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PRINCIPLES OF REGULATING ATYPICAL FORMS OF HIRED WORKERS' EMPLOYMENT

Abstract. Purpose. The purpose of the article is to establish the scope and essence of the principles of regulating atypical forms of hired workers' employment. ***Results.*** The article, relying on the analysis of scientific views of scholars and provisions of legislation in force, classifies the principles of regulating atypical forms of hired workers' employment, which are proposed to group into: general, intersectoral and special. The author proves that an important area of activities of the national legislator is to amend and supplement the legislation in force with a view to defining the scope and content of the principles of regulating atypical forms of hired workers' employment. It is determined that general legal principles are the principles which are inherent in regulating of social relations in all sectors of public life, and the sector of social relations under study is no exception. While general legal principles define only general aspects of the relevant regulatory mechanism, its content is more fully and qualitatively disclosed in sectoral and special principles. Unity and differentiation are considered in the labour law study in their interconnection and interaction, without opposition. Labour law in the aggregate of legal provisions that comprise it develops not towards unity, but towards the elimination of unjustified differences caused unreasonably; from general to special, from common principles to their specification for certain categories of employees and certain types of work (for example, for water transport workers). As for differentiation, it is carried out through the specification of general provisions of law, the establishment of additional benefits and privileges for employees compared to the legislation in force that does not contradict the idea of social equality, since the established differences in the content and scope of rights and duties of employees and employers are not aimed at creating privileges for the respective social groups, but at achieving compliance of labour law with the specifics of labour relations. ***Conclusions.*** It is concluded that today the principles of regulating atypical forms of hired workers' employment are not legally defined, which significantly complicates scientific research in this area, as well as law enforcement activities. That is why we are convinced that an important area of activities of the national legislator is to amend and supplement the legislation in force in order to determine the scope and content of the principles of regulating atypical forms of hired workers' employment.

Key words: principles, regulatory mechanism, atypical forms of employment, general legal principles, sectoral principles, special principles.

1. Introduction

The regulatory mechanism for atypical forms of employment should be based on the starting points, the initial ideas, which are commonly called principles. The latter are not just an ideological basis for regulating the relevant social relations but determine the directions of their development. Therefore, the principles of regulating atypical forms of hired workers' employment are the starting points, the initial ideas underlying the regulatory mechanism for labour activity of the actors of labour law under study. The principles define the key areas and prospects for the development of labour relations with employees who work remotely, from home or on a flexible schedule.

Some problematic issues related to the legal regulatory mechanism for atypical forms of hired workers' employment were considered in the scientific works by: D.O. Balobanova, O.P. Vikhrov, I.O. Vikhrova, T.P. Holopych, A.Yu. Dietochka, S.V. Kivalov, A.V. Kravchuk, P.H. Pererva, O.V. Priieshkina, and many others. However, despite numerous scientific achievements, the issue of the principles of regulating atypical forms of hired workers' employment is still poorly developed in the scientific literature.

Consequently, the purpose of the article is to establish the scope and essence of the principles of regulating atypical forms of hired workers' employment.

2. Content of legal principles

First, it should be noted that these principles are diverse in nature and content, and therefore, it is most appropriate to group them into: 1) general legal principles, which are characteristic of all branches of law, regardless of the sector of public life in question. These principles are: the rule of law; legality; ensuring human and civil rights and freedoms; justice; humanism; efficiency and effectiveness; and scientificity; 2) sectoral principles, i.e., those that underlie the labour regulatory mechanism for all categories of employees, without exception: the principle of unity and differentiation; equality of subjects of labour relations; certainty of labour function; contractual nature of labour; legal (including disciplinary and material) liability; 3) special principles, i.e., foundations specific to the legal regulatory mechanism for atypical forms of hired workers' employment: the principle of limitation in determining the categories of employees who may work remotely, from home or on flexible working hours; the principle of personal responsibility of the employee; the principle of free choice of work and rest time; the principle of flexibility; the principle of expediency of using an atypical form of employment; the principle of stability of labour relations.

With regards to the general legal principles, it should be marked that they are also inherent in the principles of regulating atypical forms with the use of borrowed labour. In this context, primarily, we will focus on the principles of the rule of law and legality. The rule of law serves as a legal foundation both in the field of implementation of the law enforcement function of the state by law enforcement bodies and for the entire legal system of Ukraine in general and means that: 1) It is not the state that creates law, but vice versa, law is the basis of organisation and life of the state represented by its public authorities, officials and, in particular, law enforcement bodies; 2) The right to limit state power, because in a legal state, power has certain limits that it cannot ignore; 3) The right is formed by civil society institutions in the course of its daily functioning, and the state only officially recognises, formalises and gives the right binding force, systemises and protects it; 4) The right and law are distinguished, while the rule of law is established in accordance with the law; 5) Law and the state are considered self-sufficient and relatively independent social phenomena with their own history, patterns of existence and functioning; etc. (Avakian, 2015, pp. 128-129).

Next, with regards to the principle of legality, it is worth noting that, in general, it is a complex political and legal phenomenon that reflects the legal nature of the organisation of socio-political life, the organic relationship between law and power, law and the state. In a broad socio-political sense, legality is a regime of socio-political life (Vikhrov, Vikhrova, 2015). According to O.P. Vikhrov and I.O. Vikhrova, the content of legality is: 1) inseparability from mandatory law; 2) a method of state governance of society – by adopting regulations and ensuring their implementation; 3) the principle of state activities. Therefore, legality is a regime (state) of compliance of social relations with laws and bylaws of the state, which is formed as a result of their strict implementation by all actors of law (Vikhrov, Vikhrova, 2015).

Therefore, the rule of law and legality are two key principles underlying the regulatory mechanism for any social relations. They imply not only the need to comply with the provisions of the legislation in force in the course of carrying out relevant activities, but also other social regulators, such as moral and ethical provisions, legal customs, etc. The importance of the principles of the rule of law and legality is also due to the fact that these principles underlie the formation of all other, both sectoral and special principles of regulating atypical forms of hired workers' employment.

Further, among the general legal principles of regulating atypical forms of hired workers' employment, the principle of priority of ensuring human and civil rights and freedoms should be mentioned. Ensuring human rights and freedoms is the facilitation of an enabling environment for the exercise of human rights and freedoms, which has the following three teleological dominants (purposeful directions) of state activities: 1) to promote the realisation of human rights and freedoms (by positively influencing the formation of their general social guarantees); 2) to protect human rights and freedoms (by taking measures, including legal ones, to prevent offences); 3) to defend human rights and freedoms (in case of their violation by anyone) (Priieshkina, 2017). Thus, the principle of priority of human and civil rights and freedoms is one of the leading general principles of modern Ukrainian law, which is the primacy of man and of the citizen, the primacy of their rights, freedoms and legitimate interests in relation to the executive authorities of the state, the essence of which consists of three main goals: rights and freedoms of man and of the citizen are the highest values for society and are a priority over the interests of the state; the main duty of public authorities is to respect, affirm and ensure rights and freedoms of man and of the citizen; although the provisions of the Constitution and laws of the state are an important source of law, but the deter-

mining source of rights in society is natural human rights (Kravtsov, 2009, p. 141).

As for the principle of humanism, it is one of the most essential value characteristics of a civilised society that recognises the welfare of a person, his or her right to freedom, happiness, and the expression of his or her abilities as a criterion for the progressiveness of social institutions. The principles of humanism are inherent in all civilised legal systems. They also reveal one of the most important value characteristics of law. The law enshrines and actually guarantees the natural and inalienable rights and freedoms of every person: the right to life, health, personal freedom and security, the right to protection of one's honour and dignity, protection from any unauthorised interference in the sphere of personal life and other rights (Chebotarov, 2012, p. 206).

3. Principles of regulatory mechanism in labour law

The principles of efficiency and effectiveness of regulatory mechanism for atypical forms of hired workers' employment should be underlined. The authors of *The Modern Economic Dictionary* argue that "efficiency is the effectiveness of economic activity, economic programmes and measures, characterised by the ratio of the economic effect, the result to the spending of factors and resources that led to this result; achieving the greatest amount of production using a limited amount of resources or ensuring a given output at minimum costs" (Pererva, 2018). In turn, L.I. Fedulova argues that effectiveness is a measure of management accuracy, which is characterised by the achievement of the expected state of the management object, the management goal or the level of approach to it. It is associated with production, technological and management processes, specific problems and ways to solve them. The levels of the organisation's phase state vary. They can be characterised by both high and low coefficients. Depending on their size, different states of an organisation as a system can be formed in real practice, these are: stabilisation, dynamic equilibrium of system elements, loss of dynamic equilibrium of the organisation's components. This requires making different managerial decisions and criteria for their evaluation, which, in turn, determines the specifics of the performance system formation (Fedulova, 2004). The scientist notes that effectiveness, on the one hand, depends on the creation of conditions and labour results at a particular facility, and on the other hand, on the external environment and situations that determine market conditions, as well as on the amount of share capital and the amount of situational income from the goods sold (Dietochka, 2021).

Therefore, general legal principles are the principles which are inherent in regulating of social relations in all sectors of public life, and the sector of social relations under study is no exception. While general legal principles define only general aspects of the relevant regulatory mechanism, its content is more fully and qualitatively disclosed in sectoral and special principles. Primarily, the focus should be on the content of sectoral principles, which have been extensively studied in the scientific literature. In our opinion, the following principles should be highlighted:

1) the principle of unity and differentiation. Unity and differentiation are considered in the labour law study in their interconnection and interaction, without opposition. Labour law in the aggregate of legal provisions that comprise it develops not towards unity, but towards the elimination of unjustified differences caused unreasonably; from general to special, from common principles to their specification for certain categories of employees and certain types of work (for example, for water transport workers). As for differentiation, it is carried out through the specification of general provisions of law, the establishment of additional benefits and privileges for employees compared to the legislation in force that does not contradict the idea of social equality, since the established differences in the content and scope of rights and duties of employees and employers are not aimed at creating privileges for the respective social groups, but at achieving compliance of labour law with the specifics of labour relations. Differentiation of legal regulatory mechanism for labour and closely associated relations by categories of employees may be carried out by including special provisions for a certain category of employees in regulations on labour of general application, adopting regulations that apply to a certain group of employees, by excluding the possibility of applying certain general provisions to certain categories of employees (Orlova, 2020). Thus, the principle of unity and differentiation is aimed at ensuring a special approach to the regulatory mechanism for the work of employees who work remotely, from home or on a flexible schedule. However, through unity, equal guarantees are provided to protect the rights and freedoms of this category of employees on an equal basis with others;

2) the principle of equality of actors of labour relations. The content of this principle is derived from Article 2^1 of the Labour Code of Ukraine, which prohibits any discrimination in the field of labour, including violation of the principle of equal rights and opportunities, direct or indirect restriction of employees' rights based on race, skin colour, political, reli-

gious and other beliefs, gender, ethnic, social and foreign origin, age, health status, disability, gender identity, sexual orientation, suspected or actual HIV/AIDS, marital and property status, family responsibilities, place of residence, membership in a trade union or other public association, participation in a strike, applying or intending to apply to a court or other authorities for the protection of their rights or supporting other employees in the protection of their rights, reporting possible facts of corruption or corruption-related offences, other violations of the Law of Ukraine "On Prevention of Corruption", as well as assisting a person in making such a report, on the basis of language or other grounds not related to the nature of work or conditions of its performance (Code of Labour Laws of Ukraine, 1971);

3) the principle of certainty of the labour function, which is manifested in the establishment of the labour function in a contractual manner, and the specific form of application of the employee's labour is determined by the will, free will of the employee and the employer. A condition of the labour function to be performed by the employee is the basis of an employment contract. It cannot be considered concluded unless the parties agree on the employee's profession, speciality, qualifications or position. The Labour Code enshrines the principle of contractual nature of labour relations and certainty of the labour function performed by an employee. Employees exercise their right to work by entering into an employment contract with an enterprise, institution, organisation or individual. When concluding an employment contract, the work performed by an employee (labour function) is determined by an agreement between the parties to the employment contract (Article 21 of the Labour Code) (Hruzinova and Korotkii, 2003);

4) the principle of contractual nature of labour. The contractual nature of labour relations is determined by the obligation to conclude an employment contract between a potential employee and a potential employer, and then, regardless of the form of ownership, the obligation to conclude a collective agreement at all enterprises, institutions or organisations that use hired labour and have the rights of a legal entity (Holopych, 2019);

5) the principle of legal (including disciplinary and financial) liability. The essence of this principle is that a person should be held legally liable for committing offences, including disciplinary offences, regardless of whether he or she is employed remotely or directly at the enterprise.

And the last group of principles consists of special principles, the rules thereof are aimed directly at regulating the labour activities of employees of atypical forms of employment. Among such principles, we have identified the following:

– the principle of restriction in determining the categories of employees who can work remotely, from home or on flexible working hours. The essence of this principle is that not all categories of employees may be involved in atypical forms of employment, but only those who can perform their labour function;

– the principle of personal responsibility of the employee, which means that the employee is mainly responsible for facilitating favourable working conditions for himself/herself (in particular, when it comes to remote and home-based work);

– the principle of free choice of working and resting hours, i.e. the employee chooses his/her own working and resting hours, but the total working week should not be less than 40 hours;

– the principle of flexibility. This principle has a double meaning: first, its observance allows the employer to effectively use labour resources, for example, employed remotely or from home; second, the employee has the opportunity to balance his or her needs and at the same time properly perform his or her work duties;

– the principle of expediency of using an atypical form of employment. Expediency is always something optimal that meets certain specific conditions, circumstances, without which the rule will not achieve the purpose originally laid down in it. Its application should be based on expediency as one of the main requirements proposed directly to the regulatory document itself. Compliance with expediency means compliance with the general spirit, the idea of the law (Balobanova, 2007). Therefore, the principle of expediency in the context of the topic means to find a balance between the need to use atypical forms of employment and production efficiency;

– the principle of stability of labour relations, which means that atypical forms of employment are used primarily to ensure the stability of the labour collective.

4. Conclusions

Thus, to conclude the presented research, it should be noted that today the principles of regulating atypical forms of hired workers' employment are not legally defined, which significantly complicates scientific research in this area, as well as law enforcement activities. As a result, we are convinced that an important area of activities of the national legislator is to amend and supplement the legislation in force in order to determine the scope and content of the principles of regulating atypical forms of hired workers' employment.

References:

Avakian, T.A. (2015). Verkhovenstvo prava yak osnovopolozhnyi pryntsyp derzhavnoi polityky u sferi vnutrishnikh sprav [The rule of law as a fundamental principle of state policy in the field of internal affairs]. *Yurydychnyi chasopys Natsionalnoi akademii vnutrishnikh sprav - Legal Journal of the National Academy of Internal Affairs*derzhavy i prava [Theory of the state and law]. Chernihiv: Desna Polihraf (in Ukrainian).

Balobanova, D.O. (2007). Teoriia kryminalizatsii [The theory of criminalization]. *Candidate's thesis.* Odesa: Nats. un.-t "Odeska yurydychna akademiia" (in Ukrainian).

Chebotarov, S.S. (2012). Humanizm yak pryntsyp prava Ukrainy [Humanism as a principle of Ukrainian law]. *Aktualni problemy derzhavy i prava - Actual problems of the state and law,* 64, 205-210 (in Ukrainian).

Dietochka, A.Yu. (2021). Pryntsypy realizatsii pravookhoronnoi funktsii derzhavy: administratyvno-pravovyi aspekt [Principles of implementation of the law enforcement function of the state: administrative and legal aspect]. *Candidate's thesis.* Kharkiv (in Ukrainian).

Fedulova, L.I. (2004). Menedzhment orhanizatsii [Management of Organizations]. K.: Lybid (in Ukrainian).

Holopych, T.P. (2019). Sotsialno-pravovi zasady dohovirnykh vidnosyn u trudovomu pravi Ukrainy [Social and legal foundations of contractual relations in the labor law of Ukraine].*Candidate's thesis.* Kryvyi Rih: Donetskyi yurydychnyi instytut MVS Ukrainy (in Ukrainian).

Hruzinova, L.P., Korotkii, V.H. (2003). Trudove pravo Ukrainy [Labor law of Ukraine]. K.: MAUP (in Ukrainian).

Kodeks zakoniv pro pratsiu Ukrainy: vid 10.12.1971 № 322-VIII [Code of Labor Laws of Ukraine: dated 10.12.1971 No. 322-VIII]. (1971). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/322-08/conv#Text (in Ukrainian).

Kravtsov, A. (2009). Pryntsyp priorytetu prav i svobod liudyny ta hromadianyna v suchasnomu administratyvnomu pravi Ukrainy: poniattia ta sutnist [The principle of priority of human and citizen rights and freedoms in modern administrative law of Ukraine: concept and essence]. *Problemy pravoznavstva ta pravookhoronnoi diialnosti - Problems of jurisprudence and law enforcement*, 2, 140-143 (in Ukrainian).

Orlova, N.H. (2020). Zahalni zasady yednosti i dyferentsiatsii pravovoho rehuliuvannia trudovykh vidnosyn pratsivnykiv vodnoho transportu [General principles of unity and differentiation of legal regulatory mechanism for labor relations of water transport workers]. *Naukovi zapysky - Scientific Notes*, 9, 58–63 (in Ukrainian).

Pererva, P.H. (2018) Efektyvnist yak ekonomichna katehoriia [Efficiency as an economic category]. *Visnyk Natsionalnoho tekhnichnoho universytetu "Kharkivskyi politekhnichnyi instytut" - Bulletin of the National Technical University "Kharkiv Polytechnic Institute",* 15 (1291), 137-143 (in Ukrainian).

Priieshkina, O.V. (2017). Zabezpechennia prav liudyny v Ukraini: stan ta perspektyvy [Ensuring human rights in Ukraine: state and prospects]. *Naukovi zapysky NaUKMA - Scientific notes of NaUKMA,* 200, 109-114 (in Ukrainian).

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ПРИНЦИПИ ПРАВОВОГО РЕГУЛЮВАННЯ НЕТИПОВИХ ФОРМ ЗАЙНЯТОСТІ НАЙМАНИХ ПРАЦІВНИКІВ

Анотація. ***Мета.*** Мета статті – встановити коло та сутність принципів правового регулювання нетипових форм зайнятості найманих працівників. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, здійснено класифікацію принципів правового регулювання нетипових форм зайнятості найманих працівників, які запропоновано поділити на три великі групи: загальноправові, міжгалузеві та спеціальні. Доведено, що важливим напрямом діяльності вітчизняного законодавця є внесення змін та доповнень до чинного законодавства з метою визначення кола та змісту принципів правового регулювання нетипових форм зайнятості найманих працівників. Визначено, що загальноправові принципи – це принципи, які є властивими для регулювання суспільних відносин у всіх галузях суспільного життя, не винятком є і досліджувана сфера суспільних відносин. Разом із тим якщо загальноправові принципи визначають лише загальні аспекти відповідного регулювання, то більш повно та якісно його зміст розкривається у принципах галузевих та спеціальних. Єдність та диференціація розглядаються в науці трудового права в їх взаємозв'язку і взаємодії без протиставлення. Трудове право у сукупності правових норм, що його становлять, розвивається не шляхом до єдності, а у напрямі усунення невиправданих відмінностей, викликаних необґрунтованими причинами; від загального до особливого, від єдиних

принципів до їх конкретизації для окремих категорій працівників та окремих видів праці (наприклад, для працівників водного транспорту). Що ж стосується диференціації, то вона здійснюється через конкретизацію загальних норм права, встановлення додаткових переваг та пільг для працівників порівняно з чинним законодавством, що не суперечить ідеї соціальної рівності, оскільки встановлені відмінності у змісті та обсязі прав і обов'язків працівників і роботодавців спрямовані не на створення привілеїв відповідним соціальним групам, а досягнення відповідності норм трудового права особливостям трудових відносин. ***Висновки.*** Зроблено висновок, що на сьогодні принципи правового регулювання нетипових форм зайнятості найманих працівників є законодавчо не визначеними, що значно ускладнює здійснення наукових пошуків у зазначеному напрямі, а також правозастосовну діяльність. Саме тому ми переконані, що важливим напрямом діяльності вітчизняного законодавця є внесення змін та доповнень до чинного законодавства з метою визначення кола та змісту принципів правового регулювання нетипових форм зайнятості найманих працівників.

Ключові слова: принципи, правове регулювання, нетипові форми зайнятості, загальноправові принципи, галузеві принципи, спеціальні принципи.

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CLASSIFICATION OF PRINCIPLES OF COMPENSATION FOR DAMAGES IN LABOUR LAW OF UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to reveal the essence and content and classify the principles of compensation for damages in labour law of Ukraine. ***Results.*** It is underlined that the concept of compensation for damages is one of those elements of the regulatory mechanism for relations in the field of hired labour that embodies requirements: on equality and mutual liability of the parties to labour relations; on ensuring safe working conditions; on the right of the parties to protect and restore their labour and closely related rights and legitimate interests. It is determined that the principle of presumption of innocence of an employee, according to which the employer is obliged to prove that damage caused is: first, the result of the employee's fault; second, not from the category of normal production and business risks; third, not caused by the employee as a result of his or her state of emergency. It is revealed that the sectoral principles of labour law include a fairly broad group of fundamental requirements, such as: the principle of voluntariness and freedom in labour; the principle of the right to work; the principle of equality; the principle of contractual nature of labour; the principle of certainty of labour function; the principle of stability of labour relations; the principle of material interest in labour results; the principle of labour safety; the principle of participation of labour collectives and trade unions in resolving issues related to setting working conditions and monitoring compliance with labour legislation; the principle of freedom of association of employees to exercise and protect their rights and freedoms through free association in trade unions, cooperatives, youth organisations, various societies, unions, etc.; the principle of the right to rest; the principle of financial support for employees in case of disability, illness and maternity. ***Conclusions.*** It is emphasised that special principles are inherent mainly in the concept of compensation for damages. It should be noted that they are not specific to compensation for damages in labour law, i.e., the scope of these principles is not limited to the relations of compensation for damages within labour law, but these are the principles, in our opinion, most fully and meaningfully reflect those scientifically based laws that express the value of the concept of compensation for damage as legal remedies for protecting and restoring legal justice in the field of labour.

Key words: principles, principles of law, compensation for damage, labour law of Ukraine.

1. Introduction

Compensation for damages in Ukrainian labour law is a complex activity by its nature and content, which is based on a system of starting points, basic ideas, compliance with which is mandatory for all participants in the relevant legal relations. It should be noted that principles are not just the most general provisions that form the basis of law but are the regularities of social life that have been formed as a result of its objective development, have been identified and scientifically substantiated by man as the most useful and appropriate for application in the existing legal space. Therefore, the special significance of the principles of law is in the fact that they express in a concentrated form the key, most general and universal regularities that constitute the ideological basis of both law in general and its individual elements (branches, institutions, provisions). Due to their generality, universality, relative immutability and imperativeness, they provide a corresponding unified focus of legal life in the state.

The above fully applies to the principles of compensation for damages in the labour law of Ukraine, which are the most general and universal ideas, starting points, indisputable provisions underlying the organisation and functioning of the legal mechanism of compensation for damages. The principles are intended to provide

the ideological basis for this mechanism, its general trend and key priorities.

A number of theoretical issues related to compensation for damages in the labour law of Ukraine have been considered in their scientific works by: E.V. Babaenko, V.V. Haievyi, T.Ye. Krysan, O.Yu. Kostiuchenko, I.V. Lahutina, Ya.S. Protopopova, I.A. Rymar, S.V. Selezen, O.P. Soroka, and many others. However, despite the considerable number of scientific achievements, the issue of the principles of compensation for damages in Ukrainian labour law is not sufficiently developed in the legal literature.

Consequently, the purpose of the article is to reveal the essence and content, and to classify the principles of compensation for damages in labour law of Ukraine.

2. Classification of principles in law

The legal doctrinal, academic, and periodical literature contains many research perspectives on the classification of principles of law in general and of individual legal phenomena. For example, the principles operating in law can be classified on the following grounds: a) by the form of regulatory expression (i.e., by the nature of the regulatory source in which they are enshrined); b) by the scope (in one or several branches, law in general); c) by the content; d) by the sector of social relations covered by the principles and the nature of social regularities reflected by them. According to the form of regulatory expression, the principles can be divided into those enshrined in international and domestic declarations, constitutions and current legislation. By scope, there are general, cross-sectoral, sectoral principles and principles of legal institutions. By content, there are general social (economic, political, etc.) and special legal principles. According to the sector of social relations to which the principles apply and the nature of social regularities reflected by them, science distinguishes the following principles: 1) universal; 2) general principles of law; 3) inter-sectoral; 4) sectoral; 5) ones of individual legal institutions (Tsvik, Petryshyn, Avramenko, 2011, pp. 198-199). Furthermore, a number of scientific proposals and approaches to the classification of principles in the field of labour law exist. However, as a rule, they are divided into: general legal, inherent in all branches of law; inter-sectoral, reflecting the common features of several branches of law; sectoral, characterising the specifics of a particular branch; intra-sectoral, relating to individual institutions (Bolotina, 2006, pp. 93-96). However, practically all legal scholars, in their views on principles in the field of law, note that other classifications, related to the study of specific principles inherent in certain legal phenomena, structural communities, are possible, such as universal (civilisational), typological, historical, etc. (Tsvik, Petryshyn, Avramenko, 2011, p. 199). With regards to the principles of compensation for damages in labour law, researchers mostly ignore this topic, i.e. they certainly consider the principles in one way or another, since the latter permeate the entire legal frame, but do not focus on their scope and content.

3. Key principles of compensation for damages in Ukrainian labour law

Therefore, we propose our vision of the basic principles of the compensation under study, as follows general legal principles and sectoral principles.

General legal principles. This group of principles includes the most general and comprehensive initial imperative requirements that apply to every legal phenomenon, any process of legal significance in the legal field. These principles are common to all branches and sub-branches of law, legal institutions and sub-institutions. They include fundamental provisions, such as:

- the rule of law,
- humanism,
- priority of human rights;
- legality
- equality of all before the law
- mutual responsibility of the state and the citizen, etc.

We will not dwell in detail on the content and role of each individual principle of this group, as these principles have been analysed and covered by a number of researchers. It should be noted, however, that the role of these principles is to define the fundamental values on which social life in the country is based, and to which both the life of an individual and the functioning of society and the state in general are subordinated. These principles provide for the key priorities with which all legal relations and other legally significant phenomena should be built and implemented. Therefore, the organisational and legal mechanism for compensation for damages in Ukrainian labour law should be designed and operate in such a way as to fully ensure the protection, defence and, if necessary, restoration of the values enshrined in general legal principles. Violation or substitution of such values is not allowed, in particular for reasons of expediency, rationality, usefulness, etc.

Sectoral principles. These are fundamental requirements that are inherent in a particular branch of law and relate mainly to social relations regulated by its means. Sectoral principles emphasise the particularities of a specific branch of law and, along with the subject matter and method, contribute to the individualisation of the branch as an independent

branch in the general system of law (Tsvik, Petryshyn, Avramenko, 2011, p. 204). According to Yu.P. Dmytrenko, the basic (sectoral) principles of labour law should be understood as the economic regularities of organisation of social production and distribution expressed in legal regulations in the form of basic guidelines, foundations of regulatory mechanism for labour relations which determine the general trend and most characteristic features of its content (Dmytrenko, 2009, p. 102). The scientist emphasises that legal ideas and trends can be considered as the basic principles of labour law only when they are aimed at regulating public labour relations and reflect the principles of the State's policy regulating conduct of participants to these legal relations. Moreover, each legal idea should be manifested in labour legislation so that it is implemented in specific legal provisions (Dmytrenko, 2009, p. 102).

Sectoral principles of labour law include a fairly broad group of fundamental requirements, such as: the principle of voluntariness and freedom in labour; the principle of the right to work; the principle of equality; the principle of contractual nature of labour; the principle of certainty of labour function; the principle of stability of labour relations; the principle of material interest in labour results; the principle of labour safety; the principle of participation of labour collectives and trade unions in resolving issues related to setting working conditions and monitoring compliance with labour legislation; the principle of freedom of association of employees to exercise and protect their rights and freedoms through free association in trade unions, cooperatives, youth organisations, various societies, unions, etc; the principle of the right to rest; the principle of financial support for employees in case of disability, illness and maternity (Bezzub, Mikhatulina, 2007, pp. 41-44).

It is of no importance to reveal the content of each of these sectoral principles, as well as the content of the above-mentioned general legal principles, since they (sectoral principles of labour law) have been repeatedly researched and explained in many scientific works. At the same time, we consider it necessary to note that the importance of this group of principles for regulating compensation for damages in labour law is the establishment of basic, inviolable requirements for the labour sphere regarding: the organisation and implementation of labour and closely related relations; guarantees, procedure for exercising and protecting the rights, freedoms and legitimate interests of participants in these relations In addition, the concept of compensation for damages is one of those elements of the regulatory mechanism for relations in the field of hired labour that embodies requirements: on equality and mutual liability of the parties to labour relations; on ensuring safe working conditions; on the right of the parties to protect and restore their labour and closely related rights and legitimate interests.

From the perspective of the topic under study, the most interesting are the special principles inherent mainly in the concept of compensation for damages. It should be noted that they are not specific to compensation for damages in labour law, i.e., the scope of these principles is not limited to the relations of compensation for damages within labour law, however, these principles, in our opinion, most fully and meaningfully reflect the scientifically based regularities that express the value of the concept of compensation for damage as legal remedies for protection and restoration of legal justice in the field of labour.

We argue that the special principles include:

– the principle of reality. The content of this principle is the requirement that compensation for damage should be based on actual circumstances, not on potential or possible (probable) situations. That is, compensation for damages is always a reaction to the actual negative consequences of the actions or inaction of a party (parties) to the labour relationship that have led to certain negative consequences;

– the principle of causation. According to this principle, a party shall be liable for damages if the negative consequences that caused the damage were caused by the actions (inaction) of that party;

– the principle of adequacy and sufficiency. These fundamental provisions express the requirements that the nature, amount and procedure of compensation, on the one hand, correspond to the extent of the damage caused and satisfy the interests of the injured party, and, on the other hand, do not put the other party in an unduly difficult position or deprive a person of his or her livelihood.

– the principle of reasonableness. That is, the amount of compensation shall be justified by the actual losses. This principle is quite clearly manifested in the requirement in the Labour Code that only direct actual damage is subject to compensation. It should be noted that the application of the above principle in case of compensation for non-pecuniary damage is significantly complicated by the nature of this type of damage;

– the principle of presumption of innocence of an employee, according to which the employer is obliged to prove that damage caused is: first, the result of the employee's fault; second, not from the category of normal

production and business risks; third, not caused by the employee as a result of his or her state of emergency.

4. Conclusions

In conclusion, we would like to note that the list of principles of compensation for damages in labour law provided by us is not exclusive and is not the only possible one. However, in our opinion, it is this set of fundamental requirements that most fully and clearly expresses the essential content and purpose of the concept under study. Moreover, we consider it necessary to note that the current labour legislation does not contain a list of principles of compensation for damages, but to a greater or lesser extent, each of the above principles is reflected in the legislative provisions.

References:

Bezzub, B.S., Mikhatulina, O.M. (2007). Trudove pravo Ukrainy [Labor law of Ukraine: Reference summary of lectures]. K.: MAUP (in Ukrainian).

Bolotina, N.B. (2006). Trudove pravo Ukrainy [Labor law of Ukraine]. K.: Vikar (in Ukrainian).

Dmytrenko, Yu.P. (2009). Trudove pravo Ukrainy [Labor law of Ukraine]. K.: Yurinkom Inter (in Ukrainian).

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

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КЛАСИФІКАЦІЯ ПРИНЦИПІВ ВІДШКОДУВАННЯ ШКОДИ У ТРУДОВОМУ ПРАВІ УКРАЇНИ

Анотація. ***Мета.*** Мета статті – розкрити сутність та зміст і класифікувати принципи відшкодування шкоди у трудовому праві України. ***Результати.*** Наголошено, що інститут відшкодування шкоди є одним із тих елементів механізму правового регулювання відносин у сфері використання найманої праці, що втілює у собі вимоги: про рівність та взаємну відповідальність сторін трудових відносин; про забезпечення безпечних умов праці; про право сторін на захист і відновлення своїх трудових і тісно пов'язаних із ними прав та законних інтересів. Визначено, що принцип презумпції невинуватості найманого працівника, згідно з яким роботодавець зобов'язаний довести, що завдана шкода: по-перше, є наслідком провини найманого працівника; по-друге, не належить до категорії нормального виробничо-господарського ризику; по-третє, не завдана працівником унаслідок його перебування у стані крайньої необхідності. З'ясовано, що до галузевих принципів трудового права належить досить простора група засадничих вимог, як-то: принцип добровільності і свободи праці; принцип права на працю; принцип рівноправності; принцип договірного характеру праці; принцип визначеності трудової функції; принцип стабільності трудових відносин; принцип матеріальної зацікавленості в результатах праці; принцип безпеки праці; принцип участі трудових колективів і профспілок у вирішенні питань щодо встановлення умов праці та здійснення контролю за додержанням законодавства про працю; принцип свободи об'єднання працівників для здійснення та захисту своїх прав і свобод через вільне об'єднання в профспілки, кооперативи, молодіжні організації, різноманітні товариства, спілки тощо; принцип права на відпочинок; принцип матеріального забезпечення працівників у випадку непрацездатності, хвороби та у зв'язку з материнством. ***Висновки.*** Наголошено, що спеціальні принципи властиві переважно інституту відшкодування шкоди. При цьому слід відзначити, що вони не є специфічними для відшкодування шкоди у трудовому праві, тобто сфера дії цих принципів не обмежується виключно відносинами відшкодування шкоди у межах трудового права, однак саме ці принципи, на наше переконання, найбільш повно та змістовно відображають ті науково обґрунтовані закономірності, що виражають цінність інституту відшкодування шкоди як засобу захисту та відновлення правової справедливості у сфері праці.

Ключові слова: принципи, принципи права, відшкодування шкоди, трудове право України.

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CONTROL OF CIVILIAN FIREARM CIRCULATION: OBJECT COMPOSITION

Abstract. ***Purpose.*** The purpose of the article is to analyse the object composition of civilian firearm circulation through the prism of the relevant administrative and legal mechanism. ***Results.*** The article studies some problematic issues of control of civilian firearm circulation as an object and target of the relevant legal relations, clarifies the framework of categories and concepts of the mechanism concerned, and specifies the role and place of the administrative and legal mechanism in regulating these legal relations. It is proved that at the current stage of formation of Ukrainian statehood and in the context of its active defence against russia's armed aggression, the issue of regulating civilian firearm circulation is of utmost importance, as it is a means of protecting each citizen individually only if the State ensures strict control of these processes. ***Conclusions.*** The author substantiates the perspective that civilian firearms are a specific phenomenon for Ukrainian legislation, and regulation of the relevant provisions will take time, although today, certain provisions of legal regulations of both national and local, situational or departmental significance already regulate certain procedures. In addition, the article proves the perspective that civilian firearms as an object of control and control as a form of organisation of the functioning of the administrative and legal mechanism of this process are extremely important elements which, interacting at the institutional and legal, organisational and managerial levels, will make this mechanism efficient and prevent violations of human and civil rights and freedoms which may occur as a result of reckless and inappropriate use, application and other forms of handling of firearms. Further research of the administrative and legal mechanism for controlling civilian firearm circulation may be aimed at the analysis of the structural composition of such an institutional formation and the urgent need to outline this mechanism and all its elements and components.

Key words: firearms, control, responsibility, police, civilian firearms, object of control.

1. Introduction

At the current stage of the legal system of Ukrainian society, the main issue is to ensure the safety of citizens and the population, which, in turn, according to the legislation of Ukraine, is possible, among other things, due to the right to self-defence. Hence, the issue of ensuring effective control, including over civilian firearm circulation, which is the most effective tool for self-defence in the context of russia's armed aggression against Ukrainian independence, is a priority task for the state and its individual bodies.

It should be noted that modern methods and means of self-defence, in the context of critical saturation of society with illegal firearms, as well as ongoing active hostilities, are transforming from healthy sports and self-defence techniques into a real need for society and its members to master skills in handling firearms, which necessitates effective control of its circulation at all stages.

The purpose of the article is to analyse the object composition of civilian firearm circulation through the prism of the relevant administrative and legal mechanism. This, in turn, requires solving the following research tasks: 1. To outline the content and essence of the concept of civilian firearm circulation and the corresponding concept of control; 2. To prove the perspective on the content of the phenomenon of civilian firearms as an object of control and subject matter of circulation; 3. To outline conclusions, proposals and recommendations for further research.

The object of the article is public relations in the field of public security and law and order.

The subject matter of the study is the object composition of control of civilian firearm circulation.

2. Problematic aspects of civilian firearm circulation in Ukraine

The issue of regulating certain problematic aspects of civilian firearm circulation has

long haunted both the legislator and the entire Ukrainian society. This problem has become especially acute in light of russia's ongoing large-scale armed aggression against Ukraine, which is accompanied by a critical saturation of society with illegal firearms. This problematic issue may have a number of solutions, one of which, according to scholars and practitioners, is to ensure control of civilian firearm circulation, organise and regulate the exercise of the right of Ukrainian citizens to self-defence by creating opportunities for the possession and use of firearms.

Furthermore, the issue of effective control of such circulation is of paramount importance but given that control as a theoretical and legal category and a state institution is defined by scholars in different ways, although it has several mandatory structural characteristics, we propose to characterise it through the prism of modernity.

According to A. Korinets, in the context of distortion of public legal consciousness, disregard for the norms of law and morality, rights and legitimate interests of other people, the idea of possessing and using firearms has become attractive (Korinets, 2007), which, in our opinion, is somewhat inconsistent with reality, since the majority of Ukrainian citizens consider possession of civilian firearms as a tool for self-defence, an opportunity to defend their rights, which have already been attempted or to resist russia's armed aggression fragmentarily.

The researchers note that Article 2 of Directive 91/477/EEC states that its provisions: 1) is without prejudice to the application of national provisions concerning the carrying of weapons, hunting or target shooting, using weapons lawfully acquired and possessed in accordance with this Directive; 2) do not apply to the acquisition or possession of arms and ammunition under national legislation on the armed forces, police or public authorities. Therefore, we can conclude that this regulation of EU secondary legislation is aimed at regulating exclusively civilian weapons circulation in the Union. This is important in view of the fact that today in Ukraine there is a need to create a special legislative regulation on weapons circulation in general. Therefore, the provisions of the Directive under consideration can be considered mainly in the context of improving firearm circulation in our country in this narrow context (Shumeiko, 2021).

3. Particularities of the definition of "weapons"

V. Litoshko argues that throughout history, mankind has considered weapons and the right to possess them an important topic. This is because the physical improvements provided by weapons were necessary for warfare. Weapons have also been a driving force for progress because of their key role in warfare. Although in today's world we do not need to use guns for self-defence on a daily basis, their importance is still linked to the public's focus on their acquisition, storage and use in times of emergency, crisis or military threats (Litoshko, 2022). The historiography of Ukrainian statehood has demonstrated stages that clearly emphasise both the need for civilians to have weapons for self-defence and the need for extensive educational activities on the procedure and rules for handling them, and the cultivation of a culture of respect for firearms as an object of increased danger that can, first of all, harm human and civil rights and freedoms, and only then – as a tool to help in a critical situation.

Moreover, the issue of weapons control has been studied by many scholars and considered from several perspectives. For example, D. Pryputen believes that control is expressed in the form of such actions as verification, and there is an identification of such concepts as "control" and "supervision". However, scientific views on this issue are not so unambiguous, and discussions on the equivalence and variability of control and supervision are still ongoing. Control is an integral part of public administration, so we consider state control as one of the functions of public administration. In this case, the essence of state control is to analyse the activities of entities being controlled for compliance with legislative provisions (Pryputen, 2020). We argue that the very essence of the state as a social and legal entity determines the reasons and provides the basis for the creation of a system of safe circulation of civilian firearms, in a situation where such a need has become urgent and there is a social (public) demand for it. In addition, the forms, methods, actors of control and other components of the relevant administrative and legal mechanism should be clearly defined by the legislation of Ukraine.

The concept of weapons is also ambiguous, in part due to a lack of clarity in the legislation. The *Great explanatory dictionary of the modern Ukrainian language* defines the word "weapons" as an instrument for attack or defence (Busel, 2002, p. 349). Weapons are devices and means used in armed struggle for attack (offence) or protection (defence) with the aim of defeating or destroying the enemy" (Shemshuchenko, 1999, p. 295). Therefore, in light of the danger of the relevant facilities to society in general and individuals in particular, T. Shumeiko, analysing international law, argues that the need to "issue permits (licences) for the activities of arms dealers and brokers in Ukraine (as

well as constant monitoring of such public administration licensing activities), as well as supervision over the proper use of the obtained permit), in particular, in view of Council Directive 91/477/EEC of the European Parliament, Article 5, part 1, which specifies that the relevant permit (licences) shall be obtained only by a person who is at least 18 years of age, is not likely to be a danger to themselves or others, to public order or to (public safety)" (Shumeiko, 2021), is critical and necessary in Ukrainian society.

A. Korniets, V. Petkov and O. Frolov's approach is of interest because the concept of "weapons in general" today depends on, so to speak, "sectoral characteristics". The scholars argue that in administrative law, weapons are a component of the licensing system, an object for which it is necessary to obtain prior permission from the competent state executive authority, i.e., the circulation thereof is carried out in a permissive manner; in criminal law, a weapon is a means specially designed to hit a living target and have no other economic or household purpose; in criminalistics, a weapon is an object or device that has certain characteristics (a certain degree of efficiency, serviceability) that hypothetically allow inflicting lethal injuries; in civil law, a weapon is material goods that are the object of property rights, property that can be owned, used, disposed of at one's own discretion; in constitutional law, a weapon is a means of satisfying the constitutional rights of citizens to self-defence (Korniiets, Frolov, 2008).

Accordingly, weapons as an object of control of circulation are an object of the material world, which by its functional (physical and other) properties is specially created and used to hit a living target (targets), and therefore, the social danger of this object gives grounds for creating a special procedure for its circulation and enabling state control of its circulation.

4. Conclusions

The article studies some problematic issues of control of civilian firearm circulation as an object and target of the relevant legal relations, clarifies the conceptual and categorical apparatus of the relevant mechanism, and specifies the role and place of the administrative and legal mechanism in regulating these legal relations.

It is proved that at the current stage of formation of Ukrainian statehood and in the context of its active defence against russia's armed aggression, the issue of regulating civilian firearm circulation is of utmost importance, as it is a means of protecting each citizen individually only if the State ensures strict control of these processes.

The author substantiates the perspective that civilian firearms are a specific phenomenon for Ukrainian legislation, and to regulate the relevant provisions will take time, although today, certain provisions of legal regulations of both national and local, situational or departmental significance already regulate certain procedures.

In addition, the proves the perspective that civilian firearms as an object of control and control as a form of organisation of the functioning of the administrative and legal mechanism of this process are extremely important elements which, interacting at the institutional and legal, organisational and managerial levels, will make this mechanism efficient and prevent violations of human and civil rights and freedoms which may occur as a result of reckless and inappropriate use, application and other forms of handling of firearms.

Further research of the administrative and legal mechanism for controlling civilian firearm circulation may be aimed at the analysis of the structural composition of such an institutional formation and the urgent need to outline this mechanism and all its elements and components.

References:

Busel, V.T. (2002). Velykyi tlumachnyi slovnyk suchasnoi ukrainskoi movy [A large explanatory dictionary of the modern Ukrainian language]. K.: Irpin (in Ukrainian).

Korinets, A.V. (2007). Orhanizatsiia sotsialnykh system obihu zbroi [Organization of social systems of weapon circulation]. Zaporizhzhia (in Ukrainian).

Korniiets, A.V., Frolov, O.S. (2008). Orhanizatsiia sotsialnykh system obihu zbroi [Organization of social systems of weapon circulation]. K., 2008 (in Ukrainian).

Litoshko, V.V. (2022). Pravove rehuliuvannia obihu vohnepalnoi zbroi v Ukraini: problemy ta perspektyvy [Legal regulation of firearm circulation in Ukraine: problems and prospects]. *Nove ukrainske pravo - New Ukrainian Law, 6*, 36-41 (in Ukrainian).

Pryputen, D.S. (2020). Derzhavnyi kontrol za obihom tsyvilnoi vohnepalnoi zbroi v Ukraini [State control of civilian firearm circulation in Ukraine]. *Pravo.ua - Pravo.ua, 3*, 48-53 (in Ukrainian).

Shemshuchenko, Yu.S. (1999). Yurydychna entsyklopediia [Legal encyclopedia]. K.: Ukr. Entsykl. (in Ukrainian).

Shumeiko, T.A. (2021) Perspektyvy pravovoho rehuliuvannia tsyvilnoho obihu vohnepalnoi zbroi v Ukraini v konteksti dyrektyvy Yevropeiskoho parlamentu i rady № 91/477/IeES [Prospects for the legal regulation of civilian circulation of firearms in Ukraine in the context of the directive of the European Parliament

and the Council No. 91/477/EEC]. *Vcheni zapysky TNU imeni V.I. Vernadskoho - Academic notes of TNU named after V.I. Vernadsky, 4*, 63-68 (in Ukrainian).

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КОНТРОЛЬ ЗА ОБІГОМ ЦИВІЛЬНОЇ ВОГНЕПАЛЬНОЇ ЗБРОЇ: ОБ'ЄКТНИЙ СКЛАД

Анотація. ***Мета.*** Метою статті є аналіз об'єктного складу цивільного обігу вогнепальної зброї крізь призму дії відповідного адміністративно-правового механізму. ***Результати.*** У статті досліджено окремі проблемні питання контролю за обігом цивільної вогнепальної зброї як об'єкта та предмета відповідних правовідносин, уточнено понятійно-категоріальний апарат відповідного механізму, уточнено роль і місце адміністративно-правового механізму в регулюванні вказаних правовідносин. Доводиться позиція, що на сучасному етапі становлення Української державності та в умовах її активного захисту від збройної агресії росії надважливим є питання унормування обігу цивільної вогнепальної зброї, що є засобом захисту кожного громадянина індивідуально лише за умов забезпечення жорсткого контролю за цими процесами з боку держави. ***Висновки.*** Обґрунтовано позицію, що цивільна вогнепальна зброя є специфічним для українського законодавства явищем, і унормування відповідних положень потребуватиме часу, хоча на сьогодні окремі положення нормативно-правових актів як загальнодержавного, так і локального, ситуативного чи відомчого значення вже регламентують окремі процедури та порядки. Додатково обґрунтовано позицію, що цивільна вогнепальна зброя як об'єкт контролю та контроль як форма організації функціонування адміністративно-правового механізму цього процесу є надзвичайно важливими елементами, що, взаємодіючи на інституційно-правовому та організаційно-управлінському рівнях, уможливлять якісну роботу цього механізму та не допустять порушення прав і свобод людини і громадянина, що можуть статись внаслідок необачного та недоцільного використання, застосування та інших форм поводження зі зброєю. Перспектива подальшого дослідження адміністративно-правового механізму контролю за обігом цивільної вогнепальної зброї може полягати в потребі аналізу структурного складу такого інституційного утворення та нагальної потреби в окресленні зазначеного механізму та всіх його елементів і компонент.

Ключові слова: зброя, контроль, відповідальність, поліція, цивільна вогнепальна зброя, об'єкт контролю.

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THE SYSTEM OF LEGAL REGULATIONS ENSURING PUBLIC CONTROL OVER POLICE ACTIVITIES

Abstract. ***Purpose.*** The purpose of the article is to establish the system of legal regulations which constitute the institution of public control over police activities and to outline the fundamental regulations which contain provisions governing these social relations. ***Results.*** The study examines the structure or possible options for grouping the elements of the system of legal regulations that ensure public control over police activities. The author provides basic information on the content of the concept of legal regulation, its characteristic features (such regulations contain rules of law (as opposed to individual or law application ones), i.e., they establish, amend or repeal certain legal provisions intended for repeated, regular and systematic application, and their effect does not end after a single performance by the object to which these provisions apply). The author focuses on the different perspectives on the classification of legal regulations (according to the criterion of rule-makers; depending on the nature of the will of public authorities, i.e. these are law-making documents that establish, amend or repeal legal provisions; by branches of law; by time of validity; by rule-makers; by territorial principle of validity; by the date of commencement; by the range of persons to whom the act applies; by legal force, etc.) ***Conclusions.*** The article summarises the scientific and theoretical work of authors from various scientific branches of law on the system of legal regulations ensuring public control over police activities and presents a system where the first and main grouping is whether the regulations are domestic or international. International instruments are grouped according to the content of the relations they regulate, namely, those containing provisions on fundamental human and civil rights and freedoms to exercise the right to control and influence public authorities and those containing provisions relating directly to the activities of law enforcement agencies, in particular, the police. National law includes Laws that define the general rights of citizens and civil society institutions to exercise their rights to control and influence the activities of public authorities, and to power in the state in general, and Laws, provisions thereof directly related to public control of police activities, as well as bylaws defining forms and types of public control, governing certain procedural issues of their implementation, and bylaws related to public control of police activities specifically.

Key words: control, legal regulation, classification, legal force, law, bylaw.

1. Introduction

The National Police of Ukraine is a central executive body, and its activities are based on some fundamental principles, including the principle of legality and the principle of interaction with the public based on partnership. The principle of legality stipulates that police officers and the National Police of Ukraine in general should act exclusively within the scope of their powers under the legislation in force. Therefore, the effectiveness of the police in performing its tasks depends to a large extent on the legal and regulatory framework for the National Police of Ukraine. That is why the issue of regulatory and legal framework for public control is relevant and requires comprehensive coverage. At the same time, one of the priorities for the development of the police is to increase the level of trust of the society and citizens of Ukraine. In turn, interaction between the police and the public based on partnership is impossible without the participation and influence of society and public institutions on the activities of the National Police of Ukraine, which requires an effective and efficient institution of public control over the activities of the police.

The issue of regulatory and legal framework for public control is considered by a number of Ukrainian researchers, including: V. Averianov, O. Andriiko, D. Bakhrakh, Yu. Bytiak, V. Vasylenko, S. Honcharuk, M. Kovaliv, V. Kravchuk, L. Kuzo, O. Poklad, O. Tereshchuk, T. Filipenko, O. Yunin, and others.

The purpose of the article is to establish the system of legal regulations which consti-

tute the institution of public control over police activities and to outline the fundamental regulations which contain provisions governing these social relations.

2. Content of the concept of normative legal act

In the context of the research topic, the issues of the content of the concept of a legal regulation should be under the focus, the classification and general system of legal regulations provisions thereof regulate social relations in the field of public control of police activities should be determined.

Any social relations are regulated via specific legal means and methods of power influence on the participants in social relations. This is due to the functioning of the organisational and regulatory mechanism for public control of the police activities. The main element of such a mechanism is legal regulation, their totality, and the provisions of such regulations govern these social relations. In the literature, a legal regulation may be considered as an official written document adopted by a public authority that establishes, amends, terminates or specifies a provision of law. Legal regulations are grouped into legislative regulations (in the narrow sense, these are exclusively laws) and bylaws (regulations of the President, the Cabinet of Ministers, central executive authorities, and other public administrations). A legal regulation has a number of characteristics: it is mandatory (the only difference is the range of those who are obliged to comply with the provisions of such an act), it is a direct reflection of the will of the actor that adopts it, it shall have a documentary form of consolidation, its enforcement is guaranteed by state power, in particular by coercion (Shemshuchenko, 1999, p. 41).

Legal regulations, legal provisions thereof form the basis of the organisational and regulatory mechanism for relations in the field of public control of police activities, differ in many classifications and features such as legal force, form, nature, etc. Without doubts, the main legal regulation in Ukraine is the law. Laws contain fundamental, basic legal prescriptions regulating certain social relations, and other legal regulations are based on the provisions of laws. Bylaws based on the provisions of the Laws contain provisions governing the implementation of legislative prescriptions in the activities of central executive authorities, etc., and regulate the performance of tasks and duties by such bodies (Aristova, 2010, p. 13). The provisions of law in legal regulations are generally binding state prescriptions of a permanent or temporary nature and are intended for repeated application (Koziubra, 2016, p. 154).

According to administrative law researchers, the characteristic features of legal regulations are as follows: such regulations contain provisions of law (such regulations contain provisions of law (as opposed to individual or law application ones), i.e., they establish, amend or repeal certain legal provisions intended for repeated, regular and systematic application, and their effect does not end after a one-time performance by the object to which these provisions apply) (Armash, Bandurka, Basov, Basova, Bevzenko, 2009, p. 410).

Legal regulations enable the state to establish rules for regulating certain social relations, including public control of police activities, by adopting legal provisions. Legal regulations are an important element of the overall structure of administrative and legal framework for public control of police activities. It should be noted that most of the social relations in the state, especially those of a public nature, are subject to legal regulations. A legal regulation can also be considered as an external form of the legal system in Ukraine (Shemshuchenko, 1999, p. 41).

Therefore, if legal regulations are important for regulating social relations in the field of public control of police activities, an effective influence on such relations can be exercised only in the presence of a certain system of legislative regulations and bylaw, the provisions thereof constitute the institution of public control of the police activities. In order to make a system of regulations, it is necessary to classify them. For example, M. Vylehzhanina identifies the following classification features of legal regulations: depending on the nature of the will of state bodies, i.e., these are documents of law-making that establish, amend or repeal legal provisions; by branches of law, provisions regulate certain social relations, but the same law or bylaw may regulate relations in different branches of law at the same time; regulations are classified by the time of their validity; by rule-makers (regulations of referendums, the Verkhovna Rada of Ukraine, the President, the Minister of Internal Affairs, etc.); by the territorial principle of action, i.e., all-Ukrainian, regional, local, etc.; by the date of commencement of action; by the range of persons to whom the act applies; by legal force, i.e. the Constitution and constitutional laws, laws, bylaws (Vylehzhanina, 2011, pp. 35–40). Among classification criteria, D. Pryimachenko prioritises the scope of application of legal regulations to the activities of a public authority, and accordingly, he establishes a grouping of regulations into regulations of domestic legislation and international legal regulations in the form of treaties and agreements, declarations, resolutions, etc. International regulations are of great importance, as compliance with international standards (especially those of the European Union) is a key to

the successful process of European integration and the building of a democratic legal state in Ukraine, although not all of them are legally binding or have been ratified in Ukraine, it is still a significant achievement if the Ukrainian legislation in force and bylaws are in line with the best international practice. Domestic regulations include the laws and bylaws mentioned above. International regulations that contain general provisions for the exercise of citizens' rights, as well as those related to the control of police activities should be highlighted; international regulations, the so-called doctrinal regulations that define certain vectors of development of law enforcement agencies in democratic states, in particular, the police, and the development of interaction between the police and civil society (such as Community Policing), should be identified (Pryimachenko, 2007, pp. 176-177).

According to L. Honchar, the criterion of rule-makers enables to distinguish regulations adopted by the highest public authorities (Verkhovna Rada of Ukraine, the President, the Cabinet of Ministers of Ukraine); regulations of central executive authorities (at the level of the Ministry or other central executive authorities such as the State Migration Service, etc.); regulations of structural elements of the system of a particular public authority; regulations of local public administrations (regional state administrations, etc.). Moreover, L. Honchar considers it necessary to divide legal regulations by the form of their adoption: constitutional laws; ordinary laws or codified laws; resolutions of the legislative body; resolutions of the Cabinet of Ministers of Ukraine; Presidential decrees; regulations of central executive authorities and other public authorities (Koziubra, 2016, pp. 43-44). Following P. Rabinovych, the classification of legal regulations should rely on a hierarchal system of such regulations, of the field of legal regulation and of the structure of the state (Rabinovych, 2007, pp. 125-126).

L. Luts constructs the system according to: 1) the lawmaker - adopted by the people, the head of the state, legislative body, executive body, supervisory body, local government, head of an enterprise, institution or organisation or an individual employer; 2) the nature and scope of action - legal regulations of general effect, legal regulations of exclusive effect, legal regulations of limited effect; 3) legal force - laws and by-laws (Luts, 2007, p. 194). Researcher L. Lehin calls the system of legal regulations differentiated and hierarchical, where the basis is made up of laws and bylaws, and hence builds the following system: Laws of Ukraine: 1) the Constitution of Ukraine as the Fundamental Law of Ukraine and laws amending the Constitution of Ukraine; 2) laws of Ukraine. By-laws of Ukraine: 1) resolutions of the Verkhovna Rada of Ukraine of regulatory and legal content; 2) decrees of the President of Ukraine; 3) resolutions and orders of the Cabinet of Ministers of Ukraine; 4) orders of ministries; 5) orders of central executive authorities and other legal regulations adopted by them that affect the rights and obligations of man and of the citizen; 6) orders of heads of local state administrations of regulatory and legal content; 7) decisions of local referendums of regulatory and legal content; 8) decisions of local councils and their executive bodies of regulatory and legal content; 9) orders of rural, township and city heads, heads of district councils in cities, regional councils of regulatory and legal content; 10) local legal regulations (Lehin, 2017, pp. 130–131).

The review of the scientific and theoretical work of authors from various scientific fields and branches of law enables to build the system of legal regulations ensuring public control of police activities as follows: the first and main grouping is the affiliation of regulations to domestic law or international regulations.

International instruments can also be grouped according to certain criteria, such as whether they have been ratified by Ukraine, whether they are legally binding or exist in the form of recommendations, etc. We will group international regulations by the content of the relations they regulate, namely, those containing provisions on fundamental rights and freedoms of man and of the citizen to exercise the right to control and influence public authorities. Such regulations include: Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; European Convention on Human Rights; Standard Minimum Rules for the Treatment of Prisoners; Recommendation of the Committee of Ministers of the Council of Europe on the Legal Status of Non-Governmental Organisations in Europe, etc. (Tereshchuk, 2018, pp. 146-147).

The second group of international regulations includes those provisions thereof relate directly to the activities of law enforcement bodies, in particular the police: the Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979; the Code of Conduct on Politico-Military Aspects of Security, adopted in 1994 to implement the provisions of the Charter for a New Europe and other OSCE security documents; the European Code of Police Ethics, adopted by the Committee of Minis-

ters of the Council of Europe in 2001; the Declaration on Police of 8 May 1979 (Tereshchuk, 2018, pp. 146-147). For example, the European Code of Police Ethics states that the police should be accountable to the state, citizens and their representatives. It should be subject to effective external control; State control of the police should be divided between the legislature, executive and judiciary (Recommendation Rec (2001) 10 of the Committee of Ministers to the member states of the Council of Europe "On the European Code of Police Ethics", 2001). The Code of Conduct on Politico-Military Aspects of Security states in paragraphs 20 and 21: "The participating States consider the democratic political control of military, paramilitary and internal security forces as well as of intelligence services and the police to be an indispensable element of stability and security. They will further the integration of their armed forces with civil society as an important expression of democracy... Each participating State will at all times provide for and maintain effective guidance to and control of its military, paramilitary and security forces by constitutionally established authorities vested with democratic legitimacy. Each participating State will provide controls to ensure that such authorities fulfil their constitutional and legal responsibilities. They will clearly define the roles and missions of such forces and their obligation to act solely within the constitutional framework" (Code of Conduct on Politico-Military Aspects of Security , 1994).

3. Classification of acts of national law

We primarily refer to the laws of Ukraine as regulations of national law, which are grouped into: Laws that define the general rights of citizens and civil society institutions to exercise their rights to control and influence the activities of public authorities and the government in general, and laws that directly relate to public control of the activities of the police.

- The first group of laws includes the Basic Law of Ukraine. Article 5 of the Constitution of Ukraine states that the bearer of sovereignty and the sole source of power in Ukraine is the people, who exercise power directly and through state authorities and local self-government bodies. Article 38 states that citizens have the right to participate in the administration of public affairs, Article 40 of the Constitution of Ukraine provides citizens with the right to address individual or collective petitions, or to personally recourse to state authorities, local self-government bodies and officials and employees of these bodies, who are obliged to consider the petitions, and to provide a substantiated reply within the period determined by law (Constitution of Ukraine, 1996). This group also includes: The Law "On Citizens' Appeals", which provides that citizens of Ukraine have the right to address public authorities and officials in accordance with their duties with comments, complaints and suggestions (Article 1 of the Law); the laws "On Information", "On Access to Public Information", "On Public Associations" and others (Yunin, 2020, p. 172).

- The second group of laws includes the Law on the National Police and the Law on National Security of Ukraine. The Law on the National Police has a separate section on public control. This is Section VIII "Public Control of the Police". It should be noted that it combines the provisions of democratic civilian control of the police (the Verkhovna Rada of Ukraine can pass a resolution of no confidence in the heads of police bodies) and public control (control through civil society institutions, local self-government bodies) (Law of Ukraine About the National Police, 2015). Paragraph 5 of part 1 of the Law "On National Security of Ukraine" defines democratic civilian control as: "a set of legal, organisational, informational, personnel and other measures carried out in accordance with the Constitution and laws of Ukraine to ensure the rule of law, legitimacy, accountability, transparency of the security and defence sector bodies and other bodies activities thereof are related to the restriction of human rights and freedoms in cases determined by law, promotion of their effective operation and performance of their functions, strengthening the national security of Ukraine (Law of Ukraine On the National Security of Ukraine, 2018).

The next level is bylaws, mainly intended to contain provisions on the implementation of public control of police activities. For example, the resolutions of the Cabinet of Ministers of Ukraine "On Ensuring Public Participation in the Formation and Implementation of State Policy" and "On Approval of the Procedure for Facilitating Public Expertise of the Activities of Executive Authorities" define the forms and types of public control and regulate certain procedural issues of their implementation (Filipenko, 2020, p. 72).

The legal regulations that provide for public control of the activities of the police at the bylaw level are currently as follows: the Order of the Ministry of Internal Affairs of Ukraine "On organisation of work with requests for public information in the National Police of Ukraine"; the Order of the Ministry of Internal Affairs of Ukraine "On Approval of the Rules of Ethical Conduct of Police Officers"; the Order of the Ministry of Internal Affairs of Ukraine "On Approval of the Procedure for Consideration of Appeals and Organisation of Personal Reception of Citizens in

the Bodies and Units of the National Police of Ukraine" (Filipenko, 2020, pp. 72-73).

4. Conclusions

Therefore, relying on the results of our research, we have come to the following conclusions:

1) the construction of a system of legal regulations provisions thereof constitute the institution of public control of police activities is rather conditional, as there are different approaches to classification and grouping of legal regulations. The review of a wide range of scientific and regulatory sources enables to establish the system of legal regulations provisions thereof constitute the institution of public control of police activities using and combining the criteria for the regulations to be classified as national law or international acts; by legal force and by the content of the relations regulated by the provisions of the regulations (regulations defining general aspects of public control and special regulations on the issues of public control of police activities);

2) the first and main grouping in the system of legal regulations is whether the regulations are domestic or international. International instruments are grouped according to the content of the relations they regulate, namely, those containing provisions on fundamental human and civil rights and freedoms to exercise the right to control and influence public authorities (Universal Declaration of Human Rights; International Covenant on Civil and Political Rights; Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment; European Convention on Human Rights; Standard Minimum Rules for the Treatment of Prisoners; Recommendation of the Committee of Ministers of the Council of Europe on the legal status of non-governmental organisations in Europe, etc.) and those containing provisions relating directly to the activities of law enforcement agencies, in particular, the police (Code of Conduct for Law Enforcement Officials, adopted by the UN General Assembly in 1979; Code of Conduct on Politico-Military Aspects of Security, etc.). National law includes Laws that define the general rights of citizens and civil society institutions to exercise their rights to control and influence the activities of public authorities, and to power in the state in general, and Laws, provisions thereof directly related to public control of police activities, as well as bylaws defining forms and types of public control, governing certain procedural issues of their implementation, and bylaws related to public control of police activities specifically.

References:

Aristova, I.V. (2010) Suchasnyi stan pravovoho zabezpechennia derzhavnoi sluzhby v Ukraini [The current state of legal provision of civil service in Ukraine]. *Forum prava - Law forum, 4,* 10–15 (in Ukrainian).

Armash, N.O., Bandurka, O.M., Basov, A.V., Basova, Yu.Iu., Bevzenko, V.M. (2009). Kodeks administratyvnoho sudochynstva Ukrainy [Administrative Judicial Code of Ukraine]. Kyiv: Pretsedent: Istyna (in Ukrainian).

Filipenko, T.V. (2020). Normatyvno-pravove zabezpechennia hromadskoho kontroliu za diialnistiu natsionalnoi politsii [Normative and legal provision of public control of the activities of the national police]. *Natsionalna politsiia Ukrainy: suchasnyi stan ta perspektyvy rozvytku - National Police of Ukraine: current state and development prospects, 2,* 71–75 (in Ukrainian).

Kodeks povedinky stosovno viiskovo-politychnykh aspektiv bezpeky: Mizhnarodnyi dokument vid 01 kvitnia 1994 roku. [Code of conduct regarding military-political aspects of security: International document dated April 1, 1994] URL: https://zakon.rada.gov.ua/laws/show/994_116#Text (in Ukrainian).

Konstytutsiia Ukrainy: vid 28 chervnia 1996 roku № 254k/96-VR [Constitution of Ukraine: dated June 28, 1996 No. 254k/96-BP]. URL: https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80#Text (in Ukrainian).

Koziubra, M.I. (2015). Zahalna teoriia prava [General theory of law]. Kyiv: Vaite (in Ukrainian).

Lehin, L.M. (2017.) Teoretyko-pravovi zasady systemy normatyvnopravovykh aktiv [Theoretical and legal foundations of the system of legal regulations]. *Pidpryiemnytstvo, hospodarstvo i pravo - Entrepreneurship, economy and law, 4,* 128-131 (in Ukrainian).

Luts, L.A. (2007). Zahalna teoriia derzhavy i prava [General theory of the state and law]. Kyiv: Atika (in Ukrainian).

Pryimachenko, D.V. (2007). Administratyvna diialnist mytnykh orhaniv u sferi realizatsii mytnoi polityky derzhavy [Administrative activity of customs bodies in the sphere of implementation of the customs policy of the state]. *Doctor's thesis.* Irpin: Natsionalna akademiia derzhavnoi podatkovoi sluzhby Ukrainy (in Ukrainian).

Rabinovych, P.M. (2007). Osnovy zahalnoi teorii prava ta derzhavy [Basics of the general theory of law and the state]. Lviv: Krai (in Ukrainian).

Rekomendatsiia Rec (2001) 10 Komitetu Ministriv derzhavam-uchasnytsiam Rady Yevropy «Pro Yevropeiskyi kodeks politseiskoi etyky»: Mizhnarodnyi dokument vid 19.09.2001 [Recommendation Rec (2001) 10 of the Committee of Ministers to the member states of the Council of Europe "On the European Code of Police Ethics": International document dated September 19, 2001]. URL: https://hrea.org/wp-content/uploads/2021/02/Recommendation-Rec200110_European-Code-of-Police-Ethics_Ukrainian.pdf (in Ukrainian).

Shemshuchenko, Yu.S. (1999). Yurydychna entsyklopediia [Legal encyclopedia]. Kyiv: Vyd-vo «Ukr. entsykl.» im. M.P. Bazhana (in Ukrainian).

Tereshchuk, O.D. (2018). Administratyvno-pravovi zasady hromadskoho kontroliu za pravookhoronnoiu diialnistiu v Ukraini: teoriia i praktyka [Administrative and legal principles of public control of law enforcement activities in Ukraine: theory and practice]. Kyiv: DP «Vyd. dim «Personal» (in Ukrainian).

Vylehzhanina, M.V. (2011). Klasyfikatsiinyi analiz normatyvno-pravovykh aktiv [Classification analysis of legal regulations]. Bibliotekoznavstvo. Dokumentoznavstvo. *Informolohiia - Library science. Documentary science. Informatology, 1*, 35-40. (in Ukrainian).

Yunin, O.S. (2020). Administratyvno-pravovi osnovy hromadskoho kontroliu za diialnistiu Natsionalnoi politsii Ukrainy [Administrative and legal bases of public control of the activities of the National Police of Ukraine]. *Naukovyi visnyk Mizhnarodnoho humanitarnoho universytetu - Scientific Bulletin of the International Humanitarian University, 47*, 171–174 (in Ukrainian).

Zakon Ukrainy Pro Natsionalnu bezpeku Ukrainy: vid 21 chervnia 2018 roku № 2469-VIII [Law of Ukraine On National Security of Ukraine: dated June 21, 2018 No. 2469-VIII]. (2018). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2469-19#Text (in Ukrainian).

Zakon Ukrainy Pro Natsionalnu politsiiu: vid 2 lypnia 2015 roku № 580-VIII [Law of Ukraine On the National Police: dated July 2, 2015 No. 580-VIII]. (2015). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/580-19#Text (in Ukrainian).

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СИСТЕМА НОРМАТИВНО-ПРАВОВИХ АКТІВ, ЯКІ ЗАБЕЗПЕЧУЮТЬ ГРОМАДСЬКИЙ КОНТРОЛЬ ЗА ДІЯЛЬНІСТЮ ПОЛІЦІЇ

Анотація. ***Мета.*** Метою статті є встановлення системи нормативно-правових актів, що становлять інститут громадського контролю за діяльністю поліції та окреслення фундаментальних актів, які містять норми, що регулюють зазначені суспільні відносини. ***Результати.*** У дослідженні розглядається структура або можливі варіанти групування елементів системи нормативно-правових актів, які забезпечують громадський контроль за діяльністю поліції. Наводиться основна інформація про зміст поняття нормативно-правового акта, його характерні ознаки (такі акти містять норми права, на відміну від індивідуальних або правозастосовних), тобто вони встановлюють, змінюють або скасовують певні правові норми, розраховані на багаторазове, регулярне і системне застосування, їх дія не завершується після одноразового виконання об'єктом, на якого поширюються ці норми). Акцентується увага на різних точках зору щодо класифікації нормативно-правових актів (за критерієм суб'єктів нормотворчості; залежно від характеру волевиявлення державних органів, себто це документи правотворчості, що встановлюють, змінюють або відміняють норми права; за галузями права; за часом дії; за суб'єктами нормотворення; за територіальним принципом дії; за датою початку дії; за колом осіб, на яких акт поширюється; за юридичною силою та ін.). ***Висновки.*** У статті узагальнюється науковий теоретичний доробок авторів з різних наукових сфер і галузей права щодо системи нормативно-правових актів, які забезпечують громадський контроль за діяльністю поліції, і наведена система, де першим і основним поділом є приналежність актів до вітчизняного права або до міжнародних актів. Міжнародні акти поділяються за змістом тих відносин, які вони регулюють, а саме на ті, що містять норми щодо фундаментальних прав і свобод людини і громадянина із реалізації права на контроль і вплив за органами державної влади та акти, норми яких стосуються безпосередньо діяльності правоохоронних органів зокрема. До національного права належать закони, які визначають загальні права громадян, інститутів громадянського суспільства на реалізацію прав щодо контролю та впливу на діяльність органів державної влади, загалом на владу в державі та закони, норми яких стосуються безпосередньо громадського контролю за діяльністю поліції, а також підзаконні акти, що визначають форми і види громадського контролю, регулюють окремі процедурні питання їх здійснення, і підзаконні акти, що стосуються здійснення громадського контролю саме за діяльністю поліції.

Ключові слова: контроль, нормативно-правовий акт, класифікація, юридична сила, закон, підзаконний акт.

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PARTICULARITIES OF FORMING SUSTAINABLE LAW APPLICATION PRACTICE OF AUTHORISED ACTORS IN THEIR PERFORMANCE OF ADMINISTRATIVE INVESTIGATION

Abstract. ***Purpose.*** The purpose of the article is to clarify the particularities of forming a sustainable law application practice of authorised actors in their performance of administrative investigation. ***Results.*** With a view to establishing a sustainable law application practice of authorised actors, we propose to study certain aspects of administrative investigation by the bodies vested with the relevant powers in foreign countries. It should be noted that there are different models of understanding administrative investigation: from one that merges with pre-trial investigation (in the understanding of the Ukrainian legal space) to a separate, independent procedure (as it is in Ukraine). We consider it appropriate to briefly focus on these two models and consider them using the example of the United States and post-Soviet countries. It is revealed that, unlike Ukraine, the Code of the Republic of Moldova clearly defines the moment when proceedings on an offence are commenced. Proceedings are deemed to have been commenced from the moment of notification of the fact-finding body (fact-finding bodies include specialised bodies: Ministry of Internal Affairs, National Anti-Corruption Centre, Customs Service, Specialised Transport Authorities, State Labour Inspectorate, etc.) or establishing the commission of an offence on their initiative. ***Conclusions.*** It is concluded that the implementation of foreign experience in the field of administrative offence proceedings is generally not feasible. However, in order to improve the activities of law enforcement bodies in conducting administrative investigations, we believe it would be appropriate to supplement the CUAO with Article 252-1 "Inspection of the scene", which will regulate the performance of actors vested with the relevant powers to inspect the scene, describing it with due regard to the provisions of Article 426 of Contravention Code of the Republic of Moldova No. 218-XVI of 24 October 2008. Furthermore, in our opinion, it would be advisable to allow for the research of domestic scholars and the foreign experience of the Republic of Tajikistan and the Republic of Moldova by including Article 245-1 "Commencement of a case on administrative offences" in the CUAO, which should address the issue of the moment of commencement of a case and contain the grounds necessary for commencing a case on administrative offences. This provision is necessary because currently no unanimity of views on this issue exists in the scientific community, and the legislator does not regulate it in any way.

Key words: violation, court, criminal act, administrative offence, crime.

1. Introduction

In the current context of the ongoing reform of law enforcement bodies, their representatives in their practical activities often face insufficient legislative regulatory mechanism for certain issues, including those related to administrative investigations as the initial stage of proceedings on administrative offences, which is one of the fundamental directions of implementation of the National Police's tasks. Therefore, in our study, we consider it necessary to focus on the ways in which administrative investigations implemented in Ukraine and abroad.

The purpose of the article is to clarify the particularities of forming a sustainable law application practice of authorised actors in their performance of administrative investigation.

2. Legal regulatory framework for proceedings on administrative offences

The perspectives of some scholars on the stages of proceedings in cases of administrative offences should be reviewed briefly.

For example, O.M. Yarmak's study *Records on an administrative offence as a source of evidence in proceedings on administrative offences* proposes to distinguish the following stages of proceedings on administrative offences: 1) verification of the factual circumstances of the committed act and commencement of an administrative offence case; 2) consideration and resolution of an administrative offence case; 3) appeal against a decision on an administrative offence case or a prosecutor's submission to it; 4) enforcement of a decision on an administrative offence; 5) review of a decision on an administrative offence in case of a violation of Ukraine's international obligations (Yarmak, 2014, pp. 16-17).

Some authors refer to the stage of case commencement as the stage of "commencement and administrative investigation in the case of an administrative offence", which is the initial stage. S.S. Hnatiuk notes that it is understood as "a set of procedural actions aimed at establishing the circumstances of the offence, recording and qualifying them" (Hnatiuk, 2011, p. 63). The first phase of this stage is the preliminary administrative investigation in the case on an administrative offence.

In our opinion, an administrative investigation should be considered as the first mandatory stage of proceedings, which includes the following phases: preliminary administrative investigation; commencement of an administrative offence case; establishment of the circumstances of the case; records on an administrative offence.

At the stage of preliminary administrative investigation, the authorised person is tasked with establishing the presence or absence of an administrative offence in the person's act as a factual basis for commencing a case, i.e. to conduct the primary administrative and legal qualification of the act (Chyshko, 2016, p. 27).

S.S. Hnatiuk proposes to understand preliminary administrative investigation as a system of procedural actions carried out by a public administration body vested with administrative and jurisdictional powers to verify and establish the circumstances relevant to the correct decision on the presence or absence of an administrative offence, sufficient grounds for commencing an administrative offence case (Hnatiuk, 2011, p. 72).

According to K.O. Chyshko, a prerequisite for administrative and legal qualification is an unlawful act (omission), which shall be qualified as an administrative offence (misdemeanour). When qualifying an administrative offence, the prerequisite is an act or omission that is a priori an administrative offence (misdemeanour), and the essence of such qualification is to compare their elements with the signs of offences provided for by the legislation on administrative offences (Chyshko, 2016, pp. 25-26).

Following D. Bortniak, the grounds for commencing a case on administrative offences is the commission by a person of an act containing signs of an administrative offence (factual ground). The researcher argues that the available information about an offence is a reason for commencing an administrative offence case. These may include: "statements (written or oral) of witnesses, victims and other citizens; reports of officials, administration of enterprises, institutions, organisations, judicial and investigative bodies; reports of the press and other media; reports of public organisations, community courts; direct detection of the offence by an authorised person" (Bortniak, 2009, p. 180).

In other words, the analysis of scientific views enables to conclude that there are two mandatory grounds for commencing an administrative offence case: factual (presence of an administrative offence in the person's action) and formal (availability of information about the committed offence obtained by the authorised person through legal means).

At the phase of establishing the circumstances of the case, the issues of qualification of the person's act and collection of evidence in the case of administrative offences are investigated. S. S. Hnatiuk notes that the qualification of an act is one of the main tasks of an administrative investigation and acts as its determinant (Hnatiuk, 2011, p. 56). K.O. Chyshko defines the qualification of an administrative offence as the activity of a specially authorised body (official) to cognise (determine) legally significant features of an act (offence), their analysis, summarisation and comparison with the features of corpus delicti defined by the legislation on administrative offences (Chyshko, 2016, p. 24).

With regards to evidence, according to Article 251 of the Code of Ukraine on Administrative Offences, it is "any factual data on the basis thereof, in the manner established by law, the authority (official) establishes the presence or absence of an administrative offence, the guilt of the person of committing it and other circumstances relevant to the correct resolution of the case" (Code of Ukraine on Administrative Offences, 1984).

In his study, S.S. Hnatiuk proposes to divide such circumstances into two groups:

1) circumstances that are directly relevant to the decision on the presence or absence of an administrative offence;

2) circumstances that are outside the corpus delicti but are relevant for individualisation of liability (Hnatiuk, 2011, pp. 74-75).

The relevant data rely on the records on administrative offence, explanations of the per-

son held administratively liable, victims, witnesses, expert opinion, material evidence, readings of technical devices and technical means with photo and film recording functions, including those used by the person held administratively liable, or witnesses, as well as operating in an automatic mode, or means of photography, cinema, video recording, including those used by the person being held administratively liable, or witnesses, as well as operating in an automatic mode or in the mode of photography (video recording), used in supervising the implementation of rules, regulations and standards related to road safety and vehicle parking, an act of inspection and temporary detention of a vehicle, a records on the seizure of things and documents, as well as other documents (Code of Ukraine on Administrative Offences, 1984).

These proving activities are regulated in detail by the provisions of the Code of Ukraine on Administrative Offences and bylaws, such as: Order 1376 of the Ministry of Internal Affairs of Ukraine "On approval of the Instruction on processing materials on administrative offences in the Police" of November 06, 2015, Order 173 of the Central Directorate of the Security Service of Ukraine "On Approval of the Instruction on the processing materials on administrative offences in the Security Service of Ukraine" of March 22, 2017, Order 1376 of the Ministry of Internal Affairs of Ukraine "On Approval of the Instruction on processing materials on administrative offences in police bodies" of November 06, 2015, Order 2702/5 of the Ministry of Justice "On approval of the Instruction on processing materials on administrative offences by officials of authorised probation bodies" of August 17, 2018, Order 3/02-15 of the Ukrainian Parliament Commissioner for Human Rights of February 16, 2015, Joint Order 1452/735 of the Ministry of Internal Affairs of Ukraine and the Ministry of Health of Ukraine "On approval of the Instruction on the procedure for detecting signs of alcohol, drug or other intoxication or being under the influence of medications, reducing attention and speed of reaction in vehicle drivers" of November 09, 2015, Resolution No. 17 of the Cabinet of Ministers of Ukraine of 16 January 2012 "On approval of the procedure for storage of things and documents seized in the course of proceedings on administrative offences," Procedure for temporary withdrawal of a driver's licence for a vehicle and its return: Resolution No. 1086 of the Cabinet of Ministers of Ukraine of 17 December 2008, Law of Ukraine "On Measures to Counteract Illegal Trafficking in Narcotic Drugs, Psychotropic Substances, Precursors and Their Abuse" No. 62/95-VP of 15 February 1995, Resolution No. 1103 of the Cabinet of Ministers of Ukraine "On approval of the procedure for referring vehicle drivers for examination to detect the state of alcohol, drug or other intoxication or being under the influence of drugs reducing attention and reaction speed, and conducting such examination" of December 17, 2008.

With regards to the phase of records on an administrative offence, it should be noted that this aspect is regulated by Articles 254-256 of the Code of Ukraine on Administrative Offences and a number of by-laws, such as the Order 1376 of the Ministry of Internal Affairs of Ukraine "On approval of the Instruction on processing materials on administrative offences in police bodies" of November 06, 2015, Order 2702/5 of the Ministry of Justice "On approval of the Instruction on processing materials on administrative offences by officials of authorised probation bodies" of August 17, 2018, Order No. 3/02-15 of the Ukrainian Parliament Commissioner for Human Rights of February 16, 2015, which approved the Procedure for processing materials on administrative offences, the Order 1161 of the Ministry of Emergencies of Ukraine "On approval of the Instruction on processing materials on administrative offences by the State Service of Mining Supervision and Industrial Safety of Ukraine" of September 03, 2012, etc.

According to S.S. Hnatiuk, the information entered into the records on administrative offences is usually grouped into:

Information that characterise the administrative offence (place, time and nature of the offence committed);

Circumstances that characterise the identity of the suspect (surname, name, patronymic, age, property status, place of residence and work, identity document);

Information regarding the form of the records (date and place of drawing up, position, surname, name and patronymic of the authorised official, names and addresses of witnesses and victims, if any) (Hnatiuk, 2011, pp. 76-77).

Relying on the analysis of sources, most scholars agree that records on an administrative offence are the only ground for commencing proceedings on an administrative offence, as its preparation gives an account of the event of the offence (Yesimov, Kryzhanovskyi, Kryzhanovska, 2016, p. 37), and are the document that completes the stage of commencing a case and preliminary clarification of its circumstances (Yarmak, 2014, pp. 16-17). In addition, the records on an administrative offence are "a document that has evidentiary value in a case in presence of establishing the factual data provided for in Article 251 of the Code of Ukraine

on Administrative Offences" (Yesimov, Kryzhanovskyi, Kryzhanovska, 2016, p. 109).

Researcher O.M. Yarmak argues that the records on administrative offence are a comprehensive source of evidence, as they "contain information obtained from various sources and is the most important among the means by which the facts are established, the presence or absence of an administrative offence in the person's act, the person's guilt of committing it, and other circumstances relevant to the correct resolution of the case". It is underlined that the records are of evidentiary value only if they are drawn up "by an authorised person in compliance with the requirements for its content and form established by law" (Yarmak, 2014, pp. 12-16).

In essence, the administrative investigation stage is completed by drawing up records on an administrative offence and submitting the case file for consideration as appropriate.

To sum up, it can be noted that in Ukraine, the procedure for administrative investigation as the first stage of proceedings on administrative offences includes: detection of an administrative offence, deterrence of the offence (if it is still ongoing), collection of evidence, its evaluation, giving an account of the fact of committing an offence by drawing up records on an administrative offence and transfer of the case file for consideration by the relevant authorities. Another phase of this stage should be considered as ensuring proceedings in cases of administrative offences by implementing the measures specified in Chapter 20 of the CUAO, if necessary. Based on their essence, it can be concluded that this phase is optional, since interim measures are applied only "in cases directly provided for by the laws of Ukraine, in order to deter administrative offences, when other measures of influence and identification have been exhausted, identification, records on an administrative offence if it is impossible to draw them up at the scene, if records are mandatory, ensuring timely and correct consideration of cases and enforcement of decisions on administrative offences" (Code of Ukraine on Administrative Offences, 1984).

3. Foreign experience of administrative investigation

With a view to establishing a sustainable law application practice of authorised actors, we propose to study certain aspects of administrative investigation by the bodies vested with the relevant powers in foreign countries. It should be noted that there are different models of understanding administrative investigation: from one that merges with pre-trial investigation (in the understanding of the Ukrainian legal space) to a separate, independent procedure (as it is in Ukraine). We believe it is appropriate to briefly discuss these two models and consider them on the example of the United States and post-Soviet countries.

With regard to the experience of foreign countries, it is difficult to draw a parallel with Ukraine in the field of administrative investigation, since Western countries, such as most European countries, the United States of America, Canada, etc., do not have legislation regulating liability for purely administrative offences. To be more precise, it is not customary to distinguish administrative offences in the sense in which they are regulated by Ukrainian legislation. Some authors note that most European countries have laws of a "mixed nature", i.e. those that combine substantive and procedural law in the field of administrative offences (Germany, Switzerland, Austria, Italy, Portugal). However, the regulatory framework for administrative liability is often not separated from criminal and criminal procedure legislation and the procedure of bringing to justice for committing an administrative offence is based on them (Zarosylo, 2002, p. 7).

Furthermore, administrative investigations, for example in the United States, are defined as non-criminal investigations related to employee misconduct or actions. Criminal investigations, on the other hand, are initiated on the basis of information about a crime, misdemeanour and/or violation of a federal, state or local criminal law. Administrative investigations, unlike criminal investigations, are usually not adversarial in nature, are conducted primarily through interviews rather than interrogations, and do not affect a person's liberty (Conducting Administrative Investigations: Participant Guide, 2006).

In addition, the procedure for placing administrative liability on a person differs significantly in these countries. Below are examples based on federal and local laws of the United States of America.

As a rule, the procedure for considering a case of administrative offences in these countries includes a court as a party to consideration. Such a procedure always entails entering information about the commission of an offence into a citizen's personal file (criminal record). However, in some US states (Utah, Illinois), a new procedure has been introduced whereby the court is excluded from the administrative investigation if certain conditions are met. It can be argued that this process is carried out under a simplified procedure.

The fact that a person has violated the law is the ground for a Notice of Violation (Violation Notice, hereinafter referred to as the Notice). The Notice means any written communication from a public authority about a violation of a law

or regulation, whether it is a letter, memorandum, legal or administrative request, or other written communication (Definition of Violation Notice, 2012). As a rule, it will immediately state: 1) the alleged violation; 2) the date, time and place that the alleged violation occurred; and 3) what your options are with regard to payment, mandatory appearance at a hearing, or the opportunity to request a hearing to contest (fight) the violation (The Hearing Process, 2018). In other words, the Notice certifies the fact that a person has committed an offence and is the ground for consideration of the case and subsequent prosecution for an administrative offence. It should be noted that the issuance of such Notice does not require the personal presence of the offender, it may be sent by mail.

For example, in Chicago, Illinois, the following procedure is used to prosecute administrative offences. When an authorised person determines that a violation of the law has occurred, he or she sends (in person or by mail) to the party responsible for the alleged violation the Notice, which sets out information about the suspected offence.

Thereafter, the authorised municipal service (e.g. police, Department of Construction, Streets and Sanitation, tax service, health or consumer services, etc.) sends a copy of the Notice to the Department of Administrative Hearings (hereinafter referred to as the Department) for a decision.

The Department does not investigate, prosecute, or support public prosecution of a case. Other city departments or divisions charged with protecting the public safety, health and welfare may file a claim with the Department based on observations or investigations made by a police officer, city inspector or enforcement officer. Therefore, issues regarding the receipt of the Notice should be directed to the department that issued it. A hearing officer shall be present at every hearing. The hearing officer is a licensed Illinois attorney appointed by the Department director to preside over the hearing as an independent and impartial "judge". If the person ignores the Notice, a hearing officer may enter a Default Judgment against him/her based on the evidence presented. A "Default Judgment" is similar to a Judge's order in that it can be used to place a lien on one's property, garnish one's wages and/or affect one's credit. (The Hearing Process, 2018).

Another example is the city of Spanish Fork, Utah, which has introduced a new programme for people who violate municipal ordinances, which only addresses certain categories of administrative offences. This programme provides citizens who have received the Notice with the opportunity to pay an administrative fee rather than a fine to the court. The main purpose of this programme is to allow those individuals who have committed a violation the opportunity to pay a lower fee than would have been paid at the District Court. It also changes the severity of the violation from a criminal act to an administrative violation which will not show on a person's criminal history. Most of these violations will be issued for animal, parking problems and zoning issues. Violations can be issued by Spanish Fork Police Officers or other City Employees. There will still be some animal violations that will be cited into District Court. This procedure mainly concerns administrative offences against animals, parking violations and zoning violations. Violations can be recorded by police officers or other authorised city officials.

After receiving the Notice, a person can pay the administrative fee in three ways: in person at the police station, by sending a postal order to the Police Department or by credit card over the phone. The fee is payable within 14 days from the date of the violation, and if not paid within this period, the documents are transferred to the local court for consideration. For a first-time offence, the fee will range from $10 to $100, for a repeat offence from $25 to $400, depending on the type of offence (Administrative Violations, 2017).

However, in some countries there are regulatory provisions governing issues related to administrative investigations that are similar to the national legislation of Ukraine. As a rule, this applies to Ukraine's neighbouring countries of the Commonwealth of Independent States, or the so-called "post-Soviet space" countries.

For example, the Contravention Code of the Republic of Moldova No. 218-XVI of 24 October 2008 in part 2 of Article 374 states that proceedings on offences are activities, carried out by an authorised body with the participation of the parties and other persons with rights and obligations, aimed at establishing the fact of the offence, considering and resolving the case of the offence, identifying the causes and conditions that have contributed to the commission of the offence.

At the same time, unlike Ukraine, the Code of the Republic of Moldova clearly defines the moment when proceedings on an offence are commenced. Proceedings are deemed to have been commenced from the moment of notification of the fact-finding body (fact-finding bodies include specialised bodies: Ministry of Internal Affairs, National Anti-Corruption Centre, Customs Service, Specialised Transport Authorities, State Labour Inspectorate, etc.) or establishing the commission of an offence on their initiative.

Establishing the event of an offence means the activities performed by the official examiner to collect and submit evidence of an offence, to decide on the consideration of an offence based on the official examiner's statement or to draw up records on an offence and to impose a penalty for the offence or to refer, if necessary, the case to an officer authorised to consider it within the body to which the reporting entity belongs, to a court or other body for consideration (Contravention Code of the Republic of Moldova, 2008).

Of scientific interest is also the provision governing the inspection of the scene (location, premises, things, documents, animals, human or animal corpses) by an authorised person. Article 426 establishes the purpose (detection of traces of an offence, material evidence and to establish the circumstances of the offence or other circumstances relevant to the proper resolution of the case) and the limits of the inspection of the scene. Thus, the official examiner inspects visible objects and, if necessary, allows access to them to the extent that does not violate human rights. If necessary, the person conducting the procedural activity, personally or with the help of a specialist in the relevant field, takes measurements, photographs, films, video recordings, drawings and diagrams, makes casts and prints. The site of inspection may be delimited by the staff of specialised public order and security units of the General Inspectorate of Police of Moldova.

Objects and documents found at the scene shall be examined on site, and the results of the examination shall be recorded in documentation on that action. If it is impossible to make copies, make photo or video recordings, or take samples of objects that are information carriers within the on-site examination or there are obstacles to such actions, the objects and documents that are material evidence shall be seized. To do this, the objects and documents are placed in a bag, the bag is sealed and signed, and this fact shall be indicated in the documentation on seizure. The package is opened in the presence of the offender or his/her representative (Contravention Code of the Republic of Moldova, 2008).

It is interesting that the legislation of the Republic of Tajikistan, namely the Procedural Code on Administrative Offences of the Republic of Tajikistan, contains provisions regulating the circumstances to be proved (Article 49), as well as the issue of commencing a case on administrative offences (Article 81).

The circumstances to be proved include: the presence of an administrative offence; the person who committed the offence; the person's guilt; circumstances mitigating and/or aggravating administrative liability; the nature and extent of the damage caused by the administrative offence; circumstances that preclude proceedings on an administrative offence; the existence of grounds for transferring materials on an administrative offence for consideration at the place of residence, work or study; causes and conditions contributing to the commission of the administrative offence; other circumstances relevant to the correct resolution of the case on administrative offences (Code of Procedure on Administrative Offences of the Republic of Tajikistan, 2013).

If such grounds are absent, the authorised official reviewing the administrative offence materials shall issue a reasoned decision to refuse to commence an administrative offence case.

In addition, Tajik legislation, unlike the national legislation of Ukraine, in Article 82 of the Code clearly indicates the moment of commencement of an administrative offence case. It is considered to be the moment of adoption of a ruling or decision on the commencement of an administrative offence case. The decision or ruling on the commencement of an administrative offence case shall specify the time and place of its preparation, position, and surname, the name and patronymic of the person who drew up the decision or ruling, the grounds for commencing an administrative offence case, data indicating the presence of an administrative offence event, and the article of the Code of the Republic of Tajikistan on Administrative Offences, which provides for liability for the administrative offence in question and a note on familiarisation with the rights and obligations of the individual, official or representative of the legal entity in respect of which the decision or ruling on the offence was issued (Code of Procedure on Administrative Offences of the Republic of Tajikistan, 2013).

It should be noted that in the Republic of Tajikistan, an administrative investigation is understood to be somewhat different from that in Ukraine, namely, it is carried out if, after detection of an administrative offence in the field of antitrust, banking, currency, tax and customs legislation, legislation on natural monopolies, on ensuring sanitary and epidemiological safety of the population, on environmental protection, on traffic rules, on transport, on state regulation of production and turnover of ethyl alcohol and alcoholic beverages, as well as tobacco products, fire safety, advertising legislation, copyright and related rights, consumer protection, elections and referendums, licensing of certain types of activities, requiring expert examination and other time-consuming procedural actions.

In addition, the law establishes the duration of the review (one month with the possibility of extension up to two months, and in certain cases up to three months) and stipulates that upon its completion, records on an administrative offence are drawn up or a decision is made to terminate the case on an administrative offence (Code of Procedure on Administrative Offences of the Republic of Tajikistan, 2013).

4. Conclusions

Therefore, it can be concluded that the implementation of foreign experience in the field of administrative offence proceedings is generally not feasible. However, in order to improve the activities of law enforcement bodies in conducting administrative investigations, we believe it would be appropriate to supplement the CUAO with Article 252-1 "Inspection of the scene", which will regulate the performance of actors vested with the relevant powers to inspect the scene, describing it with due regard to the provisions of Article 426 of Contravention Code of the Republic of Moldova No. 218-XVI of 24 October 2008.

Furthermore, in our opinion, it would be advisable to allow for the research of domestic scholars and the foreign experience of the Republic of Tajikistan and the Republic of Moldova by including Article 245-1 "Commencement of a case on administrative offences" in the CUAO, which should address the issue of the moment of commencement of a case and contain the grounds necessary for commencing a case on administrative offences. This provision is necessary because there is currently no unanimity of views on this issue in the scientific community, and the legislator does not regulate it in any way.

References:

Administrative Violations. Spanish Fork City. 2017. Retrieved from https://www.spanishfork.org/departments/public_safety/administrative_violations.php (in English).

Bortniak, D. (2009). Kharakterystyka provadzhennia u spravakh pro administratyvni pravoporushennia v umovakh reformuvannia administratyvnoho prava [Characteristics of proceedings in cases of administrative offenses under the conditions of administrative law reform]. *Pidpryiemnytstvo, hospodarstvo i pravo - Entrepreneurship, economy and law, 10*, 179-82 (in Ukrainian).

Chyshko, K.O. (2016). Administratyvno-pravova kvalifikatsiia pravoporushen u sferi zabezpechennia hromadskoho poriadku ta hromadskoi bezpeky [Administrative and legal qualification of offenses in the sphere of ensuring public order and public safety]. *Candidate's thesis.* Kharkiv: Kharkivskyi natsionalnyi universytet vnutrishnikh sprav (in Ukrainian).

Conducting Administrative Investigations: Participant Guide. September 25, 2006. Retrieved from https://www.nps.gov/training/tel/guides/conducting_admin_investigations_pg_20060925.pdf (in English).

Definition of Violation Notice. Law Insider. 2012. Retrieved from https://www.lawinsider.com/dictionary/violation-notice (in English).

Hnatiuk, S.S. (2011). Provadzhennia v spravakh pro administratyvni prostupky: problemni pytannia struktury [Proceedings in cases of administrative misdemeanors: problematic issues of the structure]. Lviv: LvDUVS (in Ukrainian).

Kodeks Respubliki Moldova O pravonarushenijah: ot 24 oktjabrja 2008 goda № 218-XVI [Code of the Republic of Moldova On Offenses: October 24, 2008 No. 218-XVI]. (2008). *continent-online.com*. Retrieved from http://continent-online.com/Document/?doc_id=30395669#pos=4909;-51 (in Russian).

Kodeks Ukrainy pro administratyvni pravoporushennia: vid 07.12.1984 № 8073-X [Code of Ukraine on Administrative Offenses: dated 07.12.1984 No. 8073-X]. (1984). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/80732-10#Text (in Ukrainian).

Processual'nyj kodeks ob administrativnyh pravonarushenijah Respubliki Tadzhikistan: vid 22 lipnja 2013 roku № 975 [Code of Procedure on Administrative Offenses of the Republic of Tajikistan: dated April 22, 2013 No. 975]. (2013). *ncz.tj*. Retrieved from http://ncz.tj/system/files/Legislation/975_ru.pdf (in Russian).

The Hearing Process. Administrative Hearings. City of Chicago. 2018. Retrieved from https://www.chicago.gov/city/en/depts/ah/supp_info/the_hearing_process.html (in English).

Yarmak, O.M. (2014). Protokol pro administratyvne pravoporushennia yak dzherelo dokaziv u provadzhenni v spravakh pro administratyvni pravoporushennia [Protocol on an administrative offense as a source of evidence in proceedings on administrative offences]. *Candidate's thesis.* Kharkiv: Nats. yuryd. un-t im. Yaroslava Mudroho (in Ukrainian).

Yesimov, S., Kryzhanovskyi, A., Kryzhanovska, V. (2016). Elektronnyi protokol u spravi pro administratyvni pravoporushennia: teoretychni ta praktychni aspekty [Electronic protocol in the case of administrative offenses: theoretical and practical aspects]. *Pidpryiemnytstvo, hospodarstvo i pravo - Entrepreneurship, economy and law, 6*, 108-113 (in Ukrainian).

Zarosylo, V.O. (2002). Porivnialnyi analiz administratyvnoi diialnosti militsii Ukrainy ta politsii zarubizhnykh krain (Velykobrytanii, SShA, Kanady ta Frantsii) [Comparative analysis of the administrative activities of the police of Ukraine and the police of foreign countries (Great Britain, the USA, Canada and France)]. *Candidate's thesis.* K.: Natsionalna akademiia vnutrishnikh sprav Ukrainy (in Ukrainian).

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ОСОБЛИВОСТІ ФОРМУВАННЯ СТАЛОЇ ПРАВОЗАСТОСОВНОЇ ПРАКТИКИ УПОВНОВАЖЕНИХ СУБ'ЄКТІВ У СФЕРІ ЗДІЙСНЕННЯ НИМИ АДМІНІСТРАТИВНОГО РОЗСЛІДУВАННЯ

Анотація. ***Мета.*** Метою статті є з'ясування особливостей формування сталої правозастосовної практики уповноважених суб'єктів у сфері здійснення ними адміністративного розслідування. ***Результати.*** З метою формування сталої правозастосовної практики уповноважених суб'єктів пропонуємо дослідити окремі аспекти здійснення адміністративного розслідування органами, наділеними відповідними повноваженнями, у зарубіжних країнах. Слід зазначити, що наявні різні моделі розуміння адміністративного розслідування: від такої, що зливається з досудовим розслідуванням (у розумінні українського правового простору) до відокремленого самостійного процесу (як це відбувається на території України). Вважаємо за доцільне коротко зупинитись на цих двох моделях і розглянути їх на прикладі США та пострадянських країн. З'ясовано, що, на відміну від України, Кодекс Республіки Молдова чітко визначає момент початку провадження про правопорушення. Провадження вважається розпочатим з моменту доведення до відома констатуючого суб'єкта (до констатуючих суб'єктів належать спеціалізовані органи: Міністерство внутрішніх справ, Національний центр по боротьбі з корупцією, Митна служба, Спеціалізовані органи в галузі транспорту, Державна інспекція праці тощо) або встановлення ним за власною ініціативою вчинення правопорушення. ***Висновки.*** Зроблено висновок, що імплементація закордонного досвіду у сфері провадження у справах про адміністративні правопорушення загалом не видається доцільною. Проте з метою вдосконалення діяльності правоохоронних органів щодо здійснення адміністративних розслідувань вважаємо слушним доповнити Кодекс України про адміністративні правопорушення статтею 252-1 «Огляд місця події», яка регулюватиме діяльність суб'єктів, що наділені відповідними повноваженнями щодо огляду місця події, описуючи її із врахуванням положень статті 426 Кодексу Республіки Молдова «Про правопорушення» від 24 жовтня 2008 року № 218-XVI. Також, на нашу думку, буде доцільно врахувати дослідження вітчизняних науковців і закордонний досвід Республіки Таджикистан та Республіки Молдова шляхом включення до Кодексу України про адміністративні правопорушення статті 245-1 «Порушення справи про адміністративні правопорушення», в межах якої має бути вирішене питання моменту порушення справи та міститиме підстави, необхідні для порушення справи про адміністративні правопорушення. Це положення необхідне, оскільки на сьогодні у наукових колах відсутня єдність поглядів на це питання, а законодавець жодним чином його не регулює.

Ключові слова: порушення, суд, кримінальне діяння, адміністративне правопорушення, злочин.

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GENERAL DESCRIPTION OF DISPUTE SETTLEMENT PROCEDURE INVOLVING A JUDGE AS JUDICIAL PROCEDURE IN ADMINISTRATIVE PROCEEDINGS

Abstract. ***Purpose***. The purpose of the article is determined by the poor study of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute and identify the features of one of these procedures, namely, dispute settlement involving a judge. ***Results.*** The article emphasises that the functioning of the pre-trial dispute settlement mechanism is one of the areas of heated debate in the field of judicial proceedings, and yet it definitely has more advantages than disadvantages. Meanwhile, the main disadvantage of the introduction of this mechanism is the poor study of its essence, principles and implementation, i.e., the procedure for passing through specific stages and phases of such judicial procedures. ***Conclusions.*** The author provides a general description of the dispute settlement procedure involving administrative proceedings by identifying a number of specific features of the latter: It is conducted outside the court proceedings; It is confidential; It is initiated by two parties to the dispute (the plaintiff and the defendant); It has restrictions on its conduct, i.e., it is impossible to conduct it in the following categories of cases: 1) appeals against legal regulations; against the managerial process and managerial decisions; 2) organisation and conduct of elections; 3) activities of election and referendum commissions, political parties and blocs, termination of powers of MPs; 4) restriction of some constitutional rights of citizens (the right to peaceful assembly and the right to freedom of movement); 5) ensuring the defence needs of the state; 6) at the request of state authorities (tax and customs authorities, the Security Service of Ukraine), as well as standard cases; it is held within a reasonable period of time, but not more than 30 days; implemented in the form of in-person and remote meetings (joint and/or closed); consists of three stages: 1) commencement of the procedure and holding a joint meeting; 2) settlement of the dispute by holding joint and closed meetings; 3) conclusion of a settlement agreement by the parties and its approval by the court or termination of such procedure; this procedure is not documented; cannot be repeated; results in suspension of the proceedings, which can be resumed only in case of termination of this procedure under the circumstances established by the CAPU.

Key words: judicial procedures, dispute settlement involving a judge, administrative proceedings, settlement agreement, plaintiff, defendant, court ruling.

1. Introduction

The adoption of the draft law on amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legal regulations resulted in (Draft Law of Ukraine on Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legal regulations, 2017) a number of amendments made to procedural legal regulations, in particular the CAPU, and establishment of the institution of dispute settlement involving a judge. It should be emphasised that this institution is not the only way to settle a dispute before it is directly considered in court, as the systematic interpretation of the CAPU provisions allows expanding their list, and in particular, supplementing it with: mediation (Chapter 4, Article 47, part 5, which also sets out the procedure for settling a dispute involving a judge); conciliation; withdrawal of the claim by the plaintiff (Chapter 5) (Code of Administrative Procedure of Ukraine, 2005). Such legislator's perspective is fully con-

sistent with Recommendation No. R (86) 12 of the Committee of Ministers of the Council of Europe to Member States on measures to prevent and reduce excessive workload in the courts, which emphasises the need to promote reconciliation of the parties "both outside the judicial system and before or during court proceedings. To this end, the following measures could be considered: a) to provide, together with appropriate incentives, for conciliation procedures prior to court proceedings or other means of settling disputes outside of court proceedings; b) to impose on judges, as one of their main tasks, the obligation to promote the amicable settlement of disputes by all possible means and on all relevant issues before the commencement of court proceedings in a case or at any stage of such proceedings" (Recommendation № R (86) 12 of the Committee of Ministers of the Council of Europe to member states on measures to prevent and reduce excessive workload in the courts, 1986).

The functioning of the pre-trial dispute settlement mechanism is one of the areas of heated debate around the judiciary, while they clearly have more advantages than disadvantages, including the following: "simplified procedure and absence of the element of proof; lack of formal rules of conduct; free choice of an intermediary (arbitrator, mediator, consultant, etc.); confidentiality and secrecy of dispute settlement; possibility of personal control over the course of the procedure; unlimited time; private (non-state) nature" (Bozhuk, Diachenko, 2019, p. 12). However, the main drawback of the introduction of this mechanism is the lack of research into its essence, principles and implementation, i.e., the procedure for passing through specific stages and phases of such judicial procedures. Therefore, the objective of this study is to address the gap described above by exhaustively clarification and an objective description of judicial procedures in administrative proceedings, in particular, the dispute settlement procedure involving a judge aimed at settling a dispute before a trial, and outlining their specifics, which are due to the existence of a number of differences between these judicial procedures and the trial on the merits.

Nowadays, in the science of administrative law, few studies are focused on judicial procedures for pre-trial dispute settlement in general, and dispute settlement involving a judge, in particular. Among the scientific works that form the basis of this study, we should mention the works considering: judicial practice of applying alternative dispute settlement methods (I.V. Bozhuk, S.V. Diachenko); mediation (E.V. Kataieva), and the specifics of dispute settlement involving a judge (S.V. Kivalov, A.O. Lesko, L.D. Romanadze, R.Yu. Khanyk-Pospolitak).

The purpose of the article is determined by the poor study of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute and is to identify the features of one of these procedures, namely, dispute settlement involving a judge.

2. Dispute settlement involving a judge as a judicial procedure in administrative proceedings

The differences between court proceedings and judicial procedures in administrative proceedings aimed at settling a dispute prior to trial are described in detail in the study by E.V. Kataieva, despite the fact that the priority area of scientific research was the mediation procedure, we believe it is possible to extend them to other procedures similar in nature: "1) litigation can be initiated against the will of one of the parties, the mediation procedure is voluntary; 2) a judge is appointed, a mediator is elected; 3) a court decision is made in accordance with the letter of the law, a mediation decision is made allowing for the interests of the parties, but within the law; 4) the court has full powers, the mediator has no full powers and only facilitates the development of a decision; 5) the judicial procedure is long and formalised, the mediation procedure is accelerated and informal; 6) publicity is the feature of the judicial procedure, confidentiality is one of the mediation process; 7) competitiveness of the parties is present in the court process, cooperation is characteristic of the parties to the mediation" (Kataieva, 2013, p. 160). The above list characterises judicial procedures in administrative proceedings aimed at settling a dispute prior to trial as a process characterised by discretion, since the parties to a court dispute have the opportunity to act at their own discretion to reach an agreement. In addition, each of these judicial procedures, as we have repeatedly emphasised, has its own alterations, which cannot be studied without clarifying the content of the procedures for settling a dispute before the consideration of cases on the merits.

According to A.O. Lesko, dispute settlement involving a judge "relieves the courts, which are currently overloaded, facilitates resolution of disputes as soon as possible, and also serves to save procedural costs and sometimes reduce the cost of legal assistance" (Lesko, 2019, p. 54). Following I.V. Bozhuk and S.V. Diachenko, "the essence of the procedure for dispute settlement involving a judge is communication between the parties and the judge to obtain clarification and additional information in order to assess the case by the parties" (Bozhuk, Diachenko, 2019, p. 12).

The decision on the dispute settlement procedure involving a judge is made by the judge during the preparatory hearing (Code of Administrative Procedure of Ukraine 2005) only with the consent of the parties to the dispute, as a result of which the relevant decision is made and the proceedings are suspended (the CAPU, Article 185, part 1) (Code of Administrative Procedure of Ukraine, 2005). Moreover, the will of the claimant and the defendant to resolve the dispute before the trial is not the only condition for the implementation of this procedure. Instead, the restrictions on its implementation relate to certain articles of Chapter 11 of Section II of the CAPU, as well as to typical cases. In other words, "administrative cases in which the defendant is the same public authority (its separate structural subdivisions), the dispute in which arose on similar grounds, in relations governed by the same rules of law, and in which the plaintiffs have made similar claims" (Code of Administrative Procedure of Ukraine, 2005). In addition, a systematic interpretation of the articles of Chapter 11 of Section II of the CASU (Code of Administrative Procedure of Ukraine 2005) leads to the conclusion that such a procedure is impossible in administrative cases concerning: appeals against legal regulations; managerial decisions (including decisions to place administrative liability), actions or omissions, including those documented by the bodies of the head of state, state authorities and local self-government, their officials, including those vested with state powers, political parties and blocs, election and referendum commissions (Articles 264-266-1, 273-276, 286, 287, 289-1); the electoral process (Article 277); restrictions and interference with the exercise of the right of citizens to peaceful assembly (Articles 280, 281); the right to travel outside the territory of the state (Article 289-2); meeting the needs of the defence sector of Ukraine (Article 282); appeals of public authorities (tax and customs authorities, the Security Service of Ukraine) (Articles 283, 284); early termination of the powers of a people's deputy of Ukraine (Article 285); forced return or expulsion of foreigners and stateless persons, as well as their detention (Articles 288, 289 of the CAPU).

Therefore, it is impossible to conduct a dispute settlement procedure involving a judge within administrative proceedings in the following categories of cases: 1) appeals against legal regulations; the managerial process and managerial decisions; 2) the electoral process; 3) the activities of election and referendum commissions, political parties and blocs, termination of powers of people's deputies; 4) restrictions on certain constitutional rights of citizens (the right to peaceful assembly and freedom of movement is enshrined in Articles 39 and 33 of the Constitution of Ukraine, respectively); 5) ensuring the country's defence needs; 6) at the request of public authorities (tax and customs authorities, the Security Service of Ukraine). All of the above categories of administrative cases are of crucial importance for the functioning of the state, as they relate to the social, administrative, political sectors, etc., as well as to preventing violations of citizens' rights, including through unlawful actions by state and local authorities and their officials. Given the strategic importance of the quality and outcome of such cases, it is necessary to state the objective impossibility of any negotiations on the issues in question.

Under the provisions of the CAPU, Article 185, part 3, in case of failure to reach an agreement between the parties to the case, the dispute settlement procedure involving a judge is not allowed to be repeated. This can be explained by the fact that the procedure, which is supposed to simplify administrative proceedings, may become a tool for delaying the timeframe for consideration of the case. In addition, this procedure is not possible even if one of the parties to the proceedings is a third party that makes independent claims regarding the subject matter of the dispute. The fact is that satisfaction of the third party's claims automatically causes damages to both the plaintiff and the defendant.

3. Particularities of dispute settlement involving a judge as a judicial procedure in administrative proceedings

Dispute settlement procedures involving a judge are implemented in the form of an in-person or remote meeting, which may be of two types: joint and/or closed (the CAPU, Article 186, part 1). Moreover, two types of meetings may be used simultaneously within the same procedure, since each of them has its own goals and objectives. Thus, a joint meeting is held involving the parties to the dispute, their representatives and the judge, while a closed meeting is a kind of "one-on-one" meeting between one of the parties to the dispute and the judge, initiated by the latter. Therefore, it is virtually impossible to reach a consensus between the parties without both public discussions of the dispute and private conversations between the judge and the parties to clarify their positions and hold additional consultations. Closed meetings provide an opportunity to formulate clear positions of the parties on fundamental issues that need to be resolved to settle the dispute, while joint meetings allow to clarify the essence of the dispute, finally agree on the positions of the parties and reach a con-

sensus. It is clear that such discussions should be thorough, and their conduct requires the judge to engage in a consistent dialogue, demonstrate flexibility and communication skills. As a rule, holding such consultations requires certain preparation on the part of the judge, therefore, as part of the dispute settlement procedure, the judge is allowed to announce breaks, in particular, to optimise and improve the quality of the meetings.

The timeframe for the dispute settlement procedure involving a judge is clearly established by the administrative procedure law. According to the provisions of Article 187 of the CAPU, this procedure should be carried out within a reasonable time, which depends on the specific circumstances of the dispute, the behaviour of the parties, and their real desire for the speedy resolution of the case, however, it may not exceed 30 days, and may not be extended. Certain procedural issues related to dispute settlement involving a judge are regulated by Articles 186 and 188 of the CAPU, the analysis thereof enables to present this procedure as a system consisting of the following stages:

1) commencement of the procedure and a joint meeting, during which the judge should clearly define the purpose and order of the procedure, as well as explain to the parties their rights and obligations;

2) dispute settlement, which is carried out through both joint and closed meetings, which have fundamentally different purposes: "during joint meetings, the judge establishes the grounds and subject matter of the claim, grounds for objections, explains to the parties the subject matter of proof for the category of dispute under consideration, invites the parties to submit proposals for the amicable settlement of the dispute and performs other actions aimed at the amicable settlement of the dispute by the parties" (Code of Administrative Procedure of Ukraine, 2005), instead, closed meetings are necessary for a more detailed discussion of issues related to the subject matter of the dispute, review of court practice in similar cases, discussion of the prospects for dispute settlement and specific ways to resolve it;

3) the parties enter into a settlement agreement and apply to the court for its approval by the court or terminate such procedure at the initiative of one of the parties or directly by the judge and issue a relevant ruling that is not subject to appeal.

Article 188 of the CAPU provides for the following grounds for termination of dispute settlement involving a judge: reaching reconciliation by the parties to the dispute; submission by one of the parties of an application for termination of the procedure; expiration of the procedure; in case of objective delay of the procedure by the party(ies) to the dispute, on the initiative of the judge; "the plaintiff's application to the court to leave the claim without consideration or in case the plaintiff withdraws the claim or the defendant recognises the claim" (Code of Administrative Procedure of Ukraine, 2005). If such procedure is terminated and the case is resumed in court, the merits of the case will be decided in a different court to ensure a fair and impartial decision.

It should be emphasised that this procedure is characterised by absolute confidentiality, therefore, the process of holding meetings is not documented (minutes are not drawn up), nor is their audio or video recording carried out, neither by court employees, nor by the parties to the dispute, nor by other participants in the meetings. Regarding such exclusive privacy, S.V. Kivalov argues debatably, in our opinion: "dispute settlement involving a judge is based on fundamentally different principles than those enshrined in the Code of Administrative Procedure of Ukraine (this is most evident in connection with the principles of publicity and openness of the trial and its full recording by technical means, which directly contradicts the requirements of confidentiality in closed meetings)" (Kivalov, 2014, p. 5). This position looks ambiguous, because: firstly, a closed meeting during dispute settlement involving a judge is similar in its legal nature to a closed court session, which is directly provided for within the principle of publicity (the CAPU, Article 10, para. 8); secondly, dispute settlement involving a judge is not a trial, and therefore it is hardly correct to extrapolate the principles of administrative proceedings, including the principles of publicity and openness, to this procedure.

Regarding the implementation of the dispute settlement procedure involving a judge, some results of the study by R.Yu. Khanyk-Pospolitak are worthy of attention, as she argues that "the use of the institution from 2018 to 2021 is quite stable. In administrative proceedings, unlike in economic and civil proceedings, this institution is almost never used. Moreover, in economic proceedings, the number of cases of application of the institution has been recently decreased, while in civil proceedings, on the contrary, has increased" (Khanyk-Pospolitak, 2021, p. 90). In our opinion, the unpopularity of such a procedure in administrative proceedings is primarily due to the difficulty of combining imperative and discretionary regulatory methods, which are the basis of administrative proceedings. This is because the very procedure of dispute settlement involving a judge implies reach-

ing an agreement between the parties at their own discretion, rather than a clear inevitable effect of the law during the court consideration of the dispute. The existence of a dialogue between the parties to a dispute is more typical of the discretionary method of a regulatory mechanism prevailing in civil and economic proceedings, while administrative proceedings are based on imperative methods of a regulatory mechanism, as well as the conduct of at least one of the parties to the dispute, an entity vested with state power. This significantly complicates the application of such judicial procedure as dispute settlement involving a judge, which is certainly dispositive.

This procedure in administrative proceedings is unpopular due not only to its dispositive legal nature, which is contrary to the principles of administrative law and justice, but also to a number of procedural problems. For example, L.D. Romanadze identifies the main problems of introduction and development of the dispute settlement procedure involving a judge as follows: lack of specific skills of judges related to dispute settlement through communication skills; lack of motivation of judges to implement such a procedure in combination with a high workload; failure to consider the personal qualities of judges conducting such procedures, because they should be calm, balanced, sociable, etc. (Romanadze, 2017, p. 2).

We believe that most of these problems can be solved at the stage of training of professional courts, as well as during their professional development, by introducing disciplines that will help them acquire knowledge, skills and abilities in the field of effective communication and develop personal qualities necessary for the role of conflict manager. Moreover, it is advisable to introduce mandatory use of the dispute settlement procedure involving a judge in certain categories of administrative cases. In this case, the goals of introducing a mechanism for settling disputes prior to court proceedings, including dispute settlement involving the judge (reducing the workload of judges, shortening the time for consideration of administrative cases, increasing the efficiency of administrative justice, etc.) will be achieved.

4. Conclusions

To sum up, the dispute settlement procedure involving a judge can be characterised as follows:

– it is carried out outside the court proceedings;

– it is confidential;

– it is initiated by two parties to the dispute (plaintiff and defendant);

– it has restrictions on its conduct, i.e., it is impossible in the following categories of cases: 1) appeals against legal regulations; the managerial process and managerial decisions; 2) organisation and conduct of elections; 3) activities of election and referendum commissions, political parties and blocs, termination of powers of people's deputies; 4) restrictions on certain constitutional rights of citizens (the right to peaceful assembly and the right to freedom of movement); 5) ensuring the defence needs of the state; 6) at the request of state authorities (tax and customs authorities, the Security Service of Ukraine), as well as standard cases;

– it is held within a reasonable period of time, but not more than 30 days;

– it is implemented in the form of in-person and remote meetings (joint and/or closed);

– it consists of three stages: 1) commencement of the procedure and a joint meeting; 2) resolution of the dispute through joint and closed meetings; 3) conclusion of a settlement agreement by the parties and approval by the court or termination of such procedure;

– this procedure is not documented;

– it cannot be repeated;

– it is a consequence of suspension of proceedings, which may be resumed only in case of termination of this procedure under the circumstances established by the CAPU.

Moreover, clarification of the content of the dispute settlement procedure involving a judge does not enable to form an idea of judicial procedures in administrative proceedings aimed at settling a pre-trial dispute, since this procedure is only one of them. Therefore, as part of further scientific research, we consider it necessary to study the essence of other administrative procedures, in particular, the plaintiff's withdrawal of a claim and reconciliation of the parties.

References:

Bozhuk, I.V., Diachenko, S.V. (2019). Sudova praktyka zastosuvannia alternatyvnykh sposobiv vrehuliuvannia sporiv [Judicial practice of using alternative methods of dispute settlement]. *Pidpryiemstvo, hospodarstvo i pravo - Enterprise, Economy and Law, 12,* 11-15 (in Ukrainian).

Kataieva, E.V. (2013). Natsionalni osoblyvosti mediatsii v Ukraini: dosvid ta perspektyvy [National features of mediation in Ukraine: experience and prospects]. *Slovo natsionalnoi shkoly suddiv Ukrainy - Word of the National School of Judges of Ukraine, 3,* 156-161 (in Ukrainian).

Khanyk-Pospolitak, R.Yu. (2021). Vrehuliuvannia sporu za uchastiu suddi: chy ye efektyvnoiu tsia protsedura? [Dispute settlement involving a judge: is this procedure effective?]. *Naukovi zapysky NaUKMA - Scientific Notes of NaUKMA, 8,* 85-91 (in Ukrainian).

Kivalov, S.V. (2014) Vrehuliuvannia publichno-pravovoho sporu za uchastiu suddi: nova forma pravosuddia chy proiav mediatsii v sudi? [Settlement of a public law dispute involving a judge: a new form of justice or a manifestation of mediation in court?]. *Pidpryiemstvo, hospodarstvo i pravo - Enterprise, Economy and Law, 12* (in Ukrainian).

Kodeks administratyvnoho sudochynstva Ukrainy: vid 06.07.2005 № 2747-IV [Code of Administrative Procedure of Ukraine from 06.07.2005 № 2747-IV]. (2005). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2747-15/conv#n12891 (in Ukrainian).

Lesko, A.O. (2019). Vrehuliuvannia sporu za uchastiu suddi: problemy i perspektyvy [Dispute settlement involving a judge: problems and prospects]. *Pravova derzhava - Rule of Law, 34,* 48-56 (in Ukrainian).

Proekt Zakonu Ukrainy pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy, Tsyvilnoho protsesualnoho kodeksu Ukrainy, Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv vid 23.03.2017 № 6232 [Draft Law of Ukraine on Amendments to the Economic Procedural Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legal regulations of March 23, 2017 № 6232]. (2017). *rada.gov.ua*. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc34?id=&pf3511=61415&pf35401=419014 (in Ukrainian).

Rekomendatsiia № R (86) 12 Komitetu Ministriv Rady Yevropy derzhavam-chlenam shchodo zakhodiv z poperedzhennia i zmenshennia nadmirnoho robochoho navantazhennia v sudakh vid 16 veresnia 1986 roku [Recommendation № R (86) 12 of the Committee of Ministers of the Council of Europe to member states on measures to prevent and reduce excessive workload in the courts of 16 September 1986]. (1986). *zakon.rada.gov.ua*. Retrieved from http://www.arbitr.gov.ua/files/pages/pd07072014_5.pdf (in Ukrainian).

Romanadze, L.D. (2017). *Vrehuliuvannia sporu za uchastiu suddi ta inshi protsesualni novely: vplyv na rozvytok mediatsii [Dispute settlement involving a judge and other procedural novels: the impact on the development of mediation].* Kyiv (in Ukrainian).

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ЗАГАЛЬНА ХАРАКТЕРИСТИКА ПРОЦЕДУРИ ВРЕГУЛЮВАННЯ СПОРУ ЗА УЧАСТЮ СУДДІ ЯК СУДОВОЇ ПРОЦЕДУРИ В АДМІНІСТРАТИВНОМУ СУДОЧИНСТВІ

Анотація. ***Мета.*** Мета статті зумовлена недостатнім рівнем дослідження судових процедур в адміністративному судочинстві, спрямованих на вирішення спору досудового розгляду, та полягає у визначенні ознак одної з указаних процедур, а саме врегулювання спору за участю судді. ***Результати.*** У статті наголошено, що функціонування механізму вирішення спору до судового розгляду є одним із напрямів палких дискусій, що точаться навколо сфери судочинства, між тим вони однозначно мають більше переваг, аніж недоліків. Водночас головним недоліком запровадження такого механізму є недостатня дослідженість його сутності, принципів і реалізації, тобто порядку проходження конкретних стадій і етапів, за якими відбуваються такі судові процедури. ***Висновки.*** Автором надано загальну характеристику процедури врегулювання спору за участю в адміністративному судочинстві шляхом наведення низки специфічних ознак останньої: провадиться поза межами судового провадження; вона є конфіденційною; ініціюється двома сторонами спору (позивачем і відповідачем); має обмеження щодо проведення, тобто її проведення неможливо в таких категоріях справ, як: 1) оскарження нормативно-правових актів; управлінського процесу та прийнятих управлінських рішень; 2) організація та проведення виборів; 3) діяльність виборчих комісій і комісій з референдуму, політичних партій і блоків, припинення повноважень народних депутатів; 4) обмеження окремих конституційних прав громадян (право на мирне зібрання та право на свободу пересування закріплене); 5) забезпечення оборонних потреб держави; 6) за зверненнями органів державної влади (податкових і митних органів, Служби безпеки України), а також типових справ; проводиться протягом розумного строку, але не більше 30 днів; реалізується у формі очних і дистанційних нарад (спільних та/або закритих); складається з трьох стадій: 1) початок процедури та проведення спільної наради; 2) врегулювання спору шляхом проведення спільних і закритих нарад;

3) укладення сторонами мирової угоди та затвердження її судом або припинення такої процедури; така процедура не документується; не може бути проведена повторно; є наслідком зупинення провадження по справі, яке може бути поновлене лише у випадку припинення такої процедури за обставинами, встановленими КАСУ.

Ключові слова: судові процедури, врегулювання спору за участю судді, адміністративне провадження, мирова угода, позивач, відповідач, ухвала.

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PRINCIPLES OF IMPLEMENTATION OF INTERNATIONAL STANDARDS IN THE FIELD OF HUMAN RIGHTS

Abstract. ***Purpose.*** The purpose of the article is to establish the scope and cover the content of the principles of implementation of international standards in the field of human rights. ***Results.*** The article, relying on the analysis of scientific views of scholars and provisions of legislation in force, establishes the scope and reveals the content of the key principles of implementation of international standards in the field of human rights. The author proves the necessity of legislating the principles of implementation of international standards in the field of human rights, which will make this activity more efficient and effective. It is established that the implementation of international human rights standards is a rather narrow and specific area of state legal influence, since it has its own regulatory framework, implementers, etc. Accordingly, its governing principles are a special set of initial ideas, a symbiosis of fundamental principles of both general and special legal nature. ***Conclusions.*** It is concluded that the topic of principles of law is relevant in the modern legal literature, and scholars are constantly engaged in a debate with each other over the content, types and place of the latter in legal reality. Moreover, when projecting the results obtained to the area of implementation of international standards in the field of human rights, we have sufficient grounds to assume that within this area, the principles form the idea of regulating proceedings and improving processes related to human rights. That is, the principles in this case are an abstract legal "foundation" of state influence through legal instruments on social relations arising from activities aimed at implementing international standards in the field of human rights. Allowing for this theoretical approach, as well as the scientific views of representatives of legal science, we conclude that the principles of implementation of international standards in the field of human rights are the guiding ideas, fundamental rules, and initial provisions expressed in the rules of legal regulations, which form the regulatory mechanism for social relations in the field of human rights, and the adoption and implementation of international standards in this area.

Key words: principles, implementation, international standards, ensuring, protection of human rights.

1. Introduction

Legal reality is similar to a living organism. In its most advanced form, it is a holistic phenomenon that lives, performs certain functions and interacts with other objects. However, like any organism, law is a collection of "molecules", parts of a single whole. The smallest elements are rules, which are the basis for the ideological and abstract level of national legal reality, which reflects the public perception of law in general and is expressed in principles. It should be noted that the principles are inherent in both law in general and any regulatory mechanism in particular, such as the process of implementing international standards in the field of human rights, and therefore this issue requires a comprehensive and in-depth study in the context of implementing international standards in the field of human rights. Principles embody the idea of law. They actually permeate the national legal reality, show the fundamental principles on which it is built, and set the vector for further development. In addition, although the principles of law are an abstract category, they are considered in the practical application of law in the "field" in the course of regulating social relations. Principles are in a dialectical relationship with the rules of law, in which they actually dissolve.

Some problematic issues related to the implementation of international standards in the field of human rights have been repeatedly highlighted by a large number of scholars. For example, the topic is under focus by: N. Bur-

kivska, I. Vakulich, V. Valihura, V. Kuzmenko, K. Levchenko, I. Lytvynchuk, O. Solomatina, S. Stetsenko, E. Titov and many others. However, despite numerous scientific achievements, scholars have actually neglected the issue of the principles of implementation of international standards in the field of human rights.

Consequently, the purpose of the article is to establish the scope and reveal the content of the principles of implementation of international standards in the field of human rights.

2. International standards for human rights

Despite the general theoretical certainty of principles in law, it is difficult to specify exactly how they are transformed in a narrow field of the implementation of international human rights standards. This problem is further complicated by the lack of scientific developments in this area. However, it cannot be argued that the category of principles is a novelty in the field of ensuring, protecting and regulating human rights. For example, the importance of the principles of law in the field of ensuring and affirming human rights is further explained in works by S. P. Pohrebniak: "The principles of law help to legitimise the respective groups of human rights. Support from the principles is very important for the establishment of the human rights institution, especially in the legal consciousness of the population. It should be recalled that the principles of law are historically an older category than human rights. Moreover, it can be argued that the emergence and universal recognition of the institution of human rights was a response to the flagrant violations of justice, numerous infringements of freedom, and the apparent denial of humanism that took place in the history of mankind. Confirmation of this thesis can be found in the events and consequences of the English, American and French revolutions. But perhaps the tragedy of the Second World War demonstrates this connection most convincingly. It was the unrestricted violence of the Nazi state that overturned the established idea of humanity and led to the practical implementation of a project in which humanity was considered superfluous, where human beings were trash and played the ridiculously insignificant role of an object to be eliminated, a worthless "res extensa" devoid of soul and reason; it was not about the occasional excesses of tyranny, but about the rational project that formed the basis of the Nazi state. This led to the development of the concept of "crime against humanity", the creation of the United Nations, and the adoption of the Universal Declaration of Human Rights (which is an important step towards ensuring human rights). Thus, each of the fundamental principles can be used to justify the need for a particular group of human rights. For example, the obligation to guarantee personal, political and social rights can be explained on the basis of the principle of justice. In particular, the idea of justice in the context of social distribution enables the most convincing justification and constitution of the idea of social human rights. It is logical that in order to ensure equal access to decision-making on the principles of fair distribution, citizens are regarded as equals with the same political rights. Justice also requires that each individual be granted the widest possible liberty compatible with a similar system of liberty for all, that is, a broad range of personal rights shall be recognised for the individual" (Pohrebniak, 2009, pp. 71–72).

However, the key drawback of this scholar's opinion is that he does not provide a list of guiding ideas in the field of ensuring and protection of human rights. In general legal theory, this perspective has been highlighted repeatedly. For example, A. M. Kolodii argues that the principles of rights in the aggregate are grouped into as follows: 1) principles of legal consciousness; 2) principles of development of law; 3) principles of law-making, including legislative drafting and rule-making; 4) principles of the system of law: a) general legal (basic); b) inter-sectoral; c) sectoral; d) principles of legal institutions; 5) principles of the structure of law: a) general social and legal; b) public and private; c) regulatory and protective; d) substantive and procedural; e) objective and subjective; 6) principles of law implementation, including the principles of law application; 7) law enforcement principles, especially the principles of justice and legal liability (Kolodii, 2012, p. 44).

A broader classification is made by A. D. Mashko. In his opinion, depending on the area of legal rules in the system of law covered by a particular principle of law, there are: general legal principles of law, i.e. those that apply to the legal system and all branches of law (for the modern Ukrainian legal system, an example is the principles of humanity, legality, etc.); sectoral principles, regulating a particular branch of law (for example, the principle of freedom of contract for civil law in Ukraine or the principle of presumption of innocence for criminal law in Ukraine, etc.); cross-branch principles, i.e. those that are fundamental ideas for several branches of law (for example, the adversarial principle in Ukraine can be considered as cross-branch, as it is enshrined in the civil procedure, economic procedure and criminal procedure laws of Ukraine) (Mashkov, 2015).

Depending on the legal force of a legal regulation that enshrines a particular principle

of law, there are: principles of law enshrined in constitutions (for example, the principle of the rule of law, which is enshrined in Article 8 of the Constitution of Ukraine); principles of law enshrined in laws, including codes (for example, the principle of freedom of contract enshrined in the Civil Code of Ukraine, Article 3, clause 3); principles of law enshrined in bylaws (e.g., Resolution of the National Bank of Ukraine No. 415 of July 21, 2009 sets out the principles for calculating the discount rate based on the projected inflation rate) (Mashkov, 2015).

T.I. Fulei has formed her own approach to the classification of legal principles and argues that the latter are divided into: 1) universal (general civilisation) principles of law which are applicable in any system of law; 2) general principles of law (for several systems of law) – principles of the same name in the main national legal systems of the world, which have certain features and possibilities of application in both domestic and international legal orders; among them are the following: a) general principles of law for several national systems; b) general principles of law for national systems and interstate entities (e.g., the European Union); 3) principles of the system of law, including: a) principles of international law; b) principles of domestic law (general legal ones) (Fulei, 2003, p. 10).

In addition, a certain range of starting ideas of law is inherent in the field of human rights itself. For example, Principles of public policy of Ukraine in the field of human rights No. 757-14, approved by the Verkhovna Rada of Ukraine on 17 June 1999, stipulate that the work of the state in this area is based on the following principles: recognition of human and civil rights and fundamental freedoms as inherent and inalienable; ensuring the supremacy of human rights and fundamental freedoms in relations with the state; ensuring equality of all people before law and courts; recognition of the rule of law, according to which the proclamation and implementation of human and civil rights and fundamental freedoms is based only on law; prevention of narrowing the content and scope of human and civil rights and fundamental freedoms proclaimed by the Constitution of Ukraine; recognition of the presumption of personal freedom in accordance with the principle that everything is permitted except for what is expressly prohibited by law; recognition of the limited freedom of the state, its bodies and officials in accordance with the principle that only what is expressly provided for by law is permitted (Resolution of the Cabinet of Ministers of Ukraine on the Principles of State Policy of Ukraine in the Field of Human Rights, 1999).

In the modern legal literature, the principles of law are a hot topic among scholars who are constantly engaged in a debate with each other about the content, types and place of the latter in legal reality. Moreover, when projecting the results obtained to the area of implementation of international standards in the field of human rights, we have sufficient grounds to assume that within this area, the principles form the idea of regulating proceedings and improvement of processes related to human rights. That is, the principles in this case are an abstract legal "foundation" of state influence through legal instruments on social relations arising from activities aimed at implementing international standards in the field of human rights. Allowing for this theoretical approach, as well as the scientific views of representatives of legal science, it seems that the principles of implementation of international standards in the field of human rights are the guiding ideas, fundamental rules, and initial provisions expressed in the provisions of legal regulations, which form the basis for the regulatory mechanism for social relations in the field of human rights, the adoption and implementation of international standards in this area.

3. Principles of ensuring international human rights enforcement

It should be noted that the implementation of international human rights standards is a rather narrow and specific area of state legal influence, since it has its own regulatory framework, implementers, etc. Accordingly, its governing principles are a special set of initial ideas, a symbiosis of fundamental principles of both general and special legal nature. In addition, the uncertainty of this issue in academic circles enables to synthesise original approach to the classification of principles of implementation of international standards in the field of human rights, according to which these principles include the following:

1. The principle of legality. Scientific literature indicates that legality is a complex political and legal phenomenon. It makes public administration, which by its nature involves coercion, acceptable in the minds of the population and legal from the point of view of law. Legality should be seen as a principle deterring violations of citizens' rights and freedoms and other arbitrariness (Solodarenko, 2005). It is noteworthy that the principle of legality is enshrined in the Constitution of Ukraine in this sense. Thus, according to Article 19, the legal order in Ukraine is based on the principles that no one can be forced to do anything that is not provided for by law. State authorities and local self-government bodies and their officials are obliged to act only on the basis, within the lim-

its of their powers and in the manner provided for by the Constitution and laws of Ukraine (The Constitution of Ukraine, 1996). Therefore, the implementation of international standards in the field of human rights, the principle of legality reveals that activities related to the implementation of these standards shall first of all comply with the letter of the law, be legal and based on the provisions of the legislation in force. The actors of this process may not go beyond the scope of their statutory competence and take actions that contradict national legal standards.

2. The principle of the priority of national interests. It should be noted that, according to scholars, such as F. Zelikov, the national interest is a "non-operational goal", a system of preferences that underlies politics. V. Kovalskyi, O. Manachynskyi and Y. Pronkin define national interests as the real reason for the actions of the nation and the state aimed at their survival, functioning and development, a set of national goals and basic values that are of importance in the strategy and tactics in the field of national security (Pocheptsov, 1996; Kovalskyi, 1994; Lipkan, 2008). In other words, the national interest is the key goals of the country's development as a nation, expressed in political consciousness and beliefs. For example, according to the Constitution of Ukraine, the state facilitates the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture, as well as the development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities of Ukraine. Ukraine's foreign policy activity is aimed at ensuring its national interests and security by maintaining peaceful and mutually beneficial cooperation with members of the international community in accordance with the generally recognised principles and rules of international law (The Constitution of Ukraine, 1996). In accordance with this principle, the national interest shall be in the priority in state activities aimed at implementing international standards of any content, including those related to human rights. In other words, international standards cannot contradict the strategic and tactical goals of the Ukrainian nation's development, nor violate them in any way.

3. The principle of people's power in the process of implementing international standards in the field of human rights. The Constitution states that the people are the bearer of sovereignty and the sole source of power in Ukraine. The people exercise power directly and through state authorities and local self-government bodies (The Constitution of Ukraine, 1996). This principle stipulates that any manipulation of human and civil rights and freedoms may be carried out exclusively by the will of the people of Ukraine, which they exercise through the representative institutions of democracy (the Verkhovna Rada of Ukraine and the President of Ukraine), delegated with broad powers, such as, the vector of implementation of the latest human rights standards into the national legal system.

4. The principle of equality. According to this principle, all people are free and equal in dignity and rights. Human rights and freedoms are inalienable and inviolable (The Constitution of Ukraine, 1996). In the field under study, this principle is expressed in the fact that the international standards introduced should not be unipolar, i.e., no new principles can be implemented that worsen the situation of any particular part of society or divide it into classes. The implementation of international human rights standards should consider the fact that the rights of all people are subject to protection without exception.

5. The principle of non-derogation of human rights enshrined in the Constitution. According to this principle, the implemented international standards cannot contradict the Constitution of Ukraine and in any way deny or narrow the human rights enshrined in its provisions.

4. Conclusions

Thus, in the modern legal literature, the topic of principles of law is relevant in the modern legal literature, and scholars are constantly engaged in a debate with each other over the content, types and place of the latter in legal reality. Moreover, when projecting the results obtained to the area of implementation of international standards in the field of human rights, we have sufficient grounds to assume that within this area, the principles form the idea of regulating proceedings and improving processes related to human rights. That is, the principles in this case are an abstract legal "foundation" of state influence through legal instruments on social relations arising from activities aimed at implementing international standards in the field of human rights. Allowing for this theoretical approach, as well as the scientific views of representatives of legal science, we conclude that the principles of implementation of international standards in the field of human rights are the guiding ideas, fundamental rules, and initial provisions expressed in the rules of legal regulations, which form the regulatory mechanism for social relations in the field of human rights, and the adoption and implementation of international standards in this area.

These principles include: the principle of legality, the principle of priority of national interests, the principle of equality, the principle

of democracy in the process of implementing international standards in the field of human rights and the principle of non-restriction of human rights defined by the Constitution.

References:

Fulei, T.I. (2003). Suchasni zahalnoliudski pryntsypy prava ta problemy yikh vprovadzhennia v Ukraini [Modern universal principles of law and problems of their implementation in Ukraine]. *Candidate's thesis.* Kyiv: Kyivskyi natsionalnyi universytet imeni Tarasa Shevchenka (in Ukrainian).

Kolodii, A.M. (2012). Pryntsypy prava: heneza, poniattia, klasyfikatsiia ta realizatsiia [Principles of law: genesis, concepts, classification and implementation]. *Almanakh prava - Almanac of Law, 3*, 42-46 (in Ukrainian).

Konstytutsiia Ukrainy vid 28 chervnia 1996 roku № 254k/96-VR [The Constitution of Ukraine of June 28, 1996 № 254k/96-VR]. (1996). *zakon.rada.gov.ua.* Retrieved from https://zakon.rada.gov.ua/laws/show/254к/96-вр#Text (in Ukrainian).

Kovalskyi, V. (1994). Natsionalni interesy: zahrozy ta yikh neitralizatsiia [National interests: threats and their neutralization]. *Viche - Viche, 7*, 57-62 (in Ukrainian).

Lipkan, V.A. (2008). Administratyvno-pravovi osnovy zabezpechennia natsionalnoi bezpeky Ukrainy [Administrative and legal bases of ensuring national security of Ukraine: dissertation]. *Candidate's thesis.* Kyiv: Kyivskyi natsionalnyi universytet vnutrishnikh sprav (in Ukrainian).

Mashkov, A.D. (2015). *Teoriia derzhavy i prava [Theory of State and Law].* Kyiv: Dakor (in Ukrainian).

Pohrebniak, S. (2009). Rol osnovopolozhnykh pryntsypiv prava v zabezpechenni prav liudyny [The role of fundamental principles of law in ensuring human rights]. *Visnyk Akademii pravovykh nauk Ukrainy - Bulletin of the Academy, 1(56),* 71-77 (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy Pro Zasady derzhavnoi polityky Ukrainy v haluzi prav liudyny: vid 17 chervnia 1999 roku №757-XIV [Resolution of the Cabinet of Ministers of Ukraine on the Principles of State Policy of Ukraine in the Field of Human Rights: of June 17, 1999 №757-XIV]. (1999). *zakon.rada.gov.ua.* Retrieved from https://zakon.rada.gov.ua/laws/show/1160-15#Text (in Ukrainian).

Solodarenko, M.A. (2005). Harantii ta zasoby zabezpechennia zakonnosti u derzhavnomu upravlinni: zmist i spivvidnoshennia poniat [Guarantees and means of ensuring the rule of law in public administration: the content and relationship of concepts]. Chasopys Kyivskoho universytetu prava - Journal of Kyiv University of Law, 4, 141–147 (in Ukrainian).

Pocheptsov, G.G. (1996). *Nacional'naja bezopasnost' stran perehodnogo perioda [National security of countries in transition].* Kiev: Kievskij nacional'nyj un-t im. Tarasa Shevchenko (in Russian).

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ПРИНЦИПИ ЗАПРОВАДЖЕННЯ МІЖНАРОДНИХ СТАНДАРТІВ У СФЕРІ ЗАБЕЗПЕЧЕННЯ ЗАХИСТУ ПРАВ ЛЮДИНИ

Анотація. ***Мета.*** Метою статті є встановлення кола та розкриття змісту принципів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. ***Результати.*** У статті, спираючись на аналіз наукових поглядів учених та норм чинного законодавства, встановлено коло та розкрито зміст ключових принципів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. Доведена необхідність законодавчого закріплення вказаних у статті принципів запровадження міжнародних стандартів у сфері забезпечення захисту прав людини, що зробить вказану діяльність більш дієвою та ефективною. З'ясовано, що галузь запровадження міжнародних стандартів із забезпечення прав людини – це досить вузька та специфічна сфера державно-правового впливу, адже вона має власну нормативну основу, суб'єктів реалізації тощо. Відповідно до цього принципи, на яких вона ґрунтується, являють собою особливу сукупність вихідних ідей, певним чином симбіоз основоположних начал як загально-, так і спеціально-правового характеру. ***Висновки.*** Зроблено висновок, що у сучасній юридичній літературі тема принципів права є актуальною, а науковці постійно вступають у полеміку один з одним із приводу змісту, видів та місця останніх у юридичній реальності. При цьому, проєктуючи отримані результати на сферу запровадження міжнародних стандартів у сфері забезпечення захисту прав людини, маємо досить підстав припустити, що в межах цієї галузі принципи формують ідею правового регулювання провадження та вдосконалення процесів, пов'язаних із захистом прав людини. Тобто принципи в цьому випадку є абстрактним правовим «фундаментом» державного впливу за допомогою правових інструментів

на суспільні відносини, що виникають за фактом діяльності, спрямованої на запровадження міжнародних стандартів у сфері забезпечення захисту прав людини. Ураховуючи цей теоретичний підхід, а також наукові погляди представників юридичної науки, ми дійшли висновку, що принципи запровадження міжнародних стандартів у сфері забезпечення захисту прав людини – це керівні ідеї, основоположні правила, вихідні положення, виражені в нормах юридичних актів, у відповідності до яких сформовано механізм правового регулювання суспільних відносин у галузі захисту прав людини, перейняття та імплементації світових стандартів за цим напрямом.

Ключові слова: принципи, запровадження, міжнародні стандарти, забезпечення, захист прав людини.

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ADMINISTRATIVE AND LEGAL STATUS OF ACTORS OF GENERAL COMPETENCE IN THE NATIONAL SECURITY OF UKRAINE IN THE CONTEXT OF EUROPEAN INTEGRATION

Abstract. ***Purpose.*** The purpose of the article is to reveal the essence of the administrative and legal status of the hierarchically highest actors of Ukraine's national security system in the context of European integration. ***Results.*** The author determines that the administrative and legal status of the President of Ukraine in the field under study implies characteristics as follows: the guarantor (of sovereignty, territorial integrity, and European integration course); leadership in the sectors of national security and defence; a member of the system of actors ensuring the national security of Ukraine; the Chairman of the National Security and Defence Council of Ukraine, forming its personnel and enacting decisions of the National Security and Defence Council of Ukraine by his decrees. It is revealed that the Verkhovna Rada of Ukraine is one of the leading entities within the system of national security of Ukraine in the context of European integration and is vested by the Constitution of Ukraine with exclusive powers to adopt legislative provisions in the sectors of national security, the legal regime of martial law and the state of emergency, and the principles of foreign relations. Through the activities of its committees, it is responsible for bringing Ukrainian legislation into line with EU provisions, and control of the activities of special purpose bodies with law enforcement functions, special purpose law enforcement bodies and intelligence agencies. It is stated that the Cabinet of Ministers of Ukraine has a special administrative and legal status, since it is responsible both for making public policy of some areas and for implementing decisions in the fields under study, and also has control and coordination powers, and is the initiator of numerous reforms and legislative changes. ***Conclusions.*** The author concludes that the administrative and legal status of actors of general competence in the field of ensuring national security of Ukraine in the context of European integration as a category of administrative and legal branch of scientific knowledge represents the aggregate manifestation of the functional capabilities of the managerial level, which, through its decisions and actions, objectifies an effective regulatory framework for the proper performance of tasks in this field.

Key words: administrative and legal status, security, European integration, ensuring of security, general competence, system of actors.

1. Introduction

The system of actors ensuring national security of Ukraine in the context of European integration is a complex legal entity that can be semantically identified as a list of state structures and organisations, as well as a set of civil society representatives who are legally obliged to implement defence and security measures adapted to the requirements, standards and rules of the EU.

This study is aimed at revealing the administrative and legal status of the hierarchically highest actors of this system.

The general theoretical foundations of the administrative and legal status of public authorities are a widely covered issue. For example, in this area, some ideas, provisions, concepts and theses by V. Averianov, Y. Bytiak, V. Bevzenko, T. Kolomoiets, V. Kurylo, R. Melnyk, O. Tsyhanov, and many others can be used as sources for defining the concept and essence of this category. However, the topic presented for analysis has not been comprehensively covered by scholars.

2. Actors of general competence ensuring the national security of Ukraine

With the outbreak of full-scale armed aggression by the Russian Federation, the role of the President of Ukraine in ensuring national security and European integration has increased signifi-

cantly. On 28 February 2022, President Zelenskyi signed an application for EU membership. He also emphasised that the Ukrainian authorities are applying to the EU for Ukraine's immediate accession under the special procedure (Ukrinform website, 2022). Furthermore, at the initiative of the President, issues related to ensuring the collective security of Ukraine and the Euro-Atlantic area are constantly being considered. For example, at a meeting of the National Security and Defence Council on 30 September 2022, measures to be taken to ensure the collective security of the Euro-Atlantic area and Ukraine were discussed. In particular, this includes strengthening and expanding the international coalition in support of Ukraine, increasing military and technical assistance to Ukraine, strengthening sanctions pressure on the Russian Federation, implementing proposals to ensure security in the international arena, intensifying the strategy of nuclear deterrence of the Russian Federation by the countries of the Euro-Atlantic area, and countering hybrid threats posed by the aggressor country (Official website of the Office of the President of Ukraine, 2022).

In general, the administrative and legal status of the President of Ukraine in the field under study implies characteristics as follows: the guarantor (of sovereignty, territorial integrity, and European integration course); leadership in the sectors of national security and defence; a member of the system of actors ensuring the national security of Ukraine; the Chairman of the NSDC of Ukraine, forming its personnel and enacting decisions of the NSDC of Ukraine by his decrees.

The Verkhovna Rada of Ukraine is the only legislative body in Ukraine. Given that the adaptation of European legislation within the European integration course requires a systematic approach, this body has one of the most important functions in the field under study. The first priority is to ensure its proper functioning. To resolve this issue, the Verkhovna Rada Committee on the Rules of Procedure, Deputy Ethics and Organisation of the Verkhovna Rada of Ukraine was tasked with preparing proposals for amendments to the Rules of Procedure of the Verkhovna Rada of Ukraine to regulate the specifics of submissions, consideration and adoption of draft laws aimed at bringing Ukrainian legislation into line with the provisions of the European Union acquis, fulfilment of Ukraine's international legal obligations in the field of European integration (Resolution of the Verkhovna Rada of Ukraine On some measures to fulfil Ukraine's obligations in the field of European integration, 2022).

Since 23 June 2022, when the European Council decided to grant Ukraine the status of a candidate for EU membership, additional obligations have been imposed on the Ukrainian authorities to fulfil the requirements for bringing Ukrainian legislation into line with EU law and to implement fundamental political, socio-economic, legal and institutional reforms aimed at building a developed and sustainable democracy and market economy. In order to resolve all current issues related to the above-mentioned decision of the European Council and to fulfil the conditions set by the European Commission for Ukraine, which granted it the status of a candidate for EU membership, the Verkhovna Rada of Ukraine adopted Resolution No. 2483-IX "On some measures to fulfil Ukraine's obligations in the field of European Integration" of 29 July 2022, where bringing Ukrainian legislation into line with the provisions of EU law, ensuring compliance of acts of the Verkhovna Rada of Ukraine with Ukraine's commitments in the field of European integration and EU law are defined as one of the main tasks of the Verkhovna Rada of Ukraine (Resolution of the Verkhovna Rada of Ukraine On some measures to fulfil Ukraine's obligations in the field of European integration, 2022).

The Verkhovna Rada of Ukraine has a number of committees dealing with European integration and national security, including the Verkhovna Rada Committee on Ukraine's Integration into the European Union and the Verkhovna Rada Committee on National Security, Defence and Intelligence.

For example, according to I. Klympush-Tsintsadze, Chair of the Committee on Ukraine's Integration into the EU, in Ukraine, as in other countries, the government plays a key role in the process of adapting legislation to EU law. She hopes that the capacity of the Cabinet of Ministers and ministries in this regard would increase over time. However, she also believes that the capacity of the Verkhovna Rada of Ukraine needs to be strengthened. The Chair of the Committee on Ukraine's Integration into the EU calls on the Government to make efforts to solve another systemic and large-scale problem, that is, official translations of EU legal regulations: "This is a huge systemic problem for us. The resolution adopted by the Verkhovna Rada of Ukraine provides not only for the availability of compliance tables, but also for official translations. Obviously, the Verkhovna Rada of Ukraine cannot take on this work" (Voice of Ukraine official website, 2022).

3. Regulatory framework for the legal status of actors of general competence in the national security of Ukraine

Currently, the Verkhovna Rada of Ukraine considers more than 2000 draft laws (Official

website of the Parliament of Ukraine, 2022), where the Verkhovna Rada Committee on Ukraine's Integration into the EU is a co-executor. Draft laws where the Committee is the main executor and which relate to national security issues in the context of European integration, are Draft law No. 1206 of 29 August 2019 on the principles of public policy on European Integration (Draft Law on the principles of public policy on European integration, 2019); Draft Resolution No. 5429 of 26 April 2021 on the Statement of the Verkhovna Rada of Ukraine on Ukraine's support for compliance with the norms of international law in the Eastern Mediterranean region (Draft Resolution on the Statement of the Verkhovna Rada of Ukraine on Ukraine's support for compliance with the norms of international law in the Eastern Mediterranean region, 2021); Draft Resolution No. 8080 of 28 September 2022 on the Appeal of the Verkhovna Rada of Ukraine to the Bundestag of the Federal Republic of Germany on the further provision of heavy weapons and comprehensive military and technical support to Ukraine in the face of full-scale Russian intervention (Draft Resolution on the Appeal of the Verkhovna Rada of Ukraine to the Bundestag of the Federal Republic of Germany on the further provision of heavy weapons and comprehensive military and technical support to Ukraine in the face of full-scale Russian intervention, 2022).

At the same time, the Verkhovna Rada Committee on National Security, Defence and Intelligence is engaged in ongoing legislative activities and consultations. The members of the Committee considered Draft Law No. 4210 on improving defence planning procedures, which has been revised by the Committee (Draft Law on Amendments to Some Legislative Acts of Ukraine on National Security and Defence Issues on Strengthening Democratic Civilian Control over the Armed Forces of Ukraine, Improving the Joint Leadership of the State Defence Forces and Planning in the Fields of National Security and Defence, 2020). During the preparation of the draft law for the second first reading, the working group, established for this purpose in the Committee, proposed to amend the main provisions of the draft law and to present it in a new version, and thus to change the title of the draft law from "On Amendments to Some Laws of Ukraine on improving Defence Planning Procedures" to “On Amendments to some legal regulations of Ukraine on national security and defence on strengthening democratic civilian control over the Armed Forces of Ukraine, improving joint command of the State Defence Forces and planning in the fields of national security and defence” (Official website of the Parliament of Ukraine, 2022).

It should also be noted that in 2020, the Law of Ukraine "On Intelligence" was adopted, which, in particular, defined the powers and peculiarities of forming the staff of the Verkhovna Rada Committee, which is responsible for ensuring the control functions of the Verkhovna Rada of Ukraine over the activities of special purpose bodies with law enforcement functions, special purpose law enforcement agencies and intelligence agencies. The Law of Ukraine "On Amendments to some laws of Ukraine on ensuring effective implementation of parliamentary control" was also adopted. The latter regulates the submission and consideration by the Verkhovna Rada of Ukraine of detailed reports on the activities and reports of the Director of the State Bureau of Investigation, the Prosecutor General, the Head of the Security Service of Ukraine and other state bodies and officials who are not members of the Cabinet of Ministers of Ukraine (Analytical report on the annual Message of the President of Ukraine to the Verkhovna Rada of Ukraine, 2021).

Therefore, the Verkhovna Rada of Ukraine is one of the leading entities within the system of national security of Ukraine in the context of European integration and is vested by the Constitution of Ukraine with exclusive powers to adopt legislative provisions in the sectors of national security, the legal regime of martial law and the state of emergency, and the principles of foreign relations. Through the activities of its committees, it is responsible for bringing Ukrainian legislation into line with EU provisions, and control of the activities of special purpose bodies with law enforcement functions, special purpose law enforcement bodies and intelligence agencies.

With regards to the essence of the administrative and legal status of the Cabinet of Ministers of Ukraine, we would like to clarify that this issue is widely covered within the national administrative and legal branch of scientific knowledge. For example, S. Osaulenko in her monographic study "Administrative and Legal Status of the Cabinet of Ministers of Ukraine" emphasises that its governmental activities are implemented simultaneously through political and administrative powers. Moreover, the content of the political powers of the Cabinet of Ministers of Ukraine is to make public policy, while the content of the administrative powers of the Cabinet of Ministers of Ukraine is executive and administrative activities in the management of economic, socio-cultural and administrative-political sectors (Osaulenko, 2010).

For example, the Law of Ukraine No. 794-VII "On the Cabinet of Ministers of Ukraine"

of 27 February 2014 stipulates that it ensures state sovereignty and economic independence of Ukraine, implements the domestic and foreign policy of the state, and executes the Constitution and laws of Ukraine, acts of the President of Ukraine (Law of Ukraine On the Cabinet of Ministers of Ukraine, 2014). Resolution of the Verkhovna Rada of Ukraine No. 2483-IX "On some measures to fulfil Ukraine's obligations in the field of European Integration" of 29 July 2022 designates the Cabinet of Ministers of Ukraine as the main entity initiating draft laws on the adaptation of European legislation to the national one. Thus, together with European partners, the Open Government Partnership Initiative was launched to ensure access to information, strengthen public participation in decision-making, ensure accountability of public authorities, and develop technologies and innovations to ensure transparency and accountability (Decree of the Cabinet of Ministers of Ukraine on the approval of the action plan for the implementation of the "Open Government Partnership" Initiative in 2021-2022, 2021) in all sectors.

The Cabinet of Ministers of Ukraine, along with other entities defined in Law of Ukraine No. 2469-VIII "On National Security of Ukraine" of 21 June 2018, is part of the civilian control system. In addition, it ensures control over the implementation of legislation and public policy on national security in the context of European integration.

Relying on our analysis of the legislative framework for national security and European integration and all the above, we can state that the Cabinet of Ministers of Ukraine has a special administrative and legal status, since it chooses the areas of activity and manages the executive element of the system of implementation of some functions of the state in the field under study, it also has control and coordination powers, which are explicitly provided for in a number of legal regulations governing the areas of national security and procedures for implementing the European integration process.

4. Conclusions

Therefore, the clarity of the legislative definition of the actors of administrative and legal support for Ukraine's national security in the context of European integration is of paramount importance for its proper implementation. Hierarchically, the highest representatives of this system are the bodies of general competence, such as: the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine.

The theory of administrative law determines that the administrative and legal status of a public authority represents its place, role, and purpose in a system of legal relations. The system of national security of Ukraine in the context of European integration is a specific legal entity, the parties to which acts as a coordinated mechanism, the integrity of which is its leading feature. Accordingly, it does not seem appropriate to single out the place, role and purpose of each representative of the system being analysed, since only with the cumulative manifestation of interacting elements is it possible to achieve the set goals.

Therefore, the administrative and legal status of actors of general competence in the field of ensuring the national security of Ukraine in the context of European integration as a category of administrative and legal branch of scientific knowledge represents the aggregate manifestation of the functional capabilities of the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine as a managerial level, which, through its decisions and actions, objectifies an effective regulatory framework for the proper performance of tasks in this field. In general, these actors represent the leadership of this system, which is simultaneously responsible for the development of some reform changes and directions of development of security and defence legislation based on European values and standards, as well as for the implementation of some measures that fall within their competence as actors with special support functions.

References:

Analitychna dopovid do shchorichnoho Poslannia Prezydenta Ukrainy do Verkhovnoi Rady Ukrainy [Analytical report on the annual Message of the President of Ukraine to the Verkhovna Rada of Ukraine]. NISD, 2021 (in Ukrainian).

Ofitsiinyi sait Holos Ukrainy [Voice of Ukraine official website]. (2022). Retrieved from http://www.golos.com.ua/article/363184 (in Ukrainian).

Ofitsiinyi vebportal Ofisu Prezydenta Ukrainy [Official website of the Office of the President of Ukraine]. (2022). *president.gov.ua*. Retrieved from https://www.president.gov.ua/news/prezident-proviv-zasidannya-rnbo-na-yakomu-bulo-rozglyanuto-78169 (in Ukrainian).

Ofitsiinyi vebportal parlamentu Ukrainy [Official website of the Parliament of Ukraine]. (2022). *rada.gov.ua*. Retrieved from https://itd.rada.gov.ua (in Ukrainian).

Osaulenko, S. (2010). Administratyvno-pravovyi status Kabinetu Ministriv Ukrainy [Administrative and legal status of the Cabinet of Ministers of Ukraine]. *Extended abstract of candidate's thesis.* Odesa: Nats. un.-t "Odeska yurydychna akademiia" (in Ukrainian).

Postanova Verkhovnoi Rady Ukrainy Pro deiaki zakhody shchodo vykonannia zoboviazan Ukrainy u sferi yevropeiskoi intehratsii: vid 29 lyp. 2022 roku № 2483-IX [Resolution of the Verkhovna Rada of Ukraine On some measures to fulfill Ukraine's obligations in the field of European integration: dated July 29, 2022 No. 2483-IX]. (2022). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2483-20#Text (in Ukrainian).

Proiekt Postanovy pro Zaiavu Verkhovnoi Rady Ukrainy shchodo pidtrymky z boku Ukrainy dotrymannia norm mizhnarodnoho prava v rehioni Skhidnoho Seredzemnomoria vid 26 kvit. 2021 r. № 5429 [Draft Resolution on the Statement of the Verkhovna Rada of Ukraine regarding Ukraine's support for compliance with the norms of international law in the Eastern Mediterranean region dated April 26, 2021 No. 5429]. (2021). *rada.gov.ua*. Retrieved from https://itd.rada.gov.ua/billInfo/Bills/Card/26397 (in Ukrainian).

Proiekt Postanovy pro Zvernennia Verkhovnoi Rady Ukrainy do Bundestahu Federatyvnoi Respubliky Nimechchyna shchodo podalshoho nadannia vazhkoho ozbroiennia ta vsebichnoi viiskovo-tekhnichnoi pidtrymky Ukrainy v protystoianni povnomasshtabnii rosiiskii interventsii vid 28 veres. 2022 r. № 8080 [Draft Resolution on the Appeal of the Verkhovna Rada of Ukraine to the Bundestag of the Federal Republic of Germany on the further provision of heavy weapons and comprehensive military and technical support to Ukraine in the face of full-scale Russian intervention dated September 28, 2022 No. 8080]. (2022). *rada.gov.ua*. Retrieved from https://itd.rada.gov.ua/billInfo/Bills/Card/40545 (in Ukrainian).

Proiekt Zakonu pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy z pytan natsionalnoi bezpeky i oborony shchodo zmitsnennia demokratychnoho tsyvilnoho kontroliu nad Zbroinymy Sylamy Ukrainy, udoskonalennia obiednanoho kerivnytstva sylamy oborony derzhavy ta planuvannia u sferakh natsionalnoi bezpeky i oborony vid 12 zhovt. 2020 r. № 4210 [Draft Law on Amendments to Some Legislative Acts of Ukraine on National Security and Defence Issues on Strengthening Democratic Civilian Control over the Armed Forces of Ukraine, Improving the Joint Leadership of the State Defence Forces and Planning in the Fields of National Security and Defence dated October 12, 2020 No. 4210]. (2022). *rada.gov.ua*. Retrieved from https://itd.rada.gov.ua/billInfo/Bills/Card/4304 (in Ukrainian).

Proiekt Zakonu pro zasady derzhavnoi polityky u sferi yevropeiskoi intehratsii vid 29 serp. 2019 r. № 1206 [Draft Law on the Principles of Public policy on European integration dated August 29, 2019 No. 1206]. (2019). *rada.gov.ua*. Retrieved from https://itd.rada.gov.ua/billInfo/Bills/Card/1042 (in Ukrainian).

Rozporiadzhennia Kabinetu Ministriv Ukrainy Pro zatverdzhennia planu dii iz vprovadzhennia Initsiatyvy «Partnerstvo «Vidkrytyi Uriad»» u 2021-2022 rokakh: vid 24 liut. 2021 r. [Decree of the Cabinet of Ministers of Ukraine on the approval of the action plan for the implementation of the "Open Government Partnership" Initiative in 2021-2022: dated February 24, 2021]. (2021). *kmu.gov.ua*. Retrieved from https://www.kmu.gov.ua/storage/app/sites/1/17-civik-2018/partnerstvo/plan-2022.pdf (in Ukrainian).

Sait Ukrinform [Ukrinform website]. (2022). *ukrinform.ua*. Retrieved from https://www.ukrinform.ua/rubric-ato/3416117-prezident-pidpisav-zaavku-na-clenstvo-ukraini-v-es.html (in Ukrainian).

Zakon Ukrainy Pro Kabinet Ministriv Ukrainy: vid 27 liutoho 2014 r. № 794-VII [Law of Ukraine On the Cabinet of Ministers of Ukraine: dated February 27, 2014 No. 794-VII]. (2014). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/794-18#Text (in Ukrainian).

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АДМІНІСТРАТИВНО-ПРАВОВИЙ СТАТУС СУБ'ЄКТІВ ЗАГАЛЬНОЇ КОМПЕТЕНЦІЇ У СФЕРІ ЗАБЕЗПЕЧЕННЯ НАЦІОНАЛЬНОЇ БЕЗПЕКИ УКРАЇНИ В УМОВАХ ЄВРОІНТЕГРАЦІЇ

Анотація. ***Мета.*** Мета статті – розкрити сутність адміністративно-правового статусу ієрархічно найвищих суб'єктів системи забезпечення національної безпеки України в умовах євроінтеграції. ***Результати.*** Визначено, що адміністративно-правовий статус Президента України у досліджуваній площині характеризується такими положеннями: є гарантом (суверенітету, територіальної цілісності, євроінтеграційного курсу); здійснює керівництво у сферах національної безпеки та оборони; входить у систему суб'єктів забезпечення національної безпеки України; є Головою Ради національної безпеки і оборони України, формує її персональний склад та своїми указами вводить у дію рішення Ради національної безпеки і оборони України. Виявлено, що Верховна Рада України є один із провідних суб'єктів, що входять у систему забезпечення національної безпеки України в умовах євроінтеграції, та наділений Конституцією України виключними повноваженнями щодо прийняття законодавчих положень у сферах основ національної безпеки, правового режиму воєнного і надзвичайного стану, засад зовнішніх зносин. Через діяльність своїх комітетів вона відповідає за адаптацію законодавства України до положень ЄС, а також забезпечує контроль за діяльністю

органів спеціального призначення з правоохоронними функціями, правоохоронних органів спеціального призначення та розвідувальних органів. Констатовано, що Кабінет Міністрів України має особливий адміністративно-правовий статус, оскільки відповідає як за формування окремих напрямів державної політики, так і за виконання рішень у досліджуваних сферах, а також має контрольно-координаційні повноваження, є ініціатором численних реформ та законодавчих змін. ***Висновки.*** Узагальнено, що адміністративно-правовий статус суб'єктів загальної компетенції у сфері забезпечення національної безпеки України в умовах євроінтеграції як категорія адміністративно-правової галузі наукових знань репрезентує сукупний вияв функціональних спроможностей управлінської ланки, що своїми рішеннями та діями об'єктивізує наявність ефективного регулятивного підґрунтя для належного виконання поставлених завдань у цій сфері.

Ключові слова: адміністративно-правовий статус, безпека, євроінтеграція, забезпечення безпеки, загальна компетенція, система суб'єктів.

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GUARANTEES OF NON-DISCLOSURE OF INFORMATION CONSTITUTING A SECRET AND THEIR ROLE IN ENSURING RIGHTS OF PARTICIPANTS IN CRIMINAL PROCEEDINGS

Abstract. ***Purpose.*** The purpose of the article is to assess the criminal procedure rules relating to the protection of information constituting a secret at all stages of criminal proceedings, with due regard for the current requirements of criminal procedure law aimed at a prompt and impartial investigation to fulfil the tasks of criminal proceedings. ***Results.*** The article analyses regulatory guarantees of criminal procedure law and leading scholars' perspectives on the protection of information constituting the secret of criminal proceedings. The author studies the legal mechanism for protecting information at various stages of criminal proceedings with due regard to the requirements of the Criminal Procedure Code. It is determined that, given the current state of the national legislative process relating to the regulation of criminal procedural relations and the state of affairs in law enforcement bodies' performance, an important place in scientific research on criminal procedure is given to the protection of information constituting a secret of criminal procedure. The article highlights that the protection of information is considered as a set of various procedural rules which ensure the secrecy of investigation, contributing to the most effective achievement of tasks defined for criminal proceedings. ***Conclusions.*** It is concluded that the information subject to protection by criminal procedure legislation includes regulatory and legal provisions, prescribed by criminal and criminal procedure legislation in terms of protection, on disclosure without the appropriate permission of the investigating authorities and the prosecutor of information obtained in the course of criminal proceedings; procedural work of the actors of criminal proceedings that ensures the secrecy of investigation. Moreover, such information includes the procedural form of documents prepared to warn the participants in criminal proceedings about the inadmissibility of disclosing information from the investigation, violation thereof may entail criminal liability; the subject matter and scope of information obtained during the investigation, in respect of which the non-disclosure regime is established; the procedural status of all actors of the criminal process, namely in terms of their responsibilities, in the form of non-disclosure of information of the investigation; the fundamentals of criminal proceedings, which form the basis for investigation secrecy; the duration of the prohibition on disclosure of investigation information; the procedural possibilities of the investigation authorities and the prosecutor to take measures to ensure criminal proceedings to ensure non-disclosure of investigation information.

Key words: information, guarantees of non-disclosure of information, principles of protection, criminal procedure, criminal procedure legislation.

1. Introduction

The Constitution of Ukraine guarantees that confidential information about a person may not be collected, stored, used and disseminated without his or her consent, except in cases specified by law, and only in the interests of national security, economic well-being and human rights.

According to part 3 of Article 14 of the CPC of Ukraine, which has been obtained as a result of interference with communication, may not be used otherwise than for solving the tasks of criminal proceedings, since any disclosure of information obtained during the pre-trial investigation may harm the human and civil rights guaranteed by the Constitution of Ukraine (Barannik, Nazarenko, 2011).

The disclosure of criminal proceedings may relate both to information on the status of the investigation, other secrets protected by law, and the personal life of participants in criminal proceedings, which ultimately has a significant impact on the course of criminal proceedings, deters the establishment of circumstances to be proved, and can also be considered as a way of humiliating the honour and dignity of a person (Yemelianov, 2013).

Therefore, given the current state of the national legislative process relating to the regulation of criminal procedural relations and the state of affairs in law enforcement bodies' performance, an important place in scientific research on criminal procedure is given to the protection of information constituting a secret of criminal procedure.

For example, the review of publications by domestic and foreign scholars reveals that information protected by criminal procedure law in under focus in the studies by the following authors: Yu.P. Alenin, R.V. Barannik, A.M. Blahodarnyi, I.V. Bondar, S.L. Yemelianov, V.A. Hlukhoveria, H.H. Kamalov, L.M. Loboiko, Ye.D. Lukianchykov, A.I. Marushchak, S.I. Minchenko, M.A. Pohoretskyi, A.A. Rozhnova, S.M. Stakhivskyi, V.I. Slipchenko, O.Yu. Tatarov, V.M. Tertyshnyk, L.D. Udalova, V.I. Farynnyk, M.S. Tsutskiridze, S.S. Cherniavskyi, O.H. Shylo, D.O. Shumeiko, M.Ye. Shumylo, O.O. Yukhno, R.Ya. Yablonov, O.H. Yanovska, and others.

A significant contribution to the study of secrecy of criminal procedure was made by I.V. Konchakova, I.B. Korol, I.V. Kutazova, V.H. Lisohor, A.O. Liash and other scholars whose works addressed the issues under consideration.

However, scientific developments on the issue concerned are mostly focused on certain aspects of secrecy of criminal proceedings as a complex legal concept and have not been considered under the provisions of the CPC of Ukraine 2012.

Therefore, given the insufficient coverage and study in scientific works of prohibition of disclosure of criminal proceedings, prescribed by law, and the low efficiency of the process against the background of a constant increase in the number of criminal proceedings on the fact of information disclosure, which indicates the low efficiency of documenting and investigating these criminal proceedings, the topic of research is of particular relevance.

The purpose of the article is to assess the criminal procedure rules relating to the protection of information constituting a secret at all stages of criminal proceedings, with due regard for the current requirements of criminal procedure law aimed at a prompt and impartial investigation to fulfil the tasks of criminal proceedings.

2. Ensuring the protection of secrets in criminal proceedings

The legal information reflected in the criminal procedure legislation is related to the provisions of the Criminal Procedure Code of Ukraine (hereinafter - the CPC of Ukraine), which substantiates the mechanism for implementing orders on non-disclosure of certain information at various stages of the criminal procedure.

It should be noted that certain elements may act as procedural guarantees to ensure the secrecy of criminal proceedings (Yemelianov, 2013).

For example, public officials and bodies, when provided with criminal procedural guarantees, can ensure the possibility of performing their duties and further use of the specified powers in order to fulfil the tasks of criminal proceedings, while other participants in criminal proceedings may use procedural means to protect their rights, freedoms, information and legitimate interests (Criminal Code of Ukraine, 2001).

According to the criminal procedure legislation, information subject to protection and non-disclosure includes regulatory and legal prescriptions and justification of legal prohibitions that cannot be disclosed without the relevant permission of the investigating authorities and the prosecutor, as well as information obtained in the course of criminal proceedings, which is reflected in the relevant provisions of criminal and criminal procedure legislation; procedural work of the actors of criminal proceedings, which provides for secrecy during the investigation, including pre-trial investigation; a procedural form of documents created to warn participants in criminal proceedings about the inadmissibility of disclosing information from the investigation (in case of disclosure of such information, criminal liability may result); the subject matter and scope of information obtained during the investigation, which is also subject to non-disclosure; the procedural status of all participants in the criminal proceedings (this concerns their procedural obligation to keep pre-trial investigation information confidential); legal principles of criminal pro-

ceedings that substantiate the basis for ensuring state secrecy in relation to the investigation procedure; the duration of the prohibition on disclosure of information in criminal proceedings; procedural possibilities of the investigating authorities and the prosecutor to apply measures related to ensuring criminal proceedings to implement provisions specified by the CPC of Ukraine (Chyzhmar, 2019).

When ensuring the protection of secrets in criminal proceedings, criminal procedure legislation primarily guarantees the protection of information in criminal proceedings that is expressly prohibited by law. For example, this applies to the professional secrecy of a defence counsel, the secret of confession, medical confidentiality, the secrecy of the conference room, etc.

The CPC of Ukraine, Part 8, Article 224, provides for that such information may be the basis for suspicion or accusation that a person, his/her close relatives or family members have committed a criminal offence.

For example, this also applies to officials who perform covert investigative (detective) actions and persons who may confidentially cooperate with the authorities conducting pre-trial investigations (Criminal Code of Ukraine, 2001).

Following the scientific works by R.V. Barannik and P.H. Nazarenko, the secrecy of criminal procedure is the category of professional secrets, as it follows from the content of criminal procedure activities (Barannik, Nazarenko, 2011).

With regards to the same issue, A.O. Liash notes the need to supplement Article 222 of the CPC of Ukraine with part 3, which states that disclosure of information relating to the private life of a participant directly involved in criminal proceedings is not allowed without the relevant written consent (Liash, 2013).

In addition, according to the scientist, the information that may be discovered during a search, inspection or other investigative (detective) action, circumstances relating to the personal life of persons directly residing or temporarily staying in the premises or other places where such actions are carried out, are subject to protection. It is for this reason that this provision can specify the directions of formation of the basic principles of non-interference with private life.

A.O. Liash marks that this provision should be set out in Article 15 of the CPC of Ukraine, and not in Article 222, which is more universal and may apply to any information in certain specific cases obtained during criminal proceedings. Moreover, the information constituting the secrecy of criminal proceedings can be obtained not only during investigative (search) actions (Liash, 2013).

It is envisaged that the decision of the investigator or prosecutor regarding the need to ensure the protection and non-disclosure of information at all stages of criminal proceedings shall be recorded by a resolution in accordance with the approved requirements of the CPC of Ukraine, Article 110, parts 3, 5-7, in which they specify the time, purpose and scope of such disclosure.

Therefore, employees who carry out their activities in investigative units to implement the approved provisions specified in the CPC of Ukraine, Article 222, part 2, consider it necessary to record such warning in the form of a "Protocol of warning on the inadmissibility of disclosure of pre-trial investigation information", which indicates the fact that the person is familiar with the direct content of Article 222 of the CPC of Ukraine regarding the inadmissibility of disclosure of information of criminal proceedings, and in accordance with Article 387 of the Criminal Code of Ukraine - regarding criminal liability for disclosure of information of pre-trial investigation or inquiry (Tetarchuk, Diakiv, 2019).

3. Information constituting a state secret in criminal proceedings

Further comprehensive study of protection and non-disclosure of information in the course of criminal proceedings require focusing on exactly what concerns secrecy guarantees in criminal procedure legislation and should be considered in the general system of provisions. Therefore, this issue is worth a closer look.

For example, the issues related to ensuring the non-disclosure of criminal proceedings are correlated in the criminal procedure legislation with the issues of ensuring the secrecy of pre-trial investigation.

We agree with L.D. Udalova that "criminological support for keeping the secrecy of pre-trial investigation includes complex interrelated organisational and tactical measures, which has an impact on the entire criminal procedure" (Udalova, 2009).

According to Article 222 of the CPC of Ukraine, such information is directly protected by law and may be disclosed only with the appropriate permission of the investigator or prosecutor to the extent deemed possible. Moreover, part 2 outlines cases in which "the investigator or prosecutor shall warn persons who have become aware of information of the pre-trial investigation in connection with their participation in it, of their obligation not to disclose such information without his/her permission, and their illegal disclosure shall entail criminal liability established by law" (Udalova, 2009).

Considering that the main objectives of criminal proceedings are provisions that

may reflect the results of criminal proceedings, namely, protection of an individual, the whole society and the state from criminal offences, appropriate protection of the rights, freedoms and legitimate interests of participants in criminal proceedings, we should agree with M.A. Pohoretskyi that in this case Article 222 of the CPC of Ukraine should be titled "Secrecy of pre-trial investigation information".

Furthermore, these legal provisions are outlined in Article 222 of the CPC of Ukraine and are closely related to the relevant provisions of the CPC of Ukraine, which make appropriate mechanisms for the implementation of the prescriptions relating to non-disclosure of pre-trial investigation information. Moreover, their elements are directly procedural guarantees for the protection and secrecy of pre-trial investigation.

Criminal procedural guarantees can provide public authorities and officials with a direct opportunity to perform their duties and use such powers to fulfil the tasks of criminal proceedings, and other participants in criminal proceedings – to use procedural means to protect their rights, freedoms and legitimate interests (Kytsan, 2008).

In addition to the protection of information relating directly to criminal proceedings, it should be noted that criminal procedure legislation protects information constituting a state secret, and accordingly, it shall be conducted in compliance with all the requirements of the secrecy regime.

It should be noted that procedural decisions should not contain information that may constitute a state secret. Before such information is included in criminal proceedings, it is necessary to check whether the person has an appropriate security clearance, drawn up and signed in the appropriate form, which can provide access to classified information of the relevant category of classified information and its material carriers.

Moreover, a suspect or accused person may participate directly in criminal proceedings without the appropriate security clearance, as set out in Article 28 "Duties of a citizen to keep state secrets" of the Law of Ukraine "On State Secrets", but all persons shall be warned of criminal liability for disclosure of information constituting a state secret (Kytsan, 2008).

Access to materials containing information that constitutes a state secret may be granted to defence counsels and representatives of the accused, suspect, victim and their representatives on legal grounds, an expert, translator, specialist, court reporter, as well as a court administrator who has been directly granted access to state secrets (Pohoretskyi, Hryniuk, 2016).

Such persons should have the rights and obligations provided for by the CPC of Ukraine, allowing for the circumstances recorded in the course of criminal proceedings.

The decision to grant access to classified information and media of such information shall be approved by signing an order or instruction in writing by the head of the pre-trial investigation body, prosecutor or court.

The victim, as well as his or her representatives, expert, specialist, translator, court reporter, court administrator, are strictly prohibited from making copies and extracts from information that may contain state secrets. If extracts are made for further criminal proceedings, such extracts shall be sealed by the person who made them in a manner that enables to disclose their contents.

Extracts shall be stored in accordance with the approved requirements of the secrecy regime in the relevant pre-trial investigation bodies or court and may be provided to the person who directly compiled them upon request or during the pre-trial investigation directly at the premises of the pre-trial investigation body or during the court proceedings, i.e. in the courtroom (Pohoretskyi, Hryniuk, 2016).

4. Conclusions

Therefore, the theoretical study conducted enables to argue that the protection of information constituting secrets of criminal procedure is to be regulated by criminal procedure legislation, while the guarantee of their non-disclosure is a system of legal provisions, in particular, of the CPC of Ukraine. This, in the general system, ensures the secrecy of criminal proceedings in the aspects specified in the legislation and enables to implement the tasks of criminal proceedings.

The information subject to protection by criminal procedure legislation includes regulatory and legal provisions, prescribed by criminal and criminal procedure legislation in terms of protection, on disclosure without the appropriate permission of the investigating authorities and the prosecutor of information obtained in the course of criminal proceedings; procedural work of the actors of criminal proceedings that ensures the secrecy of investigation.

Moreover, such information includes the procedural form of documents prepared to warn the participants in criminal proceedings about the inadmissibility of disclosing information from the investigation, violation thereof may entail criminal liability; the subject matter and scope of information obtained during the investigation, in respect of which the non-disclosure regime is established; the procedural status of all actors of the criminal process, namely in terms of their

responsibilities, in the form of non-disclosure of information of the investigation; the fundamentals of criminal proceedings, which form the basis for investigation secrecy; the duration of the prohibition on disclosure of investigation information; the procedural possibilities of the investigation authorities and the prosecutor to take measures to ensure criminal proceedings to ensure non-disclosure of investigation information.

References:

Barannik, R.V., Nazarenko, P.H. (2011). Osoblyvosti okhorony informatsii, shcho stanovyt taiemnytsiu u kryminalnomu sudochynstvi [Peculiarities of the protection of confidential information in criminal proceedings]. *Advokat - Advocate, 4 (127)*, 15–18 (in Ukrainian).

Chyzhmar, K. (2019). Skladovi uspikhy u kryminalnomu protsesi [Components of success in the criminal process]. Kyiv : Tsentr navchalnoi literatury (in Ukrainian).

Kryminalnyi kodeks Ukrainy vid 5 kvitnia 2001 r. № 2341-III [Criminal Code of Ukraine dated April 5, 2001 No. 2341-III]. (2001). *rada.gov.ua*. Retrieved from http://zakon4.rada.gov.ua/laws/show/2341-14 (in Ukrainian).

Kryminalnyi protsesualnyi kodeks Ukrainy vid 13 kvitnia 2012 r. № 4651-VI [Criminal Procedure Code of Ukraine dated April 13, 2012 No. 4651-VI]. (2012). *rada.gov.ua*. Retrieved from http://zakon2.rada.gov.ua/laws/show/4651-17 (in Ukrainian).

Kytsan, Yu.I. (2008). Aktualnist vyznachennia pidslidnosti kryminalnykh sprav [The relevance of determining the jurisdiction of criminal cases]. *Universytetski naukovi zapysky - University Scientific Notes, 3,* 292-295 (in Ukrainian).

Liash, A.O. (2013). Nedopustymist rozgholoshennia vidomostei dosudovoho rozsliduvannia [nadmissibility of disclosure of pre-trial investigation information]. *Chasopys Natsionalnoho universytetu «Ostrozka akademiia» - Journal of the National University "Ostroh Academy", 1(7),* 1-14 (in Ukrainian).

Pohoretskyi, M.A. Hryniuk, V.O. (2016). Vyznachennia prokurorom pidslidnosti kryminalnoho provadzhennia [Determination by the prosecutor of the subjectivity of criminal proceedings]. *Visnyk kryminalnoho sudochynstva - Bulletin of Criminal Justice, 3,* 60-68 (in Ukrainian).

Tetarchuk, I., Diakiv, T. (2019). Kryminalne protsesualne pravo Ukrainy [Criminal procedural law of Ukraine]. Kyiv : Tsentr navchalnoi literatury (in Ukrainian).

Udalova, L.D. (2009). Taiemnytsia slidstva: deiaki problemni pytannia [The mystery of the investigation: some problematic issues]. *Kryminalistyka u protydii zlochynnosti - Forensics in combating crime: materials of the conference, 3,* 76–78 (in Ukrainian).

Yemelianov, S.L. (2013) Taiemnytsia slidstva ta sudochynstva v Ukraini [The secret of investigation and judicial proceedings in Ukraine]. *Uchenыe zapysky Tavrycheskoho Natsyonalnoho unyversyteta ym. V.Y. Vernadskoho - Scientific notes of the Tavrichesky National University named after V.Y. Vernadsky, 2–1 (Ch. 2),* 310–316 (in Ukrainian).

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ГАРАНТІЇ НЕРОЗГОЛОШЕННЯ ВІДОМОСТЕЙ, ЯКІ СТАНОВЛЯТЬ ТАЄМНИЦЮ, ТА ЇХ РОЛЬ У ЗАБЕЗПЕЧЕННІ ПРАВА УЧАСНИКІВ КРИМІНАЛЬНОГО ПРОЦЕСУ

Анотація. ***Мета.*** Метою статті є оцінка кримінальних процесуальних норм, що стосуються охорони відомостей, які становлять таємницю на всіх стадіях кримінального процесу, з урахуванням чинних вимог кримінального процесуального законодавства, що спрямовані на швидке й неупереджене розслідування для втілення завдань кримінального провадження. ***Результати.*** Стаття присвячена аналізу нормативних гарантій кримінального процесуального законодавства і поглядів провідних науковців стосовно охорони відомостей, які становлять таємницю кримінального процесу. Досліджено правовий механізм охорони відомостей на різних етапах кримінального провадження з урахуванням вимог Кримінального процесуального кодексу. Визначено, що за сучасним станом вітчизняного законотворчого процесу, який стосується питання регулювання кримінальних про-

цесуальних відносин і реального стану роботи правоохоронних органів, важливе місце в науковому дослідженні з питань кримінального процесу відводиться інституту охорони відомостей, які становлять таємницю кримінального процесу. Висвітлено, що під охороною відомостей розглядається сукупність різних процесуальних норм, які забезпечують таємницю проведення розслідування, що сприяє максимальному досягненню визначених завдань кримінального провадження. ***Висновки.*** Зроблено висновок, що до відомостей, які підлягають охороні кримінальним процесуальним законодавством, належать приписи нормативно-правового характеру, що регулюються кримінальним і кримінальним процесуальним законодавством в аспектах охорони, на розголошення без відповідного дозволу органів, які здійснюють розслідування, і прокурора інформації, яка отримана під час здійснення кримінального провадження; процесуальна робота суб'єктів кримінального провадження, що забезпечує режим таємниці розслідування. Серед іншого, до таких відомостей відносять процесуальну форму документів, що формуються для попередження безпосередньо учасників кримінального провадження стосовно недопустимості розголошення відомостей розслідування, в разі порушення чого може бути кримінальна відповідальність; предмет й обсяг інформації, яка отримана під час розслідування, щодо якої встановлюється режим нерозголошення; процесуальний статус усіх суб'єктів кримінального процесу, а саме в частині їхніх обов'язків, у формі нерозголошення відомостей розслідування; основи кримінального провадження, що формує основи формування таємниці розслідування; терміни дії заборони стосовно розголошення відомостей розслідування; процесуальні можливості органів розслідування й прокурора використати заходи забезпечення кримінального провадження для забезпечення нерозголошення відомостей розслідування.

Ключові слова: відомості, гарантії нерозголошення відомостей, засади охорони, кримінальний процес, кримінальне процесуальне законодавство.

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SUBSTANTIATION OF MEASURES TO ENSURE CRIMINAL PROCEEDINGS AS A SPECIFIC LEGAL INSTITUTION

Abstract. ***Purpose.*** The purpose of the article is to substantiate scientifically measures to ensure criminal proceedings as a specific legal institution. ***Results.*** The article proves the statement that measures to ensure criminal proceedings are a specific institution of criminal procedure law. All participants in criminal proceedings shall comply with the procedural form of their conduct as prescribed by law, fulfil their duties and obey lawful decisions. After all, the solution of the tasks of criminal proceedings largely depends on the conscientious performance of procedural duties by its participants, which together creates the proper conditions for the administration of justice and the provision of judicial protection of the rights, freedoms and legitimate interests of individuals. However, in actual criminal proceedings, not all participants fulfil their procedural duties, and given the severity of possible punishment, they often evade pre-trial investigation and court. This explains the need to regulate the system of measures to ensure criminal proceedings in compliance with the standard of a reasonable time. ***Conclusions.*** It is concluded that measures to ensure criminal proceedings constitute an institution of criminal procedure law of Ukraine, which is confirmed by the compliance of the set of legal provisions regulating them with the features of a legal institution; as a legal institution, measures to ensure criminal proceedings are a system of relatively separate provisions, regulating the interdependent relations aimed at ensuring criminal proceedings by regulating the conditions, grounds and procedure for their application, the range of participants and the specifics of their legal status, as well as liability for violation of the established procedure and procedural duties imposed on them. When distinguishing measures to ensure criminal proceedings, the author substantiates the view that the application of these measures as an activity-based and practical process, during which implementing measures are taken in relation to the decision of the investigating judge or court to choose a measure to ensure criminal proceedings. From the theoretical perspective, the author proves the existence of features of a legal institution, such as: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation.

Key words: criminal procedure law, criminal proceedings, provisional measures, a set of features, legal institution.

1. Introduction

All participants in criminal proceedings shall comply with the procedural form of their conduct as prescribed by law, fulfil their duties and obey lawful decisions. After all, the solution of the tasks of criminal proceedings largely depends on the conscientious performance of procedural duties by its participants, which together creates the proper conditions for the administration of justice and the provision of judicial protection of the rights, freedoms and legitimate interests of individuals. However, in actual criminal proceedings, not all participants fulfil their procedural duties, and given the severity of possible punishment, they often evade pre-trial investigation and court. This explains the need to regulate the system of measures to ensure criminal proceedings in compliance with the standard of a reasonable time. By their legal nature, these measures

are not criminal punishment, some of them are a form of criminal procedural liability, but all of them ensure and focus on achieving a single goal of overcoming negative circumstances that impede or may impede criminal proceedings and ensuring their effectiveness. This focus makes them enforceable, as they are designed not only for specific cases of opposing the lawful activities of pre-trial investigation bodies, prosecutors, defence counsel, and courts, but primarily to prevent possible negative behaviour of a particular participant in criminal proceedings. In the structure of the domestic CPC, virtually all measures to ensure criminal proceedings are systematically and consistently regulated in Section 2 "Measures to ensure criminal proceedings". However, since the law previously in force did not provide for the concept of measures to ensure criminal proceedings at all, but only contained a system of preventive measures, in order to theoretically support the position of the legislator (which introduced such an institution in the CPC of Ukraine and included a number of other ensuring measures, among its components, in addition to preventive measures), this legal formation requires scientific substantiation of within the criminal procedure law as a specific legal institution.

The issue of application of "measures to ensure criminal proceedings" before the adoption of the CPC (2012) was not considered in the scientific literature, since even terminologically they were not provided for by the legislation in force at that time (Farynnyk, 2012, p. 4). Therefore, until 2012, most scholars focused exclusively on the study of measures of criminal procedural coercion. After the introduction of measures to ensure criminal proceedings into the criminal procedure, scholars identified these measures with measures of criminal procedural coercion, for example, L.D. Udalova and V.V. Rozhnova state that measures to ensure criminal proceedings are always associated with the use of criminal procedural coercion, since coercion is the key to ensuring that the application of measures to ensure criminal proceedings will achieve the goal set out in part one of Article 131 of the CPC, that is, effectiveness (efficiency) of proceedings (Udalova, Rozhnova, Savytskyi, 2013, pp. 118-119). S.M. Smokov (Smokov, Horelkina, 2012, p. 152) and M.A. Pohoretskyi (Pohoretskyi, Korovaiko, 2013, p. 238) argue that measures to ensure criminal proceedings and measures of criminal procedural coercion are identical. Some issues of application of measures to ensure criminal proceedings were considered by I.V. Hloviuk, H.K. Kozhevnikova, M. Myroshnychenko, V.V. Nazarova and others. These scholars considered the mechanism and peculiarities of regulatory mechanism for application of certain measures to ensure criminal proceedings, and the issue of their positioning as a specific legal institution has not been studied comprehensively and is of interest for research.

The purpose of the article is to substantiate scientifically measures to ensure criminal proceedings as a specific legal institution.

2. Measures to ensure criminal proceedings as a procedural concept

An objective prerequisite for the integration of legal provisions into an independent legal institution is the existence of a corresponding type of social relations (Krushynskyi, 2013, pp. 532-536). In this regard, the following are quite reasonably considered to be the features of a legal institution: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation (Alekseev, 2010, pp. 137-138).

The statement that the complex of these measures is an institution of criminal procedure law becomes reasonable if the general theoretical provisions on the general concepts and essence of a legal institution are extrapolated to the area of ensuring criminal proceedings. In practice, the focus of these measures on ensuring criminal proceedings (which is the reason for their title) is their essential feature and the grounds for their separation into a specific institution. However, of course, the tasks of criminal proceedings are also achieved through other procedural actions that do not belong to this group. This circumstance has logically led some scholars to deny the expediency of using the term "measures to ensure criminal proceedings" and to propose revisions to their system. For example, N.A. Sotnyk argues that, based on the content, the term "measures to ensure criminal proceedings" itself may be considered inappropriate, since criminal proceedings in general are ensured not only by them, but also by a whole arsenal of other measures, means and actions. Measures of criminal procedural coercion actually create conditions for the implementation of the tasks of criminal proceedings and ensure it compulsorily (Sotnyk, 2016, pp. 254-258). In this regard, the author even proposes to change the name of "measures to ensure criminal proceedings" to "measures of criminal procedural coercion", significantly changing their list in part two of Article 131 of the CPC, adding other measures provided for in the Code, and excluding the imposition of a monetary penalty and temporary access to things and documents. There is a certain logic in this, however, in our opinion, the specificity of these measures is determined by a number of other interrelated features, the combination of which allows to allocate such measures to a separate group of procedural actions, and their

main functional purpose (to ensure the solution of the tasks of criminal proceedings) terminologically determines their name, which quite successfully reflects their legal nature.

Like any other procedural concept, measures to ensure criminal proceedings have immanent features, the totality of which enables to formulate their scientific definition, since the thesaurus of Article 3 of the CPC of Ukraine does not contain their legal definition. In this regard, O. V. Firman, based on the classification developed by F.M. Kudin, divides all measures of criminal procedural coercion into: measures of prevention; measures of termination; provisional measures, and measures to ensure criminal proceedings, which, in his opinion, is only a group of measures of criminal procedural coercion applied on the basis, under the conditions and in the manner prescribed by the criminal procedure law, by state authorities and officials conducting criminal proceedings, and in some cases by other persons, against a suspect or accused, witnesses and victims or other persons to ensure the proper performance of their procedural duties, prevent possible or eliminate existing obstacles during criminal proceedings, obtain evidence, and enforce court decisions regarding the civil consequences of the case (Firman, 2014, pp. 231-234).

Therefore, in order to position these measures as a separate institution, it is necessary to clearly distinguish them as a separate group, which necessitates their comparison and determination of the correlation with other groups of measures that are related to the group of measures to ensure criminal proceedings by their content and role (performed by them in criminal proceedings). In particular, in the theory of criminal procedure, there are several approaches to resolving the issue of correlation between measures to ensure criminal proceedings and measures of criminal procedural coercion. The essence of the first approach is to equate these two concepts. For example, V.V. Nazarov, relying on the analysis of the definition of coercive measures in criminal proceedings, concludes that the measures to ensure criminal proceedings listed in Article 131 of the CPC, if applied, can ensure the fulfilment of the tasks of criminal proceedings. Moreover, agreeing with the views of V. Makhov and M. Pieshkov, who primarily refer to measures of criminal procedural coercion as preventive measures provided for by law, the author argues that the concepts of "criminal procedural coercion" and "measures to ensure criminal proceedings" are identical, as these measures enable to identify, collect and store evidence, prevent possible unlawful behaviour or exclude the possibility of a suspect or accused to evade investigation and trial (Nazarov and Lakhmanyk, 2013, pp. 102-106). This perspective is advocated by H.K. Kozhevnikov, who argues that the measures to ensure criminal proceedings provided for in Article 131 of the CPC can fulfil the main criminal procedural function, that is, to ensure proper behaviour of the participants in criminal proceedings, determined by the relevant provisions of the criminal procedure law (Kozhevnikov, 2012, p. 69).

The second approach to understanding the above correlation is that the concept of measures of criminal procedural coercion is broader in its content and covers measures to ensure criminal proceedings (Humin, 2013, p. 229). Indeed, it would not be entirely fair to refer only to preventive measures as measures of procedural coercion, since coercive nature is inherent in other procedural actions, including investigative actions (Nykonenko, 2014).

3. Content of the institution of measures to ensure criminal proceedings

In general, the theory of legal science has formulated various definitions of a legal institution, in particular, as a system of relatively separate and interrelated legal provisions that regulate a certain group of homogeneous social relations (Skakun, 2002, p. 249); as a part of a branch of law consisting of a set of legal provisions that regulate qualitatively homogeneous social relations (Kelman and Murashyn, 2006, p. 259); as a distinct set of legal provisions that are part of a branch of law and regulate a particular type of social relations (Khropaniuk, 1995, p. 292). Indeed, common to all these definitions is that an objective prerequisite for the integration of legal provisions into an independent legal institution is the existence of a corresponding type of social relations (Krushynskyi, 2013, pp. 532-536). In this regard, the following are quite reasonably considered to be the features of a legal institution: homogeneity of factual content; legal unity (integrity) of provisions; legislative separation (Alekseev, 2010, pp. 137-138).

The homogeneity of the factual content is the fact that each legal institution is to regulate a strictly defined type of social relations (Alekseev, 2010, pp. 137-138). As regards the institution of measures to ensure criminal proceedings, its provisions regulate a set of social relations regarding the application of appropriate procedural measures in order to achieve the effectiveness of criminal proceedings. Furthermore, there is an obvious sign of homogeneity of factual content: the whole complex of these social relations is aimed at achieving the ultimate goal of solving the tasks of criminal proceedings formulated in Article 2 of the CPC. Indeed, each of the measures to ensure criminal proceedings

has its own purpose, which determines its specificity, grounds and procedure for their application, but the general purpose of all these measures is to ensure the solution of tasks and achievement of efficiency of a particular criminal proceeding (Articles 2, 131 of the CPC), but these tasks can usually be fulfilled only if the participants in criminal proceedings behave properly. Therefore, the legal nature of measures to ensure criminal proceedings is largely determined by the conditions of application of these measures (Lejst, 1981, p. 81), one of which is the failure to perform or improper performance of duties by participants in criminal proceedings, that is, the commission of a criminal procedural violation - this enables to assert that these measures are characterised by legal unity in achieving the goal and the means of achieving it. The legal unity of the institution of measures to ensure criminal proceedings lies in the fact that the rules that form it act as a single complex, an integral system of the branch of criminal procedure law, which comprise: provisions -principles defining the general principles of application of measures to ensure criminal proceedings (Chapter 10 of the CPC); provisions defining the procedure for application of certain measures to ensure criminal proceedings (Chapters 11-18 of the CPC); provisions that determine the procedure for applying provisional measures during special procedures of criminal proceedings (Articles 482, 492, 493, 508, 580, 582-586, 597 of the CPC), that is, the legislative separation of the institution of provisional measures in criminal proceedings means that its provisions are externally enshrined in the regulatory parts of the CPC in the form of independent sections and chapters.

4. Conclusions

Thus, measures to ensure criminal proceedings constitute an institution of criminal procedure law of Ukraine, which is confirmed by the compliance of the set of legal provisions regulating them with the features of a legal institution; as a legal institution, measures to ensure criminal proceedings are a system of relatively separate provisions, regulating the interdependent relations aimed at ensuring criminal proceedings by regulating the conditions, grounds and procedure for their application, the range of participants and the specifics of their legal status, as well as liability for violation of the established procedure and procedural duties imposed on them. When distinguishing measures to ensure criminal proceedings, we proceed from the understanding of the application of these measures as an activity-based and practical process, during which implementing measures are taken in relation to the decision of the investigating judge or court to choose a measure to ensure criminal proceedings.

References:

Alekseev, S.S. (2010). Problemy teorii prava [Problems of the theory of law]. M.: Staut [in Russian].

Farynnyk, V.I. (2012). Osoblyvosti zastosuvannia deiakykh zakhodiv zabezpechennia kryminalnoho provadzhennia [Peculiarities of the application of some measures to ensure criminal proceedings]. *Yurydychnyi visnyk Ukrainy - Legal Bulletin of Ukraine, 35*, 4-6 [in Ukrainian].

Firman, O.V. (2014). Zakhody zabezpechennia kryminalnoho provadzhennia ta yikh klasyfikatsiia [Measures to ensure criminal proceedings and their classification]. *Yurydychnyi naukovyi elektronnyi zhurnal - Legal Scientific Electronic Journal, 6*, 231-234 [in Ukrainian].

Humin, O.M. (2013). Systema zakhodiv zabezpechennia kryminalnoho provadzhennia za novym Kryminalnym protsesualnym kodeksom Ukrainy [The system of measures to ensure criminal proceedings under the new Criminal Procedure Code of Ukraine]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav - Scientific Bulletin of the National Academy of Internal Affairs, 1*, 226-231 [in Ukrainian].

Kelman, M.S., Murashyn, O.H. (2006). Zahalna teoriia derzhavy i prava [General theory of the state and law]. K.: Kondor [in Ukrainian].

Khropaniuk, V.N. (1995). Teoryia hosudarstva y prava [Theory of the state and law]. M.: Dakhabov, Tkachev, Dymov [in Ukrainian].

Kozhevnikov, H. (2012). Zakhody zabezpechennia kryminalnoho provadzhennia [Measures to ensure criminal proceedings*]. Visnyk Natsionalnoi akademii prokuratury Ukrainy - Bulletin of the National Academy of the Prosecutor's Office of Ukraine, 3*, 68–70 [in Ukrainian].

Krushynskyi, S.A. (2013). Problema vyznachennia podannia dokaziv yak instytutu kryminalnoho protsesualnoho prava [The problem of defining the submission of evidence as an institution of criminal procedure law]. *Forum prava - Law Forum, 1*, 532-536 [in Ukrainian].

Lejst, O.Ye. (1981). Sankcii i otvetstvennost' po sovetskomu pravu (teoreticheskie problemy) [Sanctions and responsibility under Soviet law (theoretical problems)]. M.: Izd-vo MGU [in Russian].

Nazarov, V.V., Lakhmanyk, Yu.R. (2013). Zastosuvannia zakhodiv zabezpechennia kryminalnoho provadzhennia [Application of measures to ensure criminal proceedings]. *Yevropeiski perspektyvy - European perspectives, 3*, 102-106 [in Ukrainian].

Nykonenko, M.Ya. (2014). Vydy zakhodiv zabezpechennia kryminalnoho provadzhennia ta yikh mistse i rol u protsesi dokazuvannia [Types of measures to ensure criminal proceedings and their place and role in the process of proof]. *Zhurnal «Sudova apeliatsiia» - Journal "Court Appeal", 1 (34)*, 5-7 [in Ukrainian].

Pohoretskyi, M.A., Korovaiko, O.I. (2013). Zastosuvannia tymchasovoho dostupu do rechei i dokumentiv u kryminalnykh provadzhenniakh pro zlochyn, uchyneni orhanizovanymy zlochynnymy uhrupuvanniamy [Application of temporary access to things and documents in criminal proceedings on crimes committed by organized criminal groups]. *Borotba z orhanizovanoiu zlochynnistiu i koruptsiieiu (teoriia i praktyka) - Fight against organized crime and corruption (theory and practice), 1 (29)*, 234-241 [in Ukrainian].

Skakun, O.F. (2002). Teoriia derzhavy i prava [Theory of the state and law]. Kharkiv [in Ukrainian].

Smokov, S.M., Horelkina, K.H. (2012). Harantii zastosuvannia zakhodiv protsesualnoho prymusu u kryminalnomu sudochynstvi [Guarantees of application of measures of procedural coercion in criminal proceedings]. Odesa: Astroprynt [in Ukrainian].

Sotnyk, N.A. (2016). Kryminalno-protsesualnyi prymus cherez pryzmu novoho KPK Ukrainy [Criminal procedural coercion through the prism of the new CPC of Ukraine]. *Naukovyi visnyk publichnoho ta pryvatnoho prava - Scientific Bulletin of Public and Private Law, 3*, 254-258 [in Ukrainian].

Udalova, L.D., Rozhnova, V.V., Savytskyi, D.O. (2013). Kryminalnyi protses: navchalnyi posibnyk u pytanniakh i vidpovidiakh [Criminal procedure: a study guide in questions and answers]. K.: Vyd. dim "Skif" [in Ukrainian].

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ОБҐРУНТУВАННЯ ЗАХОДІВ ЗАБЕЗПЕЧЕННЯ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ ЯК ОКРЕМОГО ПРАВОВОГО ІНСТИТУТУ

Анотація. ***Мета.*** Метою статті є наукове обґрунтування заходів забезпечення кримінального провадження як окремого правового інституту. ***Результати.*** У статті обґрунтовується твердження, що заходи забезпечення кримінального провадження є окремим інститутом кримінального процесуального права. Всі учасники кримінального провадження мають дотримуватися передбаченої законом процесуальної форми його здійснення, виконувати покладені на них обов'язки та підкорятися законним рішенням. Адже вирішення завдань кримінального провадження багато в чому залежить від сумлінного виконання його учасниками процесуальних обов'язків, що у сукупності створює належні умови здійснення правосуддя і забезпечення судовим захистом прав, свобод і законних інтересів осіб. Проте в реальному кримінальному процесі не всі учасники виконують свої процесуальні обов'язки, а з огляду на суворість можливого покарання досить часто ухиляються від органів досудового слідства та суду. Саме цим пояснюється необхідність унормування системи заходів, спрямованих на забезпечення можливості здійснення кримінального провадження з дотриманням стандарту розумного строку. ***Висновки.*** Зроблено висновок, що заходи забезпечення кримінального провадження становлять інститут кримінального процесуального права України, що підтверджується відповідністю сукупності правових норм, які їх регулюють, ознакам правового інституту; як правовий інститут заходи забезпечення кримінального провадження являють собою систему відносно відособлених норм, що регулюють взаємозалежні відносини, пов'язані із забезпеченням кримінального провадження шляхом регламентації умов, підстав і процедури їх застосування, кола учасників та особливостей їх правового статусу, а також відповідальності за порушення встановленої процедури та покладених на них процесуальних обов'язків. Під час виокремлення заходів забезпечення кримінального провадження як окремого інституту обґрунтовано думку, що застосування цих заходів це – діяльнісно практичний процес, під час якого здійснюються заходи реалізаційного характеру щодо рішення слідчого судді, суду про обрання заходу забезпечення кримінального провадження. А з теоретичної точки зору доведено наявність ознак правового інституту, а саме: однорідність фактичного змісту; юридична єдність (комплексність) норм; законодавча відособленість.

Ключові слова: кримінальне процесуальне право, кримінальне провадження, заходи забезпечення, сукупність ознак, правовий інститут.

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FULL POWERS OF THE HEAD OF A PRE-TRIAL INVESTIGATION BODY IN THE COURSE OF A SPECIAL TASK TO DETECT AN ORGANISED GROUP OR CRIMINAL ORGANISATION'S CRIME

Abstract. ***Purpose.*** The purpose of the article is to study certain aspects of exercising the full powers of the head of a pre-trial investigation body in the course of a covert investigative (search) action such as a special task to detect criminal activities of an organised group or a criminal organisation. ***Results.*** The article studies the particularities of exercising the full powers of the head of a pre-trial investigation body in the course of a special task to detect criminal activities of an organised group or a criminal organisation. The author proves the need to define a clear scope of a special task. It is emphasised that keeping reliable information about a person secret should consist of changing (i.e., presenting in a false, incorrect form) the person's data and the purpose of his/her infiltration into the relevant organised group or criminal organisation, as well as covering (i.e. disguising, concealing) the true intentions, actions and deeds of this person. Moreover, the documents that require the agent's review are drafted in such a way as to avoid their familiarisation with information that constitutes a state secret. In the course of this task, it is important to define the scope of a special task. On the one hand, substantive law stipulates that it is not a criminal offence for a person who, in accordance with the law, performed a special task by participating in an organised group or criminal organisation in order to prevent or detect their criminal activities to cause damage to law enforcement interests, on the other hand, such a person shall be criminally liable for a crime committed intentionally and combined with violence against the victim, or a serious crime committed intentionally and involving the infliction of serious bodily harm to the victim or other grave or especially grave consequences. ***Conclusions.*** It is concluded that the head of a pre-trial investigation body at the stage of approval of the decision on a special task should study and ensure both organisational measures for implementation (selection, training, safety and maintenance of proper professional and psychological qualities, rehabilitation and adaptation of performers, and involvement of operational, operational and technical service's capabilities); material and technical support; the use of pre-identified (marked) or bogus (imitation) means), and procedural activities that define the clear scope of a special task considering the following factors: a) minimisation of possible damage to law enforcement interests; b) most effective performance of the tasks of criminal proceedings; c) keeping reliable information about a person secret.

Key words: head of a pre-trial investigation body, covert investigative (search) actions, special task to detect criminal activities of an organised group or a criminal organisation, scope of a special task.

1. Introduction

Covert investigations are a fairly new area of investigative activities aimed at obtaining information about the illegal activities of individuals (groups of individuals), which results in problems for investigative units related to their conduct, therefore, it is the head of the pre-trial investigation body who shall organise and plan the tactics of covert investigative (search) actions, take a leading role in obtaining evidence and provide methodological assistance in their conduct.

Although the mandatory elements of procedural actions are defined by the legislator, some of them cannot be provided for by the law due to the uniqueness of each covert investigative (search) action, and as a result, this leads to violations of the CPC of Ukraine, including unlawful restriction of rights and freedoms of a person (Komarnytska, 2015, pp. 17-26).

Therefore, conducting covert investigative (search) actions by investigators and using their results in criminal proceedings requires special control by the head of the pre-trial investigation body as a participant in criminal proceedings responsible for: comprehensive, full and impartial investigation of the circumstances of the criminal proceedings and identification of circumstances that exonerate the suspect, the accused, as well as mitigate his or her punishment (CPC of Ukraine, Article 9, part 2); organisation of the pre-trial investigation, including the legality and timeliness of its "covert" stage (CPC of Ukraine, Article 39, part 1); taking measures to eliminate violations of the law in case of their admission by the investigator, including during covert investigative (search) actions (CPC of Ukraine, Article 39, part 2, para. 4).

Some aspects of exercising full powers by the head of the pre-trial investigation body in the course of CISA have been studied in the dissertations by A.S. Omelianenko "Exercise of the investigator's full powers to conduct covert investigative (search) actions" (2015), Yu.V. Kolesnyk "Investigative and covert investigative (search) actions as forensic means of investigator's activities in pre-trial investigation" (2016), O.M. Salo "Exercise of powers by the head of pre-trial investigation body in conducting covert investigative (search) actions" (2018). However, the problems of exercising the full powers of the head of a pre-trial investigation body in the course of a special task to detect criminal activities of an organised group or a criminal organisation, in particular, his/her direct participation in the organisation of such covert investigative (search) action have not been studied.

The purpose of the article is to study certain aspects of exercising the full powers of the head of a pre-trial investigation body in the course of a covert investigative (search) action such as a special task to detect criminal activities of an organised group or a criminal organisation.

2. Particularities of the regulatory formation of the institution of covert investigative (search) actions

For most European countries, procedural actions that are similar to domestic covert investigative (search) actions have long been commonplace. It should be noted that at the time of adoption of the previous CPC (1960s), covert activities were considered synonymous with state secrets. And the term "covert" was not familiar and acceptable to the ideology of criminal procedure and was not used in the CPC of 1960. On the contrary, the criminal procedure was associated with the principle of publicity and openness. The legislation of the time did not provide for covert investigative (search) actions as a type of investigative action (Vilhushynskyi, 2014, pp. 12-15).

Moreover, the state had an effective system of control over the individual, as well as tacit control in the form of total monitoring (operational and investigative activities) of public life to obtain any information, which was virtually unknown to society. Search operations in the system of proving were used only as orientation information, which required further legalisation through formal public (sometimes understood as legal) investigative actions.

However, over time, the regulatory mechanism for search operations, which had previously been in the "shadow" of departmental instructions and orders, most of which were restricted and unknown to citizens, was naturally reflected in the CPC. Therefore, it took almost four decades for the amendments to Articles 65, 66, 187 of the CPC (1960) to be introduced in 2001, according to which the records of search operations with annexes obtained in the established manner were allowed to be recognised as sources of evidence, and the interception of information from communication channels was directly granted the status of an investigative action.

The model of investigative proving that existed in the CPC (1960), which was based on strict regulatory mechanism for and definition of the concepts of proving and evidence, retrospective knowledge of the circumstances of the crime, the prosecution's monopoly on the formation of evidence in the case, the presumption of proving as a result of any investigative action, was replaced by the model of logical proving (Kostin, 2003, p. 9).

According to this model, proving is of an exclusively logical nature and is carried out only in court. The formation and verification of factual data is an undoubtedly important factual (informational) basis for logical proving. Furthermore, the emphasis in procedural guarantees of observance of the law during covert investigative (search) actions has been shifted from mechanical compliance with the procedural form to the institutions of judicial control and sanctions for declaring the obtained factual data inadmissible. For example, the ground for conducting and/or using the results of most covert investigative (search) actions is obtaining a court order (Mirkovets, 2014).

The institution of covert investigative (search) actions is organically integrated into the model of logical proving, conceptually adopted by the new CPC of Ukraine.

3. The role of the head of the pre-trial investigation body in the preparation and conduct of covert investigative (search) actions

Institution of covert investigative (search) actions has led to common cases of a criminal

act provoked by law enforcement officers themselves in investigative and judicial practice. As a rule, such provocative actions take place among criminal offences in the field of drug trafficking and corruption-related criminal offences related to obtaining undue advantage.

As a result, the head of the pre-trial investigation body should pay special attention to compliance with the requirements of the CPC of Ukraine regarding the existence of grounds for covert investigative (search) actions.

Moreover, at the procedural level, the head of the pre-trial investigation body is only authorised to approve the investigator's decision to conduct a covert investigative (search) action, that is, a special task to detect criminal activities of an organised group or a criminal organisation (CPC of Ukraine, Article 272, part 2).

A special task to detect criminal activities of an organised group or criminal organisation is a set of actions carried out in accordance with the requirements of Article 272 of the CPC of Ukraine involving full-time and non-regular covert employees who are infiltrated into organised groups and criminal organisations, illegal armed groups for a short time (tactically) under the cover of a legend.

Pursuant to clause 1.13 of the Instruction on the organisation of covert investigative (search) actions and the use of their results in criminal proceedings, the performance of a special task to detect criminal activities of an organised group or criminal organisation consists in the organisation by the investigator and the operational unit of the infiltration of a person authorised by them, who performs a special task, in accordance with the law, to an organised group or criminal organisation under the cover of a legend to obtain things and documents, information about its structure, ways and methods of its criminal activities, which are relevant to the investigation of a crime or crimes committed by these groups (Order of the General Prosecutor's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Council of Ukraine, the Ministry of Finance of Ukraine, the Administration of the DPS of Ukraine and the Ministry of Justice of Ukraine On the approval of the Instructions on the organization of undercover investigative (search) actions and the use of their results in criminal proceedings, 2012).

Such special task as a covert investigative (search) action is carried out by these persons on the ground of a relevant decision (investigator's decision agreed with the head of the pre-trial investigation body or prosecutor's decision) with the reliable information about the person kept secret, justification of the scope of the special task and the use of special bogus (imitation) means.

The purpose of this set of measures is to obtain significant information by an undercover officer who has been infiltrated into the criminal environment through direct communication with persons of interest and has a number of general and special tactics.

In this regard, when approving the relevant decision by the head of the pre-trial investigation body, the focus should be on the following:

1. Keep reliable information about the person in secret, as well as develop an appropriate legend for infiltrating an authorised person into an organised group or criminal organisation (legend);

2. Define and justify the scope of the special task;

3. Determine and prove expediency of using special bogus (imitation) means;

4. Ensure that the qualification and circumstances of the criminal proceedings under investigation comply with the purpose of the measure - only in respect of grave or especially grave crimes committed by an organised group or criminal organisation.

Generally speaking, a legend is far-fetched information about yourself, someone who performs secret tasks. The use of a legend as a prerequisite for introducing a covert officer into an organised criminal group is specified in part 3 of Article 13 of the Law of Ukraine "On the Organisational and Legal Basis of Combating Organised Crime" (1993).

Therefore, keeping reliable information about a person secret should consist of changing (i.e., presenting in a false, incorrect form) the person's data and the purpose of his/her infiltration into the relevant organised group or criminal organisation, as well as covering (i.e., disguising, concealing) the true intentions, actions and deeds of this person.

Moreover, the documents that require the agent's review are drafted in such a way as to avoid their familiarisation with information that constitutes a state secret.

It is important to define the scope of a special task. On the one hand, substantive law stipulates that it is not a criminal offence for a person who, in accordance with the law, performed a special task by participating in an organised group or criminal organisation in order to prevent or detect their criminal activities to cause damage to law enforcement interests, on the other hand, such a person shall be criminally liable for a crime committed intentionally and combined with violence against the victim, or a serious crime committed intentionally and involving the infliction of serious bodily harm to the victim or other grave or especially grave consequences.

In addition, a covert employee is not liable for any damage or losses caused by him if his/her actions were necessary for the execution of the task, and the damage or losses caused by his/her actions are reimbursed by the state budget.

Consequently, the performance of a special task requires serious and thorough preparation, which includes such organisational measures as careful selection and training of a candidate, management and control of his/her activities, material and technical support of the agent operation, and adaptation of the person to life in normal conditions after its completion.

The peculiarity of organising a special task is to ensure the integrated use of forces and means in order to solve the tasks that determine the use of this type of activities. Most of these measures require preliminary preparation using qualified methods (operative guideline, visual observation of a person, place, thing, preventive and search measures).

4. Conclusions

Therefore, at the stage of approval of the decision on a special task, the head of a pre-trial investigation body should study and ensure both organisational measures for implementation (selection, training, safety and maintenance of proper professional and psychological qualities, rehabilitation and adaptation of performers, and involvement of operational, operational and technical service's capabilities); material and technical support; the use of pre-identified (marked) or bogus (imitation) means), and procedural activities that define the clear scope of a special task considering the following factors: a) minimisation of possible damage to law enforcement interests; b) most effective performance of the tasks of criminal proceedings; c) keeping reliable information about a person secret.

References:

Komarnytska, O. (2015). Orhanizatsiini ta protsesualni aspekty diialnosti prokurora pry pohodzhenni klopotannia na provedennia nehlasnykh slidchykh (rozshukovykh) dii [Organizational and procedural aspects of the prosecutor's activities when approving a request for secret investigative (search) actions]. *Chasopys Akademii advokatury Ukrainy - Journal of the Academy of Advocacy of Ukraine, 1(26),* 17-26 [in Ukrainian].

Kostin, M.I. (2003). Kontrabanda. Dokazuvannia obstavyn vchynennia zlochynu na dosudovomu slidstvi [Smuggling. Evidence of the circumstances of the commission of the crime at the pre-trial investigation]. K. [in Ukrainian].

Mirkovets, D.M. (2014). Osoblyvosti provadzhennia nehlasnykh slidchykh (rozshukovykh) dii [Particularities of secret investigative (search) proceedings]. K. : Nats. akad. vnutr. sprav [in Ukrainian].

Nakaz Heneralnoi prokuratury Ukrainy, MVS Ukrainy, SB Ukrainy, Ministerstvv finansiv Ukrainy, Administratsii DPS Ukrainy ta Ministerstva yustytsii Ukrainy Pro zatverdzhennia Instruktsii pro orhanizatsiiu provedennia nehlasnykh slidchykh (rozshukovykh) dii ta vykorystannia yikh rezultativ u kryminalnomu provadzhenni: vid 16 lyst. 2012 r. № 114/1042/516/1199/936/1681/51 [Order of the General Prosecutor's Office of Ukraine, the Ministry of Internal Affairs of Ukraine, the Security Council of Ukraine, the Ministry of Finance of Ukraine, the Administration of the DPS of Ukraine and the Ministry of Justice of Ukraine On the approval of the Instructions on the organization of undercover investigative (search) actions and the use of their results in criminal proceedings: dated November 16. 2012 No. 114/1042/516/1199/936/1681/51]. (2012). *rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/v0114900-12#Text [in Ukrainian].

Vilhushynskyi, V. (2014). Shchodo problemnykh pytan zakonodavchoho rehuliuvannia instytutu nehlasnykh slidchykh (rozshukovykh) dii u kryminalnomu provadzhenni [Concerning problematic issues of legislative regulation of the institution of secret investigative (search) actions in criminal proceedings]. *Viche - Forever, 10*, 12-15 [in Ukrainian].

Zakon Ukrainy Pro orhanizatsiino-pravovi osnovy borotby z orhanizovanoiu zlochynnistiu: vid 30 cherv. 1993 r. № 3342-XII [The Law of Ukraine On the Organizational and Legal Basis of Combating Organized Crime: dated June 30. 1993 No. 3342-XII]. (1993). *rada.gov.ua*. Retrieved from http://zakon4.rada.gov.ua/laws/show/3342-12 [in Ukrainian].

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ПОВНОВАЖЕННЯ КЕРІВНИКА ОРГАНУ ДОСУДОВОГО РОЗСЛІДУВАННЯ ПІД ЧАС ВИКОНАННЯ СПЕЦІАЛЬНОГО ЗАВДАННЯ З РОЗКРИТТЯ ЗЛОЧИННОЇ ДІЯЛЬНОСТІ ОРГАНІЗОВАНОЇ ГРУПИ ЧИ ЗЛОЧИННОЇ ОРГАНІЗАЦІЇ

Анотація. ***Мета.*** Метою статті є дослідження окремих аспектів реалізації повноважень керівника органу досудового розслідування під час проведення такої негласної слідчої (розшукової) дії, як виконання спеціального завдання з розкриття злочинної діяльності організованої групи чи злочинної організації. ***Результати.*** Досліджено особливості реалізації повноважень керівника органу досудового розслідування під час виконання спеціального завдання з розкриття злочинної діяльності організованої групи чи злочинної організації. Обґрунтовано необхідність визначення чітких меж виконання спеціального завдання. Наголошено, що збереження в таємниці достовірних відомостей про особу має полягати у зміні (тобто поданні в неправдивому, неправильному вигляді) даних особи і мети її проникнення у відповідну організовану групу чи злочинну організацію, а також у прикритті (тобто маскуванні, приховуванні) справжніх намірів, дій та вчинків цієї особи. Своєю чергою документи, які потребують ознайомлення агента, складаються таким чином, щоб уникнути їх ознайомлення з інформацією, що становить державну таємницю. Велике значення у виконанні вказаного завдання має саме визначення меж спеціального завдання. З одного боку, нормами матеріального права передбачено, що не є кримінальним правопорушенням вимушене заподіяння шкоди правоохоронюваним інтересам особою, яка відповідно до закону виконувала спеціальне завдання, беручи участь в організованій групі чи злочинній організації з метою попередження чи розкриття їх кримінально-протиправної діяльності, з іншого – така особа підлягає кримінальній відповідальності за злочин, вчинений умисно і поєднаний з насильством над потерпілим, або тяжкий злочин, вчинений умисно і пов'язаний зі спричиненням тяжкого тілесного ушкодження потерпілому або настанням інших тяжких або особливо тяжких наслідків. ***Висновки.*** Зроблено висновок, що керівником органу досудового розслідування на етапі погодження рішення щодо виконання спеціального завдання мають бути вивчені та забезпечені як організаційні заходи реалізації (добір, підготовка, безпека та підтримання належних професійних і психологічних якостей, реабілітація та адаптація виконавців, залучення можливостей оперативної та оперативно-технічної служби; матеріальне і технічне забезпечення; використання заздалегідь ідентифікованих (помічених) або несправжніх (імітаційних) засобів), так і процесуальні з визначенням чітких меж виконання спеціального завдання з обов'язковим урахуванням таких чинників: а) мінімізації можливої шкоди правоохоронюваним інтересам; б) найбільш ефективного виконання завдань кримінального провадження; в) збереження у таємниці достовірних відомостей про особу.

Ключові слова: керівник органу досудового розслідування, негласні слідчі (розшукові) дії, спеціальне завдання з розкриття злочинної діяльності організованої групи чи злочинної організації, межі спеціального завдання.

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