2 2022 (312)

ENTREPRENEURSHIP, ECONOMY and LAW

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

HELVETICA PUBLISHING HOUSE

CONSTITUTIONAL LAW

THEORY OF STATE AND LAW

CRIMINAL PROCESS

INTERNATIONAL LAW

Monument to
the Magdeburg Rights
in Kyiv is on the cover

PHILOSOPHY OF LAW

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

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

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

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

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

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

The journal is recommended for printing and distributing over the Internet by the Academic Council of Academician F.H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of the National Academy of Legal Sciences of Ukraine (Minutes No. 4 dated 27.04.2022)

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

Passed for printing 28.04.2022. Format 70×108 1/16. Offset paper.
Offset printing. Conventional printed sheet 13,48. Published sheets 12,70.
Print run – 255 copies. Order No. 0722/270
Publisher: Publishing House "Helvetica"
6/1 Inglezi St., Odesa, 65101
Certificate of publishing business entity ДК № 6424 dated 04.10.2018

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

2 2022 (312)

ПІДПРИЄМНИЦТВО, ГОСПОДАРСТВО І ПРАВО

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

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

ГЕЛЬВЕТИКА
ВИДАВНИЧИЙ ДІМ

ЦИВІЛЬНЕ ПРАВО І ПРОЦЕС

ГОСПОДАРСЬКЕ ПРАВО І ПРОЦЕС

ЗЕМЕЛЬНЕ ПРАВО

АДМІНІСТРАТИВНЕ ПРАВО І ПРОЦЕС

КОНСТИТУЦІЙНЕ ПРАВО

ТЕОРІЯ ДЕРЖАВИ І ПРАВА

КРИМІНАЛЬНИЙ ПРОЦЕС

МІЖНАРОДНЕ ПРАВО

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

ФІЛОСОФІЯ ПРАВА

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

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

Свідоцтво про державну реєстрацію друкованого засобу масової інформації серія КВ № 15779-4251ПР від 02.11.2009 р.
Журнал рекомендовано до друку та поширення через мережу Internet вченою радою Науково-дослідного інституту приватного права і підприємництва ім. академіка Ф. Г. Бурчака НАПрН України (Протокол № 4 від 27.04.2022 року)
Офіційний сайт: pgp-journal.kiev.ua

Підписано до друку 28.04.2022. Формат 70x108 1/16. Папір офсетний.
Друк офсетний. Ум. друк. арк. 13,48. Обл.-вид. арк. 12,70.
Тираж – 255. Замовлення № 0722/270
Видавець: Видавничий дім «Гельветика»,
65101, м. Одеса, вул. Інглезі, 6/1
Свідоцтво суб'єкта видавничої справи ДК № 7623 від 22.06.2022 р.

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

UDC 347.122
DOI https://doi.org/10.32849/2663-5313/2022.2.01

Iryna Berestova,
Doctor of Law, Professor, Honored Lawyer of Ukraine, Leading Researcher at the Laboratory of Protection of Subjective Rights of the Department of Private Law Problems, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, erevna@ukr.net
ORCID: *orcid.org/0000-0001-6345-3566*

Liudmyla Maistrenko,
Lawyer, Honored Lawyer of Ukraine, Deputy Managing Partner of Attorney Association "ULC", 106, Velyka Vasylkivska str., Kyiv, Ukraine, postal code 03150, ludmila.maistrenko@gmail.com
ORCID: *orcid.org/0000-0003-3631-483X*

Berestova, Iryna, Maistrenko, Liudmyla (2022). The court's assessment of the subject matter and grounds of a conditional claim for the application of the *jura novit curia* principle. *Entrepreneurship, Economy and Law*, 2, 7–17, doi https://doi.org/10.32849/2663-5313/2022.2.01

THE COURT'S ASSESSMENT OF THE SUBJECT MATTER AND GROUNDS OF A CONDITIONAL CLAIM FOR THE APPLICATION OF THE *JURA NOVIT CURIA* PRINCIPLE

Abstract. ***The purpose*** of the article is to develop ways to ensure effective protection of a person's property right by the courts by means of judicial evaluation of the subject matter and grounds of the conditional claim for application of the principle *jura novit curia*.

The ***scientific methods*** used in the article are formal-logical, case-study method, systematic, dialectical method, method of complex analysis, etc.

Results. Conditions of conditional claim as the circumstances on which the claim is based (except for the lack of a legal basis for the acquisition or preservation of property) are more common grounds of all claims (contractual, restitutionary, vindication, tort), which are most often mixed with conditional. All other claims (contractual, restitutionary, vindication, tort) arise from different legal relations regulated by different rules of law, from special institutions of civil law, which have their own specifics and features. That is, each of these claims, not so much for qualification as for a correct decision on the merits, must have its own, different from the general, basis. It is this, which is specific to each type of claim, that enters into the subject of proof in each particular case. For a vindication claim, this is, in particular, the presence of individually-defined property, which has been preserved by the defendant in the same form. For a contractual claim this is the existence of a specific contract, the fact of its conclusion, validity, its terms. For restitutionary it is the fact of invalidation of the contract, the fact of transfer of each party to the other performance under this contract. For a tort – the corpus delicti of civil law, in particular, the presence of wrongdoing in the actions of the acquirer.

Conclusions. Taking into account the specifics of the conditional legal relation the court is able without prejudice to the adversarial and dispositive civil proceedings to apply the principle of *jura novit curia* ("the court knows the laws") and independently qualify and decide the claim on the merits exactly as a conditional one in the case if the claimant stated the claim as contractual (restitutionary), vindication, tort). But within the limits of the grounds of claim stated by the plaintiff himself and according to the circumstances proved by the plaintiff the court will find that the legal basis for the acquisition of property by the acquirer is absent, given that there are no contractual, restitutionary, vindication or tort legal relations between the parties. However, a diametrical conclusion of the court must be reached if the plaintiff has stated the claim as conditional and on the grounds of the claim has determined, inter alia, the terms of conditionality and refers to the absence of a legal basis for the acquisition of the property by the defendant. In such a case, as a general rule, the court

cannot, even with reference to the principle of *jura novit curia* ("the court knows the laws"), resolve such a claim on the merits by recharacterizing it, for example, as a contractual one, and applying the rules of contract law.

Key words: conditional obligations, conditional claims, subject of action, cause of action, *jura novit curia* ("the court knows the laws"), procedural actions of the court, change of action, effective way to protect the right.

1. Introduction

Consideration of the topic of condiction from the perspective of solving applied problems that arise in judicial and legal practice in handling and resolving conditional claims predetermines several key issues that require rethinking in the following: 1) the specific conditions, the presence of which serves to conclude that it is necessary to apply to the court for the protection of the violated right with conditional claims; 2) its role in the procedural mechanism for protecting the property rights of persons; 3) reviewing the legal nature of obligations to acquire, retain property without sufficient legal nature in the substantive aspect; 4) determination of the conditions when the court applies the rules of substantive conditional law independently according to the principle of *jura novit curia*, although the plaintiff did not refer to them, and when such application is inadmissible. The practical relevance of clarifying this issue is determined by the development of ways to ensure *effective protection* of civil law (including property) by the courts. One of the steps to achieve this is the attempt to introduce into practical litigation the doctrine of *jura novit curia*, which in jurisprudence is simultaneously called a principle, a presumption or an axiom of civil litigation.

Analysis of the legal positions of the civil and economic jurisdiction of the Supreme Court (hereinafter – SC) allows us to identify the most generalized understanding of the principle *jura novit curia* ("the court knows the law"), formed by practice: "When considering a case, the court must indeed provide the correct legal qualification of the parties' relations, which, however, cannot be applied by the court to resolve the dispute on the merits in the absence of the plaintiff's respective claims in the case, because another approach by the court would violate the principle of dispositiveness of judicial process and the legitimate expectations of both the plaintiff (who applies exactly with a certain legally grounded claim) and the defendant (which, in objecting to the claim, argues exactly on the grounds and justifications that are given by the plaintiff in the case)". The Grand Chamber of the Supreme Court (hereinafter referred to as the GC of the SC) has also delved into the explanation of *jura novit curia*, observing that the principle of *jura novit curia* ("the court knows the law") applies in the procedural law, which is that: 1) the court knows the law; 2) the court independently searches the law of the dispute without regard to the reference of the parties; 3) the court independently applies the law to the factual circumstances of the dispute (*da mihi factum, dabo tibi jus*). The active role of the court in civil proceedings is manifested, in particular, in the independent qualification by the court of the legal nature of the relations between the plaintiff and the defendant, the choice and application to the disputed legal relations of the relevant rules of law, full and comprehensive clarification of the circumstances on which the parties refer as a basis for their claims and objections, confirmed by evidence, which were examined in a court session. Thus, in resolving a dispute, the court, within the limits of its procedural functional powers and within the limits of the claims, establishes the content (the legal nature, rights and obligations, etc.) of legal relations of the parties arising from the established circumstances, and determines the legal norm to be applied to these legal relations (Supreme Court, 2021a).

The purpose of the article is to develop ways for the courts to provide effective protection of a person's property right through the court's evaluation of the subject matter and grounds of a conditional claim in order to apply the principle of *jura novit curia*.

Research methods used in the article: formal-logical, case-study method, systemic, dialectical methods, method of complex analysis, etc.

Clarification of theoretical aspects and practical implementation of the main provisions of the civil law institute of acquisition, preservation of property without sufficient legal basis in the sphere of non-contractual obligations was the first comprehensive scientific research of one of the authors of this article (Berestova, 2004; Berestova, Bobryk, 2006). Conclusions once formed in the dissertation, subsequent author's publications and commentary of Chapter 83 of the Civil Code of Ukraine (Berestova, 2014), can be found in the legal positions of the Supreme Court. In turn, clarification of the nuances of the application of the institute of condiction by the courts, determining the conditions and rules for distinguishing these claims from vindication and restitution claims, claims for damages, has periodically become

a subject of scientific attention by the second of the authors of the article – now a practicing lawyer (Romaniuk, Maistrenko, 2014). The return of both authors to the modern rethinking of the topic of such a legal institution as condiction in this article is due, firstly, to the marked spread of its application associated with the formation of a certain gap in law enforcement practice in understanding the legal nature of condiction as a way to protect property rights and, secondly, the lack of comprehensive scientific and practical studies on the peculiarities of implementation of the conditional claim in the substantive aspect, combined with the procedural features of domestic proceedings, in particular, the principle of dispositiveness. Also to applied aspects of the subject of condiction, in particular, N.Yu. Filatova (Spasybo-Fatieieva, 2020, p. 420) and to some extent A.V. Potapenko (Potapenko, 2021), who studied the issue of court determination of an effective method of protection of the right and revealed the procedural features of the doctrine of *jura novit curia*, including in conditional obligations, addressed.

Previously unsettled issue. However, no detailed scientific attention on the part of scientists-theorists and practitioners to the problem of application of the principle of *jura novit curia* in conditional claims by the court in terms of compliance with the subject matter and grounds of the claim filed exactly as a conditional, which determines the relevance of this article.

2. The principle of *jura novit curia* in choosing an effective method of protecting property rights

Reflecting from the angle of choice of an effective way to protect the right, we should agree with A.V. Potapenko, who notes that according to the principle of *jura novit curia* ("the court knows the laws") the court independently carries out legal qualification of disputed legal relations and applies for decision exactly those rules of substantive law, the subject of which is the corresponding legal relationship, which does not lead to a change in the subject of action and/or the method of protection selected by the plaintiff. In this case, the requirements for the court to apply an effective method of protection of a violated, unrecognized or disputed private right or interest, not contrary to the law, will first be assessed by the court *in terms of its compliance with the subject matter and grounds of the claim* (Potapenko, 2021, pp. 107–108).

Here it should be recalled that the correct definition in the statement of claim of the subject matter and grounds of the claim still causes difficulties in law enforcement, as evidenced by the practice of the SC, which is forced to respond to such problems with its legal conclusions. It is appropriate for the study to mention the legal conclusion of the SC that the *subject matter of an action* is a certain substantive claim of the plaintiff against the defendant, in respect of which the plaintiff asks for a judicial decision, mediated by the appropriate mode of protection of rights or interests. *The causes of action* are the circumstances by which the plaintiff substantiates his claims for protection of rights and a legally protected interest. At the same time, *the legal basis of the claim* is the regulatory and legal qualification of the circumstances, specified in the statement of claim, by which the plaintiff substantiates his claims.

As you know, according to Article 13 of the Civil Procedural Code of Ukraine, the court shall hear cases not otherwise than at the request of a person filed in accordance with this Code, within the limits of his claims and on the basis of evidence submitted by parties to the case or claimed by the court in cases provided for by this Code. A participant in the case shall dispose of his rights on the subject matter of the dispute at his discretion.

The court *can not exceed* the limits of the claims and in violation of the principle of optionality *independently choose the grounds and subject matter of the claim*, as repeatedly and consistently emphasized the Supreme Court of Ukraine (Supreme Court, 2019a; Supreme Court, 2019c; Supreme Court, 2019d; Supreme Court, 2019e; Supreme Court, 2020a; Supreme Court, 2020b).

However, it is the latter components (subject matter and cause of action) that are often confused by both plaintiffs applying to court and the courts when considering civil disputes. More often mistakes are made in the causes of action.

Although such confusion is equally possible between conditional claims and vindication, restitution or those arising from tort, the most frequent and particularly noticeable, as practice shows, such confusion occurs between disputes arising from groundless acquisition, preservation of property without sufficient legal basis and disputes arising from contracts/quasi-contracts (conclusions), especially if the transactions have defects of various kinds (form, content, etc.).

It should be noted that the Supreme Court consisting of a panel of judges of the Economic Court of Cassation in the judgment in case №910/18389/20 noted that changing the subject matter of the claim means changing the substantive claim with which the plaintiff has appealed to the defendant, and changing the grounds of action is a change in the circumstances on which the plaintiff's claim is based (Supreme Court, 2021c). Given this, the problem of con-

fusion of legal disputes of this kind can lead not only to an erroneous resolution of the dispute by the court on the merits, but also to an "involuntary" violation by the court of the principle of dispositiveness of proceedings, if the court, formally applying the doctrine of *jura novit curia*, independently changes the subject and/or grounds of action (more such threat concerns changes in the grounds of action). Such mistakes are more and more frequent because the principle of *jura novit curia* actually "divides" the court's attention to the arguments of one and the same party to the case (the plaintiff) into two diametrical points: on the one hand, it is the legal grounds for the claim, which are not mandatory for the court (because the court itself knows the law and itself chooses the required rule of substantive law), and on the other hand, it is the circumstances, which the same plaintiff is referring to. These are the grounds for action, and the court has no right to go beyond them to resolve the dispute.

3. Conditional and related claims in SC findings: common and different

In analyzing the legal nature of condiction and the issues of correlation and distinction between conditional and related claims, two recent rulings of the Supreme Court deserve attention, whose conclusions force us to look at the conditional claim and the conditions under which the court may refuse to satisfy this claim not only from the perspective of an erroneous determination of the nature of the disputed legal relations, but from a different angle: in terms of the good faith conduct of the victim *up to the time* when he paid the funds or transferred the property to the acquirer, even if indeed without justification.

Thus, on August 4, 2021 the Supreme Court of Cassation Civil Court (hereinafter – CCC of the SC) adopted a ruling on case № 185/446/18, in which, quite revolutionary for the doctrine and for the first time in judicial practice, obliged the courts, when deciding conditional claims, to consider and evaluate not the conduct of the acquirer, but the victim in the conditional obligation, and directly connected the victim's conduct with its consequences in the form of the court's conclusion on whether his conditional claim is satisfied or not (Supreme Court, 2021b).

Under the circumstances of this case, the plaintiff brought a conditional claim against the defendant for withholding money unreasonably received. The claim is motivated by the fact that after meeting the defendant they had friendly relations and plans to conduct joint business activities, and for some time he carried out periodic transfers of funds to the current account of the defendant in separate payments totaling 1 330 000,00 UAH. These funds were transferred to the defendant to start a joint business (purchase of goods, etc.). Because he trusted the defendant, the agreed terms of doing business together were not set out in a written contract. The plaintiff stated that he became aware that the defendant abused his trust and took possession of his funds without any intention to conduct joint business, and spent the received funds for personal needs (enlarged her breasts, bought a car and an apartment), so he asked to recover the funds as unreasonably received by the defendant. The defendant denied and explained that they had a close relationship with the plaintiff as man and woman, she perceived this relationship as family, they planned to live together and for this purpose looked for and bought an apartment, she introduced her daughter and friends to the plaintiff. The plaintiff gave her many gifts. Getting her breasts enlarged, buying her a car and an apartment for her was his initiative. She also opened a bank account at the plaintiff's suggestion and he deposited the funds, which they spent together. Plaintiff provided the funds that are the subject of the suit voluntarily; she perceived them as funds that he was spending on her because they share a family relationship. In this case, the appellate court denied the claim. The CCC of the SC accepted the appeal in essence, but the motive part of the appeal court's decision was redrafted, stating, inter alia, the following: "Interpretation of Part 1 of Art. 1212, 1215, part 1 of Art. 267 of the Civil Code of Ukraine shows that in determining whether the funds acquired without merit should be taken into account, the acts of civil legislation should be consistent with <...> *funds are not refundable if the aggrieved person knows that he or she has no obligation (no duty) to pay the funds, but makes such payment because said person behaves inconsistently if he or she subsequently demands a refund of the funds paid*" (Supreme Court, 2021b).

Making the following conclusions on the application of Art. 1212 of the Civil Code in conjunction with Art. 3 of the Civil Code, the Supreme Court in its decision of August 4, 2021 noted that the plaintiff, transferring funds to the defendant, which the parties jointly spent, knew that between them there is no obligation (no obligation), and therefore the behavior of the plaintiff contradictory (i. e., the injured party freely and without mistake agreed to the occurrence of disadvantageous consequences). In the case there are no grounds to satisfy the conditional claims. Legal conclusions of the CCC of the SC of Ukraine stated in the above decision are unusual and interesting from the point of view of practical application

of Art. 1212 of the Civil Code of Ukraine by the courts.

But do these conclusions affect the legal nature of condiction as a type of non-contractual obligation, a legal institution? *According to the authors, they do not*. Thus, the legal nature of the condiction as a legal institution remains unchanged – it is a non-contractual obligation arising from the acquisition or preservation of property without a sufficient legal basis. The grounds for these obligations have a wide range: they can arise from actions as well as from events, and from the actions of both parties to the obligation and third parties, from actions both planned and accidental, both lawful and unlawful. There also remains the same conclusion that for the qualification of the obligation as conditional it does not matter the legal behavior of the victim and whether the property left the possession of the owner by his will or against his will, whether the acquirer is bona fide or bad faith. Note: this (in particular, the behavior of the victim) does not affect the determination of the nature of the disputed relationship as a conditional one.

The conduct of the victim has a direct impact not on the nature of the legal relationship and not on the content of the obligation, but on the conditional claim as an element in the mechanism of judicial protection of property rights. That is, the victim's conduct alone does not change the conditional obligation, does not create any legal basis for the enrichment of the acquirer, and does not make the conditional obligation any different (contractual or restorative, etc.). But the victim's claim, based on a conditional obligation, comes before the court in the form of a conditional claim. And it is the result of the court decision conditional claim (satisfaction or denial of satisfaction), judging by the legal opinion of the Supreme Court in its decision of August 4, 2021, already directly depends on the behavior of the victim by virtue of the interdisciplinary principle of good faith (Article 3 of the Civil Code of Ukraine) as a rule of direct action and implementation by the court doctrine *contra factum proprium* (prohibitions of conflicting behavior).

For an analysis of the conditions affecting both the qualification of the obligation as conditional and the result of the court's decision on the conditional claim, it is also interesting to see one of the recent rulings adopted by the CCC of the SC on January 19, 2022 in case № 202/2965/19 (Supreme Court, 2022). Thus, in this case № 202/2965/19 the causes of action are quite similar to those in case № 185/446/18. But the objections to the claim are different. The plaintiff in this case № 202/2965/19 also brought a conditional claim for recovery of the defendant's unreasonably received funds. The claim is motivated by the fact that he, a citizen of the United States, during his stay in the trip met with the defendant, they developed friendly relations and the defendant offered him to buy in Ukraine on favorable terms, which can be rented and receive rents. He agreed to the offer and transferred $ 65,000 in cash to his bank account with the purpose of the payment being purchase of the apartment. However, the defendant then refused to provide him with the documents for the purchased apartment and did not return the money. The defendant, in turn, defended herself against the suit, claiming a contractual relationship between her and the plaintiff and referring to the fact that the plaintiff had given her the money as a gift.

In evaluating this conditional claim, taking into account the defendant's objections, which were limited to a reference to the existence of contractual relations between the parties, the Supreme Court noted the following. "The general rule of part 1 of article 1212 of the Civil Code of Ukraine narrows down the application of the institute of unjust enrichment in obligatory (contractual) relations: the received by one of the parties to an obligation is subject to return to the other party from art. 1212 of the Civil Code of Ukraine only if there is a sign of groundlessness of receipt of such performance. The legal basis for enrichment must be understood as a certain economic purpose for the provision of property, legitimized by the relevant legal fact, or based directly on the law. The simultaneous presence of these two elements: the correspondence of the enrichment to the economic purpose of providing property and the legitimizing legal fact (the rule of law) that legitimizes this purpose, is necessary for the enrichment of one person at the expense of another to be considered fictitious and legitimate. Depending on the form in which the lack of a legal basis that gives rise to the obligation to return the property is expressed, we can distinguish, in particular, such a type of unjust enrichment as enrichment, the legal basis of which was absent from the beginning (*ab initio sine causa*). Such can include, for example, the transfer of property under failed transactions (including under contracts that have not been concluded). In this case, there is enrichment, although by the will of the victim, but not based on a legitimate legal fact. Such enrichment arises from the transfer of property as performance under a contract which has not been concluded. <...> The court must assume that the basis for receiving any property gratuitously from another person must be unequivocal and explicit on the part of the person making such a transfer. Consequently, acting reasonably and in good

faith, each participant in civil relations must assess whether the receipt of any property from another person creates certain civil obligations for the recipient himself, including the return of what was received without just cause. Civil law serves the purpose of ensuring the stability of civil turnover, the criterion for ensuring this is, as a general rule, the receipt by all participants in civil relations only what is due, that is, what a person is entitled to fairly and reasonably expect to receive" (Supreme Court, 2022).

As we see, in this Ruling of January 19, 2022 in case № 202/2965/19 the Supreme Court continued its well-established practice in terms of determining the conditions for distinguishing between conditional and contractual claims, as well as developed the application of interdisciplinary principles of good faith to resolve the merits of conditional claims) and extended this principle not only to the behavior of the victim, as it was in case № 185/446/18, but also to the behavior of the acquirer, observing that any person, acting lawfully, must be aware of whether there is any just basis for her receiving certain funds (material goods). In that case, the courts upheld the claim and recovered money from the defendant from the plaintiff. The SC agreed with the existence of grounds for satisfaction of the claim (as opposed to the outcome of case № 185/446/18, where it agreed just with the denial of the claim), noting that such a reasonable and equitable basis for acquiring the funds in dispute, the defendant neither existed at the time of receipt, nor subsequently such grounds did not arise.

In addition, it should be noted that the Supreme Court in Case № 202/2965/19 also stated that, as a general rule, all participants in civil relations should receive *only what is due, that is, what a person is entitled to fairly and reasonably expect to receive*. According to the authors, this conclusion is extremely important, because it is intended to somewhat ridiculous previous conclusion (about taking into account only the behavior of the victim) and directs the enforcement of Art. 1212 of the Civil Code of Ukraine in such a direction that the refusal of the court to satisfy the conditional claim only because of the behavior of the plaintiff (the victim) should be the exception rather than the rule. This is the right approach, because the essence of the conditional obligation is absolutely unjust enrichment of the acquirer and the doctrine does not endow condiction with such a mandatory element as the good faith of the victim. It follows that the general purpose of a conditional claim is to protect the violated property rights of the victim, so the denial of such protection must be extraordinary and based on more serious grounds to consider the victim's conduct to be unconscionable.

Analyzing the above, it can be seen that the conditional obligation, by virtue of its inherent specific characteristics, has much in common with, in particular, the tort obligation, the restitution obligation, the contractual/quasi-contractual obligation, and the vindication obligation. As a result, it is evident that it is not uncommon for these claims to be commingled when brought in court, mostly as to the cause of action. For example, a plaintiff has transferred money under a contract that is defective in form, and believes that this makes the defendant's acquisition of money without merit and files a conditional claim. Or conversely, the plaintiff alleges that he handed over money without entering into a contract, but because he intended to enter into one, he grounds the claim on contractual grounds and the standards of penalties inherent in contract law.

4. The Court's Action in Conditional Claims on the Application of the Principle of *jura novit curia*

The foregoing demonstrates that the court's conduct in such cases is becoming increasingly important, given the court's obligation to apply the principle of *jura novit curia* ("the court knows the law"). Recall that the principle of *jura novit curia* ("the court knows the laws") obliges the court not to pay attention to the norms of law indicated by the plaintiff in the claim, but to carry out its own legal qualification of disputed legal relations and independently choose those rules of substantive law, the subject of which are the relevant legal relations. At the same time, the court is obliged by virtue of Art. 13 of the Civil Procedural Code of Ukraine to ensure the dispositiveness of civil proceedings and has no right to go beyond the grounds and subject matter of the claim, which noted the plaintiff. In addition, the court, carrying out judicial proceedings, is also limited by such principle as the adversarial principle (Art. 12 of the Civil Procedural Code of Ukraine) and the rules of evidence, which prohibit the court to collect evidence relating to the subject matter of the dispute on its own initiative (part 7 of Art. 81 of the Civil Procedural Code of Ukraine).

Under such circumstances, the question arises: from the procedural point of view, is it possible for the court to independently qualify a claim as conditional and consider it essentially as conditional, if it (the claim) is declared by the plaintiff as a contractual (restitutionary, vindication, etc.)? Conversely, is it permissible for a court to qualify a contractual (restitutionary, vindication, etc.) claim asserted by a plaintiff as a conditional claim and decide that claim on its

merits as a conditional claim? Will such actions by the court be consistent with the rule of necessity for the court to apply an effective method of protection of the violated right, and will these actions be effective procedurally in view of the court's duty to obtain a change in the subject matter of the claim and/or the method of protection chosen by the plaintiff?

Answering this question, it should be recalled that every claim, regardless of its type, and regardless of the plaintiff's references to the rules of substantive law, has its own content and must contain its grounds – that is, the circumstances and facts, which the plaintiff substantiates his claims (Part 3 of Art. 175 of the Civil Procedural Code of Ukraine). At the same time, the cause of action directly depends on the type of legal relationship from which the dispute arose and for which the plaintiff is suing.

Grounds of action (content of the claim) actually reflect the content of legal relations. The grounds for the claim also form the subject matter of the proof, what are the circumstances that support the claims, or are otherwise relevant to the case and to be established when making a court decision (Art. 77 of the Civil Procedural Code of Ukraine). That is, the causes of action do not exist in an abstract way. They are inextricably linked to the subject of proof, and the subject of proof is individual, specific to each case and is just as inextricably linked to those legal relations from which the dispute arose.

For example, in cases of division of property of spouses who are registered as married (legal relations regulated by Articles 60, 61, 69 of the Family Code of Ukraine), in general, do not apply to the causes of action and are not subject to prove the plaintiff neither the circumstances confirming the cohabitation of the parties, no circumstances of their common household, etc. The grounds for such a claim are the circumstances of the marriage (the date of its conclusion and dissolution) and the acquisition of property by the spouses during this period. These circumstances are proved accordingly. And on the contrary, in similar legal relations – the section of the property of a woman and a man living together as a family without registration of marriage (art. 74 Family Code of Ukraine), the grounds of the claim quite different – they are just the circumstances that were not the basis of the previous case: the circumstances indicating that the parties lived together, the presence of common rights and obligations as spouses, the conduct of their common household. This example confirms that the causes of action and the subject matter of proof in two different lawsuits will be different because they arise from different legal relationships. Given this, there are no universal causes of action applicable to claims in all legal relationships without exception and the existence of which in itself allows the court to independently qualify legal relationships and decide the merits of any claim exactly and only as the court sees it, without regard to the position of the plaintiff.

The above gives us grounds to conclude that the principle of *jura novit curia* ("the court knows the law") is not always applicable in all cases without exception and is not that universal mechanism which by itself is able to provide effective protection of the violated right of the plaintiff who filed a claim, but erred in the legal qualification of legal relations from which the dispute arose.

If, however, we analyze the conditional claim and those most similar to it (contractual, restitutionary, vindication, tort) in terms of the court's application of the principle *jura novit curia* ("the court knows the laws"), we come to the following conclusions.

A conditional claim arises solely from a conditional obligation, a non-contractual obligation to return property unreasonably acquired or unreasonably retained. Given the specific nature of legal relations arising from condiction, to qualify a claim as conditional, it will be sufficient to establish the presence of such circumstances (conditions) as: a) acquisition or preservation of property by one person (acquirer) at the expense of another (victim); b) harm in the form of reduction or non-increase of property from another person (victim); c) the conditionality of the increase or preservation of property on the part of the acquirer by a decrease or no increase on the part of the injured party; d) the absence of a legal basis for the said change in the property status of these persons.

These conditions are objective. They either exist or they do not. Moreover, these very conditions (except for the lack of a legal basis) as the circumstances on which the claim is based, are to a greater extent the basis of all claims (contractual, restitutionary, vindication, tort), which are most often mixed with conditional. For all these claims, both the circumstances of reduction of property from the injured party at the expense of its increase from the acquirer and the existence of property losses (harm) for the injured party, and the conditionality of increasing or storing property on the side of the acquirer by reduction or lack of increase on the side of the injured party are proved. In fact, the main significant feature that distinguishes these claims from conditional is the presence or absence of a legal basis for changing the property status of the victim, and the main condition for qualifying a claim as conditional is that the legal relations between the parties

are not regulated by special institutions of civil law. That is, a conditional claim can be qualified if we apply the method of comparing legal relations "according to the residual principle": if under the circumstances of a particular claim legal relations (at least in the presence of general signs) still do not contain those specific features that are inherent exclusively restorative, or vindication, or contractual, or tort, then such legal relations – are not regulated by special institutions of civil law and must be recognized as conditional.

5. Conclusions

Given the specifics of the conditional legal relationship, the court is able, without prejudice to the adversarial and dispositive nature of civil proceedings, to apply the principle of *jura novit curia* ("the court knows the laws") and independently qualify and decide the claim on the merits exactly as conditional in the case where the claimant stated the claim as contractual (restitutionary), vindication, tort), but within the limits of the claimant's grounds of action and according to the circumstances proved by the claimant, the court will find that there is no legal basis for the acquirer's acquisition of the property, given that there are no contractual, restitutionary, vindication or tort legal relations between the parties. However, a diametrical conclusion should be reached if the plaintiff stated the claim specifically as conditional and the grounds of the claim defined, in particular, the conditions of condiction and refers to the absence of a legal basis for the acquisition of property by the defendant. In such a case, as a general rule, the court cannot, even with reference to the principle of *jura novit curia* ("the court knows the laws"), decide such a claim on the merits by re-characterizing it, for example, as a contractual claim and applying the rules of contract law.

The conditions of the conditional claim as the circumstances on which the claim is based (other than the lack of a legal basis for the acquisition or preservation of property) are to a greater extent common to all claims (contractual, restitutionary, vindication, tort), which are most often mixed with the conditional claim. All other claims – contractual, restitutionary, vindication, tort – arise from different legal relations regulated by different norms of law, from special institutions of civil law, which have their own specificity and peculiarity. That is, each of these claims, not so much for qualification, but for the correct decision in essence, must have its own, different from the general, basis. Moreover, it is this, specific to each type of claim, that is included in the subject matter of proof in each individual case. For a vindication claim, it is, for example, the presence of individually identified property, which has been preserved by the defendant in the same form. For contractual it is the existence of a specific contract, the fact of its conclusion, validity, its conditions. For restitutio it is the fact of invalidation of the contract, the fact of transfer of fulfillment under this contract by each party to the other. For a tort – the corpus delicti of a civil offense, in particular, the presence of illegality in the actions of the acquirer.

Taking this into account, the court, when considering a claim filed as conditional, may establish, for example, the existence of a legal basis for the acquisition of funds or other contract, namely, the fact of a contract between the parties. A strong inference is drawn that it is not the right of a court not only to classify a claim as contractual, but also to deny (or grant) it based on substantive contract law, even with reference to the principle of *jura novit curia* ("the court knows the laws"). This is because the application of the principle of *jura novit curia* ("the court knows the laws") may be applied in the above case only to state the court's conclusion that the plaintiff has misclassified the claim in order to justify by the court in a decision the dismissal of the claim solely on the basis of the wrong way the plaintiff has chosen or to justify by the court the dismissal of the claim due to the lack of merit of the conditional claim.

The principle of dispositiveness imposes on the court the obligation to resolve the dispute within the bounds of the cause of action that is determined by the plaintiff (i. e. within the circumstances by which the plaintiff substantiates his claims) in the manner provided for by the civil procedural law. The court is bound by the subject matter and scope of the plaintiff's claims (in particular, the decision of the Supreme Court of February 19, 2019 in case № 824/399/17-a (Supreme Court, 2019b)), so it has no procedural authority to independently determine the factual grounds of action, to inform the parties and "impose" the plaintiff to "support" other, defined by the court, grounds of action, independently to seek evidence to confirm or refute these self-defined by the court circumstances (the grounds of action). The principle of *jura novit curia* refers not to the factual but only to the legal causes of action and consists in the power of the court to choose the legal rule to be applied to the factual causes of action: that is, to those circumstances with which the plaintiff substantiates his claims. Therefore, the court is not entitled to decide a claim filed as conditional as a contractual claim in substance, to establish the presence or absence of the grounds characteristic of a contractual claim, and to apply in such a case the rules of substantive contract law,

because a contractual claim differs from a conditional claim in its grounds and subject of proof, and the plaintiff does not give or prove such grounds (which are necessary just for a contractual claim).

If, under such conditions, the court decides on the merits of the claim not as conditional but as contractual, and dismisses the claim because its grounds are not proven to be contractual, this would obviously violate the principle of dispositiveness in the sense that the court would actually substitute the grounds for the claim, going beyond the grounds of the claim. In addition, given paragraph 2 of Art. 186 of the Civil Procedural Code of Ukraine, this will generally deprive the plaintiff the opportunity to protect their rights and reapply to the court with a properly qualified claim – a contractual, which has already correctly specify the grounds of action, define the subject of proof and prove all the circumstances necessary to satisfy a contractual claim, because there will be a court decision taken between the same parties, the same subject matter and on the same grounds (contractual – because that is how they qualified the court).

References:

Berestova, I.E. (2004). Zoboviazannia z nabuttia, zberezhennia maina bez dostatnoi pravovoi pidstavy [Obligations to acquire, preserve property without a sufficient legal basis]. *Candidate's thesis.* Kharkiv, 202 p. [in Ukrainian].

Berestova, I.E. (2014). Hlava 83 "Zoboviazannia z nabuttia, zberezhennia maina bez dostatnoi pravovoi pidstavy" [Chapter 83 "Obligations to acquire, preserve property without a sufficient legal basis"]. *Tsyvilnyi kodeks Ukrainy: naukovo-praktychnyi komentar [The Civil Code of Ukraine: scientific and practical commentary],* vol. 11: Non-contractual obligations. Kharkiv: Pravo, pp. 345–360 [in Ukrainian].

Berestova, I.E., Bobryk, V.I. (2006). *Nabuttia, zberezhennia maina bez dostatnoi pravovoi pidstavy v pidpryiemnytskii diialnosti (pytannia teorii i praktyky): monohrafiia [Acquisition, preservation of property without a sufficient legal basis in business (issues of theory and practice): monograph]* / ed. by O.D. Krupchan. Kyiv: NDIPPiP, 165 p. [in Ukrainian].

Potapenko, A.V. (2021). Vyznachennia sudom efektyvnoho sposobu zakhystu pryvatnoho prava ta interesu, yakyi ne superechyt zakonu [Determination by the court of an effective way of protection of private law and interest, which does not contradict the law]. *Doctor's thesis.* Kyiv, 255 p. [in Ukrainian].

Romaniuk, Ya.M., Maistrenko, L.O. (2014). Restytutsiia, vindykatsiia, kondyktsiia, vidshkoduvannia shkody: okremi aspekty spivvidnoshennia ta rozmezhuvannia [Restitution, vindication, condition, compensation: some aspects of the relationship and differentiation]. *Visnyk Verkhovnoho Sudu Ukrainy – Bulletin of the Supreme Court of Ukraine*, no. 9(169), pp. 22–34 [in Ukrainian].

Spasybo-Fatieieva, I.V. (ed.) (2020). *Zakhyst prava vlasnosti. Pravovi pozytsii Verkhovnoho Sudu: komentari naukovtsiv [Protection of property rights. Legal positions of the Supreme Court: comments of scientists].* Kharkiv: EKUS, 496 p. [in Ukrainian].

Supreme Court (2019a). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Druhoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 15.07.2019 u spravi № 235/499/17 [Judgement of the Supreme Court in the composition of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation of 15.07.2019 in the case № 235/499/17]. Retrieved from: https://reyestr.court.gov.ua/Review/83025066 [in Ukrainian].

Supreme Court (2019b). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Kasatsiinoho administratyvnoho sudu vid 19.02.2019 u spravi № 824/399/17-a [Judgement of the Supreme Court in the composition of the panel of judges of the Administrative Court of Cassation of 19.02.2019 in case № 24824/399/17-a]. Retrieved from: https://reyestr.court.gov.ua/Review/80384811 [in Ukrainian].

Supreme Court (2019c). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 06.03.2019 u spravi № 571/1306/16-ц [Judgement Resolution of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation dated 06.03.2019 in case № 571/1306/16-ц]. Retrieved from: https://reyestr.court.gov.ua/Review/80330468 [in Ukrainian].

Supreme Court (2019d). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 17.07.2019 u spravi № 523/3612/16-ц [Judgement of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation of 17.07.2019 in case № 523/3612/16-ц]. Retrieved from: https://reyestr.court.gov.ua/Review/83230330 [in Ukrainian].

Supreme Court (2019e). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 30.10.2019 u spravi № 390/131/18 [Judgement of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation of 30.10.2019 in case № 390/131/18]. Retrieved from: https://reyestr.court.gov.ua/Review/85646610 [in Ukrainian].

Supreme Court (2020a). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 01.07.2020 u spravi № 287/575/16-ц [Judgement of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation of 01.07.2020 in case № 287/575/16-ц]. Retrieved from: https://reyestr.court.gov.ua/Review/90349581 [in Ukrainian].

Supreme Court (2020b). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Tretoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 01.04.2020 u spravi № 686/24003/18 [Judgement of the Supreme Court in the composition of the panel of judges of the Third Judicial Chamber of the Civil Court of Cassation of 01.04.2020 in case № 686/24003/18]. Retrieved from: https://reyestr.court.gov.ua/Review/88641382 [in Ukrainian].

Supreme Court (2021a). Postanova Velykoi Palaty Verkhovnoho Sudu vid 15.06.2021 u spravi № 904/5726/19 [Judgement of the Grand Chamber of the Supreme Court of 15.06.2021 in the case № 904/5726/19]. Retrieved from: https://reyestr.court.gov.ua/Review/98524308 [in Ukrainian].

Supreme Court (2021b). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Druhoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 04.08.2021 u spravi № 185/446/18 [Judgement of the Supreme Court in the composition of the panel of judges of the Second Judicial Chamber of the Civil Court of Cassation of 04.08.2021 in the case № 185/446/18]. Retrieved from: https://reyestr.court.gov.ua/Review/98881542 [in Ukrainian].

Supreme Court (2021c). Postanova Verkhovnoho Sudu u skladi palaty dlia rozghliadu sprav shchodo zemelnykh vidnosyn ta prava vlasnosti Kasatsiinoho hospodarskoho sudu vid 22.07.2021 u spravi № 910/18389/20 [Judgement of the Supreme Court in the Chamber for consideration of cases concerning land relations and property rights of the Commercial Court of Cassation of 22.07.2021 in case № № 910/18389/20]. Retrieved from: http://reyestr.court.gov.ua/Review/84454017 [in Ukrainian].

Supreme Court (2022). Postanova Verkhovnoho Sudu u skladi kolehii suddiv Pershoi sudovoi palaty Kasatsiinoho tsyvilnoho sudu vid 19.01.2022 u spravi № 202/2965/19 [Judgement of the Supreme Court in the composition of the panel of judges of the First Judicial Chamber of the Civil Court of Cassation of 19.01.2022 in case № 202/2965/19]. Retrieved from: https://reyestr.court.gov.ua/Review/102812416 [in Ukrainian].

Ірина Берестова,
доктор юридичних наук, професор, заслужений юрист України, провідний науковий співробітник лабораторії захисту суб'єктивних прав відділу проблем приватного права, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01042, erevna@ukr.net
ORCID: *orcid.org/0000-0001-6345-3566*

Людмила Майстренко,
адвокат, заслужений юрист України, заступник Керуючого партнера Адвокатського об'єднання «ULC», вулиця Велика Васильківська, 106, Київ, Україна, індекс 03150, ludmila.maistrenko@gmail.com
ORCID: *orcid.org/0000-0003-3631-483X*

ОЦІНЮВАННЯ СУДОМ ПРЕДМЕТА ТА ПІДСТАВ КОНДИКЦІЙНОГО ПОЗОВУ ДЛЯ ЗАСТОСУВАННЯ ПРИНЦИПУ *JURA NOVIT CURIA*

Анотація. ***Метою статті*** є розроблення шляхів забезпечення судами ефективного захисту майнового права особи шляхом оцінювання судом предмета й підстав кондикційного позову для можливості застосування принципу *jura novit curia*.

Наукові методи, використані у статті, – формально-логічний, case-study системний, діалектичний, метод комплексного аналізу тощо.

Результати. Умови саме кондикційного позову як обставини, на яких ґрунтується позов (крім відсутності правової підстави набуття чи збереження майна), є більшою мірою спільними підставами всіх тих позовів (договірного, реституційного, віндикаційного, деліктного), які найчастіше змішуються з кондикційним. Усі інші позови (договірний, реституційний, віндикаційний, деліктний) виникають із різних правовідносин, що врегульовані різними нормами права, зі спеціальних інститутів цивільного права, які мають свою специфіку та особливість. Тобто кожен із цих позовів не так для кваліфікації, як для правильного вирішення по суті повинен мати власну, відмінну від загальних, підставу. Саме ця специфічна для кожного виду позову підстава входить до предмета доказування в кожній окремій справі. Наприклад, для віндикаційного позову це, зокрема, наявність індивідуально визначеного майна, яке збереглося у відповідача в тому самому вигляді; для договірного – наявність конкретного договору, факт його укладення, дійсності, його умови; для реституційного – факт визнання недійсним договору, факт передачі кожною зі сторін одна одній виконання за цим договором; для деліктного – склад цивільного правопорушення, зокрема наявність у діях набувача протиправності.

Висновки. З огляду на специфіку кондикційних правовідносин суд спроможний без шкоди для змагальності та диспозитивності цивільного процесу застосувати принцип *jura novit curia*

(«суд знає закони») і самостійно кваліфікувати та вирішити позов по суті саме як кондикційний у тому разі, якщо позивач заявив позов як договірний (реституційний, віндикаційний, деліктний). Однак у межах наведених самим позивачем підстав позову та згідно з доведеними саме позивачем обставинами суд установить, що правова підстава набуття майна набувачем відсутня, причому між сторонами немає ні договірних, ні реституційних, ні віндикаційних, ні деліктних правовідносин. Проте діаметрального висновку суду варто доходити в тому разі, якщо позивач заявив позов саме як кондикційний і підставами позову визначив, зокрема, умови кондикції, а також посилається на відсутність правових підстав набуття майна відповідачем. У такому разі суд за загальним правилом не може, навіть із посиланням на принцип *jura novit curia* («суд знає закони»), вирішувати такий позов по суті, здійснивши його перекваліфікацію, наприклад, у договірний та застосовуючи норми договірного права.

Ключові слова: кондикційні зобов'язання, кондикційні позови, предмет позову, підстава позову, *jura novit curia* («суд знає закони»), процесуальні дії суду, зміна позову, ефективний спосіб захисту права.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 347:004.8
DOI https://doi.org/10.32849/2663-5313/2022.2.02

Yurii Burylo,
Doctor of Law, Associate Professor, Leading Researcher at the Department of International Private Law and Legal Problems of European Integration, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, burylojunior@gmail.com
ORCID: *orcid.org/0000-0001-8743-7739*

Burylo, Yurii (2022). Legal personhood of artificial intelligence systems: to be or not to be? *Entrepreneurship, Economy and Law,* 2, 18–25, doi https://doi.org/10.32849/2663-5313/2022.2.02

LEGAL PERSONHOOD OF ARTIFICIAL INTELLIGENCE SYSTEMS: TO BE OR NOT TO BE?

Abstract. The ***purpose of the article*** is to examine the possibility of establishing legal personhood for artificial intelligence systems (robots).

Research methods. The methodology of this study includes such methods of scientific research as comprehensive system analysis, comparative legal analysis, and dialectic method. The method of comprehensive system analysis makes it possible to examine artificial intelligence systems as complex entities and determine the legal consequences of these systems' operation. Comparative legal analysis allows comparing different legal provisions and legal concepts applying to these systems. The dialectic method is used to assess the progress of artificial intelligence systems as well as the development of legal provisions and concepts applying to them.

Results. To a large extent, the concept of legal personhood is based on the idea that human beings are the only intelligent entities capable of reasoning and making decisions. However, autonomous robots are likely to become even smarter than humans due to the development of artificial intelligence. This trend gives rise to the concept of electronic persons. For the time being, it is too early to recognize robots as electronic persons. Nonetheless, over time, when artificial intelligence reaches the level of strong (general) intelligence, the need for recognizing autonomous robots as electronic persons may become apparent. Although the concept of electronic persons is controversial, it may provide some legal solutions with regards to the redress for the damage caused by autonomous robots, conclusion and performance of contracts as well as legal protection of intellectual property generated by artificial intelligence systems. However, there should be restrictions of electronic persons' rights in strategic industries and in the field of national security and defense. It might be sensible to forbid electronic persons to buy and sell farm land, drugs, nuclear fuel and other dangerous substances, firearms and other weapons as well as industrial facilities designed for their production.

Conclusions. Such areas of law as intellectual property law, contract law and legislation on tort liability will have to undergo significant changes in order to address the challenges posed by the development of artificial intelligence. One of the ways to adjust the existing legal landscape to a new reality is based on the idea of granting autonomous artificial intelligence systems legal personhood and turning them into electronic persons. In the future, when autonomous smart robots reach the level of artificial general intelligence, this concept may serve as a basis for a major legal transformation comparable to the emergence of legal persons. At the same time, electronic persons' rights have to be limited in the interests of protecting natural persons, strategic industries, national security and defense. Besides, limited scope of their legal personhood should be coupled with insurance cover as well as limited liability of those who created them.

Key words: artificial intelligence, legal personhood, electronic person, redress for the damage, intellectual property.

1. Introduction

Nowadays artificial intelligence seems (hereinafter – AI) to be a buzz word. And, it is so for a good reason, as humanity is standing on the doorstep of a new technological revolution. So far there have been some technological revolutions, including such important ones as the inventions of a printing press, machine-tools, and computers. Each of these revolutions had a profound impact on the progress of civilization. The invention of a printing press by Johannes Gutenberg made it possible to disseminate information on a large scale thus contributing to the development of science, education and enlightenment in general. The industrial revolution and con-

sequently the advent of an industrial society took place after the introduction of machine-tools in the manufacturing sector. Advances in semi-conductor and digital technologies led to the creation and development of computers paving the way for information society, which is also referred to as post-industrial society.

These days we can witness another technological revolution, namely the development of AI technologies. These technologies are capable of providing numerous opportunities as well as causing a wide range of issues. Although the full potential of AI is hard to assess at the moment, it is already clear that sooner or later we are going to live alongside autonomous entities capable of thinking and making decisions on their own. Therefore, sooner or later we are going to face a serious legal issue, namely – how should the law treat such autonomous AI entities? Should they be regarded merely as things or products or as natural and legal persons with their rights and obligations?

In recent years these questions have been raised and discussed in European and American scientific literature by such legal scholars and practitioners as A. Bertolini, J. Delcker, J.J. Bryson, M.E. Diamantis, T.D. Grant, S. Chesterman, R.A. Maydanyk, N.I. Maydanyk, M.M. Velykanova, R. Free, M. Iglesias, S. Shamuilia, and A. Anderberg. Although the academic debate over these issues has been going on for a while, it is still relevant as no practical solutions to these problems seem to have been found. Moreover, the quest for such solutions seems to be particularly relevant for Ukraine, where these issues have not been properly examined by the legal community. Therefore, the purpose of this study is to examine the possibility of establishing legal personhood for AI systems. Even though this study may seem largely theoretical at first sight, it is supposed to provide a scientific foundation for addressing practical tasks concerning the redress for damages caused by AI robots, the conclusion and performance of smart contracts with the participation of autonomous AI systems as well as intellectual property rights for assets created by such systems.

The methodology of this study includes such methods of scientific research as comprehensive system analysis, comparative legal analysis and dialectic method. The method of comprehensive system analysis makes it possible to examine AI systems as complex entities and determine the legal consequences of these systems' operation. Comparative legal analysis allows to compare different legal provisions and legal concepts applying to these systems. The dialectic method is used to assess the progress of AI systems as well as the development of legal provisions and concepts applying to them.

2. Legal personhood and electronic persons

The concept of legal personhood (legal personality) is pivotal for all legal systems. It basically comes down to questions like – what entities can have rights and duties or what entities can take part in legal relations? Nowadays the ascription of legal personhood is based on the assumptions that all legal relations take place among natural person and artificial legal person, such as corporations (Avila Negri, 2021, p. 2). Even though legal persons are not human entities themselves they can be regarded as aggregations of humans. After all, corporations do not make any decisions or engage in any activities themselves. Instead, there are always some people acting on behalf of corporations. Hence, in one way or another the modern concept of legal personhood (legal personality) hinges on the human origin of rights and duties. To a large extent this is due to the fact that until recently a human being has been the only entity capable of logical reasoning and making decisions, which is absolutely essential for exercising rights and performing duties.

However, due to the advances in AI technologies the situation is about to change. Although we still live in times of the so-called "weak or narrow AI", when artificial intelligence systems are capable of performing only certain tasks, like playing chess, recognizing speech or translating texts, sooner or later we are going to live side by side with "strong or general AI", capable of learning and performing various intellectual tasks at the level equal to human. Ultimately, AI will surpass human intelligence in all possible aspects – from creativity to problem-solving and general wisdom, reaching the level of artificial superintelligence (Padaliya, 2019). In other words, pretty soon we are going to live alongside entities with the level of intelligence comparable to ours or even higher than our own. It basically means that human monopoly on intelligence will be lost to smart machines.

In such circumstances, unsurprisingly, legislators and legal scholars are starting to realize that humans are no longer the only intelligent creatures capable of acting and making decisions on their own. As a result, in recent years there have been attempts to assess the implications of AI for civil law. In 2017 a very significant step in this area was taken by the European Parliament in its Resolution with recommendations to the Commission on Civil Law Rules on Robotics, suggesting to consider the implications of all possible legal solutions regarding smart robots, including the possibility of creating a specific legal status for robots in the long

run, so that at least the most sophisticated autonomous robots could be established as having the status of electronic persons responsible for making good any damage they may cause, and possibly applying electronic personality to cases where robots make autonomous decisions or otherwise interact with third parties independently (European Parliament, 2017). This report stirred a lively debate on whether or not it would be worthwhile to establish the legal personhood (legal personality) of smart robots powered by AI.

The standpoint of those in favor of granting autonomous robots legal personhood is well exemplified by the statement of a Milan-based corporate lawyer Stefania Lucchetti, who said: "In a scenario where an algorithm can take autonomous decision, then who should be responsible for these decisions?" According to her the current model, in which either the manufacturer, the owner, or both are liable, would become defunct in an age of fully autonomous robots, and the EU should give robots some sort of legal personality "like companies have" (Delcker, 2018).

An important practical reason for giving AI systems some sort of legal personhood is the need to ensure proper compensation of damage caused by such systems. The thing is that modern AI systems are very complex. Their creation and operation involve a lot of participants such as software developers, manufactures, owners, operators etc., making it quite difficult for a victim to sue the right person for damages. As a result, it becomes increasingly difficult for a victim to get compensation. So, among many reasons for granting autonomous robots legal personhood the need to identify a single entry point for litigation, as it is described in Artificial Intelligence and Civil Liability Report (Bertolini, 2020), appears to be noteworthy. In light of this practical necessity the idea of smart robots becoming electronic persons does not seem improbable.

At the same time, there are many opponents of turning robots into electronic persons. In a letter to the European Commission, 156 artificial intelligence experts hailing from 14 European countries, including computer scientists, law professors and CEOs, warn that granting robots legal personhood would be "inappropriate" from a "legal and ethical perspective". According to Nathalie Navejans, a French law professor, who was the driving force behind the letter: "<...> by adopting legal personhood, we are going to erase the responsibility of manufacturers" (Delcker, 2018). This view is shared by other legal scholars. In particular, J.J. Bryson, M.E. Diamantis, T.D. Grant claim that although it is completely possible to declare "a machine a legal person <...>, an electronic person by contrast might prove to be a legal black hole, an entity that absorbs a human actor's legal responsibilities and from which no glint of accountability is seen". Unfortunately, there is no question that such a readily-manufacturable legal lacuna would be exploited as a mechanism for avoiding and displacing legal liabilities and obligations (Bryson, Diamantis, Grant, 2017, p. 289).

Besides, the opposition to the idea of granting AI systems legal personality has a moral argument. The attribution of legal personhood (legal personality) to humans and human communities (corporations, organizations) has a lot to do with the fact that law in general has a moral foundation and therefore rights and duties are the reflection of moral values. Since human being is the only entity capable of distinguishing between good and evil, right and wrong, justice and injustice it is natural that the capacity to have rights and duties and take part in legal relations (legal personhood) is attributed to individual humans and human communities (corporations, organizations etc.).

However, we cannot rule out the possibility that in the future thanks to machine learning AI systems may become capable of perceiving moral values. Even more so, what if autonomous robots learn to stick to moral values better than humans do? After all, unlike human beings, robots are not prone to corruption and other forms of moral degradation. Thus, despite the fact that today this moral criterion is still quite valid it is not clear if it will stand the test of time.

As we can see there are arguments both for and against granting legal personhood to robots. However, for the time being it seems that it is too early to recognize robots as electronic persons, although there are no technical obstacles for that. After all, a legal person is also an artificial legal character. Nonetheless, over time when AI reaches the level of strong (general) intelligence the need for recognizing autonomous robots as electronic persons (granting them legal personhood) may become apparent. In this regard it is also possible to agree with O.V. Kokhanovska, who says that, "it is necessary to "make haste slowly", bearing in mind that the legal consolidation of processes occurring in society in the development of information society should be based on well-being of people as the highest virtue" (Kokhanovska, 2020, p. 159). Thus, in any case the recognition of electronic persons must ultimately depend on the interests of people.

Another important question regarding the legal personhood (legal personality) of AI systems is what kind of rights and duties should

be given to such electronic persons? In this respect the closest analogy that can be used is that of a legal person. As S. Chesterman points out, in the case of corporations, personality typically means the capacity to sue and be sued, to enter into contracts, to incur debt, to own property, and to be convicted of crimes. On the rights side, the extent to which corporations enjoy constitutional protections comparable to natural persons is the subject of ongoing debate (Chesterman, 2020, p. 825). Overall, this approach appears to be acceptable to autonomous AI systems subject to further deliberations on the redress for damages, contractual relations and intellectual property rights.

3. Redress for the damage caused by AI

Among numerous concerns arising in connection with the emergence of AI the issue of redressing the damage caused by AI systems appears to be a very significant one. As it has already been mentioned the main problem in this regard is to identify a person liable for the damage caused by an autonomous AI system.

At first sight everything seems pretty clear from a legal perspective. Since there are no specific rules on redressing the damage caused by AI systems it may seem appropriate to apply tort liability rules on the compensation of damage caused by a source of increased danger. In accordance with article 1187 of the Civil Code of Ukraine damage caused by a source of increased danger shall be redressed by a person who on a relevant legal basis (ownership, contract, lease, etc.) is in possession of a vehicle, mechanism, other object, the use, storage or maintenance of which creates increased danger. Therefore, *prima facie* damage caused by an AI system has to be redressed by the operator of such a system.

However, as R.A. Maydanyk, N.I. Maydanyk and M.M. Velykanova rightly point out, when it comes to compensation for damage caused by a source of increased danger, such damage occurs in the case of using a certain vehicle, mechanism, equipment, which, although they can get out of human control, however, cannot make autonomous decisions. A distinctive feature of AI is its ability to make decisions unassisted. Therefore, this refers not only to the lack of submission to a person's control, but also to the unpredictability of its actions and causing damage (Maydanyk, Maydanyk, Velykanova, 2021, p. 156). In light of this, the application of tort liability rules on the compensation of damage caused by a source of increased danger to the damage caused by AI systems does not seem quite justified.

So, what if the general rules of tort liability are applied to the damage caused by an autonomous AI system? As it stems from article 1166 of the Civil Code of Ukraine, it has to be proven that the damage is a result of a person's fault in order for that person to be held liable for the damage. So, it turns out that an autonomous robot's operator will only be liable for the damage caused by the robot if the damage is a result of the operator's fault. However, in most cases the damage will result from the decisions of an AI algorithm, rather than the decisions of the operator. In such a case it may be the fault of a software developer or a hardware manufacturer. So, the question remains open – who is going to be held liable for the damage?

It is clear that the current civil legislation on tort liability is not quite ready to deal with AI and it is clear why. The reason is that the current legislation was adopted on the presumption that only a human being is an intelligent creature capable of reasoning and making decisions. Naturally, this legislation was designed for intelligent human beings who were in control of machines without any signs of their own intelligence. In light of this it doesn't seem quite right to apply tort liability rules designed only for intelligent human beings to situations where intelligent things like autonomous robots are also involved.

Considering the inconsistency of the existing civil legislation on tort liability with the current trends in AI the European Parliament put forward a number of ideas on how to deal with tort liability issues involving autonomous robots powered by AI. In 2020 the European Parliament passed a resolution with recommendations to the Commission on a civil liability regime for artificial intelligence suggesting to differentiate civil liability of AI systems' operators depending on the degree of risk posed by such systems. According to this resolution there should be strict liability for the operators of high-risk AI-systems without the possibility to exonerate themselves from liability by arguing that they acted with due diligence or that the harm or damage was caused by an autonomous activity, device or process driven by their AI-system, whereas civil liability of other AI-systems' operators should be enforced depending on their fault (fault-based liability) (European Parliament, 2020). Clearly, the EU is trying to work out some specific rules on tort liability for the damage caused by AI systems using a risk-based approach.

Tort liability should not be regarded as the only way of providing compensation for the damage caused by AI systems. Another effective way of redressing the damage is insurance cover. That's why in its Resolution with recommendations to the Commission on Civil Law Rules on Robotics the European Parlia-

ment suggested that it might make sense to consider such legal solutions as establishing a compulsory insurance scheme whereby producers and owners of certain categories of robots would be required to take out insurance for the damage caused by their robots; establishing a compensation fund that would guarantee a compensation even if the damage caused by a robot was not covered by insurance; allowing the manufacturer, the programmer, the owner or the user to benefit from limited liability if they contribute to the compensation fund or if they jointly take out insurance to guarantee compensation where damage is caused by a robot (European Parliament, 2017).

Although these recommendations are coupled with the idea of granting the most sophisticated autonomous robots their own legal personality (creating a specific legal status of electronic persons), they may have a positive practical impact of their own, even without apply the concept of electronic persons. On the one hand, they may help settle the issues of compensation thanks to a compensation fund in cases where it is difficult of impossible to identify a natural or legal person liable for the damage caused by an autonomous robot. On the other hand, insurance and the benefit of limited liability lower economic risks for the manufacturers, software developers and operators of AI systems in cases of their machines' malfunctioning, thus providing incentives for further development and improvement of such smart systems.

4. Contracts and AI systems

AI facilitates workflow in many professional areas and legal area is not an exception. It is especially evident when it comes to dealing with contracts where AI is used in various contract management systems. According to Sean Heck artificial intelligence in contract management is designed to "enable contract professionals to focus on strategizing and making informed decisions with an enhanced understanding of contract risk and the positive and negative relationships between data, contract language, and contract processes... It is designed to streamline data insertion, data extraction, data protection measures, and risk identification tasks with automated data entry and risk assessment mapping. AI-powered contract management software transforms static contract documents and contract data into dynamic building blocks that contract management professionals need for improved contract oversight, proactive opportunity identification, and risk mitigation" (Heck, 2021). These applications of AI in contract management do not replace human professionals when it comes to negotiating, concluding and performing contracts. They merely facilitate contract workflow.

However, sooner or later we shall face a situation when autonomous AI systems will be able to negotiate, work out contractual terms, conclude and perform contracts with very little or without human intervention. In such a case it is important to ensure that the legal system is ready to adjust to a new reality involving autonomous robots as participants of contractual relations.

Modern contract law has been built on the idea that only human beings or their communities (corporations or other legal persons) can take part in contractual relations. That's why basic provisions of contract law reflect human categories such as the will of a contracting party and the expression of will. In particular, according to article 203 of the Civil Code of Ukraine the expression of will has to be consistent with the will itself in order for the contract or any other legal act to be valid. As a legal category will has a human origin and human nature. It cannot be attributed to a machine, even though a machine may be fully autonomous and have powerful AI. It virtually means that the existing rules of contract law will be an obstacle for the conclusion of valid contracts by autonomous AI systems. It also means that when AI systems become fully capable of entering into contracts on their own the rules of contract law will have to be modified in order to adjust the existing legal framework to a new reality.

Although it is not yet clear what those rules will be like, it is possible to assume that they may be based on the concept of electronic person. In that case it would make sense to establish certain restrictions of electronic persons' contractual rights. Such restrictions could help protect the interests of natural persons as intellectually weaker parties to contracts. Restrictions of electronic persons' rights might also be necessary in strategic industries and in the field of national security and defense. For instance, it might be sensible to forbid electronic persons to buy and sell farm land, drugs, nuclear fuel and other dangerous substances, firearms and other weapons as well as industrial facilities designed for their production. Ownership of such assets by electronic persons should also be banned.

5. Intellectual property created by AI systems

Until recently creativity has been a solely human attribute. However, the development AI shows that smart robots can be creative too. In recent years we have seen numerous examples of AI systems creating works of art such as paintings, poems, music etc. Moreover, these systems are even used for inventing new drugs.

The creativity of AI systems poses serious questions in the domain of law, first of all in the area of intellectual property law. The most important and the most difficult of these questions is how should the creations and inventions generated by AI be protected by the law of intellectual property?

One of the main pillars of the existing intellectual property law is the presumption that only a human being can be creative and therefore only a human being can be an author or an inventor. Thus, all intellectual property rights stem from the creative works and inventions produced by human authors/inventors. In Ukraine, for instance, the requirements of human authorship/inventorship are enshrined in the Law of Ukraine "On copyright and related rights" and the Law of Ukraine "On the protection of rights to inventions and utility models". The same requirements can be found in the legislation of many other countries. In light of this creations and inventions generated by autonomous AI systems cannot be protected by intellectual property law. As Dr. Rachel Free points out, "the current IP laws and systems do not offer an answer to a situation where IP rights cannot protect assets that are a product of autonomous AI. It is also not sensible or practical to continue with an approach where no one owns the potential intangible assets created. The situation is generally the same in many countries around the world" (Free, 2018).

In the copyright realm, certain countries, such as the UK, South Africa, Hong Kong, India, Ireland, and New Zealand, have set up laws that can provide protection for computer-generated works. This protection would be granted to the person who set up the arrangements necessary for the creation of the work (Iglesias, Shamuilia, Anderberg, 2021, p. 13). So, the main idea of this approach is to identify a person behind a computer (in our case – an artificial intelligence system) who will ultimately benefit from the legal protection of the assets created by AI. Although, this approach appears to be pretty simple, it nevertheless raises some questions. In particular, there is an issue of machine learning. An AI system can produce intellectual property assets if it has enough data to study and learn from. Different pieces of data or datasets may belong to different persons who may be even unaware that their data are used by a smart robot. So, the question arises whether it's fair that only the manufacturer or the owner of an AI system can benefit from the legal protection of assets created by such a system. What about the owners of data used for teaching an AI system? Why can't they benefit from the assets created by an AI system?

Another issue arising in connection with this approach is the issue of liability. When studying various datasets and using them for its own purposes an AI system may violate other persons' intellectual property rights. So, who is going to be responsible for such violations, taking into account the fact that these violations are the consequence of the decisions made by an autonomous system? Would it be fair to make a person, who set up the arrangements necessary for the creation of a computer-generated work, liable for such violations?

As an alternative there is an option of giving autonomous AI systems a legal status of electronic persons capable of having intellectual property rights. In this case the author or the inventor of intangible assets would be an autonomous AI system itself. This approach may turn out to be an effective solution, provided there is also an insurance cover for the damages resulting from the intellectual property rights violations of such an autonomous system as well as limited liability of those who created this system itself.

6. Conclusions

Summing up what has been said, it is possible to make a conclusion that the development of AI is going to bring about significant changes in many areas, including the domain of law. Such areas of law as intellectual property law, contract law and legislation on tort liability will have to undergo significant changes in order to address the challenges posed by the development of AI. One of the ways to adjust the existing legal landscape to a new reality is based on the idea of granting autonomous AI systems legal personhood and turning them into the so-called electronic persons. Although the concept of electronic person is still new and controversial it should not be discarded as irrelevant. In the future when autonomous smart robots reach the level of strong (general) AI, which is equal to human intelligence, this concept may serve as a basis for a major legal transformation. If the concept of electronic person is ever implemented it will be one of the most important changes in the history of law comparable to the introduction of legal persons. At the same time, if electronic persons eventually appear on the legal horizon their interaction with natural and legal persons has to have certain limitations in the interests of protecting natural persons, strategic industries, national security and defense. That's why the scope of their legal personhood will have to be limited and coupled with insurance cover as well as limited liability of those who created them.

References:

Avila Negri, S. (2021). Robot as Legal Person: Electronic Personhood in Robotics and Artificial Intelligence. *Frontiers in Robotics and AI*, no. 8, pp. 1–10 [in English].

Bertolini, A. (2020). Artificial Intelligence and Civil Liability. *European Parliament*. Retrieved from: https://www.europarl.europa.eu/RegData/etudes/STUD/2020/621926/IPOL_STU(2020)621926_EN.pdf [in English].

Bryson, J., Diamantis, M., Grant, T. (2017). Of, for, and by the people: the legal lacuna of synthetic Persons. *Artificial Intelligence and Law*, vol. 25, iss. 3, pp. 1–19 [in English].

Chesterman, S. (2020). Artificial Intelligence and the Limits of Legal Personality. *International & Comparative Law Quarterly*, vol. 69, iss. 4, pp. 819–844. Retrieved from: https://doi.org/10.1017/S0020589320000366 [in English].

Delcker, J. (2018). Europe divided over robot "personhood". *Politico*. Retrieved from: https://www.politico.eu/article/europe-divided-over-robot-ai-artificial-intelligence-personhood/ [in English].

European Parliament (2017). European Parliament resolution of 16 February 2017 with recommendations to the Commission on Civil Law Rules on Robotics. *EUR-lex*. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52017IP0051 [in English].

European Parliament (2020). European Parliament resolution of 20 October 2020 with recommendations to the Commission on a civil liability regime for artificial intelligence. *EUR-lex*. Retrieved from: https://www.europarl.europa.eu/doceo/document/TA-9-2020-0276_EN.html [in English].

Free, R. (2018). Artificial Intelligence – Question of Ownership. *CMS.law*. Retrieved from: https://cms.law/en/int/publication/artificial-intelligence-questions-of-ownership [in English].

Heck, S. (2021). What is AI-Based Contract Management? *CobbleStone Software*. Retrieved from: https://www.cobblestonesoftware.com/blog/what-is-ai-based-contract-management [in English].

Iglesias, M., Shamuilia, S., Anderberg, A. (2021). Intellectual Property and Artificial Intelligence: A literature review. *Publications Office of the European Union*. Retrieved from: https://op.europa.eu/en/publication-detail/-/publication/912bc3f8-7d67-11eb-9ac9-01aa75ed71a1 [in English].

Kokhanovska, O.V. (2020). Osoblyvosti onovlennia tsyvilnoho zakonodavstva Ukrainy u sferi prava na informatsiiu v umovakh rozvytku hlobalnoho virtualnoho seredovyshcha [Features of updating the civil legislation of Ukraine in the field of the right to information in the conditions of development of the global virtual environment]. *Visnyk Natsionalnoi akademii pravovykh nauk Ukrainy – Journal of the National Academy of Legal Sciences of Ukraine*, vol. 27, no. 4, pp. 145–160 [in Ukrainian].

Maydanyk, R.A., Maydanyk, N.I., Velykanova, M.M. (2021). Vidpovidalnist za shkodu, zavdanu vykorystanniam tekhnolohii shtuchnoho intelektu [Liability for damage caused using artificial intelligence technologies]. *Visnyk Natsionalnoi akademii pravovykh nauk Ukrainy – Journal of the National Academy of Legal Sciences of Ukraine*, vol. 28, no. 2, pp. 150–159 [in Ukrainian].

Padaliya, V. (2019). Decoding Artificial Intelligence. *Medium*. Retrieved from: https://medium.com/decoding-artificial-intelligence/decoding-artificial-intelligence-8ed154f49c7 [in English].

Юрій Бурило,
доктор юридичних наук, доцент, провідний науковий співробітник відділу міжнародного приватного права та правових проблем євроінтеграції, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 01042, burylojunior@gmail.com
ORCID: *orcid.org/0000-0001-8743-7739*

ПРАВОСУБ'ЄКТНІСТЬ СИСТЕМ ШТУЧНОГО ІНТЕЛЕКТУ: БУТИ ЧИ НЕ БУТИ?

Анотація. ***Метою статті*** є дослідження можливості визнання правосуб'єктності систем штучного інтелекту (роботів).

Методи дослідження. Методологія роботи включає такі методи наукового дослідження, як системний аналіз, порівняльно-правовий аналіз та діалектичний метод. Метод системного аналізу дає змогу розглянути системи штучного інтелекту як комплексні сутності та визначити правові наслідки їх функціонування. Порівняльно-правовий аналіз дає можливість порівняти різні правові положення та правові концепції, що застосовуються до зазначених систем. Діалектичний метод використовується для оцінки розвитку систем штучного інтелекту, а також розроблення правових положень і концепцій, що застосовуються до них.

Результати. Значною мірою концепція правосуб'єктності базується на ідеї, що люди є єдиними розумними істотами, здатними мислити та приймати рішення. Однак завдяки розвитку штучного інтелекту автономні роботи рано чи пізно стануть навіть розумнішими за людей. Ця тенденція породжує концепцію електронних осіб. Поки що визнавати роботів електронними особами зарано.

Однак із часом, коли штучний інтелект досягне рівня сильного (загального) інтелекту, може стати очевидною необхідність визнання автономних роботів електронними особами. Хоча концепція електронних осіб є суперечливою, вона може надати певні правові рішення щодо відшкодування шкоди, заподіяної автономними роботами, укладання та виконання контрактів, а також правового захисту інтелектуальної власності, створеної системами штучного інтелекту. Проте мають бути обмеження прав електронних осіб у стратегічних галузях та у сфері національної безпеки й оборони. Можливо, було би розумно заборонити електронним особам купувати та продавати сільськогосподарські землі, наркотики, ядерне паливо та інші небезпечні речовини, вогнепальну та іншу зброю, а також промислові об'єкти, призначені для їх виробництва.

Висновки. Такі галузі права, як право інтелектуальної власності, договірне право, а також законодавство про деліктну відповідальність можуть зазнати суттєвих змін через необхідність вирішити виклики, пов'язані з розвитком штучного інтелекту. Одним із шляхів адаптації наявного правового поля до нової реальності є ідея надання автономним системам штучного інтелекту правосуб'єктності та перетворення їх на електронних осіб. У майбутньому, коли автономні розумні роботи досягнуть рівня штучного загального інтелекту, ця концепція може стати основою для масштабної правової трансформації, подібної до появи юридичних осіб. Водночас права електронних осіб мають бути обмежені в інтересах захисту фізичних осіб, стратегічних галузей, національної безпеки та оборони. Крім того, обмеженість їхньої правосуб'єктності має бути поєднана зі страховим покриттям, а також обмеженою відповідальністю тих, хто їх створив.

Ключові слова: штучний інтелект, правосуб'єктність, електронна особа, відшкодування шкоди, інтелектуальна власність.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 349.444
DOI https://doi.org/10.32849/2663-5313/2022.2.03

Mykola Haliantych,
Doctor of Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Head of the Department of Private Law Problems, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, halyantych@gmail.com
ORCID: *orcid.org/0000-0003-0346-5308*
Scopus ID: *57217736289*

Volodymyr Kochyn,
Candidate of Science of Law (Ph.D.), Senior Researcher, Leading Researcher at the Department of Private Law Problems, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, volodymyrkochyn@gmail.com
ORCID: *orcid.org/0000-0003-2468-0808*
Scopus ID: *57217825458*

Haliantych, Mykola, Kochyn, Volodymyr (2022). Principles and areas of implementation of state housing policy in Ukraine. *Entrepreneurship, Economy and Law*, 2, 26–33, doi https://doi.org/10.32849/2663-5313/2022.2.03

PRINCIPLES AND AREAS OF IMPLEMENTATION OF STATE HOUSING POLICY IN UKRAINE

Abstract. The ***purpose of the article*** is to investigate the issues of state housing policy, to establish its legal nature, to determine the characteristics and to provide suggestions aimed at updating the legislation in the housing sphere.

Methodology. The dominant methodological approach in the study is a comparative legal approach, which became the basis of understanding the content of such basic legal categories as "state housing policy", "housing fund", "housing" and made it possible to identify their specific features and differences. To understand and analyze the content of the norms of existing legislative acts regulating the procedure of providing housing to the population, we used the normative-dogmatic method, and the method of system-structural analysis allowed to find out the place of state housing policy in the system of state policy in general.

Results. It is determined that the Constitution of Ukraine requires the state to create a private-legal basis for the implementation of housing rights, as well as public legal guarantees of protection of socially disadvantaged citizens. The state housing policy is designed to ensure the realization of the rights of an individual to housing. It has been established that inconsistent state housing policy entails the need to apply the norms of civil law, social security law, administrative law in law enforcement activities in relation to housing, rather than directly the norms of the Housing Code of Ukraine. The process of updating the housing legislation of Ukraine requires a scientific justification of the conceptual foundations for the implementation of housing policy in Ukraine, where a number of issues must be defined regarding the concept of housing, housing relationships, their essence and place in the system of legal relations, the ratio of housing legislation with the civil, the status of the participants of housing legal relations, requires determination of compliance with the current legislation of Ukraine the needs of society.

Conclusions. Housing legislation needs to be updated on the basis of established international norms and standards. To do this, it is necessary to take the following measures: 1) to provide socially vulnerable segments of the population with social housing, in particular on the rights of commercial rental (rental housing); 2) create conditions for increasing the level of housing availability for these categories of the population depending on property status, place of residence, social characteristics; 3) to introduce a competitive environment in the housing market; 4) ensure state regulation in monopoly markets for utilities; 5) create financial mechanisms for the purchase of housing for certain groups of the population; 6) create an effective model of housing management. The Housing Code of Ukraine should focus on general civil law provisions, taking into account the features, in particular: obligations arising in the process of managing the housing stock, housing cooperatives, associations of co-owners of an apartment building; features of civil liability of owners and users of apartments (houses), etc. The rights and obligations of the owner of the dwelling, the rights and obligations of the persons living together with the owner in

the dwelling belonging to him, in relation to housing and communal services, must be specially defined. In order to avoid contradictions in the legal regulation in the field of housing relations, it is necessary to repeal the regulations adopted before the adoption of the Constitution of Ukraine.

Key words: housing policy, housing, housing rights, Housing Code of Ukraine, update of housing legislation, social housing.

1. Introduction

The current Housing Code of Ukraine (hereinafter – HC) as a systematized normative act, as well as the legislation adopted on its development, does not meet the changes that have occurred in society during the full-scale war. The housing legislation in Ukraine is characterized by complete legal uncertainty, expressed in fragmentation of legal regulation, the presence of a large number of reference norms and norms that have lost their regulatory influence.

To regulate legal relations in the sphere of housing, the norms of different branches of law are applied: a) civil law establishes the institutions of contractual relations of commercial rent, other transactions with housing, ownership and other proprietary rights to housing; b) social security law – the institution of social housing; c) administrative law – the institutions of registration of residence, housing construction and urban development. The housing legislation of Ukraine should provide a transition from the previous system of distribution of the state housing fund to a system based on the provision of conditions for the restoration of the housing fund.

It should be stated that the system of normative acts, especially those adopted before 1990, is not only obsolete, but also does not meet the changes that have occurred in the socio-economic development of the state, so it requires immediate harmonization with normative acts adopted after the completion of mass privatization of housing in order to bring it to the modern realities of public life.

At different times a lot of attention was paid to the development of housing legislation, in particular by such scientists as I. Biriukov, V. Hopanchuk, O. Dzera, Yu. Zaika, I. Kucherenko, who mostly relied on the existing normative base of the Soviet period. The works of Ye. Michurin, M. Sibilov, S. Slipchenko, O. Sobolev, Ye. Kharytonov are directed to the modern direction of development of civil-legal regulation of housing relations.

The **purpose of the article** is to investigate the issues of state housing policy, to establish its legal nature, to determine the characteristics and to provide suggestions aimed at updating the legislation in the housing sphere.

2. The constitutional foundations of state housing policy

The constitutional formula in Article 47 of the Constitution of Ukraine establishes the right of every person to housing, which is ensured by the state by creating conditions under which every citizen will be able to build housing, purchase it as property or take it on lease. That is, it is about the private-legal bases of realization of this right. At the same time, the above norm also enshrines the possibility of citizens in need of social protection being provided by the state and local self-government bodies free of charge or for a fee available to them in accordance with the law. Consequently, another direction is the formation of norms of the law of social security, in particular establishing the grounds for determining persons in need of housing, the procedure for providing housing by the state (state housing fund) and local authorities (communal housing fund), as well as the conditions of such provision.

Separately, this norm of the Constitution of Ukraine enshrines the guarantee of the impossibility of forced deprivation of housing other than on the basis of the law by a court decision. This prescription should be scientifically reconsidered with respect to the current regulation of the procedure of eviction from housing without providing other living quarters.

Thus, the Constitutional Court of Ukraine emphasized in its decision that there has to be a fair balance between the guarantee of protection of the right of private property, including against forced alienation without condition of preliminary and full compensation of its value (Part 5 of Article 41 of the Constitution of Ukraine) and the constitutional right of persons living in hostels to an adequate standard of living for themselves and their families, which includes sufficient food, clothing and housing (Article 48 of the Constitution of Ukraine). Such a fair balance derives from the requirements of Article 47 of the Constitution of Ukraine. The legislator is obliged to take into account that the person and the conditions of his life are the purpose and the heart of the constitutional order of Ukraine and are recognized as the highest value (Preamble, part one, article 3 of the Constitution of Ukraine). It follows from the above that the legislator cannot resort to such legislative regulation, which would allow the forcible deprivation of housing exclusively through the change of the owner of the hostel, which could put individuals and members of their families in an extremely difficult social situation, incompatible with their human dignity – one of the basic values

of the constitutional system of Ukraine (Paragraph 8 of the reasoning of the Constitutional Court of Ukraine (Second Senate) of 20 October 2021 № 7-p(II)/2021).

Consequently, the Constitution of Ukraine requires the state to create a private-law basis for the implementation of housing rights, as well as public-law guarantees for the protection of socially disadvantaged citizens. This understanding is based on the fundamental principle of state responsibility to the individual (Article 3 of the Constitution of Ukraine), which consists mainly in the proper regulation of social relations in accordance with the existing socio-economic conditions.

The Constitutional Court of Ukraine has already drawn attention to the fact that the HC was adopted before the Constitution of Ukraine came into force, and therefore a number of its provisions negate the essence of the constitutional right of every person to housing, do not meet the other constitutional foundations of social and economic development of Ukrainian society and the state, exclude the possibility of free acquisition by everyone of the right of private ownership of residential property in accordance with the law; provisions of the preamble of the Code contradict parts one, two of article 15 of the Constitution of Ukraine, according to which public life in Ukraine is based on the principles of political, economic and ideological diversity, no ideology can be recognized by the state as obligatory, so they should be brought in line with the requirements of the Basic Law of Ukraine (Paragraph 3 of Clause 3 of the motivation part of the decision of 20 December 2019 № 12-p/2019).

3. The concept of state housing policy

The state housing policy is designed to ensure the realization of the rights of every physical person to housing. The tasks of housing legislation are to regulate housing relations in order to ensure the guaranteed right of citizens to housing in conditions of its proper use.

The main principles of housing policy include: equality of rights of people in choosing the method of realization of the constitutional right to housing; accessibility of housing; forecasting of directions, measures and ways of solving housing needs; stages of addressing housing needs in accordance with state and regional programs (Kucherenko, Kucherenko, Zapatrina, 2012, p. 290).

Inconsistent state housing policy entails the need in law enforcement activities to apply the norms of civil law, social security law, administrative law, but not directly the norms of the Housing Code to legal relations in respect of housing. Experts suggest that as a consequence the code will cease to exist, and will be replaced by the Civil Code (the institutions of the contract of commercial rent, other transactions with housing, ownership of housing), social security acts (the institution of social housing) and administrative law (the institutions of management and conservation of housing).

It is believed that in order to bring clarity, it is important to understand that the development of civil law is not to regulate the entire range of social relations in the sphere of housing. It is the new HC that will take into account peculiarities of legal regulation in the housing sphere and determine, in particular: obligations arising during construction of housing, grounds for the transfer of habitable residential apartments to non-residential, legal regime of utilities and societies of co-owners of an apartment building, peculiarities of arising of ownership rights to housing; peculiarities of civil liability of owners and users of apartments (houses), management of housing stock, legal regime of social housing stock, etc.

The current stage of state housing policy is characterized by haphazard elimination of contradictions in the housing legislation, adoption of new laws, changes and additions to the current legislation of Ukraine, without a fundamental change in legislation.

Modern studies emphasize that the need for housing is basic. Societies declare the right to housing and guarantee access to it through the instruments of state housing policy. The reason for the difficulties in ensuring the right to housing is the conflict between housing as a "roof over one's head" and as an economic asset. The field of housing is also political, with various interest groups defending their vision of what "housing" is, what "housing problems" are, and how to solve them (Fedoriv, Lomonosova, 2019, pp. 8, 18).

We should agree with O. Yuldashev, who notes that "the main problems of public policy that took place in the past and are observed today, first, the lack of theoretical, ideological principles, theoretical and philosophical foundations, strategic guidelines for the formation of public policy – development and adoption of state policy decisions, and, secondly, the lack of development of theoretical framework for the practical implementation of public policy" (Yuldashev, 2005, p. 9). Currently, there must be a reform of housing legislation in order to create equal conditions for the human right to freely choose how to meet housing needs, the formation of civilized market relations, which depends on the stability of Ukrainian society and the future of Ukraine.

Decree of the Verkhovna Rada of Ukraine from December 24, 1999 approved the con-

cept of sustainable development of settlements and proposed to consider it the basis for the development of regulations, programs and projects to regulate the planning and development of settlements.

In addition to the approved normative acts the following was adopted: Decree of the Cabinet of Ministers of Ukraine from December 31, 2004 № 994-p; The order of the Cabinet of Ministers of Ukraine "On approval of the Concept of the State target socio-economic program of construction (purchase) of affordable housing in 2009–2016 years" of November 5, 2008 № 1406-p; Presidential Decree "On measures for the construction of affordable housing in Ukraine and improve the provision of housing for citizens" of November 8, 2007 № 1077/2007; as well as the Resolution of the Verkhovna Rada of Ukraine "On urgent measures to ensure the realization of the right of citizens to housing" of September 22, 2021 № 1766-IX. However, none of them has been finally implemented.

The Law of Ukraine "On Prevention of the Impact of the Global Financial Crisis on the Development of the Construction Industry and Housing" enshrined many important provisions for the further development of affordable housing are built and under construction with state support residential buildings (complexes) and apartments. Thus, in article 4 of this law the state support of affordable housing consists of the payment by the state of 30 percent of the cost of construction (purchase) of affordable housing and/or providing a preferential mortgage loan.

State support in the amount of 50 percent of the cost of construction (purchase) of affordable housing and/or preferential mortgage loan is available to persons covered by Article 10 of the Law of Ukraine "On Status of War Veterans, Guarantees of their social protection", as well as internally displaced persons, which are covered by the Law of Ukraine "On ensuring the rights and freedoms of internally displaced persons".

The existing model of housing policy, the basis of which is the Program of construction (purchase) of affordable housing and the mechanism of cheapening the cost of mortgage loans at the expense of the state, is economically and socially inefficient, since it is focused on providing state assistance in solving housing problems of families with relatively high incomes and does not meet the established European criteria of social justice. Such a narrow social orientation narrows the potential range of citizens who can use state assistance in solving their housing problems, does not allow the state to obtain the necessary economic and social effect from the implementation of the current model of state housing policy. The strategic goal of state housing policy should be to ensure that housing is affordable not only to a narrow stratum of families with high incomes, but also to families with average incomes (Hnativ, 2016).

All of the above concepts are practically non-normative in nature, defining the direction of state policy, the development of the sphere of personal belonging. To them should be added such sources as: Decree of the Cabinet of Ministers of Ukraine "On improvement of ways of youth housing construction" of October 28, 1996 № 1300; The main directions of the provision of housing for 1999–2005, approved by Presidential Decree of July 15, 1999 № 856; Forecast of development of state housing construction for 2000–2004 years, approved by the Cabinet of Ministers of Ukraine from August 27, 2000 № 1347, etc. These issues can only be resolved by law, as an act of supreme legal force binding.

The process of updating the housing legislation in Ukraine requires a scientific justification of the conceptual foundations for the implementation of housing policy in Ukraine, where a number of issues must be defined regarding the concept of housing, housing relationships, their essence and place in the system of legal relations, the ratio of housing legislation with the civil, the status of the participants of housing legal relations, requires determination of compliance with the current legislation of Ukraine the needs of society.

Recent changes that have occurred in the economic and social sphere indicate the need to reform not only housing legislation, but also approaches to the protection of human rights in housing. Modern authors proceed from the fact that human rights is a multidimensional phenomenon, and therefore requires a study of the conceptual foundations of the housing rights of an individual in Ukraine, regardless of whether he is the owner of a dwelling, tenant, uses housing on another civil law basis or is a family member of the relevant person vested with the right.

The transition to the market economy involves a change in the means of satisfying housing needs. If until now the main form of satisfaction of their needs was receiving free housing built at the expense of the state, now the rate is mainly on paid possession of the citizens (Komarovska-Churkina, 2003, p. 420). As rightly noted in the literature, no socio-economic formation has not solved the housing problem – complete satisfaction with housing persons in need of better housing conditions. This is one of the complex social problems, which covers many aspects of social life. However, the transformation of the right to hous-

ing from a declaration into an everyday reality, the implementation of constitutional norms, the realization of the housing rights of citizens, unfortunately, causes considerable difficulties. Some of these are mentioned in the Concept of State Housing Policy. At the same time, researchers draw attention to a number of economic processes that have a negative impact on the social environment (Hopanchuk, Zaika, 2003, p. 7).

Ye. Bersheda and Yu. Mantsevych proposed a model of housing policy in Ukraine according to the following: principles of a market economy; the state's obligations to citizens in terms of providing housing must be fulfilled, and not just declared; social obligations of the state, which do not correspond to market relations and cannot be provided from the budget, should be abandoned as undermining confidence in the state; obligations established by laws to provide citizens with housing from local budgets, which must be accompanied by appropriate transfers of funds from the state budget; peculiarities of providing housing by departmental characteristics, which should take place within the budgets of departments (through the temporary provision of service housing without the possibility of privatization); creation of conditions for the legalization and development of the affordable rental housing market (Bersheda, Mantsevych, 2016, p. 88).

4. Regulatory support for the reforms

The role of the state in the realization by citizens of the right to housing has changed and is not limited solely to the granting of housing. Now the legal regulation is aimed at the possibility of personal satisfaction by citizens of their housing needs on a private-legal basis. Yu. Sazonov and V. Yevsieieva note that the housing stock is distributed: private ownership – 80%, communal ownership – 11%, collective ownership – 6%, state ownership – 3%. That is, the regulatory framework, which is summarized by the housing stock, applies only to 3% of the objects of the housing stock (Sazonov, Yevtieieva, 2013).

At the same time, modern civil legislation determines a person's free choice of how to meet housing needs, the order of possession, use and disposal of housing. However, since the destruction of the state and communal housing fund, the state has been unable to create a full-fledged new legal system aimed at regulating relations in the housing sphere. Addressing the housing needs of citizens is one of the most acute socio-economic problems in Ukraine (Honcharenko, 2003, p. 3).

So far, no set of normative acts has been adopted that would define the procedure for providing housing to citizens of different categories, either for a fee, free of charge, or for an affordable fee, in various housing funds. At the same time there is no differentiation of the procedure for performing public duties, as well as the responsibility of the state or local self-government bodies for the state of provision of housing, differentiation of conditions and standards, which housing must meet. The focus of state housing policy should be manifested in the development of a single legal mechanism.

The Civil Code of Ukraine regulates the right of ownership and other proprietary rights of natural and legal persons to housing, the conditions of use of housing for hire, the free choice of ways to implement housing rights of citizens on the basis of civil law and the contract, its commercial use and other related liabilities, the subject of regulation which are relations, the object of which is housing. Since the adoption of the Law of Ukraine "On Social Housing" (January 12, 2006), the discussion about the autonomy of the existence of housing legislation (in particular, HC) has not stopped. Formation of the modern code requires defining peculiarities based on combination of private and public legal means of legal regulation in housing sphere.

The implementation of market relations in the housing sphere requires first of all the adoption of a new Housing Code. Drafts of the Housing Code were developed by the Cabinet of Ministers of Ukraine and even published for public discussion back in 2001. To overcome inconsistencies in housing legislation, the new Housing Code adopted by the Verkhovna Rada of Ukraine on July 7, 2005, which was vetoed by the President of Ukraine, proposed to develop a draft law that would fully meet the modern needs of society. The new draft LCD was adopted on November 5, 2010 only in the first reading. Separately, we should note the need for a scientific analysis of the Law of Ukraine "On the De-Sovietization of the Legislation of Ukraine", which amends the Housing Code of the USSR.

The focus of state housing policy should be expressed in: the creation of real mechanisms that provide an opportunity to obtain housing for low-income citizens of Ukraine who do not have housing or have an insufficient amount of housing; legislative guarantee of housing rights to citizens of Ukraine; provision and accessibility of housing; creation of conditions for housing to persons who can meet their housing needs on their own, and further mandatory formation of social purpose funds. In many developed market economies, the housing stock is municipal and private.

The question arises whether it is necessary to establish the legal regime of the state

housing fund, because the state should not act as the owner of housing, and should provide an opportunity for citizens to choose their own legal ways of solving their own housing needs.

In order to achieve the objectives of the LCD should not only regulate the property, but also personal non-property relations in the housing sector in the direction of determining the specifics, providing housing in the context of adaptation of Ukrainian legislation to the EU acquis to ensure an appropriate level of protection of human rights and legitimate interests. Subjects of housing relations must be able to establish subjective rights for themselves and assume duties with observance of restrictions established by the Law. Thus, the owner of housing is obliged to respect the moral foundations of society, not to harm the rights, freedoms and dignity of other citizens, the interests of society, not to violate the principles of good faith, fairness, reasonableness, while respecting the limits of the exercise of civil rights.

The trend of the modern period is a reduction of public influence on the private sphere of law. However, a significant part of the modern legislation leaves the norms of public character, determining the order of management of the housing fund, its maintenance, state control over the use and safety of the housing fund, regardless of its type and purpose. Therefore, housing legislation cannot be a mechanical set of norms, but is formed on the basis of legal principles of housing law, which predetermine not the form of existence, but mainly the content and determining the limits of the right, outside of which it is not of a legal nature.

The development of housing legislation involves the establishment of unified methodological approaches, principles and features of different in their legal nature and the purpose of the objects of the housing fund. It is necessary to develop a unified terminological toolkit by specifying the objects of the housing stock, the application of undefined legal concepts: the moral foundations of society, abuse of law, public policy, the principles of justice, good faith, reasonableness, etc. In rulemaking activities quite often concepts are applied without a clear distinction between them and without observing, when applying it in legislative acts, certain identical criteria determining the limits of the exercise of civil rights. This problem is complex and its solution practically concerns both the substantive private law and the procedural law, which determines the mechanism of its application.

5. Conclusions

The current housing legislation of Ukraine is not effective enough and does not allow to fully protect the rights of citizens for adequate housing needs. Existing legislative and other normative acts on a private law basis are in need of radical changes. It is necessary to update the housing legislation on the basis of established international norms and standards; to provide socially vulnerable segments of the population with social housing, including on the rights of commercial rent (rental housing); creation of conditions for increasing the level of accessibility of housing for categories of the population, depending on property status, place of residence, social characteristics; introduction of a competitive environment in the housing service market; ensuring state regulation on the monopoly markets of public services; creation of financial mechanisms for the purchase of housing for certain population groups; creation of an effective model of housing stock management.

The new Housing Code of Ukraine must take into account all peculiarities of legal regulation of housing legal relations and solve the problem of parallel application of different norms of current legislation. The code should concentrate general civil-law provisions with consideration of peculiarities, in particular, obligations arising during management of housing funds, housing and construction cooperatives, associations of co-owners of an apartment building, peculiarities of civil-law liability of owners and users of apartments (houses) and the like. The rights and obligations of the owner of the residential premises; the rights and obligations of the persons living together with the owner in the residential premises belonging to him for housing and communal services must be specifically defined separately.

In order to avoid contradictions in legal regulation in the sphere of housing legal relations it is necessary to abolish normative acts adopted for adoption of the Constitution of Ukraine. Housing legislation does not allow to ensure the right of citizens to housing. In the absence of a vision to solve the problem of the existence of queues for housing or compensation.

References:

Bersheda, Ye., Mantsevych, Yu. (2016). Zakonodavche zabezpechennia vyrishennia zhytlovoi problemy v Ukraini [Legislative support for solving the housing problem in Ukraine]. *Naukovi zapysky Instytutu zakonodavstva Verkhovnoi Rady Ukrainy – Scientific Notes of the Institute of Legislation of the Verkhovna Rada of Ukraine*, no. 5, pp. 82–88 [in Ukrainian].

Fedoriv, P., Lomonosova, N. (2019). *Derzhavna zhytlova polityka v Ukraini: suchasnyi stan ta perspektyvy reformuvannia [State housing policy in Ukraine: current status and prospects for reform].* Kyiv: CEDOS Analytical Center [in Ukrainian].

Hnativ, O. (2016). Zhytlova polityka v Ukraini: problemy ta shliakhy yikh podolannia [Housing policy in Ukraine: problems and ways to overcome them]. *Aktualni problemy pravoznavstva – Actual problems of jurisprudence*, iss. 3, pp. 55–57 [in Ukrainian].

Honcharenko, V. (2003). *Zhytlove budivnytstvo v Ukraini: zakonodavstvo ta sudova praktyka [Housing construction in Ukraine: legislation and case law].* Kyiv: Yurinkom Inter [in Ukrainian].

Hopanchuk, V., Zaika, Yu. (2003). *Zhytlove pravo Ukrainy: navchalnyi posibnyk [Housing law of Ukraine: teaching manual].* Kyiv: Istyna [in Ukrainian].

Komarovska-Churkina, Yu. (2003). Pryvatnopravove rehuliuvannia zabezpechennia prav hromadian na zhytlo v Ukraini [Private law regulation of ensuring the rights of citizens to housing in Ukraine]. *Zbirnyk materialiv naukovo-teoretychnoi konferentsii "Metodolohiia pryvatnoho prava" – Collection of materials of the scientific-theoretical conference "Methodology of Private Law"* (Kyiv, May 30, 2003) / ed. by O. Krupchan. Kyiv: Yurinkom Inter, pp. 419–421 [in Ukrainian].

Kucherenko, I., Kucherenko, O., Zapatrina, I. (2012). *Zhytlova polityka Ukrainy: suchasnist i maibutnie [Housing policy of Ukraine: present and future].* Kyiv: Publishing Center of the Union of Housing Co-Owners of Ukraine [in Ukrainian].

Sazonov, Yu., Yevtieieva, V. (2013). Zhytlova sfera v Ukraini: stan ta tendentsii rozvytku [Housing in Ukraine: status and development trends]. *Elektronnyi zhurnal "Efektyvna ekonomika" – Electronic Journal "Effective Economy"*, no. 6. Retrieved from: http://www.economy.nayka.com.ua/?op=1&z=2102 [in Ukrainian].

Yuldashev, O. (2005). *Problemy vdoskonalennia derzhavnoi rehuliatornoi polityky v Ukraini: monohrafiia [Problems of improving the state regulatory policy in Ukraine monograph].* Kyiv: IAPM [in Ukrainian].

Микола Галянтич,
доктор юридичних наук, професор, член-кореспондент Національної академії правових наук України, завідувач відділу проблем приватного права, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 01042, halyantych@gmail.com
ORCID: *orcid.org/0000-0003-0346-5308*
Scopus ID: *57217736289*

Володимир Кочин,
кандидат юридичних наук, старший дослідник, провідний науковий співробітник відділу проблем приватного права, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 01042, volodymyrkochyn@gmail.com
ORCID: *orcid.org/0000-0003-2468-0808*
Scopus ID: *57217825458*

ЗАСАДИ ТА НАПРЯМИ РЕАЛІЗАЦІЇ ДЕРЖАВНОЇ ЖИТЛОВОЇ ПОЛІТИКИ В УКРАЇНІ

Анотація. ***Метою статті*** є дослідження питань державної житлової політики, з'ясування її правової природи, визначення ознак та надання пропозицій, спрямованих на оновлення законодавства в житловій сфері.

Методи дослідження. Домінуючим у методології у проведеному дослідженні є порівняльно-правовий підхід, який став основою розуміння змісту таких базових правових категорій, як «державна житлова політика», «житловий фонд», «житло», і дав можливість виявити їхні специфічні особливості та відмінності. Для розуміння й аналізу змісту норм чинних актів законодавства, яке регламентує порядок забезпечення житлом населення, використано нормативно-догматичний метод, а метод системно-структурного аналізу дав змогу з'ясувати місце державної житлової політики в системі державної політики загалом.

Результати. Визначено, що Конституція України вимагає від держави створення приватно-правових засад реалізації житлових прав, а також публічно-правових гарантій захисту соціально незабезпечених громадян. Державна житлова політика призначена для забезпечення реалізації прав фізичної особи на житло. Встановлено, що непослідовна державна житлова політика зумовлює необхідність застосовувати у правозастосовній діяльності до правовідносин щодо житла норми цивільного права, права соціального забезпечення, адміністративного права, а не безпосередньо норми Житлового кодексу України. Процес оновлення вітчизняного житлового законодавства

потребує наукового обґрунтування концептуальних засад здійснення житлової політики в Україні, де має бути визначена низка питань щодо поняття житла, житлових відносин, їх сутності та місця в системі правовідносин, співвідношення житлового законодавства із цивільним, статусу учасників житлових правовідносин. Необхідне також визначення відповідності чинного законодавства України потребам суспільства.

Висновки. Оновлення житлового законодавства потрібно здійснювати на основі встановлених міжнародних норм і стандартів. Для цього необхідно здійснити такі заходи: 1) забезпечити соціально вразливі верстви населення житлом соціального призначення, зокрема на правах комерційного найму (оренди житла); 2) створити умови для підвищення рівня доступності житла для цих категорій населення залежно від майнового стану, місця проживання, соціальних ознак; 3) запровадити конкурентне середовище на ринку обслуговування житла; 4) забезпечити державне регулювання на монопольних ринках комунальних послуг; 5) створити фінансові механізми придбання житла для окремих груп населення; 6) створити ефективну модель управління житловим фондом. У Житловому кодексі України мають бути зосереджені загальні цивільно-правові положення з урахуванням особливостей, зокрема: зобов'язань, що виникають у процесі управління житловим фондом, житлово-будівельними кооперативами, товариствами співвласників багатоквартирного жилого будинку; особливості цивільно-правової відповідальності власників і користувачів квартир (будинків) тощо. Окремо мають бути спеціально визначені права та обов'язки власника жилого приміщення, права й обов'язки осіб, які проживають спільно з власником у належному йому жилому приміщенні, щодо житлово-комунальних послуг. З метою уникнення суперечностей правового регулювання у сфері житлових правовідносин варто скасувати нормативні акти, прийняті до ухвалення Конституції України.

Ключові слова: житлова політика, право на житло, житлові права, Житловий кодекс України, оновлення житлового законодавства, житло соціального призначення.

The article was submitted 11.03.2022
The article was revised 04.04.2022
The article was accepted 25.04.2022

UDC 346.3
DOI https://doi.org/10.32849/2663-5313/2022.2.04

Anatolii Ishchuk,
Junior Researcher, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, ishuk.anatoli@gmail.com
ORCID: *orcid.org/0000-0002-1439-654X*

Ishchuk, Anatolii (2022). Types of international electronic contracts and areas of their application. *Entrepreneurship, Economy and Law*, 2, 34–39, doi https://doi.org/10.32849/2663-5313/2022.2.04

TYPES OF INTERNATIONAL ELECTRONIC CONTRACTS AND AREAS OF THEIR APPLICATION

Abstract. The ***purpose*** of this scientific work is a general study of the main features of international electronic agreements and areas of their application.

Research methods. The work is performed using general and special methods of scientific knowledge.

Results. Some of the main features of international and electronic agreements are analysed, singled out and characterized. As a result, conclusions about the features of international electronic agreements are made. Some of the main areas of application of international electronic agreements with examples of their actual use are indicated.

Conclusions. It is established that although international electronic contracts are a variety of ordinary civil or commercial contracts, they have specific features, including a special procedure for concluding a contract, the need to correctly determine the time of the contract, special requirements for the law applicable to legal relations, features of the content of the agreement, the need for an arbitration clause, the special scope of international (or foreign economic) agreements, and the special composition of their subjects. It is also stated that given the relentless development of everything around us, contracts are gradually evolving into electronic form. This greatly simplifies the interaction between legal entities, "erases" the borders between countries in the commercial sphere, promotes the development of export-import operations in countries. Currently, the most popular areas of application of international electronic contracts are: trade (commercial) sphere, where the most common international agreements concluded in electronic form are contracts of sale, supply, lease; service industry; banking, where the most common contracts are contracts for banking services, for opening and maintaining a bank account, credit and loan agreements, mortgage agreements.

Key words: international agreement, electronic agreement, types of international electronic agreements.

1. Introduction

Taking into account the rapid development of e-commerce due to the relentless integration of digital technologies in the field of trade, commercial contracts concluded through information and telecommunications systems, i. e., so-called electronic contracts, are becoming increasingly popular. Electronic contracts have gained popularity due to their versatility, non-attachment to place and time, ease of conclusion and the fact that the conclusion of such contracts instead of paper form significantly expands the horizons of cooperation between contractors, even from different places the world.

The use of electronic contracts and information technology in general has led to a significant transformation of business models and the emergence of its virtually new type – e-business. Information technology is not only a way of exchanging information but also a way of interaction between producers and consumers for the further purchase and sale of goods or, for example, the provision of services.

Such contracts are gaining popularity in the field of foreign economic activity because concluding an electronic contract is much easier than concluding a standard paper one, especially when it comes to situations where the counterparties are hundreds or even thousands of kilometres apart. Speaking about the features of international electronic contracts, for a more detailed and specific study, we should consider the features of international contracts and the features of electronic contracts separately, because the combination of their traits actually forms the essence of "international electronic contracts". Thus, the purpose of this article is to conduct general study of the main features of interna-

tional electronic agreements and areas of their application.

2. Main features of the conclusion procedure for the electronic contracts

Ukrainian law interprets an electronic agreement as an agreement between two or more parties aimed at establishing, changing, or terminating civil rights and obligations and is executed in electronic form (Law of Ukraine "On e-commerce" of September 3, 2015 № 675-VIII (Verkhovna Rada of Ukraine, 2015)). Thus, the form of such transactions is electronic, and this leads to many features of such agreements and factors that should be taken into account when concluding them.

Among the features of electronic contracts are usually distinguished:

1. *Special procedure for concluding a contract*. Since electronic contracts are by their nature one of the types of civil contracts, the procedure for concluding them, like any other contract, takes place in several stages. Traditionally, in the science of civil law and, as a consequence, in the legislation of Ukraine, there are two stages of concluding a civil contract – offer and acceptance. Moreover, the place and moment of concluding the contract largely depend on how the offer was made and the acceptance was done, which are also peculiar features that characterize electronic contracts (Filatova, 2017, pp. 65–66).

However, the procedure for concluding an electronic contract still has some particularities compared to the standard procedure. In general, an offer is a proposal to enter into a contract. However, the offer to conclude a contract will not always be considered an offer, it depends primarily on the requirements set out in the legislation of a state. Usually, the offer to conclude a contract should contain everything that will contain the future contract, i. e., it should establish its main features, and, in addition, the offer should reflect the intention to conclude the contract. The term "offer" in the Civil Code of Ukraine (hereinafter – CCU) means a proposal to enter into an agreement that can be made by each party to the agreement (Verkhovna Rada of Ukraine, 2003). The legislator in the CCU immediately provided for the possibility of sending an offer via the Internet, noting in particular that the proposals to enter into a contract are, in particular, documents (information) posted on the Internet, which contain essential terms of the contract and the proposal to enter into a contract with everyone who applies, regardless of the presence in such documents (information) of an electronic signature (Verkhovna Rada of Ukraine, 2003).

At the same time, with the development of e-commerce, there is a problem with situations where the offer is addressed to an indefinite number of people, such as via the Internet. In this case, the legislator made a reservation in Article 641(2) of the CCU, that "advertising or other proposals addressed to an indefinite number of persons are an invitation to make proposals to conclude a contract, unless otherwise stated in advertising or other proposals" (Verkhovna Rada of Ukraine, 2003). However, even when concluding a contract on the Internet, there are exceptions to the offer. In particular, Article 699 of the CCU, which regulates the specifics of retail contracts, tells us that the offer of goods in advertising, catalogues, and other descriptions of goods addressed to an indefinite number of persons, is a public offer to enter into an agreement, if it contains all the essential terms of the contract. Also, the proposal to enter into a contract (offer) includes the display of the product, display of its samples or providing information about the product (descriptions, catalogues, photos, etc.) at the point of sale, regardless of price and other essential terms of the contract of sale, except when the seller has clearly determined that the product is not intended for sale (Verkhovna Rada of Ukraine, 2003).

As for the relevant legislation of Ukraine on electronic contracts, it should be noted that the Law of Ukraine "On e-commerce" has a slightly different interpretation and understanding of the offer and invitation to make an offer. Pursuant to Article 11(4) of this Law, an offer to enter into an electronic contract (offer) may be made by sending a commercial electronic message, posting an offer on the Internet or other information and communication systems, which actually means that the offer may be placed on any website and addressed to an indefinite circle of people (Verkhovna Rada of Ukraine, 2015).

Thus, in the process of concluding electronic contracts, in fact, there is another possible element – a proposal (or invitation) to make proposals to conclude a contract. This concept significantly affects the definition of another feature of electronic contracts, namely the time of conclusion of the contract.

As for the second component of the procedure for concluding a contract – acceptance, it should generally have two components. The first one – acceptance must be complete, i. e., consent must be given to all proposed terms of the offer. The second is that it must be unconditional, i. e., it must not change the offer and set new conditions. However, given the specifics of electronic contracts, along with the content of the acceptance, it is important to highlight the requirements for its form of expression. As modern technology allows you to sign contracts

with a few "clicks", there is a lot of controversy about the requirements to the form of acceptance. In addition, if the contract is concluded using information and telecommunication systems, it is important to make it clear to the contractor that the offer or acceptance was sent by a competent person, for example from an official e-mail address, official means of communication or using document exchange services such as "Medok" or "Vchasno".

2. *The moment of concluding the contract*. As for the moment of concluding the contract, it depends entirely on the successful exchange of messages containing the offer and acceptance. Everything is more or less clear with paper contracts – they are usually considered concluded from the moment of their physical signing by the parties, or from the date specified in the contract itself. But the main problem, that arises when determining the time of conclusion of an electronic contract – determining the time of the exchange of messages. This means determining the time of acceptance of the offer. With the development of new technologies, this issue is becoming important, because a timely offer may not be accepted by the recipient for reasons beyond his control, such as technical problems with the service to which such messages are transmitted. In such cases, as a general rule, the message is considered received, but it is not possible to physically read it. Different theories of determining the moment of the conclusion of the contract lead to disputes between scholars, and require detailed study (Filatova, 2017, pp. 73–74). Domestic legislation in the Article 16 of the Law of Ukraine "On e-commerce" indicates that unless otherwise provided by law or contract, electronic document (notice) is considered sent by the subject of electronic commerce at the time when such document (notice) is transmitted outside of the information system of the entity or the person authorized to send it. Unless otherwise provided by law or contract, an electronic document (notice) is considered received by the subject of electronic commerce at the time when such document (notice) is received by the information and communication system of the subject (Verkhovna Rada of Ukraine, 2015).

As one can see, according to the Ukrainian law, an electronic document (message) is considered to be received even when the document was sent to the recipient's email address, while it can be sent by the system to the "Spam" folder, which will make it difficult to find him, or will not allow you to get acquainted with him at all.

3. Manifestations of the international nature of electronic contracts

As for the features of the "international" component of the concept of "international electronic agreements", among the features that characterize international agreements are usually distinguished:

1. *Special requirements for the law to be applied to the legal relationship*. As a general rule, when concluding and determining the content of the agreement, the parties are guided by the law of the country of their choice or subsequent agreement. Problems arise only when the law applicable to the specific legal relationship of the parties is not defined by them. National law on the procedure for choosing the law applicable to legal relations in the absence of agreement of such law by the parties is defined in Article 32 of the Law of Ukraine "On private international law", which provides that in the absence of a choice of law, the law that is most closely connected to the transaction applies to the content of the transaction. Unless otherwise provided for or arising from the terms, substance or circumstances of the case, the transaction is more closely connected to the law of the State in which the party, who must do the performance, which is crucial for the content of the transaction, has its place of residence or location (Verkhovna Rada of Ukraine, 2005).

The concepts of "closest connection with the transaction" and "the party, who must perform the execution, which is crucial for the content of the transaction" is specified by the legislator in Article 44 of the same Law, which actually states which party is considered a party of such performance, crucial for the content of the transaction and the criteria for determining the law that has the closest connection with the transaction (Verkhovna Rada of Ukraine, 2005).

2. *Features of the content of the contract*. Along with the usual components of the contract, such as: name, contract number, date and place of its conclusion, name of the parties, subject of the contract (and its quantitative and qualitative characteristics), term of the contract, price and total contract amount, payment terms, the order of acceptance-transfer of works, services or goods, the procedure for filing complaints, liability of the parties, force majeure, legal addresses of the parties, their payment and postal details, an extremely important component of such agreements is the arbitration clause, where the parties must choose an arbitration institution which will resolve the dispute, the legislation that will govern the dispute, venue, composition, language of arbitration procedure. The arbitration clause must be binding and not contrary to other terms of the contract.

3. *The special scope* of international (or foreign economic) agreements and the special

composition of their subjects (Saksonov, 2012, pp. 254–259).

Thus, analysing some of the main features of international and electronic agreements, we can conclude that the main features of international electronic agreements are a special procedure for concluding a contract, the need to correctly determine the time of the contract, special requirements for the law applicable to the relationship. the presence of an arbitration clause, the special scope of international (or foreign economic) agreements and the special composition of their subjects.

4. The current state of distribution of electronic forms of transactions in the world economy

After describing the features of international electronic contracts, it is worth noting the main areas of the application of the latter. Today it is difficult to imagine the sphere of human life, which would not be transformed under the influence of general scientific and technological progress, in particular the commercial sphere, banking, services, insurance, and others.

In our opinion, the most popular field of application of electronic international agreements is the commercial sphere. World trade is constantly evolving because there will be no growth without its development. Moreover, a significant part of the economy of any country is export-import operations, and with the development of information and telecommunications systems, the implementation of export-import operations on the basis of relevant agreements becomes easier and, consequently, more popular. Obviously, it is quite convenient to be able to buy French perfume, Italian wine, or an American car while physically you are in front of a laptop or smartphone screen in Ukraine. In the commercial sphere, the most popular types of international electronic contracts, as always, are contracts of sale and supply. At the same time, international electronic contracts in the commercial sphere are mostly made in the form of acceptance of a public offer by the other party to the contract, but business entities are increasingly using the electronic form of the contract to conduct foreign economic activity.

In addition, given the increase in demand and the promotion of virtual assets and currency, it is becoming increasingly common to enter into sales contracts, the subject of which are virtual assets or currency. And given the specifics of the subject of the agreement, such agreements are mostly concluded in electronic form and are international in nature. Moreover, in demand are sales contracts subject of which is specific intellectual property, such as websites, commercial profiles on social networks, etc. Such a phenomenon as the lease of equipment, which may be in the nature of an international agreement and is mostly concluded in electronic form, is also gaining momentum in the commercial sphere. This means renting equipment for hosting the site, or renting equipment for hosting a server, which in one way or another is needed to large enterprises, and for one reason or another (availability, capacity, cost) cannot be rented in Ukraine.

International electronic contracts are also widely used in the field of service provision. It is quite convenient when looking for a specialist to perform certain works and provide services, you are free from limits of your country of residence. However, this only applies to those services or works that can actually be performed without being tied to a specific location. Currently, the IT sphere is actively developing in this direction, where specialists, being territorially in Ukraine, can perform work for customers from anywhere in the world. Graphic designers, copywriters, consulting specialists, lawyers, advertising specialists, and many other professionals who can provide services or perform work without being tied to a specific location can also work this way.

The trend of modernization of contractual relations has not escaped the banking sector. The possibility of concluding electronic contracts in the banking sector, although not everywhere in full scope, but exists. It is understood that a large number of banks are gradually considering the possibility of moving to the electronic sphere, but now it is common when a customer is offered to leave an online application to open an account, and only then, after reviewing the application, the bank still requires you to physically come to the nearest branch to continue cooperation with bank and the final opening of accounts and signing the necessary agreements.

Moreover, many foreign banks allow you to open accounts online without the need for a physical presence in the bank. For example, the UK Bank HSBC, which also operates in the US, Hong Kong and a number of other countries, offers to open an online account for UK or European Union citizens by sending the necessary photos of documents and providing complete and comprehensive information about yourself (HSBC UK, 2022). WELLS FARGO, USA (WELLS FARGO bank, 2022), and DISCOVER, USA (Discover Online Banking, 2022) also provide the opportunity to open a savings or checking account online, apply for a loan or credit online.

Switzerland is the most loyal country to open online accounts without physically contacting a bank. For example, UBS bank has

repeatedly been named the best asset management bank at the Euromoney Awards for Excellence. According to the information posted on the site, all you need to do to open an account is: 1) select the banking package of your choice online and enter your personal details; 2) download the "UBS Welcome" app from the App Store / Google Play and have your passport / ID ready for online verification. You can sign the contract directly online in the app. It is also possible to sign all the necessary agreements in the application, i. e., in electronic form, of course, after the authentication procedure (UBS me – the individual banking package, 2022).

Thus, in fact, the most common contracts concluded in the banking sector in electronic form are contracts for banking services, for opening and maintaining a bank account, credit and loan agreements, mortgage agreements.

5. Conclusions

Summarizing the above, one can state that although international electronic contracts are a variety of ordinary civil or commercial contracts, they have some particularities, including a special procedure for concluding a contract, the need to correctly determine the time of the contract, special requirements for the law applicable to legal relations, features of the content of the agreement, the need for an arbitration clause, the special scope of international (or foreign economic) agreements and the special composition of their subjects. Given the relentless development of everything around us, contracts are gradually moving into electronic form. This greatly simplifies the interaction between legal entities, "erases" the borders between countries in the commercial sphere, promotes the development of export-import operations in countries. Currently, the most popular areas of application of international electronic contracts are: trade (commercial) sphere, where the most common international agreements concluded in electronic form are contracts of sale, supply, lease; service industry; banking, where the most common contracts are contracts for banking services, for opening and maintaining a bank account, credit and loan agreements, mortgage agreements.

References:

Discover Online Banking (2022). Retrieved from: https://www.discover.com/online-banking/ [in English].

Filatova, N.Yu. (2017). Rehuliuvannia osoblyvostei ukladennia elektronnykh dohovoriv: povirnialno-pravovyi analiz [Regulation of the peculiarities of concluding electronic contracts: legal analysis]. *Problemy zakonnosti – Problems of legality*, no. 139, pp. 63–77 [in Ukrainian].

HSBC UK (2022). Retrieved from: https://www.hsbc.co.uk/ [in English].

Saksonov, V.B. (2012). Pravovi osoblyvosti zovnishnoekonomichnykh dohovoriv (kontraktiv) Ukrainy [Legal features of foreign economic agreements (contracts) of Ukraine]. *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav – Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs*, no. 2, pp. 253–260 [in Ukrainian].

UBS me – the individual banking package (2022). Retrieved from: https://www.ubs.com/ch/en/private/accounts-and-cards/bundles.html [in English].

Verkhovna Rada of Ukraine (2003). Tsyvilnyi kodeks Ukrainy: Zakon Ukrainy vid 16 sichnia 2003 r. № 435-IV [Civil Code of Ukraine: Law of Ukraine of January 16, 2003 № 435-IV]. Retrieved from: https://zakon.rada.gov.ua/laws/show/435-15#Text [in Ukrainian].

Verkhovna Rada of Ukraine (2005). Pro mizhnarodne pryvatne pravo: Zakon Ukrainy vid 23 chervnya 2005 r. № 2709-IV [On private international law: Law of Ukraine on June 23, 2005 № 2709-IV]. Retrieved from: https://zakon.rada.gov.ua/laws/show/2709-15#Text [in Ukrainian].

Verkhovna Rada of Ukraine (2015). Pro elektronnu komertsiiu: Zakon Ukrainy vid 3 veresnia 2015 r. № 675-VIII [On e-commerce: Law of Ukraine of September 3, 2015 № 675-VIII]. Retrieved from: https://zakon.rada.gov.ua/laws/show/675-19 [in Ukrainian].

WELLS FARGO bank (2022). Retrieved from: https://www.wellsfargo.com/ [in English].

Анатолій Іщук,
молодший науковий співробітник, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 01042, ishuk.anatoli@gmail.com
ORCID: *orcid.org/0000-0002-1439-654X*

ВИДИ МІЖНАРОДНИХ ЕЛЕКТРОННИХ КОНТРАКТІВ ТА СФЕРИ ЇХ ЗАСТОСУВАННЯ

Анотація. ***Метою роботи*** є загальне дослідження основних ознак міжнародних електронних договорів та сфер їх застосування.

Методи дослідження. Роботу виконано з використанням загальнонаукових і спеціальних методів наукового пізнання.

Результати. Виокремлено, охарактеризовано й проаналізовано деякі з основних ознак міжнародних та електронних договорів, на основі чого зроблено висновки про ознаки міжнародних електронних договорів. Зазначено одні з основних сфер застосування міжнародних електронних договорів із прикладами їх реального використання.

Висновки. Встановлено, що хоча міжнародні електронні договори фактично є різновидом звичайних цивільних чи господарських договорів, проте вони мають низку особливостей, зокрема: особливу процедуру укладення договору, необхідність правильного визначення моменту укладення договору, особливі вимоги до права, що буде застосовуватися до правовідносин, особливості змісту договору, необхідність наявності в ньому арбітражного застереження, особливу сферу дії міжнародних (або зовнішньоекономічних) договорів та особливий склад їх суб'єктів. Також стверджується, що з огляду на невпинний розвиток усього, що нас оточує, договори поступово переходять в електронну форму. Це значно спрощує взаємодію суб'єктів господарської діяльності, «стирає» кордони між країнами в комерційній сфері, сприяє розвитку експортно-імпортних операцій у країнах. Наразі найпопулярнішими сферами застосування міжнародних електронних контрактів є такі: торгова (комерційна) сфера, де найпоширенішими міжнародними договорами, що укладаються в електронній формі, є договори купівлі-продажу, поставки, оренди; сфера послуг; банківська сфера, де найпоширенішими договорами є договори на банківське обслуговування, на відкриття та обслуговування банківського рахунку, договори кредиту й позики, іпотечні договори.

Ключові слова: міжнародний договір, електронний договір, види міжнародних електронних договорів.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 349.444
DOI https://doi.org/10.32849/2663-5313/2022.2.05

Mykola Haliantych,
Doctor of Law, Professor, Corresponding Member of the National Academy of Legal Sciences of Ukraine, Head of the Department of Private Law Problems, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, halyantych@gmail.com
ORCID: *orcid.org/0000-0003-0346-5308*
Scopus ID: *57217736289*

Yuri Zaika,
Doctor of Law, Professor, Chief Research Associate at the Department of Private Law Problems, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, u.a.zaika@gmail.com
ORCID: *orcid.org/0000-0003-1946-3171*
Scopus ID: *57217829145*

Tetiana Popovych,
Academic Secretary, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, tgpvip@gmail.com
ORCID: *orcid.org/0000-0003-2292-4530*
Scopus ID: *57218124065*

Haliantych, Mykola, Zaika, Yuri, Popovych, Tetiana (2022). Legal nature of the contract for housing and utility services. *Entrepreneurship, Economy and Law*, 2, 40–47, doi https://doi.org/10.32849/2663-5313/2022.2.05

LEGAL NATURE OF THE CONTRACT FOR HOUSING AND UTILITY SERVICES

Abstract. ***Purpose.*** Housing legislation in Ukraine is characterized by complete legal uncertainty, which is manifested in fragmented nature of legal regulation, a bulk of reference rules and norms that have lost their regulatory effect. The right of a tenant to receive housing and utility services shall be implemented by concluding various civil law contracts. The concept and legal nature of housing and utility services, their features and varieties, correlation between concepts of "housing and utility services" and "utility services" are studied. Housing and utility services may be included in a subject matter of a contract, or a contract for housing and utility services may regulate the whole complex of utility services.

Research methods. General scientific and special methods of cognition were used to accomplish the tasks of the work.

Results. The classification features of contracts for housing and utility services are specified. It is proved that contracts for housing and utility services belong to public contracts. In particular, contracts for heat, hot water and centralized water supply, sewerage and household waste management, as well as relations arising in the process of providing services for the supply and distribution of electricity and natural gas in apartment buildings meet the characteristics of public contracts. It is argued that the classification of contracts for services by the criterion of the subject matter of the contract requires disclosure of characteristics of legal regulation of certain types of contracts for utilities and housing services.

Conclusions. Inconsistencies between norms of civil and housing legislation concerning the provision of housing and utility services can be eliminated by unification, systematization of regulations, building a system that regulates the housing sector. The suggestion to define the concept of "housing and utility services" in the Civil Code of Ukraine is substantiated.

Key words: housing, housing legislation, housing code, use of housing, housing and utility services.

1. Introduction

Contracts in the field of housing and utility services are among the most common types of civil contracts. The legal nature of any civil contract requires studying the grounds for distinguishing the relevant contract in the system of civil contracts, which will contribute to detecting its correlation with a specific group of civil contracts or establishing its independence. Such grounds constitute particular classification criteria for dividing contracts into types within a single system of contractual structures (Sevriukova, 2011, p. 63). The Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine) mentions the concept of "service" as an object of legal relations. The lexical meaning of article 177 of the Civil Code of Ukraine allows concluding that services are an independent group of objects of civil rights together with the property, which comprises items, money, securities, including property rights, work outcomes, results of intellectual and creative activity, information, as well as other tangible and intangible benefits (Borisova, Spasybo-Fateeva, Yarotsky, 2011, p. 397).

"Cambridge Advanced Dictionary" defines utility as a service that is used by the public, such as an electricity or gas supply (Cambridge Advanced Dictionary, 2021). "Legal encyclopedia" interprets housing and utilities as the services provided by specialized enterprises and organizations supplying water, gas, electricity and heat to the owners of apartments, houses, and tenants (Shemshuchenko, 1998).

A housing and utility service is a performance result, which entails a beneficial social effect that satisfies an individual's spiritual, physiological, psychological, and other non-property benefits. Thus, art. 9 of the Law of Ukraine "On State Social Standards and State Social Guarantees" stipulates that state social regulations on housing and utility services are set to determine state social guarantees on housing and utility services and the costs of renting, property management and payment for utility services, which ensure the exercise of the constitutional right of a citizen to housing.

The state should establish social standards to which the above Law attributes: 1) the marginal standard of costs for property management and utilities, provided by the Law of Ukraine "On Housing and Utility Services", depending on the income; 2) the social norm of housing and social standards for utilities due to the payment of which the state provides benefits and gives citizens subsidies; 3) quality indicators of apartment block management and the provision of utilities.

Analysis of recent research and publications. The provision of housing and utility services at different times was paid much attention, in particular, by such scientists as O. Dzera, V. Zolotar, I. Kucherenko, V. Maslov, M. Sibilov and other. However, they mainly relied on the available regulatory framework of the Soviet era. The modern development trend in civil regulation of housing and utility services are considered in the contributions by O. Karmaza, O. Michurin, S. Slipchenko, O. Sobolev, E. Kharytonov, O. Bernaz-Lukavetska (Karmaza, 2013; Slipchenko, Michurin, Sobolev, 2003; Kharytonov, Bernaz-Lukavetska, 2019), a collective monograph "Property Ownership in Ukraine: Doctrine and Implementation" (Krupchan, Luts, 2016). Compared to the Soviet period, the state's role in exercising the right to housing and utilities by citizens has changed: it is reduced not to almost free provision of housing and utility services but the personal satisfaction by citizens of their housing needs on a private (commercial) basis. New trends in the legal regulation of housing and utility services should be reflected in modern recodification.

The research purpose is to study a civil contract for housing and utility services; to clarify its legal nature; to identify features and varieties and provide proposals for updating laws on housing and utilities.

2. Methodological bases for understanding housing and utility services

To analyze prospects for the further development of housing and utility legislation, the authors studied the best practices in the domestic doctrine of contractual law, processed the acts of civil legislation of Ukraine, revealed the main trends in its development, which make it possible to identify both theoretical and practical challenges given the steps taken by Ukraine towards the adaptation of domestic civil legislation to the civil legislation of EU countries.

The structure of the conducted scientific research contains traditional elements: task statement, presentation of the initial provisions and their theoretical development, collection and analysis of empirical data, justification of the conclusion, and formulation of issues that need to be further resolved (Bezklubyi, Hrytsenko, Koziubra, 2017, p. 451).

The main tasks while investigating housing and utility relations are to define the concept and legal nature of housing and utility services and their correlation with the concept of utilities; to identify features and particularities of social relations arising in housing and utility services, as well as their structural elements; to determine the ratio of public and private control mechanisms in the housing and utility sector; to detect the peculiarity of civil law con-

tracts, the conclusion of which allows meeting the needs in housing and utility services. Such a research sequence permits a comprehensive analysis of legal categories and phenomena and the achievement of the specified goal.

The comparative-legal method is a dominant methodological approach in the research. It became the basis for defining such basic legal categories as "services", "utilities", and "housing and utility services" and contributed to the identification of their specific features and differences.

The formal dogmatic approach was used to understand and analyze the norms of current civil legislation, in particular, a set of laws regulating the provision of specific types of housing and utility services, and the system-structural analysis facilitated clarifying the place of housing and utility services in the service system in general.

The systematic approach, taking into account the abundance of housing and utility services and the peculiarities of their legal nature (provision of services for gas, heat, electricity and pot water supply, household rubbish removal, etc.), was used as a universal method of understanding and assessment of legal phenomena, the influence of individual elements of one phenomenon on another, the possibility of establishing a common denominator and allowed identifying the interrelation between legal norms that regulate the grounds and provision of housing and utility services and determine their legal regime and the relationship of subjects of legal relations as a whole.

Forecasting and modeling were the basis for justifying possible areas of harmonization of national heritage legislation with the EU acquis and allowed arguing proposals and recommendations for improving civil legislation and its practical application in the housing and utility sector.

3. The legal nature of housing and utility services

Almost all kinds of useful activities that do not create tangible value are considered services. At the same time, the main criterion is the intangible nature of the product developed during its provision. Therefore, service is beneficial not as an item but as an activity. Consumption usually occurs synchronically with the process of its creation.

The definition of service is available in the current legislation of Ukraine: according to para. 17 of art. 1 of the Law of Ukraine "On Consumer Protection", service is the contractor's activity to provide (transfer) the consumer with relevant tangible or intangible benefits specified by the contract, which is implemented under the customer's request to meet his personal needs. Pursuant to article 1 of the Law of Ukraine "On Standards, Technical Regulations and Conformity Assessment Procedures", service is an economic performance that does not create goods but is sold and bought during trade transactions. The given features of service are also inherent in housing and utility services.

According to article 901 of the CC of Ukraine, under a service contract, one party (the contractor) is obligated at the request of the other party (the client) to provide a service consumed when performing some actions or conducting an activity, whereas the client is obliged to pay the contractor for the mentioned service, unless otherwise is established by the contract. However, the CC of Ukraine lacks the concept of housing and utility services as an object of civil rights that, in our opinion, generates problems in the formulation of the contract for housing and utility services.

Housing and utility services are the object of civil rights – since it is governed by the rules of civil (private) law – arising between legally equal subjects (the contractor and the customer) of the contract. In practice, the field of utilities is a set of many branches of activity, which results in a significant variety of services regulated by the specific legislation of Ukraine.

The Law of Ukraine "On Housing and Utility Services" determines the legal regulation of contracts for housing and utility services, the basic rights and obligations of the parties to such a contract, given the peculiarities established by the laws governing relations in the supply and distribution of electricity and natural gas, heat energy supply, centralized hot water supply, centralized water supply and sewerage, and municipal waste management based on the Laws of Ukraine "On the Peculiarities of the Exercise of Ownership in an Apartment Building", "On Drinking Water, Drinking Water Supply and Disposal", "On Housing and Communal Services", "On State Regulation of Public Utilities", "On Commercial Metering of Heat Energy and Water Supply", "On Heat Supply", "On the Electricity Market", "On Waste Management", and subordinate regulations. However, it remains relevant to state that the main shortcomings of the current legislation and its application include uncertainty in the priority of legislative acts, numerous amendments, and additions to already adopted laws; the internal contradiction of legislative acts and individual norms between each other (Kuznetsova, 2013, p. 654).

The legislator classifies the service of "household rubbish removal" as a utility. Pursuant to article 35-1 of the Law of Ukraine "On Waste Management", the contractor ensuring household rubbish removal enters into contracts for

waste disposal services with consumers. But such action concerns the performance of works, not the performance of services, and the person who produces solid and liquid waste cannot be referred to as the consumer, only as the customer. In this case, as A. Kazantseva notes, establishing the ratio of goods and services in the field of utilities does not settle the problem (Kazantseva, 2018, p. 154–155).

We believe that the CC of Ukraine must clearly define the housing and utility service, thereby distinguishing between the related concepts in the housing and utility sector: the performance of works and provision of services, delimitation of the concept of block management from the provision of services.

4. General characteristics of contracts for housing and utility services

Contracts for housing and utility services are diverse, and housing and utility services are separated. Under the law and the terms of the contract for housing and utility services, homeowners have the right to receive adequate housing and utility services timely (Kharytonov, Bernaz-Lukavetska, 2019, p. 24). Thus, according to article 5 of the Law of Ukraine "On Housing and Utility Services", a housing service is a service for residential block management, and utilities are services for the supply and distribution of natural gas and electricity, supply of thermal energy, hot water, centralized water supply and disposal, and household rubbish management.

R. Heints proposes to divide utilities into: a) maintenance services (maintenance of general household systems, elevators, fire automation systems, etc.); b) sanitary services (cleaning of stairways, basements, attics, household rubbish removal, etc.); c) beautification services (cleaning and removal of snow, watering of yards, beds and lawns, etc.). By provision period: a) permanent utilities (provided throughout the year); b) seasonal utilities (provided during a certain period). By the service provider's expertise: a) ordinary utilities, which can be provided by persons who do not have specialized skills (cleaning of staircases, adjacent territories, etc.); b) qualified utilities, which can be provided by persons with expertise (preventive maintenance of buildings, elevator maintenance service, maintenance of fire-protection equipment, general utilities, etc.) (Heints, 2011). The remark of V. Skrypnyk that a contractor is an essential characteristic of the service that determines its value seems relevant (Skrypnyk, 2020, p. 223).

Housing and utility services are realized by entering into various sale, work and service contracts. Therefore, the electricity supply is associated with the electricity purchase and sale through the connected network. By its legal nature, it is not a service under the CC of Ukraine, as well as the supply of water and gas to the end-user through the connected network. For example, in accordance with art. 19 of the Law of Ukraine "On Drinking Water, Drinking Water Supply and Sewerage", a drinking water supply company provides consumers with centralized drinking water supply services under a contract on drinking water supply and/or sewerage services. Along the same lines, in accordance with art. 19 of the Law of Ukraine "On Heat Supply", the heat-generating organization is entitled to supply the produced heat directly to the consumer as per the contract of sale.

Housing and utility services are regulated by the system of contracts, which are the basis for the emergence of particular civil obligations. Within this system, a contract for housing and utility services is only a generalized name that combines different types of contracts. The systematization of contracts for housing and utility services is essential for determining the type of the mentioned contracts. O. Dziubenko believes that standpoints on the separation of some service contracts are ambiguous due to the choice of different criteria and the lack of a unified approach to understanding service particularities (Dziubenko, 2012, p. 297).

5. Classification of contracts for housing and utility services

The classification of service contracts can be carried out by different characteristic features (criteria). The classification of contracts based on the following grounds is most common in civil law: the allocation of responsibilities between the parties; qui pro quo; the moment of the contract occurrence (Brahynskyi, Vytrianskyi, 2001, p. 384).

Depending on the allocation of responsibilities between the parties, the contract for housing and utility services is bilateral: both parties are endowed with rights and obligations in relation to each other. Depending on the moment of the contract occurrence, this is a uniliteral contract, which is considered to be concluded not from the moment the parties reach an agreement but from the moment of taking actions. A contract for housing and utility services generally refers to contracts for services. However, it becomes a mixed contract when work is performed in addition to services (Heints, 2011, p. 4). Maintaining the common property of an apartment building, i. e., the performance of sanitary engineering works, repair of elevators, and repair of the common property of an apartment building, entails the performance of works if such activities include the terms and conditions of the contractor's agreement.

The residential property management contract takes the form of a mixed one. L. Baranova states that this contract is a kind of a service contract, which comprises elements of the property management contract and the agency contract. The parties have the right to conclude a contract involving elements of different contracts (a mixed contract) (part 2 of art. 628 of the CC of Ukraine). Moreover, the parties' relations under a mixed contract are subjected to the application of civil laws on contracts, the elements of which are available in the mixed contract, unless otherwise established by the contract or follows from the essence of the mixed contract (Baranova, 2017, pp. 184–185).

The classification of contracts for housing and utility services is usually based on the classification of the very services: supply and distribution of electricity, natural gas, heat supply, centralized hot water supply, centralized water supply and centralized sewage, and household waste management. Some authors have a controversial opinion that a contract for property management services can be preliminary and principal depending on a completion degree (Myrza, 2017, p. 235), because the purpose of such a contract is to obtain service. We consider the position of E. Kharytonov and O. Kharytonova, who believe that a preliminary contract does not give rise to rights and obligations, most relevant. It only creates an obligation to conclude a new contract (art. 635 of the CC) after the expiration of a certain period (or after a certain period), that is, it is an agreement on the conclusion of a future agreement (Kharytonov, Kharytonova, 2021, p. 557).

When classifying utility service contracts, we set the diversity of a group of contracts for housing and utility services. A housing and utility service may be the subject of one contract, e. g., a power supply contract. A contract for housing and utility services may regulate the entire range of utilities, e. g., a contract for residential block management.

Housing and utility services are designed to ensure the living conditions and stay of individuals in residential and non-residential premises, buildings and facilities, and complexes of buildings and facilities following regulations, norms, standards, procedures, and rules. Under the special laws of Ukraine, contracts for housing and utility services are concluded under standard contracts approved by the Cabinet of Ministers of Ukraine or other state bodies authorized by law. For example, they are the Rules for the provision of centralized heating, cold and hot water supply and sewage services and the standard contract for the provision of centralized heating, cold and hot water supply and drainage services (Resolution of the Cabinet of Ministers of Ukraine dated July 21, 2005 № 630), the Rules for residential block management services, and the Standard contract for residential block management services (Resolution of the Cabinet of Ministers of Ukraine dated September 5, 2018 № 712), etc.

It should be noted that the above classifications of contracts are not exclusive and contain only some of the most common classification features since the legislation lacks an exclusive list of housing and utility services. Classification of civil contracts for services by the criterion of the contract subject is also impossible, and monopolists independently impose it. The existing problems of current legal regulation also involve the inconsistency between the lists of utilities, which are fixed in the normative act (Kazantseva, 2018, p. 154–155).

We believe that the classification of service contracts by the contract subject requires the elucidation of the characteristic features of legal regulation in terms of specific types of contracts for utility and housing services. Civil (private) law science puts forward other classification types of contracts for housing and utility services.

6. Publicity of the contract for housing and utility services as a separate classification feature

It is proposed to additionally use publicity as a criterion for classifying service contracts. The use of this classification feature is advisable, although the contract for housing and utility services is not directly included in the group of public contracts under part 1 of art. 633 of the CC of Ukraine. However, the list is not finalized. In our opinion, contracts for housing and utility services belong to public ones.

Art. 633 of the CC of Ukraine is the general rule containing fundamentals on a public contract. It is supplemented by special rules that regulate specific types of public contracts. Special laws and by-laws enacted to develop public contract rules thoroughly regulate the most important provisions for some contracts. The following are proposed to be considered as signs of a public contract: one of the parties to the contract is an entrepreneur; the scope of the entrepreneur's activity is the sale of goods, performance of works, or provision of services; the entrepreneur complies with such mandatory conditions: a) enters into a contract with each counterparty; b) does not give preference to one person over another, except in cases provided for by law and other legal acts; c) sells goods, performs works, and provides services on the same terms for all consumers, except for cases when the law and other legal acts allow

the provision of benefits for particular categories of consumers (part 2, 3 of Article 633 of the CC of Ukraine); the contract's terms must comply with the rules established by law and other regulatory acts; violation of the requirements established by law for the entrepreneur causes negative consequences in the form of compensation to the counterparty for losses caused by unjustified refusal to enter into the contract.

In our opinion, a group of contracts for utility services, for the supply of thermal energy, hot water, centralized water supply, centralized sewerage and household waste management, as well as the relations arising in the process of providing services for the supply and distribution of electricity and natural gas in apartment buildings correspond to the signs of public contracts.

For example, one of the aforementioned is an energy supply contract. The energy supply system has undergone changes: according to the Law of Ukraine "On the Electricity Market", since January 1, 2019, two separate companies – the electricity supplier and the distribution system operator (DSO) – provide the population with electricity in each region. The DSO is engaged in the technical distribution of electricity, and the supplier sells it to customers. In accordance with paragraphs 11, 12, part 1 of Art. 4 of the aforementioned Law, the electricity market participants conduct their activities in the electricity market on a contractual basis. To ensure the electricity market's functioning, contracts are concluded, among which are a transmission connection contract and a contract for connection to the distribution system.

Following para. 6 of Art. 6, among the main tasks of the Regulator (the National Commission for State Regulation of Energy and Public Utilities) in the electricity market are to guarantee common and unencumbered conditions for connection and access to electricity networks for new users of the system, in particular, the removal of barriers that may prevent access of new buyers and producers of electricity, including those producing electricity from alternative energy sources, by establishing the procedure for the generation of fees for connection to the transmission system and distribution systems pursuant to the relevant Law. In accordance with para. 13 of the Transitional provisions of the above law, the fact of the consumer's adherence to the terms of the contract for the supply of universal services (contract acceptance) is the commission by the consumer of any actions confirming his desire to conclude a contract, in particular, the provision of a signed application for accession, payment of the bill of the universal service provider and/or the fact of electricity consumption (Verkhovna Rada of Ukraine, 2017).

The distinction between private and public has always been a scientific problem of civil law science, which kept its relevance over time (Drishliuk, 2006, p. 155). Private law cannot do without using a set of imperative rules, including prohibitions, somewhat limiting the independence and initiative of the parties to the relationship. Such restrictions may be imposed in the interests of individual groups of persons and the general interests (Sukhanov, 2004, p. 27). Art. 633 of the CC of Ukraine, which regulates the conclusion and fulfilment of a public contract, is one of the cases limiting the entrepreneur's private interests for protecting and guaranteeing the rights of the economically weaker party to the contract – the consumer.

The public nature of some civil business contracts modifies the civil principles of regulation of relevant social ties, limiting the dispositiveness and proactivity of economic entities (Drishliuk, 2007, p. 157). A public contract acts as a set of civil law rules governing contractual relations arising in the housing and utility sector, which is characterized by economic inequality between the parties that requires the establishment of additional legal guarantees for the weaker party – the consumer.

7. Conclusions

Modern housing legislation is insufficient and does not allow fully protecting the rights of citizens to adequate housing and public utility services. The current legislative and other normative acts adopted in different years need to be drastically changed following the civil law principles defined by the CC of Ukraine.

The Housing Code of Ukraine should consider all the features of the legal regulation of housing relations and solve the problem of parallel application of various norms of the current legislation. The Housing Code of Ukraine should comprise general civil provisions given the particularities that were not reflected in the CC of Ukraine, incl. obligations arising in the management of the housing stock, housing associations, condominium associations; peculiarities of civil liability of owners and users of apartments (houses), etc. The rights and obligations of a residential property owner; the rights and obligations of persons living together with the residential property owner in terms of housing and utility services should be specified.

References:

Baranova, L. (2017). Problemni pytannia dohovoru pro nadannia posluh z upravlinnia bahatokvartyrnym budynkom [Problematic issues of the contract for the provision of services for the management of an apartment building]. *Problemy vdoskonalennia pryvatnopravovykh mekhanizmiv nabuttia, peredachi, zdiisnennia ta zakhystu subiektyvnykh tsyvilnykh prav – Problems of improving private law mechanisms for the acquisition, transfer, exercise and protection of subjective civil rights*. Kharkiv, pp. 182–185 [in Ukrainian].

Bezklubyi, I., Hrytsenko, I., Koziubra, M. (2017). *Metodolohiia v pravi [Methodology in law]*. Kyiv: Hramota, 658 p. [in Ukrainian].

Borisova, V., Spasybo-Fateeva, V., Yarotsky V. (eds.) (2011). *Tsyvilne pravo [Civil law]*, in 2 vols. Kharkiv: Pravo, vol. 2, 816 p. [in Ukrainian].

Brahynskyi, M., Vytrianskyi, V. (2001). *Dohovornoe pravo. Knyha pervaia: Obshchye polozhenyia [Contract law. Book one: General provisions]*. Moscow: Statute, 842 p. [in Russian].

Cambridge Advanced Dictionary (2021). Utility. Retrieved from: https://dictionary.cambridge.org/dictionary/english/utility [in English].

Drishliuk, V. (2006). Shchodo poiednannia publichnoho ta pryvatnoho v dohovirnomu pravi Ukrainy (na prykladi publichnoho dohovoru) [Regarding the combination of public and private in the contract law of Ukraine (on the example of a public contract)]. *Universytetski naukovi zapysky – University scientific notes*, no. 2, pp. 155–158 [in Ukrainian].

Drishliuk, V. (2007). Publichnyi dohovir (tsyvilno-pravovyi aspekt) [Public contract (civil law aspect)]. *Extended abstract of candidate's thesis*. Kyiv, 20 p. [in Ukrainian].

Dziubenko, O. (2012). Osoblyvosti ta vydy dohovoriv pro nadannia posluh [Features and types of contracts for the provision of services]. *Mytna sprava – Customs*, no. 6, pp. 294–299 [in Ukrainian].

Heints, R. (2011). Tsyvilno-pravove rehuliuvannia vidnosyn za dohovorom pro nadannia komunalnykh posluh [Civil law regulation of relations under the contract for the provision of public services]. *Extended abstract of candidate's thesis*. Kyiv, 19 p. [in Ukrainian].

Karmaza, O. (2013). *Kontseptsii okhorony ta zakhystu zhytlovykh prav v Ukraini: materialnyi ta protsesualnyi aspekty [Concepts of protection and protection of housing rights in Ukraine: material and procedural aspects]*. Myronivka: Myroniv druk, 399 p. [in Ukrainian].

Kazantseva, A. (2018). Poniattia ta vydy komunalnykh posluh [Concepts and types of communal services]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu. Seriia "Pravo" – Scientific Bulletin of Uzhhorod National University. Series "Law"*, iss. 48, vol. 1, pp. 152–155 [in Ukrainian].

Kharytonov, Ye., Kharytonova, O. (2021). *Pryvatne pravo yak kontsept. Tom IV: Vid idei do realizatsii [Private law as a concept. Volume IV: From idea to realization]*, Odesa, 632 p. [in Ukrainian].

Kharytonov, Ye., Bernaz-Lukavetska, O. (eds.) (2019). *Zhytlove pravo [Housing law]*. Odesa: Feniks, 120 p. [in Ukrainian].

Krupchan, O., Luts, V. (eds.) (2016). *Pravo vlasnosti na zhytlo v Ukraini: doktryna ta realizatsiia [The right of ownership of housing in Ukraine: doctrine and implementation]*. Kyiv, 247 p. [in Ukrainian].

Kuznetsova, N. (ed.) (2013). *Pravova doktryna Ukrainy [Legal doctrine of Ukraine]*, in 5 vols. Vol. 3: Doktryna pryvatnoho prava [The doctrine of private law]. Kharkiv: Law, 760 p. [in Ukrainian].

Myrza, S. (2007). Poniattia ta yurydychna kharakterystyka dohovoru pro nadannia posluh z upravlinnia bahatokvartyrnym budynkom [The concept and legal characteristics of the contract for the provision of services for the management of an apartment building]. *Visnyk Kharkivskoho natsionalnoho universytetu vnutrishnikh sprav – Bulletin of the Kharkiv National University of Internal Affairs*, no. 38, pp. 233–237 [in Ukrainian].

Sevriukova, I. (2011). Deiaki problemy klasyfikatsii tsyvilno-pravovykh dohovoriv [Some problems of classification of civil law contracts]. *Visnyk Odeskoho natsionalnoho universytetu – Bulletin of Odessa National University*, no. 15, pp. 63–74 [in Ukrainian].

Shemshuchenko, Yu. (ed.) (1998). *Yurydychna entsyklopediia [Legal encyclopedia]*, in 6 vols. Kyiv: Ukrainska entsyklopediia im. M.P. Bazhana, vol. 2, 744 p. [in Ukrainian].

Skrypnyk, V. (2020). *Teoretychni i metodolohichni problemy obiektiv tsyvilnykh prav [Theoretical and methodological problems of objects of civil rights]*. Kremenchuk: Publisher Shcherbatykh O.V., 380 p. [in Ukrainian].

Slipchenko, S., Michurin, Ye., Sobolev, O. (2003). *Zhytlove pravo Ukrainy [Housing law of Ukraine]*. Kharkiv: Espada, 318 p. [in Ukrainian].

Sukhanov, E. (2004). O problemakh stanovlenyia y razvytyia rossyiskoho chastnoho prava [On the problems of formation and development of Russian private law]. *Tsyvylystycheskye zapysky – Civilistic notes*, iss. 3, pp. 26–46 [in Russian].

Verkhovna Rada of Ukraine (2017). Pro rynok elektrychnoi enerhii: Zakon Ukrainy vid 13 kvitnia 2017 r. № 2019-VIII [About the electricity market: Law of Ukraine of April 13, 2017 № 2019-VIII]. Retrieved from: https://zakon.rada.gov.ua/laws/show/2019-19 [in Ukrainian].

Микола Галянтич,
доктор юридичних наук, професор, член-кореспондент Національної академії правових наук України, завідувач відділу проблем приватного права, Науково-дослідний інститут приватного права і підприємництва Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01042, halyantych@gmail.com
ORCID: *orcid.org/0000-0003-0346-5308*
Scopus ID: *57217736289*

Юрій Заіка,
доктор юридичних наук, професор, головний науковий співробітник відділу проблем приватного права, Науково-дослідний інститут приватного права і підприємництва Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01042, u.a.zaika@gmail.com
ORCID: *orcid.org/0000-0003-1946-3171*
Scopus ID: *57217829145*

Тетяна Попович,
учений секретар, Науково-дослідний інститут приватного права і підприємництва Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01042, tgpvip@gmail.com
ORCID: *orcid.org/0000-0003-2292-4530*
Scopus ID: *57218124065*

ПРАВОВА ПРИРОДА ДОГОВОРУ ПРО НАДАННЯ ЖИТЛОВО-КОМУНАЛЬНИХ ПОСЛУГ

Анотація. ***Мета.*** Для житлового законодавства в Україні характерна повна правова невизначеність, що виявляється у фрагментарності правового регулювання, наявності великої кількості відсилочних норм та норм, які втратили регулюючий вплив. Право наймача на отримання житлово-комунальних послуг реалізується шляхом укладення різноманітних цивільно-правових договорів. Досліджується поняття та правова природа житлово-комунальних послуг, їхні ознаки й різновиди, співвідношення понять «житлово-комунальні послуги» та «комунальні послуги». Житлово-комунальна послуга може входити до предмета одного договору або ж договір про надання житлово-комунальних послуг може унормовувати весь комплекс комунальних послуг.

Методи дослідження. Для реалізації завдань роботи використано загальнонаукові та спеціальні методи пізнання.

Результати. Запропоновано класифікаційні ознаки договорів на надання житлово-комунальних послуг. Доведено, що договори про надання житлово-комунальних послуг належать до публічних договорів. Зокрема, договори з постачання теплової енергії, постачання гарячої води, централізованого водопостачання, централізованого водовідведення та поводження з побутовими відходами, а також відносини, що виникають у процесі надання послуг із постачання й розподілу електричної енергії та природного газу в багатоквартирних житлових будинках, відповідають ознакам публічних договорів. Аргументовано положення, що класифікація договорів про надання послуг за критерієм предмета договору потребує розкриття характерних особливостей правового регулювання окремих видів договорів надання комунальних і житлових послуг.

Висновки. Неузгодженості між нормами цивільного та житлового законодавства в частині надання житлово-комунальних послуг можуть бути усунені шляхом уніфікації і систематизації нормативних актів, побудови системи, що регулює житлову сферу. Обґрунтовується пропозиція визначити поняття «житлово-комунальна послуга» в Цивільному кодексі України.

Ключові слова: житло, житлове законодавство, житловий кодекс, користування житлом, житлово-комунальні послуги.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.95
DOI https://doi.org/10.32849/2663-5313/2022.2.06

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

Baschuk, Oleg (2022). System of authorised actors responsible for combating discrimination and a place of the National Police in its structure. *Entrepreneurship, Economy and Law*, 2, 48–53, doi https://doi.org/10.32849/2663-5313/2022.2.06

SYSTEM OF AUTHORISED ACTORS RESPONSIBLE FOR COMBATING DISCRIMINATION AND A PLACE OF THE NATIONAL POLICE IN ITS STRUCTURE

Abstract. ***Purpose.*** The purpose of the article is to define the system and characterise powers of executive authorities, individual officials responsible for combating discrimination, as well as to establish police bodies' place in its structure. ***Results.*** The article describes the powers of executive authorities, officials in the field of prevention and combating discrimination. The relevant State entities are the Committee of the Verkhovna Rada on Human Rights, De-occupation and Reintegration of Temporarily Occupied Territories, National Minorities and Inter-ethnic Relations, the Parliamentary Commissioner for Human Rights, the Cabinet of Ministers of Ukraine, the Government Plenipotentiary for the Rights of Persons with Disabilities, the Government Plenipotentiary for Gender Policy, the Educational Ombudsman of Ukraine, and the Commissioner for the Protection of the State Language. The focus is on the specificities of implementing the legal status in the field of ensuring the principle of non-discrimination by the Ministry of Foreign Affairs of Ukraine, the Ministry of Justice of Ukraine, and the Ministry of Social Policy of Ukraine. ***Conclusions.*** The following groups should be included in the system of actors responsible for combating discrimination: 1) Authorised actors in parliamentary control in the field of anti-discrimination – the Committee of the Verkhovna Rada of Ukraine on Human Rights, De-occupation and Reintegration of Temporarily Occupied Territories in the Donetsk, Luhansk and Autonomous Republic of Crimea, the city of Sevastopol, national minorities and inter-ethnic relations; Commissioner for Human Rights of the Verkhovna Rada; Representative of the Commissioner for Equal Rights and Freedoms of the Secretariat of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine; 2) Authorised actors in governmental control in the field of anti-discrimination – the Government Commissioner for the Rights of Persons with Disabilities, the Government Commissioner for Gender Policy, the Education Ombudsman of Ukraine, the Commissioner for the Protection of the State Language; 3) Actors authorised to exercise the general powers of central executive bodies in the field of anti-discrimination – the Ministry of Internal Affairs of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Justice of Ukraine, the Ministry for the Reintegration of Temporarily Occupied Territories of Ukraine; 4) Actors authorised to exercise special powers of central executive authorities in the field of anti-discrimination – the Ministry of Social Policy of Ukraine, the State Service of Ukraine for Labour Issues, the State Service of Ukraine for Ethnic Policy and Freedom of Conscience; 5) Local and regional authorised actors responsible for combating discrimination – regional, district state administrations and in Kyiv.

Key words: discrimination, prevention and combating discrimination, ministries, National Police of Ukraine, public authorities, Commissioner of the Verkhovna Rada of Ukraine for human rights, central executive authorities.

1. Introduction

A civilisational request for wide-scale development of international standards for effective prevention and combating discrimination on any grounds, the proper implementation and protection of subjective human rights at the national level has given rise to a lengthy domestic system of State bodies and officials with direct or indirect competence in this field. They are the institutional component of the National Legal Mechanism for Preventing and Combating Discrimination, which also includes the National Police. A clear understanding of the competences of these authorities will allow a correct description of the key aspects of cooperation and the places of district police officers as actors of prevention of discrimination at the local level in such cooperation.

The purpose of the article is to define the system and characterise powers of executive authorities, individual officials responsible for combating discrimination, as well as to establish a place in its structure of police bodies.

2. Review of the functions of the Verkhovna Rada of Ukraine as an actor empowered to prevent and combat discrimination

The list of entities authorised to prevent and combat discrimination is defined in the Article 9 of the Law of Ukraine on Principles of Prevention and combating discrimination in Ukraine, including the Verkhovna Rada of Ukraine; the Commissioner of the Verkhovna Rada of Ukraine for Human Rights; the Cabinet of Ministers of Ukraine; other State bodies, local self-government bodies; public organisations, natural and legal persons (Law of Ukraine On Principles of Prevention and combating discrimination in Ukraine, 2012). In other words, in accordance with international human rights standards and domestic legislation, all public authorities and citizens are involved in combating this negative social phenomenon. Nowadays, State entities, such as the legislator, the executive authorities and the Ombudsman, as well as other relevant officials not specified in the special law but their competence to prevent violations of the principle of non-discrimination derives from the body of law, are of interest.

According to constitutional provisions, the Verkhovna Rada of Ukraine is the only legislative body in our country, which is of key importance in making anti-discrimination policy, in implementing parliamentary control (Hryshko, 2017) over the activities of the executive authorities through their committees. The Law of Ukraine on the Committees of the Verkhovna Rada of Ukraine stipulates that the Committee of the Verkhovna Rada of Ukraine is a body of the Parliament composed of the people's deputies to carry out legislative work, prepare and early consider relevant issues, perform monitoring functions. They perform the functions as follows (The Constitution of Ukraine, 1996):

1) Legislative function – development of draft laws, other acts; preliminary consideration and preparation of conclusions and proposals on draft laws submitted by actors of legislative initiative; finalisation of individual draft laws on the basis of their consideration in the first and subsequent readings; preparation of conclusions and proposals on draft State-level development, environmental protection programmes; as well as giving consent to be bound by or denouncing international treaties of Ukraine; summarizing comments and proposals submitted to draft laws; making proposals for further planning of draft work;

2) Organisational function – planning of work; holding of meetings and analysis of information on issues related to the powers of the committees, organisation of hearings on these issues; preliminary discussion of the candidates to be elected, appointed, approved or agreed to be appointed by the Verkhovna Rada of Ukraine; preparation of issues for consideration by the Verkhovna Rada of Ukraine in accordance with the subjects of their competence; participation in shaping the agenda of plenary meetings; adoption of decisions, conclusions, recommendations, clarifications; consideration of appeals submitted to the committee; participation in inter-parliamentary activities, interaction with international organisations; preparation of written reports on the results of their activities; media coverage of their activities;

3) Monitoring function – the analysis of the practice of applying legal regulations, preparation and submission of relevant conclusions and recommendations for consideration by the Verkhovna Rada of Ukraine; control over the implementation of the State budget of Ukraine; organisation and preparation of parliamentary hearings; preparation and submission to the Verkhovna Rada of requests to the President of Ukraine from the Committee; interaction with the Accounting Chamber of Ukraine; interaction with the Human Rights Commissioner of the Verkhovna Rada of Ukraine; sending materials for appropriate response to the bodies of the Verkhovna Rada of Ukraine, State bodies, their officials; consideration at its meetings of the reports and information of State bodies and officials engaged in preliminary preparation of issues with regard to the consideration of such materials at the plenary session of the Verkhovna Rada of Ukraine.

The Commissioner for Human Rights of the Verkhovna Rada of Ukraine, who exercises parliamentary control over the observance of constitutional human and civil rights and freedoms, plays a central role in preventing and combating discrimination, as well as the protection of the rights of the entire population on a permanent basis. According to Stasiuk, an important task at the current stage of Ukraine's development is the creation of an effective human rights system, the main elements of which are the relevant specialised institutions. As an independent and autonomous institution, the Ombudsman plays a significant role in ensuring State protection of human and civil rights and freedoms, their observance and respect by public authorities, non-governmental organisations. In the event of a violation of such rights, the Commissioner's priority objective is to intensify remedial pro-

cesses. Consequently, this gives reason to assert that the human rights function of the Ukrainian State is the most important in today's realities (Stasiuk, 2018, pp. 142-146).

Article 3 of the Law of Ukraine on the Commissioner of the Verkhovna Rada of Ukraine for Human Rights, in addition to the systematic provision of observance and protection of human and civil rights and freedoms, among the main powers of this official, provides for preventing any forms of discrimination in the exercise of one's subjective rights (Law of Ukraine On the Commissioner for Human Rights of the Verkhovna Rada of Ukraine, 1997). The Ombudsman operates independently of the public authorities and is accountable and supervised exclusively by the Parliament, which contributes to the establishment of sufficiently effective work in making the State anti-discrimination policy (Karpinska, 2015; Kosinov, 2015).

The combination of legal instruments provided for in constitutional and administrative legislation enables the Parliamentary Commissioner for Human Rights to thoroughly implement the principle of non-discrimination in all major sectors of public life in timely manner. First of all, these are acts of response (Constitutional Provision; Provision to public authorities, associations of citizens, legal entities regardless of the form of ownership, their officials and officers) concerning violations of the provisions of the Constitution of Ukraine, Laws of Ukraine, international treaties of Ukraine on human and civil rights and freedoms.

3. Review of the functions of the Cabinet of Ministers of Ukraine as an entity empowered to prevent and combat discrimination

According to the legislation in force, the Cabinet of Ministers plays an extremely important role in guaranteeing non-discrimination and is a State entity that implements the State's internal and external anti-discrimination policy, the implementation of all legal instructions to prevent and combat discrimination by the population and public authorities and the organisation of a system of measures to ensure human and civil rights and freedoms; and directs, coordinates and monitors the work of ministries and other executive bodies in this aspect.

The Government Plenipotentiary for the Rights of Persons with Disabilities and the Government Plenipotentiary for Gender Policy and their offices are included in the structure of the Cabinet of Ministers of Ukraine (Resolution of the Cabinet of Ministers of Ukraine On approval of the structure of the Secretariat of the Cabinet of Ministers of Ukraine, 2016). These officials have a legal status, which enables to effectively implement certain key areas of State anti-discrimination policy in relation to a certain category of the population. For example, the issue of gender equality is significant to modern democratic society in any country, which has not lost its practical and theoretical-legal relevance in Ukraine for 10 years. The Government Plenipotentiary for the Rights of Persons with Disabilities is responsible for promoting compliance with international obligations to respect the rights and legitimate interests of persons with disabilities in Ukraine and monitoring their observance; participation by the Prime Minister of Ukraine in international meetings and forums to protect the rights and legitimate interests of persons with disabilities and to fulfil Ukraine's international obligations in this field; taking measures, within the limits of its powers, to eliminate violations of the rights and legitimate interests of persons with disabilities, the causes that led to their occurrence; promoting public awareness of the rights of persons with disabilities (Resolution of the Cabinet of Ministers of Ukraine On approval of the Regulation on the Government Commissioner for the Rights of Persons with Disabilities and amendments to the Resolution of the Cabinet of Ministers of Ukraine of January 3, 2013 № 5, 2017).

Two officials, appointed by this executive body, in the system of State actors responsible for preventing and combating discrimination are of special interest – the Commissioner for the Protection of the State Language and the Educational Ombudsman of Ukraine. The main objectives of the latter are: to promote public policy on the human right to a high-quality and accessible education; to implement measures to comply with educational legislation; to take measures to ensure adequate conditions for equal access to education; promotion of an inclusive form of education; promotion of Ukraine's international obligations to respect human rights to education, etc. (Resolution of the Cabinet of Ministers of Ukraine Some issues of the educational ombudsman, 2018).

The novelty of the domestic legislation was the introduction of the institution of the so-called "language ombudsman", which performs an extremely important function in the State to restore the historical significance of the State language as the most important basis of the Ukrainian identity. Moreover, in recent years, public policy has recognised the problem of linguistic discrimination in the country, which is unacceptable and requires immediate improvement.

The next group of relevant authorities is represented by the entire system of central and local executive authorities that, within the limits of their powers, must ensure an ade-

quate level of prevention and combating discrimination. On the one hand, they guarantee the observance of the principle of non-discrimination in daily internal organisational activities, on the other hand, they implement State anti-discrimination policy in the areas of the exercise of their competence. At the same time, such work is not specialised, so the system of these actors should include executive authorities, which are basically authorised by law in force to exercise general or special powers in human and civil rights and freedoms, combating of manifestations of discrimination, etc. The list of central executive bodies responsible for combating discrimination includes the following:

1) The Ministry of Internal Affairs of Ukraine and the National Police of Ukraine – ensuring the protection of human and civil rights and freedoms, the interests of society and the State, combating crime, maintaining public safety and order, and providing police services;

2) The Ministry of Foreign Affairs of Ukraine – the protection of the rights and interests of citizens and legal entities of Ukraine abroad; measures for the protection, evacuation of citizens of Ukraine, documents and property of foreign diplomatic institutions of Ukraine from States, which are in a state of armed conflict or an emergency;

3) The Ministry of Justice of Ukraine examines draft legal regulations subject to state registration, on consistency with the Convention for the Protection of Human Rights and Fundamental Freedoms and the practice of the European Court of Human Rights; promotes the development of legal services for the rights, freedoms and legitimate interests of citizens and legal entities; participates in the development and dissemination of educational programmes for the protection of rights, freedoms and legitimate interests of citizens; conducts a gender and legal analysis of legal regulations;

4) The Ministry for the Reintegration of the Temporarily Occupied Territories of Ukraine promotes the rights and freedoms of Ukrainian citizens living in the temporarily occupied territories of Ukraine adjacent to them; collects and systematises information on violations of the rights of Ukrainian citizens, foreigners and stateless persons in the temporarily occupied territories of Ukraine; takes measures to protect the rights, freedoms and legitimate interests of natural and legal persons violated as a result of the armed conflict and/or the temporary occupation of part of the territory.

The executive authorities in the field of anti-discrimination should include a number of important authorised actors responsible for State anti-discrimination policy according to specific vectors, as well as with regard to a certain category of citizens, such as: 1) the Ministry of Social Policy of Ukraine – prevention and combating of gender-based violence; ensuring equal rights and opportunities for women and men; provision of social services and social work; protection of the rights of children; protection of the rights of persons deported on ethnic grounds to Ukraine; ensuring the subjective rights of persons with disabilities; 2) the State Labour Service of Ukraine – prevention of discrimination of workers with certain diseases in the workplace; State control over compliance with the legislation on employment of persons with disabilities; 3) the State Service of Ukraine on Ethnic Policy and Freedom of Conscience – the implementation of State on inter-ethnic relations, religion and protection of the rights of national minorities in Ukraine.

4. Conclusions

In view of the above, the following points should be mentioned in the system of authorised actors responsible for combating discrimination:

1) Authorised actors on parliamentary control in the field of anti-discrimination – the Committee of the Verkhovna Rada of Ukraine on Human Rights, De-occupation and Reintegration of Temporarily Occupied Territories in the Donetsk, Luhansk and Autonomous Republic of Crimea, the city of Sevastopol, national minorities and inter-ethnic relations; Commissioner for Human Rights of the Verkhovna Rada; Representative of the Commissioner for Equal Rights and Freedoms of the Secretariat of the Commissioner for Human Rights of the Verkhovna Rada of Ukraine;

2) Authorised actors on governmental control in the field of anti-discrimination – the Government Commissioner for the Rights of Persons with Disabilities, the Government Commissioner for Gender Policy, the Education Ombudsman of Ukraine, the Commissioner for the Protection of the State Language;

3) Actors authorised to exercise the general powers of central executive bodies in the field of anti-discrimination – the Ministry of Internal Affairs of Ukraine, the Ministry of Foreign Affairs of Ukraine, the Ministry of Justice of Ukraine, the Ministry for the Reintegration of Temporarily Occupied Territories of Ukraine;

4) Actors authorised to exercise special powers of central executive authorities in the field of anti-discrimination – the Ministry of Social Policy of Ukraine, the State Service of Ukraine for Labour Issues, the State Service of Ukraine for Ethnic Policy and Freedom of Conscience;

5) Local and regional authorised actors responsible for combating discrimination – regional, district state administrations and in Kyiv.

References

Hryshko, O.M. (2017). Mekhanizm zabezpechennia prav liudyny v Ukraini [Mechanism for ensuring human rights in Ukraine]. *Pravove rehuliuvannia ekonomiky – Legal regulation of the economy, 16*, 33-43 (in Ukrainian).

Karpinska, O.B. (2015). Upovnovazhenyi Verkhovnoi Rady Ukrainy z prav liudyny yak subiekt pravozakhysnoi diialnosti [The Commissioner of the Verkhovna Rada of Ukraine for Human Rights as a subject of human rights activities]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific Bulletin of Uzhhorod National University, 31. Vols. 1,* 82-86 (in Ukrainian).

Konstytutsiia Ukrainy : pryiniata 26 cherv. 1996 roku [The Constitution of Ukraine from June 26 1996]. (1996). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/254k/96-vr#Text (in Ukrainian).

Kosinov, S.A. (2015). Ombudsmen yak instytut kontroliu za vladoiu [The ombudsman as an institution of control over power]. *Teoriia i praktyka pravoznavstva – Theory and practice of jurisprudence, 1 (7),* 1-12 (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy Deiaki pytannia osvitnoho ombudsmena : pryniata 6 cherv. 2018 roku № 491 [Resolution of the Cabinet of Ministers of Ukraine Some issues of the educational ombudsman from June 6 2018 № 491]. (2018). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/491-2018-п#Text (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy Pro zatverdzhennia Polozhennia pro Uriadovoho upovnovazhenoho z prav osib z invalidnistiu ta vnesennia zmin do postanovy Kabinetu Ministriv Ukrainy vid 3 sich. 2013 r. № 5 : pryiniata 21 liut. 2017 roku № 125 [Resolution of the Cabinet of Ministers of Ukraine On approval of the Regulation on the Government Commissioner for the Rights of Persons with Disabilities and amendments to the Resolution of the Cabinet of Ministers of Ukraine of January 3, 2013 № 5 from January 2017 № 125]. (2013). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/125-2017-p#n9 (in Ukrainian).

Postanova Kabinetu Ministriv Ukrainy Pro zatverdzhennia struktury Sekretariatu Kabinetu Ministriv Ukrainy : pryiniata 23 serp. 2016 roku № 564 [Resolution of the Cabinet of Ministers of Ukraine On approval of the structure of the Secretariat of the Cabinet of Ministers of Ukraine from August 23 2016, № 564]. (2016). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/564-2016-p#Text (in Ukrainian).

Stasiuk, O.L. (2018). Administratyvno-pravovi zasady diialnosti upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny u sferi realisatsii pravozakhysnoi funktsii derzhavy [Administrative and legal bases of activity of the Commissioner of the Verkhovna Rada of Ukraine for Human Rights in the field of realisation of the human rights function of the state]. *Pravo i suspilstvo – Law and society,* 5*, Vols. 2,* 142-146 (in Ukrainian).

Zakon Ukrainy Pro Upovnovazhenoho Verkhovnoi Rady Ukrainy z prav liudyny : pryiniatyi 23 hrud. 1997 roku № 776/97-VR [Law of Ukraine On the Commissioner for Human Rights of the Verkhovna Rada of Ukraine from December 23 1997, № 776/97-VR]. (1997). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/776/97-vr#Text (in Ukrainian).

Zakon Ukrainy Pro zasady zapobihannia ta protydii dyskryminatsii v Ukraini : pryiniatyi 06 veres. 2012 roku № 5207-VI [Law of Ukraine On Principles of Prevention and combating discrimination in Ukraine from September 6 2012, № 5207-VI]. (2012). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/5207-17#Text (in Ukrainian).

Олег Бащук,
ад'юнкт кафедри поліцейського права, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Bashchuk_Oleh@ukr.net
ORCID: *orcid.org/0000-0001-9121-8485*

СИСТЕМА СУБ'ЄКТІВ ВЛАДНИХ ПОВНОВАЖЕНЬ У СФЕРІ ПРОТИДІЇ ДИСКРИМІНАЦІЇ ТА МІСЦЕ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ УКРАЇНИ У ЇЇ СТРУКТУРІ

Анотація. ***Мета.*** Метою статті є визначення системи та характеристика повноваження органів виконавчої влади, окремих посадових осіб у сфері протидії дискримінації, а також з'ясування місця у її структурі органів поліції. ***Результати.*** У статті здійснено характеристику повноважень органів виконавчої влади, посадових осіб у сфері запобігання та протидії дискримінації. До відповідних державних суб'єктів віднесено Комітет Верховної Ради України з питань прав людини, деокупації та реінтеграції тимчасово окупованих територій, національних меншин і міжнаціональних відносин, Уповноваженого Верховної Ради України з прав людини, Кабінет Міністрів України, Урядового уповноваженого з прав осіб з інвалідністю, Урядового уповноваженого з питань гендерної політики, Освітнього омбудсмена України, Уповноваженого із захисту державної мови. Окрема увага звернута на особливостях реалізації правового статусу у сфері забезпечення принципу недискримінації Міністерством закордонних справ України, Міністерством юстиції України,

Міністерством соціальної політики України. ***Висновки.*** До система суб'єктів владних повноважень у сфері протидії дискримінації варто віднести такі ланки, як: 1) суб'єкти владних повноважень з питань парламентського контролю у сфері протидії дискримінації: Комітет Верховної Ради України з питань прав людини, деокупації та реінтеграції тимчасово окупованих територій у Донецькій, Луганській областях та Автономної Республіки Крим, міста Севастополя, національних меншин і міжнаціональних відносин; Уповноважений Верховної Ради України з прав людини; Представник Уповноваженого з дотримання рівних прав і свобод Секретаріату Уповноваженого Верховної Ради України з прав людини; 2) суб'єкти владних повноважень з питань урядового контролю у сфері протидії дискримінації: Урядовий уповноважений з прав осіб з інвалідністю, Урядовий уповноважений з питань гендерної політики, Освітній омбудсмен України, Уповноважений із захисту державної мови; 3) суб'єкти владних повноважень з питань реалізації загальних повноважень центральних органів виконавчої влади у сфері протидії дискримінації: Міністерство внутрішніх справ України, Міністерство закордонних справ України, Міністерство юстиції України, Міністерство з питань реінтеграції тимчасово окупованих територій України; 4) суб'єкти владних повноважень з питань реалізації спеціальних повноважень центральних органів виконавчої влади у сфері протидії дискримінації: Міністерство соціальної політики України, Державна служба України з питань праці, Державна служба України з етнополітики та свободи совісті; 5) суб'єкти владних повноважень місцевого та регіонального рівнів у сфері протидії дискримінації – обласні, районні державні адміністрації та у м. Києві.

Ключові слова: дискримінація, запобігання та протидія дискримінації, міністерства, Національна поліція України, органи публічної влади, Уповноважений Верховної Ради України з прав людини, центральні органи виконавчої влади.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.9 (477) 437
DOI https://doi.org/10.32849/2663-5313/2022.2.07

Viacheslav Bukovskyi,
PhD in Law, Doctoral Student, Scientific Institute of Public Law, 2a H. Kirpy street, Kyiv, Ukraine, postal code 03035, Bukovskyi_Viacheslav@ukr.net
ORCID: *0000-0002-1759-3881*

Bukovskyi, Viacheslav (2022). The subject-matter of comparative legal analysis of Ukraine, European Union member states and North America on administrative and legal support for intellectual property and investment protection. *Entrepreneurship, Economy and Law*, 2, 54–58, doi https://doi.org/10.32849/2663-5313/2022.2.07

THE SUBJECT-MATTER OF COMPARATIVE LEGAL ANALYSIS OF UKRAINE, EUROPEAN UNION MEMBER STATES AND NORTH AMERICA ON ADMINISTRATIVE AND LEGAL SUPPORT FOR INTELLECTUAL PROPERTY AND INVESTMENT PROTECTION

Abstract. ***Purpose.*** The purpose of the article is a comparative legal analysis of Ukraine, EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection. ***Results.*** The article reveals the content of the subject-matter of the comparative legal analysis of Ukraine, the EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection. It is proven that they are interrelated in many aspects by material goods in the form of intellectual property and investments, which are usually updated by actors of administrative law virtually and digitally. They constitute the content of administrative service and executive administrative activities of public administrators through the comparative and legal analysis of legislation, empirical material, case law and other interpretation of the provisions of law, scientific, financial and legal doctrines in Ukraine, EU Member States and North America. The legal framework for protection of intellectual property and investments combines: 1) From the perspective of statics, intellectual property and investments are different forms of ownership (investments are tangible property while intellectual property objects are intellectual property), but they are updated for consumers, usually in virtual digital space (format); 2) There is a mutual need for proper specification to prevent access to them by outsiders; 3) This results in many common grounds and remedies; 4) The appropriate level of protection of intellectual property rights has a direct impact on the investment climate in the State and vice versa. ***Conclusions.*** It is concluded that the content of the subject-matter of the comparative legal analysis of Ukraine, the EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection. It is proven that they are interrelated in many aspects by material goods in the form of intellectual property and investments, which are updated by actors of administrative law, usually, virtually and digitally. They represent the content of administrative service and executive administrative activities of public administrators through the comparative and legal analysis of legislation, empirical material, case law and other interpretation of the provisions of law, scientific, financial and legal doctrines in Ukraine, EU Member States and North America.

Key words: content, investments, intellectual property, protection, comparative legal analysis, subject-matter, digital format.

1. Introduction

In democratic legal countries with market economies, intellectual property and investment occupy an important place in the State and civil society system. The former is the basis for social and economic progress, the latter supports this process. They are interrelated in many fields.

Accordingly, such an important aspect of social relations cannot remain outside law. The static scope of such regulatory mechanism is private law. However, in the evolution of legal protection of values in question, the provisions of public law, primarily administrative and financial law, are of importance.

However, as domestic experience shows, the protection of intellectual property rights and investment protection are at an inadequate level, which is a leading factor in the low standard of living of citizens, because good and significant investments in the domestic economy almost do not come. Without them neither decent wages for workers, nor success for business, nor increase of gross domestic product of the Ukrainian economy are possible.

In other words, addressing the issue of intellectual property rights and investment protection will directly improve the well-being of citizens.

The comparative legal analysis of Ukraine, EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection was under focus by domestic administrative law scientists, such as V. Halunko, P. Dikhtievskyi, A. Zamryha, A. Ivanyshchuk, O. Kuzmenko, M. Loshytskyi, D. Pavlov, O. Pravotorova, A. Chubenko, O. Yunin, et al. However, they did not directly address the issues concerned analysing more general, special or related challenges.

2. Comparative legal analysis

According to the *Explanatory Dictionary of the Ukrainian Language* "subject-matter" is any concrete material phenomenon perceived by the senses; logical concept, component of the content of thought, knowledge, etc.; what is aimed at the cognitive, creative, practical activity of someone, something; the range of knowledge, which is a separate discipline of teaching (Bilodid, 1972). Practically the first two of these encyclopaedic interpretations of the category of subject-matter are such that to some extent may be inherent in our research.

Therefore, we can make a hypothesis that the subject-matter of the comparative legal analysis of Ukraine, EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection can be a material good (intellectual property and investments), which is the content of our knowledge, as well as cognitive, creative, practical activities of actors of law related to it in the form of comparative analysis of the administrative and legal support. Let us prove them.

The first component of the subject-matter of our research is "intellectual property", in the most general sense it is the intangible property that is the result of creativity (such as patents or trademarks or copyrights) (British Encyclopaedia, 2020). According to the Encyclopaedia Britannica, intellectual-property law is the legal regulations governing an individual's or an organisation's right to control the use or dissemination of ideas or information. Various systems of legal provisions exist that empower persons and organisations to exercise such control. Copyright law confers upon the creators of "original forms of expression" (for example, books, movies, musical compositions, and works of art) exclusive rights to reproduce, adapt, and publicly perform their creations. Patent law enables the inventors of new products and processes to prevent others from making, using, or selling their inventions. Trademark law empowers the sellers of goods and services to apply distinctive words or symbols to their products and to prevent their competitors from using the same or confusingly similar insignia or phrasing. Finally, trade-secret law prohibits rival companies from making use of wrongfully obtained confidential commercially valuable information (e.g., soft-drink formulas or secret marketing strategies) (British Encyclopedia, 2020).

Under art. 418 of the Civil Code of Ukraine "Intellectual property right is the human right to the result of intellectual, creative activity or to another object of intellectual property right" (Civil Code of Ukraine, 2003). The concept of "intellectual property" arose in the process of long-term practice of legislating their rights to the results of intellectual activity in industrial, scientific, artistic, industrial and other fields by certain persons. In society, relations with respect to the creation and use of intellectual property are governed by a system of legal provisions, called intellectual-property law. Objects of intellectual-property law include literary and artistic works; computer programmes; compilations of data (databases); performance; phonograms, videograms, broadcasts (programmes) of broadcasting organisations; scientific discoveries; inventions, useful models; industrial designs; layout (topography) of integrated circuits; rationalisation proposals; plant varieties, animal breeds; commercial (brand) names, trademarks (marks for goods and services), geographical indications, trade secrets (Civil Code, art. 420). The object of intellectual property right can be only the intangible object, that is, the result of intellectual, creative activity. However, not every product of creative activity is recognised as an object of intellectual-property law, but only the one that is protected by the Civil Code of Ukraine and other laws of Ukraine on intellectual property. The results of creative activities, which for one reason or another have not been protected by intellectual property rights, may be recognised as objects of civil law, but not of intellectual property rights. Objects of intellectual property rights can be not only the results of intellectual, creative activity, but also other

objects defined by the Civil Code of Ukraine and other laws. These are so-called means of individualisation of participants of civil circulation, goods and services and other non-traditional objects, equated with objects of intellectual property rights. Nevertheless, they are protected by intellectual property rights (Civil Code of Ukraine, 2003).

According to the Encyclopaedia Britannica "investment" is a process of exchanging income during one period of time for an asset that is expected to produce earnings in future periods. Thus, consumption in the current period is foregone in order to obtain a greater return in the future. For an economy as a whole to invest, total production must exceed total consumption. Throughout the history of capitalism, investment has been primarily the function of private business, however, during the 20th century governments in planned economies and developing countries have become important investors (British Encyclopaedia, 2020).

From the perspective of the Ukrainian reality, "investments" are economic operations involving the acquisition of fixed assets, intangible assets, corporate rights and/or securities in exchange for funds or property, long-term investing of capital in any enterprise for profit. Investments are grouped into public and private, direct and portfolio; in services, housing; real (direct), intellectual, financial and replacement of worn fixed assets; long-term capital (funds) investment in various sectors of the economy, mainly outside the country, as well as property and intellectual values invested in business and other activities, resulting in profits or social benefits (Chubenko, Loshytskyi, Pavlov, Bychkova, Yunin, 2018).

3. Legal nature of the categories "intellectual property" and "investment".

The question arises: what unites these two scientific categories – intellectual property and investment – what is the subject-matter of the joint study? In our view, the answer lies both in their scientific nature (statics) and in the ways of their legal protection (dynamics). However, first, the focus should be on some aspects of the legal nature of property rights. According to V. Halunko, property relations constitute a system of exceptions to access to tangible and intangible resources. If there are no exceptions to access to resources, then they are nobody's, belong to no one, or that means that the same belongs to everyone, because there is free access to them. To exclude others from free access to resources means to specify, that is, to define precisely property rights. The more clearly defined and securely protected property rights are, the better the link between property owners and their well-being. Therefore, the specification encourages effective decision-making. The reverse of the erosion of property rights occurs when they are imprecise or poorly protected (Halunko, 2018).

To sum up, the administrative and legal support for intellectual property and investment protection combines: 1) From the perspective of statics, intellectual property and investments are different forms of ownership (investments are tangible property while intellectual property objects are intellectual property), but they are updated for consumers, usually in virtual digital space (format); 2) There is a mutual need for proper specification to prevent access to them by outsiders; 3) This results in many common grounds and remedies; 4) The appropriate level of protection of intellectual property rights has a direct impact on the investment climate in the State and vice versa.

Consequently, the well-being of citizens, the proper development of business in legal, democratic and market economies depend directly on interrelated legal processes regarding the respect and protection of intellectual property as a precondition, foundations and, in some cases, a remedy for investment protection.

When protection of intellectual property and investments is based on administrative law, the external form of realisation of executive functions is public administration. According to V. Halunko, public administration is characterised by: 1) external expression of the realisation of the tasks (functions) of the executive authority; 2) administrative activities of the public administration; 3) the purpose of meeting the public interest; 4) negatively restricted from: legislative activity; administration of justice and criminal procedure; political activities; private interest activities. Public administration as a form of exercising public power is administrative activity of public administrators, which is external expression of realisation of tasks (functions) of executive power, to satisfy the public interest and to be negatively restricted to legislative judicial and political activities. In terms of content, the types of public administration are grouped into: 1) administrative services by the public administration, when the public administration should more fully satisfy the rights, freedoms and interests of individuals; implementation of executive and administrative activities (public administration), in the course of which the public administration performs public execution of the legislation throughout the State (executive activities) and in accordance with the prescribed competences issues for this purpose by-laws normative legal acts on the basis of laws for their implementation through detailing and clar-

ifying (administrative activities) (Halunko, Dikhtiievskyi, Kuzmenko, 2001).

With regard to the dynamics of the problem under consideration, it should be noted that administrative and legal protection is an institution of administrative law, consisting of homogeneous provisions, aimed at the prevention of offences (prevention of crimes) and restoration of violated rights, freedoms and lawful interests of natural and legal persons by administrative remedies, that is, forms of administrative activity of public administration, administrative coercion measures and administrative procedures. Administrative and legal protection is provided through the administrative and legal provisions, but from the perspective of the gnoseology of law, it cannot exist within such a narrow framework defined by the State, it reflects objective public relations, protects the most important values which, at some point in time, may not yet be formalised in the sources of administrative law, is governed by administrative and legal provisions and at the same time by administrative law, which is not established by the State alone, although by it primarily (Pravotorova, 2019).

The next dynamic category of our research is "support," according to the dictionary of the Ukrainian language means to supply something in sufficient quantity, to meet someone's needs; to provide someone with sufficient material means of subsistence, create a secure environment for doing something; guarantee something; protect someone, protect something from danger (Bilodid, 1972). A. Ivanyshchuk determined that administrative and legal support is a purposeful regulatory influence of the provisions of administrative law, which develop and clarify the constitutional provisions that determine the theoretical and legal administrative and legal framework for the functioning of public authority with a view to creating appropriate conditions for judges to ensure the rights, freedoms and legitimate interests of natural and legal persons, the public interest of the State and entire society. According to its content, the administrative and legal support of the judicial branch is a system of provisions of administrative law, fundamentals (concepts, doctrines and principles of the legal and regulatory framework), administrative and legal relations and administrative instruments (forms and methods of administrative activities and administrative procedures), which together form a comprehensive institution of administrative law, filled with numerous vertical and horizontal ties, homogeneous social relations (Ivanyshchuk, 2015).

Furthermore, the boundaries of the content of the comparative legal analysis of Ukraine, EU Member States and North America on the administrative and legal support for intellectual property and investment protection are: 1) Starting points, sources of research: legislation, empirical material, case law and other interpretation of the legal provisions, scientific, financial and legal doctrines of Ukraine, EU Member States and North America; 2) Results of research: a) foundations: concepts, principles, doctrines, theories of the administrative and legal support for intellectual property and investment protections of Ukraine, EU Member States and North America; b) public administration tools of the administrative and legal support for intellectual property and investment protections of Ukraine, EU Member States and North America; c) administrative procedures of the administrative and legal support for intellectual property and investment protections of Ukraine, EU Member States and North America; d) improvement of areas and legislation of the administrative and legal support for protection of intellectual property and investments in Ukraine.

4. Conclusions

Therefore, the subject-matter of the comparative legal analysis of Ukraine, the EU Member States and North America regarding the administrative and legal support for intellectual property and investment protection are interrelated in many aspects by material goods in the form of intellectual property and investments, which are usually updated by actors of administrative law virtually and digitally. They represent the content of administrative service and executive administrative activities of public administrators through the comparative and legal analysis of legislation, empirical material, case law and other interpretation of the provisions of law, scientific, financial and legal doctrines in Ukraine, EU Member States and North America.

References:

Bilodid, I.K. (1972). *Slovnyk ukrainskoi movy [Dictionary of the Ukrainian language].* Kyiv : Nauk. Dumka (in Ukrainian).

Bilodid, I.K. (1972). *Slovnyk ukrainskoi movy [Dictionary of the Ukrainian language].* Kyiv : Nauk. Dumka (in Ukrainian).

British Encyclopedia. Intellectual Property. 2020. Retrieved from https://www.vocabulary.com/dictionary/intellectual%20property (in English).

Chubenko, A., Loshytskyi, M., Pavlov, D., Bychkova, S., Yunin, O. (2018). *Investytsii: terminolohichnyi slovnyk z pytan zapobihannia ta protydii lehalisatsii (vidmyvanniu) dokhodiv, oderzhanykh zlochynnym shliakhom,*

finansuvanniu teroryzmu, finansuvanniu rozpovsiudzhennia zbroi masovoho znyshchennia ta koruptsii [Investments: a terminological vocabulary for nutrition and anti-legalisation (disclosure) of income gained by evil ways, financing of terrorism, financing of raising the mass of mass]. Kyiv: Vaite (in Ukrainian).

Halunko, V. (2018). *Administratyvno-pravova okhorona subiektiv prava vlasnosti v Ukraini [Administrative and legal protection of subordinate rights of power in Ukraine].* Kherson: VAT KhMD (in Ukrainian).

Halunko, V., Dikhtiievskyi, P., Kuzmenko, O. (2001). *Administratyvne pravo Ukrainy [Administrative law of Ukraine].* Kherson: OLDI-PLIuS (in Ukrainian).

Ivanyshchuk, A.A. (2015). *Administratyvno-pravove zabezpechennia sudovoї vlady v Ukraïni [Administrative and legal support of the judiciary in Ukraine].* Kyïv ; Kherson: Hrin D.S. (in Ukrainian).

Pravotorova, O. (2019). Administratyvno-pravova okhorona: okremi teoretychni aspekty [Administrative and legal protection: okremi theoretical aspects]. *Naukovyi visnyk Uzhhorodskoho natsionalnoho universytetu – Scientific list of Uzhgorod National University*, 57, 45-49 (in Ukrainian).

Tsyvilnyi kodeks Ukrainy vid 16 sich. 2003 roku **№ 435-IV** [Civil Code of Ukraine from January 16, 2003 **№ 435-IV**]. (2003). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/435-15#Text (in Ukrainian).

В'ячеслав Буковський,
кандидат юридичних наук, докторант, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, Bukovskyi_Viacheslav@ukr.net
***ORCID:** 0000-0002-1759-3881*

ПРЕДМЕТ ПОРІВНЯЛЬНО-ПРАВОВОГО АНАЛІЗУ УКРАЇНИ, КРАЇН-УЧАСНИЦЬ ЄС ТА ПІВНІЧНОЇ АМЕРИКИ ЩОДО АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ОХОРОНИ ІНТЕЛЕКТУАЛЬНОЇ ВЛАСНОСТІ ТА ІНВЕСТИЦІЙ

Анотація. Мета. Мета статті полягає у здійсненні порівняльно-правового аналізу України, країн-учасниць ЄС та Північної Америки щодо адміністративно-правового забезпечення охорони інтелектуальної власності та інвестицій. **Результати.** У статті з'ясовано зміст предмета порівняльно-правового аналізу України, країн-учасниць ЄС та Північної Америки щодо адміністративно-правового забезпечення охорони інтелектуальної власності та інвестицій. Доведено, що вони взаємопов'язані в багатьох аспектах матеріальними благами у формі інтелектуальної власності та інвестицій, які актуалізуються суб'єктами адміністративного права, як правило, у віртуальному цифровому форматі. Вони становлять зміст адміністративно-сервісної та виконавчо-розпорядчої діяльності суб'єктів публічної адміністрації через здійснення порівняльного та правового аналізу законодавства, емпіричного матеріалу, судової практики й іншого тлумачення норм права, наукових, фінансових і правових доктрин в Україні, країнах-учасницях ЄС та Північної Америки. Правове забезпечення охорони інтелектуальної власності та інвестицій об'єднує таке: 1) з погляду статики, інтелектуальна власність та інвестиції відносяться до різних форм власності (інвестиції – це матеріальна власність, а об'єкти інтелектуальності власності – інтелектуальна власність), однак вони актуалізуються для споживачів, як правило, у віртуальному цифровому просторі (форматі); 2) існує взаємна необхідність їх належної специфікації, щоб виключити доступ до них сторонніх осіб; 3) це призводить до багатьох спільних засад і засобів їх правової охорони; 4) належний рівень охорони права інтелектуальної власності прямо впливає на інвестиційний клімат у державі і навпаки. **Висновки.** Зроблено висновок, що предметом порівняльно-правового аналізу України, країн-учасниць ЄС і Північної Америки щодо адміністративно-правового забезпечення охорони інтелектуальної власності та інвестицій є взаємопов'язані в багатьох аспектах матеріальні блага у формі інтелектуальної власності та інвестиції як матеріальні цінності, які актуалізуються суб'єктами адміністративного права, як правило, у віртуальному цифровому форматі. Вони становлять зміст адміністративно-сервісної та виконавчо-розпорядчої діяльності суб'єктів публічної адміністрації через здійснення порівняльного та правового аналізу законодавства, емпіричного матеріалу, судової практики та іншого тлумачення норм права, наукових, фінансових і правових доктрин в Україні, країнах-учасницях ЄС та Північної Америки.

Ключові слова: зміст, інвестицій, інтелектуальна власність, охорона, порівняльно-правовий аналіз, предмет, цифровий формат.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.2.08

Liudmyla Domuschi,
Researcher, Scientific Institute of Public Law, 2a H. Kirpy street, Kyiv, Ukraine, postal code 03035, Domuschi_Liudmyla@ukr.net
***ORCID:** 0000-0002-5124-8514*

Domuschi, Liudmyla (2022). Principles of administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine. *Entrepreneurship, Economy and Law*, 2, 59–62, doi https://doi.org/10.32849/2663-5313/2022.2.08

PRINCIPLES OF ADMINISTRATIVE PROCEDURE FOR CASES INVOLVING APPEALS AGAINST AUTHORISED ACTORS' DECISIONS ON ADMINISTRATIVE LIABILITY IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to identify and outline, on the basis of the legal literature review, the basic principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine. ***Results.*** It is underlined that administrative court proceedings on appeals against authorised actors' decisions on administrative liability in Ukraine is a leverage (instrument) of influence on public administrators enabling the citizens of our State to restore or establish their legitimate rights, freedoms and interests. In the study, the principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are grouped into general and special ones. The general principles of law include: the rule of law, legality, equality of all parties before court, justice, freedom, humanism. Accordingly, the special principles in this field include: the adversarial nature of parties, the equality of all before court and law; the obligation to adjudicate; the right to appeal; the reasonableness of the time for considering the case; compensation of legal costs by the guilty party; mandatory administrative prosecution of the perpetrators; appeal only against unlawful decisions of authorised actors. ***Conclusions.*** The article identifies that the principles of administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are the basic legislated provisions, according to which, judicial authorities administer justice in the field of appeals against unlawful decisions of public authorities violating rights and freedoms and the legitimate interests of the citizens of our State, and in the event that guilt is proven, in the manner established by law, the court shall bring the guilty officials to administrative liability.

Key words: administrative liability, administrative procedure, power, principle, decision, actor, judicial appeal.

1. Introduction.

Modern public and legal processes in our State require detailed legal regulatory mechanism. Moreover, the establishment of clear positions on specific areas is the basis for the further development of a democratic civil society. Therefore, the exercise by citizens of the right to appeals against authorised actors' decisions on administrative liability is of great importance for their personal interests, in particular, the fundamental principles in this field are enshrined in the Constitution of Ukraine and current national legislation.

Principles in the administrative procedure are fundamental factors which are the basis of any system. Thus, forming and choosing principles is a very important aspect of all sectors of life. Every citizen has faced the violation of his/her rights to freedoms and legitimate interests not only by others but also by State bodies, as well as by their officials, so the State protects itself from attacks in these fields.

Therefore, the principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are used to ensure these aspects. Among the foundations of the theory of administrative law, the priority is always the principles, because only after their study one should pass to other administrative and legal phenomena.

The issue of the principles of the administrative procedure for cases involving appeals

against authorised actors' decisions on administrative liability in Ukraine was under focus of academics in administrative law of Ukraine and Spain: V. Averianov, V. Bass, Y. Bytiak, V. Halunko, M. Damirchyiev, P. Dikhtiievskyi, V. Zarosylo, V. Kolpakov, O. Kuzmenko, R. Melnik, S. Stetsenko, V. Tkachenko, O. Tykhomyrov, T. Tsurkan, V. Shkarupa, García de Enterría, Moron Miguel Sanches, Posada Martínez Lopez-Muñiz, Zanobini, and others. However, they did not focus on comparability in the relevant field.

The purpose of the article is to identify and outline, on the basis of the legal literature review, the basic principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine.

2. Appeals against authorised actors' decisions

According to the explanatory dictionary of the Ukrainian language, the principle is the basic starting point of any scientific system, theory, ideological trend, etc.; the basic law of any exact science. A feature that underlies the creation or implementation of something, the way something is created or implemented. The rule that underlies the activities of an organization, society, etc. (Luchenko, 2011).

Every person has the right to apply to an administrative court if he/she considers that his/her rights, freedoms or interests have been violated by a decision, act or omission of an authorised actor (article 5, part 1, of the Code of Administrative Procedure of Ukraine) (Konstantinov, 2010).

In other words, regardless of whether a natural or legal person in Ukraine, it is possible to apply for the protection or restoration of their legitimate rights, freedoms and interests in accordance with the current legislation and to appeal the decision of actions or omissions of authorised actors.

In addition, it should be understood that the principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are the leading bases, determined to strengthen the generally established rules of conduct in this field.

A citizen may file a complaint in person or through an authorized other person. Complaints in the interests of minors and persons without legal capacity are filed by their legal representatives. A complaint in the interests of a citizen, on his behalf, may be filed by another person, a labour collective or an organization engaged in human rights activities, in the manner prescribed by law. The complaint shall be accompanied by the decisions or copies of the decisions taken by his previous application, as well as other documents necessary for the consideration of the complaint, which, after consideration, shall be returned to the citizen. The specificities of consideration of citizens' complaints against decisions, actions or omissions of public registrars of rights on immovable property are determined by the Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances". The specificities of consideration of citizens' complaints against registration actions, refusal of public registration, omissions of the public registrar are determined by the Law of Ukraine "On State Registration of Legal Entities, Individuals-Entrepreneurs and Public Formations" (Law of Ukraine "On State Registration of Real Rights to Immovable Property and Their Encumbrances", 2004).

According to art. 55 of the Constitution of Ukraine, everyone shall be guaranteed the right to challenge in court the decisions, actions, or inactivity of State power, local self-government bodies, officials and officers. The procedure for going to court is governed by procedural legislation, in particular the Code of Administrative Procedure. Pursuant to article 2 of the CAP, the task of administrative proceedings is to ensure that the courts settle disputes in the field of public legal relations in a fair, impartial and timely manner, with a view to protecting the rights, freedoms and interests of natural persons; rights and interests of legal persons from violations by authorised actors. Any decisions, actions or omissions of authorised actors can be appealed to administrative courts, unless the Constitution or the laws of Ukraine establish another procedure for court proceedings in respect of such decisions, acts or omissions (Administrative proceedings) (Constitution of Ukraine, 1996; Konstantinov, 2010).

Therefore, administrative court proceedings on appeals against authorised actors' decisions on administrative liability in Ukraine is a leverage (instrument) of influence on public administrators enabling the citizens of our State to restore or establish their legitimate rights, freedoms and interests.

According to D. Luchenko, an administrative and legal appeal as a procedure is based on a number of principles. These include both the principles inherent in the entire administrative procedure and the special principles of the complaint procedure. The first group includes the principles of the rule of law, justice, legality, objectivity, legal equality, protection of the interests of the individual and the State, transparency, dispositive capacity, economy, etc. The second group con-

sists of the principles of unrestricted right to appeal, certainty of the right to appeal, advantages of the applicant's interests, inadmissibility of abuse of the right to appeal, mandatory mechanisms of extrajudicial appeal, a combination of written and oral complaints, etc. (Luchenko, 2011).

To sum up, it should be noted that the purpose of the principles for appeals against decisions in cases on administrative offence is to declare, proclaim, and determine how citizens' complaints should and can be processed, they establish the only correct and permitted manner of conduct of the actors of such proceedings. Deviation from the rule of conduct established by law, going beyond the permitted range of actions means violation of the provisions of law, disregard of the law, non-recognition of its prescriptions (Konstantinov, 2010).

3. Principles of administrative procedure

In general, it should be noted that the general principles of the administrative procedure are formed, established and sanctioned by the State in the Constitution of Ukraine and the Code of Administrative Procedure of Ukraine.

According to article 2 of the CAP, the task of administrative proceedings is to ensure that the courts settle disputes in the field of public legal relations in a fair, impartial and timely manner, with a view to protecting the rights, freedoms and interests of natural persons; rights and interests of legal persons from violations by authorised actors. In cases of appeal against decisions, acts or omissions of authorised actors, administrative courts check whether they have been taken (committed): 1) on the grounds, within the powers and in the manner determined by the Constitution and laws of Ukraine; 2) using the power for the purpose, for which this power is granted; 3) justified, that is, taking into account all circumstances relevant to taking the decision (committing the action); 4) impartially (unbiased); 5) in good faith; 6) prudently; 7) respecting the principle of equality before law, preventing all forms of discrimination; 8) in proportion, inter alia, with the required balance between any adverse effects on the rights, freedoms and interests of the individual and objectives, to be achieved by the decision (action); 9) taking into account the right of the person to participate in decision-making; 10) in a timely manner, that is, within a reasonable period of time (Code of Administrative Procedure of Ukraine, 2005).

In addition, following the Code, the basic principles of administrative proceedings are: 1) the rule of law; 2) equality of all parties to the proceedings before law and court; 3) transparency and openness of the court procedure and its full recording by technical means; 4) the adversarial nature, dispositive character and formal establishment of all the circumstances of the case; 5) the binding nature of the judgement; 6) the right to appeal; 7) the right to appeal against the judgement in cases defined by law; 8) reasonableness of the court's hearing; 9) inadmissibility of abuse of procedural rights; 10) reimbursement of legal costs of natural and legal persons in favour of whom the court has decided (Code of Administrative Procedure of Ukraine, 2005).

To sum up, the principles of the administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are grouped into general and special ones

The general principles of law include: the rule of law, legality, equality of all parties before court, justice, freedom, humanism, etc.

Accordingly, the special principles in this field include: the adversarial nature of parties, the equality of all before court and law; the obligation to adjudicate; the right to appeal; the reasonableness of the time for considering the case; compensation of legal costs by the guilty party; mandatory administrative prosecution of the perpetrators; appeal only against unlawful decisions of authorised actors.

4. Conclusions

Consequently, the principles of administrative procedure for cases involving appeals against authorised actors' decisions on administrative liability in Ukraine are the basic legislated provisions, according to which, judicial authorities administer justice in the field of appeals against unlawful decisions of public authorities violating rights and freedoms and the legitimate interests of the citizens of our State, and in the event that guilt is proven, in the manner established by law, the court shall bring the guilty officials to administrative liability.

References:

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

Konstantinov, S. (2010). Pryntsypy oskarzhennia postanov u spravakh pro administratyvni pravoporushennia [Principles of appealing decisions in cases of administrative offenses]. *Visnyk Natsionalnoi akademii prokuratury Ukrainy – Bulletin of the National Academy of the Prosecutor's Office of Ukraine, 4*, 82-86 (in Ukrainian).

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

Luchenko, D. (2011). Pro pravovu pryrodu oskarzhennia rishen, dii abo bezdiialnosti subiektiv vladnykh povnovazhen [On the legal nature of appeals against decisions, actions or omissions of authorised actors]. *Visnyk Akademii pravovykh nauk Ukrainy – Bulletin of the Academy of Legal Sciences of Ukraine, 4*, 152–160 (in Ukrainian).

Zakon Ukrainy Pro derzhavnu reiestratsiiu rechovykh prav na nerukhome maino ta yikh obtiazhen vid 1 lyp. 2004 roku № 1952-IV [Law of Ukraine On State Registration of Real Rights to Immovable Property and Their Encumbrances of July 1, 2004 № 1952-IV]. (2004). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/1952-15#Text (in Ukrainian).

Людмила Домусчі,
науковий співробітник, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, Domuschi_Liudmyla@ukr.net
***ORCID:** 0000-0002-5124-8514*

ПРИНЦИПИ АДМІНІСТРАТИВНОГО ПРОЦЕСУ У СПРАВАХ СТОСОВНО ОСКАРЖЕННЯ РІШЕНЬ СУБ'ЄКТІВ ВЛАДНИХ ПОВНОВАЖЕНЬ ЩОДО ПРИТЯГНЕННЯ ОСІБ ДО АДМІНІСТРАТИВНОЇ ВІДПОВІДАЛЬНОСТІ В УКРАЇНІ

Анотація. ***Мета.*** Мета статті полягає в тому, щоб на основі праць вчених-юристів визначити та окреслити основні принципи адміністративного процесу у справах стосовно оскарження рішень суб'єктів владних повноважень щодо притягнення осіб до адміністративної відповідальності в Україні. ***Висновки.*** Наголошено, що адміністративне судочинство у справах стосовно оскарження рішень суб'єктів владних повноважень щодо притягнення осіб до адміністративної відповідальності в Україні є своєрідним важелем (інструментом) впливу на суб'єктів публічної адміністрації, за допомогою яких громадяни нашої держави можуть відновити або встановити їхні законні права, свободи та інтереси. Визначено, що принципи адміністративного процесу у справах стосовно оскарження рішень суб'єктів владних повноважень щодо притягнення осіб до адміністративної відповідальності в Україні поділяються на загальні та спеціальні. До загальних належать загальновстановлені принципи права, такі як: верховенство права, законності, рівності усіх учасників перед судом, справедливості, свободи, гуманізму. Відповідно, до спеціальних принципів у цій сфері, на нашу думку, слід віднести: змагальність сторін, рівність усіх перед судом та законом; обов'язковість прийняття судового рішення; право на апеляційний перегляд справи; розумність строків розгляду справи; відшкодування судових витрат винною стороною; обов'язковість притягнення винних до адміністративної відповідальності; оскарження виключно незаконних рішень суб'єктів владних повноважень. ***Результати.*** У статті визначено, що принципи адміністративного процесу у справах стосовно оскарження рішень суб'єктів владних повноважень щодо притягнення осіб до адміністративної відповідальності в Україні – це закладені на законодавчому рівні основні положення, спираючись на які, судові органи влади здійснюють правосуддя у сфері оскарження незаконних рішень органів публічної влади, які порушують права, свободи та законні інтереси громадян нашої держави; та у випадку, якщо вина буде доведена у встановленому законом порядку, суд буде змушений притягнути винних посадових осіб до адміністративної відповідальності.

Ключові слова: адміністративна відповідальність, адміністративний процес, влада, принцип, рішення, суб'єкт, судове оскарження.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.2.09

Artem Zubko,
PhD in Law, Senior Researcher, Scientific Institute of Public Law, 2a, H. Kirpy street, Kyiv, Ukraine, postal code 03035, Artem_Zubko@ukr.net
***ORCID:** 0000-0001-9119-3638*

Zubko, Artem (2022). System analysis of the concept of "power" within the framework of public law field. *Entrepreneurship, Economy and Law*, 2, 63–66, doi https://doi.org/10.32849/2663-5313/2022.2.09

SYSTEM ANALYSIS OF THE CONCEPT OF "POWER" WITHIN THE FRAMEWORK OF PUBLIC LAW FIELD

Abstract. ***Purpose.*** The purpose of the article is to formally define the concept of "power", which may be relevant for solving a specific research problem. ***Results.*** The article formally defines the concept of "power", which may be relevant for solving a specific research problem, because despite the frequent use of this concept by the scientific community, it has a multifaceted interpretation. It is emphasised that the specificities of the concept of power are the topic sufficiently widely studied by both domestic and foreign scientists of modern times. However, the absence of a formal definition of "power" enables an additional study of this phenomenon, including within the framework of the public and legal field. It is revealed that power as a phenomenon of social reality can be considered from many discourses, the specificities of the definition thereof depend on a specific research request. It is a multidisciplinary category that combines the characteristics of the relationship between people, actors and objects and is manifested both through multiple forms of compulsion and without intentional compulsion by others. It underlines that the system of public authorities is a set of people's authorities, which have different forms of exercising this power, in particular representative authorities formed by elections, such as the Parliament, President, local self-government bodies. Each body of public authority is created for the implementation of the goals and programmes set, ensuring the protection of the rights, freedoms and legitimate interests of the people, the security of the State and society, and addressing issues of socio-economic and cultural significance. ***Conclusions.*** It is defined that, first, power is an ontological concept, quality of various states of being, essence of possibilities and reflection of reality; second, it is an active or passive manifestation of strength, applicable from an actor to an object. A formal definition of the concept of "power" is offered in this wording: the legal possibility of the actor to establish the framework of required behaviour, which shall be respected by others. Within the framework of public and legal field, this definition can be interpreted as follows: this is the right granted by legal regulations to a specific authorised actor to organise and exercise managerial influence on a certain range of objects of influence.

Key words: administrative policy, power, State, State power, public power, society.

1. Introduction.

The concept of power is part of a social theory that dates to the time of ancient Greek philosophers. However, even today a significant number of legal theorists' studies focus on the phenomenon of power and related phenomena. This can be either one simple statement, such as power is not necessarily a negative, prohibitive or repressive thing, which forces to do things against the aspirations of society, but can also be a necessary, productive and positive strength in it (Gaventa, 2003) and, indeed, expanded arguments supporting the need for a transparent system of national governance based on the leading ideals of legal doctrine.

The specificities of the concept of power are the topic sufficiently widely studied by both domestic and foreign scientists of modern times: M. Vladymyrov, A. Danylenko, N. Kapustina, S. Kovalchuk, L. Krymets, I. Maliutin, I. Minaieva, as well as: Y. Emirbekova, M. Foucault, J. Gaventa, N. Narykov, A. Rachipa, P. Samygin, S. Samygin, and others. However, the absence of a formal definition of "power" allows an additional study of this phenomenon, including within the framework of the public and legal field.

The purpose of the article is to formally define the concept of "power", which may be relevant for solving a specific research problem.

2. Prerequisites for the existence of power and society

Frequent use of the term "power" cannot help deepening in its content. Power can be called as the highest degree of emotionally charged phenomenon, which is admired by some and frightens others. Some are charmed like a magnet; others see it as a receptacle of all

sinful things. However, it has always been one of the central categories of humanitarian knowledge, without which it is difficult to determine the interaction between individuals, society and the State (Kapustina, 2005, p. 10). Therefore, the etymology of the concept of "power" is polysemantic and has a wide range of interpretations (Maliutin, 2012, p. 27).

For example, according to the *Etymological dictionary of the Ukrainian language* the word *vlada* "power" and derivatives of it *volodar* "ruler", *vladnyi* "authoritative" etc. came from the Polish language – *wladza* or Czech *vlada* – power, leadership, government (Melnychuk, 1982, p. 409). The essence is the ability to direct, govern someone or something. In other languages, power tends to be equated with strength, opportunity, influence, possession, command, suppression, etc. and has a tradition of speaking terms related to the phenomenon of power. For example, from Greek *power – kratos*, German – *macht*, French – *pouvoir*, Italian – *domino*. In Latin, words such as *potestas, auctoritas, imperium* were used to define "power". The words *potestas, auctoritas* had a narrower meaning and meant a person's special ability to lead, manage other people. Moreover, English *authority* is translated as "power", "impact", "importance". That is why we equate the word *avtorytet* "authoritativeness" with such a position of a person in a society. Another English word *power* also means "strength" and "supremacy", which, in fact, reflects the nature of authority, which in the absence of strength passes to the one who has it. The struggle for power is usually won by the most determined, the strongest, therefore, authority without strength is impossible (Maliutin, 2012, p. 27).

There is no doubt that power is not a natural phenomenon, but a human phenomenon. Accordingly, the existence of power presupposes the existence of a society in which acceptable behaviours, existing ways to encourage appropriate behaviour and punish for inappropriate behaviour (taboos, laws) are recognised at a certain level (Emirbekova, Narykov, Samygin, Samygin, Rachipa, 2016).

It is important to note that the beginnings of the Christian concept of power, as well as its philosophical origins, include its metaphysical realisation as an absolute sanction, predetermining social relations and requiring further subordination. Power is, therefore, traditionally seen only in the social, moreover in political aspect, when unconditional obedience is required. Absolutisation of power is its obligatory attribute (Krymets, 2013, p. 77).

On the other hand, beyond politics, power can be seen as a common, socialised, and embodied phenomenon. Therefore, State-centric power struggles, including revolutions, do not always lead to changes in public order. That is, there are ways beyond perception, forcing citizens to discipline without any deliberate coercion from others (Michel Foucault: power is everywhere, 2003). That is, the psychological justification of power is based on the deep foundations of human nature, where the animal's desire for priority was transformed as a result of ennoblement by consciousness (Krymets, 2013, 80).

Accordingly, within the framework of the structural and functional approach, power is regarded as a mediator in the system of social relations and, moreover, it belongs not to some individuals, but is the property of the collective. Here, power is an integrating and regulating factor, the function of which is to mobilise social forces to achieve a socially relevant goal. According to D. Iston, power can make decisions that matter to society, bringing and supporting certain values (Iston, 2001). But from the formal and administrative approach, power is a mechanism of management and organisation, gets its legitimacy and legality in legal discourse. In this case, power acts as State power, which is meaningfully disclosed in the dominant influence of the controlling actor on the controlled object. From these standpoints, power is the legal organisation of society, and the mechanism of power is the State and legal management of various activities. The latter has a complex hierarchical structure applicable to every social field, getting its resources in "unity of the people", where the formal actor of power is citizens, transfer their powers to the official agent – the State (Vladymyrov, 2010, p. 314).

3. Relations between people and the State

In essence, citizens and the State conclude a kind of "service contract", which can be terminated if one of the parties does not fulfil its obligations (Lavrov, 2013). Therefore, there is a partnership, because everyone has their own needs, the realisation of which depends directly on their interaction with each other, appropriate interaction (Danilenko, 2020, p. 71). However, by transferring power to the State, citizens actually lose the status of full partner, becoming the object of power.

The inequality between the actors and objects of power is based on certain principles and is supported by a whole system of resources (Afonin, Berezhnyi, Valevskyi, 2010, p. 30).

That is why there has been a tendency to view power no longer simply as an "ability and capacity to exercise one's will, influence the activities and behaviour of others", but above all as a right, given by the authority, to

the managerial influence. And this approach is quite justified, because in a State governed by the rule of law, no one has the right to exercise, and even more so to impose their will, and public relations are regulated through legal regulations, adopted by actors entrusted by society (Afonin, Berezhnyi, Valevskyi, 2010, pp. 30-31).

However, lawmakers cannot simply legislate. They need to convince people to accept them and follow the rules. To make this possible, the State power transforms itself into public one, that is, gives citizens broad access to participation in governance.

Interestingly, in the 19th century, the notion of political and State power was identified because the State was the centre of all power in society. Soviet approaches to the domination of State power, which was the only one at the time, are totally unsuitable in the new political and economic environment, and these concepts now need to be interpreted differently. Experts in public administration assert that State power is a political and legal phenomenon, the essence of which is that, expressing at least formally the will of all citizens of the State, it (power) provides the guiding, organising, regulating influence on society (Yarmysh, Serohin, 2002, p. 329; Minaieva, 2008). In turn, the public authorities carry out the duties of the State in the interests of society. That is, the system of public authorities is a set of people's authorities, which have different forms of exercising this power, in particular representative authorities formed by elections, such as the Parliament, President, local self-government bodies. Each body of public authority is created for the implementation of the goals and programmes set, ensuring the protection of the rights, freedoms and legitimate interests of the people, the security of the State and society, and addressing issues of socio-economic and cultural significance. In this understanding, State power is a kind of public power through which the powers of the people, the nation (popular sovereignty) are exercised (art. 5 of the Constitution of Ukraine) and formally reflected in the legislation, in particular in articles 85, 106, 140 of the Constitution of Ukraine (Kovalchuk, 2017, p. 49).

4. Conclusions

Therefore, power as a phenomenon of social reality can be considered from many discourses, the specificities of the definition thereof depend on a specific research request. It is a multidisciplinary category that combines the characteristics of the relationship between people, actors and objects and is manifested both through multiple forms of compulsion and without intentional compulsion by others.

The conducted research enables to assert that first, power is an ontological concept, quality of various states of being, essence of possibilities and reflection of reality; second, it is an active or passive manifestation of strength, applicable from an actor to an object.

Thus, a formal definition of the concept of "power" is offered in this wording: the legal possibility of the actor to establish the framework of required behaviour, which shall be respected by others.

Within the framework of public and legal field, this definition can be interpreted as follows: this is the right granted by legal regulations to a specific authorised actor to organise and exercise managerial influence on a certain range of objects of influence.

References:

Afonin, E.A., Berezhnyi, Ya.V., Valevskyi, O.L. ta in. (2010). *Kontseptualni zasady vzaiemodii polityky y upravlinnia [Conceptual bases of interaction of policy and management].* NADU (in Ukrainian).

Danilenko, A.O. (2020). Kontceptciia idealnogo gosudarstva, kakova ona? [What is the concept of an ideal State?]. *Visegrad Jurnal on Human Rights, 1(4),* 70–73 (in Russian).

Emirbekova, Y.E, Narykov, N.V., Samygin, S.I., Samygin, P.S., Rachipa, A.V. (2016). Power as a Social Phenomenon: The Nature and Importance in the Construction of the All-Russian Identity. I*ndian Journal of Science and Technology, 9(5),* DOI: 10.17485/ijst/2016/v9i5/87593 (in English).

Gaventa, J. (2003) Power after Lukes: An Overview of Theories of Power since Lukes and Their Application to Development. *Brighton: Participation Group, Institute of Development Studies.* Retrieved from https://www.powercube.net/wp-content/uploads/2009/11/power_after_lukes.pdf (in English).

Kapustina, N. (2005). Klasychnyi i neklasychnyi pidkhody u filosofsko-pravovomu doslidzhenni fenomenu vlady [Classical and non-classical approaches in the philosophical and legal study of the phenomenon of power]. *Candidate's thesis.* Odesa: Odeska natsionalna yurydychna akademiia (in Ukrainian).

Kovalchuk, S. (2017). Problema vyznachennia poniattia publichnoi vlady v teorii derzhavy i prava [The problem of defining the concept of public authority in the theory of State and law]. *Visnyk Natsionalnoho universytetu «Lvivska politekhnika» – Bulletin of the National University "Lviv Polytechnic", 884,* 47–51 (in Ukrainian).

Krymets, L.V. (2013). Fenomen vlady yak obiekt sotsialno-filosofskoho analizu. [The phenomenon of power as an object of socio-philosophical analysis. Scientific knowledge: methodology and technology]. *Naukove piznannia: metodolohiia ta tekhnolohiia – Scientific knowledge: methodology and technology, 2,* 75–81 (in Ukrainian).

Lavrov, D. (2013). Grazhdanin i gosudarstvo soiuzniki ili vragi? [Is the citizen and the State allies or enemies?]. *Rossiiskii soiuz pisatelei – Russian Union of Writers. proza.ru*. Retrieved from https://www.proza.ru/2013/12/01/1379 (in Russian).

Maliutin, I. (2012). Pryrodnyi fenomen derzhavnoi vlady [The natural phenomenon of State power]. *Viche – Chamber, 4,* 27–31 (in Ukrainian).

Melnychuk, O.S. (1982). *Etymolohichnyi slovnyk ukrainskoi movy [Etymological dictionary of the Ukrainian language].* AN URSR. Int movoznavstva im. O.O. Potebni (in Ukrainian).

Michel Foucault: power is everywhere. Powercube. 2003. Retrieved from https://www.powercube.net/other-forms-of-power/foucault-power-is-everywhere/ (in English).

Minaieva, I. (2008). Skladovi poniattia «publichna vlada» [Components of the concept of "public authority"]. *Derzhavne budivnytstvo – State building, 1,* 19-23 (in Ukrainian).

Vladymyrov, M.V. (2010). Suchasni teorii vlady: metodolohiia ta tradytsii [Modern theories of power: methodology and traditions]. *Aktualni problemy derzhavnoho upravlinnia – Current issues of public administration, 2, 313–315* (in Ukrainian).

Yarmysh, O.N., Serohin, V.O. (2002). *Derzhavne budivnytstvo ta mistseve samovriaduvannia v Ukraini [State building and local self-government in Ukraine].* Kh. : Vyd-vo Nats.un-tu vnutr. sprav (in Ukrainian).

Iston, D. (2001). *Noveishii filosofskii slovar [The latest philosophical dictionary].* Mn (in Russian).

Артем Зубко,
кандидат юридичних наук, старший науковий співробітник, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, Artem_Zubko@ukr.net
***ORCID:** 0000-0001-9119-3638*

СИСТЕМНИЙ АНАЛІЗ ПОНЯТТЯ «ВЛАДА» В РАМКАХ ПУБЛІЧНО-ПРАВОВОГО ПОЛЯ

Анотація. ***Мета.*** Метою статті є формування формального визначення поняття «влада», що може бути актуальним для вирішення конкретної дослідницької проблеми. ***Результати.*** Стаття присвячена формуванню формального визначення поняття «влада», що може бути актуальним для вирішення конкретної дослідницької проблеми, адже, попри часто вживаність цього поняття у рамках наукових кіл, воно має різнобічне трактування. Акцентовано, що особливості концепції влади є достатньо широко досліджуваною проблематикою як вітчизняних, так і зарубіжних вчених сучасності. Однак відсутність формального визначення поняття «влада» дає можливість для додаткового вивчення цього феномену, у тому числі у рамках публічно-правового поля. Виявлено, що влада, як явище соціальної дійсності, може розглядатись з багатьох дискурсів, особливості визначення яких залежать від конкретного дослідницького запиту. Це мультидисциплінарна категорія, що поєднує своїм змістом особливості взаємовідносин між людьми, суб'єктами та об'єктами, а також проявляється як завдяки множинним формам примусу, так і без будь-якого навмисного примусу з боку інших. Наголошено, що система органів публічної влади є сукупністю органів влади народу, які мають різні форми здійснення цієї влади, зокрема це представницькі органи влади, що формуються виборами, а саме парламент, Президент, органи місцевого самоврядування. Кожен орган публічної влади створено для реалізації заданих цілей і програм, які забезпечують захист прав, свобод і законних інтересів народу, безпеку держави і суспільства, вирішення питань соціально-економічного та культурного значення. ***Висновки.*** Визначено, що влада, по-перше, є онтологічною концепцією, якістю різних станів буття, сутністю можливостей та віддзеркаленням реальності; по-друге, це активний чи пасивний прояв сили, застосовний від суб'єкта до об'єкта. Формальне визначення поняття «влада» запропоновано в такому вигляді: легальна можливість суб'єкта встановлювати рамки необхідної поведінки, яких мають дотримуватись інші. У рамках публічно-правового поля це визначення можна інтерпретувати так: це надане нормативно-законодавчими актами право конкретному суб'єкту владних повноважень на організацію та реалізацію управлінського впливу щодо визначеного кола об'єктів впливу.

Ключові слова: адміністративна політика, влада, держава, державна влада, публічна влада, суспільство.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.951:343.211 (477)
DOI https://doi.org/10.32849/2663-5313/2022.2.10

Oleksandr Zubov,
Candidate of Legal Sciences, Postdoctoral Student, Scientific Institute of Public Law, 2a, H. Kirpy street, Kyiv, Ukraine, postal code 03035, Oleksandr_Zubov@ukr.net
***ORCID:** 0000-0002-4751-3881*

Zubov, Oleksandr (2022). Some judicial and administrative services. *Entrepreneurship, Economy and Law*, 2, 67–70, doi https://doi.org/10.32849/2663-5313/2022.2.10

SOME JUDICIAL AND ADMINISTRATIVE SERVICES

Abstract. ***Purpose.*** The purpose of the article is to analyse judicial and administrative services of fair and effective justice in Ukraine. ***Results.*** The article analyses judicial and administrative services of ensuring fair and effective justice in Ukraine. In the context of the reform towards a democratic society, new institutions have emerged that substantially change the State's approach to its citizens, ensuring their rights. This approach has had an impact on public administration, and a new institution for the provision of administrative services has emerged. In our case, it is important to study judicial and administrative services. It is established that the electronic court enables participants in court proceedings to file electronic documents in court, as well as to send procedural documents, in electronic and paper form. The right to access to electronic documents is granted to the judges who deal with the relevant court cases. The court shall, after the preparation and signing of a procedural document, send electronic copies of the procedural document, which shall be digitally signed by the judge, by email to the mailbox of the participant in the trial, if such participant is registered in the system. After receiving an electronic confirmation of the e-mail delivery to the user's mailbox, the responsible officer prints the e-mail and appends it to the case file. Most courts provide administrative services related to the exercise of their functions. Furthermore, related services (copying of documents, photographing, etc.) may be provided in the courts. ***Conclusions.*** Judicial and administrative services of fair and effective justice in Ukraine are a system of transparent administrative actions of public administrators (courts), which should give rise to administrative and legal relations in providing an enabling environment for subjective rights of a natural or legal person in the judicial system, observance of the legality aimed at ensuring the freedoms and legitimate interests of persons.

Key words: administrative and legal framework, efficiency, fairness, justice, services, administrative law, courts.

1. Introduction.

In the context of the reform towards a democratic society, in the State, new institutions have emerged that substantially change the State's approach to its citizens, ensuring their rights. This approach has had an impact on public administration, and a new institution for the provision of administrative services has emerged. In our case, it is important to study judicial and administrative services.

The study is based on the work of academic theorists of administrative law, such as: B. Averianov, O. Bandurka, O. Bezpalova, Y. Bitiak, M. Havryltsiv, V. Halunko, I. Holosnichenko, S. Kivalov, M. Kovaliv, V. Kolpakov, A. Komziuk, O. Kuzmenko, A. Kravtsov, R. Melnyk, I. Stakhura, A. Shcherbliuk, V. Felyk, K. Fuhlevych, et al.

The purpose of the article is to analyse judicial and administrative services of fair and effective justice in Ukraine.

2. Specificities of administrative services

Most public relations are governed precisely by administrative law, which covers the organization and operation of the apparatus of public administration. The reform of the administrative apparatus is aimed at promoting respect for the human person and ensuring the rights and freedoms that are the highest value. In this case, administrative services as a tool of public administration play a special role. Scholars believe that administrative services, as an institution of administrative law, have a triple legal nature: firstly, as the main component of the subject-matter of administrative law; secondly, as a type of public service; third, as the main tool in the activities of public administration (Halunko, Dikhtiievskyi, Kuzmenko, 2021). However, with regard to the very definition of the concept of services, scientists have developed various approaches to this issue. We consider some of them. According to K. Fuhlevych, the service is a rather specific

category of administrative law, which, despite the presence of a specialised legal instrument, the Law of Ukraine *On Administrative Services,* is still in the process of its institutionalization, doctrinal formation. The scholar argues that the administrative and legal doctrine is before the need to solve a number of newest problems related to both the advent of intersectoral legal phenomena and the affirmation of a new paradigm for the development of legal science in general. The ideological basis of this paradigm tends to the fundamentals of liberalism, which is more clearly traced in the development of the institution of administrative services, according to him, as a systematic means of communication of the State and civil society on the basis of the unqualified priority of the latter's interests. It should also be noted that the systematic implementation of the declared vector for the formation of a new quality of the State must necessarily take into account the nature of the demands of society for administrative services (Fuhlevych, 2015). According to V. Tsyndria, the provision of administrative services is an activity to satisfy certain needs of the individual, and such activity is carried out at the initiative of the individual, at his or her request. The main feature of the service is that it should be valuable for consumers outside the body of internal affairs and be perceived by them as a service (Tsyndria, 2011). According to H. Pysarenko, an administrative service is a legal relationship arising from the implementation of the subjective rights of a natural or legal person (on their application) in the process of public power activity of an administrative body to obtain a certain result (Pysarenko, 2006). In this dispute, the legislator has clearly defined what a service is. An administrative service is the result of the exercise of powers by an administrative service provider on the application of a natural or legal person, aimed at acquiring, modifying or terminating the rights and/or duties of such a person in accordance with law. In addition, this Law applies to public relations regarding provision of administrative services: inquiry, pre-trial investigation, operational and investigative activities, court proceedings, enforcement proceedings (Law of Ukraine On Administrative Services, 2012). Furthermore, the Concept provides criteria for identifying services as administrative: powers of the administrative body to provide a certain type of services is determined by the law; services are provided by administrative bodies through the exercise of powers; services are provided at the request of natural and legal persons; the result of consideration of the application is an individual administrative act (passport, certificate, license, permit, etc.); the provision of services is related to an enabling environment for rights, freedoms and legitimate interests of natural and legal persons (Order of the Cabinet of Ministers of Ukraine On approval of the Concept of development of the system of providing administrative services by executive authorities, 2006). Therefore, the provision of administrative services is also provided in the judicial field, which is the subject of our study. The focus of the analysis will be on administrative services provided by courts. Transparency and openness of the judicial system are the main factors of public trust, and it is therefore necessary to have free and prompt access to information on the legal proceedings. The first is an electronic court, through which each litigant can exercise their rights online, that is, obtain judicial and administrative services. For example, it is possible to submit any application (claim), to have open access to the procedural documents of the proceedings at a convenient time, etc. In addition, the legislator has approved standards for the provision of administrative services (Order of the Ministry of Justice of Ukraine On Approval of Standards for Provision of Administrative Services, 2009). It should be noted that the electronic court enables participants in court proceedings to file electronic documents in court, as well as to send procedural documents, in electronic and paper form. The right of access to electronic documents is granted to the judges who deal with the relevant court cases. The court shall, after the preparation and signing of a procedural document, send electronic copies of the procedural document, which shall be electronically digitally signed by the judge, by email to the mailbox of the participant in the trial, if such participant is registered in the system. After receiving an electronic confirmation of the delivery of the e-mail to the user's mailbox, the responsible officer prints the e-mail and appends it to the case file. most courts provide administrative services related to the exercise of their functions. In the future, such a case is stored in an automated system of collecting, storing, protecting, recording, retrieving and providing electronic copies of court decisions.

3. Types of administrative services.

On the official websites of courts, all administrative services that citizens can obtain are listed, for example, the website of the Department of Information Services, Movement of Administrative Cases and Document Flow indicate that they provide reception and registration of incoming correspondence to the court, checking the integrity of envelopes or packets, compliance with their addressing; reception of documents directly from participants in the administra-

tive procedure and their representatives daily during working hours in accordance with the court's schedule; registration of documents in the automated system of court document flow and their submission for consideration by the court management; registration of the resolution and entry into the automated document flow system of the court, after consideration of the document by management and determination of the executor; the entry of information on the content and date of imposition of the resolution, the surname and initials of the performer, the term of performance, the date of transfer of the document to the person responsible for document flow of the relevant structural unit or directly to the performer (performers); the entry into the automated documents flow system of court of information on the establishment of control over the document execution and stamping or inscription of red colour "Control", as well as the removal of control from the document after its execution; provision of information to the participants in the court proceeding on the date of admission of the case to the court, the single unique number of the court case, the number of proceeding, date and time of appointment of a court case, the place of the court hearing, the date of consideration of the case, as well as information on the receipt of appeals, claims, applications for revision of court decisions on newly discovered and exceptional circumstances, including the registration number of the case (document); familiarisation with the case file by persons, involved in the case, or persons not involved in the case, if the court has decided on their rights and obligations by written application; processing of information on the work of the Department from the official court website; acceptance of documents by fax channels, registration of electronic documents in accordance with the requirements of document flow, printing of the content of the electronic communication into a document and files, which have been attached to it and their transfer to the executors, in accordance with the resolution of the court's management, etc. (Matiukha, 2019). Therefore, most courts provide administrative services related to the exercise of their functions. Furthermore, related services (copying of documents, photographing, etc.) may be provided in the courts.

Nowadays, scholars dispute about corruption risks in the provision of administrative services, including by courts. Therefore, it is considered necessary to adopt a law on the functioning of all administrative bodies that is common to all administrative bodies and that regularises, optimises and humanises administrative proceedings. Therefore, the speedy adoption of the Administrative Procedure Code of Ukraine is required. One of the main objectives of such a code should be to regulate relations between public administration bodies and private (natural and legal) persons, to regulate rational and fair legal procedures for the resolution of administrative cases. Therefore, the Code should establish principles and rules of administrative procedure for public administration bodies, in particular: administrative proceedings on private persons' applications (provision of administrative services), interfering proceedings (on the own initiative of public administration bodies, including control and supervision), administrative (pretrial) appeals (Koliushko, Tymoshchuk, Banchuk, 2009). We fully support this perspective and believe that it is necessary to clearly define minimum terms for the provision of administrative services and to simplify the procedure for their provision.

4. Conclusions

Thus, judicial and administrative services of fair and effective justice in Ukraine are a system of transparent administrative actions of public administrators (courts), which should give rise to administrative and legal relations in providing an enabling environment for subjective rights of a natural or legal person in the judicial system, observance of the legality aimed at ensuring the freedoms and legitimate interests of persons.

References:

Fuhlevych, K.A. (2015). Administratyvni posluhy: poniattia, vydy, protsedurne rehuliuvannia [Administrative services: concepts, types, procedural regulation]. *Extended abstract of candidate's thesis.* Odesa (in Ukrainian).

Halunko, V., Dikhtiievskyi, P., Kuzmenko, O. ta in. (2021). *Administratyvne pravo Ukrainy [Administrative law of Ukraine].* Kherson: OLDI-PLIuS (in Ukrainian).

Koliushko, I., Tymoshchuk, V., Banchuk, O. ta in. (2009). *Koruptsiini ryzyky nadannia administratyvnykh posluh ta kontrolno-nahliadovoi diialnosti v Ukraini [Corrupt practices of administrative services and control and visual performance in Ukraine].* Tsentr polityko-pravovykh reform, Fond «Demokratychni initsiatyvy». Kyiv. Moskalenko O.M. FOP (in Ukrainian).

Matiukha, V.V. (2019). *Osnovni zavdanniamy viddilu nadannia informatsiinykh posluh, rukhu administratyvnykh sprav ta dilovodstva sudu [Main department of information services, administrative help to court].*

Retrieved from https://7aac.gov.ua/pro-sud/struktura-sudu/aparat-sudu/viddil-nadannya-informacijnix-poslug/ (in Ukrainian).

Nakaz Ministrerstva yustytsii Ukrainy Pro zatverdzhennia standartiv nadannia administratyvnykh posluh vid 31 serpnia 2009 roku № 1555/5 [Order of the Ministry of Justice of Ukraine On Approval of Standards for Provision of Administrative Services of August 31, 2009 № 1555/5]. (2009). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/v1555323-09#Text (in Ukrainian).

Pysarenko, H.M. (2006). Administratyvni posluhy v Ukraini: orhanizatsiino-pravovi aspekty [Administrative services in Ukraine: organizational and legal aspects]. *Extended abstract of candidate's thesis*. Odesa (in Ukrainian).

Rozporiadzhennia Kabinetu Ministriv Ukrainy Pro skhvalennia Kontseptsii rozvytku systemy nadannia administratyvnykh posluh orhanamy vykonavchoi vlady vid 15 liut. 2006 r. № 90-r. [Order of the Cabinet of Ministers of Ukraine On approval of the Concept of development of the system of providing administrative services by executive authorities from February 15, 2006 № 90-r.]. (2006). *kmu.gov.ua*. Retrieved from https://www.kmu.gov.ua/npas/29277890 (in Ukrainian).

Tsyndria, V.M. (2011). Orhanizavtsiino-pravovi zasady nadannia administratyvnykh posluh orhanamy vnutrishnikh sprav Ukrainy [Organizational and legal principles of providing administrative services by the bodies of internal affairs of Ukraine]. *Extended abstract of candidate's thesis*. Kyiv (in Ukrainian).

Zakon Ukrainy Pro administratyvni posluhy **:** pryiniatyi 6 veres. 2012 roku № 5203-VI [Law of Ukraine On Administrative Services from September 6, 2012 № 5203-VI]. (2013). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/5203-17#Text (in Ukrainian).

Олександр Зубов,
кандидат юридичних наук, здобувач наукового ступеня доктора юридичних наук, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, Oleksandr_Zubov@ukr.net
ORCID: *0000-0002-4751-3881*

ДЕЯКІ СУДОВО-АДМІНІСТРАТИВНІ ПОСЛУГИ

Анотація. ***Мета.*** Мета статті полягає в тому, щоб проаналізувати судово-адміністративні послуги щодо забезпечення справедливого та ефективного правосуддя в Україні. ***Результати.*** У статті проаналізовані судово-адміністративні послуги щодо забезпечення справедливого та ефективного правосуддя в Україні. В умовах реформування на шляху до демократичного суспільства в державі появилися нові інститути, які істотно змінюють підхід держави до своїх громадян забезпечуючи здійснення їх прав. Цей підхід вплинув на сферу державного управління, з'явився новий інститут надання адміністративних послуг. У нашому випадку є важливим дослідження судово-адміністративних послуг. З'ясовано, що електронний суд дозволяє подавати учасникам судового процесу до суду документи в електронному вигляді, а також надсилати процесуальні документи, як в електронному так і паперовому вигляді. Права доступу до електронних документів надаються суддям, у провадженні яких перебувають відповідні судові справи. Суд після виготовлення та підписання процесуального документа надсилає електронні копії процесуального документа, скріплені електронним цифровим підписом судді, електронною поштою на поштову скриньку учасника судового процесу, якщо такий учасник зареєстрований в системі. Після отримання електронного підтвердження доставки електронного листа в поштову скриньку користувача відповідальний працівник суду роздруковує таке повідомлення та долучає його до матеріалів справи. У своїй більшості суди надають адміністративні послуги, пов'язані зі здійснення їхніх функціональних обов'язків. Також у судах можуть надаватися і супутні послуги (виготовлення копій документів, фотографування тощо). ***Висновки.*** Судово-адміністративні послуги щодо забезпечення справедливого та ефективного правосуддя в Україні – це система прозорих адміністративних дій суб'єктів публічної адміністрації (судів), що має породжувати адміністративно-правові правовідносини у забезпеченні умов для реалізації суб'єктивних прав фізичної або юридичної особи у сфері судоустрою, дотримання законності, спрямованих на забезпечення свобод і законних інтересів осіб.

Ключові слова: адміністративно-правове забезпечення, ефективність, справедливість, правосуддя, послуги, адміністративне право, суди.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 342.156
DOI https://doi.org/10.32849/2663-5313/2022.2.11

Inna Pidbereznykh,
Candidate of Historical Sciences, Associate Professor, External Doctoral Candidate, Scientific Institute of Public Law, 2a, H. Kirpy str., Kyiv, 03035 Inna_Pidbereznykh@ukr.net
ORCID: *orcid.org/0000-0001-9906-4327*

Pidbereznykh, Inna (2022). Administrative and legal framework for the national security of the United States with Southeast Asian countries during B. Obama's presidency. *Entrepreneurship, Economy and Law*, 2, 71–75, doi https://doi.org/10.32849/2663-5313/2022.2.11

ADMINISTRATIVE AND LEGAL FRAMEWORK FOR THE NATIONAL SECURITY OF THE UNITED STATES WITH SOUTHEAST ASIAN COUNTRIES DURING B. OBAMA'S PRESIDENCY

Abstract. ***Purpose.*** The purpose of this article is the historical and legal study of the administrative and legal framework for the U.S. national security with southeast Asian countries under the Obama administration. ***Results.*** The article forms the administrative and legal framework for the U.S. national security with southeast Asian countries under the Obama administration, determining the nature of bilateral cooperation. The United States is consistent in its domestic and external national security. The world geopolitical situation is of great importance for the implementation of the foreign policy strategy. Partnership with Indonesia, the world's third largest democracy, the world's largest Muslim nation, member of the G20, as well as control of the influence of China and Russia on the South-East Asian region seems important to U.S. national security. It is revealed that that the United States, in re-establishing bilateral cooperation with the SEA countries, has proposed a wide range of areas of cooperation, including security agreements, cooperation on economic issues, environmental protection, education development, etc. The United States renews and maintains its partnership with the Philippines and Thailand, increasing the number of ships and workers to successfully complete Philippine counter-terrorism training. In Thailand, an ancient partner of the United States, it is planned to create a centre for humanitarian assistance in emergencies. Partnerships with other South-Countries in East Asia are expected to be closer than before. These include China, India, Indonesia, Singapore, New Zealand, Malaysia, Mongolia, Viet Nam, Brunei and Pacific Island countries. Of course, the focus is on relations with China, their problems, and addressing these issues, because this partnership is important for both the U.S. and China. ***Conclusions.*** It is concluded that the administrative and legal framework for the U.S. national security with the countries of South-East Asia under the Obama administration has been determined to make further partnership policy, because this is one of the most important U.S. tasks of today. International relations between the U.S. and South-East Asia continue to develop, which in turn affects the efficiency of economic development, contributes to internal and regional stability, especially to support national development in all sectors of life.

Key words: administrative and legal framework, administration, Asia-Pacific economic cooperation, fight against terrorism, internal relations, foreign policy strategy, national security, defence, South-East Asia, United States of America.

1. Introduction.

The relevance of the topic of the study is due to the growth of the role of South-East Asia (hereinafter – SEA) in the global economy, politics and its impact on the development of national security of the countries of the region. The impact of the SEA on the world economy has increased significantly, and the U.S. national security policy towards the South-Countries in East Asia has evolved over the years. Ever since the Cold War, the United States Government has provided assistance to the region on the basis of its strategic objective of national security to prevent communist rule. China's rise was also perceived by both regions as a threat, requiring the SEA to strengthen military cooperation with the US.

The reason for the rapprochement between the U.S. and the SEA countries was also the interest in the U.S. economic presence in the region. However, as a result of the Asian financial and economic crisis of 1997-1998, interest in Asia-Pacific economic cooperation has waned significantly. From an East Asian perspective, the crisis was used by the U.S. to extend the U.S. model of capitalism to East Asia

and open specific regional markets to U.S. companies. That is to say, these activities were well thought out for the region.

However, under the Bush administration, the U.S. government was more active in restoring U.S.-Asian relations as China's influence in the SEA countries increased, and trade and economic relations between China and ASEAN developed rapidly. Within a few years, the Obama administration not only continued what his predecessor had begun, but also improved its foreign policy.

In this context, studies by L. Vasyliev, V. Urliapov, H. Hrevtsova, Y. Leksiutina, N. Horodnia, et al., should be reviewed. Some management issues in the field of internal security of the country were studied by V.B. Averianov, O.F. Andriiko, Y.P. Bytiak, V.M. Harashchuk, I.P. Holosnichenko, Y.V. Dodin, R.A. Kaliuzhnyi, S.V. Kivalov, T.O. Kolomoiets, V.K. Kolpakov, A.T. Komziuk, V.V. Konoplov, O.V. Kuzmenko, V.Y. Nastiuk, V.I. Olefir, O.I. Ostapenko, V.P. Pietkov, M.M. Tyshchenko, V.K. Shkarupa, K.P. Yarmaki, and others.

The purpose of this article is the historical and legal study of the administrative and legal framework for the U.S. national security with the countries of Southeast Asia under the Obama administration.

2. Areas of U.S. Leadership Return in Asia and the Pacific

In his program article "Renewing American Leadership", published in the summer of 2007 in *Foreign Affairs*, B. Obama reveals the main areas of the President's administration: 1) to make necessarily "a more effective framework in Asia that goes beyond bilateral agreements, occasional summits, and ad hoc arrangements, such as the six-party talks on North Korea"; 2) to form "an inclusive infrastructure with the countries in East Asia that can promote stability and prosperity and help confront transnational threats; 3) "to encourage China to play a responsible role as a growing power–to help lead in addressing the common problems of the twenty-first century." That is a strategy to enhance U.S. national security requires to build a relationship with the SEA countries that broadens cooperation while strengthening U.S. ability to compete (Obama, 2008).

Washington's involvement in resolving the situation in the South China Sea, where long-standing disagreements over the status of the Spratly Islands resumed, was a serious bid for the U.S. to regain leadership in the Asia-Pacific region (hereinafter referred to as APAC). Statements by Secretary of State Hillary Clinton on support for freedom of navigation and the settlement of disputes in the South China Sea through multilateral arrangements with U.S. mediation, as the South China Sea is the U.S. national interest (as expressed at the July Summit and the Hanoi Summit of the Association of Southeast Asian Nations in October 2010) have confirmed the U.S. "return" to the SEA in the context of maritime security and "freedom of the seas".

New approaches of the Obama administration to the implementation of foreign policy were formulated in a speech by Hillary Clinton to the Senate Foreign Affairs Committee in connection with the confirmation of her candidacy for the post of Secretary of State. It was policy based on a combination of principles and pragmatism, not rigid ideology, on recognition of the fact of interdependence of the modern world; on the need to use "smart power," the full range of tools – diplomatic, economic, military, political, legal, and cultural –their right combination for each situation. Diplomacy should become the vanguard of foreign policy in the context of "smart power" (Congressional Testimony, 2009).

Another important provision of the Secretary of State's speech was the need for the United States, in the context of limited resources, to choose foreign policy priorities in order to ensure national security. These provisions were developed in subsequent speeches by Hillary Clinton and most comprehensively outlined in the program article "America's Pacific Century", published in the journal *Foreign Policy* in October 2011. The Secretary of State said: "The future of politics will be decided in Asia, not Afghanistan or Iraq, and the United States will be right at the centre of the action" (Clinton, 2011). New American strategic activity would spread from the western shores of the U.S. to the Indian subcontinent. H. Clinton highlighted the three core principles of the Obama administration that guide modern policy in the SEA: 1) to maintain political consensus on the core objectives of alliances; 2) to ensure that alliances are adaptive so that they can successfully address new challenges and seize new opportunities; 3) to guarantee that the defence capabilities and communications infrastructure of alliances are capable of deterring provocation from state and nonstate actors.

In addition to issues of U.S. national security, such as military power and economic growth, America's main value is support for democracy and human rights. This is at the core of their foreign policy, including in the Asia-Pacific region. While deepening relations with partners with whom the U.S. disagrees on these issues, the State Department calls on them to introduce reforms, improve governance, and respect human rights. An example was Burma, where the United States Gov-

ernment was determined to ensure accountability for human rights violations. Although the USA cannot and does not seek to impose its system of values, it does defend the existence of universal values inherent to every country in the world, including Asia.

It should be noted that President Obama's 9-day tour to APAC in November 2011 was of great importance for the implementation of the U.S. Asia-Pacific strategy, during which he participated in the Asia-Pacific Economic Cooperation Summit (Honolulu, Hawaii), the third ASEAN-USA Summit and the East Asian Summit (Bali, Indonesia), visited Australia, held bilateral meetings with leaders of India, Indonesia, Philippines.

On 17 November, in the Australian Parliament, President Obama delivered a keynote speech in which he grounded U.S. policy in APAC. "The United States has been, and always will be, a Pacific nation... Here, we see the future. As the world's fastest-growing region – and home to more than half the global economy – the Asia Pacific is critical to achieving my highest priority, and that's creating jobs and opportunity for the American people... As President, I have, therefore, made a deliberate and strategic decision – as a Pacific nation, the United States will play a larger and long-term role in shaping this region and its future..." (Remarks By President Obama to the Australian Parliament, 2011).

B. Obama's recognition of the U.S. leadership in APAC as upholding the set of "international norms", ensuring compliance with the same rules by all participants, is noteworthy. In this context, Washington's vision of a new international order was presented: "We stand for an international order in which the rights and responsibilities of all nations and all people are upheld. Where international law and norms are enforced. Where commerce and freedom of navigation are not impeded. Where emerging powers contribute to regional security, and where disagreements are resolved peacefully. That's the future that we seek" (Remarks by President Obama to the Australian Parliament, 2011).

This tour of the U.S. President defined the prospects for the priorities of U.S. policy in the Asia-Pacific region: strengthening bilateral security alliances; deepening working relations with major developing countries, including China; integration into regional multilateral institutions; expansion of trade and investment; development of a broad military presence; protection of democracy and human rights.

Therefore, it should be noted that the Obama administration has made a decisive turn in U.S. foreign policy from West to East Asia from the problems of traditional to non-traditional security. Renewing U.S. leadership in the region, it pursues a multi-track strategy – developing dialogue with China, avoiding confrontation with it; developing bilateral relations with regional states and ASEAN as a collective body; participation in regional multilateral institutions; involvement as mediator in the situation in the South China Sea; developing economic integration at the bilateral and multilateral levels; expanding the region to include India. An important factor is the Obama administration's recognition of the interdependence of the world, the commonality of threats and challenges that make single-handedly leadership problematic; acceptance of integration ideas as the basis of its foreign policy, decisive role of diplomacy in its implementation (Horodnia, 2012, p. 195).

3. U.S. Military Cooperation in Asia and the Pacific

We can watch the installation of American military bases in Singapore, the Philippines and Malaysia. On January 5, 2010, Barack Obama announced a program to reform the U.S. defence strategy. He said that the American army would become more compact but could maintain its global superiority and focus its efforts on the Asia-Pacific region. The reorganization of the army is primarily due to a change in strategy, at the heart of which is the ability of the United States to wage two wars simultaneously.

It should be noted that in the autumn of 2011, Leon Panetta, the U.S. Secretary of Defense, stated that the emphasis in the U.S. military strategy would be made to strengthen the U.S. presence in Asia and the Pacific in order to confront the strengthening of China's influence in the region (Experts: The visit of the U.S. Secretary of Defense to China will help deepen mutual trust and dispel doubts between the two armies, 2012). China has been increasing its military spending in recent years, while the U.S. is cutting its military budget. Although Washington is still far ahead of China in armaments and technology.

Therefore, it should be noted that the United States, in re-establishing bilateral cooperation with the SEA countries, has proposed a wide range of areas of cooperation, including security agreements, cooperation on economic issues, environmental protection, education development, etc. The United States renews and maintains its partnership with the Philippines and Thailand, increasing the number of ships and workers to successfully complete Philippine counter-terrorism training. In Thailand, an ancient partner of the United States, it is planned to create a centre for humanitarian assistance in emergencies. Partnerships with other South-Countries in East Asia are expected to be closer than before. These include China, India,

Indonesia, Singapore, New Zealand, Malaysia, Mongolia, Viet Nam, Brunei and Pacific Island countries. Of course, the focus is on relations with China, their problems, and addressing these issues, because this partnership is important for both the U.S. and China.

It should be emphasised that what is important for the U.S. is a new partnership with Indonesia, the world's third largest democracy, the world's largest Muslim nation, member of the G20. In 2010-2011, joint training with the Indonesian special forces was resumed, and several agreements were signed in the fields of medicine, education, defence, science and technology. Both governments intend to further increase student exchanges, increase investment in education, energy and agrarian policies, and increase defence trade, which is becoming an important component of international relations. According to such trend, a programme allowing students from both countries to conduct research and publish was funded by Governments in 2012. Consequently, the research competitiveness of countries is improving. There is also an active exchange of students, scientists and institutions in both countries on the conservation of the marine environment and biotechnology, indigenous plants and food security, health and adaptation to climate change (US Department of State Portal, 2018).

It should be noted that much attention has been paid to the development of ASEAN relations, which has become a centre for regional integration in East Asia. This is evidenced by the annual participation of Secretary of State H. Clinton in the ASEAN Regional Forum (ARF); Resumption of the U.S.-ASEAN Annual Summits in 2009; the Treaty of Friendship and Cooperation in the SEA in July 2009, signed by the U.S., opening the way for the U.S. to join the East Asian Summit; opening of the U.S. Mission to ASEAN in 2010 and appointment of the first ASEAN Ambassador in April 2011, etc.

In the international arena, discussions have begun on the creation of the role of the United States as a "resident country". To do this, it was necessary to combine military and economic power with public diplomacy. Such policy implies the expansion of all negotiation processes, commitment to environmental and energy security, the activation of all mechanisms of public diplomacy and, above all, accession to the 1976 Treaty. Obama's pre-election campaign did not mention the need to develop relations with the ASEAN countries. But the focus on ASEAN of U.S. foreign policy interests under Obama's democratic administration manifested itself in February 2009. Indonesia became the second country after Japan to be visited by U.S. Secretary of State H. Clinton. It is no coincidence that the ASEAN Secretariat is located in Jakarta. The central event was the first visit of Hillary Clinton to the ASEAN Secretariat in 32 years of a dialogue partnership. As a consequence of this visit, Clinton announced a decision to accede to the Bali Treaty of 1976 (Vasilev, 2010, p. 192).

U.S. increased focus on ASEAN has both global and regional reasons. In terms of global change, this is a continuation of the impact on those crisis processes around the world (including Western Europe and the USA), and are certainly reflected in the SEA region, but there are also regional reasons, and perhaps more sharply identified today. This is because the SEA has very powerful players, most notably China, which is now making increasingly clear its claim of dominance in the region. Even during U.S. President Barack Obama's visit to the ASEAN summit, China's representative made it clear that this is a problem that the USA should not interfere with. In addition to China, there are other international actors, such as India and Russia that also try to strengthen their influence in the region. To do so, the USA, as the world's leader, should pay attention to the SEA situation.

4. Conclusions

Consequently, the administrative and legal framework for the U.S. national security with the countries of South-East Asia under the Obama administration has been determined to make further partnership policy, because this is one of the most important U.S. tasks of today. International relations between the U.S. and SEA continue to develop, which in turn affects the efficiency of economic development, contributes to internal and regional stability, especially to support national development in all sectors of life.

References:

Clinton, H. (2011). America's Pacific Century // Foreign Policy. IIP Digital. Retrieved from http://iipdigital.usembassy.gov/st/english/article/2011/10/20111011161233su0.8861287.html#axzzl dsvxWPCD (in English).

Congressional Testimony. Nomination Hearing To Be Secretary of State. Testimony Hillary Rodham Clinton Secretary of State, Secretary of State. Statement before the Senate Foreign Relations Committee. Washington, DC, January 13, 2009. U.S. Department of State. Retrieved from www.state.gov/secretary/rm/2009a/1/115196.htm (in English).

Eksperty: vizit ministra oborony SShA v Kitai pomozhet v uglublenii vzaimodoveriia i rasseianii somnenii mezhdu dvumia armiiami [Experts: The visit of the U.S. Secretary of Defense to China will help deepen mutual

trust and dispel doubts between the two armies]. (2012). *russian.china.org*. Retrieved from http://russian.china.org.cn/news/txt/201209/18/content_26557744.htm (in Russian)

Horodnia, N.D. (2012). Vidnovlennia amerykanskoho liderstva v Aziisko-Tykhookeanskomu rehioni v polityt si administratsii B. Obamy [Renewal of American Leadership in the Asia-Pacific Region in the Politics of Administration of B. Obami]. *Aktualni problemy mizhnarodnykh vidnosyn – Topical issues of international news, 107*, 190-196 (in Ukrainian).

Obama, B. (2008). Renewing American Leadership. Foreign Affairs. 2007, July-August. General OneFile. Gale. University of Michigan-Ann Arbor. 30 Jan. 2008. Retrieved from http:find.galegroup.com.proxy.lib.umich.edu/ith/start.do?pro-did=ITOF (in English).

Remarks By President Obama to the Australian Parliament. (2011). The White House. President Barack Obama. Retrieved from http://www.whitehouse.gov/the-press-office/2011/11/17/remarks-president-obama-australian-parliament (in English).

U.S. Department of State: finish line for approval. U.S. Department of State Portal. 2018. Retrieved from http://www.state.gov/outofdate/bgn/indonesia/165205.htm (in English).

Vasilev, L.E. (2010). *ASEAN v nachale XXI veka. Aktualnye problemy i perspektivy [ASEAN at the beginning of the XXI century. Actual problems and prospects].* M.: ID «FORUM» (in Russian)

Підберезних Інна,
кандидат історичних наук, доцент, здобувач, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, Inna_Pidbereznykh@ukr.net
***ORCID:** orcid.org/0000-0001-9906-4327*

АДМІНІСТРАТИВНО-ПРАВОВЕ ЗАБЕЗПЕЧЕННЯ НАЦІОНАЛЬНОЇ БЕЗПЕКИ США З КРАЇНАМИ ПІВДЕННО-СХІДНОЇ АЗІЇ ЗА ЧАСІВ ПРЕЗИДЕНТА Б. ОБАМИ

Анотація. ***Мета.*** Метою цієї статті є історико-правове дослідження адміністративно-правового забезпечення національної безпеки США з країнами Південно-Східної Азії за часів президента Б. Обами. ***Результати.*** У статті сформовано адміністративно-правове забезпечення національної безпеки США з країнами Південно-Східної Азії за часів президента Б. Обами, що визначають характер двостороннього співробітництва. Сполучені Штати є послідовними у веденні зовнішньої та внутрішньої національної безпеки країни. Велике значення для реалізації її зовнішньополітичної стратегії має світова геополітична ситуація. Зауважено, що важливим для національної безпеки США є партнерство з Індонезією, третьою за розміром демократією у світі, найбільшою мусульманською нацією, членом Великої двадцятки, а також контроль за впливом на регіон Південно-Східної Азії Китаю та Росії. З'ясовано, що США, відновлюючи двостороннє співробітництво з країнами ПСА, було запропоновано широке коло сфер взаємодії, включаючи угоди у сфері безпеки, співробітництво з економічних питань, у сфері охорони природи, розвитку освіти тощо. Сполучені Штати оновлюють і зберігають партнерські відносини з Філіппінами й Таїландом, збільшуючи кількість кораблів і робітників для успішного завершення підготовки філіппінських військ у боротьбі з тероризмом. У Таїланді, давньому партнерові США, планується створити центр гуманітарної допомоги при надзвичайних ситуаціях. З іншими країнами Південно-Східної Азії передбачається встановлення більш тісних партнерських відносин, ніж раніше. Це такі країни, як Китай, Індія, Індонезія, Сінгапур, Нова Зеландія, Малайзія, Монголія, В'єтнам, Бруней та тихоокеанські острівні країни. Звісно ж, основна увагу приділяється відносинам з Китаєм, їх проблемам, та вирішенням цих питань, адже це партнерство важливе як і для США, так і для Китаю. ***Висновки.*** Зроблено висновок, що адміністративно-правове забезпечення національної безпеки США з країнами Південно-Східної Азії за часів президента Б. Обами було сповнено рішучості проводити надалі політику партнерства, адже це одне з найбільш важливих завдань для сьогоденної Америки. Міжнародні відносини між США та Південно-Східної Азії продовжують свій розвиток, а це впливає на ефективність економічного розвитку, сприяє внутрішній та регіональній стабільності, особливо для підтримки національного розвитку в усіх сферах життя.

Ключові слова: адміністративно-правове забезпечення, адміністрація, Азійсько-Тихоокеанське економічне співробітництво, боротьба з тероризмом, внутрішні відносини, зовнішні відносин, зовнішньополітична стратегія, національна безпека, оборона, Південно-Східна Азія, Сполучені Штати Америки.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.2.12

Vladyslav Pinchuk,
Adjunct at the Department of Police Law, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, Pinchuk_Vladyslav@ukr.net
***ORCID:** 0000-0002-2542-7109*

Pinchuk, Vladyslav (2022). Recording of administrative offences by district police officers: definition of essence and content. *Entrepreneurship, Economy and Law*, 2, 76–80, doi https://doi.org/10.32849/2663-5313/2022.2.12

RECORDING OF ADMINISTRATIVE OFFENCES BY DISTRICT POLICE OFFICERS: DEFINITION OF ESSENCE AND CONTENT

Abstract. ***Purpose.*** The purpose of the article is to generally describe the essence and content of the recording of administrative offences by district police officers. ***Results.*** In the article, scientific perspectives of scientists and researchers enable to describe the main scientific and theoretical, practical provisions on the interpretation of the essence and content of the report as a form of expression of decision-making in the document flaw system. The article reviews and compares the obtained results with domestic scientists' doctrinal perspectives regarding the administrative and legal interpretation of the report, as well as the recording of administrative offence. In the article and the conclusions, the author suggests a set of positive and negative aspects of the functioning of the institution in law, and, on the basis of the literature review, some steps are proposed for possible optimisation. It is proved that the recording of an administrative offence is a form of fixing the fact, event, circumstances of the act committed, which allows initiating the process of administrative prosecution of the offender. Furthermore, the author argues that its essence and significance in the context of considering an administrative offence case is key, as it can contain not only the inspection of the offence specificities in general, but also information on administrative detention of persons, information on temporary seizure and inspection of property of the offender and other facts. ***Conclusions.*** It is emphasised that the content of the recording of administrative offence is clearly regulated by the Code of Administrative Offences of Ukraine and should comply with it. In case of breach of the basic principles defined by the relevant Code, it can be sent for revision as evidenced by domestic legal practice. A special issue in the context of determining the features of the content of recording an administrative offence is the establishment of what is mandatory and what is optional, because such features have a direct impact on the timing of its formulation.

Key words: recording, administrative law, offence, police, district officers, community officers, concept.

1. Introduction

The issue of effective administrative and legal protection of human and civil rights and freedoms in Ukraine and throughout the world is urgent in the present circumstances, since an effective response to administrative offences by authorised persons and citizen concerned guarantees stability and sustainability in the development of the institution of human rights and freedoms.

Moreover, the National Police of Ukraine is the largest law enforcement body in Ukraine, with a staff of more than 120.000 people, where district police officers exercise a bulk of administrative in general and administrative and jurisdictional powers in particular.

At the same time, the main areas of optimising the work of law enforcement bodies in the context of improving the administrative and legal processes and procedures are actively studied by scientists and researchers. Therefore, we propose to focus on recording an administrative offence by a district police officer and find out the essence and content of the relevant process.

The purpose of the article is to generally describe the essence and content of the recording of administrative offences by district police officers. Goal setting, in turn, allows specifying the list of tasks, which include: the general legal description of the conceptual and categorical framework of the research; the analysis of the essence and content of the process of reporting administrative offences by district police officers; development of general theoretical proposals to optimise the functioning of the relevant institution of law.

The relevance of the topic, as stated at the beginning of the article, does not raise any objections, since the organisation of an effec-

tive response to administrative offences will positively affect the stable functioning of the institution of human and civil rights and freedoms. First of all, to provide further deeper and more comprehensive study, we propose to analyse the conceptual and categorical apparatus of the outlined topic.

2. The concept and particularities of recording an administrative offence

In the context of administrative law science, a record differs significantly from the interpretation of the concept in the classical sense. According to Shkrebets, the record is a document which fixes the course and results of meetings. The recordings show all statements on the issues under consideration, as well as the decisions taken as a result of the discussion (Shkrebets, 2018). However, it should be noted that while this interpretation of the concept 'recording' differs significantly from that of legal study in general and administrative legal science in particular, there are still common features. This directly refers to the fact that the recording, as the form of the document, is intended to fix a certain event, the performance of certain actions, their justification, as well as the final decision, which is accepted and binding to be carried out as a result of the facts under consideration.

At the same time, the issue of recording an administrative offence as a form of expression of decision-making in an administrative procedure is considered more substantively.

According to M. Bezdolnyi, who has studied the forms of expression of decisions of public authorities in relations with persons, the recording is a procedural document officially certifying the fact of unlawful actions for which administrative liability is provided, and the main source of evidence, so it should be properly documented (Bezdolnyi, 2009, p. 3). This perspective fully reflects the provisions of the law, inter alia, that an improper recording or a recording drawn up by an improper actor, is null and void and only indicates the misconduct of a police officer or other actor of public authority.

However, domestic legislation (articles 45 and 46 of the Code of Administrative Procedure and article 251 of the Code of Administrative Offences of Ukraine) do not define the concept of a recording, which, in our opinion, significantly complicates the application of this category both in scientific circles and in the practical activities of law enforcement bodies in general and district officers of the National Police of Ukraine in particular.

In I. Kuian's opinion, the recording of administrative offence is a written account of an unlawful act, having the characteristics of an administrative offence, under certain conditions, that is, when establishing the factual data provided for in article 251 of the Code of Administrative Offences, it is a document of evidentiary value in a case. For example, the scientist also cites the opinion that there is no definition of the concept of recording an administrative offence in the Legal Encyclopaedia published by the National Academy of Sciences of Ukraine (Kuian, 2003, pp. 176-177).

3. Contents of the protocol on administrative offense

We believe that the crime situation in the State, conducive to the systematic exercise by the National Police of Ukraine and other law enforcement bodies of their administrative and jurisdictional powers, such as recording an administrative offence (for example, by a district police officer) and the absence of a definition of the concept of a recording of administrative offence in the legislation of Ukraine are interrelated problems, requiring scientific development and definition.

In addition, article 256 of the Code of Administrative Offences provides for the requirements for the content of the recording of administrative offences, namely: "The recording of the administrative offence shall specify: the date and place of drawing up; the title and full name of the person who drew it up; identity data of the offender prosecuted for administrative liability (if found); time and nature of the administrative offence; the legal regulation establishing liability for the offence; names, addresses of witnesses and victims, name of the whistle-blower (by written consent), if any; explanation of the person liable; other information necessary for the resolution of the case. If the offence has caused material damage, it is also recorded" (Code of Ukraine on Administrative Offences, 1984).

Therefore, considering the general structural elements of the content of the relevant recording and the need to specify the features of its drafting by district police officers in general and all those who have the right to draw up the relevant documents in particular, in our view, it is logical to design not only a typical form of such a document, but also a definition of its concept.

According to O. Yarmak's studies on the recording of administrative offence as a source of evidence in the proceedings in cases on administrative offences, the recording of an administrative offence is the main procedural document in the case on an administrative offence, containing a summary of the facts as evidence in this case, the final legal classifi-

cation of the actions (omissions) of the person against whom proceedings have been initiated, on the grounds of which the case is considered on the merits (Iarmak, 2014).

Thus, the need to define the concept of recording of administrative offences is even more topical, since the facts listed by the scientists and the provisions of the current legislation of Ukraine clearly indicate the risk of problems with the legality of its drawing, as well as the need to respect human and civil rights and freedoms in this context.

Moreover, A. Yarmak argues that the recording is a general document in the consideration of the case on administrative offence, which only underlines the urgent need to define its concept in order to establish the appropriate procedural form.

The content of the recording of the administrative offence by a district police officer, among others, has its elements and clear requirements, as the information reflected in it directly demonstrates the circumstances, facts of the event, the surname, first name and middle name of all the participants, their address and contact details, as well as their statements regarding the situation.

In addition, the issue of the fact and circumstances of the event, which should directly indicate the relationship between the act committed by the perpetrator and the effects of the injury to human and civil rights and freedoms or the interest of the State, is also described. All the above to some extent directly affect the need to regulate the definition of the recording of an administrative offence in the current legal framework governing the recording of administrative offences, not only by district police officers, but also by other actors authorised to do so.

Furthermore, the legislator has taken steps to improve the process of the recording of administrative offences, but unfortunately, these proposals do not concern the activities of district police officers, but could be used, by analogy, for drafting other legal regulations. For example, the Law of Ukraine *On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Regulation of Relations in the Sphere of Ensuring Road Safety* (Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Regulation of Relations in the Sphere of Ensuring Road Safety, 2015) provided for a list of factual data, which may be evidence in cases on administrative offences and, accordingly, which must be specified in the recording of the administrative offence by the authorised person.

However, we believe that the implementation of the penalty point system, which would have a direct impact on the amount of fine for an administrative offence, for which a district police officer, within the scope of his/her administrative jurisdictional powers, holds the person liable, would significantly improve the functioning of the institution concerned and would directly affect the definition of both the concept of the recording of an administrative offence and its content.

At the same time, such a position requires further elaboration, as the positions specified in the legislation have been implemented taking into account the functioning of the system of automatic recording of committed criminal offences, which is not possible for natural persons, in respect of whom the district police officer within his/her competence exercises administrative and jurisdictional powers.

In addition, the legislator removed the recording of an administrative offence from the list of evidence in the category of cases on administrative offences recorded automatically (in the field of road safety), which is clearly stipulated by the Law of Ukraine *On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine 'On the National Police'* (Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine "On the National Police", 2015).

The above-mentioned positions also concern the National Police of Ukraine and can, provided substantial processing, be interpreted into the administrative and jurisdictional activities of district police officers of the National Police of Ukraine.

4. Conclusions

To sum up, the analysis of scientists' perspectives on the challenging issues of defining the essence and content of the concept of the recording of an administrative offence makes it possible to state that:

1. The recording of an administrative offence is a form of fixing the fact, event, circumstances of the act committed, allowing the initiation of administrative prosecution of the offender.

2. Its essence and significance in the context of considering an administrative offence case is key, as it can contain not only the inspection of the offence specificities in general, but also information on administrative detention of persons, information on temporary seizure and inspection of property of the offender and other facts.

3. The content of the recording of administrative offence is clearly regulated by the Code of Administrative Offences of Ukraine, and should comply with it, in case of non-compliance with the basic principles

defined by the relevant Code, it can be sent for revision, as evidenced by domestic legal practice. A special issue in the context of determining the features of the content of recording an administrative offence is the establishment of what is mandatory and what is optional, because such features have a direct impact on the timing of its formulation.

References:

Bezdolnyi, M.Iu. (2009). Administratyvno-pravovi zasady diialnosti orhaniv vnutrishnikh sprav shchodo protydii koruptsii [Administrative and legal bases of activity of law-enforcement bodies concerning counteraction to corruption]. *Candidate's thesis.* Kharkiv [in Ukrainian].

Iarmak, O.M. (2014). Protokol pro administratyvne pravoporushennia yak dzherelo dokaziv u provadzhenni v spravakh pro administratyvni pravoporushennia [Recording on Administrative Offences as a Source of Evidence in Proceedings in Cases of Administrative Offences]. Extended abstract of candidate's thesis. Kharkiv [in Ukrainian].

Kodeks Ukrainy pro administratyvni pravoporushennia : pryiniatyi 07 hrud. 1984 roku № 8073-X [Code of Ukraine on Administrative Offences from December 7 1984, № 8073-X]. (1984). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10#Text [in Ukrainian].

Kuian, I.A. (2003). Protokol pro administratyvni pravoporushennia [Recording on administrative offences]. *Yurydychna entsyklopediia – Legal encyclopedia, 5,* 176–177 [in Ukrainian].

Shkrebets, N.V. (2018). Protokol, vytiah z protokolu [Recording, extract from the record]. *lvkm.com.ua*. Retrieved from https://www.lvkm.com.ua/images/Docs/Dustancijne_navchannya_april/2/Shkrebets_NV_93_9._Protokol._Vytiah_z_protokolu.pdf [in Ukrainian].

Zakon Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo vdoskonalennia rehuliuvannia vidnosyn u sferi zabezpechennia bezpeky dorozhnoho rukhu : pryiniatyi 14 lyp. 2015 roku № 596-VIII [Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine Concerning Improvement of Regulation of Relations in the Sphere of Ensuring Road Safety from July 14 2015, № 596-VIII]. (2015). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/596-19#Text [in Ukrainian].

Zakon Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy u zviazku z pryiniattiam Zakonu Ukrainy «Pro Natsionalnu politsiiu»: pryiniatyi 23 hrud. 2015 roku № 901-VIII [Law of Ukraine On Amendments to Certain Legislative Acts of Ukraine in Connection with the Adoption of the Law of Ukraine "On the National Police" from December 23 2015 № 901-VIII]. (2015). *zakon.rada.gov.ua.* Retrieved from https://zakon.rada.gov.ua/laws/show/901-19#Text [in Ukrainian].

Владислав Пінчук,
ад'юнкт кафедри поліцейського права, Національна академія внутрішніх справ, пл. Солом'янська, 1, Київ, Україна, індекс 03035, Pinchuk_Vladyslav@ukr.net
ORCID: *0000-0002-2542-7109*

СКЛАДАННЯ ПРОТОКОЛІВ ПРО АДМІНІСТРАТИВНЕ ПРАВОПОРУШЕННЯ ДІЛЬНИЧНИМИ ОФІЦЕРАМИ ПОЛІЦІЇ: ДО ВИЗНАЧЕННЯ СУТНОСТІ ТА ЗМІСТУ

Анотація. ***Мета***. Метою статті є загальна характеристика сутності та змісту складання протоколів про адміністративні правопорушення дільничними офіцерами поліції. ***Результати***. У статті на підставі наукових позицій учених і дослідників було охарактеризовано основні науково-теоретичні та практичні положення щодо тлумачення сутності та змісту поняття протоколу як форми вираз прийняття рішення в системі документообігу. Узагальнено та проведено порівняння отриманих результатів із доктринальними поглядами вітчизняних науковців стосовно адміністративно-правового тлумачення поняття протоколу, а також протоколу про адміністративне правопорушення. Автором у тексті статті та висновках пропонується ряд позитивних і негативних аспектів щодо функціонування відповідного інституту в праві, а також на підставі проаналізованих думок пропонуються деякі кроки щодо ймовірної оптимізації. Доведено, що протокол про вчинення адміністративного правопорушення є формою фіксації факту, події, обставин учиненого діяння, що дозволяє запустити процес притягнення до адміністративної відповідальності особу-правопорушника. Автором також підтримується позиція про те, що його сутність та значення в контексті розгляду справи про адміністративне правопорушення є ключовими, оскільки він може вміщати в себе не лише оглядові характеристики правопорушення в цілому, а й відомості щодо адміністративного затримання осіб, інформацію про тимчасове вилучення та огляд майна особи-правопорушника та інші факти. ***Висновки***. Підкреслюється, що зміст протоколу про адміністративне правопорушення чітко врегульований Кодексом України про адміністративні правопорушення та має йому відповідати, а в разі недотримання основних засад, визначених відповідним кодексом, його може бути відправлено на

доопрацювання, про що свідчить вітчизняна юридична практика. Окремим питанням у контексті визначення особливостей змісту протоколу про адміністративне правопорушення є встановлення того, що є обов'язковим реквізитом, а що факультативним, оскільки такі особливості безпосередньо впливають на термін його складення.

Ключові слова: протокол, адміністративне право, правопорушення, поліція, дільничні офіцери, офіцери громади, поняття.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 351.741(477)
DOI https://doi.org/10.32849/2663-5313/2022.2.13

Serhii Saranov,
Posta graduate Student at the Department of Public Management and Administration, National Academy of Internal Affairs, 1, Solomianska Square, Kyiv, Ukraine, postal code 03035, Serhii_Saranov@ukr.net
ORCID: *0000-0002-7514-0260*

Saranov, Serhii (2022). Forms and methods of public control over activities of specialised anti-corruption bodies. *Entrepreneurship, Economy and Law*, 2, 81–91, doi https://doi.org/10.32849/2663-5313/2022.2.13

FORMS AND METHODS OF PUBLIC CONTROL OVER ACTIVITIES OF SPECIALISED ANTI-CORRUPTION BODIES

Abstract. ***Purpose.*** The purpose of the article is to reveal forms and methodological approaches in the field of public control over anti-corruption public actors based on the analysis of domestic legislation and relevant scientific works. ***Results.*** The article studies forms and methods of public control over the activities of specialised anti-corruption bodies. It is established that no democratic State can exist without effective control over the authorities by society. Control is a universal tool for improving understanding between the authorities and the public. The article establishes classification of forms of public control over the activities of specialised anti-corruption bodies in groups as follows: general, specialised, indirect and direct action, procedural. It is noted that citizens' appeals remain the most common form of control. The method of public control, such as a discussion or advisory one, is based on public participation in the discussion of issues, identification of ways of implementing anti-corruption policy and strategy by special anti-corruption bodies. This method is realised both through the active constant participation of public councils and the involvement of all actors of public control in: the organization and conduct of public hearings on anti-corruption issues, participation in advisory bodies, making proposals to improve anti-corruption activities, etc. The method of cooperation is expressed in the joint work of specialised anti-corruption bodies with representatives of the media, for example the posting of messages information, not subject to limited access, their participation in the conduct of journalistic investigations; organization of conferences, seminars, round tables with open access for participation of all actors of public control concerned. ***Conclusions.*** It is determined that methods of public control are a set of administrative and legal methods aimed at ensuring constant control over the activities of specialised anti-corruption public bodies for detecting and preventing corrupt practices, reducing corruption risks in the activities of officials of these bodies. The following methods of public control are described: method of public initiative, alternative activities, advisory, public dialogue, discussion, cooperation.

Key words: public control, method of public control, form of public control, citizens' appeal.

1. Introduction.

Nowadays, Ukraine is on the course to reforming and establishing European standards in the activities of State authorities, initiating democratic and transparent methods of governance.

This process of change and reform requires constant control by both specialised State bodies and public participation. Public control is the degree to which an effective dialogue is agreed between State bodies and representatives of the public.

According to A. Biletskyi, no democratic State can exist without effective control over the authorities by society. Control is a universal tool for improving understanding between the authorities and the public. Nowadays public anti-corruption organizations increasingly create or improve existing methods of control. However, the author argues that they did not achieve significant changes in minimising the level of corruption in the State. Therefore, it is urgent to identify the most effective forms of control, summarising the existing measures (Biletskyi, 2017, p. 240).

In their works, most scholars have studied forms and methods of public control over activities of State bodies, namely: O. Bondarchuk, A. Bukhanevych, L. Haponenko, V. Harashchuk, S. Denysiuk, O. Kalinin, O. Korniievskyi, S. Kosinov, V. Kuprii, E. Libanova, L. Palyvoda, H. Pryshliak, O. Savchenko, O. Sushynskyi; over activities of specialised anti-corruption actors, namely: A. Biletskyi, M. Burbyk, B. Holovkin, V. Doroshenko, V. Mykolenko, O. Nesterenko, V. Synchuk, O. Yurchenko,

A. Falkovskyi and others. Although the topic raised is of interest to modern scholars, it should be noted that the study of forms and methods of public control and ways of its influence on the activities of specialised anti-corruption bodies is a relatively new direction of scientific research.

The purpose of the article is to reveal forms and methodological approaches in the field of public control over anti-corruption public actors on the basis of the analysis of domestic legislation and scientific works on the topic under study.

2. Specificities of the activities of public authorities

Before proceeding to the disclosure of the set goals, the essence of forms of administrative activities of State authorities will be under the theoretical and legal analysis. Verbatim translation of the word "form" gives definition as a way of organization of something; appearance of any phenomenon connected with its essence, content (Busel, 2005, p. 639). Another dictionary defines it as the action of an executive body or its official, outwardly expressed, carried out within their competence and with certain effects (Dodonov, 2001). Y. Bitiak defines the form of management as an external manifestation of concrete actions taken by the executive authorities for the implementation of their tasks (Bytiak, Harashchuk, Zui 2010, p. 134). According to the scientist, forms of management are ways of carrying out targeted impact, that is, forms of management show how practically managerial activity is carried out (Bytiak, Harashchuk, Zui 2010, p. 134)

Therefore, forms of administrative management are external manifestations of legal effect, which in turn is expressed through the executive action of the management body.

Forms of State managerial activities are the totality of actions carried out in the process of functioning of executive bodies and their officials, including those that do not have a direct legal effect. If the actions of executive bodies and their officials have legal effects or have a certain legal significance, they are called administrative and legal forms (Dodonov, 2001).

Thus, the form of public control is an external expression of consistent actions of actors of public control over the activities of specialised anti-corruption bodies in order to minimise the emergence of anti-corruption risks.

Some scientists (V. Halunko, P. Dikhtiievskyi, O. Kuzmenko, S. Stetsenko) group the forms of public administration into: the issuance of administrative regulations (the issuance of by-laws and the issuance of individual administrative regulations); the conclusion of administrative agreements; other legally significant administrative actions; logistical operations (Halunko, Dikhtiievskyi, Kuzmenko, Stetsenko, 2018, p. 144). According to A. Biletskyi, the most successful forms of public control are: 1) participation of actors of public control in the work of advisory bodies of public control objects; 2) public monitoring; 3) public hearings (Holovkin, 2013, p. 155), public consultations, public discussions; 4) public anti-corruption expertise (Biletskyi, 2017, p. 242).

3. Legal and regulatory mechanism for public control over the activities of State bodies

Art.3 of the Law of Ukraine *On Citizens' Appeals* provides the forms, according to which citizens of Ukraine can participate in the management of State and public affairs, to influence the improvement of work of State authorities: proposals (comments), statements (applications) and complaints (Law of Ukraine on Citizens' Appeals, 1996), which can be both oral and in writing.

The draft Law of Ukraine 9013 *On Public Control over the Activities of Authorities, Their Officials* of August 07, 2018 (initiated by S.M. Kaplin) does not define the forms of public control, but it has been pointed out that civilian control over the activities of the authorities, their officials and officers is a form of exercising of power by the people by direct control over the activities of the authorities, their officials and officers with the application of civil resistance measures by these actors in case of failure or improper performance of the requirements of the legislation by the authorities, their officials and officers (Draft Law on Public Control, 2018). In turn, article 4 of the draft refers to 17 main forms of public control, such as: organization and holding of public hearings on the activities of the authorities and their officials; participation in advisory bodies and other bodies attached to the authorities; submission of communications to the authorities; and their officials with the request to eliminate violations in the issued (adopted) legal regulations, especially in relation to the rights and legitimate interests of citizens, or to cancel such regulations; making of draft laws and other legal regulations and submitting of them to the actors of legislative initiative, authorities, and their officials for consideration; initiation and conduct of a public inquiry in the event of revealing violations of the requirements of legal regulations, informing the public, the authorities, and their officials of the results thereof; ensuring the protection of the rights and legitimate interests of actors of public control, including in domestic and foreign jurisdictional bodies, in case of receiving information on pressure from the relevant authorities, and their officials, or

inducement to commit certain acts or omissions, etc. (Draft Law on Public Control, 2018).

Other draft laws of Ukraine on public control indirectly reveal forms, without distinguishing them into specific groups. For example, the Draft Law 4697 developed by S.L. Tihipko of April 14, 2014 (Draft Law on Public Control, 2014), highlighting the rights and obligations of actors of public control refers to the forms of control, such as: visits to State authorities and local government bodies during special public control procedures, procedural forms of appeal against decisions, actions or omissions of anti-corruption officials, providing information on the results of this type of control.

4. Forms of public control over the activities of public authorities

The analysis of scientific doctrine and current legislation in the field of legal regulatory mechanism for the procedure for exercising control enables to classify forms of public control over the activities of specialised anti-corruption bodies in groups as follows: general, specialised, indirect and direct action, procedural.

In our opinion, the forms of control available to every person concerned, legal grounds thereof are provided for by the constitutional framework and the legislation in force, should be considered as general. As mentioned above, the Law of Ukraine *On Citizens' Appeals* provides for the opportunities for citizens in exercising control over the activities of State authorities through an appeal. Moreover, article 7 of the law prohibits refusing to accept and consider appeals of citizens, moreover, appeals made in due course and filed in due manner, are subject to mandatory acceptance and consideration (Law of Ukraine on Citizens' Appeals, 1996). In turn, article 212-3 of the Code of Administrative Offences of Ukraine provides for administrative liability for violation of the right to information and right to appeal (Code of Ukraine on Administrative Offenses, 1984).

It should be noted that citizens' appeals remain the most common form of control. According to the NABU report for the first half of 2021, the Bureau received 9,868 applications and appeals, 85% of them – from citizens. The most popular channel is a special telephone line, through which 45% of all appeals of citizens (2021) have been processed (Official site of the National Anti-Corruption Bureau of Ukraine, 2021). The NACP has introduced a separate structural unit for digital transformation and innovative development to protect the channels of citizens' communication. The unit has developed and approved requirements for the protection of anonymous communication channels through which citizens can report corruption or corruption-related offences, other violations of the Law of Ukraine *On Corruption Prevention* (Official site of the National Agency for Corruption Prevention, 2020).

This type of public control should include public reporting by anti-corruption government bodies. According to article 1 of the Law of Ukraine *On Access to Public Information*, public information is the information reflected and documented by any means and on any media received or created in the course of performing duties by the authorised actors, under current legislation, or held by authorised actors, other managers of public information (Law of Ukraine on Access to Public Information, 2011).

According to the legislation in force, each body must, within a certain time frame, publish its results with the main indicators and achievements during the reporting period, determining the areas of development for the future. The exception is restricted information. Article 6 of the Law of Ukraine *On Access to Public Information* refers confidential, official and secret information to information with limited access (Law of Ukraine on Access to Public Information, 2011). The Law defines the means of promulgation such as: publication of reporting information on the official website of public authorities, official printed publications and other information resources.

Real public accountability and controllability of public officials in their activities to the interests of society are signs of effective public policy and universal principles of "good governance" (Kuprii, Palyvoda, 2011, p. 11-14; Nalyvaiko, Savchenko, 2017, p. 98).

Media control should also be included as a general form of control. Nowadays, in the public sector, mass media is an important part of civil society, conducting a dialogue between citizens, society and the State, as well as an instrument of publicity, openness, public sector and civil society (Orlov, 2012, p. 13; Nalyvaiko, Savchenko, 2017, p. 100). The most important tools of civil society are the social and legal or public structures of television, radio and the Internet, enabling citizens to engage in dialogue in the very public sector that is necessary for democratic society (Nalyvaiko, Savchenko, 2017, p. 100).

The dialogue from the exchange of information between representatives of the media and anti-corruption State bodies is a specific constructive public control, which has a unique influence on the conduct and application of anti-corruption actions, reducing corruption risks among employees of these bodies.

According to the NABU's report for the first half of 2021, the leadership of this anti-corruption body provided 150 responses to requests

from the media during the reporting period; 33 briefings and conferences were held with the participation of representatives of the body, including on-line; 13 interviews were given to Ukrainian media; 60 media comments on NABU activities were presented; 29 educational activities were conducted, including online (Official site of the National Anti-Corruption Bureau of Ukraine, 2021).

The next form of public control over the activities of specialised anti-corruption bodies should be considered a specialised form, characteristic of the exclusive range of actors of public control in accordance with the provisions of specialised legislation. Accordingly, actors of public control, having acquired the right to perform a specialised function, are given certain powers provided that the requirements of the legislator are met. This form is peculiar, first of all, to public councils formed under specialised anti-corruption State bodies. As noted above, public councils operate under the National Anti-Corruption Bureau of Ukraine (art. 31 of the Law of Ukraine on the National Anti-Corruption Bureau of Ukraine of October 14, 2014), State Bureau of Investigation (art. 28 of the Law of Ukraine on the State Bureau of Investigation of November 12, 2015), the National Agency for Prevention of Corruption (art. 14 of the Law of Ukraine on Prevention of Corruption of October 14, 2014), the Supreme Anti-Corruption Court (art. 9 of the Law of Ukraine on the Supreme Anti-Corruption Court of June 07, 2018).

As noted above, each public control council under specialised anti-corruption institutions has rather specific responsibilities: accountability of the NABU, SBI, NACP to public councils formed under the relevant anti-corruption body, these councils' hearing of information on the activities, plans and tasks of the anti-corruption bodies; possibility to participate in the work of the NABU, SBI and NACP disciplinary committees by electing their representatives.

The legislator provided a special procedure for the formation of public councils under specialised anti-corruption entities, putting forth restrictions on council members. The competition for membership in the councils is online voting, which is provided for in the special legal regulations governing the activities of the respective councils. It should be noted that both citizens of Ukraine and public associations may participate in the competition for the composition of the Council. This possibility is provided by special regulations on the procedure for composing councils under the NABU and NACP. Thus, in order to participate in the competition for the Public Control Council under the NABU, the relevant public associations are represented by sending to the e-mail address specified in the announcement of the competition a list of outstanding documents with the proposal of the candidate for participation in the competition (Decree of the President of Ukraine Issues of the Public Control Council at the National Anti-Corruption Bureau of Ukraine, 2015). It should be noted that both the NACP Council and the NABU Council set a limit on the number of candidates for the competition (not more than three) from public associations, but the NACP defines restrictions on the very public associations.

For example, the Procedure for holding the competition for the formation of the Public Council under the National Agency for Corruption Prevention, approved by the Decree 952 of the Cabinet of Ministers of Ukraine of 20 November (Resolution of the Cabinet of Ministers of Ukraine Procedure for holding a competition for the formation of the Public Council at the National Agency for Corruption Prevention, approved, 2019), establishes limits on the number of candidates nominated for the competition from public associations: no more than three candidates, taking into account all candidates nominated by affiliated public associations. Affiliated public associations shall be those having common founders or whose founders are close persons. If the number of candidates nominated for participation in the competition is greater, the public association that sent the documents required for participation in the competition shall be allowed to participate in the competition in the order of priority of the candidacy of the public association that sent the documents provided for in this Procedure (Resolution of the Cabinet of Ministers of Ukraine Procedure for conducting a competition for the formation of the Public Council at the National Agency for Corruption Prevention, approved, 2019).

In turn, the Procedure for the formation of the Public Control Council under the State Bureau of Investigations, approved by the Presidential Decree 42/2020 of 5 February, does not provide for the participation of members of public associations, without imposing the above restrictions. This position, in our view, is restrictive for membership of the NABU, NACP. In order to eliminate differences in special legal regulations, we propose to supplement the Procedure for the formation of the Public Control Council under the State Bureau of Investigations, approved by the Presidential Decree 42/2020 of 5 February 2020, providing an opportunity for members of public associations to participate in the competition for the Council, adding a paragraph:

"A public association may nominate no more than three candidates for participation in the competition. Candidates nominated for participation in the competition shall comply with the requirements established by this Procedure."

As already mentioned, a special form of public control, characteristic of public councils attached to specialised State bodies, is predetermined by the establishment of special requirements to the procedure for the formation of members and the holding of competitions.

For example, the procedure for the formation of the Public Control Council under the State Bureau of Investigations, approved by the Presidential Decree 42/2020 of 5 February 2020 provides for stages of competition for the formation of the Council. Accordingly, the competition consists of stages as followings: 1) promulgation of the announcement of the competition, acceptance and consideration of applications and other documents from persons wishing to participate in the competition, checking their compliance with the requirements established by this Procedure; 2) online rating voting on the official website of the State Bureau of Investigation; 3) writing essays on the given topic of the competition committee; 4) conducting an interview; 5) announcing the results in the form of a rating list; 6) submission by the competition commission for approval to the Director of the State Bureau of Investigation of the list of 15 persons selected to the Council. The positive regulatory aspect of the competition for the Council of the SBI is the envisaged procedure for each stage with a description of the procedure for the conduct of these stages with determination of the time and clearly regulated rules of applicants' conduct, which makes this process more open and transparent in comparison with other conditions of competition for the NACP, NABU, regulated by special regulations.

In order to eliminate in the future the possibility of corruption risks when conducting competition for the membership in the Council of the NACP and NABU, which will negatively affect the performance of public control, it is necessary to establish a procedure for the competition for council members in accordance with the procedure established for the members of the Council of the SBI, initiating the relevant paragraphs in the Procedure for holding the competition for the formation of the Public Council under the National Agency for Corruption Prevention, approved by the Decree 952 of the Cabinet of Ministers of Ukraine of 20 November 2019, and the Regulation on the procedure for the formation of the Council of Public Control under the National Anti-Corruption Bureau of Ukraine, approved by the Decree 272/2015 of the President of Ukraine of May 15, 2015.

The special forms of public control by the councils established at the anti-corruption bodies should be their ability to participate in the development of the anti-corruption strategy, draft legal regulations, developed by the relevant actors performing the anti-corruption activities, to draw conclusions on and evaluate these regulations.

The most successful example of functioning and interaction with the State anti-corruption body is demonstrated by the Public Control Council of the NABU, operating since 2015. On May 23, 2018, the NABU PCC members reported on the year of their work, in particular on participation in the competition and disciplinary commissions, advocacy changes in the work of the NABU and the system control of court proceedings by the NABU-SAP. Thus, over the past year, representatives of the PCC have participated in 100 meetings and 900 interviews with candidates for various positions and conducted more than 430 additional thorough checks of candidates. As a result, during this period 118 new employees were selected to the NABU (Official site of National Anti-Corruption Bureau of Ukraine, 2021). Moreover, over the past year, the PCC has been able to prosecute five employees and dismiss one for misconduct (Korniievskiy, Tyshchenko, Yablonskiy, 2018, p. 74).

Regarding the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office, as we have already noted, until 2017, the General Prosecutor's Office had an Advisory Council that, on the basis of non-interference in the activities of the Public Prosecutor's Office, exercised a form of public control, such as control over the observance of the laws by the employees of the Office. To date, legislation does not provide for the activities of the Public Council under the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office that calls into question the observance of a degree of openness and transparency in the activities of this body and the ability of citizens to exercise their constitutional rights to participate in the management of State and public affairs.

The indirect form of public control over the activities of special anti-corruption State bodies, in our opinion, should include forms of activity, which have emerged as a result of the initiative of public administrator. This should include initiating the involvement of the NABU, SBI, NACP representatives of public associations, mass media, citizens of Ukraine to discuss draft legislative and other legal regulations on the activities of the relevant

specialised body, conducting their anti-corruption and anti-discrimination expertise; organising meetings, conferences, round tables, etc. on the prevention and combating of corruption; publicising and discussing the openness and transparency of these bodies. These positions are provided for in Art. 7, para. 9 of part 1, of the Law of Ukraine *On the State Bureau of Investigation* (Law of Ukraine On the State Bureau of Investigation, 2015), Art. 12, para. 4 of part 1, of Law of Ukraine *On Prevention of Corruption* (Law of Ukraine on Prevention of Corruption, 2014), as well as Art. 5, para. 5, of the Law of Ukraine *On the National Anti-Corruption Bureau of Ukraine*, according to which the Director of the National Bureau may create commissions by his/her decision, to which representatives of public associations may engage to study issues of violation of the rights of individuals, cooperating with the National Bureau and making recommendations to remedy these violations (Law of Ukraine On the National Anti-Corruption Bureau of Ukraine, 2014).

As already mentioned, public control over the activities of the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office is carried out in a different way than the above-mentioned specialised bodies. According to Section 6.1. "Powers of employees of the Specialised Anti-Corruption Prosecutor's Office" of the Order 125 of the General Prosecutor's Office "On approval of the Regulations on the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office" of March 05, 2020, the Deputy Prosecutor General, the Head of the Specialised Anti-Corruption Prosecutor's Office is responsible for representing the SAP in relations with public associations, international organizations, etc. (Order of the General Prosecutor's Office On approval of the Regulations on the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office, 2020).

Some forms include the involvement of anti-corruption organizations in co-management with State bodies. According to analytical studies, six anti-corruption organizations were invited to participate in a certain type of activity. One such example of cooperation is an organization from Cherkasy, which participated in a certification commission that hired new police officers (Bader, Hus, Meleshko, Nesterenko, 2019, p. 11)

The next form of public control is the form of direct action, which is expressed in a targeted action, used in exceptional cases as an extreme forced form of influence on the actor of the anti-corruption body. In most cases, this form is used by anti-corruption activists or public organizations.

In their work, L.R. Nalyvaiko, O.V. Savchenko define this form of public control as "civil disobedience". The authors argue that civil disobedience is expressed in people's reaction to the shortcomings of the system and the struggle for their rights and freedoms. The measure of disobedience depends directly on how the political system considers social interests. The purpose of the civil disobedience study is that social movements and public initiatives should be legal (Nalyvaiko, Savchenko, 2017, p. 94).

According to researchers, civil society organizations can exert pressure on authorities or other actors by organising demonstrations or other types of public events in which they mobilize their supporters. Though most of the time such protests are peaceful, activists may also use confrontational and coercive methods, such as road blocking or physical resistance to corrupt actors (Bader, Hus, Meleshko, Nesterenko, 2019, p. 5).

In addition to public active initiatives and projects, the anti-corruption forms of public activities include the activities of individual active citizens to prevent and detect corrupt actions become essential. For example, according to a nationwide survey of the Ilko Kucheriv Democratic Initiatives Foundation, and the sociological service of the Razumkov's Centre, which lasted from 19 to 25 May 2018, most respondents (73%), answering the question about what citizens were ready to do to fight corruption, indicated a refusal to give bribes. Significantly fewer citizens who were interviewed chose other possible actions: 19% of respondents – to inform the law enforcement bodies; 17% – to report corruption cases in the media, blogs and social networks; 16% – to complain to the authorities about cases of corruption in their institutions; and 13% of respondents – to do nothing in principle (Korniievskiy, Tyshchenko, Yablonskiy, 2018, p. 76).

Furthermore, the form under study includes a volunteer movement in the fight against corruption among officials of State bodies, which has begun to manifest itself to date.

For example, according to the results of the study, the fight against corruption defines one of the areas of volunteer activities of young people and youth organizations. However, only 4% of the young citizens surveyed noted that they were engaged in voluntary activities to improve the system of administration (public service), fight corruption, promote reforms. 18% of young people surveyed expressed their desire to join anti-corruption activities (Korniievskiy, Tyshchenko, Yablonskiy, 2018, p. 81).

The last form of public control in the fight against corruption among the employees of specialised anti-corruption State bodies, in our opinion, is public judicial monitoring.

In accordance with constitutional provisions, every citizen of Ukraine is guaranteed the right to appeal to the courts against decisions, actions or omissions of State authorities, local self-government bodies, officials and officers (Constitution of Ukraine, 1996). In turn, in the interest of others, namely, in the public interest, according to article 21, para. 1, part 1, the Law of Ukraine *On Public Associations*, the latter may apply to the courts, participate in court sessions as observers and carry out appropriate monitoring.

Public organizations established within the anti-corruption special bodies are actively involved in monitoring of the judicial processes of the NABU and SAP proceedings. For example, for 6 months in 2018, the NABU Public Control Council, as part of the public judicial monitoring, visited 123 court sessions, most of them in Kyiv, where the most cases are considered (Official site of the Ukrainian Crisis Media Centre, 2018).

5. Methods of public control over the activities of specialised anti-corruption bodies

The purpose of our research requires to reveal methods of public control over the activities of specialised anti-corruption bodies. First, the etymological analysis of the term "method" (method of legal regulation) is the set of techniques, methods and means by which material and procedural law affect social relations (Dodonov, 2001).

According to Y. Bytiak's definition of the essence of the method of administrative law, the way of impact of the rules of this branch on public relations can be described by clarifying circumstances, such as: 1) the legal status of each of the participants of the relationship, regulated by administrative and legal provisions; 2) legal facts which determine the advent, change, termination of the administrative and legal relations; 3) the way to define and protect the rights and obligations of actors of the relations (Bytiak, Harashchuk, Zui, 2010, p. 30).

In the theory of law, scholars emphasize the encouragement, persuasion and coercion (Halunko, Dikhtiievskyi, Kuzmenko, Stetsenko, 2018, p. 144). V. Halunko notes that there are two primary (general) methods of legal regulatory mechanism in the jurisprudence: imperative and dispositive. According to the scientist, an imperative method (centralised, authoritative), based on the principles "power-submission", on the relationship of subordination of actors and objects of management (in its implementation means of prohibition, disposition, coercion and legal liability are widely used), while the essence of dispositive one is based on the legal equality of the actors of the legal relationship, their freedom to express their will in the performance of legal actions (Halunko, 2015, p. 12). Therefore, in the context of our research, we will rely on the basics of the dispositive method since the actors of public control are legally equal in the expression of will in exercising this type of control over the activities of specialised anti-corruption State bodies.

According to V. Kuleshov studies on the specificities of public control methods, for the highest level of partnership, singles out methods as follows: regulatory, public order, procedural, informational, educational, contractual, consensual, conciliatory, participatory, involvement, joint activities, joint decision-making, project, social design, strategic partnership (introduction of appropriate techniques for the functioning of an effective system, understanding of each participant, joint activities in accordance with the interests of each, agreeing on the actions of each on the basis of the principles of equality, voluntariness, openness, transparency) (Kuleshov, 2020, p. 29).

In addition, the scientist at the level of establishing a dialogue between actors of public control identifies: methods of establishing contact, communication, conducting discussions, communication, planning, coordination, manipulation, propaganda (Kuleshov, 2020, p. 29).

It should be noted that scholars have not come to a consensus in their research on how to exercise public control. Moreover, some of them in essence approach to forms of public control.

In support of our opinion, V. Kuleshov argues that individual authors classify the stages of control process (observation, assessment, analysis, forecasting) as methods of public control. Furthermore, some scientists include ideological, religious, sociocultural, moral and psychological mood in society into the methods of public control (Kuleshov, 2020, p. 30).

The scientific doctrine enables to classify methods of public control, considering the provisions of anti-corruption legislation and the activities of State bodies with a special status, which is responsible for the cessation and disclosure of corruption violations. In our opinion, the means of public control should be grouped into: method of public initiative (examination, verification, investigation), alternative activities (joint management), advisory, public dialogue (communicative and informational-educational work among citizens, aimed at formation of anti-corruption competence), discussion (advisory), cooperation.

The essence of the method of public initiative, which, in our opinion, should include public examination, verification, investigation, is the manifestation of public activity and consciousness, aimed at preventing the manifestations of corrupt activities. With regard to the definition of the nature and purpose of the public examination, verification and investigation, they are based on the determination of the causes and circumstances of the violation of public interest, legitimate rights of individuals through deliberate actions by public control actors.

It should be noted that the draft laws on public control define in different ways the legal essence of the notions of public examination, verification, investigation. For example, Draft 4697 of April 14, 2014 (initiated by S.L. Tihipko) (Draft Law on Public Control, 2014) characterizes public examination, verification, investigation as special procedures of public control over the activities of authorised actors, their officials, other objects of public control. In our opinion, the classification of these categories as procedures is incorrect, because the "procedure" (Fr. *procedure*, from Lat. *procedere* "move on") is the order, continuity, consistency in the performance of actions to achieve a certain result (Shemshuchenko, 2003, pp. 186-187). We will reveal in detail administrative procedures for public control further.

The authors of Draft 2737-1 of May 13, 2015 (initiators N.Y. Korolevska, Y.V. Solod) classify public examination and verification as measures of public control, including: analytical and monitoring research of the activities of objects of public control (Draft Law on Public Control, 2015).

The provisions of the current legislation provide for the powers of public councils, formed under specialised anti-corruption bodies, to carry out public assessments of the implementation of the tasks assigned to the latter, to draw conclusions on the reporting activities of anti-corruption bodies, and to take a position on violations of laws, human and civil rights and freedoms in the activities of relevant officials.

The analysis of the drafts and the provisions of current legislation enable to reveal the meaning of the concepts of public examination, verification and investigation as components of the method of public initiative of public control.

According to the *Great explanatory dictionary,* "expertise" is the consideration, study by a specialist in this field (expert) or a group of responsible specialists in order to give a correct assessment of the situation, phenomenon (Busel, 2005, p. 152). Accordingly, we suggest that public examination is the way of control exercised by the actor of public control, that is, the analysis and study the of compliance degree of the activities of the objects of this type of control with the requirements of the current legislation and public interests.

In turn, verification is examination for control, establishment of correctness (Busel, 2005). Therefore, public verification should be understood as one of the means of public control, involving the conduct of examination and the performance of consistent actions by the actors of that control, aimed at establishing the facts and circumstances of the activities of objects of public control with a view to determining compliance with the provisions of the current legislation and public interests.

The term "investigation" is defined as: to conduct research, study someone, something; to find out, to clarify or to understand any issue (Busel, 2005, p. 519). Public investigation is defined as a way of studying and clarifying, within the limits of the legislation, facts and circumstances of violation of public interests, legal rights of individuals and legal entities by officials of objects of public control, informing the public about this, developing recommendations to eliminate the consequences of such violations and prevent them in the future, violation of the request to bring the perpetrators to justice.

The method of social initiative should also include the submission of appeals by actors of public control to eliminate violations by officials of specialised bodies of the requirements of the current legislation and public interests, analysis of information on the facts of violation of the requirements of law; organisation and conduct of rallies, pickets and other peaceful activities aimed at countering corruption violations and the provisions of existing legislation; making lists of officials who systematically violate anti-corruption legislation, etc.

The method of alternative activities of public control is realised through joint management activities such as the establishment of partnerships between actors of public control and its objects. This method allows to carry out public control in partnership by open access to reporting and current information on the activities of bodies, except information with limited access; to identify conflict situations with regard to violations of existing legislation and public interests. For example, public councils under specialised anti-corruption bodies participate in the development of the anti-corruption strategy and the State programme for its implementation, according to the regulation on the activities of the Public Council under the NACP (Resolution of the Cabinet of Ministers of Ukraine Some issues of the Public Council at the National Agency for Prevention of Corruption, 2019).

6. Monitoring of the activities of officials or public institutions

A significant percentage of public organizations monitor the activities of officials or State institutions. Common monitoring areas include public procurement where activists can identify conflicts of interest or disagreements between purchase prices and market prices; politicians and officials' declarations where they can identify differences between declared assets and actual assets; and public expenditures in which they can identify the "leakage" of public funds in the pocket of private individuals. Public organizations also monitor the performance of public service providers in terms of transparency and virtue, using tools such as reporting (Nesterenko, Biletskyi, Bader, 2019, pp. 4-5).

The advisory method of public control involves the participation of actors of public control in the invention of alternative ways in detecting and deterring corruption violations in the activities of officials, formation. For example, in accordance with current legislation, public councils under specialised anti-corruption bodies provide ongoing advisory services. The Public Council under the SBI collects, synthesises and submits information on the proposals of civil society institutions on the need to improve the forms and methods of interaction to the State Bureau of Investigation.

Next, the method of public dialogue consists in conducting communicative, information and educational work among citizens, aimed at formation of anti-corruption competence. According to the monitoring report, 117 public organisations participate in educational anti-corruption activities (Nesterenko, Biletskyi, Bader, 2019, p. 7), aimed at raising public awareness on identifying and assessing corruption risks. According to the authors of the monitoring, anti-corruption education can help other activists acquire skills such as monitoring; officials to acquire the norms of virtue; the public to raise awareness of corruption in general (Nesterenko, Biletskyi, Bader, 2019, p. 5).

The method of public control, such as a discussion or advisory one, is based on public participation in the discussion of issues, identification of ways of implementing anti-corruption policy and strategy by special anti-corruption bodies. This method is realised both through the active constant participation of public councils and the involvement of all actors of public control in: the organization and conduct of public hearings on anti-corruption issues, participation in advisory bodies, making proposals to improve anti-corruption activities, etc.

The method of cooperation is expressed in the joint work of specialised anti-corruption bodies with representatives of the media, for example the posting of messages information, not subject to limited access, their participation in the conduct of journalistic investigations; organization of conferences, seminars, round tables with open access for participation of all actors of public control concerned.

In conclusion, it should be noted that methods of public control are a set of administrative and legal methods aimed at ensuring constant control over the activities of specialised anti-corruption public bodies for detecting and preventing corrupt practices, reducing corruption risks in the activities of officials of these bodies.

7. Conclusions

Methods of public control are a set of administrative and legal methods aimed at ensuring constant control over the activities of specialised anti-corruption public bodies for detecting and preventing corrupt practices, reducing corruption risks in the activities of officials of these bodies.

References:

Bader, M., Hus, O., Meleshko, A., Nesterenko, O. (2019). *Hromadianske suspilstvo proty koruptsii v Ukraini: sposoby vplyvu [Civil society against corruption in ukraine: ways of influence].* Leiden University, Anti-Corruption Research and Education Centre of National University Kyiv-Mohyla Academy (in Ukrainian).

Biletskyi, A.V. (2017). Hromadskyi kontrol za diialnistiu spetsializovanykh subiektiv zapobihannia koruptsii. [Hromadsky control over the activities of special-purpose sub-entities for preventing corruption]. *Pytannia borotby zi zlochynnistiu – Issues of combating crime, 33*, 240-248 (in Ukrainian).

Busel, V.T. (2005). *Velykyi tlumachnyi slovnyk [Great Explanatory Glossary].* Donetsk: TOV, VKF «BAO» (in Ukrainian).

Bytiak, Yu.P., Harashchuk, V.M., Zui, V.V. (2010). *Administratyvne pravo [Administrative Law].* Kharkiv. Pravo (in Ukrainian).

Dodonov, V.N. (2001). *Bolshoy yuridicheskiy slovar [Big Law Dictionary].* Moskva: Ynfra-M (in Russian).

Halunko, V., Dikhtiievskyi, P., Kuzmenko, O., Stetsenko, S. ta in. (2018). *Administratyvne pravo Ukrainy [Administrative law of Ukraine].* Kherson: OLDI-PLIuS (in Ukrainian).

Halunko, V.V. (2015). *Administratyvne pravo Ukrainy [Administrative law of Ukraine].* Kherson: Hrin D.S. (in Ukrainian).

Holovkin, B.M. (2013) Udoskonalennia diialnosti pravookhoronnykh, kontroliuiuchykh ta inshykh orhaniv shchodo protydii zlochynnosti u palyvno-enerhetychnii sferi Ukrainy. [Improving the activities of law

enforcement, regulatory and other bodies to combat crime in the fuel and energy sector of Ukraine]. *Publichne pravo – Public law, 1*, 152–159. [in Ukrainian].

Kodeks Ukrainy pro administratyvni pravoporushennia vid 7 hrud. 1984 roku № 8073-X [Code of Ukraine on Administrative Offenses from December 7, 1984 № 8073-X]. (1984). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/80731-10#top (in Ukrainian)

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

Korniievskiy, O.A., Tyshchenko, Yu.A., Yablonskiy, V.M. (2018). Hromadianske suspilstvo Ukrainy: suchasni praktyky ta vyklyky rozvytku. (2018), [Civil society of Ukraine: modern practices and challenges of development] analit. dopovid. za zah. red. 128 [in Ukrainian].

Kuleshov, V.V. (2020). Metody hromadskoho kontroliu predstavnytskykh orhaniv vlady: zarubizhnyi ta vitchyznianyi dosvid. [Methods of public control of representative authorities: foreign and domestic experience].*Derzhavne upravlinnia ta mistseve samovriaduvannia – Public administration and local self-government, 3 (46)*, 24-34 (in Ukrainian).

Kuprii, V., Palyvoda, L. (2011). Hromadska ekspertyza ta hromadskyi monitorynh diialnosti orhaniv vlady. [Public expertise and public monitoring of government activities]. K.: Macro (in Ukrainian).

Nakaz Ofisu Heneralnoho prokurora Pro zatverdzhennia Polozhennia pro Spetsializovanu antykoruptsiinu prokuraturu Ofisu Heneralnoho prokurora: vid 05 berez. 2020 roku № 125 [Order of the General Prosecutor's Office On approval of the Regulations on the Specialised Anti-Corruption Prosecutor's Office of the General Prosecutor's Office: dated March 5, 2020 № 125]. (2020). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/v0125905-20#top (in Ukrainian).

Nalyvaiko, L.R., Savchenko, O.V. (2017). *Teoretyko-pravovi zasady hromadskoho kontroliu za diialnistiu orhaniv derzhavnoi vlady [Theoretical and legal principles of public control over the activities of public authorities].* K.: «Khai_Tek Pres» (in Ukrainian).

Nesterenko, O., Biletskyi, A., Bader, M. (2019). *Vplyv mistsevykh hromadskykh orhanizatsii na vprovadzhennia antykoruptsiinykh reform v rehionakh Ukrainy [The infusion of community organizations on the implementation of anti-corruption reforms in the regions of Ukraine].* Mizhdystsyplinarnyi naukovo-osvitnii tsentr protydii koruptsii Natsionalnoho universytetu «Kyievo-Mohylianska akademiia». (in Ukrainian).

Ofitsiinyi sait Natsionalnoho ahentstva z pytan zapobihannia koruptsii [Official site of the National Agency for Corruption Prevention]. (2020). *nazk.gov.ua*. Retrieved from https://nazk.gov.ua/wp-content/uploads/2021/04/NAZK-Zvit-za-2020-rik-15.04.2021-1-1.pdf (in Ukrainian).

Ofitsiinyi sait Natsionalnoho antykoruptsiinoho biuro Ukrainy [Official site of the National Anti-Corruption Bureau of Ukraine]. (2021). Retrieved from https://nabu.gov.ua/report/zvit-pershe-pivrichchya-2021-roku (data zvernennia 12.12.2021). [in Ukrainian].

Ofitsiinyi sait Ukrainskoho kryzovoho media-tsentru [Official site of the Ukrainian Crisis Media Center]. (2018). *uacrisis.org*. Retrieved from https://uacrisis.org/uk/69071-courts-monitoring (in Ukrainian).

Orlov, K.A. (2012). Sredstva massovoy informatsii kak element grazhdanskogo obschestva. [Mass media as an element of civil society]. *Vestnik Yuzhno-Uralskogo gosudarstvennogo universiteta – Bulletin of the South Ural State University, 20 (279)*, 13-17 (in Russian).

Postanova Kabinetu Ministriv Ukrainy Deiaki pytannia Hromadskoi rady pry Natsionalnomu ahentstvi z pytan zapobihannia koruptsii: vid 20 lyst. 2019 roku № 952 [Resolution of the Cabinet of Ministers of Ukraine Some issues of the Public Council at the National Agency for Prevention of Corruption from November 20, 2019 № 952]. (2020). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/952-2019-%D0%BF#n78 (in Ukrainian).

Postanovoiu Kabinetu Ministriv Ukrainy Poriadok provedennia konkursu z formuvannia skladu Hromadskoi rady pry Natsionalnomu ahentstvi z pytan zapobihannia koruptsii, zatverdzhenyi : vid 20 lyst. 2019 roku № 952. [Resolution of the Cabinet of Ministers of Ukraine Procedure for conducting a competition for the formation of the Public Council at the National Agency for Corruption Prevention, approved on November 20, 2019 № 952]. (2019). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/952-2019-%D0%BF#Text (in Ukrainian).

Proekt Zakonu pro hromadskyi control: vid 07 serp. 2018 roku № 9013 [Draft Law on Public Control of August 7, 2018 № 9013]. (2018). *rada.gov.ua*. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=64506 (in Ukrainian).

Proekt Zakonu Pro hromadskyi control: vid 13 trav. 2015 roku № 2737-1 [Draft Law on Public Control of May 13, 2015 № 2737-1]. (2015). Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=55101 (in Ukrainian).

Proekt Zakonu Pro hromadskyi control: vid 14 kvit. 2014 roku № 4697 [Draft Law on Public Control of April 14, 2014 № 4697]. (2014). *rada.gov.ua*. Retrieved from http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=50646 (in Ukrainian).

Shemshuchenko, S. (2003). *Yurydychna entsyklopediia [Legal encyclopedia].* Kherson: OLDI-PLIuS (in Ukrainian).

Ukaz Prezydenta Ukrainy Pytannia Rady hromadskoho kontroliu pry Natsionalnomu antykoruptsiinomu biuro Ukrainy: vid 15 trav. 2015 roku № 272/2015 [Decree of the President of Ukraine Issues of the Pub-

lic Control Council at the National Anti-Corruption Bureau of Ukraine: dated May 15, 2015 № 272/2015]. (2015). *nabu.gov.ua*. Retrieved from https://nabu.gov.ua/polozhennya-pro-radu-gromadskogo-kontrolyu (in Ukrainian).

Zakon Ukrainy Pro Derzhavne biuro rozsliduvan : vid 12 lyst. 2015 roku № 794-VIII [Law of Ukraine On the State Bureau of Investigation of 12.11.2015 № 794-VIII]. (2015). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/794-19#Text (in Ukrainian).

Zakon Ukrainy Pro dostup do publichnoi informatsii: vid 13 sich. 2011 roku № 2939-VI [Law of Ukraine on Access to Public Information from January 13, 2011 № 2939-VI]. (2011). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/2939-17#Text (in Ukrainian).

Zakon Ukrainy Pro Natsionalne antykoruptsiine biuro Ukrainy: vid 14 zhovt. 2014 roku № 1698-VII [Law of Ukraine On the National Anti-Corruption Bureau of Ukraine from October 14, 2014 № 1698-VII]. (2014). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/1698-18#Text (in Ukrainian).

Zakon Ukrainy Pro zapobihannia koruptsii : vid 14.10.2014 № 1700-VII [Law of Ukraine on Prevention of Corruption: dated 14.10.2014 № 1700-VII]. (2014). *zakon.rada.gov.ua*. Retrieved from https://zakon.rada.gov.ua/laws/show/1700-18#top (in Ukrainian).

Zakon Ukrainy Pro zvernennia hromadian: vid 2 zhovt. 1996 року № 393/96-ВР [Law of Ukraine on Citizens' Appeals from October 2, 1996 № 393/96-VR]. (2020). *zakon.rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/393/96-%D0%B2%D1%80#Text (in Ukrainian).

Сергій Саранов,
здобувач наукового ступеня доктора філософії кафедри публічного управління та адміністрування, Національна академія внутрішніх справ, Солом'янська площа, 1, Київ, Україна, індекс 03035, Serhii_Saranov@ukr.net
***ORCID:** 0000-0002-7514-0260*

ФОРМИ ТА МЕТОДИ ГРОМАДСЬКОГО КОНТРОЛЮ ЗА ДІЯЛЬНІСТЮ СПЕЦІАЛІЗОВАНИХ АНТИКОРУПЦІЙНИХ ОРГАНІВ

Анотація. Мета. Мета статті – на основі аналізу вітчизняного законодавства та наукових праць із проблематики дослідження розкрити форми та методологічні підходи у сфері здійснення громадського контролю за антикорупційними державними суб'єктами. **Результати.** Стаття присвячена дослідженню форм та методів громадського контрою за діяльністю спеціалізованих антикорупційних органів. Зафіксовано, що жодна демократична держава не може існувати без дієвого контролю за органами влади з боку суспільства. Контроль є універсальним засобом поліпшення взаєморозуміння між владою та громадськістю. Встановлено класифікацію форм громадського контролю за діяльністю спеціалізованих антикорупційних органів за такими групами: загальні, спеціалізовані, непрямої дії та прямої дії, процесуальні. Констатовано, що звернення громадян залишається найбільш розповсюдженою формою контролю. Такий метод громадського контролю як обговорення, або дорадчий, ґрунтується на участі громадськості в обговоренні питань, визначенні шляхів реалізації антикорупційної політики та стратегії спеціальними антикорупційними органами. Цей метод реалізується як шляхом активної постійної участі громадських рад, так і залученням до цього всіх суб'єктів громадського контролю в: організації та проведенні громадських слухань з антикорупційних питань, участі в роботі консультативно-дорадчих органах, наданні пропозицій щодо покращання антикорупційної діяльності тощо. Метод співробітництва виражається у взаємній роботі спеціалізованих антикорупційних органів з представниками ЗМІ, що виражається у розміщенні повідомлень, інформації, що не підпадає під обмежений доступ, їхньої участі у проведенні журналістських розслідувань; організації конференцій, семінарів, круглих столів з відкритим доступом для участі всіх бажаючих суб'єктів громадського контролю тощо. **Висновки.** Визначено, що методами громадського контролю є сукупність адміністративно-правових методів, спрямованих на забезпечення неухильного постійного контролю за діяльністю спеціалізованих антикорупційних державних органів, спрямованого на виявлення та попередження корупційних проявів, зниження виникнення корупційних ризиків у діяльності посадових осіб цих органів. Окреслено такі методи громадського контролю: метод громадської ініціативи, альтернативної діяльності, консультативний, публічного діалогу, обговорення, співробітництва.

Ключові слова: громадський контроль, метод громадського контролю, форма громадського контролю, звернення громадян.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 342.9
DOI https://doi.org/10.32849/2663-5313/2022.2.14

Vladyslav Sulatskyi,
Postgraduate Student at the Department of Police Law, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, Sulatskyi_Vladyslav@ukr.net
ORCID: *orcid.org/0000-0002-2142-7209*

Sulatskyi, Vladyslav (2022). Concept and system of methods of an administrative and legal mechanism of preventive activities of the National Police of Ukraine. *Entrepreneurship, Economy and Law*, 2, 92–96, doi https://doi.org/10.32849/2663-5313/2022.2.14

CONCEPT AND SYSTEM OF METHODS OF AN ADMINISTRATIVE AND LEGAL MECHANISM OF PREVENTIVE ACTIVITIES OF THE NATIONAL POLICE OF UKRAINE

Abstract. The ***purpose of the article*** is to establish the concept and system of methods of preventive activities of the National Police of Ukraine based on the analysis of scientists and researchers' perspectives.

Results. By reviewing scientists and researchers' perspectives, as well as the provisions of the legislation of Ukraine on the implementation of preventive activities by the National Police of Ukraine, the author defines the basic terms and concepts related to the subject matter of this article, describes the essence and content of the functioning of the administrative and legal mechanism for ensuring prevention by the National Police of Ukraine, interprets the scientific results in the context of the study and from the perspective of domestic legislation in order to make some theoretical and practical conclusions. It is established that the methods of administrative and legal support for prevention are administrative and legal regulatory framework, which is a list of ways and means that allows the existing mechanism of law (for example, on prevention) to act and ensure human and civil rights and freedoms.

Conclusions. Arguments on the separation of methods of administrative and legal regulation from the methods of administrative and legal mechanism are given, as well as the content of the relevant categories in the context of preventive activities by the National Police of Ukraine. It is substantiated that the main methods in this process are the methods of persuasion and coercion, which, given the pluralism of legislative support in this area can and should be applied only individually to each legal relationship and persons entering into them. The position of scientists that the internal structural organization of methods in the context of the functioning of the administrative-legal mechanism has a branched structure in which this mechanism operates is proved and supported, which is why this issue needs further scientific research and thorough interpretation.

Key words: administrative and legal mechanism, methods, prevention, police, forms of implementation, methods in law.

1. Introduction

The concept and system of methods of the administrative and legal mechanism for the prevention by the National Police of Ukraine is one of the urgent and topical problems of current domestic science. The definition of the main theoretical doctrinal categories determines the effectiveness of law enforcement bodies in general and their performance of local functions in particular.

The administrative and legal mechanism for the prevention by the National Police of Ukraine is an integrated element of the law enforcement system of the Ukrainian State, enabling provision of human and civil rights and freedoms both at the stage of the restoration of violated rights and for such an event, in the way of implementing the list of preventive functions. The very prevention and the system of methods of its administrative and legal mechanism are the main theoretical foundations, which ensure the effectiveness of the relevant institution of law and enable the effective performance of the duties of authorised persons in the exercise of the functions and powers of prevention.

However, it should be noted that scientists still discuss the definition and system of methods of the mechanism for prevention by the National Police of Ukraine, and that is why the author focus on these issues with a view to developing the main provisions that would probably improve this institution of law.

The purpose of the article is to establish the concept and system of methods of pre-

vention by the National Police of Ukraine on the basis of analysis of scientists and researchers' perspectives. The goal set can be achievable only by fulfilling a number of research tasks, such as: to analyse and establish the concept of methods of the mechanism for prevention by the National Police of Ukraine; to clarify the system of methods of the mechanism for prevention by the National Police of Ukraine and to prove personal perspective on its streamlining; to propose personal perspective on optimising the scientific doctrine and solving the main problems of law enforcement, arising from the operation of the institution concerned.

2. Prevention by the National Police of Ukraine

Human and civil rights and freedoms in Ukraine and the world are basic concepts that determine the content and trend of any public policy. Their provision by law enforcement bodies is a priority performed in various ways. First of all, one of the most effective is the implementation of prevention, enabling to prevent offences. In addition, the preventive mechanism, like any institution of law, has its own methods, which, above all, should have a positive impact on its functioning.

Interpretation of the basic terms, which in combination constitute the subject matter of scientific research requires to focus on "mechanism", "method", "administrative and legal regulatory framework" and "mechanism for prevention".

A number of domestic scientists interpret the concept of "mechanism" and argue that it presupposes the interaction of the constituent elements that put it into action, so it usually has the form of a set of elements, which interact with each other and the environment (Averianova, 2003, p. 13; Tiunova, 1991, p. 11). In addition, Yu. Todyka argues that the category of "mechanism" is characterised by the fact that it is not enough to have material norms, a developed system of legislation, but clear mechanisms for their implementation are required, which fully concerns the administrative and legal field (Todyka, 2001). In turn, we fully agree that any mechanism, including legal one, is characterised by a branchy internal structure in which all elements interact with each other and with external factors to jointly ensure the functioning of certain relations. The purpose of the mechanism is its smooth operation.

According to A. Matviichuk, the essence and content of the concept of administrative and legal regulatory framework, which is a key form of expression of the relevant mechanism and an element of its content are executive and administrative activities of state organisations vested with state powers, aimed at stabilising public relations by adopting legal regulations and ensuring their implementation (Matviichuk, 2018, p. 122). That is, the administrative and legal mechanism, from a functional point of view, is an orderly system, the main purpose of which is to carry out executive and administrative activities, ensuring observance of human and civil rights and freedoms in relationship "person – state".

However, an individual issue in the studies by scientists is the interpretation of the category "prevention", which reference publications consider as deterrence of crime, preventing something or deterring something (Busel, 2004; Kovryha, Kovalova, Ponomarenko, 2005). That is, scientists understand the concept of prevention, first of all, as the prior deterring of the commission of a certain offence, which may harm the interests protected by the legislation.

Therefore, A. Bandurko argues that more broadly the concept of prevention is most often used to reveal the basic powers of the police, one of which is preventive and precautionary activities, aimed at deterring the commission of offences (legal education; keeping the public informed of the state of affairs in law and order and combating crime; awareness-raising among the population; criticism of anti-social manifestations; encouragement measures; work with offenders, so-called groups at risk; dissemination and propagation of best practices in the fight against disturbances of public order, etc.) (Bezpalova, Dzhafarova, Kniaziev, 2017, p. 34). In addition, some scholars emphasise that the term "prevention" is used in defining the concept of police action, defined as an action or set of actions of a preventive or coercive nature, that constrain certain human rights and freedoms and is applied by police officers in accordance with law to ensure compliance with police powers (Bulatin, 2020).

Therefore, the essence and content of prevention in the context of the functioning of the administrative and legal mechanism of the National Police of Ukraine is undoubtedly leading, since the offence, the commission thereof has been stopped even before the attempt to violate human and civil rights and freedoms protected by the legislation of Ukraine is an indicator of the most effective and coordinated work of law enforcement bodies.

Moreover, the legislation of Ukraine governing the activities of the National Police of Ukraine regulates that, in accordance with the tasks assigned to it, the police carry out prevention and precaution, aimed at deterring the commission of offences (Law of Ukraine "On the National Police" dated July 2, 2015 № 580-VIII (Verkhovna Rada of Ukraine, 2015)).

Therefore, it should be emphasised that the administrative and legal mechanism for prevention by the National Police may be a system of rights, duties, powers and other functional elements, implemented within the scope of certain powers to ensure human and civil rights and freedoms in the manner of deterring offences, according to the legislation of Ukraine.

As any mechanism in the legal science system, the administrative and legal mechanism also has its list of methods, which serve as a form of expression for certain actions and ensure the implementation of certain elements (rights, duties, powers).

For example, in their study on current problematic issues of administrative science and practice, D. Bakhrakh and S. Alforov argue that in the science of administrative law, regulatory methods are understood as ways of influencing people, means, techniques of achieving any purpose, fulfilling the task, that is, the authorised actors affect the relevant objects, with certain responsibilities (Bakhrakh, 2011, p. 286; Alforov, 2011, p. 58). In general, we support this perspective, because in any case, the question of formal expression of the acts committed must be fully disclosed and covered in the writings of scholars, also considering that each institution of law has its characteristics and its exclusive methods that are formed in a particular system.

Furthermore, Z. Kisil argues that the regulatory methods show how the State addresses the management challenges (Kisil, 2011, p. 289). This justifies rise that the methods of the administrative and legal mechanism, including prevention, may not conflict with the methods of the State, since the latter are basic and fundamental provisions, shaping overall national policy.

3. Specificities of the administrative and legal mechanism for prevention by the National Police of Ukraine

The focus of scholars studying problematic issues is on the fact that the regulatory method can be a set of legal means enabling to regulate public relations in the field of public administration is carried out (Honcharuk, 2004, p. 134). That is, in fact, the methods of administrative and legal support for prevention are administrative and legal regulatory framework, which is a list of ways and means that enable the existing mechanism of law (for example, on prevention) to act and ensure human and civil rights and freedoms.

For example, in his study on the administrative and legal mechanism for ensuring the electoral rights of citizens in Ukraine, P. Shorskyi identifies methods of persuasion and coercion among the administrative and legal methods. While applying the method of persuasion, the election commissions explain the voting procedure and responsibility for violation of the electoral legislation. As a method of coercion, the commissions may consider applications and complaints against decisions, actions or omissions of the actors of the electoral process and make decisions on these issues, which are mandatory for certain addressees. Decisions of election commissions, as well as decisions of executive authorities concerning the exercise by voters of the right to vote in elections, shall be communicated by them to citizens through the print media or, in case it is impossible, shall be made public by other means (Shorskyi, 2018). That is, definition of methods of persuasion and coercion as the main ones used in the process of interaction between the State and society requires to consider this issue thoroughly.

According to R. Liashuk, the method of persuasion is based on legal regulations and applied without detailed and specific legal regulatory framework. Persuasion is widely used in the course of the official activities of the police, border guards and other bodies, namely, working with the local population to prevent crime. In practice, however, there are significant shortcomings. This is due to the lack of experience and confidence of law enforcement officials in the use of persuasion in law enforcement (Liashuk, 2016). That is, while being defined in general terms, in order to prevent misconduct on both sides of such interaction, the method of persuasion is aimed at avoiding offences by people and citizens, is recommendatory and is aimed at further prevention of the commission of offences by persons intending to commit them, as well as at the legal education of the population.

According to S. Dembitska's analysis of Z. Kisil's perspective on the methods of administrative law, coercion is the psychological or physical influence of State bodies or officials on certain persons in order to compel them to comply with legal provisions. The method of coercion is aimed at developing individual forms of behaviour, as well as at maintaining social discipline, which is an integral part of the system of methods of public administration of society (Kisil, 2011, p. 204; Dembitska, 2014, p. 215).

Therefore, the above-mentioned perspective enables to prove by analogy that methods of persuasion and coercion are fully applicable in the context of the functioning of the administrative and legal mechanism for prevention by the National Police of Ukraine.

In such a case, the method of persuasion consists in raising awareness about the inadmis-

sibility of committing an offence, as well as carrying out activities to improve legal education and the need to respect the mutual legal culture of the population.

The method of coercion, in turn, consists in considering citizens' appeals, complaints about actions or omissions of other persons, and partly in bringing a person to administrative liability, since such fact is also preventive.

Some authors argue that methods of State property management are licensing, registration, tariffication, quota, monopoly and antimonopoly regulatory instruments, privatisation, investment and State protection (Hangel'dyev, 2009, p. 16), however, according to D. Bakhrakh, such a perspective is inadmissible, since the above is a means of administrative and legal management of economic activity, and not a regulatory method (Bakhrakh, 2011, p. 90). We advocate D. Bakhrah's perspective, as concrete actions cannot be characterised as methods, because the method in case of the administrative and legal mechanism is not the directly committed act, but the fact of application of law, having the desired effect. Furthermore, S. Alforov advocates this perspective and considers the method of administrative and legal mechanism as the use of prescriptions (establishment of duties), prohibitions, granting of permits (Alforov, 2011, p. 58).

Therefore, generally and in view of a well-established trend in respect of defining in the system of administrative law two basic methods of administrative and legal framework for prevention, it would be appropriate further review other perspectives on the definition of methods in this field, as a number of scholars and researchers also focus the fact that the internal structural organisation of methods in the context of the functioning of the administrative and legal mechanism has an extensive structure.

4. Conclusions

Therefore, the analysed perspectives on the interpretation of the main terms of the article, as well as the perspectives and original views of scientists on the essence and content of the functioning of the administrative and legal mechanism for ensuring prevention by the National Police of Ukraine, interpretation of the scientific results in the context of the study and from the perspective of domestic legislation, we have made a number of theoretical and practical conclusions. It is established that the methods of administrative and legal support for prevention are a list of ways and means that enable the existing mechanism of law to act and ensure human and civil rights and freedoms. Furthermore, the author argues that the main methods in such process are methods of persuasion and coercion, which, given the plurality of legal support in this field, can and should be applied exclusively to each legal relationship and its participants.

References:

Alforov, S. (2011). *Administratyvne pravo [Administrative Law].* Kyiv: TsUL [in Ukrainian].

Averianova, V. (2003). *Derzhavne upravlinnia: problemy administratyvno-pravovoi teorii ta praktyky [Public administration: problems of administrative and legal theory and practice].* Kyiv: Fakt [in Ukrainian].

Bakhrakh, D. (2011). *Administrativnoe pravo Rossii [Administrative law of Russia].* Moscow: Norma [in Russian].

Bezpalova, O., Dzhafarova, O., Kniaziev, S. (2017). *Administratyvna diialnist politsii u pytanniakh ta vidpovidiakh [Administrative activities of the police in questions and answers].* Kharkiv: KhNUVS [in Ukrainian].

Bulatin, D. (2020). *Administratyvno-pravovi zasady zdiisnennia preventyvnoi diialnosti politsiieiu: porivniannia dosvidu Ukrainy ta krain YeS [Administrative and legal principles of preventive police activities: comparison of the experience of Ukraine and EU countries].* Kharkiv [in Ukrainian].

Busel, V. (ed.) (2004). *Velykyi tlumachnyi slovnyk suchasnoi ukrainskoi movy [Large explanatory dictionary of the modern Ukrainian language].* Irpin: VTF "Perun" [in Ukrainian].

Dembitska, S. (2014). Zastosuvannia administratyvnykh stiahnen yak zasobu pokarannia pravoporushnykiv [Application of administrative penalties as a means of punishing offenders]. *Porivnialno-analitychne parvo – Comparative analytical law*, no. 2, pp. 213–216 [in Ukrainian].

Hangel'dyev, B. (2009). *Nekotorye aktual'nye voprosy upravleniya federal'noy gosudarstvennoy sobstvennost'yu [Some topical issues of federal state property management].* Moscow [in Russian].

Honcharuk, S. (2004). *Osnovy administratyvnoho prava [Fundamentals of administrative law].* Kyiv: TOV "Vydavnychyi budynok "Avanpost-Prym" [in Ukrainian].

Kisil, Z. (2011). *Administratyvne pravo [Administrative Law].* Kyiv: TsUL [in Ukrainian].

Kovryha, L., Kovalova, T., Ponomarenko, V. (2005). *Tlumachnyi slovnyk suchasnoi ukrainskoi movy [Explanatory dictionary of the modern Ukrainian language].* Kharkiv: Belkar-knyha [in Ukrainian].

Liashuk, R. (2016). Metody perekonannia ta prymusu v administratyvnii diialnosti pravookhoronnykh orhaniv [Methods of persuasion and coercion in the administrative activities of law enforcement agencies]. *Porivnialno-analitychne parvo – Comparative and analytical law*, no. 3, pp. 148–150. Retrieved from: http://pap-journal.in.ua/wp-content/uploads/2020/08/3_2016.pdf [in Ukrainian].

Matviichuk, A. (2018). Vyznachennia administratyvno-pravovoho rehuliuvannia u sferi zabezpechennia rehuliatornoi polityky [Definition of administrative and legal regulation in the field of regulatory policy]. *Pidpryiemnytstvo, hospodarstvo i parvo – Entrepreneurship, economy and law*, no. 11, pp. 121–124 [in Ukrainian].

Shorskyi, P. (2018). Administratyvno-pravovyi mekhanizm zabezpechennia vyborchykh prav hromadian v Ukraini [Administrative and legal mechanism for ensuring the voting rights of citizens in Ukraine]. *Candidate's thesis*. Sumy [in Ukrainian].

Tiunova, L. (1991). *Sistemnye svyazi pravovoy deystvitel'nosti [Systemic connections of legal reality]*. Saint Petersburg: Izd-vo Sankt-Peterburgskogo universiteta [in Russian].

Todyka, Yu. (2001). *Konstituciya Ukrainy – osnovnoy zakon gosudarstva i obshhestva [The Constitution of Ukraine is the fundamental law of the state and society]*. Kharkiv: Fakt [in Russian].

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

Владислав Сулацький,
ад'юнкт кафедри поліцейського права, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Sulatskyi_Vladyslav@ukr.net
ORCID: *orcid.org/0000-0002-2142-7209*

ПОНЯТТЯ ТА СИСТЕМА МЕТОДІВ АДМІНІСТРАТИВНО-ПРАВОВОГО МЕХАНІЗМУ ПРЕВЕНТИВНОЇ ДІЯЛЬНОСТІ НАЦІОНАЛЬНОЇ ПОЛІЦІЇ УКРАЇНИ

Анотація. ***Метою статті*** є встановлення поняття та системи методів механізму превентивної діяльності Національної поліції України на підставі аналізу думок учених і дослідників.

Результати. Автором на підставі проаналізованих позицій науковців, а також положень законодавства України про здійснення превентивної діяльності Національною поліцією України було здійснено тлумачення основних термінів і понять, що мають відношення до предмета статті, охарактеризовано сутність та зміст функціонування адміністративно-правового механізму забезпечення превентивної діяльності Національної поліції України, проведено інтерпретацію наукових результатів у контексті дослідження та пропущено їх крізь призму вітчизняного законодавства, завдяки чому сформовано низку теоретичних і практичних висновків. Визначено, що методами адміністративно-правового забезпечення превентивної діяльності є адміністративно-правове регулювання, яке являє собою перелік способів і засобів, за допомогою яких чинний механізм права (наприклад, превентивної діяльності) приводиться в дію та забезпечує права і свободи людини й громадянина.

Висновки. Наведено аргументи щодо відмежування методів адміністративно-правового регулювання від методів адміністративно-правового механізму, а також зазначено зміст відповідних категорій у контексті здійснення превентивної діяльності Національною поліцією України. Обґрунтовано, що основними методами в такому процесі є методи переконання та примусу, які з урахуванням плюралізму законодавчого забезпечення в цій галузі можуть і повинні застосовуватися виключно індивідуально до кожних правовідносин та осіб, які вступають у них. Доведено й підтримано позицію вчених щодо того, що внутрішньоструктурна організація методів у контексті функціонування адміністративно-правового механізму має розгалужену структуру, у якій цей механізм функціонує, а саме тому це питання потребує подальших наукових розвідок та ґрунтовного тлумачення.

Ключові слова: адміністративно-правовий механізм, методи, превентивна діяльність, поліція, форми здійснення, способи у праві.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 342.951:321
DOI https://doi.org/10.32849/2663-5313/2022.2.15

Ruslan Topolia,
PhD in Law, Doctoral Student at the Scientific Institute of Public Law, 2a, H. Kirpy street, Kyiv, Ukraine, postal code 03035, Topolia@gmail.com
ORCID: *0000-0002-0673-0616*

Topolia, Ruslan (2022). Scope of the administrative support of expert activities in Ukraine. *Entrepreneurship, Economy and Law*, 2, 97–100, doi https://doi.org/10.32849/2663-5313/2022.2.15

SCOPE OF THE ADMINISTRATIVE SUPPORT OF EXPERT ACTIVITIES IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to find out, based on the theory of administrative law, the theory of forensics, the theory of expert science, scientists' doctrinal provisions in this field and current legislation, the scope of administrative and expert activities in Ukraine. ***Results.*** The article underlines that in a democratic legal State, the rights, freedoms, and interests of individuals are broad, not exhaustive, and are not formally limited by positive legislation. In other words, they are wide. Accordingly, their effective protection by legal arbitrators requires specialised expertise in many branches, fields and sectors of professional knowledge. In the legal literature and practice of judicial, law enforcement and public-legal activities, such actors are briefly named "experts" and their work on analysis and qualified conclusions – "expert activities". Like any other socially useful public activity, it objectively needs the administrative and legal support. The article reveals the scope of administrative and legal support of expert activities in Ukraine. It is proved that this is social space of objective special existence of legal matter, limited by the purpose and tasks to provide sufficient quantity and quality of legally significant specific information, necessary for a fair and lawful resolution of individual legal cases. It is underlined that public administration in a broad sense is implemented in all forms of State power (not only executive, but also legislative, because of the public nature of rulemaking, judicial, because of the public position of judges, the functioning of judicial management bodies and other judicial administrators). The Government and its subordinate bodies are central public administrators, but the individual powers of the Verkhovna Rada of Ukraine and the judicial administration should not be limited either. ***Conclusions.*** It is concluded that the administrative and legal support of expert activities in Ukraine is social space of objective special existence of legal matter, limited by the purpose and tasks to provide sufficient quantity and quality of legally significant specific information, necessary for a fair and lawful resolution of individual legal cases.

Key words: administrative and legal support, expert activities, individual legal case, scope, limitations, legal matter, social space, justice.

1. Introduction

The existence of society in legal reality requires the rule of law, where human and civil rights are well protected by preventive means, in the event of a violation, legal, judicial and administrative remedies are effectively available.

Accordingly, their effective protection by legal arbitrators requires specialised expertise in many branches, fields and sectors of professional knowledge. In the legal literature and practice of judicial, law enforcement and public-legal activities such actors are briefly named "experts", and their work on analysis and qualified conclusions – "expert activities". Like any other socially useful public activity, it objectively needs the administrative and legal support.

The administrative and legal support for expert activities in Ukraine has been under focus by V. Averianov, V. Atamanchuk, V. Basai, P. Bilenchuk, V. Halahan, V. Halunko, A. Hirniak, A. Danylenko. F. Dzhavadov, O. Yeshchuk, A. Ivanyshchuk, V. Kovalova, A. Lazebnyi, O. Oliinyk, I. Pyrih, V. Revaka, O. Sabynin, M. Sehai, E. Simakova-Yefremian, H. Strilets, A. Furman, V. Shepitko, V. Yurchyshyn, V. Yusupov, O. Yara, and others. However, their research did not directly address the most common special or related challenges.

The purpose of the article is to find out, based on the theory of administrative law, the theory of forensics, the theory of expert science, scientistse doctrinal provisions in this field and current legislation, the scope of administrative and expert activities in Ukraine.

2. Significance of expertise in society

According to the *Dictionary of the Ukrainian language*, one of the meanings of the word "scope" is understood as a space limited by

something (Bilodid, 1972). In turn, space is one of the main objective forms of the existence of matter, characterised by length and volume, or the absence of any restrictions, obstacles in something (Bilodid, 1972).

Expert activities are a specific type of human activities, which is based on practical and theoretical scientific knowledge; has a cognitive, research character; can be carried out in different fields of social activities; uses methods and techniques that do not contradict the law and norms of morality and are based on modern achievements of science; pursues the goal of comprehensive, complete, objective, complex research of objects, processes or phenomena; presents new information and conclusions. Expert activities are a specific kind of human activity based on scientific knowledge, the content of which is the study of certain objects, processes or phenomena by special methods with the aim of making scientifically sound conclusions (Pyrih, 2015).

Encyclopedic sources prove that "expertise" (from French *experise*) is the consideration, study by an expert of any cases, issues requiring special knowledge (e.g. medical, accounting, forensic examination) (Melnychuk, 1975); "content" is: 1) what is said or told somewhere, what is described or depicted: the essence, the inner feature of something; 3) certain properties, characteristic features that distinguish this phenomenon, an object from similar phenomena, objects, etc.: 4) a reasonable basis, the aim, the purpose of something; 5) the list of sections, parts, stories, etc. of books, collections, manuscripts, etc., mostly indicating the pages on which they are placed (Bilodid, 1972); "support" means supplying something in sufficient quantity, meeting someone's needs; providing someone with sufficient material means of subsistence, create a secure environment for doing something; guarantee something; protect someone, protect something from danger (Bilodid, 1972).

The Law of Ukraine *On Forensic Examination* reveals that forensic examination is the examination by an expert on the basis of special knowledge of material objects, phenomena and processes, containing information about the circumstances of the case, which is under focus of proceeding by the bodies conducting the initial inquiry, pre-trial and judicial investigation. Forensic activities are carried out by specialised State institutions and, in cases and terms established by the legislation in force in Ukraine, by judicial experts who are not employees of such institutions (Law of Ukraine On Forensic Examination, 1994). Since its initiation and at all stages of its development, forensic examination has been seen as an important tool of justice necessary for the correct resolution of a case both at the investigation stage and in the court, and the expert has been considered a scientific witness (Dmytrenko, 2015).

For example, in cases of economic crimes, judges have great respect for the findings of experts. The opinion of the forensic economist serves as the central proof in the judge's decision. The importance of forensic and economic expertise in considering cases in court cannot be overestimated. The Forensic expert opinion stands out among other sources of evidence because it is difficult to disagree with it, since the disapproval must be motivated and reasoned (Dmytrenko, 2015).

Regarding the broader category under analysis, A. Furman argues that the *examination* (from Lat. *expertus* "experienced") – is: a) professional study of the physical evidence or facts in order to clarify the circumstances and making the corresponding assessment; b) consideration, investigation of a case or issue to obtain a correct conclusion, making a correct assessment; c) the social procedure for psychological assessment of certain situations, human activities or personal assets, in accordance with the customer's tasks (requests), requires in-depth study by the expert of certain psychosocial problems or issues, and then its thorough theoretical and methodological training and functional literacy; r) assessment by authoritative experts of the object or process, the cause of the event or its possible consequences, as well as the prospects for the use of things, resources or specific decisions; d) the method of substantiation by the expert of the real state of affairs in a certain sector of public life, clarification of the solidity of solving actual problems by a particular scientific discipline (sociology, didactics, psychology), as well as assessment that is connected with constructing the system of features for recognition, classification and analysis of complex innovations, development of means of measurement of objects under study in case of environment change (Furman & Hirniak, 2009).

For example, forensic examination of physical evidence studies various objects of biological origin (blood, sperm, hair, saliva, urine, sweat, excretion from breasts, bones, organs and tissues, etc.), and various objects (clothes, weapons, instruments of injury, vehicles, etc.) on which traces of biological origin have been found. The task of the forensic expert is to assist the relevant authorities in identifying such exhibits, their proper removal, description, packing and sending to an expert institution. Moreover, possible questions for the expert to decide should be coordinated with the relevant expert, enabling the proper selection of the unit

of the Forensic Bureau, experts thereof will be appointed to carry out the examinations, and consideration of the possibilities of the most complete and qualitative examination of expert samples (N.d., 2018).

3. Definition of the basic principles of expert activities

From the perspective of doctrinal knowledge, it should be noted that expert activities have specific legal features: 1) It is a specific form of human activity, differing from others by attitudes to the environment; 2) It is cognitive research; 3) It can be carried out in different fields of social activity; 4) It uses methods and techniques that do not contradict the law and morality and are based on modern achievements of science; 5) It has the purpose of comprehensive, complete, objective, complex research of objects, processes or phenomena; 6) It results in new findings and conclusions. It is a specific kind of human activity, the content of which is the knowledge of certain objects, processes or phenomena by special methods for the purpose of providing scientifically based opinions (Pyrih, 2015).

For example, scientists conduct scientific and expert assessments of the results of scientific and scientific-technical significance of various scientific works. This is carried out in accordance with the Regulations on the Ministry of Education and Science of Ukraine Competition of scientific works and scientific and technical (experimental) developments of young scientists working (studying) in higher education institutions and scientific institutions under the Ministry, the continuation of these works and developments from the general fund of the State budget (N.d., 2016).

Regarding the issue of the theory of the content of administrative and legal support for higher education in Ukraine, it should be noted that public support for higher education in Ukraine means to provide quality public services according to certain rules and standards. The administrative and legal support is a system of principles, tools and procedures of public administration, targeted regulatory and organizational impact of provisions of administrative law, which develop and clarify the constitutional provisions that determine the theoretical and legal basis for the functioning of this field of public relations to make an enabling environment for private persons to exercise their public rights, freedoms and interests. According to its content, the administrative and legal support is a system of provisions of administrative law, fundamental principles (concepts, doctrines and principles of legal regulatory mechanism), administrative and legal relations and administrative instruments (forms and methods of administration and administrative procedures), which together form a certain complex institution of administrative law, filled with numerous vertical and horizontal ties, unite homogeneous social relations (Yara, 2019).

From the perspective of the theory of administrative law, it should be noted that public administration in a broad sense is implemented in all forms of state power (not only executive, but also legislative, because of the public nature of rulemaking, judicial, because of the public position of judges, the functioning of judicial management bodies and other judicial administrators). The Government and its subordinate bodies are central public administrators, but the individual powers of the Verkhovna Rada of Ukraine and the judicial administration should not be limited either. Public administration includes the provision of uninterrupted, stable, high-quality services, respect for the rule of law and other necessary social security measures for both society and the ordinary citizen. The State should not only identify problems in a timely manner, respond immediately to them and find optimal solutions, but also take measures in general to prevent their occurrence. The development and implementation of such schemes are another important public administration function (Danylenko, 2020).

4. Conclusions

Therefore, the scope of administrative and legal support for expert activities in Ukraine is social space of objective special existence of legal matter, limited by the purpose and tasks to provide sufficient quantity and quality of legally significant specific information, necessary for a fair and lawful resolution of individual legal cases.

References:

Bilodid, I.K. (1972). *Slovnyk ukrainskoi movy [Dictionary of the Ukrainian language].* Kyiv : Nauk. Dumka. (in Ukrainian).

Danylenko, A. (2020). Zasady publichnoho administruvannia v Ukraini [Principles of public administration in Ukraine]. *Candidate's thesis.* Kyiv (in Ukrainian).

Dmytrenko, Ye. (2015). Ekspertni ekonomichni doslidzhennia ta sudova ekspertyza podatkovoho obliku [Expert economic research and forensic examination of tax accounting]. *Visnyk – Herald, 33* (in Ukrainian).

Furman, A., & Hirniak, A. (2009). *Psykhodydaktychna ekspertyza modulno-rozvyvalnykh pidruchnykiv [Psychodidactic examination of modular development textbooks].* TNEU, «Ekonomichna dumka» (in Ukrainian).

Melnychuk, O. (Eds.). (1975). *Slovnyk inshomovnykh sliv [Dictionary of foreign words].* Kyiv: Kyivska knyzhkova fabryka (in Ukrainian).

N.d. (2016). Naukovo-ekspertnyi vysnovok za rezultatamy naukovoi ta naukovo-tekhnichnoi ekspertyzy z otsiniuvannia proektu na provedennia naukovoi roboty [Scientific-expert opinion on the results of scientific and scientific-technical expertise on the evaluation of the project for scientific work]. *Yuryst onlan – Lawyer online, 31* (in Ukrainian).

N.d. (2018). *Ekspertyzy v sudochynstvi Ukrainy [Expertise in the judicial process of Ukraine].* 2018. Kyiv: Yurinkom Inter (in Ukrainian).

Pyrih, I. (2015). *Teoretyko-prykladni problemy ekspertnoho zabezpechennia dosudovoho rozsliduvannia [Theoretical and applied problems of expert support of pre-trial investigation].* Dnipropetrovsk: DDUVS (in Ukrainian).

Yara, O. (2019). Poniattia administratyvno-pravovoho zabezpechennia vyshchoi yurydychnoi osvity v Ukraini [The concept of administrative and legal support of higher legal education in Ukraine]. Naukovyi visnyk publichnoho ta pryvatnoho prava – *Scientific Bulletin of Public and Private Law, 1,* 25-32 (in Ukrainian).

Zakon Ukrainy Pro sudovu ekspertyzu vid 25 liut. 1994 r. № 4038-XII [Law of Ukraine On Forensic Examination from February 25, 1994 № 4038-XII]. (1994). *zakon.rada.gov.ua.* Retrieved from https://zakon.rada.gov.ua/laws/show/4038-12#Text (in Ukrainian).

Руслан Тополя,
кандидат юридичних наук, докторант, Науково-дослідний інститут публічного права, вулиця Георгія Кірпи, 2а, Київ, Україна, індекс 03055, E-mail Topolia@gmail.com
ORCID: *0000-0002-0673-0616*

МЕЖІ АДМІНІСТРАТИВНО-ПРАВОВОГО ЗАБЕЗПЕЧЕННЯ ЕКСПЕРТНОЇ ДІЯЛЬНОСТІ В УКРАЇНІ

Анотація. ***Мета.*** Мета статті полягає в тому, щоб на основі теорії адміністративного права, теорії криміналістики, теорії експертології, доктринальних положень у цій сфері вчених та чинного законодавства з'ясувати межі адміністративно-правового забезпечення експертної діяльності в Україні. ***Результати.*** У статті наголошено, що в правовій демократичній державі права свободи та інтереси приватних осіб є широкими, невичерпними та формально не обмеженими позитивістським законодавством. Іншими словами, вони є широкими. Відповідно, для забезпечення їх ефективного захисту юридичними арбітрами існує нагальна необхідність користуватися послугами вузьких спеціалістів у багатьох галузях, сферах та секторах професійних знань. В юридичній літературі та практиці судової, правоохоронної та публічно-правової діяльності такі суб'єкти отримали лаконічну назву «експерти», а їхня робота з аналізу та наданням кваліфікованих висновків – «експертна діяльність». Як і будь-яка інша суспільно-корисна публічна діяльність, вона об'єктивно потребує адміністративно правового забезпечення. У статті розкрито межі адміністративно-правового забезпечення експертної діяльності в Україні. Доведено, що це є соціальний простір об'єктивного спеціального існування правової матерії з обмеженою метою та завданнями щодо надання в достатній кількості та якості юридично значимої специфічної інформації, необхідної для справедливого та законного вирішення індивідуальних юридичних справ. Наголошено, що публічне адміністрування у широкому розумінні реалізовується у всіх формах державної влади (не лише виконавчої, а й законодавчої – через публічний характер нормотворчості, судової – через публічне становище суддів, функціонування органів суддівського врядування та інших суб'єктів, що здійснюють судове адміністрування). Уряд та його підпорядковані органи є центральними реалізаторами публічного адміністрування, однак і обмежуватись окремими повноваженнями Верховної Ради України та судової адміністрації теж не слід. ***Висновки.*** Зроблено висновок, що межами адміністративно-правового забезпечення експертної діяльності в Україні є соціальний простір об'єктивного спеціального існування правової матерії з обмеженою метою та завданнями щодо надання в достатній кількості та якості юридично значимої специфічної інформації, необхідної для справедливого та законного вирішення індивідуальних юридичних справ.

Ключові слова: адміністративно-правове забезпечення, експертна діяльність, індивідуальна юридична справа, межі, обмеження, правова матерія, соціальний простір, справедливість.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 342.7
DOI https://doi.org/10.32849/2663-5313/2022.2.16

Oksana Vinnyk,
Doctor of Law, Professor, Corresponding Member of the National Academy of Law Sciences of Ukraine, Chief Researcher, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, ndippp@adamant.net
ORCID: *orcid.org/0000-0002-9397-5127*
Scopus-Author ID: *57217737384*

Vinnyk, Oksana (2022). Digital rights and digital responsibilities amidst war and other threats to social welfare. *Entrepreneurship, Economy and Law*, 2, 101–107, doi https://doi.org/10.32849/2663-5313/2022.2.16

DIGITAL RIGHTS AND DIGITAL RESPONSIBILITIES AMIDST WAR AND OTHER THREATS TO SOCIAL WELFARE

Abstract. ***Purpose.*** The article considers the issue of digital rights and digital responsibilities, which has become especially important in the context of Russian aggression against Ukraine and, accordingly, should be solved to ensure the socially conscious use of digital opportunities.

Research methods. A set of research methods (dialectical, Aristotelian, analysis, prognostic, and others) contributes to analyzing various aspects of the issue concerned (the actual state of use of digital opportunities in war, statutory regulations, the status of theoretical development).

Results. The conclusion on the need to consolidate citizens' digital rights and digital responsibilities, particularly topical in war, in the Constitution of Ukraine relies on the complex nature of digitalization: despite the ample capacity of Internet resources in terms of communication under trying war conditions, assistance (using online payments) to the Armed Forces of Ukraine and citizens suffering from Russian aggression, informing the population about threats and evacuation, etc., the abuse of digital opportunities and irresponsible disclosure in social networks of information used by the enemy against Ukraine (about the location and movement of military equipment, the effects of rocket attacks, etc.) has become extremely dangerous. Although some of such actions (especially dangerous) were recognized as a crime in March 2022, the priority of private interests (regarding the publication of up-to-date information on social networks; a large amount of cryptocurrency mining, which threatens the energy security of the entire community of the city or region) sometimes dominates the interests of the Ukrainian people in the fight against Russian aggressors. Analysis of the current legislation indicates it has gaps concerning citizens' digital rights and digital responsibilities that often lead to the abuse of digital opportunities and protection problems in case of violation of digital rights.

Conclusions. It is proposed to solve the identified issues of legal support for socially responsible use of digital opportunities by eliminating gaps in legal regulation, i. e., supplementing the Constitution of Ukraine with provisions on digital rights and digital responsibilities of citizens. The abovementioned will contribute to the formation of digital citizenship with its inherent social responsibility for the consequences of the use of digital opportunities and, accordingly, will be the basis for determining the specifics of the digital status of participants in certain areas, including economic and environmental.

Key words: digitalization, digital rights, digital responsibilities, Russian aggression against Ukraine, digital abuse, digital citizenship.

1. Introduction

In the modern period, which is often referred to as the era of threats/risks (Beck, 1992), social relations are undergoing significant changes given the aggravation of old ones (environmental pollution, natural and anthropogenic disasters, social disintegration, and the ensuing problem of poverty), the emergence of new threats (coronavirus pandemic, global warming, digitalization risks, including the onset and growth of cybercrime, abuse of digital opportunities), and Russia's aggression against Ukraine since February 24 of this year – super-hazard due to the subsequent destruction of entire cities, the genocide of Ukrainians and humanitarian crisis on the occupied territories, the threat of nuclear pollution due to the capture of nuclear power plants by the occupants (Zaporizhzhia

and Chornobyl), the use of prohibited, incl. chemical, weapons, and the prospect of famine due to the lost opportunity of agricultural land use in the occupied and mine-infested territories by the aggressors... the list is endless.

Therefore, there is a problem of an adequate public response to the mentioned negative phenomena, including the potential of law – legal science, rulemaking and law enforcement which often react late to threats given objective grounds (the rate of changes in social relations related to threats, the complete novelty or suddenness of their emergence, in particular, undeclared war) and subjective circumstances (the inflexibility of state policy towards some issues, the negligence of implementors, hopes for a positive course of affairs). At the same time, the war changed the attitude towards the above threats since it is about the fate of an entire nation: thus, the abuse of digital opportunities to the detriment of the country's defense capacity (disclosure in social networks of information about the transfer, movement, or location of the Armed Forces of Ukraine or other army units formed under the laws of Ukraine, if they can be identified on the ground, and if such information was not posted in the public domain by the General Staff of the Armed Forces of Ukraine, committed under martial law or state of emergency) was recognized as a crime (Verkhovna Rada of Ukraine, 2022) in addition to the warnings (Committee on Digital Transformation, 2022) covering other (not related to the crime) cases of abuse of digital opportunities (Ministry of Defence Ukraine, 2022; Interfax-Ukraine News Agency, 2021).

Certain aspects of the legal issues of society's response to the mentioned dangers have been studied before (in terms of the coronavirus pandemic (Tatsii et al., 2020), digitalization risks (Vinnyk, 2020; Razumkov Center, 2020; Lenz, 2021), including cybersecurity (Bakalinska, Bakalynskyi, 2019; Malysheva, 2021), technogenic security (Kurbanov, 2016; Varenia, 2017), climate change/global warming (Santarius, Pohl, Lange, 2020; Romanko, 2019), and the Russia's war against the Ukrainian people since March 2022 (Ukrainian Association of International Law, National University of Trade and Economics, Crimean Reintegration Association, 2022). However, they still require further research because of their complexity and the new circumstances affecting their (problems') resolution. This is highly relevant to the current threat – war, which causes other dangers: environmental pollution, the lost opportunity for agricultural land use and the resulting lack of food; the hazard of radioactive pollution and the effects of using prohibited weapons (chemical, in particular); the spread of diseases; economic collapse; people's impoverishment due to the loss of housing, work, livelihood...

All these hazards have common features (they imperil social welfare, hence requiring preventive measures towards their occurrence and/or minimization of adverse outcomes, the feasibility of establishing a special legal regime to minimize the effect/consequences of threats), and thus need a comprehensive study, which should also consider the specifics of individual types of threats. The issue of the rights and responsibilities of participants in public life (first of all, citizens) amidst threats plays an important role. This article is a further study of the mentioned problems (Vinnyk, 2021) (with an emphasis on digital rights and digital responsibilities given the changes in public life caused by the war (Ukrainian Association of International Law, National University of Trade and Economics, Crimean Reintegration Association, 2022).

The research relies on the works by Ukrainian (O. Bakalinska, Ya. Kurbanov, N. Malysheva, S. Romanko, N. Varenia, O. Vinnyk and other) and foreign researchers (U. Beck, S. Lenz, L. Pangrazio, T. Santarius and other), general scientific and special methods of scientific cognition, namely: a *dialectical method* made it possible to reveal the essence of digitalization that gave rise to digital rights and digital responsibilities; *the Aristotelian method* allowed identifying those digital opportunities, the use of which in the war can lead to abuses; *analysis* was used in studying the results of domestic and foreign scientific research and the state of legal regulation of the mentioned relations; *a prognostic method* made it possible to determine the potential consequences of abuse of digital opportunities in wartime and formulate proposals on the need to introduce legal mechanisms to prevent/minimize adverse effects of abuses of digital opportunities under any conditions, including the war.

2. The leverage of digital rights and digital responsibilities in war

During Ukraine's large-scale digitalization of all core spheres of social life, particularly in the coronavirus pandemic and the war caused by the Russian aggression (President of Ukraine, 2022), digital rights and responsibilities have been of the most immediate interest. Access to the Internet and related opportunities (online communication, online payments, as well as the provision of monetary support by citizens and organizations to the Armed Forces of Ukraine, assistance to internally displaced persons – due to the war, online consultations on medical, legal, and other issues, official notices of danger and evacuation corridors) has become highly important. Consequently,

the above opportunities should be guaranteed as the rights protected by the Constitution (Verkhovna Rada of Ukraine, 1996) and other laws of Ukraine. In addition, in wartime, the abuse of digital opportunities to the detriment of public interests is extremely dangerous, committed not only intentionally but most often carelessly (for the sake of popularity on social networks) without considering possible negative consequences (publication on social networks of sensitive information which the enemy uses to the detriment of Ukraine, including the location of critical infrastructure, military units, and equipment, etc.).

At the same time, the laws of Ukraine regulating relations in emergency situations (Verkhovna Rada of Ukraine, 2000) and martial law (Verkhovna Rada of Ukraine, 2015), cybersecurity (Verkhovna Rada of Ukraine, 2017) and the Code of Civil Protection of Ukraine (Verkhovna Rada of Ukraine, 2013) guarantee the protection of *constitutional rights*. However, the absence of provisions on citizens' digital rights in the Constitution of Ukraine negatively affects their protection from various kinds of digital abuse, the need to refrain from which is also not enshrined in the Basic Law as a digital duty.

3. The need to enshrine the provisions on citizens' digital rights and digital responsibilities in the Constitution of Ukraine

Amending the Constitution of Ukraine in terms of digital rights and digital responsibilities of citizens will eliminate the above gaps and ensure a higher level of protection of citizens' digital rights and their compliance with digital responsibilities and ultimately will open the way to achieve the social focus of digitalization necessary, not only in emergency and military conditions but also in peacetime.

Therefore, it is proposed to amend the Constitution of Ukraine, supplementing it with a new article "Digital rights and digital responsibilities of citizens" with the following (or similar) content:

"Citizens of Ukraine have digital rights and digital responsibilities, which are determined by the Constitution of Ukraine (basic digital rights and digital responsibilities) and the laws of Ukraine (regarding digital rights and digital responsibilities in a specific area regulated by the relevant law).

Citizens of Ukraine are guaranteed the following digital rights:

– the right to *digital access/the right to Internet access* (everyone has the right to equal access and unowned and secure Internet);

– the right to *freedom of expression* (everyone has the right to freedom of expression and to seek, receive and impart information online);

– *the right to privacy and protection of personal data* (everyone has the right to online privacy and protection of personal data);

– the right to *freedom and personal security/cybersecurity* (the exercise of which includes protection from criminal acts, i. e., legal guarantees of protection from physical and psychological violence or harassment, hate speech, discrimination in the online environment; state promotion of the development and functioning of safe Internet technologies, mechanisms for protection against cyber abuse);

– the right to *use digital democracy tools* to exercise the rights to peaceful assembly, association, cooperation and to participate in the administration public affairs and, accordingly, to freely choose and use any services, websites or applications to create, join, mobilize and to be involved in social groups and associations; any citizen shall have access to the basic public services and shall not be discriminated against due to one's online activity or lack thereof;

– the right to *digital self-determination*, or the right to disconnect from the online world;

– the right to be *protected from unreasonable restrictions on digital rights and digital opportunities* (any restriction on digital rights shall be developed transparently, with the participation of both the state and civil society institutions).

Citizens of Ukraine, exercising their digital rights, are obliged to:

a) refrain from abusing digital rights and digital opportunities;

b) ethically use online materials;

c) report cyberbullying, threats, and other cases of inappropriate use of digital resources;

d) comply with the requirements of personal cybersecurity and restrictions on the use of digital resources in emergency and war situations;

e) adhere to the laws on intellectual property".

The above provisions will maintain so-called digital citizenship (Diana Z, 2020; Pangrazio, Sefton-Green, 2021) towards exercising digital rights and observing digital responsibilities and also stimulate the consolidation of provisions on the specifics of the exercise of digital rights and digital responsibilities in certain areas of public life (economic, environmental, health care, transport, etc.). In fact, it concerns the issue of digital citizenship and the digital status of participants in particular (including the above-mentioned) areas of public life.

4. Digital citizenship

Digital citizenship is a status that all online users should have. This kind of citizenship brings both freedoms and responsibilities that involve the accountable and full use of digital

technologies in the online environment to make it safe for users to cooperate and understand each other. There are several (often nine) elements of digital citizenship, namely:

– *digital access* (access to digital technologies);

– *digital commerce* (purchase and sale and/or order of goods/works/services using the Internet and the related need to solve problems when making online payments);

– *digital communication (communication* on the Internet, which requires empathy and appropriate – socially responsible – reactions from its users);

– *digital literacy* (awareness of online usage rules, which also includes the ability to differentiate between real and fake, useful and harmful content);

– *digital etiquette* (compliance with the rules for using the Internet to avoid conflicts, to exercise not only personal digital freedom but also to respect the rights and legitimate interests of other users);

– *digital* law governing relations in the online environment and which digital citizens need to know (the need for such law is due to the presence in the online environment of both positive and negative interactions. Thus, this implies the need to establish the rules of conduct enshrined in laws and requirements for users of particular social networks);

– *digital rights and responsibilities* (the rules of the online world provide not only rights but also obligations that should be observed to not be held accountable for actions and misconducts in the virtual environment. The Internet can also be used for harmful purposes and anyone needs protection against cyberbullying and cybercrimes, for instance);

– *digital health and wellness* (making use of online resources is a plus, but everyone should be aware of the dangers as well. Users should be taught to protect themselves and others from potential harm);

– *digital security* – a necessary skill in today's digital world, the importance of which is undeniable: viruses and worms can move from system to system and affect the electronic devices used; therefore, users should be aware of potential consequences and malware attacks and, most importantly, learn to prevent them and protect their devices.

5. Conclusions

The introduction of the proposed amendments to the Constitution of Ukraine (although somewhat different from the mentioned theoretical definitions of digital citizenship) should contribute to the protection of digital rights and a responsible attitude to their exercise. It is an essential step towards balanced regulation of digital relations with the prevailing participation of the state, not only self-regulatory entities, as it was declared at the outset of the digital age (Barlow, 1996) and led to the emergence and rapid growth of cyber violations and cybercrime. The state should guarantee balanced consideration of public and private interests in the digital environment (Vinnyk et al., 2021) with the involvement of self-regulatory organizations of digital business and other stakeholders. Ukraine is in urgent need of the modernization of the regulatory framework for enjoying digital rights, both in general terms and given the particularities caused by the military aggression of the Russian Federation (Human rights platform, 2019). Supplementing the Constitution of Ukraine with provisions on digital rights and digital responsibilities will contribute to the formation of digital citizenship with its inherent social responsibility for the consequences of using digital opportunities and, accordingly, will be the basis for determining the specifics of the legal status of participants in certain areas, including economic and environmental.

References:

Bakalinska, O., Bakalynskyi, O. (2019). Pravove zabezpechennia kiberbezpeky v Ukraini [Legal support of cybersecurity in Ukraine]. *Pidpryiemnytstvo, hospodarstvo i pravo – Enterprise, Economy and Law*, no. 9, pp. 100–108. Retrieved from: https://doi.org/10.32849/2663-5313/2019.9.17 [in Ukrainian].

Barlow, J. (1996). A Declaration of the Independence of Cyberspace. Retrieved from: https://www.eff.org/cyberspace-independence [in English].

Beck, U. (1992). *Risk society: towards a new modernity*. London; Newbury Park; New Delhi: SAGE Publications, 260 p. Retrieved from: http://www.riversimulator.org/Resources/Anthropology/RiskSociety/RiskSocietyTowardsAnewModernity1992Beck.pdf [in English].

Committee on Digital Transformation (2022). Komitet z pytan tsyfrovoi transformatsii zaklykaie: Ne dopomahaite vorohu. Shcho mozhna y ne mozhna publikuvaty v merezhi Internet? [The Committee on Digital Transformation urges: Do not help the enemy. What can and cannot be published on the Internet?]. *Ofitsiinyi vebportal parlamentu Ukrainy – Official web portal of the Parliament of Ukraine*. Retrieved from: https://www.rada.gov.ua/news/razom/220741.html?search=%D0%86%D0%9D%D0%A2%D0%95%D0%A0%D0%9D%D0%95%D0%A2: [in Ukrainian].

Diana Z (2020). The 9 elements of Digital Citizens our students need to know. Retrieved from: https://blog.neolms.com/the-9-elements-of-digital-citizenship-your-students-need-to-know/ [in English].

Human rights platform (2019). *Svoboda slova v interneti: praktychnyi posibnyk [Freedom of speech on the Internet: practical manual]*. Retrieved from: https://www.ppl.org.ua/bibliotech/3-2 [in Ukrainian].

Interfax-Ukraine News Agency (2021). Na Chernihivshchyni vykryly maininh-fermu, cherez yaku bez vody i svitla mohla zalyshytysia chastyna oblasti [In the Chernihiv region, a mining farm was exposed, through which part of the region could be left without water and light]. Retrieved from: https://ua.interfax.com.ua/news/general/753184.html [in Ukrainian].

Kurbanov, Ya. (2016). Zabezpechennia pryrodno-tekhnohennoi bezpeky v Ukraini i problema vyznachennia poniattia "krytychna infrastruktura" [Ensuring natural and man-made security in Ukraine and the problem of defining the concept of "critical infrastructure"]. *Pivdennoukrainskyi pravnychyi chasopys – South Ukrainian Law Journal*, no. 2, pp. 150–154. Retrieved from: http://dspace.oduvs.edu.ua/bitstream/123456789/1046/1/%D0%9A%D1%83%D1%80%D0%B1%D0%B0%D0%BD%D0%BE%D0%B2%202-2016.pdf [in Ukrainian].

Lenz, S. (2021). Is digitalization a problem solver or a fire accelerator? Situating digital technologies in sustainability discourses. *Social Science Information*, vol. 60, iss. 2, pp. 188–208 [in English].

Malysheva, N. (2021). Kiberbezpeka kosmichnoi diialnosti ta mozhlyvosti yii zabezpechennia zasobamy mizhnarodnoho prava [Cybersecurity of space activities and the possibility of its provision by means of international law]. *Pravova derzhava – Constitutional state*. Kyiv: V.M. Koretsky Institute of State and Law of the National Academy of Sciences of Ukraine, iss. 32, pp. 245–257 [in Ukrainian].

Ministry of Defence Ukraine (2022). Cherez opryliudnenu informatsiiu bloherom u zvilnenomu seli na Kharkivshchyni pochalosia zahostrennia [Due to the information published by a blogger in the liberated village in Kharkiv region, the aggravation began]. *Ukrainski natsionalni novyny – Ukrainian national news*. Retrieved from: https://www.unn.com.ua/uk/news/1974770-cherez-informatsiyu-blogera-u-zvilnenomu-seli-na-kharkivschini-pochalosya-zagostrennya-minoboroni [in Ukrainian].

Pangrazio, L., Sefton-Green J. (2021). Digital Rights, Digital Citizenship and Digital Literacy: What's the Difference? *Journal of New Approaches in Educational Research*, vol. 9, iss. 2, pp. 15–27. DOI: 10.7821/naer.2021.1.616 [in English].

President of Ukraine (2022). Pro vvedennia voiennoho stanu v Ukraini: Ukaz Prezydenta Ukrainy vid 24 liutoho 2022 r. № 64/2022 [On the imposition of martial law in Ukraine: Decree of the President of Ukraine of February 24, 2022 № 64/2022]. Retrieved from: https://www.president.gov.ua/documents/642022-41397 [in Ukrainian].

Razumkov Center (2020). Tsyfrova ekonomika: trendy, ryzyky ta sotsialni determinanty: dopovid [Digital economy: trends, risks and social determinants: report]. Retrieved from: https://razumkov.org.ua/uploads/article/2020_digitalization.pdf [in Ukrainian].

Romanko, S. (2019). Ekoloho-pravova polityka Ukrainy u sferi zminy klimatu [Environmental and legal policy of Ukraine in the field of climate change]. *Pidpryiemnytstvo, hospodarstvo i pravo – Enterprise, Economy and Law*, no. 9, pp. 88–94. Retrieved from: https://doi.org/10.32849/2663-5313/2019.9.15 [in Ukrainian].

Santarius, T., Pohl, J., Lange, S. (2020). Digitalization and the Decoupling Debate: Can ICT Help to Reduce Environmental Impacts While the Economy Keeps Growing? *Sustainability*, vol. 12, iss. 18, pp. 1–20. DOI: 10.3390/su12187496. Retrieved from: https://d-nb.info/1221184547/34 [in English].

Tatsii, V., Hetman, A., Barabash, Yu., Holovkin, B. (eds.) (2020). Zabezpechennia pravoporiadku v umovakh koronakryzy: materialy panelnoi dyskusii IV Kharkivskoho mizhnarodnoho yurydychnoho forumu [Ensuring law and order in the context of the corona crisis: materials of the panel discussion of the IV Kharkiv international legal forum] (Kharkiv, September 23–24, 2020). Kharkiv: Pravo, 250 p. Retrieved from: http://criminology.nlu.edu.ua/wp-content/uploads/2020/11/4j-forum-2020-zabezpechennya-pravoporyadku-v-umovah-koronakrizi.pdf [in Ukrainian].

Ukrainian Association of International Law, National University of Trade and Economics, Crimean Reintegration Association (2022). Mizhnarodnyi ekspertnyi kruhlyi stil "Deokupatsiia. Yurydychnyi front" [International expert round table "Deoccupation. Legal Front"]. Retrieved from: https://www.youtube.com/watch?v=ALHUgxwVvu4 [in Ukrainian and in English].

Varenia, N. (2017). Pravovi aspekty zabezpechennia tekhnohennoi bezpeky v umovakh zrostaiuchykh zahroz terorystychnoho kharakteru [Legal aspects of technogenic security in the face of growing terrorist threats]. *Materialy V Mizhnarodnoinaukovo-praktychnoi konferentsii "Aktualni pytannia suchasnoi nauky" – Proceedings of the V International Scientific and Practical Conference "Current Issues of Modern Science"* (Ivano-Frankivsk, July 7–8, 2017), in 2 vols. Kherson: Helvetyka, vol. 1, pp. 76–79. Retrieved from: http://molodyvcheny.in.ua/files/conf/other/17july2017/25.pdf [in Ukrainian].

Verkhovna Rada of Ukraine (1996). Konstytutsiia Ukrainy: Zakon Ukrainy vid 28 chervnia 1996 r. № 254к/96-ВР [Constitution of Ukraine: Law of Ukraine of June 28, 1996 № 254к/96-ВР]. *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 30, art. 141 [in Ukrainian].

Verkhovna Rada of Ukraine (2000). Pro pravovyi rezhym nadzvychainoho stanu: Zakon Ukrainy vid 16 bereznia 2000 r. № 1550-III [About the legal regime of the state of emergency: Law of Ukraine of March 16, 2000 № 1550-III]. *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 23, art. 176 [in Ukrainian].

Verkhovna Rada of Ukraine (2013). Kodeks tsyvilnoho zakhystu Ukrainy: Zakon Ukrainy vid 2 zhovtnia 2012 r. № 5403-VI [Code of Civil Protection of Ukraine: Law of Ukraine of October 2, 2012 № 5403-

VI]. *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 34–35, art. 458 [in Ukrainian].

Verkhovna Rada of Ukraine (2015). Pro pravovyi rezhym voiennoho stanu: Zakon Ukrainy vid 12 travnia 2015 r. № 389-VIII [On the legal regime of martial law: Law of Ukraine of May 12, 2015 № 389-VIII]. *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 28, art. 250 [in Ukrainian].

Verkhovna Rada of Ukraine (2017). Pro osnovni zasady zabezpechennia kiberbezpeky Ukrainy: Zakon Ukrainy vid 5 zhovtnia 2017 r. № 2163-VIII [On the basic principles of cyber security of Ukraine: Law of Ukraine of October 5, 2017 № 2163-VIII]. *Vidomosti Verkhovnoi Rady Ukrainy – Information of the Verkhovna Rada of Ukraine*, no. 45, art. 403 [in Ukrainian].

Verkhovna Rada of Ukraine (2022). Pro vnesennia zmin do Kryminalnoho ta Kryminalnoho protsesualnoho kodeksiv Ukrainy shchodo zabezpechennia protydii nesanktsionovanomu poshyrenniu informatsii pro napravlennia, peremishchennia zbroi, ozbroiennia ta boiovykh prypasiv v Ukrainu, rukh, peremishchennia abo rozmishchennia Zbroinykh Syl Ukrainy chy inshykh utvorenykh vidpovidno do zakoniv Ukrainy viiskovykh formuvan, vchynenomu v umovakh voiennoho abo nadzvychainoho stanu: Zakon Ukrainy vid 24 bereznia 2022 r. № 2160-IX [On Amendments to the Criminal and Criminal Procedure Codes of Ukraine to counteract the unauthorized dissemination of information on the sending, movement of weapons, arms and ammunition to Ukraine, movement, movement or deployment of the Armed Forces of Ukraine or other military formations committed in the conditions of Ukraine martial law or state of emergency: Law of Ukraine of March 24, 2022 № 2160-IX]. Retrieved from: https://zakon.rada.gov.ua/laws/show/2160-20#Text [in Ukrainian].

Vinnyk, O. (2020). Pravovi problemy tsyfrovizatsii v rakursi novykh zahroz dlia suspilnoho blahopoluchchia [Legal problems of digitalization in the perspective of new threats to public welfare]. *Aktualni problemy prava: teoriia i praktyka – Current issues of law: theory and practice*, no. 1(39), pp. 11–18. Retrieved from: https://doi.org/10.33216/2218-5461-2020-39-1-11-18 [in Ukrainian].

Vinnyk, O. (2021). Zahrozy suspilnomu blahopoluchchiu: zavdannia prava [Threats to public welfare: the task of law]. *Pidpryiemnytstvo, hospodarstvo i pravo – Enterprise, Economy and Law*, no. 5, pp. 176–182. Retrieved from: https://doi.org/10.32849/2663-5313/2021.5.30 [in Ukrainian].

Vinnyk, O., Zadykhaylo, D., Honcharenko, O., Shapovalova, O., Patsuriia N. (2021). Economic and Legal Policy of the State in the Field of Digital Economy. *International Journal of Criminology and Sociology*, no. 10, pp. 383–392 [in English].

Оксана Вінник,
доктор юридичних наук, професор, член-кореспондент Національної академії правових наук України, головний науковий співробітник відділу міжнародного приватного права та правових проблем євроінтеграції, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вул. Раєвського, 23-а, Київ, Україна, індекс 01042, ndippp@adamant.net
ORCID: *orcid.org/0000-0002-9397-5127*
Scopus-Author ID: *57217737384*

ЦИФРОВІ ПРАВА ТА ЦИФРОВІ ОБОВ'ЯЗКИ В УМОВАХ ВІЙНИ ТА ІНШИХ ЗАГРОЗ СУСПІЛЬНОМУ БЛАГОПОЛУЧЧЮ

Анотація. ***Мета.*** У статті порушується проблема цифрових прав і цифрових обов'язків, що набула особливої ваги в умовах російської агресії проти України та, відповідно, має бути вирішена з метою забезпечення соціально відповідального використання цифрових можливостей.

Методи дослідження. З використанням низки наукових методів дослідження (діалектичного, формально-логічного, аналізу, прогностичного та інших) розглядаються різні аспекти зазначеної проблеми, а саме: фактичний стан використання цифрових можливостей в умовах війни, нормативно-правове регулювання, стан теоретичного розроблення питання.

Результати. Висновок про необхідність закріплення на рівні Конституції України цифрових прав і цифрових обов'язків громадян, що особливо актуально в умовах війни, ґрунтується на складній природі цифровізації. Так, попри значні можливості інтернет-ресурсів щодо спілкування у складних умовах війни, допомоги (завдяки онлайн-платежам) Збройним Силам України та громадянам, що потерпають від російської агресії, інформування населення про загрози та можливість евакуації тощо, особливої небезпеки набули зловживання цифровими можливостями та безвідповідальне оприлюднення в соціальних мережах інформації, що використовується ворогом проти України (про розташування й пересування військової техніки, наслідки ракетних обстрілів тощо). І хоча частину таких дій (особливо небезпечних) у березні 2022 р. було визнано злочином, проте пріоритет приватних інтересів (щодо розміщення актуальної інформації в соціальних мережах, великого за обсягом майнингу криптовалюти, що загрожує енергетичній безпеці цілої громади міста чи області) часом домінує над інтересами українського народу в боротьбі з російськими агресорами. Аналіз

стану чинного законодавства свідчить про наявність у ньому прогалин щодо цифрових прав і цифрових обов'язків громадян, що нерідко призводить до зловживань цифровими можливостями та до проблем із захистом у разі порушення цифрових прав.

Висновки. Виявлені проблеми правового забезпечення соціально відповідального використання цифрових можливостей пропонується вирішити шляхом усунення прогалин у правовому регулюванні, зокрема шляхом доповнення Конституції України положеннями щодо цифрових прав та цифрових обов'язків громадян. Це сприятиме становленню цифрового громадянства з притаманною йому соціальної відповідальністю за наслідки використання цифрових можливостей, а отже, стане основою для визначення специфіки цифрового статусу учасників відносин у певних сферах, включно з економічною та екологічною.

Ключові слова: цифровізація, цифрові права, цифрові обов'язки, російська агресія проти України, цифрове зловживання, цифрове громадянство.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 342.4; 342.9
DOI https://doi.org/10.32849/2663-5313/2022.2.17

Andriy Rybachuk,
Judge at the Administrative Court of Cassation of the Supreme Court, Postgraduate Student, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, erevna@ukr.net
ORCID: *orcid.org/0000-0003-1200-6373*

Rybachuk, Andriy (2022). Highlighting the criteria of a non-legal law affecting its applicability by the court. *Entrepreneurship, Economy and Law*, 2, 108–115, doi https://doi.org/10.32849/2663-5313/2022.2.17

HIGHLIGHTING THE CRITERIA OF A NON-LEGAL LAW AFFECTING ITS APPLICABILITY BY THE COURT

Abstract. ***The purpose of the article*** is to study procedural actions of courts to identify the criteria of a non-legal law affecting its applicability in the case; to reveal the grounds and procedure for distinguishing the criteria of a non-legal law affecting its applicability by courts in their procedural actions.

The following ***research methods*** were used: systems method, generalization, dialectical, hermeneutic, and prognostic methods of scientific knowledge.

Results. The doctrine contains many approaches to the formation of the concept of "a non-legal law": from the absolute nullity of the law to the injustice of its individual provisions for the subject of private relations, but the possibility of applying the law to ensure the common good (public interest). The absolute nullity of laws as non-legal, i. e., the regulation on the invalidity of the law as a whole or its individual norms from the very beginning belongs to the exclusive constitutional functions of the Constitutional Court of Ukraine according to the procedure of consideration of cases. At the same time, the statement (conclusion) on the court decision about the law's inconsistency with the Constitution of Ukraine actually makes the law disputable. Consequently, the law is not applied only if it justified by the party and the judge takes into account its position since its arguments and the court's motives coincide; or the court reaches the above conclusion independently.

Conclusions. It is proved that the statement (conclusion) of the court in the judgment on the contradiction of the law of the Constitution of Ukraine turns the law into a disputed one. The law does not apply only if it is justified by the party to the dispute and the judge takes into account the position of the party, as its arguments and motives of the court (based on the court's internal conviction) coincide; or the court independently comes to the conclusion that the law of the Constitution of Ukraine is contradictory. The criteria of obvious contradiction of the Constitution of Ukraine, which characterizes the law as non-legal, are singled out: a) defects of content; b) defects of the hierarchy; c) defects of the subject; d) defects of temporal significance; e) addressing defects; f) implementation defects. There are also some criteria of potentially non-legal laws – the presence of elements of unjust provisions, but their contradiction with the Constitution of Ukraine is not obvious: 1) defects in content are not obvious; 2) defects of content due to changes in legislation; 3) form defects. It is substantiated that in terms of applicability or inapplicability of norms of the Basic Law of Ukraine in the court decision, there are procedural actions which can be divided into two groups, interconnected and covering by their scope: a) actions to establish the contradiction of the law or other normative act to the Constitution of Ukraine through the court's obligation to check the rule of law and other normative legal act for its compliance with the Constitution of Ukraine during judicial enforcement; b) actions to settle the issue of application by courts of a formally valid normative legal act that has not declared unconstitutional but contains unjust provisions (through the prism of assessing the unfairness of legal provisions in the opinion of the party or the court).

Key words: Constitution of Ukraine, court, legal law, obvious contradiction of law to Constitution of Ukraine, potentially non-legal law, unfair law provisions, procedural actions.

1. Introduction

The courts' application of norms of the Constitution of Ukraine as norms of direct action is one of the manifestations of the rule of law. Therefore, in applying the relevant norms, the courts should be particularly balanced, moderate, and aware of the consequences of both the constitutionalization of legal provisions regarding

which there are reasonable (or not) doubts of the trial parties or the court and their disqualification by the court in case of a conclusion about the application of norms of the Constitution of Ukraine. The purpose of justice is to ensure the rule of law in a broad sense. The study of the peculiarities of determining law criteria, which, according to the court opinion, may contradict the Constitution of Ukraine, should begin with identifying the features of such laws. We believe it is about the law's such features as injustice, illegality, unlawfulness, and hence (or a parallel criterion, in particular, in the case of absolute injustice of the law), contradiction of the Constitution or unconstitutionality. In this context, it seems important that a court or judge concludes the unconstitutionality of a particular law in the judgment on behalf of the court only as his own conviction with the words "contradicts...". This is due to the fact that under the distribution of constitutional competence between the courts and the Constitutional Court of Ukraine (hereinafter referred to as the CCU), the court is not authorized to use the term "unconstitutional" in the decision within the judiciary, since unconstitutionality or constitutionality of the law is the result of the implementation of the CCU's constitutional function. However, the court's statement that the law contradicts the Basic Law of Ukraine is always related and intermediated by the criterion of law unconstitutionality. In this regard, the law's "unconstitutionality" is considered from the perspective of contradiction of a law or another normative legal act to the Constitution of Ukraine in the broad sense, and not only in the procedural aspect of the authorized body – the CCU.

The idea of distinguishing the criteria of non-legal and potentially non-legal laws is driven by the practical demand because when committing a procedural action, the court must be aware of the consequences of the law's application, the constitutionality of which causes doubts. Judicial practice teems with a diversity of approaches and is still not characterized by sustainability.

Analysis of research and publications. The stated problem has a theoretical dependence because the domestic doctrine now lacks monographic or other studies on the grounds and procedure for stipulating a legal or non-legal law by the courts when forming a decision on the application of the law or the Constitution of Ukraine during the case's consideration or review. At the same time, it is worth mentioning related research contributions, which became a helpful basis for developing this article, namely: a scientific article by M.I. Melnyk and S.V. Riznyk devoted to the limits of constitutional jurisdiction and the direct effect of norms of the Constitution of Ukraine in administering justice (Melnyk, Riznyk, 2016, p. 156), which is characterized by its applied and illustrative content. However, the mentioned article was published in 2016, during the force of the previous wording of the procedural codes which stipulated other procedural actions of the courts in case of doubts about the contradiction of the law to the Constitution of Ukraine (to suspend the proceedings and resort to the Supreme Court – hereinafter referred to as the SC). Currently, the new versions of the procedural codes enshrine the court's powers not to apply the law, which, in the court's opinion, contradicts the Constitution, and to apply the norms of the Constitution of Ukraine as norms of direct effect. Keeping with the above thesis, a monographic study by S.V. Riznyk (Riznyk, 2021, p. 316) deserves attention. Using various scientific methods, the scholar models a matrix for assessing the constitutionality of normative acts and draws his conclusions from the position of the CCU's constitutional competence, which regarding, first of all, judicial enforcement and judicial interpretation is still somewhat different. S.V. Riznyk mainly considers courts in the judiciary as subjects of intermediate constitutional control and deals with their procedural actions implicitly. However, the scientist does not mention the mechanisms of how the court should act when it should determine a specific legal basis for resolving the case and has doubts about what should be the basis – the rule of law or the Constitution of Ukraine. The courts' observance of a reasonable period during the consideration or review of the case is also pivotal.

An article by A.A. Yezerov ta D.S. Terletskyi "Courts of general jurisdiction and the Constitutional Court of Ukraine: interaction issues" is relevant as well. The authors rightly emphasize that "the application of the presumption of constitutionality is not limited to jurisdictional activities of the CCU and extends to activities of courts of general jurisdiction, which *must* assess the legal acts to be applied for compliance with the Constitution in administering justice. First of all, the courts should seek to interpret the acts in such a way as to bring them into line with the Constitution and refuse them and apply constitutional provisions as norms of direct effect in the case of evident contradiction, which cannot be in any way aligned with the Constitution" (Yezerov, Terletskyi, 2020, p. 233).

Other sources used in this article include individual publications by R. Aleksi, I.E. Berestova, V.K. Babaev, M.I. Baytin, O.V. Kmit, O.S. Kopytova and other (Berestova

et al., 2020; Kmita, 2016; Babaev, 1974; Baytin, 2001; Kopytova, 2019), who somehow focused on the variety of procedural actions to establish the compliance of a law with the Constitution of Ukraine during judicial application. Considering, relying on, and sometimes criticizing the standpoints of the mentioned scientists, we attempted to generalize, model, and single out an extensive list of criteria that indicate law legality or its different flaws.

The purpose of the article is to elucidate the grounds and procedure for distinguishing the criteria of the non-legal law affecting its application by courts when they commit procedural actions.

Research methods applied in the article are as follows: systems approach, generalization, dialectical, hermeneutical and predictive methods of scientific cognition. The author's conclusions are based on more than 200 court decisions (judgments, rulings, decisions) of courts of administrative, economic and civil jurisdictions, which directly or indirectly involve the provisions of the Constitution of Ukraine.

Previously unsettled issue. Solving the problem of establishing the criteria of the non-legal law during judicial enforcement has not become the subject of independent scientific developments and hence it requires urgent scientific elaboration with the formulation of practical recommendations for separating such criteria in the daily judicial enforcement activities.

2. Theoretical approaches to understanding the category of "non-legal law"

The study of the categories of "illegality" and "injustice" in grammatical terms should be conducted given the root form of the nouns of "legality" and "justice" (these categories are crucial for the further formation of the criteria of a non-legal or unconstitutional law). The definition of these categories should then take place through analyzing the interaction of the principles of justice and legitimacy and establishing priority in the non-application of an illegal or unjust law, because injustice and illegality are not identical categories, although they are related.

Thus, as for legality, the Ukrainian researcher O.V. Kmita cites the conceptual scheme available in the doctrine, which contains at least three points. Firstly, it is about the constitutional basis of legality and its provision: a) an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value; b) human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State; c) everyone shall have the right to protect his rights and freedoms, rights and freedoms of others from violations and illegal encroachments, including from encroachments of officers and officials; d) constitutional rights and freedoms of citizens are not exhaustive; e) constitutional human and civil rights and freedoms shall not be restricted, unless a restriction is stipulated by the Constitution of Ukraine; f) human rights and freedoms are inalienable and inviolable. Secondly, legality should be covered from the perspective of the structure of the current legislation, which outlines the development of social and legal practice and comprises legal guarantees of compliance with the established legal order on pain of application (or by application) of state coercion measures in cases provided for by law. Third, legality is always associated with exercising legal practice in diversified forms based on the law (Kurochka, 2002, p. 29; Kmita, 2016, p. 27).

Justice is regarded as a general legal meta-principle or a fundamental principle of legal regulation, in particular, in the natural law type of legal understanding. Thus, from the standpoint of natural law, justice is the application of moral requirements as legal requirements for legislative acts, a concept of due process that corresponds to insight into human rights. Justice is understood far too often as the concept of proportionality of the chosen means to the desired goal (Oliinyk, 2019, p. 217).

Since law is a primary statutory tool for implementing the principle of justice, the legal law is characterized not so much by the legal properties of positive law as social and moral ones. Rule-of-law statehood relies on the fact that any normative legal acts should be the embodiment of justice (Lozynska, 2011, p. 38).

Justice as a legal category has specific criteria that can be found during the court's examination of a particular regulatory act:

1) equality – understanding of the same basic (we can say natural) rights, freedoms, and obligations of every individual and citizen, who cohabit in society. Equality also means the same opportunities to enjoy rights and realize one's interests without violating the same rights and freedoms of other individuals;

2) difference – an individual approach to solving each specific situation of uncertainty in the legal sense (when specific rights and/or interests of individuals are disputed);

3) the moral and ethical component of justice, which is considered in the legal dimension as the idea of humanism – the value of relationships between individuals, that is, respecting humanity limits in relationships. Humanity within law seeks to preserve humanity, which does not degrade honor and dignity, does not

aim to inflict pain and the attitude of individuals to each other when exercising their rights and interests;

4) consistency – a qualitative level of interaction between all public institutions towards ensuring the fair regulation of social relations, the capacity of a specific social mechanism (in this particular case, legal) to guarantee the implementation of the idea of justice precisely as a result of the interaction of all elements of the system, where none of the elements cannot achieve the above independently from each other (Skoromnyi, 2020, pp. 122–123).

Justice as a universal fundamental principle coordinates all other law principles, including mutually exclusive, of interaction with each other and other legal phenomena, in particular, with legal axioms (Kroitor, 2020, pp. 196–198). This is the integrative role of justice, which is essential in establishing the effectiveness of the law at the stage of its adoption and application by the court. For example, it is the court, determining a reasonable balance between private and public interests (proportionality) in dispositive litigation, is substantially related to the categories of legal balance and the common good, which is interpreted as an applied manifestation of justice in law.

Regarding the correlation of justice and legality, it is important to mention that the doctrine has three approaches with fundamentally different orientations:

1) the priority of the requirements of legality over justice (pronounced positivism, in particular, the rules of judicial enforcement in the USSR);

2) the principles of fairness and legality are conditionally equal (such an approach is mostly characteristic of current law enforcement by administrative courts);

3) the priority of justice over legality (characteristic of the natural-legal type of legal understanding and traced in civil law enforcement during the protection of constitutional rights of the highest level).

An unjust law raises questions about its non-legal nature. As a result, the court or judge, acting on behalf of the court, faces a dilemma when applying specific law rules: is he authorized to disqualify law rules if he considers them unfair, and therefore partially illegal?

The answer to this question is to examine the legal nature of the presumption of law and elucidate the concept of a non-legal law, which is partially developed by the theory and philosophy of law. We will provide a proper (mostly procedural) approach of Ukrainian scientists (Berestova et al., 2020, p. 173) to determining the presumption of the constitutionality of laws in countries with a separate body of constitutional control. They stress that the presumption of the constitutionality of a law is one of the important components of the presumption of the law. The authenticity of a legal act is traditionally interpreted as the act's accurate reflection of real conditions, relations that require legal influence and the adequate legal assessment of such assessments. The presumption of a legal act comprises the presumption of constitutionality, the presumption of legality and legitimacy of a normative legal act (a kind of synonymous categories), as well as the presumption of legality and integrity of the activities of participants in legal relations (Babaev, 1974, pp. 14, 114). All these elements are in an organic relationship with each other and are necessarily found in branch legislation. The presumption of constitutionality of a legal act (primarily a law) is indirectly derived from the constitutional provisions and is manifested in substantive and procedural legal aspects. The specificity of constitutional matter is that only a body of constitutional jurisdiction leads both the establishment and refutation of the presumption of the constitutionality of a law. It is the CCU that is authorized to state the unconstitutionality of an act, and the law is considered constitutional until it is enshrined in the decision of the CC. Therein lies the substantive component of the presumption of constitutionality of a normative act (Berestova et al., 2020, p. 174).

Indeed, this approach is based on the distribution of constitutional competence between jurisdictional bodies. However, if the court concludes, or the court or judicial bench (majority) has a firm belief that the applicable law contains unfair provisions and may be regarded as non-legal, the court, guaranteeing the rule of law in its judicial activities, should give a procedural reaction with the employment of some motives of a pecuniary nature at discretion. In other words, it means to take certain procedural actions regarding the application of the law. Therefore, without diminishing the above approach, we will present below our own generalized arguments on the criteria of the illegal law, which represents the elements of an unfair and illegal nature.

It is worth mentioning that the use of the term "non-legal law" within the doctrine is not supported by all legal scholars. Representatives of legal positivism (normativism) avoid the use of this term because, as M.I. Baytin said: "The provision on anti-legal legitimacy cannot be treated differently than nonsense, because what is legitimacy if it is anti-legal? The scientist argues that such "verbal manipulation" contradicts the thesis of the unity of law and order and negatively affects the training of future law-

yers, primarily law enforcement officers" (Baytin, 2001, pp. 310, 314–315).

However, positivism today is not the only type of legal understanding within the framework of judicial enforcement. Reflecting on the modern types of legal understanding, among the most common in judicial activity, incl. dispositive trials, we highlight: *sociological* – its supporters identified independent processes of lawmaking and law enforcement, while the activities of a law-enforcer within the limits established by law can be the condition for compliance and ensuring the regime of legality (Mozol, 2013, p. 39; Kopytova, 2019, p. 277), and *natural law*, which emphasizes law as a spiritual phenomenon, the ideals of justice, individual freedom, equality, social harmony, and other values without which law is impossible (Mozol, 2013, p. 38; Kopytova, 2019, p. 71).

Judicial interpretation as a stage of judicial enforcement, within which the court defines the legal qualification of relations, is in organic connection with the types of legal understanding, which in turn are the theoretical basis of the judges' reasoning. Sociological and natural law types of understanding are used by the category of "non-legal law". Thus, when establishing the legal basis of the case, the court checks the specific norm for its compliance with the provisions of the Constitution of Ukraine, which is its obligation in the mechanism of ensuring the rule of law. This process takes place through ascertaining the presence or absence of signs of justice, and legality of a legal act. In particular, the German lawyer R. Alexi attributes the following to non-legal laws: 1) an extremely unfair law; 2) a law that cannot be implemented; 3) an unconstitutional law (Sieckmann, 2021, pp. 722, 739). This approach inherits some provisions of jus naturalism, "sociologism" and normativism.

Therefore, the doctrine contains many approaches to the formation of the concept of a "non-legal law": *from the absolute nullity* of the law to the determination of the injustice of its individual provisions for the subject of private relations, but the possibility *of applying the law within the framework of ensuring the common good* (public interest – *A. R.*).

The absolute nullity of laws as non-legal, i. e., the imposition of the rule on the inapplicability of the law or its individual norms from the outset, belongs to the exclusive constitutional functions of the CCU as per procedure for consideration of cases. At the same time, a statement (conclusion) in the court decision on the contradiction of the law to the Constitution of Ukraine actually molds the law into a disputed one. Consequently, it is not applied only if the party to the dispute justifies the relevant fact and the judge takes into account the position of the party, since its arguments and motives of the court (based on the internal conviction of the court) coincide; or the court independently reaches the above conclusion.

In our opinion, the above is a key difference between functions of the CCU and the courts within the judicial system in the mechanism of full or partial disqualification of legal norms during the consideration of cases by the latter.

3. Classification of criteria of a non-legal and potentially non-legal law

The resort to theoretical, philosophical, constitutional, and branch contributions, the practice of courts of administrative, economic and civil jurisdictions, relevant decisions of the CCU, and the materials of constitutional proceedings makes it possible to single out such criteria of a *non-legal* and *potentially non-legal law* from the perspective of the court as the final law enforcement agent of a legal conflict (dispute).

1. Classification of the manifestation of the criterion of *obvious contradiction* to the Constitution of Ukraine, which characterizes the law as non-legal:

a) *defects in content*: prescriptions of laws that are obviously unfair per se;

b) *defects in the hierarchy*: provisions of by-laws that evidently contradict the content of acts of higher force;

c) *defects of the subject*: norms of a subordinate legal act issued by the subject exceeding its powers;

d) *defects of temporal significance*: provisions of laws that are objectively obsolete and come into conflict with the prescriptions of acts adopted later (in this case, chronological collisions are resolved, usually without recourse to the norms of the Constitution of Ukraine, or through indirect subsidiary application of the norms of the Constitution of Ukraine);

e) *defects of targeting*: a law adopted not for the common good; practical application creates potential corruption risks and, as a result of its application, human rights may be restricted;

f) *implementation defects:* extremely ineffective law in law enforcement due "stillbirth", zero applicability since the norm's adoption.

2. Criteria of potentially non-legal laws – the *presence of elements of unfair provisions, but their contradiction to* the Constitution of Ukraine is not obvious:

a) *content flaws are not obvious*: justification of injustice and illegality of the law norm by participants to procedural relations and/or the availability of decisions of lower-level courts having diametrically opposite motivation with the application of the norms of the Constitution

of Ukraine and the norms of the laws in one case;

b) *defects in content due to the change in legislative regulation*: sharp social rejection due to the change in the vector of legislative regulation, massive appeals with a petition not to apply such a law as unfair;

c) *defects in the form*: the by-law establishes norms that are subject to regulation exclusively by the laws of Ukraine (Art. 92 of the Constitution of Ukraine);

d) *defects* of the *subject of regulation*: the possibility of applying multiple norms with identical content of the same focus and regulation of the same sphere of social relations.

The peculiarity of potentially non-legal laws is that the current normative legal act, which contains some unjust provisions, is repeatedly applied in the administration of justice and thus, the legal norm with various defects is repeatedly reproduced in court decisions. If the CCU will recognize such an act as unconstitutional, one can further talk about a general weakening of the regulatory framework of the system of justice as a whole that does not contribute to the development of Ukraine as a country with a stable democracy, which our state is so eager to achieve.

The above criteria of a non-legal and potentially non-legal law can be a proper basis for elucidating the procedural actions of the court regarding the application of the law or another normative legal act that contains signs of a non-legal law and checking it for compliance with the Constitution of Ukraine.

In terms of applicability or inapplicability of the norms of the Basic Law of Ukraine in the court decision, we distinguish procedural actions which can be conditionally divided into two interconnected groups, the scope of which involves:

1) actions to establish the fact of contradiction of the law or another normative legal act to the Constitution of Ukraine through covering obligation of the court to check the norm of the law and another normative legal act for its compliance with the Constitution of Ukraine during judicial enforcement;

2) actions to resolve the issue of application by the courts of a formal legal act that has not recognized as unconstitutional but contains unjust provisions (through the prism of assessing the degree of injustice of the provisions of the law in the opinion of the party or the conviction of the court).

The former group includes:

1) settlement of the petitions of the parties on the application of the norms of the Constitution of Ukraine;

2) settlement of the issue of appealing to the SC to resolve the issue of requesting the CCU for the constitutionality of a law or other legal act, the decision on the constitutionality of which falls within the jurisdiction of the CCU;

3) application of the norms of the Constitution of Ukraine as the legislation according to which the court resolves cases on the merits.

We emphasize that the second paragraph is regarded as independent since, unfortunately, judicial practice indicates that the relevant obligation is often used by the courts as a power. However, after the application of the norms of the Constitution of Ukraine as norms of direct action, they do not appeal to the SC in under para. 2, part 4 of Art. 7 of the CAP of Ukraine, para. 2, part 6 of Art. 11 of the CPC of Ukraine, para. 2, part 6 of Art. 10 of the CPC of Ukraine.

The latter group includes the resolution of cases on the merits and the formation of legal opinions of the SC, when the courts reach conclusions:

1) on the presence of unjust provisions in the content of legislative norms, but within the protection of the public interest which they support– application of the rules of such a law;

2) when the courts unambiguously indicate that the application of the norms of the Constitution of Ukraine based on part 4 of Art. 7 of the CAP of Ukraine, part 6 of Art. 11 of the CPC Code of Ukraine, part 6 of Art. 10 of the CPC of Ukraine belongs to the powers of the CCU, and the applicable law is not unconstitutional and has not been recognized as such, and therefore is subject to application.

4. Conclusions

The absolute nullity of laws as non-legal, that is, the establishment of the rule on the inapplicability of the law as a whole or its individual norms from the very beginning, belongs to the exclusive constitutional functions of the CCU under the procedure for consideration of cases. Instead, the statement (conclusion) in the court decision on the contradiction of the law with the Constitution of Ukraine turns the law into a disputed one, and therefore it is not applied only if such is justified by the party to the dispute and the judge takes into account the position of the party as its arguments and motives of the court (based on the internal conviction of the court) coincide; or the court independently reaches the above conclusion. This is the key difference between the functions of the CCU and the courts in the judicial system in the mechanism of full or partial disqualification of legal norms during the consideration of cases by the latter.

Criteria of obvious contradiction to the Constitution of Ukraine, which characterizes the law as non-legal are as follows:

a) defects of content; b) defects of the hierarchy; c) defects of the subject; d) defects of temporal significance; e) defects of targeting; f) defects of implementation.

The criteria of potentially non-legal laws are the presence of elements of unfair provisions, but their contradiction with the Constitution of Ukraine is not obvious: 1) content defects are not obvious; 2) content defects are regarded through the change of legislative regulation; 3) form defects.

In terms of applicability or inapplicability of the norms of the Basic Law of Ukraine in the court decision, we distinguish procedural actions which can be conditionally divided into two interconnected groups, which covers: 1) actions to establish the fact of contradiction of the law or another normative legal act to the Constitution of Ukraine through covering obligation of the court to check the norm of the law and another normative legal act for its compliance with the Constitution of Ukraine during judicial enforcement; 2) actions to resolve the issue of application by the courts of a formal legal act that has not recognized as unconstitutional but contains unjust provisions (through the prism of assessing the degree of injustice of the provisions of the law in the opinion of the party or the conviction of the court).

References:

Babaev, V.K. (1974). *Prezumptsii v sovetskom prave [Presumptions in Soviet law].* Gorkiy, 124 p. [in Russian].

Baytin, M.I. (2001). *Suschnost prava (sovremennoe normativnoe pravoponimanie na grani dvuh vekov) [The essence of law (modern normative understanding on the edge of two centuries)].* Saratov: SGAP, 416 p. [in Russian].

Berestova, I.E., Pervomaiskyi, O.O., Sharkova, H.V., Artiukhova, V.V., Kolomiitsev, P.O. (2020). Approaches to compensation for damage caused by unconstitutional law in Eastern Europe. *Asia Life Sciences*, vol. 22, iss. 1, pp. 171–188 [in English].

Gegel, G.V.F. (1973). *Estetika [Aesthetics],* vol. 4. Moscow: Iskusstvo, 188 p. [in Russian].

Kmita, O.V. (2016). Zakonnist u protsesi postannia pravovoi derzhavy v Ukraini [Legitimacy in the process of establishing the rule of law in Ukraine]. *Candidate's thesis.* Kyiv: V.M. Koretsky Institute of state and law of National Academy of Sciences of Ukraine, 211 p. [in Ukrainian].

Kopytova, O.S. (2019). Suchasne normatyvne rozuminnia prava yak teoretychna osnova formuvannia myslennia suddiv [Modern normative understanding of law as a theoretical basis for the formation of judges' thinking]. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, economy and law*, no. 9, pp. 274–280 [in Ukrainian].

Kroitor, V.A. (2020). *Pryntsypy tsyvilnoho sudochnytsva ta yikh systema: problemy suchasnoi teorii i praktyky [Principles of civil justice and their system: problems of modern theory and practice].* Kharkiv: Pravo, 672 p. [in Ukrainian].

Kurochka, M.Y. (2002). Pravo i zakonnist na suchasnomu etapi rozvytku yurydychnoi nauky [Law and legality at the present stage of development of legal science]. *Problemy pravoznavstva ta pravookhoronnoi diialnosti – Problems of jurisprudence and law enforcement*, no. 1, pp. 26–33 [in Ukrainian].

Lozynska, I.V. (2011). Pravovyi zakon i standarty pravotvorchosti pravovoi derzhavy [Legal law and standards of law-making of the rule of law]. *Naukovyi visnyk Lvivskoho derzhavnoho universytetu – Scientific Bulletin of Lviv State University*, no. 1, pp. 37–48 [in Ukrainian].

Melnyk, M.I., Riznyk, S.V. (2016). Pro mezhi konstytutsiinoi yurysdyktsii ta priamu diiu norm Konstytutsii Ukrainy pry zdiisnenni pravosuddia [On the limits of constitutional jurisdiction and the direct effect of the norms of the Constitution of Ukraine in the administration of justice]. *Visnyk Konstytutsiinoho Sudu Ukrainy – Bulletin of the Constitutional Court of Ukraine*, no. 4–5, pp. 149–160 [in Ukrainian].

Mozol, N.I. (2013). Suchasni kontseptsii pravorozuminnia: poniattia, kharakterystyka ta osoblyvosti [Modern concepts of legal understanding: concepts, characteristics and features]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav – Scientific Bulletin of the National Academy of Internal Affairs*, no. 1, pp. 37–42 [in Ukrainian].

Oliinyk, O.S. (2019). Sutnist pryntsypu spravedlyvosti za mizhnarodnym kryminalnym pravom [The essence of the principle of justice under international criminal law]. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, economy and law*, no. 9, pp. 216–220. Retrieved from: https://doi.org/10.32849/2663-5313/2019.9.36 [in Ukrainian].

Riznyk, S.V. (2021). Konstytutsiinist normatyvnykh aktiv: sutnist, metodolohiia otsiniuvannia ta systema zabezpechennia v Ukraini [Constitutionality of normative acts: essence, evaluation methodology and support system in Ukraine]. *Doctor's thesis.* Kyiv: Ivan Franko National University of Lviv, V.M. Koretsky Institute of state and law of National Academy of Sciences of Ukraine, 488 p. [in Ukrainian].

Sieckmann, J. (2021). Alexy's Critique of Legal Positivism. *The Cambridge Companion to Legal Positivism* / ed. by T. Spaak, P. Mindus. Cambridge: Cambridge University Press, pp. 720–741. Retrieved from: https://doi.org/10.1017/9781108636377.031 [in English].

Skoromnyi, D.A. (2020). Spravedlyvist u pravovomu vymiri [Justice in the legal dimension]. *Aktualni problemy vitchyznianoi yurysprudentsii – Current issues of domestic jurisprudence*, no. 1, pp. 119–124. Retrieved from: https://doi.org/10.15421/392027 [in Ukrainian].

Yezerov, A.A., Terletskyi, D.S. (2020). Sudy zahalnoi yurysdyktsii ta Konstytutsiinyi Sud Ukrainy: pytannia vzaiemodii [Courts of general jurisdiction and the Constitutional Court of Ukraine: issues of interaction]. *Pravo Ukrainy – Law of Ukraine*, no. 8, pp. 223–237. DOI: 10.33498/louu-2020-08-223 [in Ukrainian].

Андрій Рибачук,
суддя Касаційного адміністративного суду у складі Верховного Суду, аспірант, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01402, erevna@ukr.net
ORCID: *orcid.org/0000-0003-1200-6373*

ВИОКРЕМЛЕННЯ КРИТЕРІЇВ НЕПРАВОВОГО ЗАКОНУ, ЩО ВПЛИВАЮТЬ НА ЙОГО ЗАСТОСОВНІСТЬ СУДОМ

Анотація. ***Метою статті*** є розкриття особливостей виокремлення критеріїв неправового закону, що впливають на його застосовність під час розгляду чи перегляду справи судом.

Наукові методи. У роботі використані системний, діалектичний, герменевтичний та прогностичний методи наукового пізнання, а також метод узагальнення.

Результати. Доктрина містить чимало підходів до формування концепції «неправового закону»: від абсолютної нікчемності закону до встановлення несправедливості його окремих положень для суб'єкта приватних відносин, проте можливості при цьому застосування закону в межах забезпечення загального блага (публічного інтересу). Абсолютна нікчемність законів як неправових, тобто встановлення правила про незастосовність закону загалом або окремих його норм із самого початку, належить до конституційних функцій виключно Конституційного Суду України відповідно до процедури розгляду справ. Натомість твердження (висновок) суду в судовому рішенні про суперечність закону Конституції України фактично перетворює закон на оспорюваний, а відтак він не застосовується тільки в разі, якщо таке обґрунтовує сторона спору та суддя враховує позицію сторони, оскільки її аргументи й мотиви суду (що ґрунтуються на внутрішньому переконанні суду) співпадають, або в разі, якщо суд самостійно доходить заявленого вище висновку.

Висновки. Виокремлені критерії очевидної суперечності Конституції України, що характеризує закон як неправовий, зокрема: а) вади змісту; б) вади ієрархії; в) вади суб'єкта; г) вади темпорального значення; ґ) вади спрямування; д) вади реалізації. Також встановлено коло критеріїв потенційно неправових законів – наявність елементів несправедливих положень, проте суперечність Конституції України яких не очевидна: 1) вади змісту є неочевидними; 2) вади змісту через зміну законодавчого регулювання; 3) вади форми. Обґрунтовується, що під кутом застосовності чи незастосовності в рішенні судом норм Основного Закону України виділяються процесуальні дії, які умовно можна поділити на дві групи, пов'язані між собою, які охоплюють своєю сферою: а) дії зі встановлення факту суперечності закону або іншого нормативно-правового акта Конституції України через розкриття обов'язку суду перевірити норму закону та іншого нормативно-правового акта на предмет її відповідності Конституції України під час судового правозастосування; б) дії щодо вирішення питання застосування судами формально чинного нормативно-правового акта, який не визнано неконституційним, проте він містить несправедливі положення (крізь призму оцінки глибини несправедливості положень закону на думку сторони чи переконання суду).

Ключові слова: Конституція України, суд, правовий закон, очевидна суперечність закону Конституції України, потенційно неправовий закон, несправедливі положення закону, процесуальні дії.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 342.1
DOI https://doi.org/10.32849/2663-5313/2022.2.18

Vira Kachur,
PhD in Law, Associate Professor, Head of the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, Kachur_Vira@ukr.net
ORCID: *orcid.org/0000-0002-4372-491X*

Sergey Kozin,
Doctor of Law, Associate Professor at the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, kozinsergey2010@ukr.net
ORCID: *orcid.org/0000-0001-7640-4579*

Kachur, Vira, Kozin, Sergey (2022). Coincidences as an element of the subject matter of state and law theory. *Entrepreneurship, Economy and Law*, 2, 116–123, doi https://doi.org/10.32849/2663-5313/2022.2.18

COINCIDENCES AS AN ELEMENT OF THE SUBJECT MATTER OF STATE AND LAW THEORY

Abstract. ***Purpose.*** The aim of the article is to characterize chance as an integral part of the subject of the theory of state and law. ***Results.*** In the article, the author studies coincidences as an element of the subject matter of the State and law theory. The article analyses and generalises the approaches available in the legal literature to the definition of the subject matter of the State and law theory. The essence of coincidences, its correlation with necessity and regularity is revealed. The nature of State and legal coincidences has been characterised as an important element of the subject matter of the general theory of State and law. It is established that the State and law theory, like any science, has its own subject matter, because the latter determines the independence of science, its specific properties and place in the scientific knowledge of reality. At the same time, the subject matter of the State and law theory is made virtually by the entire system of legal sciences. The subject matter of State and law is formulated as the comprehension of a complex object, that is, State and law. The content of the subject matter is traditionally regarded as regularities of the advent, development and functioning of State and law. However, the development of State and law is affected not only by regularities but also by coincidences, due to which the formation and development of individual legal systems and State entities can be specified. ***Conclusions.*** It is substantiated that the subject matter of the State and law theory should be considered not only as the comprehension of regularities, but also coincidences of the advent, development and functioning of the State and law, their role in various civilisations and cultures. The State and legal coincidence is a random, unlikely connection of State and legal phenomena and processes, not caused by State and legal regularities and does not reflect their essence. In any event, the need for fundamental changes in approaches to the scope of subject-matter of the State and law are understood has not yet come to light. In this regard, to date not only the subject matter of this science and the corresponding discipline, but even its designation is not agreed. Meanwhile, it is crucial to rethink the subject matter and structure of the State and law theory due to not only internal but also external factors, the most important of which is development of inter-State integration processes in the field of science and education, is of crucial importance among them.

Key words: State and law theory, subject matter of State and law theory, regularity, coincidences, State and legal regularity, State and legal coincidences.

1. Introduction

General theoretical legal science and the corresponding academic discipline known to many generations of domestic lawyers as "General theory of the State and law"[1], undergoes a complex and contradictory period. On the one hand, the collapse of totalitarianism and, with it, its inherent methodological monism in the study of law and other legal phenomena, the formation of independence of Ukraine and the related objective changes in the politics, economy, social consciousness, the transformed system of values and fundamentals of worldview have opened wide possibilities for updating domestic jurisprudence, including its general theoretical part,

[1] The specific names of this discipline in Ukraine and in some other countries of the world are different, for example, "State and law theory", "law and State theory", "general theory of law", "general theoretical jurisprudence", etc.

overcoming the long-term isolation from European and world culture and legal theory, enrichment with accumulated international common legal heritage, such as inalienable human rights, the rule of law, civil society, etc. On the other hand, the transition from methodological monism to ideological and methodological pluralism, with all its positive features, has led to a complicated process of knowledge of legal phenomena, one of the consequences thereof is often an eclectic combination of heterogeneous worldviews – from Marxist to neo-liberal and neo-positivist, poorly compatible with each other (Koziubra, 2013, p. 17).

In addition, if the difficulties of democratic renewal after the collapse of the totalitarian regime, political instability, aggravated primarily by the military aggression of the northern neighbour, the loss of confidence in all branches of government and most public institutions, features of the national mentality, elements of its traditional political and ideological bias are considered, the Statements by some representatives of the general theoretical jurisprudence of the post-Soviet space about the crisis of modern theoretical legal consciousness will not be so exaggerated. However, it seems more correct to speak not so much about the crisis of domestic general theoretical law, but about the difficulties of its modernisation. The construction of a holistic, internally consistent system of general theoretical jurisprudence, its final liberation from previous dogmatic representations is evidently a matter of more than one generation of legal scholars. One of the priority directions in this direction should be the rethinking of the subject-matter field of general theoretical legal science and the corresponding academic discipline (Koziubra, Pohrebniak, Tseliev, & Matvieieva, 2015, p. 14).

Issues of the subject matter orientation of scientific research have a long history of worldview thinking. This process, initiated by the philosophers of antiquity, retains its relevance for modern science. The focus and methodological identity are determinants not only of the autonomy of science, but also of its place in the system of scientific knowledge. The fundamental meaning of general theoretical legal science for scientific knowledge of the State and law determines the importance of comprehension of its subject-matter, which is complex and poly-structured, while the ideas and provisions thereof determine the unity of legal science in general. In this regard, the study of coincidences becomes particularly relevant and practical as a component of the subject-matter of the State and law theory, which is the purpose of this article. Its successful implementation requires solution of the following tasks: first, to review the existing approaches (points of view) in the legal literature to the definition of the subject-matter of the State and law theory; second, to reveal the essence of coincidences, its correlation with necessity and regularity; third, the nature of State and legal coincidences has been characterised as an important element of the subject-matter of the general theory of State and law.

The subject matter of the State and law theory is a traditional issue that is dealt with in a comprehensive manner in both textbooks and manuals on the State and law theory. Therefore, it is not an exaggeration to say that this problem affects all specialists in the field of state theory and law to some extent (Serdiuk, 2013, p. 38). At the same time, the immediate theoretical and methodological basis for this scientific article has been the works by domestic legal theorists, such as: Y.V. Bilozorov, B.D. Bondarenko, D.O. Vovk, S.D. Husarieva, M.I. Koziubra, A.M. Kolodii, O.L. Kopylenko, O.Y. Kotsiubynska, Y.V. Kryvytskyi, S.L. Lysenkov. Y.M. Oborotov, P.M. Rabinovych, I.A. Serdiuk, O.F. Skakun, O.D. Tykhomyrov, M.V. Tsvik, in which separate aspects of coincidences in the field of State and law as theoretical and legal phenomenon are disclosed.

2. Establishment and development of the general State and law theory

The State and law theory is a fundamental scientific and academic discipline, the development and establishment of which has a long history. Understanding the subject-matter of the State and law theory is associated with specificities that reflect the different stages of the formation of this field of knowledge. During these stages, the question of the independence of this component of the legal science and the focus and scope of the State and legal phenomena examined by it has been repeatedly raised. When considering the State and law theory, it is important to clearly understand what kind of scientific discipline is studied, given the existing substantial differences in the understanding of the State and law theory in domestic and foreign jurisprudence. The specificities of a particular country and its legal system advent from one of the legal families, the State and law theory may not be classified as a separate field of knowledge or vice versa, recognised as an independent component of the legal science, science of sciences in the field of theoretical jurisprudence, which determines the relevance of scientific research of the subject-matter of general theoretical legal science at the present stage.

The existence of its own subject-matter, that is, those phenomena and processes of the real world, which are considered and studied by

a system of knowledge, is one of the necessary conditions for its classification into a class of independent sciences. No science can aspire to a comprehensive study of natural or social phenomena and processes, it only singles out certain of them, or even their individual aspects, the cognition of which is possible by its own means and methods. The subject-matter of science is not something frozen, once and for all given. It is constantly evolving, as the phenomena and processes involved in the orbit of scientific research are qualitatively changing. Therefore, every science, periodically, at some historical stages of development, needs to be re-examined, clarified, and sometimes substantially reinterpreted. General legal science is no exception in this respect. The fundamental changes that have taken place in the post-Soviet space over the past thirty years have had a significant impact on the phenomena themselves, which constitute the object of the study of general theoretical jurisprudence. This necessitates not only a higher level of knowledge of them, the study of new connections and properties of these phenomena, but also the revision of certain well-established approaches and perceptions (Koziubra, 2013, p. 19).

The general theory of State and law emerged as a result of the gradual and evolutionary development of legal science as its organic, important component and the influence of specific historical circumstances on legal science as a specific system of knowledge. Its advent is due to the needs of society, which formulate the corresponding social demand to legal science, and the latter finds adequate tools to meet it (Kotsiubynska, 2012, p. 9). The stages of formation of ideas about the subject-matter of general theoretical legal science include: the first period (30s – 50s of the XX century) is formal, when the formation of ideas about the subject-matter of general theoretical science in the absence of ideological pluralism, the presence of excessive politicisation of science, attribution to the focus of subject-matter of the State and law theory and the category of regularities without their comprehensive analysis; the second period (50s-90s of the XX century) is characterised by the expansion of the focus of subject-matter of the State and law theory, the substantiation that State and legal regularities are part of the subject-matter of general theoretical science and the formation of a classical approach to the definition of the subject-matter; the third period (from the XXI century) is pluralism of scientific ideas about the subject-matter of the theory of State and law (Bondarenko, 2019, p. 12).

Traditionally, the subject-matter of the State and law theory is determined only through a set of legal (State and legal, legal and State) regularities. For example, the subject-matter of the State and law theory is "general and specific regularities of the advent, functioning and development of the State and law..." (Lysenkov, Kolodii, Tykhomyrov, & Kovalskyi, 2005, 10; Lysenkov, 2006, p. 13); "general and specific regularities of the advent, development and functioning of the State and legal reality in society" (Husariev, Oliinyk, Sliusarenko, 2008, 14); "universal (general) specific regularities of the advent, structuring, functioning and development of legal and State phenomena" (Rabinovych, 2008, p. 211), etc. According to the encyclopaedic legal literature, the State and law theory is one of the basic legal sciences and general theoretical academic disciplines. The subject-matter of the State and law theory are the basic general regularities of the advent, development and functioning of State and legal phenomena (the essence of the State, form of the State, type of the State, functions of the State, mechanism of the State, essence of law, form of law, system of law, legal relations, subjective rights, offences, application of legal provisions, legal and regulatory mechanism). The main common regularities are fundamental and universal, as they are common to different States and their legal systems. Therefore, regularities of modern State development are: an increase in the volume of general social affairs carried out by the State; active participation in international organisations and inter-State associations; observance of the principles and provisions of international law; the focus on human rights; a new approach to the correlation between the State and the rule of law; a new correlation between the State and society, according to which the State makes an enabling environment ("rules of the game") for the development of civil society and does not directly interfere in its activities; resilience in changes and combinations of State institutions. The State and law theory studies not only the regularities, but also the results of their action by means of certain parties of legal reality, that is, indirect actions of regularities (for example, the inevitability of liability – a legal principle arising from a State regularity of legal liability means). Since coincidences accompany the development of different States and their legal systems, the consideration of regularities also takes into account coincidence, because without knowledge of coincidences (regarding small changes) it is difficult to correctly understand general regularities (Skakun, 2004, pp. 36-37).

At the same time, legal doctrine presents an approach thereof proponents expand the subject-matter of the State and law theory,

highlighting in its content different components. For example, according to O.L. Kopylenko, the subject-matter of the State and law theory is the State and law as specific social phenomena, the general regularities of their occurrence, purpose and functioning, their essence, types, forms, functions, structure and mechanism of action, relations among themselves and legal relations with other actors of public life, the main State and legal categories common to all branches of jurisprudence, as well as the features of the State-political and legal consciousness and legal culture (Zaichuk, 2008, 23). Similar perspectives are expressed by other domestic legal theorists, in particular O.Y. Kotsiubynska (Kotsiubynska, 2012, p. 7), O.I. Osaulenko (Osaulenko, 2007, p. 6) etc.

In turn, M.V. Tsvik and D.O. Vovk argue that the subject-matter of the general theory of State and law is the essence and the most common regularities of the advent, development, functioning of legal and State phenomena and processes, as well as the main basic concepts for the entire legal science. According to the given definition in the structure of the subject-matter of the State and law theory involve three components: 1) the essence of law and the State; 2) the more general regularities of the advent, development, functioning of law and the State; 3) the system of legal concepts (Tsvik, 2011, p. 19). It should be noted that according to Y.V. Kryvytskyi, the subject-matter of the State and law theory is essential properties, general and specific regularities of the advent, development and functioning of the State and law, as well as other related phenomena of social reality. The first element of the subject-matter, investigated by general theoretical science, is the essence of State and legal phenomena. It is the principal and most essential property that distinguishes these phenomena from related homogeneous phenomena and is conditioned by deep connections and trends in their development (e.g., State – from non-State authorities, law – from other types of social regulators). For the State, such a characteristic is the existence of political power in the country, covering the entire population, for the law, it is its establishment in detail, a measure of possible and necessary behaviour. Perceptions of the essence of the State and law provide for the deepening and concretisation of knowledge about the nature of legal phenomena and the reference for the identification and study of existing regularities in the State and legal field. Next, the consideration of the second component of the subject-matter of the State and law theory requires specifying that State and legal regularities are objective, necessary, general, stable relationships of interaction of State and legal phenomena between themselves and other social phenomena deriving from their nature, essence (Hida, 2011, pp. 22-24).

Without diminishing the significance of the regularities in the analysis of the subject-matter of the State and law theory, it is appropriate to focus on the approach of the author's team led by Y.M. Oborotov that in the State and legal processes coincidences are also possible, because the State and law as social phenomena and human creations are not deprived of elements of chaos, irrationality, imbalance. In the light of this judgment, the subject-matter of State and law theory includes: 1) the nature and social purpose of State and legal phenomena; 2) regularities and coincidences of the advent, functioning and development of the State and law; 3) the system of concepts and categories used in jurisprudence (law, State, their essence, functions, forms, provisions of law, legal relations, realisation of law, order, etc.); 4) legal principles, axioms, presumptions, fictions that have been developed and used by legal theory and practice; 5) theoretical models of law-making, law application and interpretation practice; 6) forecasts and practical recommendations for the improvement and development of law and the State (Oborotov, Krestovska, Kryzhanivskyi, & Matvieieva, 2012, p. 7).

The perspective on considering not only regularities but also coincidences as the subject-matter of the State and law theory is shared by other specialists in the field of general legal theory. In particular, I.A. Serdiuk argues that it seems appropriate, within the framework of a synergistic methodological approach, to consider one of the components of the subject-matter of the State and law theory coincidental connections of the State and legal phenomena, the study of which will contribute to the improvement of complex systems with non-linear development, capable of self-organisation and self-regulation. Such systems may include civil society, the national legal system, etc. Therefore, it is possible to propose such an approach to the definition of the subject-matter of study: the subject-matter of the State and law theory is general and specific regularities of the advent, development and functioning of the State and law, as well as unknown or unexplored coincidental relationships that affect significantly the advent, development and functioning of these phenomena (Serdiuk, 2013, p. 46). According to I.H. Bilas and A.I. Bilas, the subject-matter of the State and law theory can be defined as a system of basic concepts and categories of legal science, general and specific regularities, coincidences of advent, development and functioning of State and law,

as well as other related phenomena (Bilas, Bilas, 2015, p. 14).

Therefore, domestic legal scholars gradually come to the conclusion that reducing the functioning of the State and law only to legitimate processes does not correspond to the specificity of any social system, including legal system, the development of which is not only regular, but also accompanied with the occurrence and disappearance of certain trends and coincidences.

3. Correlation between categories and concepts

The most important in the context of legal science is to determine the relationship of the category "regularity" with the adjacent philosophical category "necessity", corresponding to the category "coincidence". In many cases, philosophical consideration of the concept of "regularity", such a concept is identified with the concept of "necessity" or mediates it. The dual category of the concept of "necessity" is the notion of "coincidence", reflecting a random connection between phenomena of reality and with certain reservations is the opposite of the regularities. In general, in philosophical science the categories of regularities and coincidences are reflected with the help of paired philosophical categories, such as necessity and coincidences, specific due to reflection of different types of connections in the objective world and its knowledge. Therefore, it is necessary to consider thoroughly the concepts of "necessity" and "coincidence". In philosophy, "necessity" is defined as a concept for characterizing the internal stable relation of objects, which is due to the history of development and the totality of present conditions of such objects' existence. The necessary is what under certain circumstances must be available or will have to be. Necessity determines the internal regularity in the relationships between phenomena. The necessity is what in any case should occur under certain conditions in some way. The necessity reflects the stable, essential interrelationship of phenomena, processes and objects of reality, which is determined by the previous history of their development (Bondarenko, 2020, p. 134). The necessity is also understood as a system of interrelationships and relationships that determines change, progress, development in a precisely defined direction with clearly defined results. In other words, the necessity is a special link that necessarily leads to a certain event. In the field of State and legal phenomena, necessity and regularity are not identical. This is because necessity may be subjective, as opposed to always objective regularity. In this context, they state the necessity to adopt one or another law, to take necessary legal policy measures, etc. If the law is implemented only when necessary, the regularity is realised through the possibility. Objective necessity can be perceived as an unavoidable scenario, independent of the will of individual actors, a special case of regularities.

The relationship between regularity and coincidences, which are related categories, is of importance for general theoretical legal science. Coincidence refers to a category that reflects the problematic or unnecessary occurrence or existence of certain events. The coincidental is what, under certain conditions may or may not be. The necessary-to-coincidental ratio suggests that coincidences is a form of necessity detection, while coincidence is instead a complement to it (Bondarenko, 2020, p. 135). Coincidence as a philosophical category describes the external prerequisites of phenomena; what may or may not happen, what will take place in a certain way; what may or may not be in such conditions. The concept of coincidence reflects aspects of reality arising mainly from external conditions, superficial unstable relationships, and incidental occurrences of circumstances. Coincidence is a set of interrelations and relationships in which the occurrence of a certain event may or may not occur. It should be noted that coincidence is a relationship in which the occurrence of an event does not flow from general development trends and cannot be foreseen in advance. In many cases, in scientific developments, regularity and coincidence are characterised as antonyms. The category "coincidental" refers not to what happens without a causal link, but unpredictably affects the development of a certain regularity, due to which the result of its action changes. This situation may be the result of the interaction of two different regularities. Understanding the relationship between necessity and coincidence depends on the more general framework within which they are considered. Phenomena and processes that may manifest themselves as necessary in some contexts may be coincidental in other contexts and in other respects. Therefore, when considering the regularities, necessities and coincidences in the system of State and legal phenomena the specifics of this field should be taken into account (Bondarenko, 2020, p. 137).

In turn, D.O. Vovk argues that in the course of the study of legal regularities or trends, coincidences in the development of legal phenomena can arise. The latter mean an unpredictable, atypical confluence of circumstances in the field of law and the State as a legal concept, which occurs with little probability and is not conditioned by their essence. The specificity of coincidence is that it is not universal and is

not usually repeated in similar situations. For example, coincidences are the existence of various "atypical" forms of government (elected monarchy, Libyan Jamahiriya and others), non-standard forms (sources) of law (for example, the directives of the President in the Republic of Belarus of an uncertain legal character), unusual attributes of the State (for example, four State languages in Switzerland), etc. The occurrence of these coincidences is not related to the essence of legal phenomena and is determined by non-legal factors (desires to preserve or concentrate political power, specificities of the social system, historical past, etc.). The legal science study coincidences due to the fact that legal regularities, tendencies and coincidences do not exist separately. Coincidences, if repeated, can become trends. At the same time, the latter are able to transform into regularities. For example, the trend towards granting the right to vote to women has gradually evolved into an international standard of human rights, that is, it has become a regularity. Opposing examples are possible. For example, slavery and the possibility of human trafficking transactions are a reality for most systems of ancient law. In Europe, however, because of the economic inefficiency of slave labour and Christian dogmas, slavery is gradually declining and can be seen as a trend and subsequently a coincidence (for example, slavery in the US or serfdom in the Russian Empire) (Vovk, 2017, p. 868).

On the contrary, O.M. Nosdrin argues that the very fact of the existence of coincidence in social processes as absolute non-conditionality, and therefore the unpredictability of the development of a particular process, requires solid proof. So far, there is no convincing evidence for this in science, but the facts confirming the relativity of the concept of "coincidences", on the contrary, take place. Those phenomena, relationships, processes, which science for any reason cannot explain, bring them under the regularity are often recognised as coincidental. In fact, the entire history of science is a constant movement by explaining various kinds of "coincidences" (Nozdrin, 2013, p. 9).

According to N.M. Krestovska and L.H. Matvieieva, coincidences are also possible in State and legal processes, as well as in public life in general. Coincidence is an event, the main cause thereof cannot be established by the means of modern science, because it is caused by a multitude of insignificant and short-term causes. In jurisprudence, coincidence is understood as an unpredictable and atypical confluence of circumstances between the State and law, which occurs with little probability and is not conditioned by the essence of law. It is necessary to consider coincidences because the State and law as social phenomena and human creations are not free from the elements of chaos. In this sense, the State and law theory, like all other social sciences, is a science that is more lawful than regular. True, in most cases, coincidences are studied by not so much the theory as the history of State and law (Krestovska, & Matvieieva, 2015, p. 20).

4. Conclusion

Therefore, the above analysis enables to assert that the State and law theory, as any science, has its own subject-matter. Specifically, the subject-matter describes the autonomy of science, its special characteristics, and its place in the field of the scientific knowledge of reality. At the same time, the subject-matter of the State and law theory is made virtually by the entire system of legal sciences. This is due to the fact that sectoral and other legal sciences study only certain fields, aspects of the State and law or the history of the State and legal life and cannot give a holistic and complete picture of the State and legal organisation of society. Given that the subject-matter of any science is the basis for understanding its essence, specificity and purpose, its clear definition should be one of the main tasks that a particular science should perform. The subject-matter of the State and law theory is a constantly refined dynamic category.

The subject-matter of State and law is formulated as the comprehension of a complex object, that is, the State and law. Traditionally the content of the subject-matter is considered as the regularities of the advent, development and functioning of the State and law. However, the development of the State and law is affected not only by regularities but also by coincidences, due to which the formation and development of individual legal systems and State entities can be specified. Therefore, the subject-matter of the State and law theory should be considered not only as the comprehension of regularities, but also coincidences of the advent, development and functioning of the State and law, their role in various civilisations and cultures. The State and legal coincidence is a random, unlikely connection of State and legal phenomena and processes, not caused by State and legal regularities and does not reflect their essence. At the same time, the regularity in any case does not have full authority over the State and legal phenomena and processes. It does not fully form them with all the nuances and specificities, because in the State and legal field, the coincidence is of importance, which is a paired category regarding the regularity. Usually due to their

interaction, the regularity forms common features, the basis and essence of a certain State and legal phenomenon and process, while specific and special, unique features form coincidence.

In any event, the need for fundamental changes in approaches to the scope of subject-matter of the State and law are understood has not yet come to light. In this regard, to date not only the subject-matter of this science and the relevant subject, but even its designation is not agreed. Meanwhile, it is crucial to rethink the subject-matter and structure of the State and law theory due to not only internal but also external factors, the most important of which is development of inter-State integration processes in the field of science and education is of crucial importance among them.

References:

Koziubra, M.I. (2013). Zahalnoteoretychne pravoznavstvo: problemy modernizatsii [General theoretical jurisprudence: problems of modernization]. *Zahalnoteoretychne pravoznavstvo, verkhovenstvo prava ta Ukrain – General theoretical jurisprudence, rule of law and Ukraine*, 17–55 (in Ukrainian).

Koziubra, M.I., Pohrebniak, S.P., Tseliev, O.V., & Matvieieva, Yu.I. (2015). *Zahalna teoriia prava [General theory of law]*. Kyiv (in Ukrainian).

Serdiuk, I.A. (2013). Vyznachennia predmeta teorii derzhavy i prava: doktrynalni pidkhody ta pravove zakriplennia [Defining the subject-matter of the State and law theory: doctrinal approaches and legal consolidation]. *Naukovyi visnyk Dnipropetrovskoho derzhavnoho universytetu vnutrishnikh sprav – Scientific Bulletin of Dnipropetrovsk State University of Internal Affairs, 3*, 37–48 (in Ukrainian).

Kotsiubynska, O.Yu. (2012). Teoriia derzhavy i prava: systemnyi analiz suchasnoho stanu ta perspektyv rozvytku [The State and law theory: a systematic analysis of the current state and prospects]. *Extended abstract of candidate's thesis*. Lviv (in Ukrainian).

Bondarenko, B.D. (2019). Zakonomirnosti yak predmet zahalnoi teorii prava [Regularities as a subject of general theory of law]. *Extended abstract of candidate's thesis*. Kyiv (in Ukrainian).

Lysenkov, S.L., Kolodii, A.M., Tykhomyrov, O.D., & Kovalskyi, V.S. (2005). *Teoriia derzhavy i prava [Theory of State and law]*. Kyiv : Yurinkom Inter (in Ukrainian).

Lysenkov, S.L. (2006). *Zahalna teoriia derzhavy i prava [General theory of State and law]*. Kyiv: Yuryskonsult (in Ukrainian).

Husariev, S.D., Oliinyk, A.Yu., & Sliusarenko, O.L. (2008). *Teoriia prava i derzhavy [Theory of law and the State]*. Kyiv : Pravova yednist (in Ukrainian).

Rabinovych, P.M. (2008). Osnovy zahalnoi teorii prava ta derzhavy [Fundamentals of the general theory of law and the State]. Lviv : Krai [in Ukrainian].

Skakun, O.F. (2004). *Teoriia derzhavy i prava [Theory of State and law]*. Kyiv : Ukr. entsykl (in Ukrainian).

Zaichuk, O.V. (2008). *Teoriia derzhavy i prava [Theory of State and law]*. Kyiv: Yurinkom Inter (in Ukrainian).

Osaulenko, O.I. (2007). *Zahalna teoriia derzhavy i prava [General theory of State and law]*. Kyiv: Istyna (in Ukrainian).

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

Hida, Ye.O. (2011). *Teoriia derzhavy ta prava [Theory of State and law]*. Kyiv: FOP O.S. Lipkan (in Ukrainian).

Oborotov, Yu.M., Krestovska, N.M., Kryzhanivskyi, A.F., & Matvieieva, L.H. (2012). *Teoriia derzhavy i prava [Theory of State and law]*. Kharkiv: Odissei (in Ukrainian).

Bilas, I.H., & Bilas, A.I. (2015). Transformatsiia zahalnoi teorii derzhavy i prava u suchasnu yurysprudentsiiu ta yii funktsionalne pryznachennia u formuvanni pravorozuminnia yurystiv [Transformation of the general theory of the State and law into modern jurisprudence and its functional purpose in formation of legal understanding of lawyers]. *Nashe pravo – Our right, 4*, 5–16 (in Ukrainian).

Bondarenko, B.D. (2020). *Zakonomirnosti yak predmet zahalnoi teorii prava [Regularities as a subject of general theory of law]*. Kyiv: BD Dakor (in Ukrainian).

Vovk, D.O. (2017). *Yurydychna zakonomirnist [Legal regularity]*. Kharkiv: Pravo (in Ukrainian).

Nozdrin, O.M. (2013). Pravove zhyttia yak katehoriia suchasnoi yurydychnoi nauky: teoretyko-metodolohichne doslidzhennia [Legal life as a category of modern legal science: theoretical and methodological research]. *Extended abstract of candidate's thesis*. Mariupol (in Ukrainian).

Krestovska, N.M., & Matvieieva, L.H. (2015). *Teoriia derzhavy i prava [Theory of State and law]*. Kyiv: Yurinkom Inter (in Ukrainian).

Віра Качур,
кандидатка юридичних наук, доцентка, завідувачка кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, Kachur_Vira@ukr.net
ORCID: *orcid.org/0000-0002-4372-491X*

Сергій Козін,
доктор юридичних наук, доцент кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, kozinsergey2010@ukr.net
ORCID: *orcid.org/0000-0001-7640-4579*

ВИПАДКОВОСТІ ЯК СКЛАДОВИЙ ЕЛЕМЕНТ ПРЕДМЕТА ТЕОРІЇ ДЕРЖАВИ І ПРАВА

Анотація. Мета. Метою статті є характеристика випадковості як складового елемента предмета теорії держави і права. **Результати**. У статті автор досліджує випадковості як складовий елемент предмета теорії держави і права. Проаналізовано та узагальнено наявні в юридичній літературі підходи до визначення предмета теорії держави і права. Розкрито сутність випадковості, її співвідношення з необхідністю та закономірністю. Охарактеризовано природу державно-правових випадковостей як важливого компонента предмета загальної теорії держави і права. Встановлено, що теорія держави та права, як і кожна наука, має свій предмет, адже саме останній визначає самостійність науки, її специфічні властивості та місце у сфері наукового пізнання дійсності. Водночас предмет теорії держави та права створюється фактично всією системою юридичних наук. Предмет теорії держави і права формулюється як осягнення складного об'єкта, яким є держава та право. Стало вже традиційним змістом предмета розглядати закономірності виникнення, розвитку та функціонування держави та права. Разом із тим у розвитку держави і права вагому роль відіграють не лише закономірності, а й випадковості, крізь призму яких часто тільки й можливо проникнути у специфіку становлення і розвитку окремих правових систем і державних утворень. **Висновки.** Обґрунтовано, що предметом теорії держави і права слід розглядати осягнення не лише закономірностей, а й випадковостей виникнення, розвитку та функціонування держави і права, їх ролі в різних цивілізаціях і культурах. Державно-правова випадковість – це випадковий, малоймовірний зв'язок державно-правових явищ і процесів, що не зумовлений державно-правовими закономірностями та не відображає їх сутність. У будь-якому разі усвідомлення необхідності корінних змін у підходах до розуміння предметного поля теорії держави і права ще не настало. У зв'язку із цим наразі відсутня єдність поглядів не лише стосовно предмета цієї науки і відповідної навчальної дисципліни, а й навіть щодо її назви. Тим часом нагальна потреба в переосмисленні предмета й структури теорії держави і права все відчутніше зумовлюється не лише внутрішніми, а й зовнішніми чинниками, вирішальне значення серед яких належить розвитку міждержавних інтеграційних процесів у сфері науки та освіти.

Ключові слова: теорія держави і права, предмет теорії держави і права, закономірність, випадковість, державно-правова закономірність, державно-правова випадковість.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 347.46 (477)
DOI https://doi.org/10.32849/2663-5313/2022.2.19

Oleksandr Krupchan,
Doctor of Law, Professor, Full Member (Academician) of the National Academy of Legal Sciences of Ukraine, Director, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, ndippp@adamant.net
ORCID: *orcid.org/0000-0002-3701-5658*

Oleksandr Gaydulin,
Doctor of Law, Associate Professor, Leading Researcher, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, gaydulin@i.ua
Scopus-Author ID: 57217828443
ORCID: *orcid.org/0000-0002-1269-7007*

Krupchan, Oleksandr, Gaydulin, Oleksandr (2022). Radical reconstruction of the theoretical and methodological foundations of private law in Ukraine: liberation from the influences of post-communism and Russian chauvinism totalitarian ideologies. *Entrepreneurship, Economy and Law*, 2, 124–129, doi https://doi.org/10.32849/2663-5313/2022.2.19

RADICAL RECONSTRUCTION OF THE THEORETICAL AND METHODOLOGICAL FOUNDATIONS OF PRIVATE LAW IN UKRAINE: LIBERATION FROM THE INFLUENCES OF POST-COMMUNISM AND RUSSIAN CHAUVINISM TOTALITARIAN IDEOLOGIES

Abstract. ***Purpose.*** This research concerns the fundamental issues of a comprehensive assessment of the prospects of restructuring the theoretical and methodological foundations of domestic civil law science in view of the need for decisive deprivation of national legal consciousness from the relics of Soviet ideology. Such reconstruction is mandatory in the face of the confrontation of the Ukrainian People with full-scale aggression of the Russian Federation. The ideological "sanitation" of our public consciousness has become universal, but it is most relevant to modern law.

Research method. In methodological terms, this study attempts to criticize the influences of political ideology on private law science from the standpoint of legal cultural studies. The scope of the cross-cultural legal method was demonstrated on the example of a systematic analysis of the general methodology of private law or civil philosophy.

Results. This analysis focuses on studying two directions of substantial reconstruction of civil law science: 1) in the sphere of general methodology of private law; 2) in the field of scientific private law theory. The above allowed distinguishing ten priority ways of urgent actions to purify legal science from destructive influences of hostile totalitarian ideology, in particular, the imperial doctrine of the so-called "Russian world". This publication does not represent an exhaustive list of the activities or actions for our scientists in the area of civil law. It has a "motivating" nature and involves deploying a broad and open scholarly discussion in the domestic scientific society.

Conclusions. *The most important conclusion* is as follows: it is time to terminate the shameful presence of our jurisprudence in the cultural space that is dominated by the relics of Marxist-Leninist ideology, which were given a new lease of life in the notorious "Putinism". We must finally rethink the whole content of domestic civil law theory and methodology. The civil legislation of Ukraine must comply with not only the letter but also with the spirit of private law. Ukraine should return to the European cultural and legal tradition not on paper but in real life. Thinking based on the principles of natural law must oppose the philosophy of primitive positivism.

Key words: natural law philosophy, private law theory, civil law methodology, legal culture, totalitarian ideology, common sense.

The bloody mire of Mongolian slavery,
not the rude glory of the Norman epoch,
forms the cradle of Muscovy,
and modern Russia is but
a metamorphosis of Muscovy.
Karl Marx

In general, Russia suffers
from a frightening poverty
in the sphere of facts
and a frightening wealth
of all types of arguments.
Anton Chekhov

1. Introduction

Amidst full-scale armed aggression of the Russian Federation against Ukraine, domestic lawyers do their best to approach our victory over a treacherous and cruel enemy. Military issues mainly have a public-law nature, but civil law scholars are looking for a way of switching legal science to the war context.

For example, "a consortium of Ukrainian and international lawyers is poised to initiate mass proceedings against the Russian state and private military contractors and businesspeople backing the Russian war effort to gain financial compensation for millions of Ukrainian war victims" (Walker, Koshiw, 2022).

However, in addition to the significance of addressing practical concerns during the judicial proceedings, there is also a need to spend the available time and resources to promote the theoretical and methodological fundamentals of domestic civil law science.

As a result of these efforts, several conceptual foundations of a fundamental research project were formulated, the idea of which is brought to your attention.

The fact is that the law in general and civil law in particular always have some ideological and political basis (Andrushchakevych, 2021, pp. 77–83). Consequently, the Russian imperial and later Soviet ideologies significantly influenced the legal understanding in Ukraine for a long time.

It is well known that theory and methodology take pride of place in civil law. General theoretical meanings and values not only determine the structure of civil law doctrines but are also immanently available in the content of some legal constructions and special terms. Such a substantial content of law should be rational and fully meet the principle of reasonableness. Politically ideologized doctrines in style terms always have significant sensory content, predominantly focused not on the mind but faith. For this very reason, an increase of so-called evaluation concepts in modern legal discourse indicates that the ideological foundations of domestic civil law theory do not fully meet the needs of private law (Kravchuk, 2021, pp. 18–22).

If we carry out an express review of the abstracts of modern legal theses in Ukraine, we will definitely see the widespread presence of "generic spots" of the Soviet Law Concept. First of all, it is a constant, almost ritual, reference to the use of the "dialectical-materialistic method", which, as everyone knows, is an organic component of the doctrine of "Marxism-Leninism", and the statement of a monopoly position in the legal doctrine of a "single faithful" theory of state and law (Kachur, Kozin, 2022, pp. 68–73). All this confirms the exclusively normative understanding of the essence of law itself from the standpoint of hidden, and sometimes frank, legal positivism. Domestic academic lawyers, including the authors of this publication, bear responsibility for such dogmatization of legal theory and methodology. It should be remembered that the lack of intent does not abolish guilt for negligence or self-confidence not only in actions but also thoughts.

The time is now to terminate the shameful presence of our jurisprudence in the cultural space, which is dominated by the relics of Marxist-Leninist ideology, which were given a new lease of life in the notorious "Putinism". We, all civil law scientists, should agree that we have been too enthusiastic about "language games" in the continuous translation of the whole array of legal concepts and terms from the Russian language into Ukrainian without noticing that the substantial content and the structure of the formally updated terminology remain unchanged. We must finally rethink the whole content of domestic civil law theory and methodology. The civil legislation of Ukraine must comply with not only the letter but also with the spirit of private law. Ukraine should return to the European cultural and legal tradition not on paper but in real life.

Two groups of tenth strategic directions of significant transformation of the theory and methodology of domestic civil law, which are being tested by legal scholars of Ukraine, are brought to your attention (Krupchan, Gaydulin, 2022). Therefore, this publication repeats some provisions, which are under consideration in Ukraine, because it is aimed at engaging foreign partners in the scientific discussion.

2. In the sphere of general methodology of private law

There is a need to rethink the thesis of the antagonistic nature of the worldview positions of natural law and legal positivism. At the same time, it should be kept in mind that this thesis has become consistent vulgar-mechanistic during the continuous stay of Ukrain-

ian civil law in a shared Soviet and post-Soviet ideological space, where Russian ideology dominated. Therefore, an important area for restructuring the scientific and legal methodology is search for a new *pluralistic philosophical paradigm of law*, which reconciles the various alternative concepts of nature and the essence of morality and law in the distinction and dialectical unity of private- and public-legal subsystems.

Further progressive development of Ukrainian civil law is impossible without clarifying the essence of modern Western legal concepts through the prism of their suitability for new theoretical understanding and solving the most pressing problems of private law (Majdanyk, 2019, pp. 143–180). Thus, it is expedient to draw special attention to those theories that modern Russian science and propaganda regard as the most hostile and dangerous by constantly declaring them as postmodern. Among such concepts, two competing schools are worthy of comparative study: the theory of *economic analysis of law* (*law and economics*) dominant in the US and the theory of *legal interpretivism* or *European hermeneutics of law*.

The deployment of systemic historical and legal research of origins, essential characteristics, and basic determinants of the Russian legal mentality is urgent. It is important to identify the profound reasons why this way of thinking contradicts the liberalist European paradigm of private law. For this purpose, it is necessary to get on with in-depth scientific discussion regarding the reactionary role of the *Asiatic mode of material and spiritual production*. This concept was developed by K. Marx in the early 1850s, but following Soviet science, it is purposefully suppressed in the modern political and legal ideology of the Russian Federation (Krader, 1975). This is due to the fact that the founders of Marxism were extremely negative about "Russian communism" as a doctrine and practice, which are antagonistic towards basic European cultural values. However, the need for this area of scientific search is primarily driven by the productivity of the cross-cultural approach to finding out the fundamental contradictions of European and Eastern civilizations.

It is essential to bring the style of philosophizing in the legal sphere, which characterizes the consistent scientific orientation in the spirit of high rationalism without any religious and ideological impurities, in line with the Western tradition. The crucial thing is that the relevant style recognizes no worldview system as absolutely correct. The subject of a separate study should involve Ukraine's capacity to borrow the institutional division of philosophical knowledge into (1) philosophy of law and (2) legal philosophy, which is common in the English-language cultural and legal tradition (Golding, Edmundson, 2005). If *philosophy of law* is recognized as metaphysics of the general ideological foundations of the legal system, then *legal philosophy* is understood as a praxeological theory of marginal principles of law and effectiveness of legal implementation on the basis of common sense and general principles of law.

There is an urgent need to revise conceptual and methodological approaches to the *interpretation of law and legal facts*. Such approaches have become almost axiomatic in post-Soviet law, but Western doctrine regards them as hopelessly outdated. In particular, it refers to recognition along with two stages of interpretation – clarification and explanation, the third – rulemaking interpretation, which is extremely negatively perceived in the Russian theory of law. Its hermeneutics is counterproductive towards the new institute named *Law of Interpretation*, which is being formed in English law. In this regard, by casting away banal "language phobias", it is advisable to carefully review the entire Ukrainian-language terminology system of civil law. Where it is possible and appropriate, we need to choose those synonymous verbal versions which have a direct etymological and semantic connection with Latin and English invariants, not a Russian loan word (Gaydulin, 2017, pp. 223–230).

3. In the field of a scientific theory of private law

For statist-minded modern Russian private law thinking, the idea of "decentralization" of the system of legal sciences is absolutely unfit. It is not acceptable for the totalitarian mentality that this approach allows for the highest positions of many versatile general theories of law that is inherent in the Western tradition of jurisprudence. In order to ensure the stability of such a pluralistic system of legal knowledge, it is proposed to supplement subordination ("vertical") interdisciplinary structural relations with a set of coordination ("horizontal") and reordination ("inverse") connections. A special role should be played by the subsidiary use of sectoral sub-theories to fill the gaps in general theories of law. It is believed that a civil law theory, that is formed amidst legal Europeanization and globalization, is able to play the relevant role.

Considerable intellectual efforts are now required to rethink the spirit of private law without being constrained by existing frameworks of the literal approach to legal thinking, which was formed in the bosom of the Soviet civil law tradition. This is prompted by the fact

that the "letter of civil law" is often a formalistic brake for creative development of a legal consciousness. Particular attention is paid to the widespread in the Western justice moral and legal principles of social harmony (the coordination of private interests), a universal common mind, the inviolable privacy of interpersonal relations, etc. For ideological reasons, Soviet law made these principles "anathema" as "bourgeois prejudices" motivated by class interests.

The post-Soviet institutional division of the private law system will be subject to radical reformatting. The new legal systematization should allow for the development of new branches and institutions of private law. In-depth implementation of some "exotic" legal institutions inherent in the Anglo-American cultural and legal tradition, similar to trust and acts of interpretative law, is important for the restructuring of civil law theory and methodology. The necessary step is substantiation of prospects for incorporation at the legislative level of such legal constructions in their European sense as: 1) denaturation; 2) reinterpretation; 3) innovation 4) adaptation; 5) convalidation, which together with the institution of amicable settlement are united by the concept of conversion. At the same time, the most pressing issue is the recognition of legal harmonization by the leading way of converging national systems of private law (Jessel-Holst, 2019, pp. 309–318).

The creation of *an updated theory of law sources* is most crucial for the true Europeanization of private law. In particular, the argumentation of the recognition of the sources of law: doctrines, contracts, practice of courts, discretion is required. Innovation is the conceptual development based on the experience of Scandinavian and some other countries, the expediency and need to introduce precedent private law in Ukraine, leaving legislation the main source of public law. This is explained by the fact that there is an approximation of different legal systems in the context of the place of judicial precedent in law systems. V. Beschastnyi, A. Fomenko, N. Obushenko and L. Nalyvaiko noted: "<...> the use of judicial precedent in the enforcement of continental law by countries becomes more widespread in clarifying and interpreting the provisions of the law. In the countries of the common law, on the contrary, the legislative path of the development of law is of particular importance" (Beschastnyi et al., 2019).

Europeanization and globalization of the domestic system of private law is impossible without a decisive "resuscitation" of a dogmatized theory of legal regulation, which is categorically distinguished from the current issues of *legal discretion* and *self-regulation* (Babadzhanian, 2022, pp. 11–16). The extremely high heuristic potential of civil law theory should be revealed by the results of establishing coherence between methods of scientific and legal knowledge and methods of legal regulation, in particular: 1) the dogmatic method of cognition and the imperative method of legal regulation; 2) comparative scientific method and dispositive method; 3) the hermeneutic method of cognition and the discretionary method of legal regulation.

4. Conclusions

This list of actions is not an exhaustive. It has a "motivating" nature and involves deploying a broad and open scholarly discussion in the domestic scientific society.

The framework, but programmatic, nature of this article determines that in order to commence the proposed restructuring of theoretical and methodological foundations of private law science, it is advisable to lay out the basic, in our view, directions of such conceptual restructuring. But this process should not be reduced only to the linguistic and terminological "cleansing" of our cultural and legal space liberated from the aggressor. The positive or integrative effect of such transformations, which are expected from the ideological "rehabilitation" of domestic civil law, is much more important than the negative ones. Only radical, conceptual changes in civil law theory and methodology can bring us closer to the European cultural and legal tradition (Hoffmann, 2016, pp. 181–196).

References:

Andrushchakevych, Yu. (2021). Law and ideology: the essential unity. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 11, pp. 77–83. Retrieved from: https://doi.org/10.32849/2663-5313/2021.11.10 [in English].

Babadzhanian, H. (2022). The concept of self-regulation of economic and trade activities. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 1, pp. 11–16. Retrieved from: https://doi.org/10.32849/2663-5313/2022.1.02 [in English].

Beschastnyi, V., Fomenko, A., Obushenko, N., Nalyvaiko, L. (2019). Place of Court Precedent in the System of Law of the European Union and in the System of Law of Ukraine. *Journal of Legal, Ethical and Regulatory Issues*, vol. 22, iss. 6. Retrieved from: https://www.abacademies.org/articles/place-of-court-precedent-in-the-system-of-law-of-the-european-union-and-in-the-system-of-law-of-ukraine-8893.html [in English].

Gaydulin, O. (2017). New concepts in Europeazation of private law after the 2016 Brexit referendum: some experience in interpretation of law. *Pravove rehuliuvannia ekonomiky – Legal Regulation of the Economy*, no. 16, pp. 223–230. Retrieved from: https://ir.kneu.edu.ua/handle/2010/24292 [in English].

Golding, M., Edmundson, W. (eds.) (2005). *The Blackwell Guide to the Philosophy of Law and Legal Theory.* Oxford: Blackwell, 355 pp. DOI: 10.1002/9780470690116 [in English].

Hoffmann, T. (2016). Europeanisation of Private Law in Ukraine: Comparisons in the Field of Law of Obligations. *Political and Legal Perspectives of the EU Eastern Partnership Policy* / ed. by T. Kerikmäe, A. Chochia. London: Springer, pp. 181–196. DOI: 10.1007/978-3-319-27383-9_12 [in English].

Jessel-Holst, C. (2019). EU Harmonization of Private Law as Exemplified in South-East European Countries. *Ukrainian Private Law and the European Area of Justice* / ed. by E. Kurzynsky-Singer, R. Kulms. Tübingen: Mohr Siebeck, pp. 309–318 [in English].

Kachur, V., Kozin, S. (2022). Methodological function of the state and law theory. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 1, pp. 68–73. Retrieved from: https://doi.org/10.32849/2663-5313/2022.1.11 [in English].

Krader, L. (1975). The Asiatic Mode of Production: Sources, Development and Critique in the Writings of Karl Marx. Assen, Netherlands: Van Gorcum, 454 p. [in English].

Kravchuk, D. (2021). Characteristics of temporal evaluation concepts of civil law. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 12, pp. 18–22. Retrieved from: https://doi.org/10.32849/2663-5313/2021.12.03 [in English].

Krupchan, O., Gaydulin, O. (2022). Shliakhy dokorinnoi rekonstruktsii teoretyko-metodolohichnykh zasad pryvatnoho prava v konteksti zvilnennia vitchyznianoi yurysprudentsii vid destruktyvnykh vplyviv totalitarnoi ideolohii postkomunizmu ta rosiiskoho shovinizmu: na shliakhu do hlobalizatsii ta yevropeizatsii pravovoi systemy Ukrainy [The ways of radical reconstruction of the theoretical and methodological foundations of private law in the context of liberation of domestic jurisprudence from destructive influences of totalitarian ideology of post-communism and Russian chauvinism: on the way to the globalization and Europeanization of the legal system of Ukraine]. *Yurydychna Ukraina – Legal Ukraine*, no. 2, pp. 25–30 [in Ukrainian].

Majdanyk, R. (2019). Development of Ukrainian Private Law in the Context of its Europeanization. *Ukrainian Private Law and the European Area of Justice* / ed. by E. Kurzynsky-Singer, R. Kulms. Tübingen: Mohr Siebeck, pp. 143–180 [in English].

Walker, S., Koshiw, I. (2022). Mass civil legal action to seek compensation for Ukrainian war victims. *The Guardian*, May 31. Retrieved from: https://www.theguardian.com/world/2022/may/31/mass-civil-legal-action-to-seek-compensation-for-ukrainian-war-victims [in English].

Олександр Крупчан,
доктор юридичних наук, професор, дійсний член (академік) Національної академії правових наук України, директор, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Миколи Раєвського, 23-а, Київ, Україна, індекс 01042, ndippp@adamant.net
ORCID: *orcid.org/0000-0002-3701-5658*

Олександр Гайдулін,
доктор юридичних наук, доцент, провідний науковий співробітник, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Миколи Раєвського, 23-а, Київ, Україна, індекс 01042, gaydulin@i.ua
Scopus-Author ID: 57217828443
ORCID: *orcid.org/0000-0002-1269-7007*

КАРДИНАЛЬНА РЕКОНСТРУКЦІЯ ТЕОРЕТИЧНОЇ І МЕТОДОЛОГІЧНОЇ ОСНОВИ ПРИВАТНОГО ПРАВА В УКРАЇНІ: ВИЗВОЛЕННЯ ВІД ВПЛИВІВ ПОСТКОМУНІЗМУ І РОСІЙСЬКОГО ШОВІНІЗМУ ТОТАЛІТАРНОЇ ІДЕОЛОГІЇ

Анотація. ***Мета.*** Дослідження стосується фундаментальних питань комплексної оцінки перспектив перебудови теоретичних і методологічних засад вітчизняної цивілістики з огляду на необхідність рішучого позбавлення правосвідомості від реліктів радянської ідеології, що загострюється в умовах всенародного протистояння України повномасштабній агресії з боку Російської Федерації. Ці проблеми ідеологічної «санації» нашої суспільної свідомості набули суцільного характеру, проте вони найбільш актуальні для сучасної юриспруденції.

Методи дослідження. У методологічному плані дослідження являє собою спробу критики впливів політичної ідеології на приватноправову науку з позиції правової культурології. Можливості крос-культурного правового методу були продемонстровані на прикладі систематичного аналізу насамперед загальної методології приватного права або цивілістичної філософії.

Результати. Цей аналіз зосереджений на дослідженні двох напрямів змістовної реконструкції цивілістичної науки: 1) у сфері загальної методології приватного права; 2) у сфері наукової приватноправової теорії. Це дало змогу виокремити десять пріоритетних напрямів невідкладних дій для очищення правової науки від деструктивних впливів ворожої тоталітарної ідеології, зокрема імперської доктрини так званого «русского мира». Цей перелік не є вичерпним. Він має «мотивуючий» характер і передбачає розгортання широкої та відвертої наукової дискусії у вітчизняному науково-правовому товаристві.

Висновки. Найважливіший висновок полягає в тому, що настав час припинити ганебну присутність нашої юриспруденції в культурно-правовому просторі, де домінують релікти марксистсько-ленінської ідеології, які отримали друге життя в лоні горезвісного «путінізму». Ми мусимо нарешті переосмислити весь зміст вітчизняної цивілістичної теорії та методології. Цивільне законодавство має відповідати не лише букві, а й духу приватного права. Україна повинна повернутися до європейської культурно-правової традиції не словами, а справами. Мислення на основі принципів природного права має виступати проти філософії примітивного позитивізму.

Ключові слова: філософія природного права, теорія приватного права, цивілістична методологія, правова культура, тоталітарна ідеологія, здоровий глузд.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 343.137.5
DOI https://doi.org/10.32849/2663-5313/2022.2.20

Olexandra Kaminska,
Postgraduate Student at the Department of Criminal Procedure, National Academy of Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, a.immensely@gmail.com
ORCID: *orcid.org/0000-0002-1524-0176*

Kaminska, Olexandra (2022). Specificities of the application of procedural coercive measures during inquiries in respect of juveniles. *Entrepreneurship, Economy and Law*, 2, 130–135, doi https://doi.org/10.32849/2663-5313/2022.2.20

SPECIFICITIES OF THE APPLICATION OF PROCEDURAL COERCIVE MEASURES DURING INQUIRIES IN RESPECT OF JUVENILES

Abstract. ***Purpose.*** The purpose of the scientific article is to analyse the existing coercive measures applied to juveniles during the inquiry. **Research methods.** The work is performed using general scientific and special methods of scientific knowledge: dialectical, historical and legal, formal and logical, methods of hermeneutics, generalization, comparison, etc. **Results.** An integral part of criminal proceedings is the protection of the rights of juveniles, the inadmissibility of illegal and unjustified prosecution. The need to study and summarize those coercive measures that are appropriate for juveniles who commit criminal offenses makes this article relevant. Improving and establishing in law the most humane precautionary measures that can fully ensure the rights and freedoms of juvenile offenders will help ensure the best interests of children in conflict with the law. Emphasis is placed on the existence of a significant number of problematic, controversial and unresolved issues of the CPC of Ukraine that arise during the application of measures of procedural coercion against a minor suspect, accused during the inquiry. **Conclusions.** Procedural coercive measures are an extreme remedy applied only under certain conditions and circumstances. Coercive measures include precautionary measures which are regarded as "special sanctions" applied to a person who has not yet been found guilty by the court. Juveniles who have committed a criminal offence may be subject to such measures as personal commitment and personal warranty. A transfer under supervision of parents, guardians, tutors or the administration of a children's institution is considered to be a special precautionary measure. The main purpose of procedural coercive measures applied to a juvenile as a precautionary measure is to exert educational influence on the consciousness and behaviour of the juvenile offender. It is proposed to add to the list of main measures provided for in article 176 of the CPC of Ukraine a precautionary measure such as the transfer of a juvenile suspect or accused person under supervision to parents, guardians, tutors or the administration of a children's institution.

Key words: coercion, influence, precautionary measure, criminal offense, pre-trial investigation.

1. Introduction

The Criminal Procedure Code provides for cases in which a person who participates in criminal procedural relations may be subjected to procedural coercive measures, of which the most severe are precautionary measures. Precautionary measures are a significant component of procedural coercive measures, and their use is always linked to restrictions on the rights and freedoms of certain categories of persons (suspect, accused). The law provides for two precautionary measures that may be applied to a juvenile suspect or accused who has committed a criminal offence: personal commitment, personal warranty. An alternative or special precautionary measure is provided for in the legislation for transferring a juvenile suspect or accused person under supervision of parents, guardians, tutors.

Specific aspects of taking precautionary measures in criminal proceedings were under the focus of Y.P. Alenin, Y.M. Hroshevyi, A.Y. Dubynskyi, O.V. Kaplina, Z.F. Kovryha, Y.D. Lukianchykov, D.P. Pysmennyi, V.V. Rozhnova, S.M. Stakhivskyi, L.D. Udalova, V.I. Farynnyk, O.Y. Khablo, O.F. Vakulenko, S.V. Pastushenko, N.V. Rohatynska, and others. But now, due to the rapid development of criminal procedure under international child-friendly legislation, the issue of taking coercive measures against juveniles during the conduct of an initial inquiry is not examined.

The purpose of the scientific article is to analyse the existing coercive measures applied to juveniles during the inquiry. In order to achieve this purpose, the following tasks

should be fulfilled: to describe the concept of coercion in criminal proceedings and its place in the criminal justice system; to define the role of precautionary measures in the system of procedural coercive measures; to highlight the main theoretical and legal basis for using precautionary measures on juveniles during an inquiry.

Methodological tools are selected in accordance with the purpose set, the specificity of the object, and the subject matter of the study. The work was performed using general scientific and special methods of scientific knowledge: dialectical, historical-legal, formal-logical, hermeneutic methods, generalization, comparison.

The scientific novelty of the publication is that the research and generalization of coercive measures applied to juvenile offenders allow identifying the most effective ones, such as: personal commitment, personal warranty, transfer under supervision. The expediency of applying the listed measures to juveniles who have committed criminal offences has been analysed. The study makes proposal to add to the list of precautionary measures a transfer of a juvenile suspect or accused under supervision of parents, guardians, tutors or the administration of a children's institution.

2. Peculiarities in the application of measures of procedural enforcement

Coercion is an inherent feature of the legal and regulatory mechanism. A procedural coercive measure is an element in the criminal procedure regulatory mechanism by which the state implements the requirements of law in a situation where a person does not fulfil or improperly fulfils the procedural obligations established by law (Matskiv, 2008, p. 97). The main factor determining the necessity of its application is the possibility of the participant in proceedings to commit an unlawful act. A coercive measure is exercised through a system of actions and decisions ensuring the achievement of the objective of a specific procedural act or the goal of a certain stage of criminal proceedings or the accomplishment of the objectives of criminal proceedings in general. But provided that "no person shall be subjected to unjustified procedural coercive measures" (art. 2 of the CPC) (Ukrainian Criminal Procedure Code). Therefore, coercion is implemented through a system of measures that are the subject of discussion in scientific journals.

According to V.M. Kornukov, coercive measures in criminal proceedings are the totality of all coercive measures provided for by the rules of criminal procedure law, aimed at proper performance of tasks of criminal proceedings and fulfilment by the participants in proceedings own duties during investigation and consideration of criminal proceedings (Kornukov, 1978, p. 7).

Following Blahodyr and Liash, a coercive measure is an effective remedy against crime required at different stages of the criminal procedure (Liash, 2010, p. 32). In addition, they argue that coercive measures in criminal proceedings are a type of legal coercive measures involving the presumed and actual restriction (deterioration) of the social (including legal) status for the person subject to coercion and providing for the coercive threat or the actual negative effects of material, moral or organizational nature (Liash, 2010, p. 32).

V.V. Rozhnova defines coercive measures as the procedural means of State and legal coercion, provided for by criminal procedure law, applied by the authorized bodies conducting the proceeding, in a manner clearly defined by law, against persons, involved in criminal proceedings, to prevent and stop their unlawful actions, to identify and fix evidence in order to successfully fulfil the tasks of legal proceedings (Rozhnova, 2003, p. 9).

M.A. Pohoretskyi argues that coercive measures are those provided for in the criminal procedure law, applied in the manner prescribed by it by the authorized State bodies and their officials, provided the presence of grounds established by law regarding the suspect, the accused and other participants in the criminal proceedings, and aimed at preventing and deterring unlawful actions on the part of such persons, which impede or may impede with the proper investigation of criminal proceedings by the bodies of pre-trial investigation and court (Pohoretskyi, 2007 p.4). We agree with that view.

The analysis of the provisions of the CPC in force, the results of scientific research in this field and the materials of practice, it may be considered that coercive measures are divided into precautionary measures (provided for in art. 176 of the CPC) and measures to support criminal proceedings (Criminal Procedure Code of Ukraine, 2012).

3. Peculiarities of measures of procedural force for minors

As above noted, precautionary measures by their legal nature are procedural coercive measures. These are certain restraints for a person suspected or accused of committing a criminal offence (Sivak, 2014, pp. 294-301). Although they are applied exclusively by court, they did not include the factors of punishment and the attitude of the State towards the individual as a perpetrator. The literature review reveals that the precautionary measures are "procedural sanctions" (Cherniavskyi, Tsutskiridze, Dudarets, 2019, p. 66). Procedural

sanctions are measures of influence applied to a person in case of violation of the conditions of procedural norm and entail certain adverse (negative) effects (Sivak, 2014, pp.294-301).

The purpose of the application of precautionary measures to juveniles is: to ensure the normal course of criminal proceedings; to prevent and remove real and possible obstacles on the part of the suspect (accused) in proceedings; to ensure the participation of the suspect (accused) in proceedings if such participation is required and where he or she arrives as soon as possible at the place of their conduct; to prevent the perpetration of further offences by the suspect (accused); the need to neutralize attempts of the suspect (accused) to create obstacles to the implementation of the procedural decisions, as well as educational influence on the juvenile person (Vakulenko, 2015, p.93).

General precautionary measures in accordance with the provisions of article 176 of the CPC are: personal commitment; personal warranty; bail; house arrest; detention (Criminal Procedure Code of Ukraine). According to the provisions of article 176 of the CPC, precautionary measures are applied: during pretrial investigations, by the investigating judge at the request of the investigator agreed with the prosecutor, or at the request of the prosecutor; during judicial proceedings, by the court at the request of the prosecutor (Criminal Procedure Code of Ukraine, 2012). The prosecutor is the supervisor of this category of proceedings; in order to ensure maximum respect for the procedural guarantees by the juvenile suspect, the accused, he decides independently on the need to apply a precautionary measure or verifies the lawfulness and reasonableness of the relevant decision of the investigator, after which he submits the decision to be considered by the investigating judge (Criminal Procedure Code of Ukraine, 2012).

The CPC of Ukraine states that, in addition to participants in criminal proceedings who have the right to initiate precautionary measures and to take decisions on their application, the defence party has the right to do so, that is, it has the possibility to submit a motion for a precautionary measure, which justifies the declared principle of adversarial proceedings in criminal proceedings (Criminal Procedure Code of Ukraine, 2012).

The application of a precautionary measure to a juvenile requires an individual approach. Consideration should be given to the age and psychological characteristics of the underaged, the state of health, the type of activity, the place of residence, the effectiveness of the measures chosen, and whether the juvenile has committed a criminal misdemeanour or a crime. Precautionary measures in criminal proceedings against juveniles should be protective and educational, but in no way punitive (Sivak, 2014, pp.294-301).

Letter 223-1134/0/4-13 of the High Specialized Court of Ukraine for consideration of civil and criminal cases of July 18, 2013 explicitly states that criminal proceedings against juveniles shall be conducted in accordance with the general procedure, taking into account the particularities provided for in Chapter 38 of the CPC, and in compliance with the principle of ensuring the exercise by juveniles of the right to enjoy additional guarantees established by domestic law and international treaties (Letter of the Supreme Specialized Court of Ukraine for consideration of civil and criminal cases, 2013). This approach is consistent with the provisions of the main international legal instruments in the field of the rights of the child.

In particular, article 3 of the UN Convention on the Rights of the Child defines that "in all actions concerning children, the best interests of the child shall be a primary consideration", and article 37 stipulates that "no child shall be subjected to torture or other cruel, inhuman or degrading treatment or punishment" (Convention on the Rights of the Child, 1989). Furthermore, para. 54 of the UN Guidelines for the Prevention of Juvenile Delinquency (the Riyadh Guidelines) stipulates that "no child or young person should be subjected to harsh or degrading correction or punishment measures at home, in schools or in any other institutions" (Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines), 1990). Finally, para. 5.1. of United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") provide that the juvenile justice system shall emphasize the well-being of the juvenile and shall ensure that any reaction to juvenile offenders shall always be in proportion to the circumstances of both the offenders and the offence (United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985).

As already mentioned, during pre-trial investigation of criminal offences (including those committed by juveniles), precautionary measures such as personal commitment and personal warranty (Criminal Procedure Code of Ukraine, 2012) are permitted.

Personal commitment is a precautionary measure, implying restriction of the right of a suspect or accused person to freedom of movement, free choice of residence or stay by submission on the suspect, accused of an obligation to perform duties imposed on him or her by the investigating judge, court as specified in

part 5, article 194 of the CPC (Cherniavskyi, Tsutskiridze, Dudarets, 2019, p.44; Criminal Procedure Code of Ukraine, 2012).

It should be noted that part of the scientific community considers personal commitment to be ineffective, as there is no awareness and understanding of its importance to the juvenile person. Vakulenko believes that personal commitment is based on the effect of fear of punishment (Vakulenko, 2015, p.98). Tarasova argues that the purpose of the precautionary measure is prevention, avoidance of undesirable behaviour, and not intimidation of a juvenile person, since the precautionary measures do not constitute punishment (Tarasova, 2012, p.155).

Personal warranty is a precautionary measure, implying the provision by persons whom the investigating judge considers to be a credible written undertaking that they shall be entrusted for the performance by a suspect or accused person of the duties assigned to him or her, according to article 194 of the CPC of the Ukraine, and undertake, if necessary, to deliver him or her to the pre-trial investigation body or to the court at short notice (Cherniavskyi, Tsutskiridze, Dudarets, 2019, p.44; Criminal Procedure Code of Ukraine, 2012). Personal warranty is grounded on the fact that other persons, guarantors, who mainly have personal or service ties with the person they vouched for, and can influence him morally, are responsible for his or her behaviour (Chernyavsky, Tsutskiridze, Dudarets, 2019, p. 45).

Moreover, the use of personal warranty shows how high legal culture in society is and whether it is possible to involve the public in the rehabilitation of juvenile offenders. Such persons should be specially trusted primarily by the juvenile offender and not only by the court. Moreover, the presence of "effect of shame" (that you will not justify trust; that others are responsible for you; that you cannot keep your words). It should be added that such a precautionary measure is not of a deterrent character, as well as personal commitment (Rogatynska, Kolodiichuk, 2018, p.178).

In addition to the above-mentioned precautionary measures, juvenile suspects or accused persons may be subject to a special precautionary measure, such as the transfer of juveniles under the supervision of their parents, guardians or tutors, in case of juveniles being brought up in a children's institution, their transfer under supervision of the administration of the institution (Criminal Procedure Code of Ukraine). It consists of a written undertaking by any of those persons or a representative of the administration of the children's institution to ensure that the juvenile suspect or accused person is brought before the investigator, the prosecutor, the investigating judge, the court, if necessary, as well as his or her good conduct. The transfer under supervision of parents and other persons is possible only with their consent and the consent of the juvenile suspect or accused. A person who undertook to conduct supervision, shall have the right to refuse further fulfilling of this obligation, upon giving a notice thereon in advance (Criminal Procedure Code of Ukraine, 2012).

O.F. Vakulenko believes that such special precautionary measure, transfer under the supervision of parents, guardians, tutors, administration of the children's institution, is the most effective precautionary measure for juvenile suspects, accused (Vakulenko, 2015, p.96). This is due to the provision of the so-called Beijing Rules (United Nations Standard Minimum Rules for the Administration of Juvenile Justice), which stipulate that no juvenile shall be removed from parental supervision, whether partly or entirely, unless the circumstances of her or his case make this necessary (United Nations Standard Minimum Rules for the Administration of Juvenile Justice). Within the family, the parents have not only the right but also the responsibility to care for and supervise their children. The separation of children from their parents is a measure of last resort, and may be resorted to only when the facts of the case clearly warrant this grave step (for example child abuse) (United Nations Standard Minimum Rules for the Administration of Juvenile Justice). S.V. Pastusheko believes that "a person (or persons) supervising a juvenile suspect or accused, should have his or her respect, be his or her authority, deal with the problems of the teenager, ensure control over his or her behaviour and the like" (Pastusheko, 2017, p.128).

The difficulties of transferring a juvenile suspect or accused person under the supervision, such as the complexity of the procedure of application; lack of understanding of the rights and obligations that should be respected by the "supervisors" etc. The analysis of this special precautionary measure enables to conclude that the list of basic precautionary measures provided for in article 176 of the CPC should be added.

It should be noted that a temporary precautionary measure is the detention of a person (the CPC, art. 176) (Criminal Procedure Code of Ukraine). A person who commits a criminal misdemeanour is detained for a maximum of three hours from the moment of actual detention. The authorized official who has carried out detention and the person conducting the initial inquiry shall immediately inform the person, in

a language he or she understands, of the grounds for the detention and of the criminal offence for which he or she is suspected of having committed, and explain his or her right to have a defence counsel, to receive medical assistance, to give explanations, to give evidence or not to say anything about the suspicion against him or her, to inform other persons immediately of his or her detention and whereabouts in accordance with the provisions of the CPC of Ukraine, to demand that detention be verified and other procedural rights (art. 298-2) (Criminal Procedure Code of Ukraine).

A juvenile offender may be detained and imprisoned only if the juvenile is suspected or accused of a grave crime or exceptionally grave crime, provided that the application of another precautionary measure will not prevent the risks provided for in article 177 of the CPC (Criminal Procedure Code of Ukraine).

An analysis of the legislative provisions in force and their use enables to assert the CPC of Ukraine does not regulate a significant number of problematic, controversial and unresolved issues, arising due to application of coercive measures to a juvenile suspect or accused person during an initial inquiry.

4.Conclusions

Procedural coercive measures are an extreme remedy applied only under certain conditions and circumstances. Coercive measures include precautionary measures which are considered "special sanctions" applied to a person who has not yet been found guilty by the court. Juveniles who have committed a criminal offence may be subject to such measures as personal commitment and personal warranty. A transfer under supervision of parents, guardians, tutors or the administration of a children's institution is considered to be a special precautionary measure. The main purpose of procedural coercive measures applied to a juvenile as a precautionary measure is to exert educational influence on the consciousness and behaviour of the juvenile offender. It is proposed to add to the list of main measures provided for in article 176 of the CPC of Ukraine a precautionary measure such as the transfer of a juvenile suspect or accused person under supervision to parents, guardians, tutors or the administration of a children's institution.

References:

Cherniavskyi, S.S., Tsutskiridze, M.S., Dudarets, R.M. (2019). *Dosudove rozsliduvannia kryminalnykh prostupkiv [Pre-trial investigation of criminal offenses].* Kyiv (in Ukrainian).

Kerivni pryntsypy zapobihannia zlochynnosti sered nepovnolitnikh (Er-Riiadski kerivni pryntsypy): vid 14 hrud. 1990 roku [Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) of December 14, 1990]. (1990). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/995_861#Text (in Ukrainian).

Konventsiia pro prava dytyny: vid 20 lyst. 1989 roku [Convention on the Rights of the Child of November 20, 1989]. (1989). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/995_021#Text (in Ukrainian).

Kornukov, V.M. (1978). *Meru protsessualnoho prynuzhdenyia v uholovnom sudoproyzvodstve. [Coercive measures in criminal proceedings].* Kyiv (in Russian).

Kryminalnyi protsesualnyi kodeks Ukrainy: vid 13 kvit. 2012 roku № 4651-VI [Criminal Procedure Code of Ukraine of April 13, 2012 № 4651-VI]. (2012). *rada.gov.ua*. Retrieved from: https://zakon.rada.gov.ua/laws/show/4651-17#Text (in Ukrainian).

Liash, A.O. (2010). *Zastosovuvannia prymusu pid chas provadzhennia slidchykh dii: navch. posibnyk dlia studentiv vyshch. navch. zakladiv [Use of a coercive measure during investigative actions].* Kyiv (in Ukrainian).

Lyst Vyshchoho spetsializovanoho sudu Ukrainy z rozghliadu tsyvilnykh i kryminalnykh sprav Pro deiaki pytannia zdiisnennia kryminalnoho provadzhennia shchodo nepovnolitnikh: vid 18.07.2013 № 223-1134/0/4-13 [Letter of the Supreme Specialized Court of Ukraine for Civil and Criminal Cases On some issues of criminal proceedings against juveniles from July 18, 2013 № 223-1134/0/4-13]. (2013). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/v1134740-13#Text (in Ukrainian).

Matskiv, H.Ia. (2008). Kryminalno-protsesualni stroky pry zastosuvanni zakhodiv protsesualnoho prymusu [Criminal procedural terms in the application of coercive measures]. *Candidate's thesis.* Kyiv (in Ukrainian).

Minimalni standartni pravyla Orhanizatsii Obiednanykh Natsii, shcho stosuiutsia vidpravlennia pravosuddia shchodo nepovnolitnikh (Pekinski pravyla): vid 29 lystop. 1985 roku [United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) from November 29, 1985]. (1995). *rada.gov.ua.* Retrieved from: https://zakon.rada.gov.ua/laws/show/995_211#Text (in Ukrainian).

Pastushenko, S. V. (2017). *Zastosuvannia zapobizhnykh zakhodiv do nepovnolitnoho pidozriuvanoho, obvynuvachenoho. [Application of precautionary measures to a juvenile suspect or accused].* Kyiv: Nats. akad. vnutr. Sprav (in Ukrainian).

Pohoretskyi, M.A. (2007). Obgruntuvannia rishen pro zastosuvannia prymusovykh zakhodiv u kryminalnykh spravakh pro orhanizovanu zlochynnist. [Substantiation of decisions on the application of coercive measures in criminal cases of organized crime]. *Borotba z orhanizovanoiu zlochynnistiu i koruptsiieiu (teoriia i praktyka) – Fight against organized crime and corruption (theory and practice),* 15, 3-14.

Rohatynska, N., Kolodiichuk, N. (2018). Zastosuvannia zapobizhnykh zakhodiv shchodo nepovnolitnoho: spektr nevyrishenykh pytan. [Application of precautionary measures against juveniles : a range of unresolved issues]. *Aktualni problemy pravoznavstva – Current issues of jurisprudence,* 4, 174-179. (in Ukrainian).

Rozhnova, V.V. (2003). Zastosuvannia zakhodiv protsesualnoho prymusu, poviazanykh z izoliatsiieiu osoby [Application of coercive measures related to the isolation of a person]. *Candidate's thesis.* Kyiv (in Ukrainian).

Sivak, O.V. (2014). Henezys stanovlennia y rozvytku zapobizhnykh zakhodiv shchodo nepovnolitnikh: vplyv istorychnykh chynnykiv na modernizatsiiu zakonodavstva v systemi zapobizhnykh zakhodiv. [Genesis of formation and development of precautionary measures against juveniles: the influence of historical factors on the modernization of legislation in the system of precautionary measures]. *Pravo i suspilstvo – law and society,* 4, 294-301 (in Ukrainian).

Tarasova, I.V. (2012). Zastosuvannia do nepovnolitnikh zapobizhnykh zakhodiv, shcho obmezhuiut svobodu peresuvannia. [Application of precautionary measures to juveniles restricting freedom of movement]. *Pravnychyi visnyk Universytetu «KROK» – KROK University Legal Bulletin*, 13, 153–159. (in Ukrainian).

Vakulenko, O.F. (2015). Problemy zastosuvannia zapobizhnykh zakhodiv shchodo nepovnolitnikh. [Problems of application of precautionary measures against juveniles]. *Naukovyi visnyk Natsionalnoi akademii vnutrishnikh sprav – Scientific Bulletin of the National Academy of Internal Affairs,* 1, 91–99 (in Ukrainian).

Олександра Камінська,
ад'юнкт кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, a.immensely@gmail.com
ORCID: *orcid.org/0000-0002-1524-0176*

ОСОБЛИВОСТІ ЗАСТОСУВАННЯ ЗАХОДІВ ПРОЦЕСУАЛЬНОГО ПРИМУСУ ПІД ЧАС ПРОВЕДЕННЯ ДІЗНАННЯ ЩОДО НЕПОВНОЛІТНІХ

Анотація. ***Мета статті.*** Метою наукової статті є аналіз наявних заходів процесуального примусу, що застосовуються до неповнолітніх під час проведення дізнання. ***Методи дослідження.*** Робота виконана з використанням загальнонаукових та спеціальних методів наукового пізнання, таких як: діалектичний, історико-правовий, формально-логічний, методи герменевтики, узагальнення, порівняння тощо. ***Результати.*** Невід'ємною частиною кримінального судочинства є захист прав неповнолітніх, недопустимість незаконного, необґрунтованого притягнення їх до кримінальної відповідальності. Необхідність дослідження і узагальнення тих заходів процесуального примусу, які є доречними у застосуванні до неповнолітніх, що вчиняють кримінальні проступки, і зумовила актуальність даної статті. Удосконалення та закріплення на законодавчому рівні найбільш гуманних запобіжних заходів, які повною мірою можуть забезпечити права і свободи неповнолітніх правопорушників, сприятимуть забезпеченню найкращих інтересів дітей, що перебувають у конфлікті з законом. Наголошено на наявності значної кількості проблемних, спірних та неврегульованих КПК України питань, що виникають під час застосування заходів процесуального примусу щодо неповнолітнього підозрюваного, обвинуваченого під час дізнання. ***Висновки.*** Заходи процесуального примусу є крайніми заходами впливу, що застосовуються за певних умов та обставин. До заходів процесуального примусу відносять запобіжні заходи, які вважаються «спеціальними санкціями», що застосовуються до особи, яку ще не визнано винною судом. Щодо неповнолітніх, які вчинили кримінальний проступок, то допускається застосування таких запобіжних заходів, як особисте зобов'язання та особиста порука. Спеціальним запобіжним заходом вважається передання під нагляд батькам, опікунам, піклувальникам чи адміністрації дитячої установи. Головним завданням процесуального примусу, що застосовується до неповнолітнього у вигляді запобіжного заходу, є виховний вплив на свідомість та поведінку неповнолітнього правопорушника. Пропонується додати до переліку основних запобіжних заходів, передбачених ст. 176 КПК України, такий запобіжний захід, як передання неповнолітнього підозрюваного, обвинуваченого під нагляд батькам, опікунам, піклувальникам чи адміністрації дитячої установи.

Ключові слова: примус, вплив, запобіжний захід, кримінальний проступок, досудове розслідування.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022

UDC 341.3; 341.4
DOI https://doi.org/10.32849/2663-5313/2022.2.21

Volodymyr Korol,
Doctor of Law, Head of the Department of Private International Law and Euro Integration Legal Issues, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, royalviking777@gmail.com
ORCID: *orcid.org/0000-0003-3573-3426*

Oksana Nebyltsova,
PhD in Economics, Professor, Deputy Head of the Department of International Accounting and Audit, Kyiv National Economic University named after Vadym Hetman, 54/1, Peremohy avenue, Kyiv, Ukraine, postal code 03057, onebyltsova@hotmail.com
ORCID: *orcid.org/0000-0002-8931-2021*

Korol, Volodymyr, Nebyltsova, Oksana (2022). International law fundamentals of judicial state immunity in the context of warfare. *Entrepreneurship, Economy and Law*, 2, 136–141, doi https://doi.org/10.32849/2663-5313/2022.2.21

INTERNATIONAL LAW FUNDAMENTALS OF JUDICIAL STATE IMMUNITY IN THE CONTEXT OF WARFARE

Abstract. ***The purpose of the article*** is to study international law approaches which determine both restrictions and opportunities concerning legal and legitimate overcoming of the states' absolute immunity barrier in warfare.

Research methods. The article is grounded on inductive reasoning: its epistemological capabilities were supplemented, and cognitive limitations were balanced by applying a set of methods of studying judicial immunity phenomenon, i. e., system analysis, comparative law, trends extrapolation.

Results. Attention is focused on key aspects of the Supreme Court's Opinion regarding judicial immunity of the foreign state in the civil case of compensation for damage caused to the natural person and her children in connection with the death of her husband and the father of children as a result of such state armed forces' actions. Its provisions and conclusions determined the advisability of studying the relevant rules related to the immunity of the states and actions of its armed forces of the European Convention on State Immunity (1972), commentary of the International Law Commission to the United Nations Convention on Jurisdictional Immunities of States and Their Property (2004), long-term disputes between Italy and Germany concerning compensation for damage caused by army's actions during World War II and the appropriate 2012 International Court of Justice decision as well as gaps and imperfection of the Ukrainian legislation in terms of immunity of states and their property.

Conclusions. Ensuring a proper level of natural persons rights and legitimate interests protection violated by armed forces of the foreign state is challenging within both its absolute judicial immunity and restrictive immunity in some civil proceedings. It is necessary to consider the degree of freedom to exercise sovereign rights by a foreign state in the broader context of fundamental principles, peremptory norms of international law (*jus cogens*). Deliberate violation of them may result in denial or restriction of its rights, incl. to judicial immunity, lawfully. Applying of the foreign state's immunity "ignoring" concept is quit non-standard approach for overcoming the legal barrier of its absolute judicial immunity in the civil case of compensation for damage caused to the natural person in the context of armed forces' actions and delicti exception.

Key words: judicial immunity, foreign state, compensation for damage.

1. Introduction

In the context of prolonged hostilities maintained by the armed forces of two or more states, the scale of the socially significant issue of the legal protection of the fundamental personal non-property right – the right to life of both civilians and the military, is increasing every day. Consequently, the pre-existing problems become aggravated, and emerging ones are actualized in terms of international public and private international laws. They concern the jurisdictional immunity of states in general and its integral component – judicial immunity – in particular.

The above necessitates the statement of the article's purpose, which is the review of international law approaches that determine restrictions and opportunities for the legal and legitimate overcoming of the barrier of absolute immunity of states in the context of hostilities.

To achieve the purpose, it is advisable to refer to the conventions on immunities of states and their property developed by international organizations, the relevant laws of Ukraine, the decisions of the courts of Ukraine and the International Court of Justice, as well as scientific publications of domestic and foreign lawyers, such as Yu.V. Cherniak, D.O. Koval, B.A. Boczek.

2. Interstate disputes between Ukraine and Russia within institutional and *ad hoc* arbitration

Along with the military actions in Ukraine, there are ensuing legal processes with the need to resolve organically related issues of state sovereignty and jurisdiction. They are taking place between Ukraine and Russia (hereinafter referred to as "the foreign state") in line with legal processes within both institutional and *ad hoc* arbitration. Thus, in 2019, the WTO Dispute Settlement Body decided to prohibit the transit of goods from Ukraine across the territory of the foreign state. At the same time, for the first time in interstate disputes, it applied sub-clause III clause b of Art. XXI GATT which provides that nothing in the agreement shall be construed to prevent any contracting party from taking any action which it considers necessary for the protection of its essential security interests taken in time of war or other emergency in international relations.

Therefore, on February 21, 2020, the *ad hoc* Tribunal, established under Annex VII to the 1982 United Nations Convention on the Law of the Sea, delivered a judgment that started a new chapter in the judicial confrontation between Ukraine and the Russian Federation regarding jurisdiction in the Dispute Concerning Coastal State Rights in the Black Sea, Sea of Azov, and Kerch Strait (Koval, 2021, p. 7).

It is interesting to note that these disputes were adjudicated between legally equal, sovereign subjects of international law. At the same time, one of the issues on the agenda of the state and society is the availability of viable legal opportunities for private law entities to file lawsuits against the foreign state in the courts of Ukraine following consequences the of actions of the latter's army, which led to the death of citizens of Ukraine, personal injuries, and destruction or damage to property.

3. Judgement of the Supreme Court on the foreign state's judicial immunity

On April 14, 2022 the Civil Court of Cassation, as part of the Supreme Court, adopted a ruling in case № 308/9708/19, which deserves attention in terms of the implemented conceptual and legal approaches to the issue of state judicial immunity.

The materials published on the official website of the Supreme Court set out the essence of the case where the plaintiff, acting in her own interests and on behalf of young children, appealed to the Ukrainian court with a claim to the foreign state for compensation for moral damage caused to her and her children in connection with the death of her husband and father of her children as a result of the armed aggression of the foreign state on the territory of Ukraine (Supreme Court, 2022).

The court of cassation adopted such a decision because the court of original jurisdiction and the court of appeals had issued a ruling based on established legal fundamentals regarding the absolute nature of the judicial immunity of the foreign state. This approach is enshrined in part 1 of Art. 79 of the Law of Ukraine "On Private International Law" dated June 23, 2005 № 2709-IV, which, at the same time, provides for narrowing the scope of absolute judicial immunity of a sovereign state in view of the norms of an international treaty or the law of Ukraine.

Justifying its opinion, the Supreme Court referred to the European Convention on State Immunity, adopted by the Council of Europe on May 16, 1972 (Council of Europe, 1972) and the United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly resolution 59/38 on December 2, 2004 (not yet in force as of May 2022) (United Nations, 2004). However, Ukraine is not a party to any of these conventions, but they reflect, in the opinion of the Supreme Court, "a trend in the development of international law regarding the recognition of certain limits within which a foreign state is entitled to invoke immunity in civil proceedings" (Supreme Court, 2022). In addition, the resolution contains a potentially constructive generalization for the citizens of Ukraine that both conventions "provide that a State cannot invoke immunity from jurisdiction before a court of another State which is otherwise competent in a proceeding which relates to injury to the person, if the act or omission occurred in whole or in part in the territory of that other State and if the author of the act or omission was present in that territory at the time of the act or omission. (Supreme Court, 2022).

4. Conceptual and legal approaches to international treaties on state immunity

In this context, specific conceptual and legal aspects are worth discussing to understand whether there may be counter-arguments that are capable of criticizing the reasoning and con-

clusions of the Supreme Court. Thus, the overall interpretation of the norms of the 1972 European Convention does not allow ignoring its 31st article, the disposition of which links the immunity of a contracting state and actions of its army that is completely correlated with the essence of the court case. Consequently, this article clearly states the preservation of immunity by a contracting state regardless of any actions of its armed forces when on the territory of another Contracting State (Council of Europe, 1972).

Given the lack of a similar norm in the 2004 UN Convention, the military aspect can be considered to be present latently and closely related to the new, at that time, conceptual approaches in international law. In particular, the report of the 1990 International Law Commission to the UN General Assembly on personal injuries and damage to property (initially – Art. 13) referred to the introduction of the concept of a "non-profit civil offence" and the responsibility of a State to pay pecuniary compensation for damage caused by acts or omissions attributable to that State (United Nations, 1993).

In addition, the commentary of the International Law Commission of 1991 to the draft article highlights the same issue as an exception to the general rule on State immunity in the field of civil liability for acts that caused bodily harm (article 12 "Personal injuries and damage to property"). The determining principle of this exception is territoriality, which:

a) locates *the locus delicti commissi* and the presence of the author of the act or omission within the territory of the State of the forum, which acquires court jurisdiction. While immunity has been maintained for acts jure imperil, it has been rejected for acts jure gestionis;

b) excludes cross-border delicts from the scope of art. 12; furthermore, as stated in paragraph 7 of the commentary, it is clear that cases of shooting or firing across a boundary or of spill-over across the border of shelling as a result of an armed conflict are excluded from the areas covered by article 12. The above provision could become actual within the theoretical and legal model of filing lawsuits by domestic subjects of private law against Belarus, from the territory of which the shelling of the territory of Ukraine was carried out. Following para. 3 of the commentary, since the damaging act or omission has occurred in the territory of the State of the forum, the applicable law is clearly the *lex loci delicti commissi* and the most convenient court is that of the State where the delict was committed. On the one hand, such an approach emphasizes the private-law nature of relations with a foreign element, which are covered by the scope of art. 12 and mainly concern death as a result of an accident, personal injuries or damage to property as a result of a traffic accident. On the other hand, the scope of this article was intended to be sufficiently broad to cover intentional physical harm or even murder (United Nations, 1994).

Both above conventions are designed to unify legal norms on functional or limited immunity of a state in the legal relations where it enters not as a sovereign subject of international law, which is equal with other states *(par in parem non habet imperium)*, but as a participant in private relations with a foreign element (in particular, commercial, investment) which are axiomatically based on the legal equality of the parties, free will, and property independence.

5. Gaps and shortcomings of the legislation of Ukraine

Given the importance of the institute of functional immunity and the fact that Ukraine is not a party to any of the mentioned conventions, the adoption of a law to ensure the rights and interests of the Ukrainian state and its citizens could be a theoretically logical step in law-making. The use in the previous statement of "theoretically" and conditional "could" means that such the relevant law is still not available in the legislation of Ukraine.

There was an uncertain attempt in 2015, but the draft Law of Ukraine "On jurisdictional immunities and liability of foreign states", dated March 16, 2015 № 2380, was not even included in the agenda of the Parliament. As the explanatory note stressed, the draft law was intended "to regulate the liability of foreign states, enterprises, institutions and organizations owned by foreign states directly or indirectly, including for cases of damage to property and/or health of citizens of Ukraine, as well as legal entities – residents of Ukraine" (Petrenko, 2015).

Without a systematic, legally verified approach, the domestic legislator takes fragmentary measures, which result in the consolidation of erroneous norms in the laws of Ukraine. In particular, Art. 32 of the Law of Ukraine "On Production Sharing Agreements" enshrined that the agreements with the participation of a foreign investor provide for the waiver by the state of judicial immunity, immunity from provisional remedy, and enforcement of the court decision. Two years after the law's entry into force, the Constitutional Court of Ukraine approved a decision the quintessence of which is that the state is entitled to waive immunity in civil relations, including foreign economic and business. At the same time, a waiver of the immu-

nity, judicial as well, by the state, which is fixed in art. 32 and obligatorily enshrined in production-sharing agreements, should be recognized as unconstitutional (Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the People's Deputies of Ukraine on the compliance of the first part of Article 5, part three of Article 6, Article 32 of the Law of Ukraine "On production sharing agreements" to the Constitution of Ukraine (case on production sharing agreements) in the case № 17-рп/2001 of December 6, 2001 (Constitutional Court of Ukraine, 2001)).

6. Judgments of the International Court of Justice and disputes between Italy and Germany concerning post-war reparations

In the development of the above, the issue of the availability of alternative provisions, which would act as a legal and legitimate basis for the courts of Ukraine to overcome the barrier of absolute immunity of the foreign state, emerges full-blown. An analysis of some decisions of the International Court of Justice and the European Court of Human Rights allowed Supreme Court Judge Yu.V. Cherniak to conclude that "there is currently no recognition of the fact of limiting the immunity of a foreign state in the case of its serious violation of human rights and commission of an international crime in the state of the forum" (Cherniak, 2022).

Having posted a photo of the Nazi massacre of civilians in Italy in 1944 on the last day of April 2022, Deutshe Welle again turns to the problem of a long-running dispute between Germany and Italy over WWII reparations. Consequently, despite the judgment of the International Court of Justice, the Italian courts still accept civil claims of the German Reich's violation of the rules of international humanitarian law from 1943 to 1945 and render judgment in favor of the plaintiffs, ignoring the judicial immunity of Germany (Deutsche Welle, 2022).

The proceedings before the International Court of Justice in the case of Germany v. Italy and the 2012 judgment covered a set of issues with regard to judicial immunity, compulsory measures against German property, recognition court decisions of a third State, namely Greece, as compulsory in the territory of Italy. As for the latter point, it clearly enough that Germany justified its jurisdictional immunity to make it impossible for "Greek citizens to attempt to enforce in Italy the judgment rendered by the Greek court on the massacres committed by German military units during their withdrawal in 1944" (General Assembly of United Nations, 2013).

An important conceptual and legal emphasis in this decision is to separate two issues: the nature of the state's actions, which became the basis for the claim, and the judicial immunity of the state – the principles and rules on immunity do not take into account the nature of the State's actions, even illegal, obviously criminal.

The quintessence of the opinion of the Supreme Court is that a dispute between a citizen of Ukraine and a foreign state (at the same time, the Supreme Court uses the concept of "a foreign country") can be considered and resolved by the court of Ukraine as a proper and competent court in the case of a tortious exception (Supreme Court, 2022). At the same time, the court of Ukraine, in considering the case where a foreign state is identified as the defendant, has the right to ignore the immunity of this country and consider cases on compensation for damage caused to an individual as a result of its armed aggression on a lawsuit filed against this foreign country (Supreme Court, 2022).

By relying on this formulation, on the one hand, there is recognition of the immunity of a foreign state and, on the other hand, the application of the procedural and legal concept of its "ignoring", which is the basis for resolving the issue of international jurisdiction of the case that combines factual and legal aspects of compensation for moral damage, tort exception, and actions of the army of a foreign state.

7. Peremptory norms of international law and State immunity

Seizing room for extrapolating the conceptual principles of other areas of international law to the article scope, one can refer to the law of treaties. In the well-known Vienna Convention of 1969, it is worth paying attention to articles 52 and 53. They state that a treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations and if it conflicts with a peremptory norm of general international law.

The standpoint of the Polish specialist in international law remains relevant to this day. He emphasizes that, in case of the state's violation of peremptory norms *jus cogens,* it may be denied the exercise of rights, in particular, to recognition, reservations to treaties, and extradition (Boczek, 2005, p. 19). The universally recognized values underlying the modern international legal order include: sovereign equality of states, waiver of force or threats of force against, inter alia, political independence, inviolability of state borders, territorial integrity, non-interference in internal affairs, respect for human rights and fundamental freedoms – this list is not exhaustive.

8. Conclusions

Summarizing the above, we can make a generalization: it is challenging to ensure an adequate level of protection of the rights and legitimate interests of citizens violated by the armed forces of a foreign state by litigation within the institutions of both its absolute jurisdictional, incl. judicial, and functional or limited immunity.

Ignoring the right of a specific subject, within the scope of this article – the foreign state, to judicial immunity, which emerges from the international legal principles of sovereignty, may seem a debatable conceptual approach. At the same time, the degree of freedom to exercise such a right by a foreign state is theoretically possible and also should be practically addressed in the broader context of fundamental principles and peremptory norms of international law (*jus cogens*). Consequently, a conceptual approach to the refusal or restriction of the power of a foreign state to exercise the right to judicial immunity in the case of a deliberate violation of the mentioned fundamental principles, peremptory norms of international law (*jus cogens*) enshrined, in particular, in the Charter of the United Nations, the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States of 1970, the Helsinki Final Act of 1975, seems legally justified.

One needs hardly apply the methodology of legal forecasting to obtain an answer to the question whether there are prospects for obtaining the consent of a foreign state to take measures by domestic courts to provide claims and further enforcement of court decisions in civil cases on claims for violation of personal non-property and property rights and interests of peaceful citizens. It leaves these issues open and intensifies the necessity to conduct further research.

References:

Boczek, B.A. (2005). International Law: a Dictionary (dictionaries of International Law, № 2). Lanham; Toronto; Oxford: The Scarecrow Press, Ins., 478 p. Retrieved from: https://books.google.la/books?id=NR7m-FXCB-wgC&printsec=copyright#v=onepage&q&f=false [in English].

Cherniak, Yu.V. (2022). Yurysdyktsiinyi imunitet inozemnoi derzhavy u tsyvilnykh spravakh pro vidshkoduvannia shkody: Qui Vadis [Jurisdictional immunity of a foreign state in civil cases of compensation for damage: Qui Vadis]. *Sudebno-yuridicheskaya gazeta – Judicial newspaper*, March 13. Retrieved from: https://sud.ua/ru/news/blog/232109-yurisdiktsiyniy-imunitet-inozemnoyi-derzhavi-u-tsivilnikh-spravakh-pro-vidshkoduvannya-shkodi-qui-vadis [in Ukrainian].

Constitutional Court of Ukraine (2001). Rishennia Konstytutsiinoho Sudu Ukrainy u spravi za konstytutsiinym podanniam narodnykh deputativ Ukrainy shchodo vidpovidnosti Konstytutsii Ukrainy (konstytutsiinosti) chastyny pershoi statti 5, chastyny tretoi statti 6, statti 32 Zakonu Ukrainy "Pro uhody pro rozpodil produktsii" (sprava pro uhody pro rozpodil produktsii) u spravi № 17-рп/2001 vid 6 hrudnia 2001 r. [Decision of the Constitutional Court of Ukraine in the case on the constitutional petition of the People's Deputies of Ukraine on the compliance of the first part of Article 5, part three of Article 6, Article 32 of the Law of Ukraine "On production sharing agreements" to the Constitution of Ukraine (case on production sharing agreements) in the case № 17-рп/2001 of December 6, 2001]. Retrieved from: https://ccu.gov.ua/docs/440 [in Ukrainian].

Council of Europe (1972). European Convention on State Immunity, adopted by the Council of Europe on May 16, 1972. Retrieved from: https://rm.coe.int/16800730b1 [in English].

Deutsche Welle (2022). Germany takes Italy to court over Nazi reparations. *dw.com*, April 30. Retrieved from: https://www.dw.com/en/germany-takes-italy-to-court-over-nazi-reparations/a-61645814 [in English].

General Assembly of United Nations (2013). Report of the International Court of Justice 1 August 2012 – 31 July 2013. Retrieved from: https://www.icj-cij.org/public/files/annual-reports/2012-2013-en.pdf [in English].

Koval, D.O. (2021). The Award Concerning Jurisdiction in the Coastal State Rights Dispute Between Ukraine and Russia: What Has Been Decided and What to Expect Next. *Lex Portus*, vol. 7, no. 1, pp. 7–30. DOI: 10.26886/2524-101X.7.1.2021.1 [in English].

Petrenko, P.D. (2015). Poiasniuvalna zapyska do proektu Zakonu Ukrainy "Pro yurysdyktsiini ta mainovi imunitety inozemnoi derzhavy" vid 16 bereznia 2015 r. № 2380 [Explanatory note to the draft of the Law of Ukraine "On jurisdictional immunity and responsibility of foreign states", dated March 16, 2015 № 2380]. Retrieved from: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54404 [in Ukrainian].

Supreme Court (2022). Verkhovnyi Sud sformuliuvav vysnovok shchodo sudovoho imunitetu RF u spravi pro vidshkoduvannia shkody, zavdanoi derzhavoiu-ahresorom [The Supreme Court has issued an opinion on the judicial immunity of the Russian Federation in the case of compensation for damage caused by the aggressor state], *supreme.court.gov.ua*, April 23. Retrieved from: https://supreme.court.gov.ua/supreme/pres-centr/news/1270169/ [in Ukrainian].

United Nations (1993). Yearbook of the International Law Commission, 1990. Volume II. Part One: Documents of the forty-second session. New York. Retrieved from: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1990_v2_p1.pdf [in English].

United Nations (1994). Yearbook of the International Law Commission, 1991. Volume II. Part Two: Report of the Commission to the General Assembly on the work of its forty-third session. New York; Geneva. Retrieved from: https://legal.un.org/ilc/publications/yearbooks/english/ilc_1991_v2_p2.pdf [in English].

United Nations (2004). United Nations Convention on Jurisdictional Immunities of States and Their Property, adopted by the UN General Assembly resolution 59/38 on December 2, 2004. Retrieved from: https://treaties.un.org/doc/source/recenttexts/english_3_13.pdf [in English].

Володимир Король,
доктор юридичних наук, завідувач відділу міжнародного приватного права та правових проблем євроінтеграції, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01042, royalviking777@gmail.com
ORCID: *orcid.org/0000-0003-3573-3426*

Оксана Небильцова,
кандидат економічних наук, професор, заступник завідувача кафедри міжнародного обліку та аудиту, Київський національний економічний університет імені Вадима Гетьмана, проспект Перемоги, 54/1, Київ, Україна, індекс 03057, onebyltsova@hotmail.com
ORCID: *orcid.org/0000-0002-8931-2021*

МІЖНАРОДНО-ПРАВОВІ ЗАСАДИ СУДОВОГО ІМУНІТЕТУ ДЕРЖАВ У КОНТЕКСТІ ВІЙСЬКОВИХ ДІЙ

Анотація. ***Метою статті*** є розкриття міжнародно-правових підходів, що зумовлюють як обмеження, так і можливості для легального й легітимного подолання бар'єру абсолютного імунітету держав у контексті військових дій.

Методи дослідження. В основу статті покладено індуктивний метод пізнання, його гносеологічні можливості доповнено, а пізнавальні обмеження компенсовано шляхом застосування сукупності методів дослідження правового феномену судового імунітету, зокрема системного аналізу, порівняльно-правового методу, екстраполяції трендів.

Результати. Увагу сфокусовано на ключових аспектах постанови Верховного Суду щодо судового імунітету іноземної держави в цивільній справі про відшкодування шкоди, завданої фізичній особі та її дітям у зв'язку із загибеллю її чоловіка й батька дітей унаслідок дій армії такої держави. Її положення та висновки зумовили доцільність дослідження норм щодо імунітету держав і дій їхніх збройних сил, релевантних Європейській конвенції про імунітет держав 1972 р., коментарів Комісії з міжнародного права до Конвенції ООН про юрисдикційні імунітети держав та їх власність, багаторічних спорів між Німеччиною та Італією щодо відшкодування шкоди, завданої діями армії у Другій світовій війні, та відповідного рішення Міжнародного Суду 2012 р., а також прогалин і недоліків законодавства України з питань імунітету держав та їх власності.

Висновки. Забезпечення належного рівня захисту порушених збройними силами іноземної держави прав і законних інтересів фізичних осіб у цивільному процесі в межах інститутів її як абсолютного судового, так і функціонального чи обмеженого імунітету є проблематичним. Ступінь свободи на реалізацію іноземною державою суверенних прав необхідно розглядати в більш широкому контексті фундаментальних принципів, імперативних норм міжнародного права (*jus cogens*). Їх свідоме порушення може мати наслідком правомірну відмову або обмеження її прав, зокрема й на судовий імунітет. Застосування концепції «ігнорування» імунітету іноземної держави в цивільній справі про відшкодування шкоди, завданої фізичній особі, у контексті дій збройних сил та деліктного винятку є досить нестандартним підходом для подолання правового бар'єру абсолютного судового імунітету.

Ключові слова: судовий імунітет, іноземна держава, відшкодування шкоди.

The article was submitted 10.03.2022
The article was revised 31.03.2022
The article was accepted 21.04.2022

UDC 327.8; 327.9; 339.9
DOI https://doi.org/10.32849/2663-5313/2022.2.22

Volodymyr Nahnybida,
Doctor of Law, Associate Professor, Head of the Scientific Laboratory, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, v.nagnybida@gmail.com
ORCID: *orcid.org/0000-0003-4233-7173*

Nahnybida, Volodymyr (2022). Digital assets rights in the light of Western sanctions against the Russian Federation. *Entrepreneurship, Economy and Law*, 2, 142–148, doi https://doi.org/10.32849/2663-5313/2022.2.22

DIGITAL ASSETS RIGHTS IN THE LIGHT OF WESTERN SANCTIONS AGAINST THE RUSSIAN FEDERATION

Abstract. The ***purpose of the article*** is to conduct a scientific analysis of Western sanctions policies against the Russian Federation concerning the digital assets market, free flow of crypto-currencies with the participation of Russian legal entities and individuals, their scope, and potential effectiveness.

Research methods. The study is based on general scientific and special methods of scientific knowledge, namely, methods of analysis and synthesis, forecasting and modeling methods.

Results. In the article, the author presents a comprehensive view of current regulative approaches taken in Western countries, namely the United States and the countries of European Union, regarding rights on digital assets in the general framework of sanctions policy taken against the Russian Federation as a reaction to its violent and unprovoked military aggression in Ukraine. Recommendations are also provided for strengthening the sanctions regime to adapt to the specifics of the legal nature of digital assets, their use as a means of circumventing Western sanctions.

Conclusions. Despite different regulatory mechanisms, there is a gradual inclusion of digital assets and rights to them in the scope of sanctioned property rights related to the Russian Federation in Western sanctions. The main feature of this regime today is aiming to restrict Russian legal entities and individuals from accessing and making transactions with digital assets, opening e-wallets and mining cryptocurrency. Regarding the further improvement of the sanctions regime on the rights to digital assets of persons related to the Russian Federation, we see three key directions: 1) practical and regulatory inclusion of digital assets in the scope of the general concept of assets used, taking into account that such assets are generally "hidden"; 2) developing additional recommendations (roadmap, action plan etc.), adapted specifically to the imposition of sanctions on digital assets, considering the peculiarities of the legal regulation of their circulation, in particular in the United States and the European Union (special attention should be paid to the classification of digital assets, ways to establish the owners of rights to them, the minimization of the risks of avoiding sanctions against "traditional" rights by their digitalization, and the optimization of coordination in this area between different Western legal orders, which currently have quite different legal approaches in this respective area); 3) strengthening the sanctions policy against Russian cryptocurrency exchanges, companies and the technical capabilities of legal entities and individuals related to the Russian Federation to mine cryptocurrencies, to make calculations to circumvent sanctions using digital assets.

Key words: economic sanctions, Russian-Ukrainian war, digital asset, virtual currency, crypto-asset, Russian Federation entities and individuals.

1. Introduction

A new phase of the Russian-Ukrainian war began on February 24, 2022, marked by a full-scale invasion of the Russian Federation in our country. The response of the Ukrainian government was immediate and proportional to the level of the threat: on the same day, the President of Ukraine signed Decree № 64/2022 "On the imposition of martial law in Ukraine" (President of Ukraine, 2022), which was approved by the Verkhovna Rada of Ukraine without delay in Law of Ukraine "On approval of the Decree of the President of Ukraine "On the imposition of martial law in Ukraine" of February 24, 2022 № 2102-IX (Verkhovna Rada of Ukraine, 2022). Along with the intense military action and information war, one of the key aspects of our struggle is economic war, waged not only by Ukraine, but with the direct participation of the Western world countries: the United States, the EU, the United Kingdom, the Commonwealth of Australia, Japan, Taiwan (the

Republic of China), and so on. Adopted restrictive economic and financial mechanisms, widely known as "economic sanctions" – restrictions that have been periodically applied by different countries to achieve their foreign policy goals, especially widely used in the XX century (Manuilova, 2014, p. 38), directed against Russian government, separate Russian entities and individuals, the entire Russian industries, primarily connected with the Russian military-industrial complex and the economical abilities of the Russian Federation to continue its brutal and unprovoked aggression as such, already reportedly made Russia a most sanctioned country in the world (Euronews, 2022).

While the major efforts on imposing sanctions against the Russian Federation are concentrated on "traditional" economic domains, the underlying intent is also connected with the prevention of circumvention of sanctions by Russia, via, inter alia, usage of digital assets, including crypto-currencies. The main issue with this process lies in the field of legal characteristics of digital assets as such, their decentralized nature, difficulties in controlling the corresponding transactions, taking into account the overall "embryonic" state of legal regulation of digital assets market in the US and the EU. Nonetheless, several crypto-assets sanctions are adopted by our Western allies in the latest packages of sanctions against the Russian Federation and connected entities (Brett, 2022; Reuters, 2022).

Thus, it is of practical importance to conduct a scientific analysis of Western sanctions policies against the Russian Federation concerning digital assets market, free flow of crypto-currencies with the participation of Russian legal entities and individuals, their scope and potential effectiveness, which is the main aim of this article. To achieve this goal, we will examine the general logic and applied legal mechanisms in Western sanctions imposed on the Russian authoritarian regime with emphasis on economic and financial instruments, and further delve in specifics of sanctions concerning crypto-currencies and other digital assets connected to the government of the Russian Federation, Russian entities and individuals. Examining stated subjects and issues, we will use general and special methods of scientific knowledge, namely methods of analysis and synthesis, forecasting and modeling methods.

2. Basic characteristics of the legal framework of the Western sanctions against the Russian Federation

At the regulatory level, the mechanism of implementation of the EU sanctions imposed on the Russian Federation is carried out via two fundamental EU non-legislative acts, subject to further numerous amends. These are: Council Regulation (EU) № 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine (European Union, 2014b) and Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (European Union, 2014a).

The scope of these non-legislative acts is broad, ranging from freezing all funds and economic resources belonging to, owned, held or controlled by any natural or legal persons, entities or bodies, or natural or legal persons, entities or bodies associated with them, as listed in Annex I to the Council Regulation (EU) № 269/2014 of 17 March 2014 according to Article 2(1) of the Regulation, to prohibiting the direct or indirect purchase or sale of, the direct or indirect provision of investment services for or assistance in the issuance of, or any other dealing with transferable securities and money-market instruments issued after 9 March 2022 by: (a) Russia and its Government; (b) the Russian Central Bank; or, (c) a legal person, entity or body acting on behalf of, or at the direction of, the entity referred to in point "b", according to the provisions of Article 1a of the Council Decision 2014/512/CFSP of 31 July 2014. The general goal of those and other sanctions (prohibitions or restrictions) is understood: to weaken the economy of the Russian Federation as a direct response to the several aggressive acts against Ukraine, starting from the annexation of Crimea in 2014. Their particular provisions, however, may be the subject of another comprehensive study, while we will pay attention further only to those, which are directly or indirectly connected to the ownership, transactions and operations with rights on digital assets.

The regulatory implementation of the process of imposing economic and financial sanctions on the Russian Federation by the United States is differing from the EU, representing an extensive system of acts adopted at the level of laws, the President's executive orders, determinations of the Secretary of the Treasury, sanctions regulations of Treasury's Office of Foreign Assets Control (OFAC), and so on. Historically, this process started with the Ukraine/Russia-related sanctions program, which was implemented by the OFAC on March 6, 2014, when the President of the United States of America, in Executive Order (E.O.) 13660, declared a national emergency to deal with the threat posed by the actions and policies of certain persons who had undermined democratic processes and institutions in Ukraine; threat-

ened the peace, security, stability, sovereignty, and territorial integrity of Ukraine; and contributed to the misappropriation of Ukraine's assets (Office of Foreign Assets Control, 2016). One of the latest most notable taken regulative actions was the amendment and reissuance, in their entirety, the Ukraine-Related Sanctions Regulations, 31 C.F.R. part 589 by the OFAC, and renaming the regulations the Ukraine/Russia-Related Sanctions Regulations (U.S. Department of the Treasury, 2022d). It is stated that this administrative action replaces the regulations that were published in abbreviated form on May 8, 2014 with a more comprehensive set of regulations that includes additional interpretive and definitional guidance, general licenses, and other regulatory provisions that will provide further guidance to the public (Amendment to the Ukraine-Related Sanctions Regulations and Associated Administrative List Updates (U.S. Department of the Treasury, 2022a)). Further on, we will concentrate on US regulations specific to the analyzed subject of sanctions on digital assets rights.

3. Rights on digital assets: already imposed sanctions and possible future development

On the EU level, the main restrictions concerning digital assets and crypto-currencies are presented in the latest so-called "fifth package" of sanctions against the Russian Federation (European Union, 2022c), by adopting, inter alia, the Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine (European Union, 2022a). In Article 1b(2) of the main (amended) Decision it is stated that it shall be prohibited to provide crypto-asset wallet, account or custody services to Russian nationals or natural persons residing in Russia, or legal persons, entities or bodies established in Russia, if the total value of crypto-assets of the natural or legal person, entity or body per wallet, account or custody provider exceeds EUR 10 000. In the paragraph 6 of the preamble to the amending Decision, it is substantiated that, in view of the gravity of the situation, and in response to Russia's military aggression against Ukraine, it is appropriate to introduce further restrictive measures. In particular, it is appropriate to extend the prohibition on deposits to crypto-wallets.

It is also worth mentioning that in FAQ (Frequently Asked Questions) section on an official web-site of the European Commission regarding crypto-assets coverage in EU sanctions policy on the Russian Federation as of April 11 2022, there are two key points mentioned:

1) regarding general coverage of crypto-assets and in particular cryptocurrencies by these sanctions, it is stated that in Council Regulation (EU) № 269/2014, the non-exhaustive definition of "funds" *covers crypto-assets, including cryptocurrencies*, and the definition of "economic resources" may also *extend to certain crypto-assets (emphasis added)*. As such, crypto-assets are covered by the relevant provisions on the asset freeze and prohibition to make funds or economic resources available to listed persons. For its part, Council Regulation (EU) № 833/2014 clarifies that "transferable securities" *include crypto-assets*, but it adds "with the exception of instruments of payment". Summarizing, this document concludes, that all transactions prohibited in the Regulations are also prohibited if carried out in crypto-assets, and all transactions allowed in the Regulations remain allowed if carried out in crypto-assets. In addition, crypto-assets should not be used to circumvent any EU sanctions;

2) regarding mentioned prohibition in Article 5b(2) of Council Regulation (EU) № 833/2014 to provide crypto-asset wallet, account or custody services to Russian nationals or natural persons residing in Russia, or legal persons, entities or bodies established in Russia, if the total value of crypto-assets of the natural or legal person, entity or body per wallet, account or custody provider exceeds EUR 10 000, and taking into account the possibility of enormous fluctuations of the value of crypto-assets, on the issue of interpreting this prohibition by the service provider, the document lies responsibility on the latter, stating that EU crypto-asset wallet, account or custody services providers should therefore put in place the appropriate safeguards and remedies to avoid ending up servicing clients in the conditions laid down by Article 5b(2). These safeguards and remedies should duly take into account the fact that the value of crypto-assets can fluctuate substantially over a short period of time (European Union, 2022b). As of today this provision is contained in Article 1b(2) of the Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine as mentioned above. Thus, the EU's broader approach to interpreting the meaning of "funds", "economic resources" with the inclusion of any type of crypto-assets is established, as well as laying the obligation to prevent exceeding the allowable fiat equivalent in the crypto-wallet account, owned by Russian entities, on service providers, which is understandable. Nonetheless, it is seemed that present EU sanctions aren't comprehensive enough and do not comprise the whole spectrum of digital assets, doing so

only by expansive interpretation of general legal and economic concepts, while aiming directly only on crypto-asset wallets and connected operations with them.

Regarding digital assets rights sanctions aimed against Russian Federation and imposed by the United States respective authorities, taking into account quite branched structure of regulatory decision making in this light, it is practical to summarize two main approaches, upheld by the OFAC:

1) OFAC has imposed expansive sanctions actions against certain Russian entities and individuals pursuant to E.O. 14024 (President of the United States, 2021), in addition to other authorities. All U.S. persons are required to comply with OFAC regulations, regardless of whether a transaction is denominated in traditional fiat currency or virtual currency. Under this provision, inter alia, U.S. persons, including virtual currency exchanges, virtual wallet hosts, and other service providers, such as those that provide nested services for foreign exchanges, are generally prohibited from engaging in or facilitating prohibited transactions, including virtual currency transactions in which blocked persons have an interest (U.S. Department of the Treasury, 2022b);

2) OFAC recently also specifically targeted Russia's virtual currency mining industry via the operations of relevant Russia's companies. Namely, OFAC designated virtual currency mining company Bitriver, which was founded in Russia in 2017 and currently operates out of three offices across Russia. In 2021, Bitriver shifted legal ownership of its assets to a Switzerland-based holding company. OFAC designated this holding company, Bitriver AG, pursuant to E.O. 14024 for operating or having operated in the technology sector of the Russian Federation economy. OFAC additionally designated 10 Russia-based subsidiaries of Bitriver AG pursuant to E.O. 14024 for being owned or controlled by, or for having acted or purported to act for or on behalf of, directly or indirectly, Bitriver AG: OOO Management Company Bitriver, OOO Bitriver Rus, OOO Everest Grup, OOO Siberskie Mineraly, OOO Tuvaasbest, OOO Torgovy Dom Asbest, OOO Bitriver-B, OOO Bitriver-K, OOO Bitriver-North, and OOO Bitriver-Turma. By doing so OFAC stated that the United States is committed to ensuring that no asset, no matter how complex, becomes a mechanism for the Putin regime to offset the impact of sanctions (U.S. Department of the Treasury, 2022c). It is seen that the steps taken by the US regulator to counter the activities of Russian mining companies, combined with other mechanisms of a prohibitive nature, can, if not stop such companies' activities, but significantly reduce profits and the possibility to attract new users, prevent transactions wi.th the US and other Western countries via the platforms used.

Concerning future broadening of sanctions regime on digital assets rights, connected one way or another with the Russian Federation, there are several key aspects that are worth mentioning. As the starting point, relevant additions can be made in recommendations, proposed by the international working group on sanctions on Russia (also known as the Yermak-McFaul expert group), which has already prepared two documents: the Action Plan on Strengthening Sanctions against the Russian Federation on April 19 (The International Working Group on Russian Sanctions, 2022), and The Energy Sanctions Roadmap: Recommendations on Sanctions on the Russian Federation on May 10 (Office of the President of Ukraine, 2022). Although the first document does not specifically mention crypto-currencies and other digital assets and the second one is not available for the public yet, the Action Plan contains several usages of the term "assets", which may be seen in a broad sense, both in the Title 5, dedicated to strengthening of individual sanctions against designated categories of individuals: 1) it is recommended to sanction all family members of persons connected to the Russian government who hold *the assets* of individuals in category I, with a focus on relatives of the President, including all his children and their mothers, as well as other senior political personalities *(emphasis added)*; 2) to consider, in close consultation with the Government of Ukraine, sanctions relief to individuals in the above categories who publicly and credibly denounce Putin's war, stop all business operations in Russia that help to finance the war, agree to assist financially in Ukraine's reconstruction, and help identify *hidden assets of those sanctioned (emphasis added)*.

In this regard it is advisable to include on practice and in future regulations in the scope of the concept of "assets" used in the Action Plan, especially those that are hidden, also virtual currencies, other digital values and assets. Moreover, taking into account the legal and technological nature of digital assets, their "elusiveness" from regulative monitoring and control, it is considered necessary to develop additional recommendations (roadmap, action plan etc.), adapted specifically to the imposition of sanctions on digital assets, taking into account the peculiarities of the legal regulation of their circulation, in particular in the United States and the European Union. Particular attention should be paid to the classification of digital assets, ways to establish the owners of rights to them, to the minimization of the risks of avoid-

ing sanctions against "traditional" rights by their digitalization, to the optimization of coordination in this area between different Western legal orders, which as of today have quite different legal approaches in this respective area. Additional efforts should be made to strengthen the sanctions policy against Russian cryptocurrency exchanges, companies and the technical capabilities of legal entities and individuals related to the Russian Federation to mine cryptocurrencies, to make transactions to circumvent sanctions using digital assets.

4. Conclusions

Summarizing, we must acknowledge that despite different regulatory mechanisms adopted in the US and the EU, there is a gradual inclusion of digital assets and rights to them in the scope of sanctioned property rights related to the Russian Federation in Western sanctions. The main feature of this regime today is aiming to restrict Russian legal entities and individuals from accessing and making transactions with digital assets, opening e-wallets and mining cryptocurrency.

Regarding the further improvement of the sanctions regime on the rights to digital assets of persons related to the Russian Federation, we see three key theses: practical and regulatory inclusion of digital assets in the scope of the general concept of assets used, taking into account that such assets are generally "hidden"; developing additional recommendations (roadmap, action plan etc.), adapted specifically to the imposition of sanctions on digital assets, considering the peculiarities of the legal regulation of their circulation, in particular in the United States and the European Union. Particular attention should be paid to the classification of digital assets, ways to establish the owners of rights to them, to the minimization of the risks of avoiding sanctions against "traditional" rights by their digitalization, to the optimization of coordination in this area between different Western legal orders, which currently have quite different legal approaches in this respective area; strengthening the sanctions policy against Russian cryptocurrency exchanges, companies and the technical capabilities of legal entities and individuals related to the Russian Federation to mine cryptocurrencies and make calculations to circumvent sanctions using digital assets.

References:

Brett, J. (2022). U.S. Treasury Sanctions Russian Crypto Mining Operation Amid New Token Launch. Retrieved from: https://www.forbes.com/sites/jasonbrett/2022/04/20/us-treasury-sanctions-russian-crypto-mining-operation-amid-new-token-launch/?sh=7b3eab0920b4 [in English].

Euronews (2022). Watch: Russia is the most sanctioned country in the world. Here's what you need to know. Retrieved from: https://www.euronews.com/my-europe/2022/03/16/watch-russia-is-the-most-sanctioned-country-in-the-world-here-s-what-you-need-to-know [in English].

European Union (2014a). Council Decision 2014/512/CFSP of 31 July 2014 concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A02014D0512-20220409 [in English].

European Union (2014b). Council Regulation (EU) № 269/2014 of 17 March 2014 concerning restrictive measures in respect of actions undermining or threatening the territorial integrity, sovereignty and independence of Ukraine. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX-%3A02014R0269-20220421 [in English].

European Union (2022a). Council Decision (CFSP) 2022/578 of 8 April 2022 amending Decision 2014/512/CFSP concerning restrictive measures in view of Russia's actions destabilising the situation in Ukraine. Retrieved from: https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2022.111.01.0070.01.ENG&toc=OJ%3AL%3A2022%3A111%3ATOC [in English].

European Union (2022b). Crypto-assets Frequently Asked Question – as of 11 April 2022. Retrieved from: https://ec.europa.eu/info/sites/default/files/business_economy_euro/banking_and_finance/documents/faqs-sanctions-russia-crypto_en.pdf [in English].

European Union (2022c). EU adopts fifth round of sanctions against Russia over its military aggression against Ukraine: press release. Retrieved from: https://www.consilium.europa.eu/en/press/press-releases/2022/04/08/eu-adopts-fifth-round-of-sanctions-against-russia-over-its-military-aggression-against-ukraine/ [in English].

Manuilova, K.V. (2014). Ekonomichni sanktsii yak instrument zovnishnoi polityky [Economic sanctions as a tool of foreign policy]. *Aktualni problemy mizhnarodnykh vidnosyn – Actual problems of international relations*, iss. 122, vol. II, pp. 38–44 [in Ukrainian].

Office of Foreign Assets Control (2016). Ukraine/Russia Related Sanctions Program, updated June 16, 2016. Retrieved from: https://home.treasury.gov/system/files/126/ukraine_overview_of_sanctions.pdf [in English].

Office of the President of Ukraine (2022). Ekspertna hrupa Yermaka-Makfola napratsiuvala Dorozhniu kartu enerhetychnykh sanktsii [Yermak-McFaul's expert group has developed a roadmap for energy sanctions]. Retrieved from: https://www.president.gov.ua/en/news/ekspertna-grupa-yermaka-makfola-napracyuvala-dorozhnyu-kartu-74941 [in Ukrainian].

President of the United States (2021). Blocking Property with Respect to Specified Harmful Foreign Activities of the Government of the Russian Federation: Presidential Executive Order 14024 of April 15, 2021. Retrieved from: https://home.treasury.gov/system/files/126/14024.pdf [in English].

President of Ukraine (2022). Pro vvedennia voiennoho stanu v Ukraini: Ukaz Prezydenta Ukrainy vid 24 liutoho 2022 r. № 64/2022 [On the imposition of martial law in Ukraine: Decree of the President of Ukraine of February 24, 2022 № 64/2022]. Retrieved from: https://www.president.gov.ua/documents/642022-41397 [in Ukrainian].

Reuters (2022). New Russia Sanctions Include Crypto Wallets Target by EU. *NDTV Group*. Retrieved from: https://www.ndtv.com/business/new-russia-sanctions-include-crypto-wallets-target-by-eu-2875709 [in English].

The International Working Group on Russian Sanctions (2022). Action Plan on Strengthening Sanctions against the Russian Federation. Retrieved from: https://www.president.gov.ua/storage/j-files-storage/01/14/05/1b07ba028243db56c95578163a001012_1650466841.pdf [in English].

U.S. Department of the Treasury (2022a). Amendment to the Ukraine-Related Sanctions Regulations and Associated Administrative List Updates. Retrieved from: https://home.treasury.gov/policy-issues/financial-sanctions/recent-actions/20220429 [in English].

U.S. Department of the Treasury (2022b). Russian Harmful Foreign Activities Sanctions. Frequently Asked Questions. 1021. Do the prohibitions of Executive Order (E.O.) 14024 and other Russia-related sanctions extend to virtual currency? Retrieved from: https://home.treasury.gov/policy-issues/financial-sanctions/faqs/1021 [in English].

U.S. Department of the Treasury (2022c). U.S. Treasury Designates Facilitators of Russian Sanctions Evasion. Retrieved from: https://home.treasury.gov/news/press-releases/jy0731 [in English].

U.S. Department of the Treasury (2022d). Ukraine-Related Sanctions Regulations, 31 C.F.R. Part 589. Retrieved from: https://home.treasury.gov/system/files/126/fr87_26094.pdf [in English].

Verkhovna Rada of Ukraine (2022). Pro zatverdzhennia Ukazu Prezydenta Ukrainy "Pro vvedennia voiennoho stanu v Ukraini": Zakon Ukrainy vid 24 liutoho 2022 r. № 2102-IX [On approval of the Decree of the President of Ukraine "On the imposition of martial law in Ukraine": Law of Ukraine of February 24, 2022 № 2102-IX]. Retrieved from: https://zakon.rada.gov.ua/laws/show/2102-20#Text [in Ukrainian].

Володимир Нагнибіда,
доктор юридичних наук, доцент, завідувач наукової лабораторії, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Раєвського, 23-а, Київ, Україна, індекс 01402, v.nagnybida@gmail.com
ORCID: *orcid.org/0000-0003-4233-7173*

ПРАВА НА ЦИФРОВІ АКТИВИ У СВІТЛІ САНКЦІЙ ЗАХІДНИХ КРАЇН ПРОТИ РОСІЙСЬКОЇ ФЕДЕРАЦІЇ

Анотація. ***Метою статті*** є проведення наукового аналізу санкційної політики держав Заходу проти Російської Федерації щодо ринку цифрових активів, вільного обігу криптовалют за участю російських юридичних і фізичних осіб, їх масштабу та потенційної ефективності.

Методи дослідження. Дослідження базується на загальнонаукових і спеціальних методах наукового пізнання, а саме на методах аналізу та синтезу, прогнозування та моделювання.

Результати. У статті автор надає комплексну характеристику сучасних регулятивних підходів, прийнятих у західних країнах, а саме США та державах Європейського Союзу, щодо прав на цифрові активи в загальних межах санкційної політики проти Російської Федерації як реакції на її насильницьку й неспровоковану військову агресію проти України. Також пропонуються рекомендації щодо посилення санкційного режиму для адаптації до особливостей правової природи цифрових активів, їх використання як засобу обходу західних санкцій.

Висновки. Відбувається поступове включення цифрових активів та прав на них у сферу підсанкційних об'єктів права власності, пов'язаних із Російською Федерацією в західних санкціях, незважаючи на різні механізми регулювання. Головним на сьогодні є обмеження російським юридичним і фізичним особам доступу та можливості здійснення операцій із цифровими активами, відкриття електронних гаманців та майнингу криптовалюти. Щодо подальшого вдосконалення режиму санкцій стосовно прав на цифрові активи осіб, пов'язаних із Російською Федерацією, ми бачимо три ключові напрями: 1) практичне й нормативне включення цифрових активів у сферу загального використовуваного поняття активів з урахуванням того, що такі активи, як правило, є «прихованими»; 2) розроблення додаткових рекомендацій (дорожньої карти, плану дій тощо), адаптованих спеціально до введення санкцій щодо цифрових активів з урахуванням особливостей правового регулювання їх обігу, зокрема, у США та Європейському Союзі (особливу увагу варто приділити класифікації цифрових активів, способам встановлення власників прав на них, мінімізації ризи-

ків уникнення санкцій проти «традиційних» прав шляхом їх цифровізації, оптимізації координації в цій сфері між різними західними правопорядками, які на сьогодні мають досить різні правові підходи у відповідній сфері); 3) посилення санкційної політики щодо російських криптовалютних бірж, компаній та технічних можливостей юридичних і фізичних осіб, пов'язаних із Російською Федерацією, щодо майнингу криптовалют для проведення розрахунків для обходу санкцій за допомогою цифрових активів.

Ключові слова: економічні санкції, російсько-українська війна, цифровий актив, віртуальна валюта, криптоактив, юридичні та фізичні особи, що є резидентами Російської Федерації.

The article was submitted 11.03.2022
The article was revised 01.04.2022
The article was accepted 22.04.2022

UDC 355: 340.12 (075.8)
DOI https://doi.org/10.32849/2663-5313/2022.2.23

Fedir Shulzhenko,
Doctor of Political Science, Professor, Honored Worker of Education of Ukraine, Head of the Department of Theory and History of Law, Kyiv National Economic University named after Vadym Hetman, 54/1, Peremohy avenue, Kyiv, Ukraine, postal code 03057, teoriafedir@ukr.net
ORCID: *orcid.org/0000-0001-6880-1662*

Oleksandr Gaydulin,
Doctor of Law, Associate Professor, Leading Researcher, Academician F. H. Burchak Scientific Research Institute of Private Law and Entrepreneurship of Nationality Academy of Law Sciences of Ukraine, 23-a, Rayevsky str., Kyiv, Ukraine, postal code 01042, gaydulin@i.ua
Scopus-Author ID: *57217828443*
ORCID: *orcid.org/0000-0002-1269-7007*

Shulzhenko, Fedir, Gaydulin, Oleksandr (2022). Legal and political aspects of war in Ukraine: philosophical reflection on the scene of battles. *Entrepreneurship, Economy and Law*, 2, 149–154, doi https://doi.org/10.32849/2663-5313/2022.2.23

LEGAL AND POLITICAL ASPECTS OF WAR IN UKRAINE: PHILOSOPHICAL REFLECTION ON THE SCENE OF BATTLES

Abstract. ***Purpose.*** The research deals with philosophical, military, political and legal issues for the comprehensive assessment of the situation around Russia's armed aggression against Ukraine. Among them, the most challenging issues touch upon reasonableness and reality of certain political and military actions. These problems have acquired an international character in modern jurisprudence.

Research methods. From a methodological point of view, this study represents as a further development of an idea of Prussian military theorist Carl Philipp Gottlieb von Clausewitz (who said: "War is merely the continuation of policy with other means") in a modern context. The possibilities of this method have demonstrated an example of the systematic analysis of the related political and military acts.

Results. This analysis allows making a preliminary conclusion that many international and domestic political reasons or factors caused this war in Ukraine. But this armed aggression was prepared and ideologically substantiated for a long time within the framework of the doctrine, the so-called "Russian world". Most importantly, each of the warring factions has not only a different goal setting but also operates with a fundamentally different type of moral and legal thinking. The mindset based on the principles of natural law is opposed to the philosophy of primitive positivism. An irreconcilable antagonism of good and evil is the essence of this epistemological conflict. It determines the eschatology of this war, which entails the global catastrophe of the old law and order based exclusively on the power of the states. The victory over the latest attempt of dictatorial political regimes to get revenge by will raise the birth of a new democracy – human-centered. This is exactly defining the course and outcome of this war.

Conclusions. The most important conclusion is that this war will definitely be victorious for Ukraine. This is because the policy determines the war, not vice versa. Great military scientist Carl von Clausewitz was right. Putin lost this war politically on the day when he began it. Separate and partial military successes will not change this logic, they only pull off the shameful end of this big *gamble* with no payoff.

Key words: legal philosophy, reasonableness, common sense, law, politics, war, armed aggression.

> What is reasonable is real;
> that which is real is reasonable.
> *G. Hegel "Elements*
> *of the Philosophy of Right" (1820)*

1. Introduction

This article is written by two philosophizing scientists, a political scientist and a law theorist, who both were colonels far back in the past. One of them served in the Investigation and Operational bodies of the Ministry of Internal Affairs, and the latter – in the Armed Forces of Ukraine. Therefore, they are trying to find a systematic association between law, politics and war, which are so specifically represented in modern warring Ukraine.

It's the definite and indefinite article simultaneously, because its object is allegedly known

to all, but, as it turned out, is not completely clarified. Law, Politics and War are specific and unspecific (generic) things at the same time. The authors do not claim a complete solution to the problem. This is reflection of theorists. The problem must be solved by our soldiers on the battlefield. Our warriors are not observers, but main actors of this terrible tragedy, which was not considered to write either William Shakespeare nor Dante Alighieri. Notorious "obscure poet" Putin, as murderous imperator Nero, dared. But actors, from both sides, have their own scenarios. Russian soldiers cannot win, the Ukrainian ones cannot lose.

This article was written at the beginning of a full-scale attack by the Russian Federation on Ukraine and during peace negotiations in Turkey. Given the time frame, the authors avoided short-term forecasting and final conclusions.

It may sound pathetic, but they tried once again to understand the infinite, eternal essence of the short-term local phenomena under some extreme conditions, but in the context of global concerns.

Thus, let's try and figure out what makes up the essence of this emergency that is Russia's armed aggression against Ukraine. This requires clearing the "fog of the war" or the uncertainty of the battlefield information, which hides the main reasons and perspectives for the war.

At the same time, it is necessary to take into consideration that "the legal and regulatory basis of the operation of the security and defence sector is covered by many legal regulations of different jurisdictions, indicating the complexity of the relevant sector of public policy" (Beikun, Pryimak, 2021, pp. 29–34).

That is why, the related problems of domestic and international law should be carefully addressed, and military legislation should be continuously monitored.

The special relevance and timeliness of the research subject put pressure on us, so theoretical and methodological reasoning of it will be brief.

This is a predominantly philosophical analysis, not within the philosophy of law (as Philosophers "Legal Philosophy") but in terms of Legal Philosophy (as Jurists' Legal Philosophy). A modern Spanish scientist Jesús Vega wrote about these differences (Vega, 2018, p. 29).

However, as a basic methodological principle, we use statements by a Prussian military theorist, major general Carl Philipp Gottlieb von Clausewitz (1780–1831): "War is merely the continuation of policy with other means". In particular, in his famous work, "On War" (1832), he has so launched this idea: *"When whole communities go to war – whole peoples, and especially civilized peoples – the reason always lies in some political situation, and the occasion is always due to some political object. War, therefore, is an act of policy"* (Clausewitz, 1989, pp. 86–87).

In this context, it is important to note that these words absolutely do not lose its justice for almost 200 years. Put it more bluntly, truths are not growing old. It is the eternal realism of absolute ideas and the major force of practical philosophy.

2. Political aspects of Russia's war against Ukraine

Many international and domestic political reasons or factors caused this war in Ukraine. It is most unfortunate that our warnings were confiemed: "From the end of the second – the beginning of the third millennium, the world community is increasingly convinced that the system of institutions and legal mechanisms of international security are inefficient and incapable of eliminating arising threats and regulating regional conflicts that threaten serious consequences for human civilization" (Shulzhenko, 2019, pp. 16–17).

This armed aggression was prepared and ideologically substantiated for a long time within the framework of the doctrine, the so-called "Russian world". For the first time, V. Putin officially applied this term in 2001 during his speech at the Congress of compatriots. He then immediately noted that its content goes far to the geographical boundaries of the Russian ethnos. After the Orange Revolution of 2004–2005, this theory was supplemented by the idea of V. Putin "On the Division of the Russian People", "The Community of Slavic Peoples", etc. (Shulzhenko, 2019, p. 18).

As already stated, political and legal arbitrariness carried out by puppets of oligarchic financial groups destabilized Ukrainian society. It also provoked the Russian political leadership to full-scale armed aggression, which began on February 24, 2022 (Shulzhenko, 2021, pp. 10–11).

Most importantly, each of the warring parties has not only a different goal setting but also operates with a fundamentally different type of moral and legal thinking.

The mindset based on the principles of natural law is opposed to the philosophy of primitive positivism. Russian political leadership, Leviathan, professes the philosophy which solves all problems by the violent pressure of the state.

Paradoxically, but a modern ruling regime in Moscow, which proclaimed "denazification of Ukraine" completely forgot the warning to the founder of the Soviet State in relation to Great Russian chauvinism, which fairly believed that people who humiliate others cannot be free.

The main features of the mentality of the Ukrainian people are the natural denial of violence, gravity to freedom, participation of the people in solving national and regional affairs, solidarity and justice.

The essence of this epistemological conflict is an irreconcilable antagonism of good and evil. It determines the eschatology of this war, which entails the global catastrophe of the old law and order based exclusively on the power of the states. The victory over the latest attempt of dictatorial political regimes to get revenge by will raise the birth of a new, human-centric, democracy. This defines the course and outcome of this war.

It is really inspiring that the head of our state correctly specifies the most viable means for bringing an end to the conflict. Thus, Ukrainian President Volodymyr Zelensky told CNN in an exclusive interview about his attempts to dwell with Putin to stop Russia's War in Ukraine: "I'm ready for negotiations with him. I was ready for the last two years. And I think that without negotiations we cannot end this war... I think that we have to use any format, any chance in order to have a possibility of negotiating, possibility of talking to Putin. But if these attempts fail, that would mean that this is a third World War" (Collinson, 2022).

Political issues are organically connected with legal problems. As it is well known, building a solid foundation based on law and justice is of significant importance to ending armed conflict and post-conflict reconstruction. First of all, it should be taken into account that the Rule of Law Principle provides stability and coherence of the legal system (Allan, 1995).

3. War as it is: a mental trap from positivists

However, most commentators and analysts were immersed in the tactics of military events and left strategic problems at the discretion of politicians. Military experts are in danger of falling into a tactical lagoon.

For instance, it is essential to analyse the conclusions by the former UN Inspector Scott Retter, who studied for over 35 years the Soviet and Russian military doctrines, the equipment of the Armed Forces of the USSR, and their tactics.

In particular, in numerous television interviews, he came to a completely defined unified solution. It says that the so-called "military operation" of Russia is an example of the outright full-scale military invasion of a neighboring country. He notes "everybody knows that the invasion is not going according to plan, but this is classic multi-axis invasion, a non-smooth, but successful operation". In his opinion, "the Ukrainians are putting up a very solid fight but they're losing, they're losing decisively" (Moment of Clarity with Lee Camp, 2022).

Scott Retter is a metaphysically very close-minded military expert. His philosophical way of looking at things is a very limited by own considerable military experience.

But common sense is not a collection of prejudices acquired by life experience. A common-sense belief is not produced in a certain way but rather a particular sort of belief, that is, one that is available to people in general on account of its triteness, its palpable obviousness (Rescher, 2020, pp. 208–224).

A particularly striking example of the politics' primacy is the maneuver of the Russian troops in the north of Ukraine after the month offensive actions in the direction of Kyiv. How can some experts feel military necessity where it lacks? From a tactical point of view, such indentation of troops is absolutely "unprofitable", because it depreciates all previous losses and successes. Only crazy or lunatic on the roof of his combat experience cannot see that the so-called redeployment of troops is due to the considerations of political negotiations, and not purely military necessity. It is no accident that in the statement by Sergey Lavrov, Minister of Foreign Affairs of the Russian Federation, about the withdrawal of Russian forces from the North of Ukraine, there was such a value judgment as a "gesture of good will" (Hindustan Times, 2022).

Therefore, the logic of common sense dictates the need for an individual analysis of these negotiations.

4. What an illegal agreement is worth?

Legal reality is always intelligent. Therefore, common sense (including the judgements of lawyers) claims that any contracts, which are outside the law and are determined by quick-fix conditions, are not worth the paper they are written on.

This scientific analysis of the current legislation showed that a peace agreement, which can end a military conflict between Russia and Ukraine, would not be concluded in the foreseeable future.

Such preliminary but categorical conclusion may be attributed to a number of causes, as explained below.

Firstly, in the Ukrainian legal system, international treaties concluded by the country rank second after the Constitution. It means an agreement on Ukraine's neutrality, similar to Finland, is unlawful. It is contrary to the Constitution, which consolidated the North Atlantic integration process of our country (preamble, paragraph 5 of the first part, article 85, article 102, and paragraph 11 of article 116 of Constitution of Ukraine (Verkhovna Rada

of Ukraine, 1996)). The 5 preambular paragraph specifically recognizes the immutability of the policy and it declared that the "Verkhovna Rada of Ukraine, on behalf of the Ukrainian people – citizens of Ukraine of all nationalities <...> adopts this Constitution – the Fundamental Law of Ukraine":

"<...> caring for the strengthening of civil harmony on Ukrainian soil, and confirming the European identity of the Ukrainian people and the irreversibility of the European and Euro-Atlantic course of Ukraine" (Verkhovna Rada of Ukraine, 1996).

Secondly, regarding the legal mechanism for implementing such an agreement on denial of NATO accession, there are also direct legal limits. Thus, Article 3 of the Law of Ukraine "On the All-Ukrainian Referendum" dated January 26, 2021 (the subject of an all-Ukrainian referendum) attributes that:

"<...> are contrary to the provisions of the Constitution of Ukraine, the universally recognized principles and norms of international law" (Verkhovna Rada of Ukraine, 2021).

Thirdly, such a referendum can be held only in peace time, which involves a cease-fire and the full withdrawal of the aggressor's troops from the territory of Ukraine. This follows from Article 19 of the Law of Ukraine "On Legal Regime of Martial Law" dated May 12, 2015, № 389-VIII:

"1. The following is prohibited martial law: Changing the Constitution of Ukraine; holding all-Ukrainian and local referendums" (Verkhovna Rada of Ukraine, 2015).

The latter position directly follows from Article 52 (Coercion of a State by the threat or use of force) of Vienna Convention on the Law of Treaties on 23 May 1969:

"A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations" (United Nations, 1969).

In concluding, it is necessary to add to the legal argument against the viability of a peace agreement with the Russian Federation, the next moralistic statement that belongs to the British commander and the state figure, the winner in the battle of Waterloo (1815) Field Marshal Arthur Wellesley, 1st Duke of Wellington (1769–1852):

"I mistrust the judgement of every man in a case in which his own wishes are concerned" (Gurwood, 1852).

As it turned out, our interests are antagonistic in modern reality. The Ukrainian people will never pander to the aggressive plans of Russian political leadership.

Mass suicide is a complete absurd. Moreover, such mental perversion is not inherent in Ukrainian consciousness.

We do not want to be drawn into a new international agreement, which repeats the principal drawback of the Minsk agreements.

All the previous arrangements concluded under military pressure of the Russian Federation, with a tacit agreement of the Western leaders and NATO, resulted in war.

In political essence, it is a reproduction of the principle of appealing to the aggressor, a traditional solution of such armed conflicts by their 'freezing' over many years.

5. Conclusions

Despite any military result in the theater of operations, the political reign of Zelensky (in the sense of the people's support for state power) will become stronger. On the contrary, Putin's power will become much weaker, not only on the international arena, but also in his country.

This war can last a few months or even years, but it will definitely be victorious for Ukraine. This is because the policy determines the war, not vice versa. Great military scientist Carl von Clausewitz was right. Putin lost this war politically on the day when he began it. Separate and partial military successes will not change this logic, they only pull off the shameful end of this big gamble with no payoff.

Positivist analysts, who ignore the war's moral and spiritual components, will be shocked. Contrary to all the laws of armed struggle, the Russian "Armada Invencible" will be eventually destroyed, like the Spanish one in 1588.

Ukraine finally stops to be an "anti-scientific state" (Academician O. Kostenko). The adoption of main political decisions in our country should be carried out through comparing alternative versions of various scientific schools and experts, and not only the nearest environment of the President must be endowed with such a competence. It is now real like never before amidst the unification of the entire Ukrainian people during the war.

The specific nature of the reasonableness as a means of achieving the flexibility of legal regulation has made this academic exchange of positions extremely relevant (Halkevych, Nykyforak, 2021, pp. 125–129).

According to Francis Bacon, knowledge itself is power. We hope these thoughts on the raised issues will make us stronger and better to win a glorious victory.

References:

Allan, T. (1995). The Rule of Law in Law, Liberty, and Justice: The Legal Foundations of British Constitutionalism. Oxford: Oxford University Press, 314 p. [in English].

Beikun, A., Pryimak, V. (2021). Legal and regulatory basis for security and defence sector operation: conceptual approach. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 7, pp. 29–34 [in English].

***Clausewitz, C. von** (1989). On War /* ed. and transl. by M. *Howard, P. Paret. New Jersey: Princeton University Press,* 752 p. [in English].

Collinson, S. (2022). Analysis: Why Putin is mercilessly targeting civilians even as Zelensky pleads for peace talks. *CNN*, March 21. Retrieved from: https://edition.cnn.com/2022/03/21/politics/zelensky-ceasefire-talks-ukraine-war-analysis/index.html [in English].

Gurwood, J. (ed.) (1852). The Dispatches of Field Marshal the Duke of Wellington, During His Various Campaigns in India, Denmark, Portugal, Spain, the Low Countries, and France. Volume 2. London: John Murray, 772 p. [in English].

Halkevych, S., Nykyforak, V. (2021). Discretional nature of subjective reasonableness. *Pidpryiemnytstvo, hospodarstvo i pravo – Entrepreneurship, Economy and Law*, no. 9, pp. 125–129. Retrieved from: https://doi.org/10.32849/2663-5313/2021.9.18 [in English].

Hindustan Times (2022). Russia lists "goodwill gesture" for talks, has a condition to end Ukraine war. Retrieved from: https://www.hindustantimes.com/world-news/ukraine-russia-lists-goodwill-gesture-for-talks-but-has-a-condition-to-end-war-101649239938256.html [in English].

Moment of Clarity with Lee Camp (2022). Former UN Inspector Scott Ritter on What The Hell Is Happening. *YouTube*. Retrieved from: https://www.youtube.com/watch?v=rRFjlnoMCeE&list=TLPQMjkwMzIwMjIdbWx5Pajlsg&index=7 [in English].

Rescher, N. (2020). Common-Sense Realism. *The Cambridge Companion to Common-Sense Philosophy* / ed. by R. Peels, R. van Woudenberg. Cambridge: Cambridge University Press, pp. 208–224. Retrieved from: https://doi.org/10.1017/9781108598163.010 [in English].

Shulzhenko, F. (2019). "Ruskyi mir" u systemi zahroz rehionalnii ta hlobalnii bezpetsi ["Russian world" in the system of threats to regional and global security]. *Yurydychnyi visnyk Ukrainy – Legal Newsletter of Ukraine*, no. 24–25, pp. 16–18 [in Ukrainian].

Shulzhenko, F. (2021). Polityko-pravove svavillia yak komponent hibrydnoi viiny [Political and legal arbitrariness as a component of a hybrid war]. *Yurydychnyi visnyk Ukrainy – Legal Newsletter of Ukraine*, no. 11(1340), pp. 10–11 [in Ukrainian].

United Nations (1969).Vienna Convention on the Law of Treaties, done at Vienna on 23 May 1969. Retrieved from: https://legal.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf [in English].

Vega, J. (2018). Legal philosophy as practical philosophy. *Journal for Constitutional Theory and Philosophy of Law*, no. 34, pp. 20–44. Retrieved from: http://journals.openedition.org/revus/3859 [in English].

Verkhovna Rada of Ukraine (1996). Konstytutsiia Ukrainy: Zakon Ukrainy vid 28 chervnia 1996 r. № 254к/96-ВР [Constitution of Ukraine: Law of Ukraine of June 28, 1996 № 254к/96-ВР]. Retrieved from: https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=254%EA%2F96%2D%E2%F0#Text [in Ukrainian].

Verkhovna Rada of Ukraine (2015). Pro pravovyi rezhym voiennoho stanu: Zakon Ukrainy vid 12 travnia 2015 r. № 389-VIII [On Legal Regime of Martial Law: Law of Ukraine of May 12, 2015 № 389-VIII]. Retrieved from: https://zakon.rada.gov.ua/laws/show/389-19?lang=uk#Text [in Ukrainian].

Verkhovna Rada of Ukraine (2021). Pro vseukrainskyi referendum: Zakon Ukrainy vid 26 sichnia 2021 r. № 1135-IX [On the All-Ukrainian Referendum: Law of Ukraine of January 26, 2021 № 1135-IX]. Retrieved from: https://zakon.rada.gov.ua/laws/show/1135-20#Text [in Ukrainian].

Федір Шульженко,
доктор політичних наук, професор, заслужений працівник освіти України, завідувач кафедри теорії та історії права, Київський національний економічний університет імені Вадима Гетьмана, проспект Перемоги, 54/1, Київ, Україна, індекс 03057, teoriafedir@ukr.net
***ORCID:** orcid.org/0000-0001-6880-1662*

Олександр Гайдулін,
доктор юридичних наук, доцент, провідний науковий співробітник, Науково-дослідний інститут приватного права і підприємництва імені академіка Ф. Г. Бурчака Національної академії правових наук України, вулиця Миколи Раєвського, 23-а, Київ, Україна, індекс 01042, gaydulin@i.ua
***ORCID:** orcid.org/0000-0002-1269-7007*
***Scopus-Author ID:** 57217828443*

ПРАВОВІ ТА ПОЛІТИЧНІ АСПЕКТИ ВІЙНИ В УКРАЇНІ: ФІЛОСОФСЬКІ РОЗДУМИ З ТЕАТРУ ВОЄННИХ ДІЙ

Анотація. ***Мета.*** Дослідження стосується філософських, військових, політичних та правових питань для комплексної оцінки ситуації навколо збройної агресії Росії проти України. Серед них найбільш складні питання торкаються розумності й реальності певних політичних і військових дій. Ці проблеми придбали міжнародний характер у сучасній юриспруденції.

Методи дослідження. З методологічної позиції дослідження являє собою розвиток ідеї прусського військового теоретика Карла Філіпа Готліба фон Клаузевіца (який говорив: «Війна є лише продовженням політики іншими засобами») у сучасному контексті. Можливості цього методу були продемонстровані на прикладі систематичного аналізу пов'язаних політичних та військових дій.

Результати. Проведений аналіз дає змогу зробити попередній висновок про те, що війну в Україні викликали багато міжнародних і внутрішніх політичних причин чи факторів. Однак ця збройна агресія була підготовлена та ідеологічно обґрунтована впродовж тривалого часу в межах доктрини так званого «русского мира». І найголовніше, що кожна з воюючих сторін не лише має відмінну цільову установку, а й діє на основі принципово різних типів морального та правового мислення. Мислення на основі принципів природного права виступає проти філософії примітивного позитивізму. У непримиренному антагонізмі добра і зла полягає суть цього гносеологічного конфлікту. Він визначає есхатологію цієї війни, яка полягає у глобальній катастрофі старого правопорядку, заснованого виключно на владі держав. Перемога над останнім реваншем диктаторських політичних режимів сприятиме народженню нової демократії – людиноцентричної. Саме це визначає перебіг і результат цієї війни.

Висновки. Найважливіший висновок полягає в тому, що нинішня війна обов'язково буде переможною для України, оскільки політика визначає війну, а не навпаки. Великий військовий учений Карл Клаузевіц мав рацію. Політично цю війну Путін програв у той день, коли він її почав. Окремі військові успіхи не змінюють цю логіку, вони тільки відтягують ганебний кінець цієї великої авантюри без виграшу.

Ключові слова: правова філософія, розумність, здоровий глузд, право, політика, війна, збройна агресія.

The article was submitted 10.03.2022
The article was revised 30.03.2022
The article was accepted 21.04.2022