanism of the international treaty will be considered on the example of the Criminal Law Convention on Corruption.

According to Art. 24 of the «Criminal Law Convention on Corruption (ETS 173)»(1999) «The Group of States against Corruption (GRECO) shall monitor the implementation of this Convention by the Parties». GRECO's work is divided into rounds, each of which explores a range of issues on a particular topic. During the first round, which took place in 2000-2002, assessed the independence, specialization and powers of the bodies involved in the fight against corruption, as well as the issue of immunity of civil servants from arrest and prosecution. Second round of evaluation (2003-2006) was devoted to the issue of detection and confiscation of proceeds from corruption, prevention of the use of legal entities to conceal corruption. The third round of evaluation (2007–2011) was focused on the criminalization issues of certain acts covered by the Convention, as well as ensuring the transparency of the financing of political parties. In 2012–2016, a fourth round was held on the prevention of corruption among parliamentarians, judges and prosecutors. In 2017, the fifth round of the GRECO evaluation was launched, which focused on preventing corruption, stimulating incorruptibility and impartiality in governments and law enforcement agencies.

The GRECO evaluation mechanism consists of two stages. At the first stage, a general

analysis of the situation is carried out in order to identify problems and develop recommendations for improving legislation and law enforcement practices. To do this, two experts from other countries, selected from pre-established lists by national delegations, are sent to the country under assessment. The second stage assesses the measures taken by states to implement the proposed recommendations. Further evaluation of the implementation of the recommendations (the “Compliance Procedure”) serves to verify the achievements of Member States and to facilitate the implementation of the recommendations. The list of issues for evaluation and the team of experts for each country being audited are approved at the GRECO plenary session. Written answers to the questions, as well as information received by experts during the visit to the country directly from representatives of state bodies and civil society institutions, form the basis of a preliminary expert reports. Experts first send the draft preliminary report to the state so that it can make remarks and comments on the report before it is submitted to GRECO. The draft is then discussed in plenary and put to the vote. In addition to analyzing the implementation of anti-corruption standards, the final evaluation report provides mandatory and optional recommendations for improving legislation and law enforcement practices. Mandatory recommendations must be implemented within 18 months.

That is, in the functioning of the control mechanism of an international treaty, the substantive component ensures the use of subjects of international control of various forms, methods and measures of control activities, adhering to the relevant principles and norms of international law, which allows to qualitatively ensure compliance with international treaties.

6. Conclusions

International control as a means of securing international obligations is becoming increasingly important today, becoming the norm and necessary condition for the functioning of international law. The study of the phenomenon of international control over compliance with international treaties is of great practical importance, directly affecting the quality and degree of development of provisions on the control mechanism of specific international treaties. An effective control mechanism, in turn, makes a huge contribution to ensuring proper compliance with international treaty obligations, which ultimately affects the state of compliance with international law and improving the effectiveness of international law in general.

References:

- Butkevych, V.H.** (Ed.) (2002). *Mizhnarodne pravo. Osnovy teorii*: pidruchnyk [International law. Fundamentals of theory: a textbook] / V.H. Butkevych [et al.]. Kyiv : Lybid (in Ukrainian).
- Convention (III) relative to the Treatment of Prisoners of War, Geneva, 12 August 1949.** Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/375?OpenDocument>
- Cremona, M., Thies, A., & Wesse, R.A.** (Eds.) (2017). *The European Union and international dispute settlement*. Oxford; Portland, Oregon : Hart Publishing.
- Jackson, W.D.** (1982). Verification in Arms Control: Beyond NTM. *Journal of Peace Research*, XIX (4), 345–353.
- Li, Y., Qi, T., & Bian, C.** (Eds.) (2020). *China, the EU and international investment law: reforming investor-state dispute settlement*. Abingdon, Oxon ; New York, NY : Routledge.
- Lukashuk, I.I.** (1980). *Mehanizm mezhdunarodno-pravovogo regulirovaniya* [The mechanism of international law regulation]. Kiev : Vishha shkola (in Russian).
- Marochkin, S.Ju.** (1988). *Problema jeffektivnosti norm mezhdunarodnogo prava* [The problem of the effectiveness of international law]. Irkutsk : Izd-vo Irkut. un-ta (in Russian).
- Medvedieva, M.O.** (2012). *Teoretychni ta praktychni aspekty realizatsii mizhnarodno-pravovykh norm u haluzi okhorony navkolishnoho seredovyshcha* [Theoretical and practical aspects of the implementation of international law in the field of environmental protection] / Kyiv. nats. un-t im. Tarasa Shevchenka, In-t mizhnar. vidnosyn. Kyiv : Feniks (in Ukrainian).
- Onishchenko, N.M., & Suniehin, S.O.** (2021). Effective control over ensuring human rights and freedoms as a dimension of a democratic society: Social context. *Journal of the National Academy of Legal Sciences of Ukraine*, 28(3), 15–26.
- Pieragostini, K.** (1986). Arms Control Verification: Cooperating to Reduce Uncertainty. *Journal of Conflict Resolution*, 30(3), 420–444.
- Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), 8 June 1977.** Retrieved from <https://ihl-databases.icrc.org/applic/ihl/ihl.nsf/INTRO/470>
- Rikhof, J., & Cocan, S.** (2019). Control in International Law. *African Journal of International Criminal Justice*, 5(1), 5–55.
- Schmitt, M.N., & Heinegg, von, W.H.** (Eds.) (2012). *The implementation and enforcement of international humanitarian law*. Farnham, Surrey, England ; Burlington, VT : Ashgate Pub.
- Serdiuk, O.V., & Yakoviuk, I.V.** (Eds.) (2019). *Teoriya ta praktyka zastosuvannya Konventsii pro zakhyst prav liudyny i osnovopolozhnykh svobod: kompendium* [Theory and practice of application of the Convention for the Protection of Human Rights and Fundamental Freedoms: Compendium] / [Serdiuk O. V., Yu.V. Shchokin, I.V. Yakoviuk et al.]. 2-he vyd., dopov. Kharkiv : Pravo (in Ukrainian).
- Shevchenko, L.I.** (Ed.) (2008). *Novyi slovnyk inshomovnykh sliv*: blyzko 40 000 sl. i slovospoluchen [New dictionary of foreign words: about 40,000 words and phrases] / L.I. Shevchenko, O.I. Nika, O.I. Khom'iak, A.A. Dem'ianiuk. Kyiv : ARII (in Ukrainian).
- Simonova, N.S.** (2013). Institucional'nyj mehanizm obespechenija vypolnenija objazatel'stv po mezhdunarodnym dogovoram: ponjatie, osnovnye jelementy [The Institutional Mechanism of Ensuring for Meeting Commitments under International Treaties: Definition and Basic Elements.]. *Moskovskij zhurnal mezhdunarodnogo prava – Moscow Journal of International Law*, 3, 60–82 (in Russian).
- Statute IAEA.** Retrieved from <https://www.iaea.org/sites/default/files/statute.pdf>
- Tarasov, O.V.** (2014). *Sub'iekt mizhnarodnogo prava: problemy suchasnoi teorii*: monohrafiya [The subject of international law: problems of modern theory: a monograph] / Nats. yuryd. un-t im. Yaroslava Mudroho. Kharkiv: Pravo (in Ukrainian).
- Tiunov, O.I.** (1981). Mezhdunarodno-pravovye sredstva realizacii mezhdunarodnykh dogovorov [International legal means of implementing international treaties.]. *Voprosy universal'nosti i jeffektivnosti mezhdunarodnogo prava: mezhevuz. sb. nauch. tr. – Questions of universality and efficiency of international law: interuniversity collection of scientific works*, Pp. 27–37. Sverdlovsk : UrGU (in Russian).
- Tiunov, O.I.** (2012). O roli mezhdunarodno-pravovogo monitoringa i mezhdunarodnogo kontrolja v razvitii Evrazijskoj jekonomicheskoj integracii [On the role of international legal monitoring and international control in the development of Eurasian economic integration]. *Evrazijskij juridicheskij zhurnal – Eurasian law journal*, 10, 5–10. Retrieved from <https://eurasilaw.ru/nashi-rubriki/persona-grata/intervyu-s-o-i-tiunovym-cudej-konstitucionnogo-suda-rf-v-pochetnoj-otstavke> (in Russian).
- Treaty on the Non-Proliferation of Nuclear Weapons (NPT).** Retrieved from <https://www.un.org/disarmament/wmd/nuclear/npt/text/>
- Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and the Ocean Floor and in the Subsoil Thereof.** Retrieved from https://treaties.unoda.org/t/sea_bed
- Trebina, O.M.** (2022). Mizhnarodnyi kontrol: kontseptualizatsiia fenomena [International control: the conceptualization of the phenomenon]. *Innovations and prospects of world science. Proceedings of the 6th*

International scientific and practical conference (February 2-4, Vancouver, Canada), Pp. 1063–1072. Vancouver, Canada: Perfect Publishing (in Ukrainian).

Valeev, R.M. (2001). Kontrol' v sovremennom mezhdunarodnom prave [Control in Modern International Law] / Kaz. gos. un-t. Jurid. fak. Kazan' : Centr innovac. Tehnologij (in Russian).

Zabara, I.M. (2016). Mizhnarodni pravovidnosyny – osnova mizhnarodnoho pravoporiadku (teoretychni aspekty) [International legal relations are the basis of the international legal order (theoretical aspects)]. *Yurydychnyi naukovyi elektronnyi zhurnal - Juridical scientific and electronic journal*, 3, 185–187 (in Ukrainian).

Олеся Требіна,

аспірантка кафедри міжнародного права, Національний юридичний університет імені Ярослава Мудрого, вулиця Пушкінська, 77, Харків, Україна, індекс 61024, olesyatrebina@gmail.com

ORCID: orcid.org/0000-0002-1985-9646

КОНТРОЛЬНИЙ МЕХАНІЗМ МІЖНАРОДНОГО ДОГОВОРУ: СУТНІСТЬ І СКЛАДОВІ

Анотація. *Метою роботи* є з'ясування сутності та основних складових контрольного механізму забезпечення виконання міжнародних договорів.

Методи дослідження. Методологічно робота заснована на системному підході в аналізі міжнародних правовідносин та міжнародних договорів, на формально-логічному й компаративному методах тлумачення міжнародного права, використовуваних як на теоретичному, так і на емпіричному рівнях, контент-аналізі міжнародних договорів.

Результати. Доведено, що міжнародний контроль як засіб забезпечення міжнародних зобов'язань набуває все більш важливого значення, стає нормою та необхідною умовою функціонування міжнародного права. Обґрунтовано, що як будь-які правовідносини, міжнародні контрольні правовідносини мають необхідні елементи: об'єкт, суб'єкти та зміст. Об'єктом міжнародного контролю є виконання зобов'язань за міжнародним договором. Суб'єктами контрольної діяльності можуть виступати міжнародні організації та їх органи, спеціально створювані контрольні органи та держави. Зміст правовідносин міжнародного контролю включає взаємні права та обов'язки суб'єктів при тому, що основний та загальний обов'язок у будь-яких контрольних правовідносинах є необхідність відповідати загальноновизнаним принципам та нормам міжнародного права. Визначено, що виходячи зі структури міжнародних правовідносин, ми можемо виділити три складові в контрольному механізмі виконання міжнародних договорів: 1) договірну складову, пов'язану з об'єктом правовідносин, 2) інституційну складову, пов'язану з суб'єктом (суб'єктами) міжнародних правовідносин та 3) змістовну складову, пов'язану зі всім спектром забезпечення вимог міжнародних договорів (принципи, норми, форми, методи, засоби контрольної діяльності тощо).

Висновки. Дослідження феномену міжнародного контролю за дотриманням міжнародних договорів має величезне практичне значення, безпосередньо впливаючи на якість та ступінь розробленості положень про контрольний механізм міжнародних договорів. Ефективно діючий контрольний механізм, своєю чергою, вносить значний внесок у справу забезпечення належного дотримання міжнародних договірних зобов'язань, що, зрештою, позначається на стані дотримання міжнародно-правових норм та підвищення ефективності міжнародного права загалом.

Ключові слова: міжнародний договір (конвенція), міжнародний контроль, контрольний механізм договору (конвенції), суб'єкт міжнародного права, міжнародні правовідносини.

The article was submitted 14.02.2022

The article was revised 09.03.2022

The article was accepted 29.03.2022

UDC 340.12

DOI <https://doi.org/10.32849/2663-5313/2022.1.19>**Sviatoslav Skliar,***Postgraduate Student at the Department of Public Law, Yuriy Fedkovych Chernivtsi National University, 2, Kotsiubynskoho street, Chernivtsi, Ukraine, postal code 58012, skliar.sviatoslav@chnu.edu.ua***ORCID:** orcid.org/0000-0002-1279-611XSkliar, Sviatoslav (2022). Do human rights have the ability to overcome selfish interests? *Entrepreneurship, Economy and Law*, 1, 121–126, doi:<https://doi.org/10.32849/2663-5313/2022.1.19>

DO HUMAN RIGHTS HAVE THE ABILITY TO OVERCOME SELFISH INTERESTS?

Abstract. Purpose. The article is devoted to the analysis of the practical importance and functional capacity of the universalization of human rights, which will provide an answer to the question: "Can a universal moral law become the foundation for decisions made in society?" **Research methods.** The article is based on dialectic method and antroposociocultural approach. **Results.** The main arguments of the critique of the possibility and necessity of substantiation of human rights are highlighted. It has been shown that the most convincing theories are currently unable to provide an objective basis for human rights decision-making. Using the example of state fiscal policy, it is proved that morality will not be able to overcome the selfish interest of man, and the universalization of human rights, based on morality that contradicts human nature, will lead to the marginalization of a human being. The author argues that the combination of reasonable coercion and satisfied needs rejects the need for selfish behavior in general. **Scientific novelty.** It is the first attempt to challenge a moral-based understanding of human rights due to its contradiction with human nature. **Conclusions.** Despite numerous attempts to discover the fundamental basis of human rights, scientists have not succeeded to do so, and no justification at this point can determine the correct, socially desirable behavior of the individual. The desired foundation, on which society may rely in order to make an influence on selfish interest, lies in the provisions of the theory of interest and economic prosperity. Satisfied needs of every member of society, which is possible due to the theory of interest and the theory of human rights to taxes, can affect a significant part of human behavior, which will eventually lead to altruistic actions. In such conditions, deception and benefit maximization will be rudimentary behavior. There is no need for some moral code that will create a basis for decision-making policy. The desire and striving for conditions in which the need for selfish behavior is lost shapes an adequate basis for political and personal decisions.

Key words: human rights, tax compliance, tax evasion, relativism, self-interest, universalization of human rights.

1. Introduction

Any political decision requires justification. Despite the fact that immediate priority is to improve the country's prosperity, further considerations eventually lead to the need for a fundamental basis, especially when it comes to policies that do not directly affect the economic flourish, such as ecology, health care, social policy or taxation. Society is not limited to consumption. Substantiation of a certain decision, both at the individual level, and at the level of the whole nation requires the existence of certain prerequisites, based on which such decisions can be assessed. The search for such preconditions is a task that cannot be called new, but there are no satisfactory answers to the questions that arise in the search process. All philosophical and political concepts that prevailed at some point were eventually rejected or refuted. Libertarianism, utilitari-

anism, liberal ideology, and many other political philosophy branches have never been able to provide humanity with a basis on which it would be possible to stir its activity. For almost a century, the modern Western world has been guided by the concept of inalienable inherent human rights, which Ukraine has adopted, enshrining it at the Constitutional level. The Western community has chosen human rights as the main criteria for assessing any process in society. Despite intuitive clarity and functional validity, there is no fundamental basis on which human rights can rely to become universal criteria for evaluating a particular solution.

Consequently, the purpose of this publication is to answer the question: "Can human rights, given their universalization, become the desired basis and justify the decisions made within a society?" The article is based on general scientific and special methods of scientific

knowledge. However, the dialectical method and antroposociocultural approach dominate the entire discussion of the abovementioned problem.

The article is divided into three parts: firstly, current most important and relevant views in this regard; secondly, the hazard of moral universalization; finally, an optimal solution in overcoming one's self-interest in fiscal policy.

2. The importance and the main problem of human rights' universalization

Justification and further legitimization of human rights is not a new task. Each philosophical and legal direction has its own vision of where such rights come from, and how the state should regulate this area (and whether it should be regulated at all). However, despite significant scientific achievements on this issue, there is no consensus on even the very possibility of human rights universalization. The practical need to address this issue varies depending on the historical period in which philosophical thought is designed to use human rights to solve a particular problem. Currently, Ukraine, like the rest of the Western world, is in a state of active tax reforms, designed to solve, among other things, the problem of a low level of tax compliance. One of the obstacles here is the selfish interest of man: it is unclear why a man should sacrifice his personal interest for the sake of others.

Nowadays, human inalienable rights are the most influential point of view of why one should do the right thing. The universalization of such rights is in fact a justification for the truthful and proper decision, but the reference to an apparency of human rights as an objective reality is clearly not a strong argument. It is important to state why human rights are inviolable and inalienable. Moreover, universality is designed to solve the neglecting problem in the case of human rights relativity. If cultural or personal circumstances distort human rights, then following them is relative and depends on external circumstances. Thus, the existence of human rights at this stage of historical development is similar to the existence of God's will before existentialism: you must act according to God's word then; you must act in accordance with human rights now. However, there is a significant difference between these guidelines: while religious rules are absolute and based on a powerful concept of God's will, human rights have no such basis, which in fact leads to debate about their objectivity.

3. Are human rights universal? Arguments against

The debate over the possibility and necessity of universalizing human rights has given rise to a considerable number of arguments that

originate in the philosophical thought of many scholars, but almost all arguments can be confined to two main thoughts.

The first argument for the lack of objective justification concerns cultural relativism. Human rights have a long history, but their legitimacy and description were conducted only after World War II in response to the challenges of the postwar era: everyone has certain inalienable rights that everyone else must respect (United Nations General Assembly, 1948). The first thing that comes here to mind concerns cultural differences: how human rights can be universal if human needs differ depending on the group and historical period. To prove this thesis, we do not even need to back through time, when the state did not exist (although such an argument occurs as well), we may only mention the cultures that coexist with the Western world. As early as 1947, the American Anthropological Association disagreed with the then-proposed version of the Universal Declaration of Human Rights and formulated one of the requirements to be upheld when adopting it: "Standards and values are relative to the culture from which they derive so that any attempt to formulate postulates that grow out of the beliefs or moral codes of one culture must to that extent detract from the applicability of any Declaration of Human Rights to mankind as a whole" (AAA, 1947, 542). Clearly, many cultures are incompatible with proclaimed human rights, such as in Asia, where people live by family rather than individualism (Lee, 1996). In general, all relativistic objections can be summarized in one question: why should certain achievements of one culture be taken as universal and applicable to all cultures? According to relativists, the postulation of the existence of human rights regardless of the historical period and cultural heritage is not proper evidence.

There are many answers to this counterargument of the universality of human rights, but now it is expedient to emphasize only one thing: if there are no objective moral norms, and everything depends on culture, it means that every culture is good in itself and no seemingly unfair and anti-moral occurrences (such as slavery, racism, nationalism, etc.) cannot be interfered externally (Rachels, 2011). Obviously, such a justification will satisfy only a few. Adopting this philosophical position, the state, as well as the individual, are in fact shackled, and cannot solve any problems. Relativism here rests on the same problem as fatalism or causal determinism.

There are also some logical contradictions here: the current environment becomes true environment, but what moral basis allows us to

say so? From the relativist's point of view, any moral justification is only a reflection of a certain opinion of a certain group at a certain time, so the statement that any culture should not be interfered is a similar reflection of some (means western) cultural heritage. Thus, the logic derived from the relativistic position is driven into a dead end.

The second argument concerns the possibility of the existence of human rights in general and, even if such an existence is possible, the actual need for its justification. The skeptical argument, in general, boils down to the fact that the justification of human rights can be abandoned, and decision-making policy can be guided only by a certain inner moral conviction. If cultural relativism cannot ensure the objectivity of our judgments, and human rights cannot be universalized, then during the decision-making process we cannot say with certainty how to do things better. As R. Dworkin stated in his lecture "Is there truth in interpretation": "we read, we puzzle, we puzzle again, then we come to a judgment, and it is a judgment, not a choice, does not feel like a preference, it feels like a judgment" (Dworkin, 2009). Thus, we must be satisfied only with the available abstract means and intuition. The main argument here is functional capacity: despite the difficulties in substantiation, human rights have indeed become a useful tool for the prosperity of society in all areas, and therefore justification is superfluous.

However, the justification of human rights is not limited to responding to criticism. One of the most compelling concepts is based on human rights as the concept that was derived from human needs (interests). According to the theory of interest, human rights are objective to relation with the existence of needs. To meet such needs, it is necessary to create conditions for mutual coexistence of people that is based on the recognition of the needs of others. Thus, to meet the needs of society, it is necessary to meet the needs of everyone through reciprocal interaction and commitment. Moreover, the risk associated with people who due to circumstances beyond their control are unable to contribute to the common good must be taken by everyone. Caring for people who are currently unable to take care of themselves (due to age mostly) is retribution for past or future debt, that is, merely the exercising of transcendental exchange. Developing the concept of the theory of interest R.O. Havrilyuk substantiates the human right to taxation as a necessary mechanism for human rights (Havrilyuk R.O., 2014). However, the abovementioned position is unlikely to overcome private interest. Despite the strong logic and obvious relationship of mutual satisfaction of needs, it is unclear

why a person being, selfish by nature, will care about others. If respect for human rights can be beneficial, why not neglect these rights to maximize benefits where it is possible? It is easy to imagine a progressive tax supporter, who enjoys the benefits of a mutually built society and, at the same time, maximally utilizing the system, understates assets and net assets on his books. The human right as the duty of another will not work perfectly in this case. Otfried Höffe gives some counterarguments, for example, about the pettiness of a person who does not accept transcendental exchange (Höffe, 2008, 42), and it is working when we need to justify decisions in public policy, but the postulation of any shortcomings of people who will not be guided by these principles will not solve any problem. Of course, there are people who do not want to participate in the formation of the public good (given the influence of libertarianism and similar philosophy). Other functional theories (as well as theories of will) also do not allow overcoming selfish interest. There is no satisfactory justification for directing individual choices into the stream of human rights.

However, it should be noted that the justification of human rights is important not only for individual behavior. More often this concept is used to legitimize public policy. The theory of interest still works at the political philosophy, where it is convincingly proven that considering the needs of everyone is the most effective way to interact within society. Such arguments can be used for adequate public policy, and for individual democratic choice. Understanding its effectiveness and justification will cause the citizen to support somehow the relevant initiatives at the society or group level, but not necessarily at the level of personal choice in a particular situation. Thus, egalitarian policies are still able to explain and even determine a significant part of human behavior, even to some extent to overcome the bitter feeling of tax collection injustice, but ignore actions aimed at maximizing one's own well-being through neglecting the needs of others. Transcendental exchange develops Rawls' concept and defends the position not only of the solidarity justice (a person should not suffer because of circumstances beyond his control) but also of the exchange fairness (a person must give what he or she takes away during periods of incapacity). This explanation of human rights is usually quite persuasive: it is much easier to fight the urge of tax evasion if it is necessary to repay one's own debt, and not just because others are less fortunate and unable to provide for themselves. However, fairness does not always determine the appropriate decisions. Justice can be neglected for one's own benefit, and no concept of human rights

justification currently can answer the question "why should a person abandon his or her tries to maximize benefits" or, strictly speaking, "why should a person give up his interest here and now because of the rights of another". Of course, we can limit ourselves to state policy justifying (the theory of interest and the human right to taxation provides the necessary basis for this) and leave the uncoordinated individual choice on the institution of coercion. However, if there is nothing wrong with neglecting public policy if it contradicts individual interests, then there will be no point in democratic choice and self-interest understanding – everyone will deceive and oppose the formal requirements. Without volitional choice, only coercion remains and under such conditions, the justification of such coercion will not affect anything at all. Therefore, we need some power to ensure that human rights-based laws are followed. This problem could solve certain, not yet discovered, moral law, but such an approach is fraught with peril.

4. Why do moral-based human rights and reciprocal exchange contradict each other?

In history, there have been cases of moral universalization of certain behavioral norms. Rules that had such a basis were most profound during the reign of religion (but still with the promotion of interest, where injustice here and now was compensated after death). The concept of human rights does not have a respective "tool for equalization" of any contradictions. Any attempt to derive or create such an instrument eventually encounters the very nature of man, in which, ironically, the origins of his inalienable rights were sought, and which differs from the theoretical constructions in this field. The selfish nature of human is the main obstacle here. Further development of the concept of natural human rights inevitably leads to the opposite result: human, according to any natural law, tends to win the competition by any means, and reciprocal interaction is always accompanied by attempts to maximize benefits via deception. Selfish interest is natural, each person (under certain conditions) will give priority to their own needs, which is exactly what the desired universal moral law must face.

Thus, the existence of an objective, detached from relativism, morality would allow creating a universal core that would support human rights and explain why they should be followed in the decision-making process at any level. In his recent work on the universalization of human rights, Eric Blumenson responds to critics of universalism and concludes by mentioning the need to seek a more just and inclusive view (Blumenson, 2020, 19). In other words, universalization and objective morality are

and should be the subject of the search for philosophical thought, but what will such morality mean for the selfish interest of man, which is a part of his nature? It is very easy to talk about the need for a moral absolute when it comes to slavery, torture, extreme inequality, sexism, and nationalism. The existence of a moral force that would unequivocally condemn and make such processes impossible in the modern world seemed inevitable. However, when it comes to the resources and opportunities that are needed to guarantee equality and justice, everything becomes more complicated. The tax is a necessary condition for overcoming the anti-moral processes that occur in the world, and therefore the moral law, which will not be funded, loses any content. Under such conditions, the refusal to fund objectively moral initiatives is immoral. That is, selfish interest is anti-moral. Assuming that selfish interest is an integral part of a human, the discovery of the desired absolute moral law will lead to the state where every person is anti-moral. Such logic works only if there is a tax system, but a viable society without a mutual exchange is currently difficult to even contemplate. Assuming that morality is, at least partially, relative (and the opposite has not been proven), directing our moral law towards human rights in a society where mutual exchange is taking place is dangerous. The universalization of human rights and the corresponding requirement to follow them strictly means the marginalization of the average person, who without an understanding of the unconditional requirement not to follow his objectively existing selfish nature and contemplating social stratification, will see the demand to share only as the way of intellectual elites to establish their position in society, where following rules is "appropriate", and selfish (in the sense of moral supporters – deviant) behavior should be condemned not only as a reaction to deception, but also as morally unacceptable. Not surprisingly, the need to adhere to certain norms through moral dogma causes resistance in society, and the postmodernism, due to a failure to rationally justify all the contradictions, rejects this problem in general and offers in return to pursue intuitive goals. Universalization here becomes a problem for the individual, and therefore public policy based on the existence of a certain objective morality implies certain inferiority of all people who do not follow it, which, obviously, will not solve any problems.

The desire to maximize one's wealth is natural and understandable. Resistance and response to deception on the part of society are understandable as well. How then to supplement coercion in order to persuade the person to respect

the rights of another in all dimensions? The answer here lies again in the selfish nature of man, or rather in its manifestations. Maximizing the good, like any other behavior, has its limits and conditions of application. It is well known, that pursuing one's own interests by neglecting the rights of others is a tactic of poverty, hopelessness, and despair. Good deeds require good conditions. After all, we should not forget about the other side of man – altruistic, perhaps less influential, and more demanding, but still important enough to consider it. Altruism flourishes in the face of satisfied needs, and there is no reason for its limiting. After all, the absence of the need to deceive in order to defend the dignity and provide one's own survival, as a consequence of economic prosperity and related processes, will allow to achieve the necessary balance in society, which will inevitably lead to respect for the needs of others. However, the moral objectification of certain human rights is a task not only unnecessary but also harmful, and modernity provides us with many more mechanisms for good coexistence than in times when religion played a key role in making the right decision. Economic prosperity, high level of education, scientific achievements, and many other factors determine the behavior of the type "Don't do unto others what you don't want done unto you" much more often than in times of religious domination, despite the lack of impeccable logic to convince the citizen that the right behavior is the only possible behavior. The last argument here will be that the justification of human rights (whether moral law or remote interest in time) in any form is unlikely to ensure absolute respect for such rights. Historical development is filled with cases of neglect

of religious dogmas. Neither the universal moral law of God's absolute will nor the distant interest in the reward after death has been able to overcome the selfish nature of man. The interest here and now at some point overcame God, and there is no reason to believe that human rights will cope better.

5. Conclusions

Philosophical thought is optimistic for the moral universalization (or the very process of finding) of human rights, and discussions on this issue are considered appropriate and necessary for their further development. Discovering objective circumstances that will determine the right behavior at any level is, of course, a noble goal for any scientist. It is quite understandable to shift the scientific search towards moral categories, especially after the seeming exhaustion of the means offered by human nature. However, morality also cannot be a panacea. The relative concept may not be able to find a foundation for human rights, but it persuasively demonstrates the relativity of current moral laws. The fact that moral law universality leads to the demoralization of human being shows us that moral law can't be used as the universalization of human rights. The example of the tax is just one of many social processes that cannot be regulated in this way. Modern theories of human rights do not provide us with comprehensive mechanisms for regulating social relationships, and scientific view must again turn to human nature, which allows us to see the conditionality of human behavior and evaluate decisions based on their ability to create conditions in which selfish behavior is superfluous.

References:

- Dworkin R.** (2009). "Is There Truth in Interpretation? Law, Literature and History" Retrived from: www.youtube.com/watch?v=742JyiqLhuk (timecode: 14:13-15:02) (in English).
- Blumenson E.** (2020) How are Human Rights Universal? Harvard Kennedy School, Carr Center for Human Rights Policy, 1–19 (in English).
- Havrylyuk R.O.** (2014) The nature of tax law: anthroposociocultural approach [The nature of tax law: anthroposociocultural approach], Chernivtsi (in Ukrainian).
- Lee, S.** (1996). Liberal Rights or/and Confucian Virtues? *Philosophy East and West*, 46, 367 (in English).
- Höffe O.** (2008) *Transtsendentalnyi obmin – fihura lehitymatsii prav liudyny* [Transcendental exchange is a figure of legitimation of human rights]. *Philosophy of human rights* (in Ukrainian).
- Rachels J.A.** (2011). The challenge of cultural relativism. Chapter in the book "Bioethics" by Nancy S. Jecker, Professor Nancy S Jecker, Ph.D., Albert R. Jonsen, Robert A. Pearlman. 2011 p., 550 (in English).
- The Executive Board, American Anthropological Association.** (1947). Statement on Human Rights. *American Anthropologist*, 49(4). (in English).
- Universal Declaration of Human Rights** (1948). Paris: United Nations General Assembly (in English).

Святослав Скляр,

аспірант кафедри публічного права, Чернівецький національний університет імені Юрія Федьковича, вулиця Коцюбинського, 2, Чернівці, Україна, поштовий індекс 58012, skliar.sviatoslav@chnu.edu.ua

ORCID: orcid.org/0000-0002-1279-611X

ЧИ МОЖУТЬ ПРАВА ЛЮДИНИ ПОДОЛАТИ ЕГОЇСТИЧНІ ІНТЕРЕСИ?

Анотація. Мета. Стаття присвячена аналізу практичної значущості та функціональної спроможності універсалізації прав людини, що в результаті дасть відповідь на питання: «Чи може універсальний моральний закон стати основою рішень, що приймаються в суспільстві?» **Методи дослідження.** В основі статті – діалектичний метод та антропосоціокультурний підхід. **Результати.** Висвітлено основні аргументи критики можливості та необхідності обґрунтування прав людини. Показано, що найпереконливіші теорії наразі не можуть забезпечити об'єктивну основу для прийняття рішень у сфері прав людини. На прикладі державної фіскальної політики доведено, що мораль не зможе подолати егоїстичний інтерес людини, а універсалізація прав людини, заснована на моралі, що суперечить людській природі, призведе до маргіналізації людини. Автор стверджує, що поєднання розумного примусу та задоволених потреб відкидає потребу в егоїстичній поведінці взагалі. **Наукова новизна.** Це перша спроба кинути виклик моральному розумінню прав людини через її суперечність людській природі. **Висновки.** Не дивлячись на численні спроби, відкрити фундаментальну основу прав людини так не і вдалося, і жодне обґрунтування наразі не спроможне зумовити правильну, суспільно бажану поведінку індивіда. Шуканий фундамент, тобто можливість вплинути на егоїстичний інтерес, криється у положеннях теорії інтересу та економічному процвітанні. Задоволені потреби кожного члена суспільства, що можливо згідно з теорією інтересу та теорією прав людини на податки, спроможні зумовити значну частину поведінки людини, що призведе і до альтруїзму, а обман задля власного виживання стане поведінкою рудиментарною. Немає жодної необхідності в певному моральному кодексі, який стане основою для прийняття рішень в суспільстві. Саме прагнення до умов, в яких втрачається потреба в егоїстичній поведінці, формує адекватну основу для політичних і особистих рішень.

Ключові слова: права людини, дотримання податкового законодавства, ухилення від сплати податків, релятивізм, особистий інтерес, універсалізація прав людини.

The article was submitted 15.02.2022

The article was revised 09.03.2022

The article was accepted 30.03.2022