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SUBJECT-MATTER JURISDICTION AND COGNISANCE OF APPLICATIONS FOR ESTABLISHING FACTS RELEVANT TO PROTECTION OF FAMILY RIGHTS AND INTERESTS

Abstract. ***Purpose.*** The purpose of the article is to clarify the subject-matter jurisdiction and cognisance of applications for establishing facts relevant to the protection of family rights and interests. ***Results.*** It is emphasised that cases of establishing facts relevant to the protection of family rights and interests are under the civil jurisdiction of the court on the ground of a direct indication of the law. However, unlike other cases of separate proceedings, such as recognition of a natural person as missing or declaration of his/her death, recognition of a natural person as incapacitated or partially incapacitated, etc., which are within the exclusive civil jurisdiction of the court, cases on establishing legally relevant facts are considered in court, provided that the law does not determine another procedure for their establishment. This is due to the lack of the judicial or administrative procedure, directly provided by law, for establishing all legal facts in the absence or impossibility of obtaining the necessary documents. There are no conditions for consideration in civil proceedings of cases on establishing the fact of a single household of a man and a woman without marriage, on establishing the fact of kinship between natural persons, on establishing the fact of paternity (maternity) by the civil procedure and family legislation of Ukraine, as well as no other bodies authorised to consider such cases. Therefore, the consideration of these cases is the exclusive civil jurisdiction of the court. ***Conclusions.*** It is concluded that the consideration of applications for establishing facts relevant to the protection of family rights and interests is the exclusive civil jurisdiction of the court, except for applications for establishing the facts of registration of marriage, divorce, adoption, which are under the subject-matter jurisdiction of the court in compliance with the conditions specified in the law. At the same time, a specific court authorised to consider applications for establishing facts relevant to the protection of family rights and interests is determined according to the rules of exclusive territorial cognisance, and in the presence of the conditions provided for in Part 2 of Article 257 of the Civil Procedure Code of Ukraine – cognisance by the decision of a higher court.

Key words: family rights and interests, subject-matter jurisdiction, court jurisdiction.

1. Introduction

According to Article 124 of the Constitution of Ukraine, justice in Ukraine shall be administered exclusively by the courts: Constitutional Court of Ukraine and courts of general jurisdiction. The jurisdiction of the courts shall extend to all legal disputes arising in the state. There are no questions about the scope of powers of the Constitutional Court of Ukraine, as it is the only body of constitutional jurisdiction in our country and decides on the compliance of laws and other legal regulations with the Constitution of Ukraine, gives official interpretation of its provisions and laws of Ukraine. The system of courts of general jurisdiction is quite extensive and is based on the principles of territoriality, specialisation and instance. It consists of local courts, courts of appeal, high specialised courts and the Supreme Court of Ukraine) (Bychkova, 2013).

Due to the branching of the judicial system of Ukraine, as well as the specifics of consideration and resolution of certain categories of civil cases, which include, inter alia, cases on the establishment of facts relevant to the protection of family rights and interests, the legislation provides for special rules that determine

the civil jurisdiction and cognisance of such cases.

2. The importance of civil jurisdiction

The concept of 'jurisdiction' comes from the Latin *jurisdictio*, which literally means 'one who speaks about law' (Yefimov, 2015).

According to O. Yefimov, the essence of this concept is not in the literal translation, but in the meaning it has received in the course of human development: 'the one who is allowed to speak about the law'. That is, this is the person authorised by law to apply the provisions of law to resolve certain issues (Yefimov, 2015).

In the legal literature, judicial jurisdiction is considered in a narrow and broad sense.

D.M. Shadura, advocating the perspective of V.V. Komarov (Komarov, Tertyshnikov, Barankova, 2008), considers judicial jurisdiction in a broad sense as a system of four constituent elements: functions of the judiciary; subject matter of jurisdiction; legal powers; procedural nature of judicial activity. The scientists argue that criteria for delimitation of judicial jurisdiction are: a) the nature of disputed legal relations (subject criterion) and b) their legal competence (Shadura, 2008).

Furthermore, the term *pidvidomchict* 'subject-matter jurisdiction,' which has the Russian origin, is more often used in legal regulations. For example, A. O. Vlasov, pointing to the Russian origin of this term, believes that it means 'to bring under *vidomstvo* 'jurisdiction'', i.e., to introduce a legal issue (case) into the system of institutions serving a certain state branch (Vlasov, Artamonova, Vlasova, 2003).

On this basis, some authors equate civil jurisdiction and subject-matter jurisdiction cognisance of civil cases (Yefimov, 2015), some, on the contrary, advocate the perspective according to which civil jurisdiction and subject-matter jurisdiction of civil cases are different legal categories (Bychkova, Biriukov, Bobryk, 2009).

Regarding the correlation of civil jurisdiction and subject-matter jurisdiction of civil cases, we advocate the perspective of S.S. Bychkova, according to which, if judicial jurisdiction helps delimit the subject-matter competence between different courts and sections of the judicial system, then subject-matter jurisdiction determines the property of a court case to fall under the jurisdiction of the court, and not another jurisdictional body (Bychkova, 2013).

Therefore, the importance of civil jurisdiction is that it helps the state perform its tasks and functions through the system of bodies established for this purpose, the totality of which for a certain type of activity is called a branch. The provisions of civil jurisdiction are designed not only to delimit the powers of different jurisdictional bodies, but also to determine the very procedure for exercising these powers (Yefimov, 2015).

It should be noted that cases of establishing facts relevant to the protection of family rights and interests are under the civil jurisdiction of the court on the ground of a direct indication of the law (Part 1 of Article 256 of the Civil Procedure Code of Ukraine). However, unlike other cases of separate proceedings, such as recognition of a natural person as missing or declaration of his/her death, recognition of a natural person as incapacitated or partially incapacitated, etc., which are within the exclusive civil jurisdiction of the court, cases on establishing legally relevant facts are considered in court, provided that the law does not determine another procedure for their establishment. This is due to the lack of the judicial or administrative procedure, directly provided by law, for establishing all legal facts in the absence or impossibility of obtaining the necessary documents.

3. Features of civil proceedings

Depending on the possibility established by law to consider and resolve a particular civil case by only one jurisdictional body or several ones, a distinction is made between exclusive (exclusive, single, peremptory) and multiple (numerous) subject-matter jurisdiction of civil cases (Bychkova, Biriukov, Bobryk, 2009).

In case of exclusive subject-matter jurisdiction, the consideration and resolution of a separate civil case falls within the competence of only one jurisdictional body.

There are no conditions for consideration in civil proceedings of cases on establishing the fact of a single household of a man and a woman without marriage, on establishing the fact of kinship between natural persons, on establishing the fact of paternity (maternity) by the civil procedure and family legislation of Ukraine, as well as no other bodies authorised to consider such cases. Therefore, the consideration of these cases is the exclusive civil jurisdiction of the court.

In case of multiple subject-matter jurisdiction, the consideration and resolution of individual civil cases falls within the competence of several jurisdictional bodies. In turn, depending on the method of choosing the jurisdictional body that shall resolve a civil case, multiple subject-matter jurisdiction is divided into contractual, alternative and conditional (Bychkova, Biriukov, Bobryk, 2009).

The contractual subject-matter jurisdiction determines that the choice of the jurisdictional body that shall consider the case is due to mutual agreement of the parties. For example, this is the subject-matter jurisdiction of civil disputes referred to arbitration courts (Article 17

of the Civil Procedure Code of Ukraine; Part 2 of Article 1 of the Law of Ukraine 'On Arbitration Courts').

Proceeding from the fact that cases on establishing facts legally relevant to the protection of family rights and interests are considered in a separate proceeding, one of the specificities of the procedural form thereof is the prohibition to transfer the case to the arbitration court (Part 5 of Article 235 of the Civil Procedure Code of Ukraine), there is no possibility to choose the appropriate jurisdictional body that will consider such an application according to the rules of contractual jurisdiction.

In addition, due to the absence of a legislative alternative, it is impossible to choose the jurisdictional body that will consider the case according to the rules of *alternative subject-matter jurisdiction*.

Conditional subject-matter jurisdiction implies that a certain civil case falls under the jurisdiction of the relevant jurisdictional body provided the conditions stipulated by law are met.

For example, applications for establishing the facts of registration of marriage, divorce, adoption are considered by the court, provided that the relevant record has not been preserved by the State Civil Registry Offices, has been refused to restore or can be restored only on the ground of a court decision to establish the fact of registration of the civil status. Therefore, in this case, the rules of conditional civil jurisdiction apply, according to which, under conditions, specified in the law, this case may be under the jurisdiction of either the court or the State Civil Registry Office.

According to the rules of conditional civil jurisdiction, competence is delimitated between different jurisdictional bodies in cases on establishing the fact of birth of a person at a certain time. As a rule, the establishment of the fact of birth of a person at a certain time is established by the State Civil Registry Office, and in case of impossibility of registration by the State Civil Registry Office of the relevant fact, the consideration of such a case falls under the civil jurisdiction of the court.

After the court determines that the establishment of a fact legally relevant to the protection of family rights and interests falls under the civil jurisdiction of the court, it faces another issue on which the opening of proceedings depends: this is the issue of determining the scope of the competence of the court to consider and resolve the case (Yefimov, 2015), that is, determining cognisance.

In the legal literature, cognisance is understood as a property of civil cases by means of which their consideration and resolution are assigned by law to the competence of the relevant court (Bychkova, Biriukov, Bobryk, 2009).

The significance of cognisance is that it helps to delimit the competence to consider and resolve civil cases under jurisdiction of court within the system of courts civil jurisdiction: both between courts of different branches and between courts of the same branch (Churpita, 2015).

Different criteria are used to classify cognisance. The current civil procedure law of Ukraine classifies cognisance depending on the functions performed by the courts, and the territory covered by the activities of a particular court. Depending on these two criteria, the competence of different courts within the system of courts of general jurisdiction is determined, and cognisance is classified into functional and territorial (Yefimov, 2015).

Functional cognisance determines the competence of certain branches of the judicial system of Ukraine based on the functions they perform. At the same time, territorial cognisance distributes the competence to consider and resolve civil cases among the courts of the same branch depending on the territory covered by their powers. The importance of territorial jurisdiction is due to its rules that help determine which court of the branch of the judicial system is authorised to consider and resolve a particular civil case (Churpita, 2015).

Functional cognisance of cases on establishing facts relevant to the protection of family rights and interests is defined in Article 107 of the Civil Procedure Code of Ukraine, according to which all cases to be considered and resolved in civil proceedings are considered by district, local district, city and city district courts, which are courts of first instance.

Regarding *territorial cognisance*, civil procedure legislation and procedure study distinguish its several types: general territorial cognisance (Article 109 of the Civil Procedure Code of Ukraine), cognisance by a decision of a higher court (Articles 108, 111 of the Civil Procedure Code of Ukraine), alternative cognisance (Article 110 of the Civil Procedure Code of Ukraine), cognisance of several related claims (Article 113 of the Civil Procedure Code of Ukraine) and exclusive cognisance (Article 114 of the Civil Procedure Code of Ukraine).

The content of Article 257 of the Civil Procedural Code of Ukraine enables to state that applications for establishing facts relevant to the protection of family rights and interests are submitted to the court under the rules of exclusive territorial cognisance, as well as cognisance by a decision of a higher court.

In the legal literature, exclusive territorial cognisance is referred to as cognisance, which is determined by the legislator's instruction to consider and resolve certain categories of civil cases only by specific courts directly provided for by law, that is, some applications shall be addressed to a court clearly established by law. Such cognisance is called exclusive because it excludes the possibility of applying rules of territorial cognisance other than those established by law for this category of cases (Bychkova, Biriukov, Bobryk, 2009).

Exclusive territorial cognisance shall be established to ensure better conditions for fair, impartial and timely consideration and resolution of civil cases, as well as enforcement of the decision taken as a result of their consideration. Due to the peculiarities of individual claims, it is easier and faster to find out the circumstances relevant to the case at the location of the material subject matter of the dispute, the majority of evidence, and the main procedural actions (Bychkova, Biriukov, Bobryk, 2009).

The rule of exclusive territorial cognisance is enshrined in Part 1 of Article 257 of the Civil Procedure Code of Ukraine, according to which the application of a physical person to establish a legally relevant fact shall be submitted to the court at the place of his/her residence.

Therefore, in accordance with Part 1 of Article 257 of the Civil Procedure Code of Ukraine, applications in cases on establishing facts relevant to the protection of family rights and interests, in particular, the establishment of: the fact of kinship between natural persons (paragraph 1 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the facts of registration of marriage, divorce, adoption (paragraph 4 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the fact of paternity (maternity) (Article 135 of the Family Code of Ukraine), the fact of a single household of a man and a woman without marriage (paragraph 5 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), the fact of birth of a person at a certain time (paragraph 7 of Part 1 of Article 256 of the Civil Procedure Code of Ukraine), are filed to the court according to the rules of exclusive territorial cognisance, that is, at the place of residence of the applicant.

4. Judicial practice of establishing legally relevant facts

The court practice provides some clarifications on the issues of determining the place of residence of a natural person. In accordance with paragraph 5 of Resolution 2 of the Plenum of the Supreme Court of Ukraine of June 12, 2009 'On the application of civil procedure law in the consideration of cases in the court of first instance' the place of residence of a natural person is determined in accordance with the provisions of Article 29 of the Civil Code of Ukraine (Civil Code of Ukraine, 2008) and Article 3 of the Law of Ukraine 'On Freedom of Movement and Free Choice of Residence in Ukraine' (Law of Ukraine On Freedom of Movement and Free Choice of Residence in Ukraine, 2003), and the location of a legal entity is determined in accordance with the provisions of Article 93 of the Civil Code of Ukraine.

According to Article 3 of the Law of Ukraine 'On Freedom of Movement and Free Choice of Place of Residence in Ukraine', the place of residence of a natural person is a dwelling located in the territory of an administrative-territorial unit in which such person resides permanently or temporarily, and the place of stay of a natural person is an administrative-territorial unit in which the person resides for less than six months a year.

When resolving these issues, the courts shall also consider the clarifications contained in Decision No. 15-rp/2001 of the Constitutional Court of Ukraine of November 14, 2001 (registration case) (The decision of the Constitutional Court of Ukraine in the case based on the constitutional submission of 48 People's Deputies of Ukraine regarding compliance with the Constitution of Ukraine (constitutionality) of the provisions of subsection 1 of paragraph 4 of the Regulation on the passport service of internal affairs bodies, approved by the resolution of the Cabinet of Ministers of Ukraine (registration case), 2001). The place where a person is in custody in the form of a preventive measure, the place where a person is serving a sentence of imprisonment under a court verdict, the place where a person is undergoing inpatient treatment are not the place of residence of a natural person.

As noted above, the second type of cognisance, according to the rules of which applications for establishing facts relevant to the protection of family rights and interests are submitted to the court, is the cognisance by a decision of a higher court.

It should be noted that the introduction of this type of cognisance ensures the principle of independence of judges and their obedience only to the law (Article 126 of the Constitution of Ukraine), eliminating the possibility of direct or indirect influence on the judge of the local court that will consider the case, as well as doubts about the impartiality of judges (Komarov, Bihun, Barankova, 2011).

The rule of cognisance by a decision of a higher court is enshrined in Part 2 of Article 257 of the Civil Procedure Code of Ukraine. According to the rule, cognisance of cases upon

the application of a citizen of Ukraine residing abroad to establish a fact of legal significance, including for the purpose of protecting family rights and interests, is determined by a decision of a judge of the Supreme Court of Ukraine upon his/her request.

Allowing for sub-paragraph 2 of Clause 'c' of paragraph 14.1.213 of Article 14 of the Tax Code of Ukraine (Tax Code of Ukraine, 2010), a natural person shall be considered to reside outside Ukraine if he/she stays in Ukraine for less than 183 days (including the day of arrival and departure) during the year.

5. Conclusions

Therefore, it can be argued that the consideration of applications for establishing facts relevant to the protection of family rights and interests is the exclusive civil jurisdiction of the court, except for applications for establishing the facts of registration of marriage, divorce, adoption, which are under the subject-matter jurisdiction of the court in compliance with the conditions specified in the law. At the same time, a specific court authorised to consider applications for establishing facts relevant to the protection of family rights and interests is determined according to the rules of exclusive territorial cognisance, and in the presence of the conditions provided for in Part 2 of Article 257 of the Civil Procedure Code of Ukraine – cognisance by the decision of a higher court.

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ПІДВІДОМЧІСТЬ ТА ПІДСУДНІСТЬ ЗАЯВ ПРО ВСТАНОВЛЕННЯ ФАКТІВ, ЩО МАЮТЬ ЗНАЧЕННЯ ДЛЯ ОХОРОНИ СІМЕЙНИХ ПРАВ ТА ІНТЕРЕСІВ

Анотація. ***Метою*** статті є з'ясування підвідомчість та підсудність заяв про встановлення фактів, що мають значення для охорони сімейних прав та інтересів. ***Результати.*** Наголошено, що справи про встановлення фактів, які мають юридичне значення для охорони сімейних прав та інтересів, підпадають під цивільну юрисдикцію суду на підставі прямої вказівки закону. Проте, на відміну від інших справ окремого провадження, таких, наприклад, як визнання фізичної особи безвісно відсутньою або оголошення її померлою, визнання фізичної особи недієздатною чи обмежено дієздатною тощо, які віднесені до виключної цивільної юрисдикції суду, справи про встановлення фактів, що мають юридичне значення, розглядаються в суді за умови, що законом не визначено іншого порядку їх встановлення. Це пояснюється тим, що не для всіх юридичних фактів в законі прямо передбачений судовий чи адміністративний порядок їх встановлення у випадку відсутності чи неможливості отримання необхідних документів. Для розгляду в порядку цивільного судочинства справ про встановлення факту проживання однією сім'єю чоловіка та жінки без шлюбу, про встановлення факту родинних відносин між фізичними особами, а також встановлення факту батьківства (материнства) цивільним процесуальним та сімейним законодавством України не передбачено жодних умов, а також не визначено інших органів, уповноважених розглядати такі справи. Відтак розгляд зазначених справ є винятковою цивільною юрисдикцією суду. ***Висновки.*** Зроблено висновок, що розгляд заяв про встановлення фактів, що мають значення для охорони сімейних прав та інтересів, є виключною цивільною юрисдикцією суду, за винятком заяв про встановлення фактів реєстрації шлюбу, розірвання шлюбу, усиновлення, які підвідомчі суду при дотриманні визначених у законі умов. Разом із цим встановлення конкретного суду, уповноваженого розглядати заяви про встановлення фактів, що мають значення для охорони сімейних прав та інтересів, здійснюється за правилами виключної територіальної підсудності, а за наявності умов, передбачених у ч. 2 ст. 257 Цивільного процесуального кодексу України, – підсудності за ухвалою суду вищої інстанції.

Ключові слова: сімейні права та інтереси, підвідомчість, підсудність.

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PREVENTION AND MINIMIZATION OF LEGAL DEFECTS IN THE MECHANISM OF LEGAL REGULATION OF THE EMBRYO'S LEGAL STATUS

Abstract. ***Purpose.*** The central goal of the present paper is to determine ways to prevent possible defects in law and reduce the existing drawbacks in the field of the embryo's legal status. ***Research methods.*** The methodological approach used in the study is a mixed methodology based on the application of general scientific methods (analysis, synthesis, deduction, analogy, comparison, generalization, hypothetical and systemic methods), special methods (forecasting), and private methods of legal science (formal-legal). ***Results.*** The impact of existing legal defects on social relations was studied, and such negative consequences as violation of the principles of humanism, non-discrimination, and justice were singled out. The main types of legal defects in the mechanism of legal regulation of the embryo's status were highlighted and reasoned. A list of ways to prevent and minimize such defects was compiled. The following general legal methods of prevention were distinguished: 1) determination of the scope of legal regulation; 2) justification in the legal doctrine of the development of social relations concerned; 3) implementation of the national legislation adaptation. Technical methods of preventing legal defects include 1) carrying out an examination of draft laws, and 2) unification of legal terminology. It was proposed to minimize legal defects in the relevant area by using the following methods of elimination: 1) adoption of new legal norms; 2) modification of existing legal norms; 3) systematization of the legislation of Ukraine in the form of official incorporation, consolidation, or codification. The following methods of overcoming the existing legal defects in the regulation of the embryo's legal status were highlighted: 1) application of the principles of law: justice, humanism, and non-discrimination; 2) application of analogy. Scientific novelty. The present research is one of the pioneering ones in the national legal doctrine. ***Conclusions.*** The available provisions of Ukrainian legislation are insufficient for regulating embryo's legal status; however, even minor legal regulations contain numerous legal defects. The implementation of the proposed steps of prevention and minimization will drive the necessary development of legislation on the embryo's legal status and will provide an opportunity to protect a person at the very first development stage – intrauterine.

Key words: violation of principles of law, uncertainty of legal norms, legal gaps, gender-biased sex selection, acquis communautaire, elimination, overcoming.

1. Introduction

The legal system is developed amidst rule-making of different levels and complex state system. Under such conditions and given the human factor, errors, contradictions, and gaps in law (legal defects) are inevitable.

The issue of legal defects in the mechanism of legal regulation of the embryo's status, especially cases of their prevention and minimization, has been poorly studied in Ukrainian legal science. This is not surprising since legal relations raising the embryo's legal status appeared only 44 years ago – after the birth in 1977 of the first IVF (in vitro fertilization) baby (Brown, 2018).

However, despite the lack of sufficient legal regulation, the progress of science and medicine is annually gaining new scientific, diagnostic, and therapeutic achievements revealing new research perspectives. That progress makes the embryo's legal situation particularly volatile because new ways of exploiting embryos are not regulated or are scantily regulated by legislation, which leads to disastrous consequences.

Consequently, the **purpose** of the study is to outline a way to improve the regulatory framework for the embryo's legal status by specifying remedies to prevent and minimize legal defects in the mechanism of statutory regulation of the embryo's status.

To achieve the goal, the following **tasks** have been solved:

1. The analysis of national and international legislation on the legal status of the embryo was carried out.

2. Legal defects in the regulation of the legal status of the embryo found in the legislation of Ukraine were classified.

3. The available ways of preventing and minimizing legal defects in law were analyzed.

4. The ways of preventing and minimizing potential and detected legal defects necessary for the relevant development stage of legal relations are highlighted.

An integrated methodological approach was used to achieve the set objectives. The general scientific methods employed in the study comprise analysis, synthesis, deduction, analogy, comparison, generalization, hypothetical-deductive method, and systems approach. For example, comparison facilitated in establishing the inconsistency of the available legal nomenclature among different levels of national regulations. The hypothetical-deductive method, for its part, allowed making deduction-based scientific assumptions in the form of conclusions. The specific method of the present study is forecasting, which is also covered in the research findings. As for private methods of legal science, the legalistic approach traditional for jurisprudence was used, within which the generalization and systematization of the statutory regulation of the embryo's status were exercised, and methods for interpreting legal acts were developed.

The data set forth in the study are divided into 3 subsections: 1) Consequences and types of legal defects in the mechanism of statutory regulation of the legal status of the embryo; 2) Prevention of legal defects in the mechanism of statutory regulation of the status of the embryo; 3) Minimization of legal defects in the mechanism of statutory regulation of the legal status of the embryo.

2. Consequences and types of legal defects in the mechanism of statutory regulation of the embryo's legal status

Legal defects are inherent in any branch of law. However, while some defects do not have a destructive effect on the legal relations in a particular branch of law, others cause irreversible and tragic consequences. For example, legal defects in regulating the embryo's legal status result in at least a violation of the principles of humanism, non-discrimination, and justice, at most – female mortality.

The principle of humanism, which is evident in the Constitution of Ukraine, defines the human being, his or her life and health, honour and dignity, inviolability and security as the highest social value (Konstytutsiia Ukrainy, 1996). The legal status of human life at the very first stage of its development – intrauterine, is not approved, and its safety is not guaranteed. It should be noted that the above does not equate the human value before and after birth. The issue of embryo value is undoubtedly essential from both a moral and legal point of view, but it goes beyond the present study. However, there is no question that the embryo has some degree of value, hence the human embryo has more respect than the embryo of other species. The beforementioned is confirmed by para. 2, part 2, art. 25 of the Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine), which recognizes that in cases established by law, the interests of a child conceived but not yet born are protected (Tsyvilnyi kodeks Ukrainy, 2003). At the same time, due to the lack of consistent and sufficient legal regulation of the limits of embryo research, states risk becoming a haven for ethically contradictory, inhuman, cruel, immoral, and unethical experiments on human embryos that violate the principle of humanism.

Violation **of the principle of justice** and **non-discrimination** is associated with the issue of balancing the competing rights of the mother with the legal status of the unborn child. The imbalance of the rights of the mother and the embryo most often appears in countries that, for ideological and religious reasons, enshrine the unborn child's right to life from the moment of conception, which leads to the prohibition of any procedure that terminates pregnancy (abortion). In addition to the prohibition of induced termination of pregnancy, the recognition of the unborn child's right to life at a level similar to that of the born child usually results in the denial of the full range of reproductive health services necessary to protect women's rights to life, health, dignity, and privacy. The United Nations Human Rights Committee notes that denial of access to services that only women require, including abortion, is discriminatory and may amount to gender-based violence, torture and/or cruel, inhuman or degrading treatment. Ensuring access to these services in accordance with human rights standards is recognized as part of the state's obligations to eliminate discrimination against women and ensure women's right to health, reproductive rights, and other fundamental human rights (United Nations Human Rights Office of the High Commissioner, 2020). The World Health Organization argues that the prohibition of abortion does not affect their frequency – on the contrary, severe restrictions on abortion increase the level of illegal and dangerous abortions with an associated

risk to the life and health of a pregnant woman (World Health Organization, 2011).

Discrimination can also be observed in such a phenomenon as social sex selection. The international community is inclined to limit or prohibit the choice of a child's sex upon social indicators since it causes a violation of the sexual balance of the population. Foreign doctrine even contains the term "*missing women*" (Moskalenko, 2018), which indicates a shortage of women compared to their expected number in the region due to abortion, infanticide, as well as inadequate medical care and nutrition for female children (Wikimedia Foundation, 2022). Article 14 of the Convention for the Protection of Human Rights and Dignity of the Human Being with regard to the Application of Biology and Medicine: Convention on Human Rights and Biomedicine, of 04.04.1997 (hereinafter referred to as the Oviedo Convention) establishes that use of techniques of medically assisted procreation shall not be allowed for the purpose of choosing a future child's sex, except where serious hereditary sex-related disease is to be avoided (Convention on Human Rights and Biomedicine, 1997). A similar provision in the form of a recommendation is available in the WMA Statement on In-Vitro Fertilization and Embryo Transplantation, adopted by the 39th World Medical Assembly in October 1987, and other international documents. Ukraine, unfortunately, still does not have a statutory ban on social sex selection.

The mentioned gap is only one of the types of legal defects in the statutory regulation of the area under study. Analysis of regulations makes it possible to establish various logical-structural and technical defects in the norms relating to the embryo's legal status and some specifics of legal defects in legal relations. Summarizing the results of such an analysis, it is suggested identifying the following **types of legal defects** in the regulatory mechanism of the embryo's legal status:

1. ***Legal defects of the parties involved in legal relations***. The specificity of legal relations is manifested in the lack of the very parties of legal relations due to the lack of the formalized status of the embryo –an object of law, a subject of law, or a special legal category (*sui generis*).

2. ***Ambiguity of legal norms***. The technical defect of the legal norm is evident in the lack of an accurate and complete statutory regulation, which inevitably leads to a decrease in the regulatory properties of law, complicates the interpretation of its norms, and prevents their effective implementation. Thus, the mentioned para. 2, part 2, art. 25 of the CC of Ukraine is the only reference to the legal status of the embryo in national regulations. It states that in cases established by law, the interests of the embryo are protected, but the legislator does not specify them. There are also no measures for protecting the interests of the unborn child. Even the feasibility of such a regulation is questionable since the 2004 decision of the Constitutional Court established that an interest, even if protected by law, unlike a right, is not ensured by the legal obligation of the other party, and the use of a good in which a person has a legitimate interest should proceed without the requirements of certain actions from other persons or specific boundaries of behavior (Rishennia Konstytutsiinoho Sudu Ukrainy, 2004).

3. ***Defects of legal terminology*** **are** also technical defects of the legal norm. The legislation of Ukraine contains two terms that relate to the intrauterine life of a person – "**embryo**" (up to eight weeks) (Zakon Ukrainy Pro zaboronu reproduktyvnoho klonuvannia liudyny, 2004) and "**fetus**" (from the 12th full week of pregnancy to removal from the mother's body) (Nakaz Ministerstva okhorony zdorovia Ukrainy, 2006). The definition of the period of intrauterine life of a person from the 8th to the 12th week is not enshrined legislatively. Moreover, normative legal acts include many vague semantic synonyms: in the Family Code of Ukraine (hereinafter referred to as the FC of Ukraine) – "embryo" (Art. 123), "a conceived child" (Art. 110, 122); in the CC of Ukraine – "a child conceived but not yet born" (Art. 25, 1298); in the Fundamentals of Ukrainian legislation on health care – "embryo" (Art. 48); in the Procedure for the Use of Assisted Reproductive Technologies in Ukraine (hereinafter – Order No.787) – "embryo", "fetus"; in the Law of Ukraine "On the Prohibition of Human Reproductive Cloning" – "embryo" (Art. 2), "a fertilized egg" (Art. 2).

4. ***Gaps***. Being a logical-structural defect, they lack a rule of law that would regulate relations that fall within the scope of legal influence. The examples of gaps in regulating the legal status of the embryo are as follows:

1) a zero ban on sex selection of the embryo upon social indicators;

2) excluding single men from the circle of subjects who can receive a donor embryo.

3. Prevention of legal defects in the regulatory mechanism of the embryo's legal status

Among other things, scientists identify general legal and technical ways to prevent law defects.

It is proposed to identify the **following general legal ways to prevent** legal defects in the mechanism of statutory regulation of the status of the embryo:

1. ***Determination of the scope of legal regulation***. It is necessary to establish the circle of social relations, events, facts, and circumstances when they: 1) require legal regulation, 2) are reflected in the conscious volitional behavior of subjects, 3) are subject to legal regulation given the need for their external control to prevent interference with legally protected values. The relevant legal relations concern each of us and our descendants, influence human population, and interfere in the most rapid and most important period of human growth – embryonic, and therefore must be properly regulated. The need for their external control is supported by the above cases of the adverse consequences of imperfect legislation on statutory regulation of the status of the embryo.

2. ***Substantiation in the law doctrine of*** the *concepts of development of social relations under consideration*. The conscious will of legal entities regarding the need to recognize and consolidate "new" legal relations at the legislative level is primarily manifested in sufficient scientific research. Subject-related literature should elicit the problems of current regulation and offer ways to solve them. Unfortunately, there is a lack of relevant literature sources in the field under study. At this stage of the development of legal regulation of the embryo's status, it is expedient to advance the doctrinal base and increase the number of high-quality works that would contain substantial and appropriate suggestions for updating and amending the current legal regulation that does not meet modern requirements.

3. ***Adaptation of national legislation***. First of all, it refers to the adaptation of national legislation to *acquis communautaire*, especially the international legal acts already adopted by Ukraine. **Acquis communautaire** is a common set of rights and obligations that unites all EU countries as members of the Union. It is constantly evolving and comprises the content, principles, and political objectives of treaties; legislation adopted under the Treaties; case law of the Court of Justice of the EU; declarations and resolutions adopted within the EU, etc. (Acquis communautaire). Although Carine Brochier from the European Institute of Bioethics noted that until the legal status of the embryo is settled in the European Union (Dailymotion, 2015), it is possible to highlight the essential principles that the European Union uses in resolving issues related to its legal status. Thus, in the case of Parrillo v. Italy as of 27.08.2015 regarding the violation of the right to peaceful enjoyment of his possessions (that is, embryos), the European Court of Human Rights (hereinafter – ECHR) concluded that Art. 1 of Protocol No. 1 to the Convention, on the protection of property, cannot be applied in the present case given that human embryos cannot be regarded as "possessions" (Case of Parrillo v. Italy, 2015). The practice of the European Court of Human Rights as a source of Ukrainian law established that a human embryo is not a legal object. In addition, one of the fundamental Conventions on Human Rights and Biomedicine (the Oviedo Convention) has not yet been ratified, which was signed by Ukraine on March 22, 2002. Crucial provisions of the Convention, such as the prohibition of social sex selection and some provisions concerning research on embryos in vitro, have not yet been rendered in national legislation.

The **technical ways** to prevent legal defects in the mechanism of statutory regulation of the embryo's status of include:

1. ***Examination of draft laws***. The most important thing at the relevant stage is to examine draft laws for compliance with *acquis communautaire*, particularly with the requirements of the Convention for the Protection of Human Rights and Fundamental Freedoms and the ECHR practice. Pursuant to Part 1 of Art. 19 of the Law of Ukraine "On the Implementation of Decisions and the Application of the Practice of the European Court of Human Rights", the representative body carries out a legal examination of all drafts and by-laws that are subject to the requirement of state registration for compliance with the Convention which results in a specific conclusion (Zakon Ukrainy Pro vykonannia rishen ta zastosuvannia praktyky Yevropeiskoho sudu zv pra liudyny, 2012). Unfortunately, there is currently no draft law regulating the legal status of the embryo. However, the legal regime of the embryo is partially defined by the legislation regulating the procedure for using assisted reproductive technologies (hereinafter referred to as ART). Nowadays, three draft laws related to ART have been registered: No. 6475 dated 28.12.2021 "Draft Law on Assisted Reproductive Technology"; No. 6475-1 dated 11.01.2022 "Draft Law on the Application of Assisted Reproductive Technologies"; No. 6475-2 dated 13.01.2022 "Draft Law on the Application of Assisted Reproductive Technologies and Replacement Motherhood". As rightly stated in the explanatory notes to almost every draft law, the drafts lack provisions concerning Ukraine's obligations amidst European integration, rights and freedoms guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms. However, Parts 3, 4 of Art. 19 of the Law of Ukraine "On the Implementation of Decisions and Application of the Practice of the European Court of Human Rights" establish that a representative body provides a constant and reasonable peri-

odic check of current laws and by-laws for compliance with the Convention and the practice of the Court, and, based on its results, submits proposals to the Cabinet of Ministers of Ukraine to amend effective laws and regulations to bring them into line with the Convention's requirements and the relevant practice of the Court (Zakon Ukrainy Pro vykonannia rishen ta zastosuvannia praktyky Yevropeiskoho sudu z prav liudyny, 2012). In view of the aforesaid, current and future draft laws, involving the very laws, should be coordinated with the ECHR practice. At the same time, draft law No. 6475-1 can be an example of the violation of the ECHR practice, which in Art. 23 defines patients who resort to ART as the owners of embryos and health care facilities that use ART as the owners of donor embryos. Although such a regulation renders the actual position of embryos in Ukraine without specifying the peculiarities of that kind of ownership, the provision contradicts the ECHR decision in the case of Parrillo v. Ital – the court established human embryos cannot be regarded as "possessions".

2. ***Unification of legal terminology.*** Considering the above conclusions about the defects of legal nomenclature, it is necessary to agree on the terms of human "embryo" and "fetus". It is proposed to set out clause 1.4 of the Instruction for determining the criteria of the perinatal period, live birth and stillbirth dated 29.03.2006 (hereinafter referred to as Order No.179) as follows: "The fetus is an intrauterine product of conception as of the formation of the placenta (from the eighth to the twelfth week) until expulsion/removal from the mother's body". In addition, it is essential to agree on vague semantic synonyms the legislator applies to refer to the unborn child and, if needed, distinguish between them ("embryo", "fertilized egg", "conceived child", "a child conceived but not yet born").

4. Minimization of legal defects in the regulatory mechanism of the embryo's legal status

As for ***minimizing current legal defects***, it is proposed to consider the following ways to **eliminate** them:

1. ***Adoption of novels***. Given the novelty of the area under study and the lack of legal norms that would directly relate to the embryo's legal status, there is a need for a great deal of novels. They should regulate the legal status of the embryo, determine ways to protect and defend its interests, the limits of embryonic research, etc. For example, it is advisable to introduce into national legislation a provision prohibiting the use of ART for selecting the sex of an unborn child with some exceptions and prohibiting social sex selection.

2. ***Amendments to existing legal regulations.*** Within the present work, the author has already proposed to amend clause 1.4. of Order No.179 and updating the wording of the term "fetus". In addition, Order No. 787 requires numerous changes as its provisions do not allow a single man to resort to assisted reproductive technologies. The substantiation of expediency of including single men in the list of subjects using some ART types (for example, obtaining donor embryos, surrogate motherhood services, etc.) is beyond the scope of the present study; however, such a gap concerns the embryo's legal status and should be eliminated through appropriate amendments in the law.

3. ***Systematization of the legislation*** *of Ukraine in the form of official incorporation, consolidation, or codification*. In specifying such a method of eliminating legal defects, it should be noted that it is too early for its application since there are not even separate articles that would establish the legal status of the embryo and its aspects. However, the scanty current regulation in our country is scattered across various regulatory legal acts: the CC of Ukraine, the FC of Ukraine, the Fundamentals of Ukrainian legislation on health care, the Procedure for the use of assisted reproductive technologies in Ukraine, the Law of Ukraine "On the Prohibition of Human Reproductive Cloning", etc. The adoption of advanced provisions at the first stages of the development of legal regulation of the embryo's status will definitely take place in the form of additions to the mentioned regulations, and therefore it is necessary to carry out the systematization of legislation for the convenience of using such provisions in the future.

Regarding the ways to **overcome** the existing legal defects in the regulation of the embryo's legal status, it is proposed to emphasize the following:

1. ***Application of the principles of law***: justice, humanism, and non-discrimination. It is essential to agree with Pohrebniak S. that the application of the general principles of law is a means that is quite rarely used. It is justified by the current state of development of positive law, when almost all situations requiring legal regulation, receive appropriate direct or indirect regulation by the legislature (Pohrebniak, 2013). Hence, applying these principles should only be an auxiliary way to minimize legal defects in regulating the legal status of the embryo.

2. ***Application of analogy.*** It is not only about applying the analogy of law but also the method of analogy as a tool for establishing equivalence (correspondence, similarity) between the two systems under consideration following some features. The analogy can

be used to specify the legal status of a human embryo in Ukraine – enshrining the duty of others to treat it with respect. Indeed, the consolidation of a personal non-property obligation of a subject toward another requires the latter to be legally capable, and an embryo is not under national law. At the same time, Art. 298 of the CC of Ukraine enshrines the duty of everyone to respect a person who has died (Tsyvilnyi kodeks Ukrainy, 2003). The article enshrined the personal non-property obligations of others toward a person who is also not a subject of law and does not have legal capacity (lost it) – the deceased person. Such a provision is a norm-principle by its nature that promotes the moral foundations of society in Ukraine and aims to ensure respect for human dignity. The method of analogy makes it possible to recognize that such a norm-principle is also crucial for the legal protection of the embryo because it will be focused on maintaining respect for human dignity in the prenatal phase of its development.

5. Conclusions

1. Legal defects in the mechanism of statutory regulation of the status of the embryo have their consequence: **violation of the principles of humanism** (manifested in unethical research on embryos), **non-discrimination** (manifested in social sex selection), and **justice** (manifested in creating an imbalance between the rights of the mother and her unborn child, which leads to an increase in female mortality).

2. Depending on the components of the mechanism of legal regulation of the embryo's status, it is proposed to distinguish the following types of legal defects in the area under study:

legal defects of legal norms:

1) logical-structural: gaps;

2) technical legal: uncertainty of law norms; defects in legal nomenclature (inconsistency of terminology, use of inaccurate semantic synonyms);

3) legal defects of the parties involved in legal relations.

3. Proposals for preventing and minimizing legal defects are set out in the work sequentially. Thus, first of all, it is necessary to implement general legal methods of prevention as follows: to determine the scope of legal regulation; to substantiate the concepts of development of the studied sphere of public relations amidst the doctrine of law; to ensure the adaptation of national legislation. These steps commence the formulation of laws on the legal status of the embryo.

4. The next step should involve introducing technical ways to prevent legal defects, such as the examination of drafts and the unification of legal terminology.

5. After introducing ways to prevent legal defects, the legislation of Ukraine will be about minimizing existing ones by eliminating and overcoming them. The following measure can contribute to eliminating legal defects in regulating the status of the embryo through the adoption of new legal norms; amendments to current legal norms; systematization of the legislation of Ukraine. At the same time, it will be necessary to apply such remedies as the principles of law – justice, humanism, non-discrimination, and analogy.

6. The above steps put into practice in the proposed sequence will help develop legislation on the legal status of the embryo. If the sequence is broken, we run the risk of encountering even more legal defects. For example, the unification of legal nomenclature is impossible without a preliminary definition of the scope of legal regulation under which the relevant terminology will be used. As a rule of thumb, the adoption of novels and the introduction of amendments to existing ones do not occur without a previous justification of such a need in the legal doctrine of law. Thus, implementing the proposed methods of preventing and minimizing will drive the necessary legislative evolvement toward the legal status of embryos and will make it possible to protect a person in the prenatal phase of development, during which the progress of his inherited potential takes place.

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ЗАПОБІГАННЯ ТА МІНІМІЗАЦІЯ ЮРИДИЧНИХ ДЕФЕКТІВ У МЕХАНІЗМІ ПРАВОВОГО РЕГУЛЮВАННЯ ПРАВОВОГО СТАТУСУ ЕМБРІОНА

Анотація. ***Мета роботи.*** Провідною метою поточного дослідження є визначення способів попередження можливих юридичних дефектів та зменшення кількості наявних у сфері регулювання правового статусу ембріона. **Методологія**. Використаний методологічний підхід є змішаним та базується на застосуванні загальнонаукових методів (аналіз, синтез, дедукція, аналогія, порівняння, узагальнення, гіпотетичний та системний методи), спеціальних методів (прогнозування) та приватних методів юридичної науки (формально-юридичний). **Результати**. Досліджено вплив наявних юридичних дефектів на суспільні відносини та виокремлено такі негативні наслідки, як порушення принципів гуманізму, недискримінації та справедливості. Виокремлено та роз'яснено основні види юридичних дефектів у механізмі правового регулювання статусу ембріона. Сформовано перелік способів запобігання та мінімізації таких дефектів. Так, виокремлено такі загальноправові способи запобігання, як: 1) визначення сфери правового регулювання; 2) обґрунтування в доктрині права концепцій розвитку досліджуваної сфери суспільних відносин; 3) забезпечення адаптації національного законодавства. До техніко-юридичних способів запобігання юридичним

дефектам у механізмі правового регулювання статусу ембріона віднесено: 1) проведення експертизи законопроектів, 2) уніфікацію правової термінології. Запропоновано мінімізувати юридичні дефекти досліджуваної сфери за допомогою використання таких способів усунення: 1) прийняття нових правових норм; 2) внесення змін до існуючих правових норм; 3) проведення систематизації законодавства України у формі офіційної інкорпорації, консолідації чи кодифікації. Також виділено такі способи подолання наявних юридичних дефектів регулювання правового статусу ембріона, як: 1) застосування принципів права: справедливості, гуманізму, недискримінації; 2) застосування аналогії. Наукова новизна. Дослідження на висунуту тематику є одним з найперших в національній юридичній доктрині. **Висновки**. Наявні приписи українського законодавства є недостатніми для регулювання правового статусу ембріона, втім, навіть незначне правове регулювання містить велику кількість юридичних дефектів. Втілення запропонованих кроків запобігання та мінімізації започаткує необхідний розвиток законодавства у сфері правового статусу ембріона та дасть можливість убезпечити людину в найпершому етапі його розвитку – внутрішньоутробному.

Ключові слова: порушення принципів права, невизначеність правових норм, прогалини, соціальна селекція статі, acquis communautaire, усунення, подолання.

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THE UKRAINIAN MODEL OF THE NATIONAL JUDICIARY REGARDING THE ESTABLISHMENT OF THE FACT OF DEATH AND BIRTH IN THE TEMPORARILY OCCUPIED TERRITORY: A RETROSPECTIVE ANALYSIS OF 2014–2022 CHANGES IN CIVIL PROCEDURE LEGISLATION

Abstract. The article is devoted to the study of peculiarities of the Ukrainian model of establishing the fact of death/birth of a person in the temporarily occupied territory of Ukraine during the Russian Federation's large-scale military aggression against Ukraine. As part of the present work, the authors carried out a detailed comparative analysis of the revisions of Article 317 of the Civil Procedure Code of Ukraine, which underwent significant changes due to the adoption by the Verkhovna Rada of Ukraine of Law of Ukraine No. 2345-IX as of July 1, 2022 "On Amendments to Certain Legislative Acts of Ukraine Regarding the Peculiarities of Proceedings" in cases of establishing the fact of birth or death of a person during martial or state of emergency in temporarily occupied territories". A legal evaluation of these changes was given, and their effectiveness was analyzed taking into account the already formed judicial practice. Peculiarities of the Georgian and Moldovan models of establishing the facts of the death/birth of a person in the temporarily occupied territory are singled out, since in the past Georgia and Moldova, like Ukraine, were "lucky" to experience the "care of a brotherly neighbor". Given the military realities in Ukraine and the prevailing circumstances, an opinion is expressed as to whether it is possible to introduce features of the Moldovan and/or Georgian models in Ukraine.

The purpose of the study is to analyze the key legislative changes to the provisions of the Civil Procedure Code in terms of simplifying the procedure for establishing the fact of birth and death of a person in the temporarily occupied territory during martial law and state of emergency; to compare the relevant versions of Article 317 of the Civil Code of Ukraine to provide a legal assessment of the effectiveness of the relevant changes; to highlight the key features of the Georgian and Moldovan models of establishing the fact of birth and death of a person in the temporarily occupied territory with the possibility of further adoption of experience and its implementation in Ukraine.

Research methodology. The methods of system analysis and comparison were used in the research.

Results prove that the problems of legal regulation of the procedure for establishing the fact of birth and death of a person in the temporarily occupied territory of Ukraine are poorly studied. However, it is worth noting the significant contribution of K.V. Husarova (Husarov, 2020), I. M. Volkova, T. A. Stoyanova, M. H. Sviderska, O. I. Ugrynovska and Pinyashka M. (Ugrynovska, Pinyashka, 2020), and other specialists in the science of civil procedure law. The empirical basis of studying a primary source is the modern legislation of Ukraine, as well as the legislation of Georgia and Moldova.

In addition, it should be noted that in her research, Maryna Basilashvili covered the comparative legal analysis of registration of civil status acts in Ukraine and Georgia.

Conclusions. The legislative changes analyzed in this study in terms of simplifying proceedings in cases of establishing the fact of birth or death of a person in the territory where martial law or state of emergency has been imposed, or in the temporarily occupied territory of Ukraine, can rightly be called progressive, appropriate and necessary, since they are dictated by the realities of wartime in our country. Moreover, they will contribute to the unification of judicial practice in establishing the fact of birth and death of a person in the territory where martial law or state of emergency has been imposed, or in the temporarily occupied territory of Ukraine. But the legislator still has much work to do in this regard. The regulation of the institution of establishing the fact of birth and death of a person in the temporarily occupied territory in Georgia and Moldova has many features and original legal norms that give grounds to conclude about the possibility of implementing specific positive points of foreign models of establishing the specified types of legal facts in Ukraine by improving Ukrainian legislation and applying in the Ukrainian legal space.

Key words: legal fact, fact of death, fact of birth, temporarily occupied territory, martial law, Georgia, Moldova.

1. Introduction

The consequence of the 2014 Russian Federation's armed aggression against Ukraine which had three phases (***the first:*** as of February 20, 2014, when it was recorded the first cases of violation by the Armed Forces of the Russian Federation contrary to the Russian Federation's international legal obligations of the procedure for crossing the state border of Ukraine in the Kerch Strait and use of its army units stationed in Crimea; ***the second*** started in April, 2014, when armed bandit groupings controlled, managed and financed by secret agencies of the Russian Federation proclaimed the "Donetsk People's Republic" (7 April, 2014) and the "Luhansk People's Republic" (27 April, 2014); ***the third*** started on August 27, 2014, with mass invasion of the territory of Donetsk and Luhansk regions by regular units of the Armed Forces of the Russian Federation), and was condemned by the world community) (Rezoliutsiia Parlamentskoi asamblei Rady Yevropy № 2122, 2016) was illegitimate military occupation and subsequent illegal annexation of the territory of the Autonomous Republic of Crimea and the city of Sevastopol – an integral part of the state territory of Ukraine, military occupation of a large part of the state territory of Ukraine in the Donetsk and Luhansk regions (Postanova Verkhovnoi Rady Ukrainy Pro Zaiavu Verkhovnoi Rady Ukrainy Pro vidsich zbroinii ahresii Rosiiskoi Federatsii ta podolannia yii naslidkiv, 2015).

The illegal occupation of part of the Ukrainian territory by the Russian Federation has caused many problems in every sphere of public life of our country. They also affected the state registration of civil status acts. It refers to those practical problems that arise in the state registration of civil status acts for citizens living in the temporarily occupied territory of Ukraine, i.e., the Autonomous Republic of Crimea, the city of Sevastopol, and some districts, cities, towns and villages of Donetsk and Luhansk regions. First of all, it is a case of the acts of birth and death in the temporarily occupied territory of Ukraine. Despite the armed aggression and occupation, the biological processes of human birth and death continued. From 2014 to 2017, about 200,000 people were born in the temporarily occupied territory, and about 270,000 people died (Analitychna zapyska blahodiinoho fondu «Pravonazakhyst» shchodo administratyvnoi protsedury reiestratsii aktiv narodzhennia ta smerti, yaki vidbulys na TOT, 2022). In addition, in the Autonomous Republic of Crimea, the number of births was as follows: in 2016 – 22,995 people, in 2017 – 9,810 people. At the same time, the number of deaths in the relevant territory was as follows: in 2016 – 28,932 people, in 2017 – 14,323 people. In turn, in the territory of the so-called "DPR", there were recorded the following data: • in 2016 – 11,771 births and 34,833 deaths; • in 2017 – 5,875 births and 17,866 deaths (Uhrynovska, Piniashko, 2020, p. 51).

The above problems were triggered by the failure to provide appropriate medical documents specified by the legislation of Ukraine, since documents issued by the occupation authorities were not considered as such in the meaning of Ukrainian legislation. Consequently, the Ukrainian authorities of the state registration of civil status acts could not register, and a person, accordingly, could not obtain a birth/death certificate of persons resided/residing in the temporarily occupied territory of Ukraine determined by the Verkhovna Rada of Ukraine.

Given the circumstances, it was obvious that it would be impossible to solve the problem concerned via administrative means through empowering the bodies of state register of civil status acts and, probably, would not be too effective at the mentioned stage.

In this regard, the Law of Ukraine "On Amendments to the Civil Procedure Code of Ukraine concerning Establishment of Fact

of Birth or Death in the Temporarily Occupied Territory of Ukraine" dated February 4, 2016 No. 990-VIII, which entered into force on February 24, 2016 (hereinafter referred to as Law No. 990-VIII) updated the Civil Procedure Code of Ukraine by supplementing with **article 257-1 " Peculiarities of proceedings on establishing the fact of birth or death in the temporarily occupied territory of Ukraine"** (Zakon Ukrainy Pro vnesennia zmin do Tsyvilnoho protsesualnoho kodeksu Ukrainy shchodo vstanovlennia faktu narodzhennia abo smerti oby na tymaschovo ok okupi terytorii, Ukrainy, 2016). Thus, the law's provisions, for the first time in Ukraine, enshrined the institution of ***"establishing the fact of birth or death in the temporarily occupied territory of Ukraine"*** at the legislative level.

As can be seen from the explanatory note to the Law No. 990-VIII, it was adopted to optimize the process of obtaining birth/death certificates by persons residing in the temporarily occupied territory of Ukraine determined by the Verkhovna Rada of Ukraine without appropriate medical documents provided for by the legislation of Ukraine. It would contribute to ensuring the enforcement of the rights of citizens living in the temporarily occupied territory of Ukraine to obtain the certificates (Poiasniuvalna zapyska do proektu Zakonu Ukrainy Pro vnesennia zmin do Tsyvilnoho protsesualnoho kodeksu Ukrainy shchodo vstanovlennia faktu narodzhennia abo sti na tymaschovo okovi terupyii, Ukrainy, 2015).

As part of the "judicial reform", the Verkhovna Rada of Ukraine adopted the Law of Ukraine No.2147-VIII on October 3, 2017, which entered into force on December 15, 2017, "On Amendments to the Economic Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts" (hereinafter – the Law No.2147-VIII), which amended the Civil Procedure Code of Ukraine and set out its provisions in a new version. The enshrined novels allowed the scientific community to define the code in professional circles as a "new Civil Procedue Code of Ukraine". In fact, the provisions of Article 317 of the new CPC fixed the peculiarities of proceedings in cases of registering birth or death in the temporarily occupied territory of Ukraine, which will be further discussed in the present study (Zakon Ukrainy Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy, Tsyvilnoho protsesualnoho kodeksu Ukrainy, Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv, 2017).

2. Legislative changes

On February 24, 2022, a new phase of the Russian Federation's armed aggression began, which was marked by a large-scale military invasion of the sovereign territory of the Ukrainian state (Rezoliutsiia Generalnoi Asamblei Orhanizatsii Obiednanykh Natsii "Ahresiia proty Ukrainy", A/RES/ES-11/1, 2022; Promizhne rishennia Mizhnarodnoho sudu OON, 2022). The "elder loving brother" called it a "special military operation". The Decree of the President of Ukraine No. 64 dated 24.02.2022, approved by the Law of Ukraine dated 24.02.2022 No. 2102-IX, imposed martial law in Ukraine from 05:30 am on February 24, 2022, in connection with the military aggression of the Russian Federation against Ukraine based on the proposal of the National Security and Defense Council of Ukraine, in accordance with paragraph 20 of part one of Article 106 of the Constitution of Ukraine, the Law of Ukraine "On the Legal Regime of Martial Law" (Ukaz Prezydenta Ukrainy "Pro vvedennia voiennoho stanu v Ukraini", 2022), which was subsequently repeatedly extended and continues at the present time.

As a result of the advance of the Russian army, part of the Ukrainian territory is or has been under the temporary control of the aggressor country's military. And some cities, for example, Mariupol, are under siege almost from the beginning of a new phase of armed aggression. All this time, the Russian army has been committing systematic and massive crimes against the civilian population, including indiscriminate shelling using artillery and air raids on objects of the private residential sector of civilian infrastructure (hospitals, libraries, shelters, etc.). Numerous cases of shooting of the civilian population in the territories temporarily controlled by Russian troops were recorded which could not be properly documented. According to the information received, mass killings and burials of civilians are happening in the territories of Ukraine temporarily occupied by the Russian military. There is also information about attempts of the Russian military to dispose of the bodies of civilians whom they killed to hide crimes. In the territories controlled or blocked by the army of the aggressor state, there are facts of the birth of children who, as a result of active hostilities or temporary control of settlements by the Russian army, cannot be properly registered (Poiasniuvalna zapyska do proektu Zakonu Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo osoblyvostei vstanovlennia yurydychnykh faktiv v umovakhiennoho chy nadzvychainoho stanu, 2022).

Following data posted on the website of the Ukrainian Parliament Commissioner for Human Rights as of December 2022, 15,000 people were known to be missing under special circumstances (Upovnovazhenyi Verkhovnoi Rady Ukrainy z prav liudyny, 2022).

Moreover, the Office of the United Nations High Commissioner for Human Rights confirmed 6,702 deaths and 10,479 injured civilians in Ukraine due to a full-scale Russian invasion (from February 24 to December 4). From November 1 to November 30, OHCHR recorded 162 civilian deaths and 526 injured in Ukraine. The organization emphasizes that the real number of deaths is much higher, as information from some places where intense hostilities continue is delayed, and many reports still need to be confirmed. This applies, for example, to the settlements of Mariupol (Donetsk region), Izium (Kharkiv region), Lysychansk, Popasna and Sievierodonetsk (Luhansk region), where, reportedly, there were numerous civilian deaths or injuries. In OHCHR, they point out that most of the confirmed losses were due to the use of explosives with wide area effects, including shelling via heavy artillery and multiple-launch rocket systems, as well as missile and air attacks (Upvoradas).

All the facts of birth and death occurred in the conditions and within the territory subject to martial law required a comprehensive solution and a simplified procedure for their registration by analogy with a simplified procedure for registering birth and death in the temporarily occupied territory of Ukraine.

In order to promote the exercise and protection of civil rights and maintain proper registration of births and deaths during martial law or state of emergency, the Verkhovna Rada of Ukraine adopted the Law of Ukraine No. 2345-IX as of July 1, 2022 "On Amendments to Certain Legislative Acts of Ukraine on the Specifics of Proceedings in Cases on Establishing the Fact of Birth or Death during Martial Law/ State of Emergency in Temporarily Occupied Territories", which entered into force on August 7, 2022 (hereinafter referred to as the Law No. 2345-IX) (Zakon Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo osoblyvostei provadzhennia u spravakh pro vstanovlennia faktu narodzhennia abo smerti osoby v umovakh voiennoho chy nadzvychainoho stanu ta na tymchasovo okupovanykh terytoriiakh, 2022). Law No. 2345-IX amended the Civil Procedure Code of Ukraine by introducing a simplified procedure for establishing the legal facts of birth and death in the territory in which martial law or state of emergency operates, and the provisions of Article 317 are restated.

In this regard, the authors further present comparative analysis of the peculiarities of proceedings in cases of registering birth or death during martial law or emergency state in the temporarily occupied territories, enshrined in Article 317 of the CPC of Ukraine as revised in **Law No. 2147-VIII (hereinafter for convenience – the old wording is until August 6, 2022, inclusively) and Law No. 2345-IX (hereinafter for convenience – the new version is as of August 7, 2022).**

The first particularity of the amendments enshrined by Law No. 2345-IX is the **expansion of the territorial scope of the provisions of Article 317 of the CPC of Ukraine**. In particular, this follows from the analysis of the article's title in both versions. Thus, in the older version, the provisions of Article 317 concerned proceedings in cases of registering birth or death only in **the temporarily occupied territory of Ukraine**. However, in the new version, the article regulates proceedings in cases of registering birth or death in the **territory in which martial law or emergency state was introduced, or in the temporarily occupied territory of Ukraine.**

Therefore, the scope of Article 317 of the CPC of Ukraine, in addition to the temporarily occupied territory of Ukraine, is also extended to the territory where martial law or emergency state is introduced. In addition, the revised version does not specify the definition of the temporarily occupied territory of Ukraine by the Verkhovna Rada of Ukraine.

The amendments were obviously dictated by martial law imposed throughout Ukraine on February 24, 2022, which is currently ongoing.

The explanatory note to the draft Law No. 2345-IX, when substantiating the need to extend the relevant procedure for establishing facts for the period of the emergency state, holds that the same procedure for registering birth and death should be extended during the emergency state which, in accordance with law norms, is a special legal regime that can be temporarily introduced in Ukraine or its individual areas in the case of anthropogenic or natural emergencies not lower than the national level, which have led or may lead to human and material losses, pose a threat to the life and health of citizens, or in an attempt to seize state power or change the constitutional order of Ukraine by violence and, under the Law, provides for vesting the relevant state authorities, military command and local self-government bodies with the powers necessary to avert a threat and ensure the safety and health of citizens, the normal functioning of the national economy, state authorities and local self-government bodies, and protection of the constitutional order;

it also allows for temporary, due to the threat, restrictions in exercising constitutional rights and freedoms of man and citizen and the rights and legitimate interests of legal entities with an indication of their duration (Poiasniuvalna zapyska do proektu Zakonu Ukrainy Pro vnesennia zmin do deiakykh zakonodavchykh aktiv Ukrainy shchodo osoblyvostei stanovlennia yurydychnykh faktiv v umovakh voiennoho chy nadzvychainoho stanu, 2022).

As for the specification of the territory in which martial law or a state of emergency has been imposed, or in the temporarily occupied territory of Ukraine, it should be noted the following.

Following the provisions of Article 5 of the Law of Ukraine "On the Legal Regime of Martial Law", martial law in Ukraine or in its particular areas is introduced on the proposal of the National Security and Defense Council of Ukraine by the Decree of the President of Ukraine approved by the Verkhovna Rada of Ukraine (Zakon Ukrainy Pro pravovyi rezhym voiennoho stanu, 2015).

The state of emergency in Ukraine or in its particular areas is introduced by the Decree of the President of Ukraine, which is subject to approval by the Verkhovna Rada of Ukraine within two days from the moment of the appeal of the President of Ukraine (Article 5 of the Law of Ukraine "On the Legal Regime of the State of Emergency") (Zakon Ukrainy Pro pravovyi rezhym nadzvychainoho stanu, 2000).

As for the temporarily occupied territory of Ukraine, the following should be noted.

The current legislation of Ukraine does not define the concept of "temporarily occupied territory of Ukraine". Only in Article 1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Citizens and the Legal Regime in the Temporarily Occupied Territory of Ukraine", which determines the legal status of the temporarily occupied territory of Ukraine, it is stated that the **territory of Ukraine temporarily occupied by the Russian Federation** (hereinafter referred to as the temporarily occupied territory) is an integral part of the territory of Ukraine, which is subject to the Constitution and laws of Ukraine, as well as international treaties, the consent to be bound by which is provided by the Verkhovna Rada of Ukraine. In addition, the article contains a note about the beginning of the temporary occupation of certain territories of Ukraine. In particular, the date of the beginning of temporary occupation by the Russian Federation of certain territories of Ukraine is February 19, 2014. The Autonomous Republic of Crimea and the city of Sevastopol have been temporarily occupied by the Russian Federation since February 20, 2014. Individual territories of Ukraine that are part of Donetsk and Luhansk regions are occupied by the Russian Federation (including the occupation administration of the Russian Federation) since April 7, 2014 (Zakon Ukrainy Pro zabezpechennia prav i svobod hromadian ta pravovyi rezhym na tymchasovo okupovanii terytorii Ukrainy, 2014).

A rather approximate definition of the concept of "**temporarily occupied territory of Luhansk and Donetsk regions**" was available in Article 1 of the Law of Ukraine "On the Peculiarities of State Policy on Ensuring Ukraine's State Sovereignty over Temporarily Occupied Territories in Donetsk and Luhansk Regions" No. 2268-VIII dated January 18, 2018, which expired on May 7, 2022, based on Law No. 2217-IX dated April 21, 2022. In particular, on the day of adoption of the Law, it was assumed that the temporarily occupied territories of Donetsk and Luhansk regions are recognized as parts of the territory of Ukraine controlled by the armed units of the Russian Federation and the occupation administration, namely: 1) the land territory and its internal waters within specific areas, cities, towns, and villages of Donetsk and Luhansk regions; 2) internal sea waters adjacent to the land territory defined by paragraph 1 of this part; 3) the subsoil under the territories defined by paragraphs 1 and 2 of this part, and the airspace over these territories.

It is not coincidence that the present study's authors characterized the above definition of the concept of "**temporarily occupied territory in Luhansk and Donetsk regions**" as approximate, since, as it does not have all those features of temporarily occupied territory that would characterize it as such. Consequently, it requires proper legislative consolidation, given the established practice.

The Resolution of the Cabinet of Ministers of Ukraine No. 1364 dated December 6, 2022 "Some issues of forming a list of territories where hostilities are (were) conducted or temporarily occupied by the Russian Federation" establishes that the list of territories where hostilities are (were) conducted or temporarily occupied by the Russian Federation (hereinafter referred to as the list) is approved by the Ministry of Reintegration of the Temporarily Occupied Territories of Ukraine under the annex and in agreement with the Ministry of Defense on the basis of suggestions from relevant regional and Kyiv city military administrations (Postanova Kabinuistriv Ukrainyiaki pytannia formuvannia pereliku terytorii, na yakykh vedia (bolysia) boutsi abiovi di tymasovo oovany Rosupiisukhu Federiiei, 2022).

Thus, from December 6, 2022, the Ministry for Reintegration of the Temporarily Occupied

Territories is authorized to compile a list of territories temporarily occupied by the Russian Federation. According to the information posted on the Ministry's official website, the latest order approving the list of such territories is dated December 22, 2022, Order No. 309 (Nakaz Ministerstva z pytan reintehratsii tymchasovo okupovanykh terytorii Pro zatverdzhennia Pereliku terytorii, na yakykh vedutsia (velysia) boiovi dii abo tymchasovo okupovanykh Rosiiskoiu Federatsiieiu, 2022).

It should be noted that despite the consolidation in the Civil Procedure Code of Ukraine of the so-called three national procedural models of registering birth and death (sub-paras. **7-9 of Part 1 of Art. 315 of the Civil Procedure Code of Ukraine**), or so-called general procedures for establishing the relevant facts, namely: the establishment of the birth fact at a certain time in case of impossibility of registration by the state registration authority of civil status acts of birth; death at a certain time in case of impossibility of registration by the state registration authority of civil status acts of death; death of a person who went missing under circumstances that threatened them with death or give grounds to consider them dead due to anthropogenic or natural emergency accident in connection with the imposition of martial law throughout Ukraine. **Starting from February 24, 2022, the effect of sub-paras. 7-9 of Part 1 of Art. 315 of the CPC of Ukraine was suspended for the specified period, and the provisions of Article 317 of the CPC of Ukraine are exclusively subject to application**.

The second particularity of amendments introduced in the wording of Article 317 of the CPC is the expansion of the parties authorized to apply to sue for the establishment of a legal fact under Article 317 of the CPC of Ukraine.

In particular, before introduced amendments, an application for birth registration could be submitted by parents, relatives, their representatives, or other legal guardians of the child. Starting from 07.08.2022, an application for birth registration can be submitted by parents or one of them, representatives, **family members, guardian, trustee, person who maintains and brings up the child,** or other legal representatives of the child. Thus, relatives were replaced by family members, and an expanded list of legal representatives of the child was presented, indicating specific persons: **guardian, trustee, a person who maintains and brings up the child.**

According to paragraph five of clause 6 of the reasoning of the Decision of the Constitutional Court of Ukraine as of June 3, 1999 No. 5-rp/99 in the case of the official interpretation of the term "family member", family members are, in particular, persons who permanently reside with them and share a common household. Such persons involve not only close relatives (siblings, grandchildren, grandfather and grandmother) but also other relatives or persons who do not have direct familyhood with a person (brothers and sisters in law; stepsiblings; stepfather, stepmother; guardians, trustees, stepchildren, and others). Prerequisites for their recognition as family members, in addition to living together, are the following: common household maintenance, that is, common costs, a common budget, shared meals, purchase of property for common use, shared costs and housing maintenance, its repair, mutual assistance, oral or written agreements on using the premises, and other circumstances testifying family relations.

As the legislation of Ukraine does not contain an exhaustive list of family members and only determines the criteria under which persons constitute a family, the Civil Court of Cassation of the Supreme Court, in its ruling as of April 23, 2020 in case No. 686/8440/16-ц (proceeding No. 61-15699св19) and supported the legal opinion expressed by the Supreme Court in its ruling as of March 31, 2020 in case No. 205/4245/17 (proceeding No. 61-17628св19), noted that criteria for attributing to family members include cohabitation (with the exception of the separation of the spouses with a valid reason and the child with parents), common household and mutual rights and obligations of persons who have united for cohabitation (Postanova Kasatsiinoho tsyvilnoho sudu Verkhovnoho sudu u spravi № 686/8440/16-ts, 2020).

Until 07.08.2022, an application for registering death could be submitted by **relatives** of the deceased or their representatives, after 07.08.2022 – by **family members** of the deceased, their representatives or **other interested persons (if the establishment of the fact of death affects their rights, obligations, or legitimate interests).** Thus, the relatives of the deceased, as subjects of the right to apply for death registration, were replaced by family members of the deceased and a new category of applicants – other interested persons, which were specified: persons **whose rights, obligations, or legitimate interests depend** on the establishment of the death fact.

In our opinion, the expansion of the parties entitled to file a relevant petition in court is legally justified and dictated by the realities of wartime, and, most importantly, will contribute to the protection of persons **whose rights, obligations, or legitimate interests are influenced** by the registration of birth/death.

The third particularity of amendments to Article 317 of the CPC of Ukraine is the change, or rather clarification, of the rules of jurisdiction of cases on registration of death/birth in accordance with Article 317 of the CPC of Ukraine.

Before the introduced amendments, the application for registering birth was submitted to **any** court **outside such (temporarily occupied) territory of Ukraine, regardless of** the place of the applicant's residence. As from 07.08.2022, such an application is submitted to any **local court** of Ukraine **that administers justice**, regardless of the place of residence (stay) of the applicant.

Hence, clarifying the rules of jurisdiction for the consideration of applications for registering birth, the legislator focused on a court title by indicating that such a court is the local one and also indicated that it is authorized to administer justice. And this is not accidental. During a large-scale war in Ukraine and ensuing martial law, many courts, not only located in the temporarily occupied territories but also in the zone of active hostilities, are deprived of the ability to administer justice, and therefore, the relevant order of the Chairman of the Supreme Court changed the territorial jurisdiction of such courts. We believe it is appropriate that the new version has no indication of the need to apply to the court outside the relevant (temporarily occupied – in the older version) territory of Ukraine, because the territorial jurisdiction of the court located in the temporarily occupied territory, as indicated above, is changed by the specific order of the Chairman of the Supreme Court, and martial law is imposed throughout the territory of Ukraine.

Therefore, taking into account the above, it can be said that as from 07.08.2022, an application for death registration under Article 317 of CPC of Ukraine is submitted to any **local court** of Ukraine **that administers justice in the territory subjected to martial law** but **outside the temporarily occupied territory of Ukraine,** regardless of the place of residence (stay) of the applicant.

The rules of jurisdiction in cases of death registration were also changed. Thus, until 07.08.2022, an application for establishing the fact of death could be **filed in court outside such (temporarily occupied) territory of Ukraine**; as from 07.08.2022 – **to any local court of Ukraine that administers justice, regardless of the place of residence (stay) of the applicant**. In other words, the legislator, as in the rules of jurisdiction of cases on birth registration, clarified the rules of jurisdiction to consider applications for registering death by focusing on the court's jurisdiction and indicating that such a court is the local court and also indicated that it is authorized to administer justice. The reasons for such a decision of the legislator are mentioned above. In addition, unlike the rules of jurisdiction of cases on registering birth, which almost remained the same, clarifying the rules of jurisdiction of cases on registering death, the legislator noted that the **place of residence (stay) of the applicant does not affect the determination of jurisdiction rules.**

Keeping the norm on the **urgency** of consideration of the specific category of cases the same, the legislator only changed the initial moment of urgency countdown: if the old wording of the article provided that cases are considered immediately **after** receiving the relevant application by the court**, the new version provides for immediate consideration since the day** when the relevant application is received by the court. It should be noted that judicial practice did not experience a significant difference in these changes. Moreover, judicial practice has not yet developed a common approach to understanding the **urgency** of considering the specific category of cases. The analysis of the Unified State Register of Court Decisions gives grounds to assert that the consideration of specific cases takes place both on the day of application receipt (Ukhvala Halytskoho raionnoho sudu m.Lvova u spravi No. 461/6803/22, 2022) and on another day determined by the court and different from the day of application receipt (Ukhvala Lychakivskoho raionnoho sudu m.Lvova u spravi No. 463/9086/22, 2022).

It is obvious that in terms of the urgency of consideration of specific cases, it should be understood that after application receipt, the court immediately decides on initiating proceedings in the case, takes preparatory actions, convokes the persons involved in the case, and then begins the trial.

In our opinion, the legislator, setting urgent deadlines for the consideration of the category of cases concerned, thereby attached importance to such cases and pursued the goal to protect the rights and legitimate interests of the applicant effectively and within a reasonable time but not by any means of formally "fast" consideration of the case, as it sometimes appears to onlookers.

As for the provisions of Article 317 of the CPC of Ukraine, which regulate the content of the court decision on registering birth and the need to indicate the date and place of birth of a person, their parents; the urgency of execution of the judgment in cases of establishing the fact of birth or death, the possibility of appealing it, as well as the procedure for issuing the court decision to participants in the case and forwarding it to the State Register of Civil Status Acts. That is, the wording of the pro-

visions of parts 3-5 of Article 317 of the CPC of Ukraine has not changed.

In general, the Ukrainian model of establishing the fact of death/birth in the temporarily occupied territory of Ukraine, incl. the territory where martial law or a state of emergency was introduced as from 07.08.2022 also, can be described exclusively as a **judicial one**, since the establishment of such a fact is possible only by applying to the court. Moreover, according to the explanations provided by the Civil Court of Cassation as part of the Supreme Court in the letter dated April 22, 2021 No. 985/0/208-21, it is indicated that the provisions of the civil procedure law (Article 317 of the CPC of Ukraine) **do not require persons applying to the court to establish the relevant fact to file a written refusal of the civil status registration authority in a court to register such facts (**Lyst-roziasnennia Kasatsiinoho tsyvilnoho sudu u skladi Verkhovnoho Sudu No. 985/085/208-21, 2021**)**.

3. Foreign models

In the present study, the authors also consider it necessary to pay attention to the foreign experience of legal regulation of the procedure for establishing the fact of birth/death in the temporarily occupied territory. In particular, Georgia and Moldova are significant in this context as they have experienced the war and temporary occupation of their sovereign territory and developed their regulation models, which are of interest.

Moldovan model.

When we refer to the Moldovan model, we mean the procedure for recognizing the registration of births and deaths in the territory of the Pridnestrovian Moldavian Republic (hereinafter – PMR).

History brief. The Pridnestrovian Moldavian Republic (PMR or Transnistria) is an unrecognized breakaway state that is internationally recognized as part of Moldova. It occupies almost the entire Moldovan part of the left bank of the Dniester, as well as several settlements on the right bank of the river. In the northeast, it borders Ukraine (Odesa and Vinnytsia regions), and in the southwest – Moldova. The so-called "independence" of the unrecognized Transnistrian Moldovan Republic was proclaimed on August 25, 1991, after which a short-term armed conflict began between the separatists and the Russian military on the one hand and the Moldovan troops on the other, culminating in the actual victory of the separatists with the participation of the Russian army. The Russian Federation does not officially recognize the sovereignty of the Pridnestrovian Moldavian Republic but unofficially provides it with military, economic, political, and diplomatic support (Wikipedia, 2022).

Today, Moldova does not recognize PMR, but the situation remains peaceful and their relations are regulated by the relevant legislative acts.

The legal status of the Transnistrian region is directly determined by Law No. 173 "On Fundamental Regulations of the Special Legal Status of Settlements on the Left Bank of the River Nistru (Transnistria) approved by the Parliament of Moldova as of July 22, 2005 (with references to the Ukrainian plan put forward by the Ukrainian government in the early 2005 – new proposals for resolving the Transnistrian conflict – "On a settlement through democratization")" (Rishennia YeSPL "SPRAVA Katan TA INShI proti Moldovy TA ROSII", 2012). According to the Law (Article 3), an autonomous territorial entity with a special legal status is established within the Republic of Moldova – Transnistria, which may include (or withdraw from) settlements on the left bank of the Dniester River based on the results of local referendums held in accordance with the legislation of the Republic of Moldova (Fylypenko, 2022, pp.8-9). Thus, the government of the Republic of Moldova considers the Pridnestrovian Moldavian Republic an integral part of its territory with a special legal status and, hence, does not statutorily regard it as "temporarily occupied territory of the Republic of Moldova".

The provisions of Article 13-1 of the Law of the Republic of Moldova "On Civil Status Acts" stipulate that the facts of civil status that occurred and were registered in the settlements of the Left Bank of the Dniester and the municipality of Bender (Transnistria) can be certified through issuing civil status acts by the competent authorities of the Republic of Moldova, if their registration took place in a manner similar to the procedure regulated by the legislation of the Republic of Moldova.

During the registration of civil status acts, a corresponding record of a civil status act is drawn up, which is a basis for issuing a civil status act. The law specifies data to be entered in the register of births, marriages, dissolution of marriage, change of surname and/or name, death, as well as relevant certificates of registration of civil status acts (Part 4.5 of Art. 5 of the Law of the Republic of Moldova "On Civil Status Acts").

On May 16, 2001, to implement the joint statement of the leaders of the Republic of Moldova and Transnistria as of April 9, 2001, guided by the Memorandum "On the Basis for Normalization of Relations between the Republic of Moldova and Transdniestria" as of May 8, 1997, the Protocol "On Mutual Recogni-

tion of Documents Issued by the Competent Authorities of the Parties in the Territory of Transdniestria and the Republic of Moldova" was signed between the Republic of Moldova and Transdniestria. Thus, article 1 states that certificates of registration of civil status acts issued by the competent authorities of the parties (Transdniestria and the Republic of Moldova) (ProtolokProvzaiemnevyznanniadiinaterytorii) are recognized in the territory of Transdniestria and the Republic of Moldova.

The above indicates that the Republic of Moldova recognizes death/birth certificates issued by the authorities of Transnistria, without additional procedures for registering death/birth by the authorities of Moldova or establishing the facts of death/birth.

Therefore, the peculiarity of the Moldovan model of establishing the fact of birth/death on the PMR territory is the automatic recognition by the Republic of Moldova of the relevant act of death/birth occurred on the PMR territory, and the certificate of registration of such an act issued by the bodies of Transnistria.

However, it should be noted that the Moldovan model of automatic recognition of the relevant act is not absolute, since in the presence of specific circumstances and features of a particular case, the issue of registering death/birth and establishing the fact of death/birth in the PMR territory may be subject to judicial review. These conclusions are confirmed by the provisions of Article 281 of the Civil Procedure Code of Moldova as of May 30, 2003. According to subparagraphs "c, e" of paragraph 2, it is provided that the court considers cases on establishing facts of legal significance, namely: the fact of birth/death registration; the fact of death at a certain time under certain circumstances (Tsyvilnyi protsesualnyi kodeks Moldovy, 2003). It is obvious that the provisions of Article 281 of the Civil Procedure Code of Moldova also apply to cases on establishing the facts of death/birth registration and the fact of death/birth in the PMR territory, since, as stated above, PMR is an integral part of the territory – an autonomous territorial entity with a special legal status, under the legislation of the Republic of Moldova.

The Georgian model.

It is commonly known that in August 2008, the Russian Federation unleashed military aggression against Georgia, which caused the occupation of part of its territory – Abkhazia and South Ossetia. The territories are still under the control of the aggressor state and are not recognized by the international community as independent states.

In this regard, on January 21, 2021, the ECHR adopted a decision in the case of Georgia v. Russia (Georgia v. Russia, application No.38263/08). The ECHR officially recognized that Russia exercised control over the territory of Abkhazia and South Ossetia from August 12 to October 10, 2008. In addition, the Court recognized the exercise of effective control by the Russian Federation in these territories even after the mentioned period, as evidenced by the cooperation and assistance agreements signed between the Russian Federation, South Ossetia and Abkhazia (Rishennia YeSPL "Hruziia proty Rosii", 2021).

Consequently, it can be argued that Georgia also had to settle the issue of registration of civil status acts and recognition of documents issued in non-government-controlled territories.

It is worth mentioning that the regulation of the status of the occupied territories of Georgia is currently regulated by the provisions of the Law of Georgia "On Occupied Territories" as of October 23, 2008. The provisions of the enacting clause declare that Georgia is a sovereign, unified, and indivisible state, and the presence of the armed forces of any other state on its territory without an explicit and voluntary consent of the State of Georgia is an illegal military occupation of the territory of a sovereign state according to the Hague Regulations of 1907, Fourth Geneva Convention of 1949 and the norms of customary international law. Following the provisions of Article 1 of the Law, the main purpose is to define the status of territories that have been occupied as a result of military aggression by the Russian Federation, and to establish a special legal regime for these territories (ZakonHruziiProokupovaniterytorii, 2008).

Particular attention should be paid to the fact that the relevant Law did not omit the legal status of illegal bodies (officials) established and operating in the occupied territories of Georgia. Thus, the Article 8 of the Law, which is called "Illegal Bodies (Officials)", stipulates that a body (official) shall be illegal if it is not established (appointed/elected) under the procedures determined by the legislation of Georgia, and/or if in any form it actually performs legislative, executive, or judicial functions or other activity in the occupied territories that fall within functions of the State or local self-government bodies of Georgia. Any act issued by such bodies (officials) shall be deemed void and shall have no legal implications, except for cases when the said act is considered in the manner prescribed by the legislation of Georgia to establish the citizenship of Georgia, issue a neutral identity card and/or neutral travel document, register birth, marriage, divorce, death, legal residence of a person in the Abkhaz Autonomous Republic or

the Tskhinvali region (the former South Ossetian Autonomous Region). At the same time, part three of Article 8 states that in the occupied territories, the possibility of establishing facts of legal significance is maintained under the Law of Georgia "On Civil Acts".

An analysis of the provisions of Article 8 of the Law of Georgia "On the Occupied Territories" gives grounds to assert that it enshrines in Georgia, formed in international practice, the **principle of "Namibia exceptions"**, according to which documents issued by the occupation authorities can be recognized only if their non-recognition entails serious violations or restrictions of fundamental human rights. As a rule, the principle is used to recognize acts of registration of births, deaths, and marriages.

Moreover, as stated in the information note on the Law of Georgia "On the Occupied Territories" drafted by the Parliament of Georgia for the Venice Commission, the relevant procedures were included in the legislation of Georgia that allow civil registration authorities to recognize such facts that affect the legal status of a person, including one living in the occupied territories. It refers to documents confirming the birth, death, and credentials of a person necessary for the realization of the rights and legal interests of residents of occupied territory (Informatsiina dovidka shchodo Zakonu Hruzii Pro okupovani terytorii, 2022).

In particular, part four of Article 11 of the Law of Georgia "On Civil Status Acts" provides that acts issued by illegal bodies (officials) located in the occupied territories may be submitted to the body that registers civil acts for the purposes provided for by paragraph 2 of Article 8 of the Law of Georgia "On Occupied Territories" (Zakon Hruzii Pro tsyvilni akty, 2011).

The analysis of the provisions of the Law of Georgia "On Civil Status Acts" allows asserting that the normative act enshrines an administrative procedure, that is, the establishment by the civil status registration authority of the relevant facts of legal significance, in particular: the facts of a person's birth and death at a certain time and in certain circumstances and the facts of registration of births and deaths (part one of Article 90). The procedure is conducted administratively (according to Chapters VI and VIII of the General Administrative Code of Georgia) and requires only a written application and the presence of the applicant, other interested persons and witnesses (testimony and explanations of these persons are used as evidence) in the territorial civil status registration authority for oral hearing. It can be applied only in cases upon which the receipt or restoration of documents certifying the relevant fact is impossible in another order or is associated with inappropriate costs and efforts.

Paragraph four of Article 94 of the Law of Georgia "On Civil Status Acts" states that the decision establishing or refusing to establish a fact of legal significance shall be made no later than one month after the submission of the relevant application. However, the civil status registration authority may make a decision extending time limit if a longer time limit than defined in this Law is required for the establishment of essential circumstances of the case. At the same time, the entire time limit for making a decision shall not exceed two months. The decision shall also contain the information necessary for drafting the respective civil status record and its registration.

In some cases, any failure to establish the data necessary for civil status registration may not serve as unconditional grounds for the refusal to establish the fact of legal significance. The civil status registration authority shall be authorised to make a decision establishing a fact of legal significance without a certain piece of information if it cannot be established due to the lack of sufficient evidence or for other reasons (part three of Article 95 of the Law of Georgia "On Civil Status Acts").

Despite the availability in Georgia of an administrative procedure for establishing the facts of birth and death by the civil status registration authority at a certain time and under certain circumstances and facts of registration of births and deaths, these facts can be established in court, that is, based on a court decision. The above conclusion follows from the data below.

According to the Civil Procedure Code of Georgia as of November 14, 1997, a court shall hear non-contentious matters on the establishment of facts of legal significance (Article 310) (TsyvilnyiprotsesualnyikodeksHruzii, 1997).

Indeed, the provisions of Article 312 of the Code, which provides for a list of facts of legal significance and subject to judicial establishment, do not enshrine the possibility of establishing the facts of birth and death at a certain time and in certain circumstances and facts of registration of births and deaths.

However, Article 422-1 of the Civil Procedure Code of Georgia "Annulment of a court decision on establishment of some facts of legal significance" stipulates that court decisions on facts of legal significance relating to the birth or death of a person at a certain time and under certain circumstance, or the registration of birth or death may be annulled based on an action brought by an interested person, if at the time of bringing the action for annulment there are two different civil records

and wrong data have been established under the decision appealed.

Consequently, it is possible to invalidate a court decision on the establishment of the facts of birth or death of a person at a certain time and under certain circumstances, as well as registration of births and deaths based on Article 422-1 of the Civil Procedure Code of Georgia subject to a preliminary court decision on the establishment of the relevant fact and its inconsistency with the available records of the civil status act.

The coverage in this study of the peculiarities of the Ukrainian, Georgian, and Moldovan models of establishing the facts of birth/death in the temporarily occupied territory and in the territory in which martial law or a state of emergency has been introduced (applies exclusively to Ukraine since August 7, 2022) raises a rather interesting question in a practical aspect: is it possible under the legislation of Ukraine, including by applying Article 317 of the Civil Procedure Code of Ukraine by analogy with the law, to establish in court the fact of death/birth of a citizen of Ukraine on the territory of a foreign state (occupied part of its territory), e.g., the fact of death of a citizen of Ukraine on the territory of Abkhazia?

Moreover, it is essential to mark that, for example, the legislation of Georgia has a clear and unambiguous position in this regard. Thus, the provisions of Part 3 of Article 90 of the Law of Georgia "On Civil Status Acts" stipulate that the civil status registration authority shall establish any fact of legal significance that occurred abroad only with respect to a citizen of Georgia, an underage child of a citizen of Georgia, a stateless person having the status in Georgia, and a person having the status of refugee or the humanitarian status in Georgia.

Let's go back to Ukraine. At first glance, without delving into the issue concerned, you can definitely answer "No", since allegedly the current procedural legislation does not provide for the possibility of establishing a legal fact, including death/birth, on the territory of a foreign state, and the provisions of Article 317 of the Civil Procedure Code of Ukraine provide for the possibility of establishing the fact of death/birth on the temporarily occupied territory of Ukraine, not a foreign state. However, it is not all as easy as it sounds.

The Supreme Court gave an unequivocal and substantiated answer to the question, considering the cassation appeal in case No. 367/2656/20.

The case sparks interest as the trial subject was the requirement of the wife to ESTABLISH THE FACT of the DEATH of her husband – CITIZEN OF UKRAINE on the TERRITORY of the **"TURKISH REPUBLIC OF NORTHERN CYPRUS" (hereinafter** – "TRNC"**),** WHICH is the OCCUPIED TERRITORY OF THE REPUBLIC OF CYPRUS, CONVICTED by the WORLD COMMUNITY, DECLARED ILLEGAL and RECOGNIZED ONLY BY TÜRKIYE. The applicant required to establish the specific fact to obtain her ex-husband's death certificate to obtain a pension in connection with the loss of a breadwinner in the interests of her minor daughter.

By the decision of the Irpin City Court of Kyiv region as of May 7, 2020, which was not changed by the decision of the Kyiv Court of Appeal as of September 24, 2020, the initiation of proceedings was refused be relying that the CPC of Ukraine does not provide for the possibility of establishing the fact of death of a person in the territory of a foreign state by the court (Ukhvala Irpinskoho miskoho sudu Kyivskoi oblasti u spravi No. 367/2656/20, 2020; Postanova Kyivskoho apeliatsiinoho sudu urav spi No. 367/2656/20, 2020).

However, in a decision dated September 15, 2021, the Civil Court of Cassation of the Supreme Court, reviewing the above-mentioned court decisions of the first and appellate jurisdictions in cassation, summarized, emphasizing the erroneousness of the conclusions of the court of the first and appellate jurisdictions, that the CPC of Ukraine does not provide for the possibility of establishing the fact of the death of a person in the territory of a foreign state by the court. The erroneousness of such conclusions is that the uncertainty of procedural law rules cannot be interpreted against the applicants and limit their right to judicial protection, including in cases of separate proceedings, since the jurisdiction of Ukrainian courts extends to any legal dispute. Therefore, the courts of first and appellate jurisdiction made premature conclusions about the refusal to initiate proceedings in the case that caused a violation of procedural law. As a result, the decision of the first-instance court and the decision of the court of appeal were canceled, and the case was forwarded to the former court to settle the initiation of proceedings in the case (Postanova Kasatsiinoho tsyvilnoho suduVerkhovnoho Suduu spravi No. 367/2656/20, 2021).

It is also worth paying attention to the conclusions of the court of first instance, formulated following the consideration of the case upon retrial. Thus, the Irpin City Court of the Kyiv region, in its decision as of November 25, 2021, satisfying the application and establishing the fact of death of a citizen of Ukraine in the territory of TRNC, noted that it was impossible to perform the corresponding

consular action: it could not register the death of a citizen of Ukraine in the specified territory by the Embassy of Ukraine in the Republic of Cyprus in accordance with the "Instruction on the procedure for registering civil status acts in diplomatic missions and consular institutions of Ukraine", approved by the Order of the Ministry of Justice of Ukraine, the Ministry of Foreign Affairs of Ukraine as of May 23, 2001 No. 32/5/101 (as amended by the Order of MJU, MFA of Ukraine as of August 25, 2004 No. 90/5/191 (r 1066-04), registered with MJU as of 01.06.2001 under No. 473/5664), since the so-called TRNC was convicted by the world community and declared illegal. With the exception of Türkiye, no state or international organization recognizes the relevant territory. Non-recognition of the territory by the world community and Ukraine, in particular, makes it impossible to protect Ukrainian citizens by diplomatic institutions of Ukraine, and all documents issued in this territory are not recognized by Ukraine. Legalization of documents (affixing an apostille) by the competent authorities of Cyprus is impossible. Hence, the court of first instance, applying the "Namibia exceptions", satisfied the application (Rishennia Irpinskoho miskoho sudu Kyivskoi oblasti u spraviNo. 367/2656/20, 2021).

By its decision in one case, the Supreme Court resolved an array of conflicts that may arise in this regard and thereby shaped an appropriate legal position that will contribute to ensuring and establishing the unity and sustainability of the specific judicial practice.

Conclusions

The war continues. The fighting lasts in Kharkiv, Donbas, and southern Ukraine. The Russian army is bombing every minute, shelling residential neighborhoods of cities, destroying civilian infrastructure, hospitals, schools, and kindergartens, and killing civilians regardless of age...But even during the full-scale war – at this time especially – all the forces of society and the state should be focused on the protection of the borders of our state, territorial integrity and, most importantly, the rights, freedoms, and legitimate interests of our fellow citizens. State duty is now highly enhanced. People who have remained in the temporarily occupied territory and cannot leave it for specific causes and those who live in the frontline regions and areas of active hostilities need our support and protection badly, including legal. Therefore, even in such a tough time – the war, the state must follow the current realities and dictate of the times, and thus adjust its legislation and adopt a novel one that could "overcome" modern military challenges.

Every day in Ukraine, in its controlled and temporarily occupied territory, in basements, bomb shelters, hospitals, houses, and the streets, people are dying and being born – our people. However, modern reality sometimes hinders properly registering birth/death hence obtaining a Ukraine-recognized document confirming the relevant fact. It refers to cases when the fact of birth or death happen in the temporarily occupied territory, and the documents issued by the occupying authorities have no legal force and, accordingly, civil status register authorities in the controlled territory cannot certify the relevant act of civil status by relying on such documents; or cases when the fact of birth/death took place in the controlled territory of Ukraine subject to martial law, but due to active hostilities or other circumstances (death/birth in the basement, hospital that was bombed, etc.), it is impossible to obtain appropriate medical documents to confirm the relevant fact to further submit it to the civil status register authorities. To solve the above problems, the institute of establishing the fact of death and birth of a person in the territory under martial law or a state of emergency, or in the temporarily occupied territory of Ukraine, provided for by Article 317 of the CPC of Ukraine, given the amendments made.

In addition, it is essential to realize the obvious: the institution of establishing the facts of birth and death in the temporarily occupied territory of Ukraine is not absolute and shall not be used for abuse and manipulation. As a result, the act of birth or death in the temporarily occupied territory of Ukraine will be subject to establishment in court in the following cases: 1) it gives rise to legal consequences, i.e., it affects the emergence, change, or termination of personal or property rights of citizens; 2) the current legislation does not provide for any other procedure for its establishment; 3) the applicant has no other opportunity to obtain or restore a lost or destroyed document certifying a fact of legal significance; 4) the establishment of a fact is not related to the subsequent settlement of a right dispute. The court is authorized check the availability of the specific conditions in every specific case to avoid abuses and speculations.

For this reason, it is probably too early to speak of changing the entirely judicial Ukrainian model of establishing the fact of death/birth in the temporarily occupied territory to an administrative or mixed one. It is apparent that only the judicial authorities, given their powers and practical experience in the relevant area gained for almost 9 years of war, currently can overcome these challenges.

Maybe in the future, after the war ended,

when new challenges will raise, the Ukrainian legal system will be ready to change its entirely judicial model of establishing the fact of death/birth in the occupied territory to an administrative one, as in Moldova or Georgia. However, it is now not on time, as our country has another scenario than Moldova and Georgia.

At the same time, it is worth pointing out that the Unified State Register of Court Decisions contains **138 185 decisions (from February 24, 2016 to February 23, 2022)** according to the category of cases: civil cases (before/from January 01, 2019); cases of separate proceedings; cases on establishing facts of legal significance, of which: the fact of birth/death; of which: **138,185 decisions are made** in the temporarily occupied territory of Ukraine; **from February 24, 2022 to January 04, 2023** – **18,343 decisions**.

The main goal of the relevant Ukrainian model, whether a judicial or administrative one, should be the efficient protection of the rights of our fellow citizens and the avoidance of excessive formalism and bureaucracy, not a banal simplification of the procedure without clarifying all the circumstances.

However, it would be more desirable if the outlined Ukrainian model of establishing legal facts became dead and the memory of it remained only on the pages of scientific works.

The country cannot survive without those living its rights.
Adam Mickiewicz

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УКРАЇНСЬКА МОДЕЛЬ НАЦІОНАЛЬНОГО СУДОЧИНСТВА ЩОДО ВСТАНОВЛЕННЯ ФАКТУ СМЕРТІ І НАРОДЖЕННЯ НА ТИМЧАСОВО ОКУПОВАНІЙ ТЕРИТОРІЇ: РЕТРОСПЕКТИВНИЙ АНАЛІЗ ЗМІН ЦИВІЛЬНОГО ПРОЦЕСУАЛЬНОГО ЗАКОНОДАВСТВА 2014–2022 РР.

Анотація. Стаття присвячена дослідженню особливостей української моделі встановлення факту смерті/народження особи на тимчасово окупованій території України в умовах широкомасштабної військової агресії російської федерації проти України. Авторами в межах цієї роботи здійснено детальний порівняльний аналіз редакцій статті 317 ЦПК України, яка зазнала суттєвих змін у зв'язку із прийняттям Верховною Радою України 01 липня 2022 року Закону України № 2345-IX«Про внесення змін до деяких законодавчих актів України щодо особливостей провадження у справах про встановлення факту народження або смерті особи в умовах воєнного чи надзвичайного стану та на тимчасово окупованих територіях». Надано правову оцінку цим змінам та проаналізовано їх ефективність з урахуванням уже сформованої судової практики. Виокремлено особливості грузинської та молдовської моделей встановлення фактів смерті/народження особи на тимчасово окупованій території, так як Грузії і Молдові в минулому також, як і Україні, «пощастило» відчути на собі «турботу братнього сусіда». З урахуванням військових реалій в Україні та обставин, що склалися, висловлено думку про те, чи можливе запровадження особливостей молдавської та/або грузинської моделей в Україні.

Мета. Метоюдослідження є аналіз ключових законодавчих змін, внесених до положень Цивільного процесуального кодексу в частині спрощення процедури встановлення факту народження та смерті особи на тимчасово окупованій території, в умовах воєнного та надзвичайного стану. А також порівняння відповідних редакцій статті 317 ЦПК України для надання правової оцінки ефективності внесених змін. Висвітлення ключових особливостей грузинської та молдовської моделей встановлення факту народження та смерті особи на тимчасово окупованій території з можливістю подальшого запозичення та перейняття досвіду, а також впровадження таких в Україні.

Методологія дослідження. Під час дослідження використано метод системного аналізу та порівняння.

Результати засвідчують не в повній мірі вивчення проблем правового регулювання процедури встановлення факту народження та смерті особи на тимчасово окупованій території України. Хоча варто зауважити значний внесок у дослідження цієї сфери Гусарова К.В. (Гусаров, 2020), Волкової І.М., Стоянової Т.А., Свідерської М.Г., Угриновської О.І. та Піняшка М.(Угриновська, Піняшко, 2020), а також інших фахівців науки цивільного процесуального права. Емпіричним підґрунтям дослідження першоджерела є сучасне законодавство України, а також законодавство Грузії та Молдови.

Крім того, слід зазначити, що висвітлення питання порівняльно-правового аналізу реєстрації актів цивільного стану в Україні та Грузії в своєму дослідженні здійснила Марина Басілашвілі (Басілашвілі, 2019).

Висновки. Проаналізовані в даному дослідженні законодавчі зміни в частині спрощення провадження у справах про встановлення факту народження або смерті особи на території, на якій введено воєнний чи надзвичайний стан, або на тимчасово окупованій території України, по праву можна назвати прогресивними, доречними та необхідними, оскільки такі є продиктовані реаліями військового часу в нашій державі. Більше того, такі сприятимуть уніфікації судової практики в питанні встановлення факту народження та смерті особи на території, на якій введено воєнний чи надзвичайний стан, або на тимчасово окупованій території України. Але законодавцю є ще над чим працювати в цьому питанні. Регулювання інституту встановлення факту народження та смерті особи на тимчасово окупованій території в Грузії та Молдові має багато особливостей, оригінальних правових норм, які дають підстави зробити висновок про можливість впровадження конкретних позитивних моментів іноземних моделей встановлення зазначених видів юридичних фактів в Україні шляхом удосконалення українського законодавства та застосування в українському правовому просторі.

Ключові слова: юридичний факт, факт смерті, факт народження, тимчасово окупована територія, воєнний стан, Грузія, Молдова.

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ABOUT RAISING THE QUESTION OF CHOOSING AN EFFECTIVE METHOD OF PROTECTING CORPORATE RIGHTS IN AN LLC AS A NECESSARY CONDITION FOR RESOLVING A DISPUTE IN COURT

Abstract. The research relevance determines the fact that the term 'effective remedy' appeared in Ukrainian legislation at the end of 2017. The jurisprudence of its application is currently being formed, scientific research on an effective method of protecting corporate rights is mostly carried out in the context of analyzing civil rights' protection as a whole and does not provide thorough and comprehensive answers regarding the characteristics of such a method of protection.

The purpose of the article is to examine the essence of the concept of 'an effective method of protecting corporate rights', its criteria and characteristics, as well as the substantiation of the positive impact of the implementation of the provisions regarding the effectiveness of the protection method into Ukrainian legislation. **Research methods.** During the research, dialectical, formal-logical, comparative-legal and logical-legal methods of cognition were used. **Results.** The article presents a scientific and practical analysis of the interpretation and application by the European Court of Human Rights of the provisions of Art. 13 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms, which establish that everyone whose rights and freedoms have been violated has the right to an effective method of legal protection at a national competent legal authority, as well as provisions of national statutory regulation and judicial practice in the application of an effective way of protecting corporate rights in a limited liability company. The author analyzed scientific research devoted to the protection of civil rights, the provisions of the substantive and procedural legislation of Ukraine, and legal conclusions set forth in the decisions of the European Court of Human Rights and the Supreme Court.

Conclusions. Based on the analysis of doctrinal approaches, provisions of legislation, and the practice of the European Court of Human Rights and the Supreme Court, the characteristics of an effective method of protecting corporate rights are formulated. Using the case of current judicial practice, the author substantiated that the establishment of requirements for the effectiveness of the protection method in national legislation contributes to the protection of the violated corporate rights of the participants of limited liability companies within the limits of one legal process.

Key words: protection of corporate rights, effective method of protection of corporate rights, criteria of effectiveness of protection of corporate rights, method of protection of corporate rights, judicial form of protection of corporate rights.

1. Introduction. Any kind of right, including corporate, has value and significance for its carrier exclusively when it can be protected by the actions of the person and authorized state bodies. Standard civil circulation involves not only the recognition of the subject's civil rights but also ensuring their proper and effective legal protection. The term 'effective remedy' appeared in Ukrainian legislation only at the end of 2017. The judicial practice of its application is currently being formed, and scientific research on an effective way to protect corporate rights is conducted mainly in the context of studying the protection of civil rights in general and hence, there are no well-grounded and comprehensive answers regarding the char-

acteristics of such a remedy, which determines the **relevance of the research topic under consideration**.

Recent research and publications. Both in practice and doctrine, the protection of corporate rights is of considerable interest. At the same time, given changes in statutory regulation and the development of corporate relations in Ukraine, research in the relevant area does not solve all applied problems.

Issues related to protecting corporate rights in a limited liability company have become an object of academic regard within the study of the problems of corporate legal relations of such Ukrainian scientists as O. A. Belianevych, O. V. Bihniak, V. A. Vasylieva, O. M. Vinnyk, N. D. Vintoniak, O. V. Harahonych, N. S. Hlus, O. V. Dzera, A. S. Dovhert, Yu. M. Zhornokui, A. V. Zelisko, I. R. Kalaur, O. R. Kibenko, O. R. Kovalyshyn, O. V. Kolohoida, V. M. Kossak, A. V. Kostruba, O. O. Kot, O. V. Kokhanovska, N. S. Kuznietsova, S. S. Kravchenko, V. M. Kravchuk, I. V. Lukach, V. V. Luts, R. A. Maidanyk, V. M. Makhinchuk, V. S. Milash, M. D. Pleniuk, I. B. Sarakun, A. V. Smitiukh, I. V. Spasybo-Fatieieva, P. O. Stefanchuk, Ya. M. Shevchenko, R. B. Shyshka, V. S. Shcherbyna, O. S. Yavorska, and others.

The purpose of the article is to examine the essence of the concept of 'effective remedy for corporate rights', its criteria, and characteristics and prove the positive impact of implementing the provisions on effective remedies in Ukrainian legislation. To achieve the goal, the author analyzes research papers on the protection of civil rights, substantive and procedural legislation of Ukraine, and legal conclusions outlined in the decisions of the European Court of Human Rights and the Supreme Court. **Research methods.** In the article, the author applies dialectical, formal-logical, comparative-legal, and logical-legal methods of cognition.

Based on the analysis of doctrinal approaches, legislative provisions, and practice of the European Court of Human Rights and the Supreme Court, the characteristics of an effective remedy for corporate rights are formulated. By relying on the current judicial practice, the author substantiates that the consolidation of the requirements for effective remedies in national legislation contributes to the redress of violated corporate rights of participants of limited liability companies within the framework of one trial.

2. General provisions on the forms and methods of protecting corporate rights in a limited liability company. The classification of protection forms of civil rights and legally protected interests into jurisdictional and non-jurisdictional has become generally accepted in civil law doctrine, legislation, and law enforcement. Such terminological gradation of protection forms is conditional, but it is quite convenient for their differentiation in practice.

In the present article, the jurisdictional form of protection of corporate rights is of interest. The jurisdictional form of protection of corporate rights is interpreted as the activities of authorized bodies to protect violated or disputed subjective rights. The essence of the mentioned form is that a person who believes that their rights and legitimate interests have been violated by unlawful actions of other persons or bodies appeals to state or other competent authorities (court, higher instance of state authority and governance, etc.), which are authorized to take the necessary measures to restore the violated right and desist the offense (Belianevych, 2007, p. 65; Kot, 2017, pp. 242–245; Lukach, 2015, pp. 249–250).

As for the ways to protect the violated rights, in the scientific literature, they are usually understood as legally enshrined substantive measures of a coercive nature, which contribute to the restoration (recognition) of violated, disputed, or unrecognized rights, restoration of the victim's property status and influence on the offender (Kot, 2017, p. 257; Spasibo-Fateeva, 2014, p. 57).

The definition of legal remedies for corporate rights proposed by the doctrine has quite a close meaning. For example, Yu. M. Zhornokui considers legal remedies for corporate rights as '... a procedure defined by law for ensuring the restoration (recognition) of violated rights, and at the same time, legal influence on the offender to restore the violated property and non-property aspects' (Zhornokui, 2016, p. 243). O. V. Zudikhin defines legal remedies for the corporate rights of participants in business companies as 'a law enforcement tool enshrined in or authorized by law which conducts a warning and/or renewal, recognition of violated (not recognized, disputed) corporate right, as well as compensation for losses ensuing from such a violation' (Zudikhin, 2011, p. 11). According to N. A. Slipenchuk, legal remedies for corporate rights are 'a system of actions of the participant of the corporation or the corporation itself and/or jurisdictional bodies established by law, a local act, or agreement through which the violations are terminated, and the violated, unrecognized or disputed subjective corporate right and/or compensation for the damage caused are restored' (Slipenchuk, 2014, p. 88).

The doctrine of civil and commercial law contains a variety of criteria for classifying remedies for civil and, in particular, corporate rights. Thus, there is the division of remedies for civil rights into restrictive, restorative, and penal (Spasibo-Fateeva, 2014, p. 72). The criteria for classifying remedies for corporate rights have close meaning. Considering the performance criterion (purpose), there is an independent system of remedies for corporate rights, the application of which allows confirming or satisfying the protected right, changing(terminating) the obligation; remedies, the application of which makes it possible to prevent or enjoin from violating corporate rights; remedies, the application of which pursues the goal of restoring the shareholder's violated right and providing them with compensation for the losses incurred (Luts, 2007, p. 248; Slipenchuk, 2014, p. 103; Zudikhin, 2011, p. 11).

I. V. Lukach classifies remedies for corporate rights into general and corporate (Lukach, 2015, pp. 285–289).

Remedies for corporate rights are also classified into contentious and non-contentious methods according to the criterion of the protection method (Hulyk, 2006, p. 221).

In the context of the problem stated in the article title, the classification proposed by V. I. Tsikalo is further used. The scientist divides remedies for corporate rights depending on the legal certainty and content of the violated corporate rights into effective ways to protect corporate rights and appropriate ways to protect corporate rights (Tsikalo, 2022, p. 422).

3. The concept of 'effective remedy'. The concept of appropriate remedies for corporate rights is quite intelligible and familiar to both doctrine and law enforcement practice. The legislative term 'effective remedy' amidst judicial protection of corporate rights appeared in the legal realm of Ukraine with the adoption of the Law of Ukraine 'On Amendments to the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine and other legislative acts' No. 2147-VIII, which entered into force on 15.12.2017 (Verkhovna Rada of Ukraine, 2017). Thus, the updated version of the Commercial Procedure Code of Ukraine includes a provision that if the law or the contract does not determine a remedy for the plaintiff's violated right or interest, the court, following the claim of such a person, may determine in its decision a protection method that does not contradict the law (Art. 5). The updated terminology of procedural legislation also meets the standards of European legislation. After all, a similar concept is available in the Convention for the Protection of Human Rights and Fundamental Freedoms: Article 13 of establishes that everyone whose rights and freedoms are violated shall have an effective remedy before a national authority. The essence of the concept of 'effective remedy' and its criteria are elucidated in the practice of the European Court of Human Rights.

Thus, in paragraph 145 of the judgment as of 15.11.1996 in the case of Chahal v. the United Kingdom, the European Court of Human Rights noted that the mentioned norm guarantees the availability at national level of a remedy to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order (Chahal v. the United Kingdom, 1996).

Article 13 of the Convention guarantees the availability of an effective remedy before a national authority to enforce the substance of the Convention rights and freedoms in whatever form they might happen to be secured in the domestic legal order. Hence, art. 13 requires that the rules of national remedy relate to the substance of the 'arguable claim' under the Convention and provide appropriate redress, although States Parties have some discretion as to the manner how they fulfil their obligations under the mentioned provision of the Convention. The essence of obligations under Art. 13 also depends on the nature of the applicant's complaint under the Convention. However, the remedy required by Art. 13 should be 'effective' both in law and in practice, so that its use is not impeded by the acts or omissions of the authorities of the State concerned (Aydin v. Turkey, judgment as of 22 September 1997, Reports 1997-VI, p. 1895-96, paragraph 103, and Kaya v. Turkey as of 19 February 1998, Reports 1998-I, pp. 329-30, paragraph 106). The Court also recalls that when a person makes a well-founded allegation that he has been tortured or materially ill-treated by the State, the concept of an 'effective remedy' implies, among other things, a thorough and effective investigation which can result in the identification and punishment of those responsible and include the complainant's effective access to the investigation procedure (see Tekin v. Turkey, judgment as of 9 July 1998, Reports 1998-IV, p. 1517, paragraph 53) (Afanasyev v. Ukraine, 2005).

In addition, the European Court of Human Rights emphasized that the initiation of court proceedings per se does not meet all the requirements of para. 1 of Art. 6 of the Convention (Right to a fair trial). The purpose of the Convention is to guarantee rights that are practical and effective, not theoretical or illusory. The right of access to a court includes not only the right to initiate proceedings but also

the right to obtain a 'resolution' of the dispute in court. It would be illusory if the national legal system of a Contracting State allowed a person to bring a civil action before a court without guaranteeing that the case would be settled by a final decision in judicial proceedings. For para. 1 of Art. 6 of the Convention, it would be impossible to specify the procedural guarantees afforded to the parties in proceedings, which are fair, public and expeditious, without guaranteeing the parties that their civil disputes will be finally resolved (Multiplex v. Croatia, 2003; Kutic v. Croatia, 2002).

Analyzing national systems of legal remedy in the observance of the right to the effectiveness of domestic mechanisms in terms of ensuring the guarantees specified in Art. 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has repeatedly stated in its decisions that to be effective, a remedy shall be independent of any action taken by state bodies, be directly accessible to those concerned (see the judgment as of 06.09.2005 in the case of Gurepka v. Ukraine (Gurepka v. Ukraine), application No.61406/00, para. 59); capable of preventing the occurrence or continuation of the alleged violation or providing adequate compensation for any violation that has already occurred (see the judgment as of 26.10.2000 in the case of Kudla v. Poland, application No.30210/96, para. 158) (para. 29 of the judgment as of 16.08.2013 in the case of Garnaga v. Ukraine, application No.20390/07).

In order to encourage and facilitate the fulfilment of their obligations under the European Convention on Human Rights, the Member States of the Council of Europe have adopted a Guide to Good Practice in Respect of Domestic Remedies which, inter alia, emphasizes that: 'A remedy is effective only if it is available and sufficient. It must be sufficiently certain not only in theory but also in practice, and must be effective in practice as well as in law, having regard to the individual circumstances of the case. Its effectiveness does not, however, depend on the certainty of a favourable outcome for the applicant' (Council of Europe, 2013).

Considering the above-mentioned practice of the European Court of Human Rights, it can be concluded that the effectiveness of remedies for an individual is determined following two criteria: availability and sufficiency. We support V. I. Tsikalo's position that the criteria of 'availability' and 'sufficiency' should be used not only to characterize the effectiveness of the protection of the convention rights of an individual but also to protect corporate rights. 'Availability' in the protection of corporate rights should be understood as the objective possibility of applying appropriate remedies, provided that they do not contradict the law or the contract. In other words, effective remedies to protect corporate rights, although not directly established by law or contract, do not contradict them. 'Sufficiency' for protection of corporate rights means the ability to achieve the result that the participant (shareholder) expects. 'Sufficiency' is the ability to get rid of the right's violation, that is, to remove obstacles to its implementation (Tsikalo, 2022, p. 423).

4. Application of the effectiveness criterion for the protection of corporate rights in national judicial practice. The Grand Chamber of the Supreme Court also formulated the criteria for effective remedies for corporate rights. Thus, the Court repeatedly drew attention to the fact that resorting to a particular remedy for civil rights depends on the content of the right or interest for the protection of which the person applied and on the nature of its violation, non-recognition, or challenge. Such a right or interest must be protected by the court effectively, that is, following the essence of the relevant right or interest, the nature of its violation, non-recognition, or challenge and the consequences caused by these actions (Supreme Court, 2018; Supreme Court, 2019).

Turning to the implementation of the concept of 'effective remedy' in the Ukrainian procedural legislation, it should be noted that it corresponds to the provisions of para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine as amended by the Law No. 2147-VIII, which stipulates that the court has the right to protect a civil right or interest in another way established not only by the contract or the law but also by the court in cases specified by law.

In fact, the new version of the Commercial Procedure Code of Ukraine and the amendments introduced to para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine expanded the list of judicial remedies provided for by Art. 16 of the Civil Code of Ukraine and Art. |20 of the Civil Code of Ukraine by allowing to protect rights not only in the manner prescribed by law, contract but also by the court and such that effectively protects the right.

The author believes that introducing the remedy standard into procedural legislation and allowing the court to determine an effective remedy contributes to the actual protection of corporate rights in an LLC and shift away from formalism in court decisions when the court can refuse the claim's satisfaction due to the inappropriate remedy. At first glance, it may seem that a lack of well-formulated criteria for court determination of the effectiveness of a remedy not established by law or contract provides an avenue for too subjective assess-

ment of the court and may lead to a violation of the principles of proportionality, reasonableness, adequacy and equality of the parties. At the same time, given the mentioned principles, the lack of well-formulated criteria will facilitate protecting violated corporate rights within one appeal to the court. Moreover, Part 2 of Art. 5 of the Commercial Procedure Code of Ukraine enshrines reliable protection against court arbitrariness when choosing an effective remedy. After all, the legislator made it clear that in choosing an effective remedy, the court is guided not by its discretion but by the content of claims of the person whose corporate rights are violated.

Such a statement can be supported by a case from judicial practice. Thus, the established standpoint is that neither civil nor economic legislation enshrines such a remedy as the cancellation and/or invalidation of the business entity's minutes of a general meeting. Under the established judicial practice, the decision of the general meeting of participants (shareholders, members, or founders) of a legal entity, not the general meeting minute, can be invalidated in court since the minute is a document that only fixes the fact of rendering a decision at the general meeting and is not an act within the meaning of Art. 20 of the Commercial Code of Ukraine (Supreme Court, 2021). However, in case No. 914/921/18, the Commercial Court of Cassation within the Supreme Court supported the position of the courts below regarding the remedy chosen by the plaintiff, which requested to cancel the minutes of the general meeting of the LLC participants, referring to the provisions of para. 12, Part 2 of Art. 16 of the Civil Code of Ukraine, Art. 5 of the CPC of Ukraine and the principles provided for in Art. 3 of the Civil Code of Ukraine. In particular, the Court of Cassation emphasized that the commercial courts considered the purpose of the plaintiff's appeal and proved violation of his rights by the decisions of the extraordinary general meeting under Art. 74 of the CPC of Ukraine, correctly protected the violated rights of the plaintiff by invalidating the decision of the extraordinary general meeting of the LLC participants, which is an effective remedy, to ensure the restoration of the plaintiff's violated right following Art. 5 of the CPC of Ukraine as well as those provided for in Art. 3 of the Civil Code of Ukraine, the principles of fairness, good faith, reasonableness (Supreme Court, 2019).

5. Conclusions. A remedy contributing to an actual restoration of violated corporate rights, which leads to the desired results for the subject and is adequate to the circumstances upon which the violation of corporate rights occurred, is considered effective. Introducing the effective remedy standard into the procedural legislation and allowing the court to determine an effective remedy assists in the actual protection of corporate rights in an LLC and shifting away from formalism in court decisions when the court can refuse claim satisfaction due to the improper remedy.

Taking into account the above scientific conclusions, legislative provisions, and the practice of the European Court of Human Rights and the Supreme Court, the following characteristics of an effective remedy for corporate rights can be formulated:

1) it may be directly provided by the law or the contract, or not provided by them;

2) it does not contradict the law or the contract;

3) it corresponds to the content of claims of the person whose corporate rights have been violated, the nature of the violation of corporate rights, and the consequences caused by such violation;

4) it is available and sufficient for the person who applied for the protection of the violated corporate right.

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ДО ПОСТАНОВКИ ПИТАННЯ ВИБОРУ ЕФЕКТИВНОГО СПОСОБУ ЗАХИСТУ КОРПОРАТИВНИХ ПРАВ У ТОВ ЯК НЕОБХІДНОЇ УМОВИ ВИРІШЕННЯ СПОРУ У СУДОВОМУ ПОРЯДКУ

Анотація. Актуальність обраної теми дослідження зумовлює те, що термін «ефективний спосіб захисту» з'явився в українському законодавстві наприкінці 2017 року. Судова практика його застосування на сьогодні лише формується, наукові дослідження щодо ефективного способу захисту корпоративних прав здійснюються здебільшого у контексті дослідження питань в цілому захисту цивільних прав та не дає ґрунтовних і вичерпних відповідей щодо характеристик такого способу захисту.

Метою статті є дослідження сутності поняття «ефективного способу захисту корпоративних прав», його критеріїв та характеристик. А також обґрунтування позитивного впливу імплементації

до українського законодавства положень щодо ефективності способу захисту. ***Методи дослідження.*** У дослідженні застосовано діалектичний, формально-логічний, порівняльно-правовий та логіко-юридичний методи пізнання. ***Результати.*** У статті подано науково-практичний аналіз трактування та застосування Європейським судом з прав людини положень ст. 13 Конвенції Ради Європи «Про захист прав людини та основоположних свобод», які встановлюють, що кожен, чиї права та свободи було порушено, має право на ефективний спосіб юридичного захисту в національному органі. А також положень національного нормативно-правового регулювання та судової практики у сфері застосування ефективного способу захисту корпоративних прав у товаристві з обмеженою відповідальністю. Автором здійснено аналіз наукових досліджень, присвячених питанням захисту цивільних прав, положень матеріального і процесуального законодавства України та правових висновків, викладених у рішеннях Європейського суду з прав людини і Верховного Суду.

Висновки. На підставі аналізу доктринальних підходів, положень законодавства та практики Європейського суду з прав людини і Верховного Суду сформульовано характеристики ефективного способу захисту корпоративних прав. Автором на прикладі актуальної судової практики обґрунтовано, що закріплення на рівні національного законодавства вимоги до ефективності способу захисту сприяє захисту порушених корпоративних прав учасників товариств з обмеженою відповідальністю у межах одного судового процесу.

Ключові слова: захист корпоративних прав, ефективний спосіб захисту корпоративних прав, критерії ефективності захисту корпоративних прав, спосіб захисту корпоративних прав, судова форма захисту корпоративних прав.

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CURRENT LEGAL AND REGULATORY MECHANISM FOR STAFFING AND A PLACE OF LABOUR LEGISLATION IN IT

Abstract. ***Purpose.*** The purpose of the article is to formulate a conceptual perspective on the current legal and regulatory mechanism for the staffing of the National Police and to establish a place of labour law provisions in it. ***Results.*** The article analyses the content and importance of the general legal concept 'legal and regulatory mechanism'. The content of the category 'legal and regulatory mechanism for the staffing of the National Police of Ukraine' is defined. The body of regulations that constitute the structure of the legal and regulatory mechanism for the staffing of the National Police of Ukraine is determined. It is stated that the legal and regulatory mechanism for the staffing of the National Police of Ukraine is the body of legal regulations, provisions of which regulate public relations, which arise in the process of the staffing of the police, as well as the activity of participants of this process. ***Conclusions.*** It is concluded that the legal and regulatory mechanism for the staffing for all categories of employees in general, as well as police officers directly, is carried out by means of provisions, of both international and national law. Moreover, it should be noted that international documents, the Constitution of Ukraine and general regulations of labour law, such as the Law of Ukraine 'On vacation', etc., mainly consolidate the basic labour rights of police, guarantees of realisation and protection of these rights, as well as other labour standards in the state, which should be implemented, including in the employment of police officers. Along with the general regulations, a departmental regulatory framework is formed on the basis of the Law of Ukraine 'On the National Police', as well as the by-laws of the Ministry of Internal Affairs and the National Police. They contain legal levers that regulate the procedure and peculiarities of the staffing mechanisms of the National Police of Ukraine, namely: powers and functions of the actors of staffing; forms, methods and techniques of the staffing of the police; procedures arising within the staffing and their legal effects, etc.

Key words: staffing, legal and regulatory mechanism, National Police of Ukraine.

1. Introduction

An important aspect of the content of the staffing of the National Police bodies is the legal and regulatory mechanism for this type of activity, which determines its regularities, specifics and mechanisms of implementation. However, the importance of this category in general is determined by the fact that it concentrates the general legal basis for the staffing in the NPU. These are numerous provisions of official state and international regulations, which are characteristic of various branches of law. However, considering our perspective on the labour-law nature of the staffing, the place of labour legislation and certain labour provisions in the system of the legal and regulatory framework should be analysed.

The issue of the legal and regulatory mechanism for activities of the National Police of Ukraine in general and its staffing in particular have been considered in the studies by S.S. Aleksieiev, A.S. Piholkin, P.M. Rabinovych, V.S. Nersesiants, Yu.S. Reshetov, R.O. Khalfina, A.T. Komziuk, M.M. Marchenko, O.F. Skakun, and other scientists. However, despite a considerable number of scientific achievements, the legal literature lacks comprehensive studies of the characteristics of the current legal and regulatory mechanism for staffing.

The purpose of the article is to formulate a conceptual perspective on the current legal and regulatory mechanism for the staffing of the National Police and to establish a place of labour law provisions in it.

2. Scientific approaches to definition of the concept of 'Legal and regulatory mechanism'

To understand all the features of the category 'legal and regulatory mechanism', it should be noted that it comes from the words 'regulation', 'regulate', which means: to introduce a certain order, system; to organise; to make operational; to achieve correct interaction, coordination, separate components; to reach a certain degree reducing or increasing, etc. (Felicyn, Shmelev, Medvedev, Kruglikova, 1961, pp. 1111-1112).

In the legal field, 'regulatory' is frequently endowed with meaning of 'legal', and according to S.S. Alekseev, is defined as a legal influence on social relations, which is carried out by means of law and the body of legal means (Alekseev, 1966). A.S. Piholkin offers a broader definition of the legal and regulatory mechanism: 'It represents all forms of influence of the right on public life: the issuance of law provisions, the general influence of law, the implementation of legal provisions in specific actions of legal actors, the enforcement of these provisions, i.e. the very legal conduct, and all that creates a basis and a prerequisite for such conduct, provides it' (Kurakin, 2013, p. 10). In addition, P.M. Rabinovych argues that the value of the legal and regulatory mechanism is expressed in its use for the development of both individual and entire society (Hizhevskyi, Hlovchenko, Kovalskyi, 2002, p. 369).

Moreover, in the context of the legal and regulatory mechanism, the term 'regulatory and legal' is often used, which scientists consider in several ways. For example, many scientists emphasise that 'regulatory' is an important feature of the legal and regulatory mechanism. V.S. Neresiants divides legal and regulatory mechanism into such that exists in an abstract-general form, which provides that the law provision does not yet have a specific regulatory and legal significance in relation to the specific conduct of a particular person in specific conditions; and legal and regulatory mechanism in a boundary-specified form, which is a specific regulatory and legal action of the law provision on the specific conduct of a particular person in a specific situation (Neresiants, 2001, p. 98). Yu.S. Reshetov proves that the regulatory feature is one of the features of the law, where the content of the law is of a general character, reflected in the form of state power provisions, and the rules of the law allow to make the life of people organised, arranged, secure. According to the scientist, this is achieved by means of the law action connected with the legal and regulatory mechanism. The scientist proves that the place of the legal and regulatory mechanism in the law action is determined by its social role, and the purpose of law is to regulate social relations, therefore, the main function of law is regulatory, since the vector of influence of law on consciousness and actions of people differs from the informational, educational and value orientation action of law (Reshetov, 2013, p. 113). According to R. O. Khalfina, the regulatory feature of the legal and regulatory mechanism is in general something more legally deep and socially significant, directly connected with the value of law. The regulatory feature in this sense, according to the scientist, means that legal and regulatory mechanism by means of general rules meets the need of the society concerning the approved regulatory principles and therefore covers all spheres of social life, which require to be legally regulated (Pashchenko, 2019).

Therefore, summing up different scientific approaches, and allowing for general conceptual understanding of the category 'legal and regulatory mechanism', we believe that the legal and regulatory framework for the staffing of the National Police of Ukraine is the body of legal regulations, provisions of which regulate public relations, which arise in the process of the staffing of the police, as well as the activity of participants of this process. According to the logic of the formulated definition, the state of the legal and regulatory mechanism for the staffing of the NPU directly depends on the scope and target orientation of the legal regulations that form the content of the category. Therefore, in order to assess in general how public relations in the given field are regulated, as well as to determine the place of labour law provisions in this issue, the entire system of regulations, provisions thereof are related to the regulations of the staffing of the National Police of Ukraine should be revealed.

The first of the legal regulations of the national law system necessary for the allocation in the research aspect of the principles of the legal and regulatory mechanism of the staffing in the National Police is the Constitution of Ukraine of June 28, 1996 No. 254k/96-VR. This document is the basis of all Ukrainian law, the Basic law, which is at the centre of the legal and regulatory mechanism of all legal relations that arise on the territory of the state in various fields of public life. Directly as a source of the legal and regulatory mechanism of the staffing of the police, the effect of the Constitution is expressed in three aspects. First, the Basic Law establishes the principles of the labour sector of the state, common for the activity of all employees without exception. Secondly, the Basic Law establishes the legal status, powers, functions, format and procedure for performance of the higher state authori-

ties, namely: the Verkhovna Rada of Ukraine, the President of Ukraine and the Cabinet of Ministers of Ukraine. Third, the Constitution defines the principles of the legal and regulatory mechanism in the state, including in the field of the staffing of the National Police (The Constitution of Ukraine, 1996).

Next, following the Constitution of Ukraine in the hierarchical construction of the regulatory system of our state, comes the Labour Code of Ukraine of December 10, 1971, No. 322-VIII (hereinafter – the LC), which constitutes the legal and regulatory basis for the staffing of the National Police. This document regulates the labour relations of all employees, contributing to the growth of labour productivity, improving the quality of work, making public production efficient and raising on this basis the material and cultural standards of life of workers, strengthening labour discipline and gradually transforming labour for the benefit of society into the first vital need of every able-bodied person (Labour Code of Ukraine, 1971). That is, the LC is a kind of 'constitution' in the field of labour relations. This legal regulation defines the fundamental aspects of regulating all relations that arise in the field of labour, and applies to all categories of workers, including police. For example, the provisions of the Code provide for the mechanisms for ensuring the labour rights of employees, the procedure for dismissal and employment, the basic social security, standards of working time and rest, and so on. Due to the general, initial nature of the LC, police personnel units in their activities, first, shall be guided by the provisions of this document, and then allow for the provisions of special legislation. In addition, the formation of a special legal and regulatory mechanism for the staffing of the National Police should comply with the requirements and provisions of the LC.

3. Legal and regulatory mechanism for the staffing

In addition to these aspects, Law of Ukraine 580-VIII 'On the National Police' of July 02, 2015 regulates the issue of police oath-taking, movement of police officers by the service, peculiarities of working time distribution of the National Police personnel, specifics of professional training of police officers, etc. (Law of Ukraine On the Disciplinary Statute of the National Police of Ukraine 2018). Therefore, as well as the LC, the departmental legal regulation governing the police activity is the basic special document for authorised units to be guided in the implementation of the staffing in the system of NPU.

Law of Ukraine 2337-VIII 'On the Disciplinary Statute of the National Police of Ukraine' of March 15, 2018, which defines the essence of the service discipline in the National Police of Ukraine, the powers of police officers and their managers on its enforcement, types of disciplinary charges and the procedure for their application and appeal, is important in the regulatory basis of the staffing (Law of Ukraine On the Disciplinary Statute of the National Police of Ukraine, 2018). The provisions of the law state that the service discipline is observance by a police officer of Constitution and laws of Ukraine, international agreements, consented by the Verkhovna Rada of Ukraine as binding, regulations of the President of Ukraine and the Cabinet of Ministers of Ukraine, orders of the National Police of Ukraine, legal regulations of the Ministry of Internal Affairs of Ukraine, the oath of police, orders of senior officers. Service discipline is based on an enabling organisational and socio-economic environment for honest, unbiased and decent performance of the duties of the police officer, observance of the honour and dignity of the police officer, teaching of conscientious attitude to the fulfilment of the duties of the police officer by the reasonable application of methods of persuasion, encouragement and coercion (Law of Ukraine On the Disciplinary Statute of the National Police of Ukraine, 2018).

A large range of official regulations defining the areas and specificities of the regulatory framework for the staffing in the National Police are concentrated at the sublegal level and presented by organisational and executive documents of the Ministry of Internal Affairs of Ukraine and the leadership of the National Police of Ukraine, most of which contain labour law provisions, or generally refer to the labour law branch.

In particular, most legal regulations of the Ministry of Internal Affairs of Ukraine are focused on peculiarities of professional (official) training of police officers. For example, according to Order 50 of the Ministry of Internal Affairs 'On approval of the Regulations on the organisation of training of employees of the National Police of Ukraine ' of January 26, 2016, the service training is defined as a system of measures aimed at strengthening and updating the necessary knowledge and skills of the police officer allowing for the specifics and profile of his/her service activity (Order of the Ministry of Internal Affairs of Ukraine On approval of the Regulations on the organisation of training of employees of the National Police of Ukraine, 2016).

In addition, the basis of the legal and regulatory framework for the staffing of the National Police includes Order 90 of the Ministry

of Internal Affairs 'On approval of the Regulations on the organisation of the inspection of the physical fitness level of candidates for entry to the National Police of Ukraine' of February 09, 2016, Order 105 of the Ministry of Internal Affairs 'On approval of the Regulations on the organisation of primary professional training of police officers, for the first time in the police service' of February 16, 2016.

Some by-laws of the MIA regulate the issue of ensuring the legality of the labour activity of the police and the mechanisms of their promotion in the service. For example, Order 1179 of the MIA 'On Approval of the Rules of ethical conduct of police officers' of November 09, 2016 is a generalised collection of professional-ethical requirements concerning the rules of conduct of police officers and is aimed at ensuring the service of the police to the society by providing protection of human rights and freedoms, counteracting crime, maintaining public security and order at the basis of ethics and universal values (Order of the Ministry of Internal Affairs of Ukraine On approval of the Rules of ethical conduct of police officers, 2016). Other legal document, Order 1465 of the MIA 'On approval of the Instruction on the procedure for attestation of police officers' of November 17, 2015, establishes mechanisms for evaluation of business, professional, personal qualities of police officers, their educational and qualification levels, by means of deep and comprehensive study, determination of conformity with positions, and prospects of their career (Order of the Ministry of Internal Affairs of Ukraine On approval of the Instruction on the procedure for attestation of police officers, 2015).

As for the legal regulations of the National Police, Order 136 of the National Police of Ukraine ' On approval of the Regulations on the Personnel Department of the National Police of Ukraine ' of December 03, 2015 (Order of the Ministry of Internal Affairs of Ukraine On approval of the Regulations on the Personnel Department of the National Police of Ukraine, 2015).

4. Conclusions

The review of various legal sources reveals that the legal and regulatory mechanism for the staffing for all categories of employees in general, as well as police officers directly, is carried out by means of provisions, of both international and national law. Moreover, it should be noted that international documents, the Constitution of Ukraine and general regulations of labour law, such as the Law of Ukraine 'On vacation', etc., mainly consolidate the basic labour rights of police, guarantees of realisation and protection of these rights, as well as other labour standards in the state, which should be implemented, including in the employment of police officers. Along with the general regulations, a departmental regulatory framework is formed on the basis of the Law of Ukraine 'On the National Police', as well as the by-laws of the MIA and the National Police. They contain legal levers that regulate the procedure and peculiarities of the staffing mechanisms of the NPU, namely: powers and functions of the actors of staffing; forms, methods and techniques of the staffing of the police; procedures arising within the staffing and their legal effects, etc.

However, despite the above-noted, the current legal and regulatory mechanism for the staffing of police bodies composed of the provisions of labour laws can be defined as extremely low. For example, these documents form the general regulatory basis of labour relations in the police, while within the departmental regulatory framework this issue is under focus only in certain provisions of the by-laws, which are generally referred to the administrative branch of law. In our opinion, such situation requires correction, because the discrepancy between the general regulatory framework and special one generates numerous legal gaps, as a result of which labour rights of police officers can be violated. We argue that this negative factor can be remedied by the adoption of a separate document, the Law of Ukraine 'On labour activities of police officers'. The document should become a basic legal source that regulate all legal relations that arise in the activity of police officers and constitute a subject matter of the staffing. The Constitution, the Labour Code and other general labour regulations should be the basis of this Law. The provisions of the Law should be focused on the functions and powers of specially authorised entities responsible for the implementation of the staffing of the police. In our opinion, such approach will improve the quality and full legal and regulatory mechanism for all issues related to the staffing of the National Police of Ukraine.

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СУЧАСНИЙ СТАН НОРМАТИВНО-ПРАВОВОГО РЕГУЛЮВАННЯ КАДРОВОГО ЗАБЕЗПЕЧЕННЯ ТА МІСЦЕ В НЬОМУ ТРУДОВОГО ЗАКОНОДАВСТВА

Анотація. ***Мета*** статті полягає у тому, щоб сформулювати концептуальну позицію щодо сучасного стану нормативно-правового регулювання кадрового забезпечення Національної поліції та встановити місце у ньому норм трудової галузі права. ***Результати.*** У статті проаналізовано зміст та значення загально юридичного поняття «правове регулювання». Сформульовано визначення змісту категорії «нормативно-правове регулювання кадрового забезпечення Національної поліції України». Визначено сукупність актів, які становлять структуру нормативно-правового регулювання кадрового забезпечення Національної поліції України. Визначено, що нормативно-правове регулювання кадрового забезпечення Національної поліції України – це сукупність нор-

мативно-правових актів, норми яких упорядковують суспільні відносини, що виникають в рамках реалізації процесу кадрового забезпечення поліцейських, а також діяльність суб'єктів цього процесу. ***Висновки.*** Зроблено висновок, що нормативно-правове регулювання кадрового забезпечення всіх категорій працівників в цілому, а також поліцейських безпосередньо, відбувається за допомогою норм як міжнародного? так і національного права. При цьому варто зазначити, що міжнародні документи, Конституція України та загальні акти трудового права, на кшталт КЗпП, Закон України «Про відпустки» і т.д., здебільшого закріплюють основні трудові права поліцейських, гарантії реалізації та захисту даних прав, а також інші стандарти праці в державі, які мають втілюватись у тому числі в трудовому процесі поліцейських. Водночас поряд із загальними актами існує відомча нормативна база, сформована на основі Закону України «Про Національну поліцію», а також підзаконних документів Міністерства внутрішніх справ та Національної поліції. Саме в них закріплено юридичні важелі, котрі регулюють порядок та особливості роботи механізмів кадрового забезпечення Національної поліції України, а саме: повноваження та функції суб'єктів кадрового забезпечення; форми, методи та способи кадрового забезпечення поліцейських; процедури, що виникають в межах кадрового забезпечення та їх юридичні наслідки тощо.

Ключові слова: кадрове забезпечення, нормативно-правове регулювання, Національна поліція України.

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PERSONNEL POLICY AND KEY SECTORS OF PLANNING IN MANAGEMENT

Abstract. ***Purpose.*** The purpose of the article is to characterise personnel policy and the key sectors of planning in management. ***Results.*** The article reveals that the staff of the organisation is not stable, it is in constant motion, due to the hiring of someone and dismissal of others. The number of hires and dismissals for the relevant period is employee or staff turnover, which is divided into necessary and unnecessary. The first rate consists of employees who leave for objective reasons, i.e. those that do not depend on the organisation: organisational (staff reductions) and personal (retirement). The second rate includes employees who are dismissed of their own choice or for various violations. One of the most common characteristics of the personnel movement is its turnover, i.e. voluntary official leaving by an employee of the place of work (organisation, institution, etc.) on the basis of a decision made due to unfavourable socio-economic factors or dismissal for violation of labour discipline. Voluntary resignation of employees due to their dissatisfaction with the workplace (conditions, work, everyday life, etc.) is considered as "active turnover". Conversely, the rate of dismissal of employees due to dissatisfaction of the organisation with a particular employee characterises "passive turnover". ***Conclusions.*** It is concluded that when developing the personnel concept of the organisation it is necessary to determine in the proportion of applying this or that personnel policy. The decisive factor that ensures the success or failure of the implementation of the personnel concept is the concept of staff incentives. The experience of different organisations enables to propose the development of special systems of staff payments, their participation in the distribution of profits of the organisation, flexible working hours, etc. Incentive methods can be both material and moral. Differentiation means an individual approach to stimulating different groups of personnel. Flexibility and promptness of this process requires constant review of incentives depending on changes in the organisation and society. The main principles governing the concept of incentives are: accessibility, correspondence to the performance, combination of material and moral methods.

Key words: staff, personnel, organisation, effective use, professional and social development.

1. Introduction

The word "cadre" comes from the French *cadre* ("framed painting, square"), which comes from the Latin "quadrangle". In this way, an official list of employees of state institutions was formed. At first, such lists were called "cadres", and later – employees who were included in them (Alekseev, 1999, p. 94).

The planning function involves decisions about the goals of the organisation and the activities of its members to achieve those goals.

Strategic planning is a set of managerial actions and decisions aimed at developing specific strategies to help the organisation achieve its goals.

The strategic planning process is a tool that helps in making managerial decisions. Its task is to ensure innovation and change in the organisation at a sufficient level.

A strategy is a detailed comprehensive integrated plan designed to ensure that the organisation's mission and goals are achieved.

The strategic plan should be developed from the perspective of the entire organisation, not a specific individual. And it should be based on comprehensive research and evidence. To com-

pete effectively in the business world, a firm should constantly collect and analyse a large amount of information about the industry, competition and other factors.

The strategic plan gives the organisation a certainty, an identity, which allows it to attract the necessary employees, as well as opens prospects for development.

Finally, strategic plans should be flexible enough to allow for modification and reorientation if necessary.

2. Planning and success of the organisation

Some organisations can achieve a certain level of success without investing much effort in formal planning. Moreover, strategic planning does not guarantee success. An organisation that designs strategic plans may fail due to errors in organisation, motivation and control.

However, formal planning can create a number of important and very significant enabling factors for the organisation.

The current pace of change and increase in knowledge is so rapid that strategic planning is the only way to formally anticipate future needs and opportunities. Strategic planning provides a basis for decision making. Formal planning helps reduce risk in decision making. Planning, because it should serve to formulate goals, helps define a unified purpose in the organisation.

In science and in practice, along with the concept of "cadre", which has already been established, the concepts of "human resources" and "personnel" have become widely used. This is largely a reflection of the trends that have emerged in foreign management theory and practice. In the USA and many Western European countries, the term "cadre" was initially replaced by "personnel", and in the 70s of the twentieth century the term "human resources" came for a long-time use, reflecting the economic feasibility of investing in a person, the development of skills and abilities. A theoretical justification of new forms of work with personnel was developed, which was called the "concept of human resources". Theorists of this concept tried to emphasise the importance of personnel in modern management and find more effective ways to use it.

Let us consider the concepts of "personnel" and "cadre". Are these concepts fundamentally different or identical? In the legal encyclopaedia, the concept of "cadre" is defined as the main staff of the organisation.

This definition correlates with the description of this concept on the pages of the encyclopaedic dictionary *Management, Informatics*: cadre is the main (regular) staff of employees of an institution, professional or public organisations of a particular industry. Based on the above definitions, the difference between the concepts of "personnel" and "cadre" is in their linguistic origin, in their content these concepts are identical.

In recent years, the concept of "personnel" has become widely used, which has already been reflected in the activities of most organisations. The personnel (staff) in a broad sense includes persons who work on a permanent or temporary basis and perform certain labour functions in bodies, institutions and organisations on paid terms.

In modern management practice, the use of the concept of "personnel" (from Latin *persona* – "person" or *personalis* – "personal") means a transition to fundamentally new positions in the field of activity of organisations. The use of this concept reflects a real increase in the role of the human factor in ensuring the effective functioning of employees, the growing dependence of the performance on the quality of development, motivation.

The personnel are classified following a range of grounds:

1) by professional affiliation (lawyers, economists, psychologists, teachers, doctors, etc;)

2) by objective characteristics of a person (status, age, education, work experience, etc;)

3) by official position (head, manager, staff, etc.)

4) by legal status in the management system (officials, employees, etc.);

5) by functional role in the management system, i.e. participation in the development, adoption and organisation of managerial decisions (managers, specialists and support staff) (Bandurka, 2001, p. 56).

The number of personnel is determined by factors such as the scale of activity, its features, complexity, importance of tasks, etc.

3. Characteristics of personnel movement

The staff of the organisation is not stable, it is in constant motion, due to the hiring of someone and dismissal of others. The number of hires and dismissals for the relevant period is employee or staff turnover, which is divided into necessary and unnecessary. The first rate consists of employees who leave for objective reasons, i.e. those that do not depend on the organisation: organisational (staff reductions) and personal (retirement). The second rate includes employees who are dismissed of their own choice or for various violations.

One of the most common characteristics of the personnel movement is its turnover, i.e. voluntary official leaving by an employee of the place of work (organisation, institution, etc.) on the basis of a decision made due to unfavourable socio-economic factors or dismissal for violation of labour discipline. Voluntary resig-

nation of employees due to their dissatisfaction with the workplace (conditions, work, everyday life, etc.) is considered as "active turnover". Conversely, the rate of dismissal of employees due to dissatisfaction of the organisation with a particular employee characterises "passive turnover".

The staff of the organisation is characterised not only by quantitative indicators, but also by a number of qualitative indicators: age, gender, education, profession, specialty and others. The ratio between separate groups of employees, formed on different grounds, creates the structure of the organisation's personnel. On the pages of various literary sources this structure is called personnel or social. There are statistical and analytical personnel structures.

The statistical structure reflects the distribution and movement of personnel by categories of positions: managers, heads, employees, etc.

The analytical structure provides for the characterisation of employees by characteristics such as: age, gender, education, length of service, profession.

Staffing of any organisation is carried out by recruiting specialists, that is, persons who have mastered the basics of professions that are required by a particular organisation. Therefore, from the practical point of view, it is important to characterise the personnel structure by elements such as profession, specialty, position, qualification level, etc. Each profession always implies a number of relatively separate functions associated with the performance of a specific, narrower range of duties. These functions and duties are the basis of division into specialties. Each profession includes a number of specialties.

Personnel management of the organisation is a purposeful activity of managers and leading personnel of different levels, which includes the development of the concept and strategy of personnel policy, principles and methods of personnel management. It consists in planning of staffing, search and selection of personnel, determination of personnel potential and needs of the organisation in personnel, accounting and rationing of the number of personnel, its development.

The purpose of personnel management is to provide personnel, to organise their effective use, professional and social development, to achieve a rational degree of personnel mobility, to create optimal conditions for their self-realisation during their work.

Personnel policy is a system of basic goals, principles, forms, methods, tasks, methods of staffing the organisation with personnel who have the necessary business, moral and professional qualities. It is based on the principles of scientific validity of the need for employees of a particular qualification, thorough selection and study of employees for their business and moral qualities, a combination of trust and respect for employees with fundamental requirements to them, timely renewal of personnel, legal and social protection of employees.

The concept of personnel management implies a set of techniques, means, forms and methods of influence on personnel in the process of its recruitment, use, development and dismissal in order to obtain the best results of labour activity is united by technology (Alekseev, Zhigalov, 1994, p. 98).

Personnel management technologies are regulated by specially developed documents: regulations, instructions, guidelines, norms, job descriptions, etc. that are developed and implemented within each organisation.

Life requires the implementation of personnel policy in accordance with the needs of the organisation, its main goals.

The general trend in personnel policy of Ukraine is to increase the share of highly qualified personnel in the staff of the organisation.

The peculiarity of the new personnel policy is the study and adoption of the experience of leading countries, law schools and management schools.

There is a regional study of the experience of countries depending on where the trained personnel will work. For example, in Siberia and the Far East, Russia applies the experience of Japan, China, South Korea, America; in the European part – of Germany, France, America. As for Ukraine, the experience of Germany and America is spreading here. Nonetheless, as practice shows, such implementation of experience in most organisations is not effective. In our opinion, we can make personnel and managerial breakthroughs by applying the best that has been developed by mankind, adapting it to the Ukrainian conditions and mentality of the nation, while developing such methods of training and management that could be further used (Bitiak, Bogutckii, Garashchuk, 2003, p. 64).

What trends should the personnel policy of the organisation follow at the present stage in Ukraine?

4. HR planning and recruitment

Based on the concept of personnel policy, its main trends at the present stage are:

human resource planning. Human resource is a category that is neither replenished nor revived. It requires capital investment;

recruitment, personnel selection in accordance with the goals of the organisation,

career guidance, adaptation to the conditions of the organisation.

The content of new methods of personnel selection is diverse.

In most countries of the world, when selecting personnel, candidates are tested for potential abilities, volitional qualities, professionalism.

It should be noted that the country has a rather large leading personnel apparatus – up to 15% (in the USA this rate is higher than 17%), but the efficiency of management is much higher than in any Western country. Such number of managers causes their constant attestation. On its basis, job descriptions are revised (Afanasev, 1977, p. 142).

As an example, we present the job description of the HR manager, which can be found in textbooks of Western countries:

I. General provisions

Manage the staffing. Plan and implement plans of personnel policy (recruitment, testing, study, selection of personnel), inform the staff.

II. Examples of works to be performed

Plan and ensure a uniform workload of staff. Inform the staff, using various methods of communication. Interview new employees, study graduates of educational institutions. Hold meetings with managers on personnel issues. Establish a rating system for employees of the organisation and train managers of the organisation on methods of personnel assessment. Keep personal files of the staff.

III. Education

Bachelor's degree or equivalent in human resources or related field Familiarity with the principles and methods of management.

The security of the organisation is one of the new trends in the personnel strategy. The formation of relations, the aggravation of the economic situation contributed to the development of crime. In this context, the way out for organisations is to create a security service.

Such services, including private ones, are beneficial to the state due to a unified system to combat crime, and much less money to invest in law enforcement,

For example, in the USA in 1998, 675 thousand people worked in the police, while 1.2 million were employed in private agencies.

Among the functions of the security service are:

Collect data on potential employees of the organisation.

Protect premises.

Patrol the territory of the organisation and adjacent territories.

Ensure personal safety of the organisation's managers and staff.

Collect confidential information for business meetings and conversations.

Combat data leakage.

Collect confidential information regarding unreliable partners.

Investigate and prevent violations on the territory of the organisation.

The basis for the development of the concept of management in the organisation is its goals and scope of economic activity. The effectiveness of the organisation, regardless of the area of its activities, is the ability to coordinate and organise the activities of personnel to achieve the goals of the organisation.

A difficult problem for the organisation is the creation of internal training and retraining centres.

Some organisations have established "Business Schools" operating on a commercial basis. This facilitates the organisation's activities in the implementation of personnel policy and increases motivation, reduces staff turnover, facilitates planning for the use of human potential. Management practice confirms that an employee should not work in one place all his or her life.

Personnel policy of any organisation can be divided into active and compensatory. Active policy is selection and recruitment of personnel directly from educational institutions. It requires significant investments for further training of qualified personnel.

The content of compensatory personnel policy is that the organisation hires personnel according to the required specialties and qualifications. This requires significantly less costs. In addition, this policy can be applied to provide staff with a non-permanent term of employment.

5. Conclusions

When developing the personnel concept of the organisation it is necessary to determine in the proportion of applying this or that personnel policy.

The decisive factor that ensures the success or failure of the implementation of the personnel concept is the concept of staff incentives. The experience of different organisations enables to propose the development of special systems of staff payments, their participation in the distribution of profits of the organisation, flexible working hours, etc.

Incentive methods can be both material and moral. Differentiation means an individual approach to stimulating different groups of personnel. Flexibility and promptness of this process requires constant review of incentives depending on changes in the organisation and society.

The main principles governing the concept of incentives are: accessibility, correspondence to the performance, combination of material and moral methods.

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КАДРОВА ПОЛІТИКА ТА ОСНОВНІ СФЕРИ ПЛАНУВАННЯ У МЕНЕДЖМЕНТІ

Анотація. ***Мета.*** Метою статті є характеристика кадрової політики та основні сфери планування у менеджменту. ***Результати.*** В статті з'ясовано, що персонал організації не є сталим, він знаходиться у постійному русі внаслідок прийому на роботу одних та звільнення інших. Кількість прийнятих і звільнених за відповідний період складає плинність кадрів або персоналу, який поділяється на потрібний та зайвий. Перший складають працівники, що вибули за об'єктивних причин, тобто таких, що не залежать від організації: організаційні (скорочення штатів) та особисті (вихід на пенсію). Другий показник включає працівників, які звільнені за власним бажанням або за різного роду порушення. Однією з найбільш поширених характеристик руху персоналу є його плинність, тобто добровільне офіційне залишення працівником місця роботи (організації, установи тощо) на основі прийнятого рішення, що було викликане несприятливими соціально-економічними факторами, або звільнення за порушення трудової дисципліни. Звільнення працівників за власним бажанням, що зумовлене їх незадоволеністю робочим місцем (умовами, праці, побуту тощо), складають в активну плинність». І, навпаки, показники звільнення працівників у зв'язку із незадоволеністю організацією конкретним працівником характеризують «пасивну плинність». ***Висновки.*** Зроблено висновок, що при розробці кадрової концепції організації необхідно визначитися, в якій пропорції застосовувати ту чи іншу кадрову політику. Вирішальним фактором, який забезпечує успіх чи невдачу впровадження кадрової концепції, є концепція стимулювання праці персоналу. Використовуючи досвід роботи різних організацій, можна запропонувати розробку спеціальних систем виплат персоналу, участь їх у розподілі прибутків організації, гнучкий режим праці тощо. Методи стимулювання можуть бути як матеріальні, так і нематеріальні. Диференційованість означає індивідуальний підхід до стимулювання різних груп персоналу. Гнучкість та оперативність цього процесу потребує постійного перегляду стимулів залежно від змін в організації та суспільстві. Основні принципи, на яких повинна базуватися концепція стимулювання: доступність, відповідність результатам праці, поєднання матеріальних та моральних методів.

Ключові слова: персонал, кадри, організація, ефективне використання, професійний та соціальний розвиток, персонал.

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GUARANTEES OF RIGHTS OF PARTICIPANTS IN ADMINISTRATIVE AND LEGAL RELATIONS IN THE FIELD OF MAKING PUBLIC POLICY ON ECONOMIC SECURITY OF THE STATE

Abstract. ***Purpose.*** The purpose of the article is to define the legal nature and essence of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State. ***Results.*** The article defines the essence of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State. The study analyses concepts such as: 'guarantee', 'legal guarantees'. The guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State are classified and the essence of each of them is determined. It is noted that the features of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State are: the regulatory and legal framework; special legal means; the procedure and conditions for the implementation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State, which are prescribed at the legislative level; protection in case of violation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State. ***Conclusions.*** It is concluded that the features of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State are: 1) the regulatory and legal framework; 2) special legal means; 3) the procedure and conditions for the implementation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State, which are prescribed at the legislative level; 4) protection in case of violation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State; 5) legal and economic instruments for the protection and defence of the rights of participants in the relevant relations; 6) a binding nature; 7) the purpose of introducing the latter is a balance between economic profit and public interest in a particular sector of the economy; 8) they are a separate element of the administrative and legal mechanism for ensuring economic security; 9) depending on the threats to economic security, the latter tend to protect the public interest in a particular sector of the economy, etc.

Key words: guarantees, rights, guarantees of rights, administrative and legal relations, making public policy on economic security of the State, economic security.

1. Introduction

In modern conditions, guarantees of the rights and freedoms of participants in administrative and legal relations is of particular importance and is an urgent problem for both Ukraine and many foreign countries. Today, the degree of security of rights of participants in administrative and legal relations in various sectors is a significant indicator of the level of development achieved by society and the state. For each participant in administrative and legal relations to enjoy subjective rights in Ukraine, effective mechanisms should be determined to ensure the possibility of implementing the latter in modern economic transformations. Therefore, it can be argued that each sector of making public policy, in particular on economic security of the State, should have an effective mechanism for ensuring administrative and legal relations functioning in this sec-

tor, which in turn includes certain guarantees for participants. As it is known, guarantees are aimed at supporting the continuous development of administrative and legal relations in the field of making public policy, in particular on economic security of the State, therefore, their definition is one of the mandatory components of the latter.

The study of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State generally or fragmentarily within the broader issue has been under focus by domestic scientists such as: V.B. Averianov, O.F. Andriiko, O.M. Bandurka, O.M. Bondarevska, O.V. Dzhafarova, O. V. Komienin, D.O. Koshykov, S.I. Lekar, V.I. Melnyk, K. R. Padalko, O.M. Rieznik, T.V. Tsvihun, and others.

The purpose of the article is to define the legal nature and essence of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State.

2. Features of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State

We propose to start a direct characterisation of the guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State with the characterisation of a category 'guarantee'.

In scientific work by O. V. Boiko, 'guarantee' (French 'guarantie' – to ensure) is interpreted as a 'pledge', 'condition that ensures something'. Moreover, the author notes that the legal literature review reveals that the guarantees of rights and freedoms can be understood as: a) a set of subjective and objective factors; b) a system of socio-economic, political, moral, legal and organisational prerequisites, conditions, means and methods. We believe that the latter definition does not quite reveal the meaning of the concept of guarantees but lists their types. A more accurate definition seems to be 'conditions, means and ways' that ensure the realisation and comprehensive protection of rights (Boiko, 2020, pp. 25).

The *New explanatory dictionary of the Ukrainian language* defines 'guarantee' as 'provision or creation of material means; protection of someone, something from danger; guarantee of something' (Yaremenko, 2000, p. 42). Instead, the *Great explanatory dictionary of the modern Ukrainian language* defines the word 'guarantee' as 'a pledge of fulfilment of obligations, exercise of rights' (Busel, 2002, p. 173).

In the course of considering scientific interpretations on the understanding of this category, we note that O.V. Dzhafarova's scientific perspective is of interest that the State establishes guarantees through obligations necessary to ensure that the latter (at the level of provisions) do not turn into obstacles to enjoying human rights and freedoms (at the level of their implementation), so that they do not turn from a legal means into socially harmful and illegal (Dzhafarova, 2015, p. 30).

A. V. Ponomarenko suggests considering legal guarantees as a set of conditions, ways and means reflected in legal regulations, which determine the procedure for the realisation, enjoyment of human rights and freedoms, as well as their protection, defence and restoration in case of violation (Ponomarenko, 2013, p. 39).

According to E.V. Bilozorov, guarantees are a number of specific means, thanks to which the effective exercise by citizens of their rights and freedoms, their protection and defence against offenses becomes real. According to the scientist, their main purpose is to provide everyone with equal legal opportunities for the acquisition, implementation, protection and defence of subjective rights and freedoms (Bilozorov, 2009, p. 27). Furthermore, guarantees are a system of means that facilitate the realisation of rights and freedoms, interests and duties covered by law (Averianov, 2002, p. 160).

Interesting is the definition of M. M. Voinarivskyi, who argues that guarantees are: 'in the narrow sense, the fundamental provisions of objective law that ensure the implementation, protection, defence and restoration of subjective rights and legitimate interests of parties to legal relations; in the broad sense, elements of the legal system that ensure the systematic and consistent framework of objective law provisions in the relevant sources, their unambiguous interpretation and effective application' (Voinarivskyi, 2014).

It should be noted that in his scientific work, D. O. Koshykov describes legal guarantees, as follows: 1) It is a mandatory element, which forms a set of objects aimed at ensuring and protecting fundamental values – rights and freedoms; 2) They are always associated with a particular person and his/her legal status; 3) Their content may vary depending on the types of legal status of a person and the relations to which he/she becomes a party; 4) One of the aspects of the main purpose of guarantees is to ensure and protect human rights and freedoms, which is reflected in their protective and ensuring functions, and they also perform a preventive function; 5) In the mechanism for ensuring human rights and freedoms,

they become dynamic under certain factors, for example, encroachment or violation of rights and freedoms, until then they are statistical; 6) Guarantees should be legally enshrined in order to perform their functions, otherwise they lose their legal properties and cannot fully perform their own functions; 7) The functioning of guarantees does not require the existence or creation of any special legal conditions, as it is provided by the entire system of law' (Koshykov, 2021, pp. 293-294). In general, we agree with the opinion of the scientist, but we believe that it is unclear what the author means by 'a set of objects aimed at ensuring and protecting fundamental values – rights and freedoms', an element of which, according to him, guarantees are.

Given the scientific interpretations, we argue that guarantees are legally enshrined provisions that have their own characteristics and also perform the protective function of the rights of participants in administrative legal relations.

It should be noted that guarantees, as legally enshrined provisions, are contained in various legal regulations, which gives rise to their grouping or classification.

With regard to the classification of guarantees, it should be noted that in the scientific literature they are grouped into: general and special (Volynka, 2003, p. 202) or regulatory and organisational. General guarantees are argued considered to cover economic, political, ideological, social and other aspects. In turn, 'the essence of special guarantees is the means established by law to ensure the use, observance, enforcement and application of law provisions, aimed at ensuring the constitutional order, the rule of law, the Constitution and laws, the establishment of law and order, the protection of human and civil rights and freedoms, the exercise of democracy, state power and local self-government' (Bosyi, 2019, p. 81).

For example, in his study on the definition of administrative and legal guarantees for the realisation of the rights of road users, Ya. Lakuichuk notes that the system of administrative and legal guarantees for the protection of the rights of road users is divided into regulatory and organisational guarantees. In addition, such classification is relatively conditional, but it contributes to the understanding of the nature of the origin and essence of administrative and legal guarantees (Lakuichuk, 2021, p. 173).

3. The content of guarantees of rights of participants in administrative and legal relations in the field of making public policy on economic security of the State

With regard to the main issue of our study, we agree with the scientific perspective of D. O. Koshykov that guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State are:

1) *Adoption of binding decisions (supreme state authorities, central executive bodies, local self-government bodies)*. Describing this guarantee requires to remind that actors of this guarantee are: the President of Ukraine, the Verkhovna Rada of Ukraine, the Cabinet of Ministers of Ukraine, the National Security and Defence Council of Ukraine, the National Bank of Ukraine, the Ministry of Internal Affairs of Ukraine, the Ministry of Finance of Ukraine, the State Fiscal Service of Ukraine, the Security Service of Ukraine, etc. It should be noted that our study does not disclose guarantees for each actor separately, in view of this, we will continue further scientific analysis of the problem we have set. For example, according to Part 4 of Article 10 of the Law of Ukraine 'On the National Security and Defence Council of Ukraine', the decisions of the National Security and Defence Council of Ukraine, enacted by decrees of the President of Ukraine, are binding on the executive authorities (Law of Ukraine On the National Security and Defence Council of Ukraine, 1998);

2) *Independence in their professional activities and decision-making (courts, prosecutors, local self-government bodies)*. In accordance with Part 1, 2 of Article 71 of the Law of Ukraine 'On Local Self-Government in Ukraine', territorial communities, bodies and officials of local self-government independently exercise the powers granted to them. Executive authorities and their officials have no right to interfere with the lawful activities of local self-government bodies and officials, as well as to resolve issues referred by the Constitution of Ukraine, by this and other laws to the powers of local self-government bodies and officials, except in cases of powers delegated by the councils (Law of Ukraine on Local Self-Government in Ukraine, 1997). Moreover, according to Article 6 of the Law of Ukraine 'On the Judiciary and the Status of Judges', when administering justice, courts are independent from any illegal influence (Law of Ukraine on the Judiciary and the Status of Judges, 2016);

3) *Obtaining information related to the status of economic security in cases where no special regimes of its use or dissemination are established (local self-government bodies, public institutions)*. This guarantee is implemented in the provisions of Section IV of the Law of Ukraine 'On Access to Public Information';

4) *An appropriate level of logistics for the functioning of individual actors that make public policy on economic security of the State,*

systematic remuneration of officials of such entities and their social protection (higher state authorities, central executive authorities, local self-government bodies). This guarantee is implemented in Part 1 of Article 25 of the Law of Ukraine 'On Central Executive Bodies': financial and logistical support for the activities of ministries and other central executive bodies is provided at the expense of the State Budget of Ukraine. It should be noted that according to Article 16 of the Law of Ukraine 'On the Prosecutor's Office', the prosecutor's guarantees are the financing and organisational support for the prosecutor's office, as well as proper material, social and pension provision of the prosecutor, in the manner prescribed by law (Law of Ukraine On the Prosecutor's Office, 2014);

5) Public examination of legal regulations, participation in their discussion, including during parliamentary hearings, submitting one's conclusions and proposals (civil society institutions). This guarantee is implemented in the Procedure for promoting public examination of the activities of executive bodies (Resolution of the Cabinet of Ministers of Ukraine On approval of the Procedure for promoting public examination of the activities of executive bodies, 2008);

6) *The right to appeal to the Ukrainian Parliament Commissioner for Human Rights if the rights, freedoms and interests of the participants in these legal relations are violated by the actions of actors that ensure economic security of the State (civil society institutions)*. This guarantee is implemented on the basis of the Laws of Ukraine 'On Citizens' Appeals' and 'On the Ukrainian Parliament Commissioner for Human Rights';

7) *The legal liability for encroachment on economic security of the State, when one of the participants in these legal relations by actions or inaction causes damage to the other (higher state authorities, central executive authorities, local self-government bodies, civil society institutions)*. For example, according to Part 1 of Article 27 of the Law of Ukraine 'On Central Executive Bodies' officials of ministries and other central executive bodies are subject to criminal, administrative, disciplinary and civil liability in accordance with the law, as well as liability for violation of the requirements of the Law of Ukraine 'On Preventing Threats to National Security Associated With Excessive Influence by Persons Who Wield Significant Economic and Political Weight in Public Life (Oligarchs)' (Law of Ukraine On Central Bodies of Executive Power, 2011);

8) The possibility to apply to the court in case of violation or probability of violation of their rights, freedoms and interests in the field of economic security of the State (higher state authorities, central executive authorities, local self-government bodies, public institutions). According to Part 4 of Article 71 of the Law of Ukraine 'On Local Self-Government in Ukraine', local self-government bodies and officials have the right to apply to the court to declare regulations of local executive authorities, other local self-government bodies, enterprises, institutions and organisations to be illegal because they restrict the rights of territorial communities, powers of local self-government bodies and officials (Law of Ukraine on Local Self-Government in Ukraine, 1997);

9) Involvement in making economic policy of the state, preparation of strategically important legal regulations on economic security of the State, in particular the draft National Security Strategy of Ukraine (higher state authorities, central executive authorities, local self-government bodies, public institutions). For example, with regard to public associations, it should be noted that the law provides for a guarantee to participate, in the manner prescribed by law, in the development of draft regulatory legal regulations issued by state authorities, authorities of the Autonomous Republic of Crimea, local self-government bodies and related to the scope of activities of a public association and important issues of State and public life (Koshykov, 2020; Law of Ukraine On Public Associations, 2012).

4. Conclusions

To sum up, we propose to consider the guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State as a set of legal provisions that define the legal conditions and means, the procedure for the realisation, protection and defence of the rights of persons in relations with public authorities and local self-government bodies regarding the realisation of economic rights of citizens and the formation and implementation of public policy.

The features of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State are: 1) the regulatory and legal framework; 2) special legal means; 3) the procedure and conditions for the implementation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic security of the State, which are prescribed at the legislative level; 4) protection in case of violation of guarantees of the rights of participants in administrative and legal relations in the field of making public policy on economic

security of the State; 5) legal and economic instruments for the protection and defence of the rights of participants in the relevant relations; 6) a binding nature; 7) the purpose of introducing the latter is a balance between economic profit and public interest in a particular sector of the economy; 8) they are a separate element of the administrative and legal mechanism for ensuring economic security; 9) depending on the threats to economic security, the latter tend to protect the public interest in a particular sector of the economy, etc.

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ГАРАНТІЇ ПРАВ УЧАСНИКІВ АДМІНІСТРАТИВНО-ПРАВОВИХ ВІДНОСИН У СФЕРІ РЕАЛІЗАЦІЇ ДЕРЖАВНОЇ ПОЛІТИКИ В ГАЛУЗІ ЗАБЕЗПЕЧЕННЯ ЕКОНОМІЧНОЇ БЕЗПЕКИ ДЕРЖАВИ

Анотація. ***Метою*** статті є визначити правову природу та сутність гарантій прав учасників адміністративно-правових відносин щодо реалізації державної політики у галузі забезпечення економічної безпеки держави. ***Результати.*** У статті визначено сутність гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави. У дослідженні проаналізовано такі поняття як: «гарантія», «юридичні гарантії». Наведено класифікацію й визначено сутність кожної із гарантії прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави. Зауважено, що ознаками гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави є: нормативно-правове закріплення; мають спеціальні юридичні засоби; закріплений на законодавчому рівні порядок і умови реалізації гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави; забезпечення захистом у разі порушення гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави. ***Висновки.*** Зроблено висновок, що ознаками гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави є: 1) закріплення у нормативно-правових актах; 2) наявність спеціальних юридичних засобів; 3) законодавча регламентація порядку і умов реалізації гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави; 4) захист у разі порушення гарантій прав учасників адміністративно-правових відносин у сфері реалізації державної політики у галузі забезпечення економічної безпеки держави; 5) містять правові та економічні інструменти охорони та захисту прав учасників відповідних відносин; 6) мають загальнообов'язковий характер; 7) метою запровадження останніх є баланс між економічним прибутком та публічним інтересом в певній сфері економіки; 8) є окремим елементом адміністративно-правового механізму забезпечення економічної безпеки; 9) в залежності від загроз економічній безпеці останні мають тенденцію до захисту саме публічного інтересу в тій чи іншій сфері економіки тощо.

Ключові слова: гарантії, права, гарантії прав, адміністративно-правові відносини, реалізація державної політики в галузі забезпечення економічної безпеки держави, економічна безпека.

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GENERAL PRINCIPLES OF STATE REGISTRATION OF INDIVIDUAL ENTREPRENEURS AS AN OBJECT OF THE ADMINISTRATIVE PROCEDURE REGULATORY MECHANISM

Abstract. ***Purpose.*** The purpose of the article is to determine general principles of state registration of individual entrepreneurs as an object of the administrative procedure regulatory mechanism. ***Results.*** It can be emphasised that state registration of business entities is an important element of administrative-legal regulatory mechanism for entrepreneurial activity, which combines interdependent features of legal method, legal form and administrative procedure. As a legal method of public administration, state registration of business entities is the recognition by the state of the fact of the initiation of a business entity, termination of its activities or change of legal status with the simultaneous written recording of such fact in the Unified State Register. In this regard, state registration is based on a certain restriction of the freedom of enjoying the right to entrepreneurial activity by citizens and their associations through its application within the framework of the administrative procedure established by law. State registrars as public administrators, performing preliminary control at the stage of formation of business entities and ongoing one in the process of their functioning, objectively contribute to greater transparency of the internal market of Ukraine. ***Conclusions.*** Specific features of administrative procedures for state registration of individual entrepreneurs can be identified, as follows: a) They are applied in the public regulatory mechanism for the economy; b) They regulate law application activities of the state registrar as a public administrator; c) They have, as a rule, a non-jurisdictional character; d) They result in an administrative act, that is, a corresponding entry in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations.

It is proposed that administrative procedures for state registration of individual entrepreneurs should be understood as the procedure, established by law, for considering by the state registrar as a public administrator of an individual administrative case related to the certification of the fact of acquisition or deprivation of the status of an entrepreneur by a natural person, based on the results of the consideration thereof an administrative act is adopted in the form of a corresponding entry in the Unified State Register.

Key words: legal relations, legal status, actors, legal regulatory mechanism, legal influence.

1. Introduction

The transformation processes in all sectors of public life of our country over the past thirty years have been inextricably linked to making an enabling environment for the realisation and protection of the rights, freedoms and legitimate interests of natural persons and legal entities, contributing to the rapid development of legal institutions, which require the systematic legal regulatory mechanism and clearly defined implementation through the regulated activities of public administrators.

The institution of state registration of business entities has passed a long way of its formation and transformation, due not only to the rapid development of entrepre-

neurship, which has become the driving force of the domestic economy, but also to the European integration choice of Ukraine, which resulted in a large-scale adaptation of national legislation to EU law.

An effective mechanism for economic relations, from the perspective of legislative and managerial support for the implementation of the state-guaranteed right to entrepreneurial activity provided for by the Constitution of Ukraine, requires to clearly understand the peculiarities of the object of state power, and therefore to reveal the content of the concept of 'state registration' is of importance for the analysis of the state of the art of the administrative and legal regulatory mechanism in this field.

2. State registration of business entities

In the legal doctrine, the concept of 'registration' is not characterised by stable views, however, when defining this concept, scientists usually identify the official recognition of the legality of certain facts, the rise or termination of rights and obligations, the consolidation of the legal status of a natural or legal person as its main feature, applying along with the term 'registration' the concepts of 'registration proceedings', 'registration procedure'.

For example, Yu.M. Kozlov, D.M. Ovsianko, L.L. Popov define state registration as an act of official recognition of the legality of relevant actions and legal regulations, the task of which in most cases is entrusted to the bodies of justice and internal affairs (Kozlov, Ovsianko, Popov, 2004), P.I. Kononov considers it as a activity of competent administrative (registration) bodies, regulated by administrative and procedural provisions, on recognition and confirmation by the state of the legal status, certain property or non-property rights and obligations of natural persons and legal entities, their rise, change or termination, the facts of these persons' ownership of certain types of property (items) and the possibility of their intended use, the legality of actions and decisions taken by these persons, other legal facts (Kononov, 2001), while M.Yu. Tikhomirov argues that it is a legal act of recognition and confirmation by an authorised entity of facts, events or phenomena subject to accounting and registration, which give the object of registration legality, make it legally significant (Tikhomirova, Tikhomirov, 2006).

According to D.M. Bakhrakh, the essence of registration is to verify the legality of facts, their official recognition and subsequent accounting (Bakhrakh, 2000). In A. I. Riabko's opinion, registration is a controlling legal means to register a controlled entity that has fulfilled all the requirements of the law regarding the performance of actions, management of documents, payment of duties, while the registrar has no right to refuse it. Registration, that is, entering special lists, registers, cadastres of various facts of legal significance, material objects, real estate, legal acts, enterprises, is carried out for the purpose of accounting (Riabko, 1999).

With regard to state registration of business entities, scientists also focus on the official recognition and certification by the state of a fact related to a certain business entity. For example, T. O. Kolomoiets and N. V. Halitsyna define LLC state registration as the procedure established by law for legalisation, change of legal status or termination of a company by adopting an administrative act by the registration authority (public administrator), on the basis of which the relevant entry is made in the Unified State Register (Kolomoiets, Halitsyna, 2010). I.M. Hrushchynskyi defines the registration procedure '... as a procedure, stipulated by law, performed by state registration authority in order to record legal facts...' (Hrushchynskyi, Kravchuk, Pohranychnyi, 2000). Similarly, S.V. Lykhachov defines the procedure of registration of business entities as a procedure provided by law for actions performed by state registration authority, as a record of legal facts that reflect the start, change or termination of the status of a business entity (Lykhachov, 2001). However, L. P. Kotiash is convinced that state registration of legal entities as an object of the administrative and legal regulatory mechanism for registration of legal entities is a public welfare, which allows citizens to receive goods and services from 'eternal' persons for a long time, which do not cease with the death of a natural person, as well as the performance by special public administrators of legally significant administrative actions in the field of legalisation or termination of a legal entity, changes in the information contained in the Unified State Register of Legal Entities, as well as other registration actions provided for by law in order to exercise various entrepreneurial, political, professional, sports and other rights to provide useful benefits to society (Kotiash, 2017).

The Law of Ukraine 'On State Registration of Legal Entities, Individual Entrepreneurs and Public Associations' in the very definition of state registration focuses on the content of certain registration procedures, stating: 'state registration of legal entities, public associations that do not have the status of a legal entity, and individual entrepreneurs is an official recognition by the state of the fact of formation or termination of a legal entity, a public association that does not have the status of a legal entity, certification of the fact of the relevant status of a public association, trade union,

its organisation or association, political party, employers' organisation, associations of employers' organisations and their symbols, certification of the fact of acquisition or deprivation of the status of an entrepreneur by a natural person, changes in the information contained in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations, about a legal entity and an individual entrepreneur, as well as other registration actions provided for by this Law' (Law of Ukraine On State Registration of Legal Entities, Individual Entrepreneurs and Public Associations, 2003), but also at the legislative level regarding state registration the emphasis is on an official recognition by the state through certification of a certain fact.

Therefore, it can be emphasised that state registration of business entities is an important element of administrative-legal regulatory mechanism for entrepreneurial activity, which combines interdependent features of legal method, legal form and administrative procedure. As a legal method of public administration, state registration of business entities is the recognition by the state of the fact of the initiation of a business entity, termination of its activities or change of legal status with the simultaneous written recording of such fact in the Unified State Register. In this regard, state registration is based on a certain restriction of the freedom of enjoying the right to entrepreneurial activity by citizens and their associations through its application within the framework of the administrative procedure established by law. As a legal form, state registration of business entities is manifested in an administrative act of the registration authority, by which the relevant entry about a natural or legal person is made in the State Register. As an administrative procedure, state registration of business entities is the procedure, established by law, of successive actions by public administrators and natural persons aimed at recognition by the state of the fact of the initiation of a business entity, termination of its activities or change of legal status with the simultaneous written recording of such fact in the Unified State Register (Kolomoiets, Halitsyna, 2010).

3. Features of state registration

The next issue to be resolved is the question of the sectoral affiliation of the institution of state registration of business entities, since, according to M.P. Hurkovskyi, the implementation of state registration is intended to ensure the public interest and involves balancing public and private interests in a certain way (Hurkovskyi, 2012). We advocate those scholars who refer state registration to the institutions of administrative law and argue our position as follows.

First, the category of 'public interest' is the criterion for dividing legal sciences into public and private. Moreover, interests as a legal category can correlate the legal regulatory mechanism, be a factor in the start, change, termination of legal relations, change of the legal status of their parties. It is interests that program legal regulatory mechanism and find (select) the necessary effective legal means (Malko, Subochev, 2004). The essence of the understanding of the public interest, according to L.O. Zolotukhina, should be covered by establishing the range of existing objective needs, meeting which should be ensured by public power means (Zolotukhina, 2019).

We advocate E.V. Petrov's perspective that economic activity is one of those spheres in which the public interest is manifested, called to life by the economic needs of the whole society. In other words, in the legal system of the state there arise and develop provisions aimed at ensuring the realisation of the said public interest. Their main developer, as well as the applicant, is the state represented by the relevant public institutions. Therefore, these interests lay the foundation for the implementation of the economic function by the state (Petrov, 2012). What is more, by state registration of business entities, the state primarily realises the public interest, which is to purify the economic sphere from fictitious entrepreneurs, since, according to criminologists, more than 50% of business entities in Ukraine are created for the purpose of 'optimisation' of taxation. State registrars as public administrators, performing preliminary control at the stage of formation of business entities and ongoing one in the process of their functioning, objectively contribute to greater transparency of the internal market of Ukraine.

Secondly, state registration has the following features:

1) it is a system of public-legal relations, the content of which is to regulate public relations in those areas where strict compliance with the requirements of certain legal conduct is necessary. Deviation from the registration procedure leads not only to individual offenses, but also entails negative managerial consequences;

2) the implementation of state registration has its own principles of organisation of managerial influence, which include: limitation of state interference in the activities of social institutions, interest of citizens in fulfilling the administrative conditions of state registration, coordination of the state and citizens in the implementation of management programs, specialisation of managerial influence, professional competence;

3) state registration is a form of control over the actual compliance with mandatory conditions related to the activities of parties to registration legal relations (Alekseev, 1989);

4) it is a special administrative and legal procedure, which is expressed in a set of legal means that characterise the special interaction between permits, prohibitions, positive obligations that create a certain direction of legal regulatory mechanism (Alekseev, 1989). Registration in this case is associated with obtaining by the actor of certain rights or legal status, without which further legally significant actions are impossible;

5) the provisions regulating the registration procedure cover homogeneous, closely related relations within the same field, that is, they constitute an independent legal institution, which by criteria, target and methods are administrative and legal; imperative prescriptions and prohibitions for registration legal relations are established not in private manner and not for the sake of ensuring the interests of the person to whom the legal provision is addressed, but for the sake of someone else's interest, that is, for a public purpose (Gorshenev, 1972);

6) these substantive features are dialectically united with their legal form, that is, a certificate (extract) of state registration, which is a legal document of a public administration body confirming the relevant rights or legal status of citizens and legal entities (Dobrov, 2005).

Thirdly, the procedural form, the concept of 'state registration' and 'registration procedures' correlate as content and form. State registration should be understood as accounting, recording of certain facts, giving them legitimacy, legal significance; and registration procedures are the procedure established by law for the implementation of such actions by the authorised bodies.

Registration procedures, including procedures for state registration of individual entrepreneurs, are a specific type of administrative procedures, as they have all the general features of administrative procedures, namely 1) application in the public sphere; 2) regulated order of law enforcement activities; 3) coverage of positive managerial activities; 4) establishment of a certain procedure for the implementation of certain actions, since the task of administrative procedures is to streamline the activities of authorised bodies and all stakeholders, resulting in increased efficiency and quality of public administration in general; 5) specific parties (one of the parties is always a public administrator, endowed with state powers); 6) consolidation in administrative and procedural provisions, which, in turn, regulate the application of substantive provisions of administrative and other branches of law, and at the same time regulate the activities of authorised bodies and officials (Halitsyna, 2010).

We support V. M. Bevzenko's perspective that administrative procedures are: a) an external manifestation of the exercise of public administrator's powers granted to these entities to ensure (facilitate) the exercise of rights, freedoms, interests of individuals, fulfilment of subjective duties and tasks of the state; b) a manifestation of organisational, administrative and executive activities of public authorities, local self-government bodies, their officials and officers; c) an institution of administrative law, inseparable from it and objectively interconnected with it, which is characterised by stages and the presence of special proceedings (Kolomoiets, Halitsyna, 2010).

4. Conclusions

On the basis of general features of administrative procedures, specific features of administrative procedures for state registration of individual entrepreneurs can be identified, as follows: a) They are applied in the public regulatory mechanism for the economy; b) They regulate law application activities of the state registrar as a public administrator; c) They have, as a rule, a non-jurisdictional character; d) They result in an administrative act, that is, a corresponding entry in the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Associations.

We propose that administrative procedures for state registration of individual entrepreneurs be understood as the procedure, established by law, for considering by the state registrar as a public administrator of an individual administrative case related to the certification of the fact of acquisition or deprivation of the status of an entrepreneur by a natural person, based on the results of the consideration thereof an administrative act is adopted in the form of a corresponding entry in the Unified State Register.

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ЗАГАЛЬНІ ЗАСАДИ ДЕРЖАВНОЇ РЕЄСТРАЦІЇ ФІЗИЧНИХ ОСІБ – ПІДПРИЄМЦІВ ЯК ОБ'ЄКТ АДМІНІСТРАТИВНО-ПРОЦЕДУРНОГО РЕГУЛЮВАННЯ

Анотація. ***Метою*** статті є визначення загальних засади державної реєстрації фізичних осіб – підприємців як об'єкт адміністративно-процедурного регулювання. ***Наголошено, що*** державна реєстрація суб'єктів господарювання є важливим елементом адміністративно-правового регулювання підприємницької діяльності, що поєднує у собі взаємозалежні ознаки правового методу, правової форми й адміністративної процедури. Як правовий метод діяльності публічної адміністрації державна реєстрація суб'єктів підприємницької діяльності полягає у визнанні державою факту виник-

нення суб'єкта підприємницької діяльності, припинення його діяльності або зміни правового статусу з одночасною письмовою фіксацією такого факту у Єдиному державному реєстрі. У зв'язку з цим державна реєстрація заснована на певному обмеженні свободи реалізації громадянами та їх об'єднаннями права на підприємницьку діяльність за допомогою його застосування в рамках встановленої законом адміністративної процедури. З'ясовано, що державні реєстратори як суб'єкти публічної адміністрації, здійснюючи попередній контроль на стадії створення суб'єктів господарювання та поточний – в процесі їх функціонування, об'єктивно сприяють більшій прозорості внутрішнього ринку України. ***Висновки.*** Специфічними ознаками адміністративних процедур у сфері державної реєстрації фізичних осіб-підприємців є такі: а) застосовуються у сфері публічного регулювання економіки; б) регулюють правозастосувальну діяльність державного реєстратора як суб'єкта публічного адміністрування; в) мають, як правило, неюрисдикційний характер; г) результатом є адміністративний акт – відповідний запис у Єдиному державному реєстрі юридичних осіб, фізичних осіб-підприємців і громадських формувань. Запропоновано, під адміністративними процедурами у сфері державної реєстрації фізичних осіб-підприємців розуміти нормативно закріплений порядок вирішення державним реєстратором як суб'єктом публічного адміністрування індивідуальної адміністративної справи, пов'язаної із засвідченням факту набуття або позбавлення статусу підприємця фізичною особою, за результатами розгляду якої приймається адміністративний акт у вигляді відповідного запису до Єдиного державного реєстру.

Ключові слова: правовідносини, правовий статус, суб'єкти, правове регулювання, правовий вплив.

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THEORETICAL AND LEGAL INTERPRETATION OF THE COMPETENCE AND FULL POWERS OF LAW ENFORCEMENT BODIES AS PUBLIC POLICY MAKERS IN THE FIELD OF NATIONAL SECURITY AND DEFENCE

Abstract. ***Purpose.*** The purpose of the article is to reveal the correlation between the categories of 'full powers' and 'competence' through the prism of law enforcement bodies as public policy-makers in the field of national security and defence. ***Results.*** It is established that discussions on the categories of 'full powers' and 'competence' in legal science are mostly polemical. Their legal definition will help to put an end to this issue. It is proved that obtaining of the right to do something (full powers), which is provided by law, implies obtaining of the appropriate status. That is, if you get the opportunity to purchase something – you are a buyer, and if you get the right to drive a motor vehicle – you are a driver. This in turn imposes on such a person both rights and duties. Regarding the theoretical and legal understanding of the competence and full powers of law enforcement bodies as public policy-makers in the field of national security and defence, the following is summarised: 1) the competence of law enforcement bodies as public policy-makers in the field of national security and defence should be understood as the area of exercising full powers of law enforcement bodies and a set of those unique features of their administrative activity that enable to distinguish it from related types and areas of application; 2) the full powers of law enforcement bodies as public policy-makers in the field of national security and defence are a set of mandatory actions, enshrined in legal regulations, the performance of which is determined as necessary to achieve the goals of the functioning of such bodies and their performance of tasks and functions related to the protection and defence of national interests. ***Conclusions.*** It is determined that the correlation between these categories is conditionally proportional. It is impossible to consider competence separately from full powers, as well as full powers from competence. Although from the theoretical and legal discourse perspective, the full powers of law enforcement bodies as public policy-makers in the field of national security and defence are part of their competence.

Key words: public policy, competence, national security, national defence, full powers, law enforcement bodies.

1. Introduction

As it is known, a special role in predicting, detecting, identifying and countering threats to national security and defence is played by the public policy-makers in this field. Their capabilities, full powers and activities should ensure the effectiveness of the State's security function (Yarovyi, 2019). The leading actors are law enforcement bodies. Therefore, competence and full powers are an important element of their administrative and legal status.

It should be emphasised that the study of their competence and full powers is required, because only in this way it is possible to reveal the content of the authorised actor's performance, real functions, and as a result, to make reasonable recommendations and proposals regarding the administrative and legal status of the body, changes and amendments to the current legislation (Zamryha, 2019, p. 268). However, the basic point is that the scientific doctrine and legal regulations of Ukraine do not have clarity in the issues of conceptual and substantive understanding of the competence and full powers of authorised actors in general and law enforcement bodies in particular.

The topic under study is a common subject matter of scientific research by domestic

scientists, but only in a general aspect. In particular, scientists, such as I. Borshchevskyi, M. Holovan, D. Holosnichenko, I. Holosnichenko, O. Hryn, A. Zamryha, N. Kushlakova, S. Leiko, O. Ponomarev, M. Potip, O. Rieznik, R. Sydorkina, S. Shoptenko, T. Yarovyi, laid the foundation for the theoretical and legal understanding of the competence and full powers of law enforcement bodies as public policy-makers in the field of national security and defence. However, it has not been studied directly in the given context.

The purpose of the article is to establish the correlation between the categories of 'full powers' and 'competence' through the prism of law enforcement bodies as public policy-makers in the field of national security and defence.

2. Theoretical and legal interpretation of the competence of law enforcement bodies

As noted above, today there is no unanimous interpretation among scholars regarding the correlation of these categories. Some scholars believe that the term 'full powers' is broader than the category 'competence'. For example, the authors of the *International Police Academy* have determined that legislative full powers in a broad sense are rights and duties in any form (oral, written, direct, indirect) of bodies to exercise power on their own behalf (on the territory entrusted to them in a certain period of time, in relation to a circle of persons, within the subject matter of the legal and regulatory mechanism), using persuasion, coercion and encouragement as the main means of streamlining objectively existing administrative relations (Rymarenko, Kondratiev, Moiseiev, Tatsii, Shemshuchenko, 2006, p. 266; Potip, 2012, p. 32). On the contrary, other authors believe that full powers are a structural element of competence, considering competence as a legal characteristic by which the position of a particular body in the political and legal space is accurately fixed. Its constituent elements enable to determine the legal position of a particular body as a party to power relations as clearly as possible (Borshchevskyi, Hryn, 2020, p. 56).

Therefore, for a more accurate understanding of these categories, the explanatory dictionary of the modern Ukrainian language should be referred. Thus, it interprets the term 'competence' as: 1) good knowledge of something; 2) the range of full powers of any organisation, institution or person (Bilodid, 1970).

To be precise, the term 'competence' comes from the Latin 'competentia' (conduct, ability, belonging to law), that is the range of full powers granted by law, statute or other act to a particular body or official; knowledge and experience in a particular field (Prohorov, 1984, p. 613; Holovan, 2008, p. 24). From a managerial perspective, competence determines the position of a particular body in their system, and also acts as a method of regulating the relationship between these bodies (Lazarev, 2017; Kushlakova, Sydorkina, 2018).

Relying on the review of scientific literature, we present the main approaches to the interpretation of the concept of 'competence'. For example, scientists understand it as: a set of interdependent qualities of a personality (knowledge, skills, abilities, ways of activity), which are set to a certain range of issues and processes and necessary for high-quality, productive activity in relation to them (O.V. Kuchai); integrative concept that contains the following aspects: readiness for target calling; readiness for evaluation, readiness for action, readiness for reflection (O.I. Pometun); objective category, socially recognised level of knowledge, skills and abilities, attitudes, etc. in a certain sector of human activity as an abstract carrier (based on discussions organised within the UNDP project 'Education Policy and Peer Education'); some alienated, predetermined requirement for the training of a person (properties or qualities, potential abilities of a person), predetermined requirement for knowledge and experience in a certain field (M.S. Holovan) (Leiko, 2013, pp. 131–132).

Legal encyclopaedias interpret competence as: 1) a set of legally established full powers, rights and duties of a particular state body (local self-government body) or official (Rymarenko, Kondratiev, Moiseiev, Tatsii, Shemshuchenko, 2006); 2) a set of rights and duties established in an official – legal or non-legal – form, i.e. the full powers of any agency or official, which determine the ability of this body or official to make binding decisions, organise and control their implementation, and take responsibility measures if necessary (Shemshuchenko, 2001). That is, in the first interpretation, full powers are not identified with rights and duties while in the second, they are.

In the above interpretations of competence, their common basis is their content: knowledge that a person should have; the range of issues in which a person should be aware; the experience necessary for the successful performance of work in accordance with the established rights, laws, statutes. Knowledge, a range of issues, and experience are presented as generalised concepts that do not relate to a specific person, which are not his/her personal characteristics. The above interpretations clearly reflect the cognitive (knowledge) and regulatory (full powers, law, statute) aspects of this concept (Holovan, 2008, p. 24).

With regard to the definition of competence in administrative law, S. Shoptenko underlines

an example that in addition to the classical approach, there is also a restrictive approach, in which the content of competence is reduced exclusively to the totality of full powers, and an expanding approach, which includes in the structure of competence, in addition to the subject matters of authority and full powers, tasks, functions, methods of activity, etc. (Shoptenko, 2017). In turn, O. Ponomarov, studying the administrative and legal status of the tax police, adds that its competence consists of basic and additional elements. The main elements determine the content of competence, and additional elements reflect its distinctive features (Ponomarov, 2015).

Accordingly, competence is defined by a certain organisation, institution, State as a predetermined requirement for knowledge, skills, abilities that a person should possess for successful performance within the sphere where this activity will be performed. Therefore, competence should be understood as a certain sphere, a range of activities, a predetermined system of issues that a person should be well aware of, i.e. have a certain set of knowledge, skills and attitude to them (Leiko, 2013, p. 133).

In our case, this is the area of exercising full powers of law enforcement bodies and a set of those unique features of their administrative activity that enable to distinguish it from related types and areas of application.

3. Theoretical and legal interpretation of the full powers of law enforcement bodies

The term 'full powers' should be further analysed. For example, in the above-mentioned dictionary 'full powers' are defined as: 'the right granted to someone to do something' (Bilodid, 1970). Such a right, its scope shall be defined by law. And we do not agree with the criticism of O. Rieznik (2018) that the granted right does not include duties, this is not true. After all, 'right' and 'rights' are different categories. Obtaining of the right to do something (full powers), which is provided by law, implies obtaining of the appropriate status. That is, if you get the opportunity to purchase something – you are a buyer, and if you get the right to drive a vehicle – you are a driver. This in turn imposes on such a person both rights and duties. A similar perspective is in the *Great Encyclopaedic Dictionary of Law* edited by Yu. Shemshuchenko that interprets 'full powers' as a set of rights and duties of state bodies and public organisations, as well as officials and other persons assigned to them in the manner established by law for the implementation of their functions (Shemshuchenko, 2001). Therefore, D. Holosnichenko and I. Holosnichenko define 'full powers' through the system of rights and duties acquired in a legitimate way by the State, local self-government, state bodies and local self-government bodies, their officials, other parties to legal relations in order to ensure the opportunities, needs and interests of a person and citizen, individual social groups and entire society (Holosnichenko, Holosnichenko, 2011, p. 153). Therefore, if the full powers are a set of rights and duties and additionally responsibilities, the competence includes the sphere (subject matter) of authority. Accordingly, the type of activity is important for both competence and full powers.

It should be added that the legitimate definition of 'full powers' is as follows: 1) a document issued by a competent authority of a State (Vienna Convention on the Law of Treaties, 1969); 2) these are the rights and duties assigned to the executive body, including the duty to bear responsibility for the effects of the exercise of full powers – the so-called 'jurisdictional' duties (Decree 810/98 of the President of Ukraine of July 22, 1998 'On measures to implement the Concept of Administrative Reform in Ukraine').

Thus, competence is the scope of full powers that are assigned to a body (official) in accordance with the tasks and functions assigned to it, and full powers are the rights and duties assigned to a body (official), as well as responsibility for the effects of decisions taken (Draft Law of Ukraine On Delegated Full powers, 2008).

4. Conclusions

The conducted research allows us to state that discussions on the categories of 'full powers' and 'competence' in legal science are mostly polemical. Their legal definition will help to put an end to this issue.

As for the theoretical and legal understanding of the competence and full powers of law enforcement bodies as public policy-makers in the field of national security and defence, we can sum up the following:

1) the competence of law enforcement bodies as public policy-makers in the field of national security and defence should be understood as the area of exercising full powers of law enforcement bodies and a set of those unique features of their administrative activity that enable to distinguish it from related types and areas of application;

2) the full powers of law enforcement bodies as public policy-makers in the field of national security and defence are a set of mandatory actions, enshrined in legal regulations, the performance of which is determined as necessary to achieve the goals of the functioning of such bodies and their performance of tasks and functions related to the protection and defence of national interests.

The correlation between these categories is conditionally proportional. It is impossible to consider competence separately from full powers, as well as full powers from competence. Although from the theoretical and legal discourse perspective, the full powers of law enforcement bodies as public policy-makers in the field of national security and defence are part of their competence.

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ТЕОРЕТИКО-ПРАВОВЕ РОЗУМІННЯ КОМПЕТЕНЦІЇ ТА ПОВНОВАЖЕНЬ ПРАВООХОРОННИХ ОРГАНІВ ЯК СУБ'ЄКТІВ ФОРМУВАННЯ ТА РЕАЛІЗАЦІЇ ДЕРЖАВНОЇ ПОЛІТИКИ У СФЕРІ НАЦІОНАЛЬНОЇ БЕЗПЕКИ І ОБОРОНИ

Анотація. ***Мета.*** Метою статті є розкриття співвідношення між категоріями «повноваження» та «компетенція» через призму діяльності правоохоронних органів як суб'єктів формування та реалізації державної політики у сфері національної безпеки і оборони. ***Результати.*** Виявлено, що дискусії щодо категорій «повноваження» та «компетенція» в юридичній науці мають здебільшого полемічний характер. Поставити крапку у цьому питанні допоможе легальне визначення їхніх дефініцій. З'ясовано, що отримати право на здійснення чогось (повноваження), що передбачено нормою, включає в себе і отримання відповідного статусу. Тобто, якщо ти отримуєш можливість придбання чого-небудь – то ти покупець, а якщо отримав право керувати автотранспортом – то ти водій. Це, в свою чергу, накладає на таку особу як права, так і обов'язки. Щодо теоретико-правового розуміння компетенції та повноважень правоохоронних органів як суб'єктів формування та реалізації державної політики у сфері національної безпеки і оборони узагальнено наступне: 1) під компетенцією правоохоронних органів як суб'єктів формування та реалізації державної політики у сфері національної безпеки і оборони слід розуміти сферу реалізації повноважень правоохоронних органів та набір тих унікальних особливостей їхньої адміністративної діяльності, які дають змогу відмежувати її від суміжних різновидів та сфер застосування; 2) повноваженнями правоохоронних органів як суб'єктів формування та реалізації державної політики у сфері національної безпеки і оборони є сукупність закріплених актами законодавства обов'язкових дій, вчинення яких визначено як необхідне для досягнення цілей функціонування таких органів та виконання ними завдань та функцій, пов'язаних із забезпеченням охорони та захисту національних інтересів. ***Висновки.*** Визначено, що співвідношення між цими категоріями є умовно співпропорційне. Неможливо компетенцію розглядати відділено від повноважень, як і повноваження від компетенції. Хоча з теоретико-правового дискурсу повноваження правоохоронних органів як суб'єктів формування та реалізації державної політики у сфері національної безпеки і оборони є частиною їхньої компетенції.

Ключові слова: державна політика**,** компетенція, національна безпека, національна оборона, повноваження, правоохоронні органи.

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INSTITUTION OF INSPECTION AS A FORM OF PUBLIC CONTROL

Abstract. ***Purpose.*** The purpose of the article is to consider the institution of public inspection as an important form of public control with the proposal of its more effective application. ***Results.*** The perspectives of scientists on the definition of inspection as a component of public control measures, as well as its definition in domestic draft laws are analysed. Public inspection is defined as a special procedure as opposed to general procedures. The purpose, grounds and procedure of public inspection are specified. The examples of public inspections conducted by trade unions, public inspectors of the State Environmental Inspectorate and in the field of improvement of human settlements, in the logging industry are given. It is emphasised that public inspection is carried out according to a certain procedure. Its main elements include: the adoption of a relevant decision by a public organisation indicating the subject matter and purpose of the public inspection; indication of the grounds for conducting it; indication of the persons involved in the inspection; their full powers during its conduct; term of conduct; signatures of representatives of the public organisation that made this decision. It is revealed that during the public inspection it is prohibited: 1) to carry it out on the issues beyond the competence of a public organisation; 2) for the entity subject to public inspection to provide with information that is extraneous to the issues being inspected; 3) to disclose confidential information of the entity subject to public inspection; to exceed the terms of public inspection. It is determined that the public inspection is carried out to find out the real activities of public authorities and its officials regarding the proper performance of their official duties and to prevent corruption and/or eliminate threats to other public interests, to protect the rights and legitimate interests of individuals and legal entities. Public inspections can also be carried out against legal entities, individual entrepreneurs, if they are subject to public control. ***Conclusions.*** It is concluded that public inspection as a procedure of public control has proved its effectiveness in various sectors and industries. However, its implementation is not always possible. Control bodies, notwithstanding the Ukrainian legislation, ignore the decisions of public organisations to conduct public inspections. This is due to the absence of a law on public control with a clearly defined procedure for conducting public inspections, which is urgently needed and will contribute to their greater effectiveness.

Key words: public control, public inspection, special procedure, grounds for public inspection, target of public inspection.

1. Introduction

Implementation of public control over the activities of public authorities and local self-government bodies, legal entities in order to prevent them from violations, prevent corruption, ignoring the interests of the person and the state is an important function of public organisations. Public control should ensure open and transparent activity of state and self-governing institutions, increase the level of citizens' participation in their governance, protection of human rights and freedoms, feedback between the state and society. The main procedures of public control are public monitoring, public hearings, public expertise, public investigation, hearing of reports on the results of work, public inspections. Some of these procedures are more developed and applied, some are just being implemented. The latter include public inspection, which is effective in certain industries and areas, but needs to be used more. This is the reason for the scientific interest in the issues of public inspection

The issues of public control have been under study by scientists in various aspects. However, the analysis of their publications shows that such an effective and important form of public control as inspection has not yet been focused enough. Only some researchers, such as Yu. Zakharov, define the public inspection. In the works by O.S. Ihnatenko, A.S. Krupnyk, D.S. Pryputen, S.M. Hrydnytska and O.V. Tytova, public

inspection is listed among other forms and measures of public control. It should be noted that when considering the forms of public control in scientific works, public inspection is not always characterised. Therefore, this state of consideration of the inspection as a form of public control actualises this study.

The purpose of the article is to consider the institution of public inspection as an important form of public control with the proposal of its more effective application.

2. Regulatory and legal framework for public inspection

The concept of the term of inspection is contained in reference sources, national scientific literature, draft laws. Here are some examples. Among several dictionary definitions of the *Great explanatory dictionary of the modern Ukrainian language*, the following is worthy of attention: inspected, i.e. subjected to analysis to identify the presence of any component, element, etc. (Busel, 2004, p. 719). In the *Legal Encyclopedia* this term is interpreted as inspecting the implementation of laws, decisions, etc. and is one of the most important functions of public administration (Shemshuchenko, 1998, p. 323).

The public inspection in Draft Law 4697 on public control (registered in the Verkhovna Rada of Ukraine (VRU) on April 14, 2014) is defined as a special procedure of public control, which provides for a set of actions of the actors of public control to collect information, establish facts and circumstances of the activities of the entity subject to public inspection in order to determine its compliance with the current legislation and public interests (Draft Law on Public Control, 2014). The same definition is contained in the Draft Law on legal and organisational principles of public control and public dialogue in Ukraine (registration in the Verkhovna Rada on April 30, 2021, No.5458) (On legal and organisational principles of public control and public dialogue in Ukraine, 2014).

Some draft laws refer to the inspection as a type of public control measures, but the definition is not given, in addition, the articles on the inspection procedure have errors and are deficient. For example, the Conclusions of the Chief Expert Department of the Verkhovna Rada of Ukraine of January 04, 2016 on the Draft Law of Ukraine 'On public control' (Register No. 2737-1 of November 13, 2015, finalised), among other shortcomings, indicated that in parts 5 and 8 of Art. 16 of the Draft it is provided to conduct an inspection in the premises of the entity subject to public control during the working hours established by its internal labour regulations. At the same time, as it can be seen from the text of the Draft, the actors of public control shall not be responsible for unjustified disorganisation of the work of state authorities and local self-government bodies, and other possible abuses (Conclusion of the Main Expert Department, 2016).

Other draft laws mention inspection as one of the forms of public control. For example, in the Draft Law of Ukraine 'On amendments to some Laws of Ukraine on the establishment of an institutional mechanism for public control over the activities of local self-government bodies and officials' (Register No. 2282 of October 17, 2019). The Draft indicates the public inspection of decisions, actions and omissions of officials and local governments for their compliance with the public interests of the territorial community, the requirements of the Constitution and Laws of Ukraine (On amendments to some Laws of Ukraine on the establishment of an institutional mechanism for public control over the activities of local self-government bodies and officials, 2019).

Some draft laws on public control do not mention inspection as a form of its implementation at all. This is evidenced by the analysis of the Draft Law on public control over the activities of authorities, their officials (Draft Law 9013 of August 07, 2018), which was withdrawn from consideration by the Verkhovna Rada on August 29, 2019 (On public control over activities of authorities, their officials, 2018).

The legal literature review reveals several definitions of public control, for example, it is considered as a public inspection by civil society of the state's activities for compliance with goals proclaimed, adjustment of these activities and the goals, subordination of public policy, activities of State bodies and officials to the interests of society, as well as supervision of civil society over the activities of the State and local self-government bodies aimed at protecting and ensuring the legitimate rights, interests and fundamental freedoms of a person, and respect for them (Zakharov, 2010).

D.S. Pryputen, studying the concept of public control in the field of activities of the National Police of Ukraine, considers it as a type of activity as follows: first, inspection or observation for the purpose of further inspection of activities aimed at fulfilling the assigned tasks and implementing the functions of the National Police; second, the possibility of stopping the identified violations (Pryputen, 2020).

S.M. Hrudnytska and O.V. Tytova study public control as a type of citizen participation in the management of public affairs, characterise it as a management function, a process of checking that the controlled object achieves its goals (Hrudnytska, Tytova, 2018, p. 30).

As well as public expertise and public investigation, public inspection is defined as a spe-

cial procedure that public organisations have the right to carry out to control the activities of public authorities The general procedures of public control include: 1) hearing of performance reports; 2) public hearings; 3) public monitoring (Draft Law on Public Control, 2014).

The public inspection is carried out to find out the real activities of public authorities and its officials regarding the proper performance of their official duties and to prevent corruption and/or eliminate threats to other public interests, to protect the rights and legitimate interests of individuals and legal entities. Public inspections can also be carried out against legal entities, individual entrepreneurs, if they are subject to public control.

Public inspection cannot be an end in itself for public organisations. There must be certain grounds for its implementation, such as: 1) real information about illegal or corrupt activities of state authorities, local self-government bodies, legal entities, public organisations; 2) well-known facts that the said entities by their activities cause damage to the environment, public interests, interests of individuals and legal entities; 3) obtaining information on failure to eliminate violations by the entity subject to public inspection, which have been mentioned above; 4) appeals of public organisations to the entity subject to public inspection on issues that may be its target.

3. Specificities of public inspection as a form of public control

Public inspection is carried out according to a certain procedure. Its main elements include: the adoption of a relevant decision by a public organisation indicating the subject matter and purpose of the public inspection; indication of the grounds for conducting it; indication of the persons involved in the inspection; their full powers during its conduct; term of conduct; signatures of representatives of the public organisation that made this decision.

It should be noted that during the public inspection it is prohibited: 1) to carry it out on the issues beyond the competence of a public organisation; 2) for the entity subject to public inspection to provide with information that is extraneous to the issues being inspected; 3) to disclose confidential information of the entity subject to public inspection; to exceed the terms of public inspection.

Public inspection can be planned, unscheduled, thematic. For example, during public control, trade unions can check the calculations of wages and state social insurance, the use of funds for social and cultural activities, etc. (Legal grounds for public control by trade unions, 2020).

Public inspections are actively carried out by public inspectors of the State Environmental Inspectorate. Based on the results of public inspections, they record violations of environmental legislation and submit them to State environmental control bodies and law enforcement bodies to bring violators to justice. If it is impossible to establish the identity of the violator on the spot, public inspectors may deliver the violator to the law enforcement bodies and other local executive authorities (Regulations on public control in the field of environmental protection, 1994). They also participate in conducting, together with employees of state control bodies, raids and inspections of compliance by enterprises, institutions, organisations and citizens with legislation on environmental protection, compliance with environmental safety standards and the use of natural resources (Public control in the field of environmental protection, 2021).

The public inspection in the logging industry is established in detail. In particular, it provides for: inspection of the presence of relevant permits, identification of the location of the site within the quarterly network of forestry and identification of the location of the site in kind, determination of the boundaries and dimensions of the logging area, measurements of trees, measurements of trunks of felled trees, verification of documentation for the transportation of wood by vehicle, calculation of the measurements made (logging area, timber stock), verification with the data specified in the relevant permits of the forest user and identification of deviations, preparation of proper documentation (acts, conclusions, report), their publication in local, regional and national media) and transfer to the relevant competent authorities (state environmental inspection, prosecutor's office, etc.) (Methods of public control over logging, 2018).

The public labour protection inspector checks the state of working conditions and safety at the workplace, compliance by employees with the rules, regulations, instructions, other legal regulations on labour protection and makes proposals to the employer (its representatives) (Standard provision on the public labour protection inspector, 2013).

The need for a public inspection is specified in the Regulations on public control in the field of landscaping, public inspectors have the right to record violations of the relevant legislation and submit them to the state control bodies to bring the perpetrators to justice (Order of the Ministry of Construction, Architecture and Housing and Communal Services of Ukraine On the approval of the provision Regulations on public control in the field of landscaping, 2007).

However, frequently controlling bodies ignore the decision of public organisations to

conduct a public inspection. In their refusals, officials refer to Part 1 of Article 6 of the Law of Ukraine 'On basic principles of state supervision (control) in the field of economic activity'. According to the provisions of this article, the basis for conducting an unscheduled event on state supervision (control) is an appeal of a person, not a legal entity. They also note that the fact of violation of the applicant's rights has not been confirmed. As a result, they refuse to conduct public inspection. Such responses from officials of regulatory authorities contradict Article 38 of the Constitution of Ukraine, which establishes that citizens have the right to participate in the management of public affairs, the Resolution of the Supreme Court of Ukraine of May 6, 2020 in case No. 804/340/1849, which contains a reference to paragraph 1 of Part 1 of Article 21 of the Law 'On Public Associations', that in order to implement its objective(s), a public association has the right to apply, in the manner prescribed by law, to public authorities, local governments, their officials with proposals (comments), applications (petitions) complaints and other legislative provisions (Controlling bodies regularly ignore requests from public organisations to carry out inspections, which is a violation of Ukrainian legislation and the rights of non-governmental organisations, 2021).

4. Conclusions

Therefore, public inspection as a procedure of public control has proved its effectiveness in various sectors and industries. However, its implementation is not always possible. Control bodies, notwithstanding the Ukrainian legislation, ignore the decisions of public organisations to conduct public inspections. This is due to the absence of a law on public control with a clearly defined procedure for conducting public inspections, which is urgently needed and will contribute to their greater effectiveness.

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ІНСТИТУТ ПЕРЕВІРКИ ЯК ФОРМА ГРОМАДСЬКОГО КОНТРОЛЮ

Анотація. ***Мета.*** Метою статті є розглянути інститут громадської перевірки як важливої форми громадського контролю з пропозицією її більш ефективного застосування. ***Результати.*** Проаналізовано погляди науковців щодо дефініції перевірки як складової заходів громадського контролю, а також її визначення в вітчизняних законопроєктах. Громадська перевірка визначена як спеціальна процедура на відміну від загальних процедур. Зазначено мету, підстави та процедуру громадської перевірки. Наведено приклади щодо проведення громадських перевірок профспілками, громадськими інспекторами Держекоінспекції та у сфері благоустрою населених пунктів, в лісозаготівельній галузі. Наголошено, що громадська перевірка здійснюється за певною процедурою. До основних її елементів віднесемо: прийняття відповідного рішення громадською організацією із зазначенням предмету та мети громадської перевірки; вказівка на підстави проведення; зазначення осіб, які залученні до перевірки; їх повноваження під час її проведення; термін проведення; підписи представників громадської організації, яка прийняла це рішення. З'ясовано, що під час громадської перевірки забороняється: 1) її здійснювати з тих питань, які не відносяться до компетенції громадської організації; 2) надання об'єктом громадської перевірки інформації, яка є сторонньою до питань, що перевіряються; 3) розголошувати конфіденційну інформацію об'єкта громадської перевірки; перевищувати терміни проведення громадської перевірки. Визначено, що громадська перевірка здійснюється для з'ясування реальної діяльності органів державної влади та її високопосадовців щодо належного виконання ними своїх службових обов'язків та з метою попередження вчинення корупційних дій або/чи усунення загроз інших суспільним інтересам, захисту прав і законних інтересів фізичних і юридичних осіб. Громадські перевірки також можуть здійснюватися стосовно юридичних осіб, фізичних осіб-підприємців, якщо вони є об'єктами громадського контролю. ***Висновки.*** Зроблено висновок, що громадська перевірка як процедура громадського контролю засвідчила свою ефективність в різних сферах та галузях. Проте не завжди її проведення є можливим. Контролюючі органи всупереч українському законодавству ігнорують рішення громадських організацій про проведення громадських перевірок. Зазначене зумовлене відсутністю закону про громадський контроль з чітко визначеними для реалізації порядком і процедурою проведення громадської перевірки, який є нагальним для прийняття та буде сприяти більшій дієвості їх проведення.

Ключові слова: громадський контроль, громадська перевірка, спеціальна процедура, підстави громадської перевірки, мета громадської перевірки.

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GUARD POLICE IN THE SYSTEM OF LAW ENFORCEMENT BODIES OF UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to determine the place of the Guard Police in the system of law enforcement bodies of Ukraine. ***Results.*** Law enforcement bodies, along with secondary (auxiliary) ones, perform one or more main law enforcement functions that are decisive in their activities (preventive, protective, re-socialisation, operative-search, crime investigation, court proceedings, consideration of cases on administrative offenses, consideration of cases on financial and administrative-economic offenses, execution of sentences, decisions, rulings and resolutions of courts, decisions of bodies of inquiry and pre-trial investigation and prosecutors). The law enforcement function is to ensure the rights of freedoms and legitimate interests of society, to protect the latter from any unlawful encroachments or crimes in a particular area of its activity. Due to its content, the essence of such function may change, and therefore its expression is possible through related types of power activities. The law enforcement function is a unifying factor between the Guard Police and all other law enforcement bodies, as it is the common link that determines the status and role of these agencies in the public authority sector, as well as establishes the functional orientation of their work. ***Conclusions.*** It is concluded that the system of law enforcement bodies of Ukraine is a complementary, multifunctional, structured totality of authorities, objectively independent and not subordinate to each other, activities thereof are aimed at ensuring and protecting the rights and freedoms of man and citizen from any unlawful encroachments in various sectors of public life, as well as ensuring state security, law and order. The place of the Guard Police in the system of law enforcement bodies of Ukraine is determined by the tasks entrusted to it, according to which the Guard Police is an agency with a special administrative and legal status, which is part of the structure of the National Police of Ukraine, activities thereof are aimed at implementing both the general full powers of the National Police of Ukraine and special ones in the field of guarding material and physical objects in accordance with the provisions of the regulatory legal framework. In other words, the Guard Police is actually a "body within a body" that also performs law enforcement functions, but within its own rather narrow competence.

Key words: guarding of facilities, Guard Police, movable property, immovable property, business entity.

1. Introduction

State power is not a static phenomenon that governs society within a certain territory, but an ordered set of organisations vested with power, each of which has its own competence and performs part of the functions of the state enshrined in the Constitution and other legislation of Ukraine. Today in our country there are many different groups of these agencies, each of which is responsible for the duties assigned to it. One of the most important among all state organisations is the system of law enforcement bodies, which is entrusted with ensuring the most important priority – the rights and freedoms of man and citizen and law and order in the state. The Guard Police is of importance in this system.

Frequently, the term "law enforcement bodies" is applied to police units. At the same time, in their totality, the latter constitute a fairly large system, the features of which affect the status of its elements (specific bodies, one of which is the Guard Police), determine their place and functional orientation. Another problem is the lack of a sustainable approach to defining the content of law enforcement bodies in scientific and legislative terms.

2. Specificities of the definition of law enforcement bodies of Ukraine

Referring to the views of scholars on the definition of the concept under study, it should be noted that, for example, S.Y. Lykhova proposes that law enforcement bodies include those that,

firstly, in their activities act on behalf of the state, secondly, are vested with power and, thirdly, act in the interests of the entire society (Lykhova, 1984, pp. 74–75). R. Tevlin believes that state bodies that are specially established to ensure law and order, respond to offences and crime and which for this purpose are empowered to apply the measures of state coercion and rehabilitation of offenders provided by law, are law enforcement bodies (Tevlin, 1985, pp. 52–53). M.I. Melnyk emphasises that a law enforcement body is a state, as a rule, armed body that performs law enforcement functions and, in this regard requires specific material and other support. In order to effectively perform their duties, employees are endowed with various specific rights, have appropriate benefits, external signs of belonging to law enforcement bodies, and enjoy increased legal protection (Melnyk, Khavraliuk, 2002, pp. 43–44). E.P. Grigoris's definition of law enforcement bodies is of interest. Thus, law enforcement bodies should be considered in a broad (theoretical) and narrow (legislative) sense. In the broad sense, it is the court, the prosecutor's office, the police, and in the narrow sense, only the police. Furthermore, he provides the criteria by which a particular body belongs to law enforcement bodies. Firstly, they are executive bodies; secondly, they all carry out law enforcement activities, which are aimed at combating offences in the form of certain forms that are provided for by law; thirdly, they are armed bodies that have a certain procedure for recruitment and service. Advocacy and notaries are defined as non-state law enforcement bodies (Grigonis, 2002, pp. 16–18).

According to T.O. Pikulia, law enforcement bodies include bodies that, along with secondary (auxiliary) ones, perform one or more main law enforcement functions that are decisive in their activities (preventive, protective, re-socialisation, operative-search, crime investigation, court proceedings, consideration of cases on administrative offenses, consideration of cases on financial and administrative-economic offenses, execution of sentences, decisions, rulings and resolutions of courts, decisions of bodies of inquiry and pre-trial investigation and prosecutors). According to the author, in the broad sense, law enforcement bodies include the court, prosecutor's office and law enforcement bodies to combat crime, in the narrow sense – only law enforcement bodies combating crime (police, tax police, Security Service of Ukraine, State Protection Department, State Border Guard Service, Military Law Enforcement Service in the Armed Forces of Ukraine, State Customs Service, State Department of Ukraine for the Execution of Sentences) (Pikulia, 2004, p. 179).

V.T. Nor, N.P. Anikina and N.R. Bobchenko argue that law enforcement bodies are state bodies specially authorised by the state to exercise control and supervision over the observance of the Constitution, laws and other legal regulation, to ensure law and order, to apply measures of state coercion to offenders whose characteristic features are the implementation of law enforcement activities (ensuring law and order, combating offenses, protecting the legitimate rights and interests of citizens, legal entities, society and the entire state); the availability of appropriate state full powers to carry out law enforcement activities; the ability to directly apply various coercive measures (e.g. detention, arrest, imprisonment, etc.); their activities are under special state control and supervision, and they operate only according to and in the manner established by law (Nahorna, 2018, p. 46).

V.V. Zaichenko and Y.O. Zahumenna, relying on the review of the current legislation of Ukraine and theoretical and methodological sources, define the following features of a law enforcement body:

1. A law enforcement body is authorised by a special law to carry out law enforcement activities, which disclose the tasks of the organisation and the purpose of this body;

2. It performs its activities in compliance with the rules and procedures established by law.

3. Law enforcement bodies in their activities have the right to apply measures of state coercion to persons who have committed an offence.

4. Lawful and justified decisions made by state bodies are binding on officials and citizens.

5. It is an integral totality, the system-forming factor of which is not a structural (organisational), but a functional criterion, that is law enforcement activities, determined by their common functional purpose, which is primarily to protect and defend the law. Unlike other systems of state bodies, the system of law enforcement bodies is characterised by the absence of a traditional organisational structure, such as the system of executive bodies (Zahumenna, 2010).

According to T.O. Shkulia, law enforcement bodies include bodies that, along with secondary (auxiliary) ones, perform one or more main law enforcement functions that are decisive in their activities (preventive, protective, re-socialisation, operative-search, crime investigation, court proceedings, consideration of cases on administrative offenses, consideration of cases on financial and administrative-economic offenses, execution of sentences, decisions, rulings and resolutions of courts,

decisions of bodies of inquiry and pre-trial investigation and prosecutors). According to the author, in the broad sense, law enforcement bodies include the court, prosecutor's office and law enforcement bodies combating crime, in the narrow sense, only law enforcement bodies combating crime (police, tax police, Security Service of Ukraine, State Protection Department, State Border Guard Service, Military Law Enforcement Service in the Armed Forces of Ukraine, State Customs Service, State Penitentiary Department) (Shkulia, 2004, p. 179).

Therefore, the diversity of opinions reveals that scientists in the study of the content of law enforcement bodies consider them from the perspective of certain features. Moreover, each separate scientific view focuses on certain specific aspects.

3. The system of law enforcement bodies of Ukraine

It can be determined that in their totality law enforcement bodies are characterised by several common features.

1. Firstly, all law enforcement bodies without exception constitute a single system.

2. Secondly, their functions include law enforcement functions, the content of which is broad and multidimensional, therefore, it is revealed in the activities of each body in its own way.

3. Thirdly, law enforcement bodies of the state perform their activities in accordance with their own competence. Each of them has its own role and importance in the governmental apparatus of the state. At the same time, in total, their work is aimed at achieving a common goal determined by the law enforcement sector of the state.

These features should be considered separately for a more precise determination of the place and importance of the Guard Police in the system of law enforcement bodies of Ukraine. The first and one of the key points of the law enforcement bodies of our country and the Guard Police in particular is the system nature of the latter. Thus, the term "system" (from the Greek *the whole, composed of parts; connection*) is a set of elements that are in relations and connections with each other, which creates a certain integrity, unity. When defining the concept of "system", it is necessary to consider its closest relationship with the concepts of integrity, structure, connection, element, relationship, subsystem, etc. Since the concept of a system has an extremely wide scope of application (almost every object can be considered as a system), its sufficiently complete understanding implies the construction of a family of appropriate definitions, both substantive and formal. Only within such a family of definitions it is possible to express the basic system principles: integrity (principally the system properties are not the sum of properties of its constituent elements and the latter properties do not constitute the whole; dependence of each element, property and relation of the system on its place, functions, etc. within the whole); structurality (the possibility of describing the system through the establishment of its structure, that is, the network of connections and relations of the system; the conditionality of the behaviour of the system is not so much the behaviour of individual elements, but the properties of its structure); the interdependence of the system and the environment (the system forms and manifests properties in the process of interaction with the environment, being the leading active component of interaction); hierarchy (each component of the system in its turn can be considered as a system, and the system under study in this case is one of the components of a wider system); the multiplicity of description of each system (due to the fundamental complexity of each system, its adequate cognition requires the construction of many different models, each of which describes only a certain aspect of the system), etc. (Averincev, Arab-Ogly, Il'ichev, 1989, p. 584).

According to some scientists, such as M. Meskon, M. Al'bert and F. Heduori, a system is a certain integrity consisting of interdependent parts, each of which contributes to the characteristics of the whole (Meskon, Al'bert, Heduori, 1994, p. 79). N.I. Budenko and M.I. Kapinus argue that: a system is an integrity internally organised on the basis of a particular principle, in which all elements are so closely related to each other that they act in relation to the environment and other systems as something unified. Elements of the system are the minimum units within the whole and perform certain functions in it. The nature of the relationship that exists between the elements of the system forms the concept of its structure, which is a mutually conditioned set of connections of individual elements within the system, which determines its qualitative specificity. Therefore, the system is a unity of naturally arranged and interconnected parts. Thus, the key features of the system, according to the authors, are: the presence of components, elements in the system; interconnection, interaction between these elements (if these elements are not connected and do not interact with each other, then it is not a system, but a summative formation); each system has systemic features that appear only as a result of the relationship and interaction of its elements. Systemic attributes are qualities that are specific to a particular system and distinguish one system from another (Kapinus, 2001, p. 90).

Therefore, in aggregate, law enforcement bodies are an integral system, which indicates their close interconnection and complementarity in the security sector of our country. Thus, the factor of system nature in no way encroaches on the independence of each law enforcement body, in particular, the Guard Police. Nevertheless, as an integral part of a single ordered totality, the latter cooperates with other government agencies both in the performance of its functions and in the context of providing assistance to other bodies.

In addition, system nature is explicitly provided for in the legislation governing the activities of the Guard Police and other law enforcement bodies. According to Article 5 of Law 580-VIII of Ukraine "On the National Police of Ukraine" of July 02, 2015, the police and all its structural elements in the course of their activities interact with law enforcement bodies and other state authorities, as well as local self-government bodies in accordance with the law and other regulations (Law of Ukraine On the National Police, 2015).

Similar provisions can be found in the departmental regulatory framework of other law enforcement bodies, namely:

1. One of the main principles of the National Anti-Corruption Bureau of Ukraine (hereinafter – NABU) is interaction with other state bodies, local self-government bodies, public associations. In its work, the NABU interacts with the police, the Security Service of Ukraine and other law enforcement bodies (Article 3,19-1 of Law 1698 of Ukraine "On the National Anti-Corruption Bureau of Ukraine" of October 14, 2014).

2. The Security Service of Ukraine (hereinafter referred to as the SSU) interacts in its work with the Guard Department of Senior Officials of Ukraine, law enforcement and revenue and duties bodies in the manner and on the principles determined by the laws, decrees of the President of Ukraine and acts of the Security Service of Ukraine and the relevant agency adopted on their basis (Article 17 of Law 2229-XII of Ukraine "On the Security Service of Ukraine" of March 25, 1992).

3. In the course of performing its functions, the State Bureau of Investigation (hereinafter referred to as the SBI) cooperates with the prosecutor's office, the bodies of internal affairs, the National Anti-Corruption Bureau of Ukraine, the Security Service of Ukraine, the central executive body that ensures the formation and implementation of the state tax and customs policy, the central executive body that implements public policy on prevention and counteraction to legalisation (laundering) of proceeds from crime or terrorism financing, etc.

Next, the prevalence of the law enforcement function in the work of all law enforcement bodies should be underlined. In our opinion, it is this point that determines the unity of the system of these state agencies. The content of this function has been repeatedly revealed by many scholars. For example, I.P. Lavrinchuk argues that the law enforcement function involves the protection of each member of society from unfair treatment by others (Lavrinchuk, 1999, p. 99). Thus, Y.I. Horinetskyi makes proposal to define the law enforcement function of the modern state as an independent and priority direction of public policy, which is implemented by legal means to achieve a social effect of the protection of law in general, the foundations of the constitutional order, including the rights, freedoms and legitimate interests of man and citizen and other objects, strengthening of law and order, and at the same time is a legal form of achieving other goals of society and the state (Horinetskyi, 2005, p. 7).

Relying on the existing scientific perspectives, the law enforcement function is to ensure the rights of freedoms and legitimate interests of society, to protect the latter from any unlawful encroachments or crimes in a particular area of its activity. Due to its content, the essence of such function may change, and therefore its expression is possible through related types of power activities.

Again, the proof of this perspective can be found in the provisions of legislation. For example, Law 580-VIII of Ukraine "On the National Police" of July 02, 2015 states that the police is a central executive body that serves the society by ensuring the protection of human rights and freedoms, combating crime, maintaining public safety and order (Law of Ukraine On the National Police, 2015).

In turn, the NABU bodies shall prevent, detect, deter, investigate and disclose corruption offenses under its jurisdiction, as well as prevent the commission of new ones (Law of Ukraine On the National Anti-Corruption Bureau of Ukraine, 2014).

According to the legislation, the SSU is a special purpose state body with law enforcement functions, which ensures the state security of Ukraine, while the Prosecutor's Office of Ukraine is the only system that is in the manner prescribed by law, carries out the functions established by the Constitution of Ukraine in order to protect human rights and freedoms, general interests of society and the state (Law of Ukraine On the Prosecutor's Office, 2014; Law of Ukraine On the Security Service of Ukraine, 1992).

Therefore, the law enforcement function is a unifying factor between the Guard Police and all other law enforcement bodies, as it is the common link that determines the status and role of these agencies in the public authority sector, as well as establishes the functional orientation of their work.

Finally, the unity of purpose and differentiation of competence of law enforcement bodies should be considered. According to the articles of the Constitution of Ukraine, a person, his/her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms, and guarantees thereof determine the content and direction of the state activity. The state is accountable to the individual for its activities. Affirming and ensuring of human rights and freedoms is the main duty of the state. In addition, the protection of the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security are the most important functions of the state, a matter of concern for all the Ukrainian people. Ensuring state security and protection of the state border of Ukraine are entrusted to the relevant military formations and law enforcement bodies of the state, the organisation and procedure of which are determined by law, etc. (Constitution of Ukraine, 1996).

Therefore, the activities of law enforcement bodies are aimed at ensuring the constitutionally guaranteed freedoms of man and citizen, ensuring state security and law and order in the country. These goals are key and ensure the integrity of the vector of activity of the entire system of law enforcement bodies.

In addition, the implementation of these goals in the day-to-day work of law enforcement bodies, including the Guard Police, is carried out within the relevant competence, which is determined by the legislation and by-laws of each individual authority. In particular, the National Police of Ukraine is entrusted with the tasks of:

1. Ensuring public safety and order.
2. Protection of human rights and freedoms, as well as the interests of society and the state.
3. Combating crime and providing, within the limits defined by law, services to assist persons who for personal, economic, social reasons or as a result of emergency situations need such assistance (Law of Ukraine On the National Police, 2015).

The performance of these tasks is entrusted to a centralised group of elements of the structure of the National Police of Ukraine, which currently includes: the criminal police; patrol police; pre-trial investigation bodies; special police; special operations police and guard police (Law of Ukraine On the National Police, 2015). Patrol Police Department

The latter, as an element of the National Police of Ukraine, also ensures the implementation of the competence of this body, but it does this through a set of its own tasks, which include, in particular, the organisation and implementation of measures for the physical protection of objects and property of all forms of ownership, individuals, taken under protection on a contractual basis (Order of the Ministry of Internal Affairs of Ukraine On the organisation of official activities of the Guard Police to ensure the physical protection of objects, 2017). In addition, during the physical protection of objects, the Guard Police performs the tasks of organising the protection of movable and immovable property (objects) of business entities of various forms of ownership, cargoes, objects of state ownership in the cases and in the manner prescribed by the legislation of Ukraine, in accordance with the current legislation, provision of collection services, ensuring access and intra-facility regimes at security facilities, prompt response to alarms of technical security equipment at facilities, connected to the centralised surveillance points of the Guard Police, or other reports of offenses, personal and property security of individuals, public safety and order (public order and public safety) within the posts and routes of guarding, participate in the implementation of state protection, preventive measures, special operations (operational plans), prevent, detect and stop offenses in places of service. During the guarding of objects, the Guard Police participate in the fight against terrorism within their competence, defined by laws and other regulations issued on their basis (Order of the Ministry of Internal Affairs of Ukraine On the organisation of official activities of the Guard Police to ensure the physical protection of objects, 2017).

4. Conclusions

Therefore, the system of law enforcement bodies of Ukraine is a complementary, multifunctional, structured totality of authorities, objectively independent and not subordinate to each other, activities thereof are aimed at ensuring and protecting the rights and freedoms of man and citizen from any unlawful encroachments in various sectors of public life, as well as ensuring state security, law and order.

The place of the Guard Police in the system of law enforcement bodies of Ukraine is determined by the tasks entrusted to it, according to which the Guard Police is an agency with a special administrative and legal status, which is part of the structure of the National Police of Ukraine, activities thereof are aimed at implementing both the general full powers

of the National Police of Ukraine and special ones in the field of guarding material and physical objects in accordance with the provisions of the regulatory legal framework. In other words, the Guard Police is actually a "body within a body" that also performs law enforcement functions, but within its own rather narrow competence.

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ПОЛІЦІЯ ОХОРОНИ В СИСТЕМІ ПРАВООХОРОННИХ ОРГАНІВ УКРАЇНИ

Анотація. ***Мета.*** Метою статті є визначення місця Поліції охорони в системі правоохоронних органів України. ***Результати.*** До правоохоронних належать органи, які поряд з другорядними (допоміжними) виконують одну або кілька головних правоохоронних функцій, які є визначальними в їх діяльності (профілактичну, захисну, ресоціалізаційну, оперативно-розшукову, розслідування злочинів, судового розгляду справ, розгляду справ про адміністративні правопорушення, розгляду справ про фінансові та адміністративно-господарські правопорушення, виконання вироків, рішень, ухвал і постанов судів, постанов органів дізнання і досудового слідства та прокурорів). Правоохоронна функція полягає у забезпеченні прав свобод і законних інтересів суспільства, захисту останнього від будь-яких протиправних посягань чи злочинів у тій чи іншій сфері його діяльності. Внаслідок свого змісту сутність подібної функції може змінюватись, у зв'язку із чим її вираження можливе через суміжні види владної діяльності. Правоохоронна функція виступає об'єднуючим фактором між поліцією охорони та усіма іншими правоохоронними органами, адже саме вона є спільною ланкою, яка визначає статус та роль зазначених відомств у секторі державної влади, а також встановлює функціональну направленість їх роботи. ***Висновки.*** Зроблено висновок, що система правоохоронних органів України – це взаємодоповнююча, багатофункціональна, структурована сукупність органів влади, об'єктивно незалежних та не підпорядкованих один одному, діяльність яких направлено на забезпечення та захист прав і свобод людини і громадянина від будь-яких протиправних посягань в різних сферах суспільної життєдіяльності, а також забезпечення державної безпеки та правопорядку. Місце поліції охорони в системі правоохоронних органів України визначається покладеними на неї завданнями, відповідно до яких поліція охорони – це відомство з особливим адміністративно-правовим статусом, яке входить до структури Національної поліції України та діяльність якого направлено на реалізацію як загальних повноважень Національної поліції України, так і спеціальних в галузі охорони матеріальних та фізичних об'єктів відповідно до положень нормативно-правової бази. Іншими словами, поліція охорони – це фактично «орган в органі», який також має правоохоронні функції, але виконує їх в межах власної досить вузької компетенції.

Ключові слова: охорона об'єктів, поліція охорони, рухоме майно, нерухоме майно, суб'єкт господарювання.

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SPECIFICITIES OF ECONOMIC LIABILITY FOR OFFENSES IN THE FIELD OF TELECOMMUNICATIONS

Abstract. ***Purpose.*** The purpose of the article is to clarify the specificities of economic liability for offenses in the field of telecommunications. ***Results.*** The category of legal liability is classified according to various criteria. In practical terms, the classification based on the nature of sanctions and the sectoral feature is considered to be most appropriate. According to the latter, it is customary to distinguish legal liability types, such as criminal, administrative, disciplinary, civil, constitutional and international. It was revealed that spam, as a phenomenon, takes place not only in electronic but also in traditional mail. The economic component of spam is entrusted to the sender, who pays for the postal service, and the postal service delivers to the addressee (to the home mailbox or P.O. box in the post office). The technology in this case allows you to remain anonymous. In fact, in most cases, postal services receive printed products in unconverted form for mass mailing to postal addresses. Such an agreement is beneficial to each of the parties. The postal department proceeds from the need to preserve the postal network in the face of falling demand for subscriptions to printed publications. The sender saves money on creating its own delivery network. The recipient, taking out a pack of advertising booklets from the mailbox, does not feel much irritation. He does not pay for their delivery services as a recipient and does not pay for it even indirectly as a taxpayer. ***Conclusions.*** The current legislation defines the grounds for establishing contractual liability. For example, we can cite the provisions of Article 36 of the Law "On Telecommunications", which define the grounds for contractual liability in the relations of telecommunications between operators, providers and consumers, to consumers of these services. In particular, in accordance with the provisions of Part 2 of Article 36 of the above law, if there is a delay in payment for the services provided by the telecommunications operator and provider, consumers pay a penalty calculated by the cost of unpaid services in the amount of the discount rate of the National Bank of Ukraine, which was in effect at the time for which the penalty is charged. These provisions are detailed in the Rules for Provision and Receipt of Telecommunication Services.

Key words: telecommunications market, detection, prevention, elimination, legislation.

1. Introduction

In the form of a duty, liability is an active aspect, in which it is the person's awareness of his/her own social position, significance in the social progress, personal participation in the state affairs. Liability within the first meaning is a certain behavioural regulator of moral and political nature. The interest in the aspect of the obligatory type of liability reached its maximum level when it became possible to legally justify cruel and inhuman crimes (Shemshuchenko, 1998, p. 128).

The second aspect of liability can be understood due to the retrospective, in the form of liability for actions that were committed in the past. On the one hand, it can be defined as a person's recognition of the consequences of his/her own unfavourable behaviour, and on the other hand, imposition of appropriate restrictions and deprivations on this person, adequate negative public reaction to his/her actions. Some scholars note that legal liability can be used only in relation to a broad understanding of the concept of "punishment".

It should be noted that despite the existence of legal liability for the protection of the order of social and state nature, the above does not exhaust its high role and purpose. Since legal liability implies an outstanding educational impact, any punishment for legal violations is primarily stored in the personal consciousness of the offender.

The purpose of the article is to clarify the specificities of economic liability for offenses in the field of telecommunications.

2. Theoretical issues of legal liability in the field of telecommunications

Legal liability is an important regulatory element of social relations of a legal nature, the content thereof can be described as a targeted impact on individual behaviour through legal means. This complex influence enables to fully regulate relations in society, to give them the appropriate features of stability and consistency, to implement the principles of social justice and to avoid aggravation of social conflicts. The existence of law in the form of a regulator of relations of society at all times is directly conditioned by the need to maintain law and order in a heterogeneous society, filled with internal contradictions, in order to prevent any deviations and violations of the established rules of conduct.

Legal liability as an independent and necessary component of the legal regulatory system can be characterised by three specific features:

1. It is the types of state coercion.

2. The exclusive basis for the application of legal liability is a legal violation.

3. This legal category is implemented and functions by taking appropriate negative measures against persons who have committed legal violations (Hrek, 2010, p. 42).

The category of legal liability is classified according to various criteria. In practical terms, the classification based on the nature of sanctions and the sectoral feature is considered to be most appropriate. According to the latter, it is customary to distinguish legal liability types, such as criminal, administrative, disciplinary, civil, constitutional and international.

Determination of the specificity of legal liability, the use of its certain varieties, establishment of the boundaries and development of possible areas for its improvement provide for particularly acute problems in the field of telecommunications and the use of the radio frequency resource of Ukraine (Kozlovskyi, 2016, p. 203).

For example, the above is due to a large number of controlling entities and legal provisions of the legislation that regulate certain relations, their scattering in regulations of not only different legal force, but also different legislative branches.

According to the provisions of Article 75 of the Law of Ukraine "On Telecommunications", persons who violate the telecommunications legislation shall be liable for civil, administrative and criminal offences in accordance with the law (Law of Ukraine on Telecommunications, 2003).

Moreover, profits received by a telecommunications operator or provider in the course of its activities without notifying the National Commission for the State Regulation of Communications and Informatization (NCCIR) and/or permits for the use of numbering resources, licenses, violations of tariffs set by the NCCIR, shall be seized by the court and transferred to the State Budget of Ukraine (Kozlovskyi, 2016, p. 203).

3. Specificities of economic activity in the telecommunications industry

Due to the peculiarities of the subject of telecommunications relations, economic activities in the telecommunications industry are a fairly new phenomenon, and there is a lack of thorough research of problems related to the analysis of the characteristics of economic liability of legal entities in the telecommunications industry.

Economic liability is understood as the endurance by the actors of economic relations of adverse consequences of economic and (or) legal nature due to the use of economic sanctions against them in the manner and on the grounds provided by laws and economic contracts. The legal means of implementation of liability within the economic sector are economic sanctions as measures of influence on the legal violator within the economic sector, the use of which have economic and (or) legal effects of adverse type (Milash, 2008, p. 377).

Chapter 24 of the Economic Code of Ukraine (EC) defines general principles of liability of participants of relations in the economic sector. According to the provisions of Article 216 of the Economic Code of Ukraine, the parties to economic relations bear economic liability for violations of provisions in the sector of economic activity by economic sanctions against the guilty persons in the manner and on the grounds provided by the Economic Code of Ukraine, other laws and agreements.

Part 2 of Article 217 of the EC of Ukraine provides for types of economic liability such as: compensation for damages; penal sanctions; operational and economic sanctions.

Moreover, according to parts 3, 4 of Article 217 of the EC of Ukraine, another type of liability is administrative and economic sanctions, the difference thereof from others can be recognised in the fact by whom they can be applied and in the grounds for using these sanctions (Economic Code of Ukraine, 2003).

Furthermore, the above types of liability differ from each other by the forms of its implementation. Like all other types of legal liability, economic liability is characterised by the following forms of implementation: voluntary and compulsory (judicial and extrajudicial procedure).

Administrative and economic sanctions, including compensation for damages and pen-

alty sanctions, can be used both voluntarily and in a judicial (compulsory) manner; sanctions of economic and operational nature, exclusively in an extrajudicial compulsory manner; administrative and economic sanctions, in a compulsory (extrajudicial) manner (Milash, 2008, p. 377).

The grounds for economic liability (use of sanctions of economic type) of a business entity may include a legal violation committed by this entity in the economic sector.

The following special legal regulations govern relations in the telecommunications industry and establish the procedure for bringing to liability persons guilty of violating certain provisions of legislation in this field:

1. Law "On Telecommunications".

2. Rules for providing and receiving telecommunication services.

3. Basic requirements to the agreement on provision of telecommunication services, etc.

Since the legal relations that arise in the telecommunications industry are of an economic nature, in addition to the above legal provisions, the parties of relations in the field of telecommunications are subject to the provisions of legislation governing economic relations.

Taking into account the general provisions of economic legislation, special provisions define the characteristic specificities of the use of administrative and economic sanctions against telecommunications operators and providers.

Bringing administrative and economic entities to liability is of great interest, because the procedure for establishing offenses (through scheduled and unscheduled inspections by an authorised entity) has its own characteristics.

The state supervision of the telecommunications market, in accordance with tasks entrusted, is carried out by the NCCIR. The main task of this supervision is to detect, prevent and eliminate violations of the legislation by the participants of the administrative and telecommunications market in the course of their activities in the telecommunications sector. The NCCIR exercises its full powers in terms of supervision by conducting scheduled and unscheduled inspections, implementing other measures in accordance with the legislation aimed at detecting, preventing and eliminating legislative violations by participants of the administrative telecommunications market.

During inspections the NCCIR:

1) monitors compliance with the requirements for the quality of services in the telecommunications sector, availability of licenses provided by law, other permits in the telecommunications sector;

2) verifies compliance with the license conditions by telecommunications operators and providers;

3) controls the compliance of administrative telecommunications market participants with laws, standards and other regulatory documents in the telecommunications sector;

4) measure the parameters of telecommunications networks in the manner prescribed by the NCCIR;

5) controls the observance of the traffic routing procedure on telecommunications networks by telecommunications operators.

Measures of influence on offenders, based on the information provided on the official website of the NCCIR (Official site of the National Commission for State Regulation of Electronic Communications, Radio Frequency Spectrum and Provision of Postal Services, 2021) are: issuing orders to eliminate violations of licensing conditions within the telecommunications sector and conditions for the use of radio frequency resources; issuing orders to eliminate legislative violations within the telecommunications sector and the use of radio frequency resources and other means of influencing offenders.

S. Seniuta underlines that the Ukrainian legislation regulating activities in the field of telecommunications provides for the use of administrative and economic sanctions, which are provided for by both the EC and other laws (Seniuta, 2014, p. 55).

The EC provides for the following type of administrative and economic liability: administrative and economic fine, which can be defined as a sum of money paid by a business entity to a certain budget in case of violation of the established rules for economic activities.

The notion of the terms "fine" and "penalty" is provided by the current Tax Code of Ukraine (TCU). According to Section 1 of the TCU, these legal relations should be guarded by this regulations, which is confirmed by the essence of Article 1 of the TCU.

According to the content of subparagraph 14.1.162 of Article 14 of the TCU, the fine is the amount of funds in the form of interest rates charged on the amounts of monetary liabilities not repaid within the time established by law.

In accordance with subparagraph 14.1.265 of Article 14 of the TCU, a penalty shall be understood as a payment of a fixed amount and/or interest charged from a taxable person in connection with their breaching requirements of the tax legislation and other laws subject to control by state tax service agencies, as well as sanctions for breaches in the field of foreign economic activity.

Regarding other types of economic sanctions in the field of telecommunications, it can

be said that violations during economic activities by business entities may arise, in addition to legal requirements, also from contracts. Moreover, it is necessary to distinguish the liability of contractual and non-contractual nature of business entities.

Liability of contractual and non-contractual type may arise both in vertical and horizontal legal relations between participants in relations in the telecommunications industry. For example, liability may arise both between the economic entities that carry out economic activities in the telecommunications industry, between economic entities and consumers, between economic entities and telecommunications regulatory authorities, etc. (Seniuta, 2014, p. 56).

4. Specificities of the legal and regulatory framework for contractual liability

The current legislation defines the grounds for establishing contractual liability. For example, we can cite the provisions of Article 36 of the Law "On Telecommunications", which define the grounds for contractual liability in the relations of telecommunications between operators, providers and consumers, to consumers of these services. In particular, in accordance with the provisions of Part 2 of Article 36 of the above law, if there is a delay in payment for the services provided by the telecommunications operator and provider, consumers pay a penalty calculated by the cost of unpaid services in the amount of the discount rate of the National Bank of Ukraine, which was in effect at the time for which the penalty is charged. These provisions are detailed in the Rules for Provision and Receipt of Telecommunication Services.

In contractual relations, the other party, the business entity to which the services are provided, is not exempt from liability.

The above examples of grounds for bringing participants of economic relations in the field of telecommunications, in accordance with the provisions of Article 217 of the EC, can be attributed to a type of penalty sanctions.

Furthermore, the legislation enshrines the grounds for applying other types of liability, that is, compensation for damage, application of operational and economic sanctions.

For example, the establishment of the obligation to compensate for damage by one of the parties to the obligation is enshrined in part 4 of Article 36 of the Law "On Telecommunications", according to which, whenever damage to the telecommunications network, due to consumer fault, is detected, all the costs of the administrative telecommunications operator to eliminate the damage, as well as reimbursement of other losses (including lost profits), should be borne by the consumer.

In the relations between the provider of services in the field of telecommunications and the consumer, measures of operational and economic influence may, if necessary, be applied, which enable the party to immediately respond to the violation in case of its detection.

For example, paragraph 54 of the Rules for the provision and receipt of telecommunications services (Resolution of the Cabinet of Ministers of Ukraine On approval of the Rules for the provision and receipt of telecommunications services, 2012) provides for an operational and economic measure such as the right of the administrative and telecommunications operator and provider to temporarily reduce the provision of services on their own initiative.

Analysis of the general legislative grounds for bringing to legal liability participants in telecommunication relations enables to determine which types of liability from those provided for by general regulations are embodied in the rules of special legislation. It should be noted that the provisions of special legislation provide for the possibility of applying all types of legal liability defined in the EC.

It should be noted that the participants should specify the rights of the participants of telecommunication relations in certain contracts, which will provide an opportunity to specify legal liability or establish liability and its form for those types of violations for which it is not provided by the current legislation (Seniuta, 2014, p. 58).

Next, the focus should be on the opinion of the scientist who underlines that liability in the field of telecommunications is not only within the framework of generally accepted types of liability, but also liability for spamming. For example, Yu.V. Volkov (Volkov, 2011, pp. 80-83) argues that in the modern world spam, that is, mass unwanted e-mailing has become quite a common negative phenomenon. Everyone who has an electronic mailbox has probably faced this problem. For the recipient, in the vast majority, this phenomenon is negative and requires adequate measures. Considering ways to combat spam, first of all, the nature of the phenomenon should be considered.

Spam, as a phenomenon, takes place not only in electronic but also in traditional mail. The economic component of spam is entrusted to the sender, who pays for the postal service, and the postal service delivers to the addressee (to the home mailbox or P.O. box in the post office). The technology in this case allows you to remain anonymous. In fact, in most cases, postal services receive printed products in unconverted form for mass mailing to postal

addresses. Such an agreement is beneficial to each of the parties. The postal department proceeds from the need to preserve the postal network in the face of falling demand for subscriptions to printed publications. The sender saves money on creating its own delivery network. The recipient, taking out a pack of advertising booklets from the mailbox, does not feel much irritation. He does not pay for their delivery services as a recipient and does not pay for it even indirectly as a taxpayer. This type of spam, paid for by a private advertiser, allows the budget to save on the maintenance of the state postal service.

A different nature of the phenomenon is observed in the case of sending spam through electronic communication channels. The sender, nominally pays for access to the network (in fact, can carry out the mailing for free, using their own, official or attracted resources). Delivery is made to the mail server of the addressee's telecommunications operator or to a similar server of the addressee's free postal service. Receipt by the subscriber is carried out at his own expense. This is one of the essential differences between e-mail spam and postal spam. On the other hand, the cost of sending via telecommunication channels is much less than the cost of postal mailing. The use of a mailing register (a list of addresses of a mail server or compiled in another way) significantly reduces the time of preparation of one letter. Furthermore, significant factors are the absence of customs barriers to spamming, the possibility of anonymous mailing and others. Efficiency and low cost in the presence of high demand create a significant advantage of electronic mailing. These differences of electronic mail spam from traditional mail spam give rise to a lot of problems. Reuters agency with reference to the U.S. Department of Commerce notes that 83% of all e-mail traffic is spam ("spam" e-mail) (Resolution of the Cabinet of Ministers of Ukraine On approval of the Rules for the provision and receipt of telecommunications services, 2012), the fight against which the United States, Great Britain and Australia began jointly.

5. Conclusions

To sum up, it should be noted that the specificities of liability for violations in the field of telecommunications are characterised by the application of different types of liability. According to the provisions of Article 75 of the Law of Ukraine "On Telecommunications", persons who violate the telecommunications legislation shall be liable for civil, administrative and criminal offences in accordance with the law. Moreover, some scientists underline a fairly new type of legal liability in the field of telecommunications – economic liability

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ОСОБЛИВОСТІ ГОСПОДАРСЬКОЇ ВІДПОВІДАЛЬНОСТІ ЗА ПРАВОПОРУШЕННЯ У СФЕРІ ТЕЛЕКОМУНІКАЦІЙ

Анотація. ***Мета.*** Метою статті є з'ясування особливостей господарської відповідальності за правопорушення у сфері телекомунікацій. ***Результати.*** Категорію юридичної відповідальності класифікують за різноманітними ознаками. Найбільш доцільною в рамках практичного відношення вважається класифікація за ознаками характеру санкцій та за галузевою рисою. За останньою прийнято виділяти наступні види правової відповідальності, зокрема кримінальну, адміністративну, дисциплінарну, цивільно-правову, конституційну та міжнародно-правову. З'ясовано, що спам, як явище, має місце не тільки в електронній, а й в традиційній пошті. Економічна складова спаму покладена на відправника, який оплачує поштову послугу, а поштова служба здійснює доставку до адресата (в домашню поштову скриньку або абонентський ящик в поштовому відділенні). Технологія в даному випадку дозволяє залишатися анонімним. Насправді в більшості випадків поштові служби отримують друковану продукцію в неконвертованому вигляді для масової розсилки на поштові адреси. Така угода вигідна кожній зі сторін. Поштове відомство виходить з необхідності збереження поштової мережі в умовах падіння попиту на підписку друкованих видань. Відправник економить кошти на створення власної мережі доставки. Одержувач, виймаючи з поштової скриньки пачку рекламних буклетів, не відчуває особливого роздратування. Він не платить за послуги з їх доставки, як одержувач і не платить за це навіть непрямим чином як платник податків. ***Висновки.*** Чинне законодавство визначає підстави для встановлення договірної відповідальності. Так, як приклад, можна навести положення статті 36 закону «Про телекомунікації», якими визначено підстави використання відповідальності договірного типу у відносинах телекомунікацій поміж операторами, провайдерами й споживачами, до споживачів даних послуг. Зокрема, згідно зі змістом норм ч. 2 статті 36 вищевказаного закону, якщо є затримка оплати за надані послуги телекомунікаційними оператором та провайдером споживачі оплачують пеню, що обчислюється вартістю послуг, що неоплачені, у розмірі облікової ставки Національного Банку України котра діяла в момент, за котрий пеня нараховується. При цьому вказані положення деталізуються Правилами надання й отримання телекомунікаційних послуг.

Ключові слова: телекомунікаційний ринок, виявлення, запобігання, усунення, законодавство.

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Tarasenko, Kostiantyn, Ulianchenko, Yurii (2022). Scientific studies of the constitutional and legal status of mass media. *Entrepreneurship, Economy and Law*, 7, 91–95, doi

SCIENTIFIC STUDIES OF THE CONSTITUTIONAL AND LEGAL STATUS OF MASS MEDIA

Abstract. ***Purpose.*** The substantiation of the study of the constitutional and legal status of mass media and its components, as well as the prospects and shortcomings of the relevant status in the present period are analyzed. Determining the constitutional and legal foundations of the organization and activity of the media in Ukraine, identifying the place and status of the media in modern civil society, establishing their role in our everyday life, providing scientifically based proposals aimed at improving the activity of the media in Ukraine.

Research methods. The work was performed on the basis of general scientific and special methods of scientific knowledge.

Results. Today, all over the world, information has the greatest value. People constantly perceive new information, sometimes even without noticing it. Its sources are television, radio, newspapers, magazines, and the Internet, or in other words, mass media. As for Ukraine, it has not become an exception among other countries of the world. It should be noted that the problem of the constitutional and legal foundations of the organization and activity of mass media is multifaceted, which led to the activation of scientists and practitioners in the study and development of specific scientific works, as evidenced, in particular, by the research of O. Voznesenska, T. Zavorotchenko, I. Isayenka, O. Kaplii, T. Kostecka, H. Kranostup, I. Ludvik, L. Mardakhaeva, O. Nesterenko, V. Serdyuka, Yu. Todyky, T. Chubaruk, and other leading scientists. Violations of the rights and status of mass media enshrined in the Constitution of Ukraine are analyzed. The main reasons for violation of the fundamentals of the constitutional status of mass media are indicated, and the classification of mass media following the degree of dependence on the state is given. The option of solving the problem concerned both by of the state and society is analyzed.

Conclusions. Currently, the legal foundations for the organization and activity of mass media have been created, and state guarantees have been established in accordance with the Constitution of Ukraine and the relevant above-mentioned Laws of Ukraine. Individual issues of the organization and activity of mass media in Ukraine are regulated by orders of the Ministry of Justice of Ukraine and Resolutions of the Verkhovna Rada of Ukraine. It should be noted that only since 05/07/2022, the normative legal acts of the former Ukrainian SSR and the USSR have not been applied on the territory of Ukraine due to the universally recognized international principle of legal succession, which is directly related to the full-scale invasion. Among them, it should be noted, in particular, the Law of the USSR "On the press and other mass media". It is obvious that such legislation needs to be changed.

Key words: Constitution, constitutional law, constitutional status, constitutional guarantees, mass media.

1. Introduction.

The mass media are undoubtedly the most active participants in public information relations. Their significance comes from the possibility to affect the consciousness of people. In modern society, printed publications, radio, and television are the most widespread and accessible ways of finding, receiving, and disseminating information.

Today, information is the most valuable thing in the world. People constantly perceive new information, sometimes even without noticing it. Its sources are television, radio,

newspapers, magazines, the Internet, or in other words, mass media. As for Ukraine, it is not an exception among other countries.

It should be noted that the globalization trend appeared in the world at the end of the 20th century. In general, the relevant term means the process of assimilation by countries of scientific achievements and cultural characteristics in other states. In the 21st century, the phenomenon has gained untold proportions, beginning with politics and ending with holidays. The process of globalization most likely would not have had such rapid development and spread in the world if there had not been mass media.

The media, having facts crucial for the whole world, conveyed them not only to ordinary people but also to heads of the states and officials, who ultimately facilitated the extension of globalization. Countries adopted normative legal acts regulating the basics of the status of mass media. Ukraine is not an exception: according to Part 2 of Art. 15 of the Constitution of Ukraine "Censorship is prohibited", and Art. 34 states "Everyone is guaranteed the right to freedom of thought and speech, and to the free expression of his or her views and beliefs. Everyone has the right to freely collect, store, use and disseminate information by oral, written or other means of his or her choice".

2. Mass information.

In the modern world, the implementation of freedom of the media is based on efficient and enforceable legislation; it is one of the essential features of civil society and the rule of law. At the same time, the institute of freedom of the media is prone to change, as well as the number of media kinds and ways of searching for, receiving, and disseminating mass information increases. For example, electronic media, which are available in the information and communication network – the Internet, have already firmly become part of our lives.

Mass information means printed, audio, audiovisual, and other messages and materials intended for an unlimited number of people.

The media means a periodical, an online media outlet, a TV/radio channel, a television program, a radio program, a video program, a newsreel program, or another form of periodic dissemination of mass information under a permanent name. As you can see, the legislator comprehensively define the concept, indicating that the relevant sphere of public life will be almost completely protected by law, thereby excluding or minimizing the occurrence of conflicts and violations of media rights.

3. The mode of mass information.

The legal regime of mass information is a specific procedure for regulating the search, receipt, production, storage, and dissemination of information and other transactions carried out by subjects of media relations in respect of and within the institute of freedom of the press based on the norms of constitutional law and other branches of Ukrainian law, as well as the norms of constitutional and administrative law of Ukraine.

Freedom of the press should be understood as the objective opportunities, restrictions, and prohibitions established by the legislation of Ukraine for individuals and legal entities in search, receipt, production, dissemination, and storage of messages and information through the media.

Media censorship can be primary and secondary. Primary censorship had been applied in Ukraine since 1721 and was actually banned only in 1993. Primary censorship applies when arranging media products for release (broadcast), and its important form is the provision of mandatory instructions by state bodies to publishers, editors, etc. The secondary censorship can be applied under the law in the period from the initial publication (broadcast) of media products. Secondary censorship may involve any lawful measures toward editorial material, including forfeiture, classification, etc. The relevant type of censorship is currently used in Ukraine.

Freedom of information is closely related to freedom of thought, but the former is not a derivative of the latter. The same holds for freedom of the press which is closely related to freedom of speech while is not derived from freedom of speech but is an independent legal institution.

According to Part 2 of Art. 15 and Art. 34 of the Constitution of Ukraine, everyone is guaranteed the right to freedom of thought and speech, and censorship is prohibited. In fact, the freedom of dissemination of mass information and freedom of the media has been proclaimed. But such freedom cannot be absolute. Article 34 of the Constitution of Ukraine establishes that everyone has the right to freely collect, store, use and disseminate information by all legal means. The above provisions of the Constitution apply both to relations related to the search, production, and distribution of mass information, and to other types of public relations arising from information circulation. The Laws of Ukraine "On Printed Media (Press) in Ukraine" and the Law "On Information" directly deal with the regulation of media relations.

Therefore, as mentioned above, the legal regime of mass information is a specific procedure regulating the search, receipt, production, storage, and dissemination of information and other transactions carried out by the subjects of media relations arising in respect of and within the institution of freedom of mass information based on the norms of constitutional law and other

branches of Ukrainian law. It defines the rights and obligations of participants in media relations, restrictions, and prohibitions applied in the field of freedom of mass information.

The constitutional model of freedom of the press in the aggregate with the legislation on the media can guarantee and maintain a fairly effective enforcement of the right to freedom of the press. The implementation of freedom of information is regulated by legislative norms of various branches of Ukrainian law.

The specifics of the media activities (freedom of the press, censorship prohibition, the obligation of state bodies, public associations and their officials to provide the relevant information at the editorial office's request, etc.) allow the media to be intermediaries between citizens and state bodies and organizations, local governments, public associations, and their officials in obtaining information.

The media are able to influence social relations inside and outside of state-legal regulation. It can result in a violation of the stability of social relations. In addition to various types of state support for the media, the state conducts such activities as control and supervision in relation to the media. They occur upon the establishment and operation of the media. Information control is carried out to reproduce individual social behavior, that is, to keep the media stable. After the registration of the media entity, state intervention should take place with the maximum guarantee of freedom of speech but with the necessary forms of state support.

The institute of freedom of mass information includes the norms available in the Constitution of Ukraine, laws, declarations, by-laws, international acts, etc. These norms ensure independent regulation of particular relations in the production, dissemination, use, modification, consumption, and storage of mass information.

Another main component of the constitutional-legal status of the media and other subjects of constitutional law is their legal personality. The media's constitutional legal personality is a system of legal capability, legal capacity, and delictual capacity of the subject defined by the Constitution and laws of Ukraine. Summarizing the provisions on the legal construction of the constitutional and legal status of the media in Ukraine, it is worth emphasizing the complexity of its construction. Thus, one can argue about the two-level legal construction of the legal status of the relevant subject of constitutional law. The essence of the legal structure of the media status is determined by the doctrinal, regulatory, and organizational legal elements, and the content – by the concept of the media, the principles of their work, the constitutional legal personalityof the media and the guarantees of their activities. The essential and content structural elements of the constitutional and legal status of the media are considered sufficient for the effective activity or behavior of the media in implementing and ensuring the constitutional right of citizens established by part two of Art. 34 of the Constitution of Ukraine (Burlakov, 2020, pp. 47).

4. Problems of mass information freedom

Freedom of mass information as a principle meets the corresponding political and legal regime. In other words, the legal regime expresses the degree of rigidity of legal regulation, the presence of known restrictions or benefits, the permissible level of activity of subjects, and the limits of their legal independence. Freedom of information is guaranteed by the state. At the same time, the implementation of freedom of mass information in Ukraine cannot go without significant problems.

One of the determining factors of attributing messages and data to the category of mass information is their dissemination through the media – print, audiovisual, or other. Freedom of mass information cannot be interpreted as permissiveness. Strict restrictions are imposed on the media, which is why the current Ukrainian legislation on the media is based primarily on imperative norms.

In fact, there are many violations of the legal status of the media. Thus, in studying the constitutional and legal status of the media and its observance in practice, the authors managed to draw two interim conclusions: first, you cannot help marking that in most cases the rights of the media are respected and protected, and all means are provided for protection in case of their violation; secondly, there are often cases (and there are many) when the constitutional rights of the media are grossly violated, and they are deprived of any opportunity to defend their legitimate interests. Thus, information becomes a tool for achieving the goals of the state and ensuring its security (Vitkova, 2018, pp. 17).

Consequently, it raises the question about the reasons for that state of affairs of the media in Ukraine. Most experts in political science and history associate it with the historical development of the media in Ukraine, involving innovative methods of using information in modern history. The fact is that since pre-revolutionary Ukraine, newspapers and magazines operated within state limits. A striking example is the censorship during the reign of Alexander III, and even the regulation of the media in the totalitarian USSR. It is natural that the state authorities try to fully subjugate the media as the main channel of influence on public awareness (Posida, 2020, pp.168)

It is important to understand that the media can shape public opinion and be the cause of changes in domestic political processes. According to the researchers, the media in Ukraine have lost such essential functions as assessing government actions, expressing the opinion of society, and providing unbiased information.

The media in Ukraine are directly controlled by government agencies, so the media are under strict supervision and are financially dependent on officials.

Freedom of speech and freedom of information are one of the fundamental principles of democracy and, as already mentioned, are enshrined in the Constitution of Ukraine. Such a foundation is of utmost importance for the work of the media, as we can judge about the political and legal regime in the country by the quality and veracity of their performance.

Experts distinguish three types of the media in Ukraine:

The first type is the media that are completely subordinate to the state and provide information as the seat of power requires.

The second type is the media controlled by the economic elite of the country. Such an option of organizing the media in democratic countries is quite free, but in Ukraine, in the current political situation, the economic elite is closely intertwined with the political one. In this regard, the freedom of this kind of the mass media does not differ from the first type, upon which the mass media are controlled by the state.

The third option is the completely independent mass media. Their number in percentage ratio is much smaller, and they mostly work to bring advertising to the viewer, not to conduct a high-quality journalistic investigation.

It should be noted that in 2015, the international non-governmental organization Freedom House published a global survey and rating of press freedom in the world in 2015 (Global Press Freedom, 2015). Therefore, according to the rating, the Ukrainian media are not free. At the same time, Yemen and South Sudan are a sequence higher in the list, although the level of democratic development in these countries is much lower than in Ukraine. A major problem is not even the subordination of the media to the government, but the social state since it drives the limited freedom of the media. The mass media is one of the most effective methods of enjoying citizens' rights, and it is their free development that leads to the creation of a strong civil society.

Freedom of the press is often given a central place in the block of constitutional guarantees relating to freedom of expression. Abroad, the term "freedom of the press" is used to refer to the print media, but it is sometimes used more broadly to mean freedom of all types of mass media.

5. International practices

The main criteria for choosing a state for analyzing the constitutional legislation on freedom of mass information were as follows: the availability of specific norms on freedom of the press in the constitution and the presence or absence of a special law on the media in the system of national legislation. And, first of all, we were interested in Western European situation, because the first newspapers appeared in Western Europe, and therefore, it has the most considerable experience of legal regulation of the right to freedom of mass information.

Most foreign states now have significant legislative regulation of the media. Such countries as Germany, Italy, the United States, France, Sweden, and Austria have a pronounced freedom of expression enshrined in writing in the constitutions. The relevant provision does not exist in Great Britain and Australia. Lawmakers in these countries claim that freedom of expression is guaranteed in their unwritten constitutions.

All leading European countries, except Great Britain, and the USA have specific constitutional guarantees protecting the freedom of the press. A strong judiciary plays a big part in ensuring freedom of the press, as well as the right of citizens to access information in the countries under consideration.

At the same time, in all foreign countries, the legislation on the media establishes legal restrictions on freedom of the print press and establishes state control over their activities.

6. Conclusions

The media's constitutional and legal status is a system of specific elements that determine the components of the activities and conduct of the media toward the implementation of freedom of the media and enforcement of the constitutional right of citizens of our state to be able to dispose information they possess as their discretion.

There has recently appeared a belief that the media are the "fourth" power branch in the state. Given the study conducted, it is possible to say for sure that the above statement is true. The media play an extremely important role in enjoying the rights and freedoms of a person and a citizen. Nevertheless, we have to state that the media performance has not yet become the factor that would contribute to achieving national harmony in the state and eliminating social tension in society.

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НАУКОВІ ДОСЛІДЖЕННЯ КОНСТИТУЦІЙНО-ПРАВОВОГО СТАТУСУ ЗАСОБІВ МАСОВОЇ ІНФОРМАЦІЇ

Анотація. ***Мета.*** Обґрунтування дослідження конституційно-правового статусу засобів масової інформації його складових, а також проаналізовано перспективи та недоліки даного статусу в період сьогодення. Визначення конституційно-правових засад організації та діяльності ЗМІ в Україні, виявлення місця та статусу ЗМІ в сучасному громадянському суспільстві, встановлення їхньої ролі в нашому повсякденному житті, надання науково обґрунтованих пропозицій, спрямованих на удосконалення діяльності ЗМІ в Україні.

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

Результати. Сьогодні в усьому світі найбільшу цінність містить в собі інформація. Люди постійно сприймають нову інформацію, деколи навіть не помічаючи цього. Телебачення, радіо, газети, журнали, інтернет – є її джерелом, або іншими словами – засобами масової інформації. Що стосується України, то вона не стала винятком серед інших держав світу. Слід зазначити, що проблема конституційно-правових засад організації та діяльності ЗМІ є багатоаспектною, що зумовило активізацію учених та практиків щодо вивчення та вироблення наукових напрацювань із даної теми, про що свідчать, зокрема, дослідження О.А. Вознесенської, Т.М. Заворотченко, І.П. Ісаєнка, О.В. Каплій, Т.А. Костецької, Г.М. Краноступ, І.В. Людвик, Л.В. Мардахаєва, О.В. Нестеренко, В.В. Сердюка, Ю.М. Тодики, Т.В. Чубарук та інших провідних вчених. Проаналізовано порушення прав та статусу засобів масової інформації, закріплених у Конституції України. Вказано основні причини порушення основ конституційного статусу ЗМІ, наведено класифікацію ЗМІ відповідно до ступеня залежності від держави. Аналізується питання можливості вирішення цієї проблеми як з боку держави так й суспільства.

Висновки. Наразі створено правові основи організації та діяльності ЗМІ, встановлено державні гарантії згідно з Конституцією України та відповідними вищезазначеними Законами України. Окремі питання організації та діяльності ЗМІ в Україні урегульовуються наказами Міністерства юстиції України та Постановами Верховної Ради України. Слід зазначити, що лише з 07.05.2022 року не застосовуються на території України нормативно-правові акти колишнього УРСР та СРСР у силу загальновизнаного міжнародного принципу правонаступництва, що безпосередньо пов'язано з повномасштабним вторгненням загарбників. Серед таких слід зазначити, зокрема, Закон СРСР «Про пресу та інші засоби масової інформації». Очевидно, що таке законодавство потребує змін.

Ключові слова: Конституція, конституційне право, конституційний статус, конституційні гарантії, засоби масової інформації.

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LEGAL RESTRICTIONS AS THE BASIS OF INSTRUMENTAL THEORY OF LAW

Abstract. ***Purpose***. The purpose of the article is to study legal restrictions as an element of the mechanism of legal regulation, their essence, and approaches to their determination and classification; to elucidate the essence of legal restrictions as a key element of the instrumental theory of law. ***Research methods***. General scientific and special methods of scientific cognition were used for carrying out the present research. ***Results***. The main approaches to determining legal remedies are considered as a part of instrumental theory of law. The article analyses the place of legal restrictions in the mechanism of legal regulation, examines the main scientific approaches to identifying legal restrictions as an element of the system of legal remedies, and provides an author's definition of legal restrictions. The importance of legal restrictions for legal influence and the main approaches to their classification, in particular, depending on the structural element of a legal norm, were researched, while legal restrictions were considered amidst the disposition of the legal norm. The peculiarities of the implementation of legal restrictions were analysed in order to ensure their effective impact. The peculiarity of legal obligations as a special type of legal restrictions is regarded. ***Conclusions***. It should be noted that legal regulation is carried out through a combination of legal incentives in the process of legal regulation and legal restrictions. It is through the use of various legal means that the positive effect of legal regulation on public relations is achieved. In general, the issue of legal restrictions is a question of the limits of human legal freedom in society, because it is limited by the freedom of others. Thus, legal restrictions (along with legal incentives) are fundamental means of legal regulation. The effect of only legal incentives in the process of legal regulation cannot exist without legal restrictions that balance the mechanism of legal regulation. The relevant relationship contributes to the impact of law on society. Similarly, the violation of the balance in applying various legal means has the consequence of not obtaining the desired result of legal regulation. Therefore, legal incentives, backed by appropriate legal restrictions, have the most effective impact on legal regulation.

Key words: mechanism of legal regulation, legal means, legal restrictions.

1. Introduction

Modern theoretical science substantiates different approaches to understanding law. The main ones are legal, sociological, normative, communicative, integrative and instrumental scientific approaches. Each of them focuses on important aspects of law, revealing its value and social purpose. The analysis of the problem determines the essence of the instrumental approach.

Instrumental theory of law focuses on the practical (praxiological) purpose of law, and special attention is paid to clarifying the nature of legal remedies and various types of legal activities. Given that the modern legal paradigm is becoming more practice-oriented, instrumental theory of law is becoming one of the integrative theories of law, and the concept of legal means is called 'instrumental theory of law', 'instrumental approach', which is supported by A. Malko, K. Shundikov, V. Sapun (Malko, Shundikov, 2003; Sapun, 1992) and which can be considered one of the most promising and progressive scientific areas of modern theoretical and legal science.

Substantiation of the instrumental theory of law (instrumental approach) was a natural stage in the formation of legal understanding. Its main provisions are due to the value of law, its ability to be an instrument of ordering the diverse life of society. Instrumental theory of law can be considered as a potential future replacement for normativism, as instrumentalism is a fundamental scientific trend, philosophically and methodologically sound and productive, which should be further researched and expanded. Thus, instrumental theory shifts the vector of ideas about the right to a higher level of knowledge.

The purpose of the article is to study legal restrictions as an element of the mechanism

of legal regulation, their essence, and approaches to their determination and classification; to elucidate the essence of legal restrictions as a key element of the instrumental theory of law. General scientific and special methods of scientific cognition were used for carrying out this research.

2. Legal restrictions as the basis of instrumental theory of law

The basis of instrumental theory of law is the analysis of legal means. In general, legal means are legal phenomena that are reflected in the tools (resolutions) and actions (technologies), which satisfy the interests of legal entities, ensure the achievement of personal and public goals.

One of the approaches to the formation of ideas about legal means is their understanding as the institutional phenomena of legal reality, which render the regulatory force of law, its energy, and play the role of its active centers. Another approach is to understand legal means as a tool that accumulates in the mechanism of legal regulation, which contributes to achieving the goal of legal regulation (Denisova, 2013, p. 86). To achieve the goal of regulatory influence, law uses unique tools – means of legal influence, which are divided into two groups (legal incentives and legal restrictions).

It should be noted that the theory of remedies is more important primarily as a general theoretical concept that allows for using various remedies regardless of the nature of the legal relationship between the subjects of law in different law branches. At the same time, according to K. Petrov, it is possible to see the shortcomings of law enforcement, which are caused by the wrong choice of legal means (Petrov, 2019, p. 47).

Legal restrictions are means of exercising legal responsibility and tools to ensure the legal status of the person. A. Malko has thoroughly studied legal restrictions as a process of legal coercion at the informational and psychological level in potential or actual terms, in the performance of actions in the public interest or in the interests of the authorized entity. According to the scientist, legal restrictions (as well as legal incentives) constitute a more extensive layer of the legal sphere – information and psychological means of law, while reflecting the duality of legal information. They are broader in scope than traditional methods of legal regulation and do not replace other diverse legal remedies, to some extent integrating and unifying them (Malko, 2004, p. 92).

S. Bobrovnik has an important position which defines legal restriction as those enshrined in the right to refrain from an illegal act, the purpose of which is to create the necessary conditions to meet the interests of the authorized entity and the public interest as a whole (Bobrovnyk, 2004, p. 92). Following N. Onishchenko, a legal restriction is an obstacle to illegal behaviour enshrined in legal norms, which creates conditions for satisfying the interests of the subject of law for the normal functioning of social institutions (Onishchenko, 2010, p. 97). The existence of legal restrictions is intended to protect society from the arbitrariness of law enforcement. Ultimately, legal restrictions must have one goal in all cases: to ensure a reasonable compromise between the public need and the interests of such a society (Goiman, 1998, p. 33).

Based on various approaches to the definition of legal restrictions (which are primarily due to the multifaceted nature of this category), it is most optimal to define legal restrictions as certain legal remedies aimed at deterring and restricting the subject of legal relations from certain acts through negative motivation. Thus, legal restrictions are a certain limit to the lawful conduct of legal entities, which must not violate the legal rights and interests of other entities. In this case, the legal restriction is a safeguard against illegal behaviour. In general, legal restrictions are designed to reduce social activity that is contrary to legal norms. In fact, legal restrictions operate in a system with legal incentives and protect public relations from the negative impact of illegal factors. That is why legal restrictions perform the functions of protection and defence and are not designed to develop public relations.

The functional purpose of legal restrictions is to create such conditions under which the need to protect and safeguard the interests of individual entities and society will be met. Thus, legal restrictions prevent illegal activity and stabilize social processes.

According to A. Denisova, the importance of legal restrictions for legal influence is as follows:

1) they determine the limits of permissible behaviour in the process of legal influence;

2) are a means of ensuring the legal status of a person as an important aspect of the manifestation of legal influence;

3) have a regulatory basis for consolidation and provide preventive action to prevent violations of legal requirements;

4) ensure the formation of motivation for the need for legal influence (Denisova, 2013, p. 101).

The category of 'legal restrictions' is most fully disclosed in the scientific legal literature through the classification of its types. A. Malko notes that the main types of legal restrictions, depending on the element of the rule of law

in which the restrictions are fixed, are legal fact-restrictions (hypothesis of the rule of law), duty, prohibition, suspension, etc. (disposition of the rule of law) and punishment sanction (Malko, 2004, p. 94). According to N. Onishchenko, the classification of restrictions depends on the content of values that the subject is deprived of when applying them: substantive and moral and legal restrictions (Onishchenko, 2010, p. 229).

In order to substantiate the criterion of classification of legal restrictions depending on the structural element of the legal norm in which they are enshrined, legal entities take into account that the conditions of their rights and obligations, benefits and prohibitions, legal consequences due to specific legal facts. That is why in some cases the subjects want to occur, and in others – prevent their occurrence.

Legal regulation is carried out by various means, which are applied in a certain sequence, replacing and complementing each other. It is these tools that ultimately shape the legal state of society (Vengerov, 1998, p. 264). Legal obligations are the primary means of regulation. Following A. Malko and V. Subochev, duty is a certain way of realizing interests by influencing the behaviour of other subjects of legal relations. It is the duty that motivates the legitimate interests, while establishing the framework of permissible behaviour for the participants of such legal relations by virtue of their own behaviour (Malko, Subochev, 2004, p. 2).

Based on the analysis of the modern legal literature, it is worth mentioning that responsibilities include both incentives and legal restrictions. In this regard, A. Malko states that the relevant view is not based on information and psychological action of law but on the social mechanism, sociological approach to legal incentives, in which the main problem is not to meet the specific interests of specific subjects of law (material side) and the problem of their lawful activities (formal side) (Malko, 2005, p. 97).

3. Legal remedies in the structure of the rule of law

An important aspect of the study of legal remedies is their placement in the structure of the rule of law. Thus, V. Kozhevnikova argues that from the standpoint of the structure of the rule of law, restrictions in the hypothesis are indicated as legal grounds in the form of legal facts, the presence of which results in a restriction of a particular right (Kozhevnikova, 2018, pp. 18–21). The disposition reveals the content of a certain legal restriction and sets out prohibitions, suspensions, and obligations. The limits of rights are established for all subjects of the respective legal relations and are specified in the acts of the current legislation. Restrictions, in turn, are characteristic of the establishment of certain rights, subjects of family relations in accordance with the features, conditions and procedure for exercising the relevant rights.

At the level of the disposition of the legal norm, legal restrictions are legal obligations, prohibitions, suspensions, while sanctions contain certain penalties, which are the most significant means of restriction. Another criterion for distinguishing legal restrictions as a means of legal regulation is belonging to a particular area of law in which they are enshrined, namely:

1) civil law restrictions that are enshrined in the rules of civil law, such as Art. 36 of the Civil Code of Ukraine, which provides for the restriction of civil capacity of an individual under certain conditions (Civil Code);

2) restrictions in labor legislation. For example, the following restrictions according to the Labour Code of Ukraine: restrictions on overtime work (Article 62), restrictions on payroll deductions (Article 127), restrictions on women's work at night (Article 175), etc. The main array of legal restrictions in labor law is contained in the form of prohibitions (Labour Code);

3) restrictions in family law. For example, restrictions are enshrined in the Family Code of Ukraine, namely: restrictions on persons who cannot be married to each other (Article 26), deprivation of parental rights (Article 164), restrictions on persons on adoption (Article 212), etc. (Family Code);

4) restrictions in land legislation, which are highlighted in a separate chapter 18 of the Land Code of Ukraine on restrictions on land rights, which, for example, are: a) the condition to begin and complete construction or development of land within the prescribed time; b) a ban on certain activities; c) a ban on changing the purpose of the land, landscape; d) the condition to carry out the construction, repair or maintenance of the road, road section; e) the condition of compliance with environmental requirements or the performance of certain works; e) conditions to grant the right to hunt, catch fish, collect wild plants on their land at the prescribed time and in the prescribed manner (Land Code);

5) economic and legal restrictions, which often exist in the form of suspension of the business entity. For example, in accordance with Art. 246 of the Commercial Code of Ukraine established restrictions and suspensions in the following cases: 1) the implementation of any economic activity that threatens human life and health or poses an increased danger to the environment is prohibited; 2) in the case of economic activity in violation of environmental requirements, the activities of the busi-

ness entity are prohibited (Commercial Code);

6) environmental and legal restrictions, which are in the form of specific legal restrictions on the limits of emissions of pollutants into the environment. For example, according to Art. 44 of the Law of Ukraine 'On Environmental Protection' set limits on emissions of pollutants into the environment and other types of harmful effects in general in the Autonomous Republic of Crimea, regions, cities of national importance or individual regions are set if it leads to pollution of natural resources importance, territories of other oblasts, – the central body of executive power, which implements the state policy in the field of environmental protection (Law of Ukraine 'On Environmental Protection');

7) administrative and legal restrictions, which exist mainly in the form of warnings and prohibitions. For example, in Art. 30 of the Code of Administrative Offenses of Ukraine provides for deprivation of the right to drive a citizen is applied for up to three years for gross or repeated violation of the exercise of this right or for up to ten years for systematic violation of the use of this right (Code of Administrative Offenses);

8) the widest list of restrictions is established in criminal law in the form of prohibitions, punishments and restrictions of rights. For example, Art. 172 of the Criminal Code of Ukraine establishes that for illegal dismissal of an employee for personal reasons or in connection with his notification of violation of the Law of Ukraine 'On Principles of Prevention and Combating Corruption' to another person, as well as other gross violations of labour legislation from two thousand to three thousand non-taxable minimum incomes or deprivation of the right to hold certain positions or engage in certain activities for up to three years, or correctional labour for up to two years (Criminal Code).

Within the framework of legal regulation, legal facts act as circumstances that limit, restrain and determine the limits of permissible behaviour, as well as provide an opportunity to implement permitted behaviour. Therefore, at the present stage, legal obligations in terms of legal restrictions should be studied as a motivational and motivating effect on people's behaviour.

It should also be noted that it is not enough to have the necessary arsenal of legal restrictions to ensure their effective impact. An important aspect is their implementation. In conducting her dissertation research, O. Levada appropriately noted that the signs of realization of legal restrictions are: 1) focus on restraining the subject's own interests and at the same time satisfying the interests of the other party in legal relations and public interests in protection and defence; 2) the actual reflection of the reduction of opportunities, freedom, and hence the rights of the individual, which is carried out through duties, prohibitions, punishments, suspensions, limitations and types of behaviour of subjects; 3) expression of negative legal motivation; 4) performance of a protective function in the public and state interest; 5) aim to reduce negative activity (Levada, 2019, pp. 13).

It is noteworthy that legal obligations play an important role not only as legal restrictions, but also positive obligations that indicate the subject of the need for lawful action. Positive commitments are more related to coercion than to stimulating people's behaviour. In general, in the legal literature, legal restrictions are rightly associated with the narrowing of permits, the imposition of prohibitions and additional positive obligations, as the obligation is a necessity, due to which in case of non-compliance there are penalties.

Developing the idea of legal obligations, it can be argued that prohibitions are also to some extent passive obligations. By imposing prohibitions, the regulator thus imposes certain negative obligations – that is, the obligation to refrain from illegal acts. Thus, the legislator expresses his negative attitude to certain actions that he considers undesirable for public relations. In this regard, A. Denysova believes that the prohibition by creating obstacles to the interests of the individual in relation to whom it acts, is aimed at realizing the interests of the opposite party (Denysova, 2013, p. 108).

4. Conclusions

Summarizing the above, it should be noted that legal regulation is carried out through a combination of legal incentives in the process of legal regulation and legal restrictions. It is through the use of various legal means that the positive effect of legal regulation on public relations is achieved. In general, the issue of legal restrictions is a question of the limits of human legal freedom in society, because it is limited by the freedom of others.

Thus, legal restrictions (along with legal incentives) are fundamental means of legal regulation. The effect of only legal incentives in the process of legal regulation cannot exist without legal restrictions that balance the mechanism of legal regulation. It is relationship that contribute to the impact of law on society Similarly, the violation of the balance in the application of various legal means has the consequence of not obtaining the desired result of legal regulation. Consequently, legal incentives, backed by appropriate legal restrictions, have the most effective impact on legal regulation.

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ПРАВОВІ ОБМЕЖЕННЯ ЯК ОСНОВА ІНСТРУМЕНТАЛЬНОЇ ТЕОРІЇ ПРАВА

Анотація. ***Мета***. Дослідження правових обмежень як елементу механізму правового регулювання, їх значення та підходів до їх класифікації. Розкриття сутності правових обмежень як ключового елементу інструментальної теорії права. ***Методи дослідження***. При здійсненні дослідження були використані загальнонаукові та спеціальні методи наукового пізнання. ***Наукова новизна***. Розглянуто основні підходи до визначення правових засобів. У статті проаналізовано місце правових обмежень у механізмі правового регулювання та розглянуто основні наукові підходи до визначення

правових обмежень як елементу системи правових засобів, надано авторське визначення правових обмежень. Досліджено значення правових обмежень для правового впливу та основні підходи до визначення класифікації правових обмежень, зокрема залежно від структурного елементу правової норми, розглянуто правові обмеження на рівні диспозиції правової норми. Проаналізовано особливості реалізації правових обмежень задля забезпечення їх ефективного впливу. Розглянуто особливість правових обов'язків як особливого виду правових обмежень. ***Висновки***. Слід зазначити, що правове регулювання здійснюється через комбінацію дії правових стимулів у процесі правового регулювання та правових обмежень. Саме через застосування різноманітних правових засобів досягається позитивний ефект правового регулювання на суспільні відносини. В загальному питання правових обмежень є питанням меж правової свободи людини в суспільстві, адже вона обмежена свободою інших людей. Отже, правові обмеження (поряд із правовими стимулами) є основоположними засобами правового регулювання. Дія лише правових стимулів у процесі правового регулювання не може існувати без правових обмежень, які збалансують механізм правового регулювання. Саме на цьому взаємозв'язку побудований вплив права на суспільство. Так само і порушення цього балансу у застосуванні різноманітних правових засобів має наслідком неотримання бажаного результату правового регулювання. Саме тому правові стимули, підкріплені належними правовими обмеженнями, мають найефективніший вплив на правове регулювання.

Ключові слова: механізм правового регулювання, правові засоби, правові обмеження.

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REFORM OF LAW ENFORCEMENT BODIES AND ITS IMPACT ON THE ORGANISATION OF CRIME CONTROL UNDER CRIMINAL LAW IN THE FIRST HALF OF THE 1920S

Abstract. ***Purpose.*** The purpose of the article is to study the process of reforming law enforcement bodies and its impact on the organisation of crime control under criminal law in the first half of the 1920s. ***Results.*** It is emphasized that the Soviet law enforcement bodies were involved by the authorities in the implementation of tasks to impose the appropriate ruling regime, which involved their participation in forceful actions that were negatively perceived by the majority of the population. This reduced the credibility of representatives of such bodies in the eyes of the public, which largely determined the nature of their staffing. The relatively low credibility of the Soviet law enforcement bodies during the 1920s was also due to the selectivity of their counteraction to criminals, based on the class expediency of the relevant activities. The formation of a corrupt system of officials in law enforcement bodies frequently negated efforts aimed at "purification" of the militia ranks from bribe-takers, discipline violators, and thieves. This was due to the "immunity" of the top leadership of law enforcement bodies, based on their involvement in the party nomenclature, which did not allow for a fundamental renewal through large-scale recertification, while the participation of senior militia officials in the activities of family and landowner groups in the party environment made them vulnerable only in the event of the defeat of one or another group in the fight against competitors. Therefore, even after losing some of the subordinates who were convicted of various crimes, including those who fulfilled the whims of the top leadership, it received new executors by replacing their predecessors. ***Conclusions.*** It is concluded that the measures to reform law enforcement bodies, strengthen criminal repression, and mainly the economic transformations of the Bolshevik government contributed to a change in the qualitative structure of crimes and their quantitative characteristics, which led to measures of crime control under criminal law, which in the late 1920s was complicated not only by a sharp aggravation of social relations in the countryside, but also by the inability of law enforcement officials to control all localities, as the economic opportunities of wealthy and middle peasants for some time still allowed them to organise quite effective resistance, which resulted in mass violations of the law. Therefore, according to the top leadership of the USSR, the most effective means of suppressing the resistance of the peasantry to the policy of forced appropriation of their labour results was policy on collectivisation of agriculture.

Key words: law enforcement bodies, authority structures, population, public, counteraction to criminals.

1. Introduction

The Communist Party nomenclature in the USSR was formed as a group separated by various privileges from the rest of the society, which was not only to some extent excluded from the scope of law, when legal acts were substituted by decisions of party bodies in relation to a particular person in case of violation of "party discipline", but also as a group opposed to representatives of intellectual work, as "soft-bodied persons" who could not be firm enough to preserve the "gains of the revolution".

The process of separation of the Communist Party and State nomenclature, and later ordinary party functionaries, from the population was most clearly manifested in the establishment of an extensive system of benefits and privileges for officials at a time when ordinary citizens suffered from hunger, unemployment, lack of proper social security, housing and living

conditions. This did not contribute to the formation of ideas about the Bolsheviks' power as fair, and for some of the persons who committed crimes, it served as a kind of justification for criminal activities and, quite likely, could be the basis for opposing the top of the underworld (for example, "thieves in law") to any state bodies on the basis of lack of cooperation with the authorities. Such opposition, as an element of criminal subculture, existed at least before the beginning of the German-Soviet war and was one of the foundations for the formation of rules of conduct for representatives of the criminal world, who under any circumstances did not cooperate with the authorities.

It was the privileges that attracted to the ruling party careerists and people who sought to gain power at any cost to satisfy their own ambitions. This fact caused the spread of official crimes among party and state employees. At the same time, the proportion of criminals in this field fluctuated for a long time between 8 and 9% (Mikheieva, 2004). This category of criminals also included persons who enjoyed the rights and privileges of party and Soviet figures using forged documents (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

Problems that are important both in theoretical and practical aspects for consideration of the process of crime control were raised in the works by O.M. Bandurka, Y.A. Helfand, L.M. Davydenko, A.I. Dolhova, A.P. Zakaliuk, A.F. Zelenskyi, O.M. Lytvak, P.P. Mykhailenko, V.M. Popovych. The role and importance of the scientific heritage of Ukrainian and foreign scientists, their proposals and recommendations on the organisation of effective crime prevention are of high value, but it should be admitted that the problem of historical and legal analysis of crime control under criminal law in Ukraine in 1922–1960 has not yet been under a comprehensive study.

That is why the purpose of the article is to study the process of reforming law enforcement bodies and its impact on the organisation of crime control under criminal law in the first half of the 1920s.

2. Specificities of criminal activities and criminalisation of representatives of the authorities

The most widespread type of criminal activities of the party and Soviet leaders was the abuse of power, which manifested itself in the appropriation of food, drinks, drinking and orgies with subordinates, as well as the illegal acquisition and receipt of valuable items, including jewellery, expensive weapons, furniture, etc. as bribes (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. In the report of the instructor of the Central Committee of the RCP(b) Kasatkin-Vladimirskyi, which was drawn up in 1923, it was noted that a significant part of the workers of the Ekaterinoslav party organisation was associated with local political and criminal banditry, repeatedly engaged in the illegal appropriation of food and belongings from the population, arranged massive drunkenness (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

The scale of criminal activities in the ranks of the party in the first half of the 1920s was such that forced the Secretary of the Central Committee of the CP(b)U V. Molotov to approve on October 19, 1923 Circular No. 58 "On the fight against wastefulness, criminal use of official position by members of the Communist Party", which recommended transferring cars and drays to the state, and emphasized the need to strengthen the fight against alcoholism and bribery (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. At the same time, the Central Committee of the CP(b)U, in order to "strengthen the credibility of the party", repeatedly forced journalists under the threat of criminal punishment to refuse to publish materials that tarnished responsible party workers engaged in criminal activities (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. This practice of double standards contributed to the criminalisation of officials, some of whom viewed their activities solely as a means of personal enrichment and uncontrolled use of power. However, the strengthening of authoritarian trends in the party leadership necessitated the formation of management verticals based on personal loyalty to the top party leadership contrary to common sense, morality and humanity. Such commitment was achieved by expanding the rights and privileges of the party nomenclature and the fear of losing them in case of guilt or committing a crime that threatened not so much the life, health or property rights of citizens, but the interests of the top party leadership. This approach contributed to the expansion of privileges of the nomenclature.

The privilege of the party nomenclature was enshrined in accordance with the instruction 0/26 of the Central Control Commission of the CP(b)U of February 15, 1926, according to which all cases brought against party members who did not have serious public importance were to be considered in party cells (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. Party cells were given the right to determine punishment within party discipline by taking under control, reprimanding, etc.

At the same time, all the most important elements of the Soviet state system, such as party, authority institutions, law enforcement bodies, courts, prosecutor's office, in one way or another participated in the formation of the totalitarian regime, although a special place in this process was occupied by the security agencies of the Cheka-SPA-NKVD (Arkhiiereiskyi, Bazhan, Bykova, 2002, p. 225). As well as the procedure for the formation of law enforcement bodies, this had a significant impact on the nature of the organisation of crime control under criminal law.

Soviet law enforcement bodies were involved by the authorities in the implementation of tasks to impose the appropriate ruling regime, which involved their participation in forceful actions that were negatively perceived by the majority of the population. This reduced the credibility of representatives of such bodies in the eyes of the public, which largely determined the nature of their staffing. The relatively low credibility of the Soviet law enforcement bodies during the 1920s was also due to the selectivity of their counteraction to criminals, based on the class expediency of the relevant activities.

The legal basis for the creation of the Soviet militia was the decree of the Council of People's Commissars of the Ukrainian SSR of February 9, 1919 "On the organisation of the militia", according to which the Council of People's Commissars of the Ukrainian SSR instructed the People's Commissariat of Internal Affairs to form militia units on the ground (Shevchenko, Chamlai, Strelnyi, 2012, p. 91). However, it did not regulate the procedure of interaction of the militia with other state bodies of the Ukrainian SSR, which contributed to a decrease in the overall efficiency of the law enforcement system of the republic. In March 1919, the Instruction "On the organisation of the workers' and peasants' militia of the Ukrainian SSR" was approved, which provided for the creation of the Soviet militia department in the status of a subdivision of the NKVD of the Ukrainian SSR with the subordination of provincial militia departments to it. Along with this, district militia departments and militia departments in cities were created. Over time, criminal investigation bodies were created as part of the People's Commissariat of Justice of the Ukrainian SSR. The change in the administrative-territorial division of the Ukrainian SSR in the mid-1920s led to the creation of a new structure of the militia apparatus with the liquidation of provincial militia departments and the distribution of their employees to the newly created administrative districts and regions. And according to the Resolution of the Council of People's Commissars of the Ukrainian SSR of August 25, 1928 "On District Meetings of Soviets", administrative militia departments were created within the district executive committees, which were to provide administrative and military administration, militia and criminal investigation.

3. General specificities of the activities of law enforcement bodies

A characteristic feature of the work of militia officers was the overload of duties, which was due to lack of staff. On June 16, 1924, at the meeting of People's Commissars of Internal Affairs of the Union Republics, a significant reduction in the staff of criminal investigation and militia was noted due to lack of funds (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. Therefore, in October 1922 in Kharkiv province, most of the 194 militia officers were workers and peasants who had no special professional training. Due to the lack of funds and the low level of training of operatives, covert work was practically not carried out (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

The relatively low credibility of law enforcement bodies and the specifics of their activities attracted people from a certain social environment to join them, many of whom considered the purpose of their involvement in law enforcement not so much to combat crime as to use power (Mikheieva, 2003, p. 172). In this regard, on September 18, 1922, the head of the Criminal Investigation Department of the Ukrainian SSR Mykhailov emphasised the need to improve the authority of the militia by purifying its ranks of persons who could not perform their duties and outright criminals who abused their official position (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

The documents of law enforcement bodies noted that the system of bribery in the militia in the first half of the 1920s was built on a clearly defined vertical. Bribery has become one of the sources of permanent income for militia officers of various ranks, and for the vast majority of NEPmen it has become a guarantee of their activities (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. At the same time, party and state officials, along with law enforcement officers, were not only involved in covering up the smugglers' affairs, but also in financing their activities, ensuring the avoidance of liability, including through illegal smuggling outside the USSR. These schemes involved not only militia and SPA officers (heads of the border unit of the Volyn provincial department of the SPA), but also personally the head of the commission for the study

of the border zone of the Ukrainian SSR Poluian (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

Extortion from traders and illegal appropriation of goods became widespread in a system where senior officials demanded regular bribes from their subordinates in the form of various kinds of "gifts", which created mutual responsibility (Website of the Central State Archive of Public Association, *cdago.gov.ua)*. This kind of relationship between superiors and subordinates not only neutralised success in crime control, but also ensured the formation of criminal organisations with the participation of law enforcement officers.

The liability of militia officers for official crimes remained extremely abnormal: paramilitary guards were tried by a military tribunal, and militia officers were tried by a secular court, qualifying such crimes as negligence of duty (Website of the Central State Archive of Public Association, *cdago.gov.ua)*.

The formation of a corrupt system of officials in law enforcement bodies frequently negated efforts aimed at "purification" of the militia ranks from bribe-takers, discipline violators, and thieves. This was due to the "immunity" of the top leadership of law enforcement bodies, based on their involvement in the party nomenclature, which did not allow for a fundamental renewal through large-scale recertification, while the participation of senior militia officials in the activities of family and landowner groups in the party environment made them vulnerable only in the event of the defeat of one or another group in the fight against competitors. Therefore, even after losing some of the subordinates who were convicted of various crimes, including those who fulfilled the whims of the top leadership, it received new executors by replacing their predecessors. Such a nature of the organisation of staffing in the militia not only neutralised the growth of the credibility of law enforcement bodies, but also formed confidence in the expediency of such state of affairs, because bribery became a guarantee of career growth, economic activity, turning into an important element of social relations. Moreover, the conviction of about 10% of law enforcement officers for criminal activities could not change the situation, as the number of convicted persons was only the "tip of the iceberg" due to the spread of latent crime in the presence of large-scale mutual responsibility, and the level of remuneration in law enforcement bodies only provoked some employees to participate in bribery.

4. Conclusions

Therefore, measures to reform law enforcement bodies, strengthen criminal repression, and mainly the economic transformations of the Bolshevik government contributed to a change in the qualitative structure of crimes and their quantitative characteristics, which led to measures of crime control under criminal law, which in the late 1920s was complicated not only by a sharp aggravation of social relations in the countryside, but also by the inability of law enforcement officials to control all localities, as the economic opportunities of wealthy and middle peasants for some time still allowed them to organise quite effective resistance, which resulted in mass violations of the law. Therefore, according to the top leadership of the USSR, the most effective means of suppressing the resistance of the peasantry to the policy of forced appropriation of their labour results was policy on collectivisation of agriculture.

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РЕФОРМА ПРАВООХОРОННИХ ОРГАНІВ ТА ЇЇ ВПЛИВ НА ОРГАНІЗАЦІЮ КРИМІНАЛЬНО-ПРАВОВОГО КОНТРОЛЮ ЗА ЗЛОЧИННІСТЮ У ПЕРШІЙ ПОЛОВИНІ 1920-Х РР.

Анотація. ***Мета.*** Метою статті є дослідження процесу реформування правоохоронних органів та його вплив на організацію кримінально-правового контролю за злочинністю у першій половині 1920-х рр. ***Результати.*** Наголошено, що радянські правоохоронні органи залучалися владними структурами до реалізації завдань по насадженню відповідного правлячого режиму, що передбачало їх участь у силових акціях, які негативно сприймалися більшістю населення. Це знижувало авторитет представників таких органів в очах громадськості, що багато в чому визначало характер їх комплектування. Відносно невисокий авторитет радянських правоохоронних органів впродовж 1920-х років пояснювався також вибірковістю їх протидії злочинцям, заснованою на класовій доцільності здійснення відповідної діяльності. Формування корумпованої системи чиновників у правоохоронних органах часто зводило нанівець зусилля по «очищенню» лав міліції від хабарників, порушників дисципліни, крадіїв. Це було пов'язано з тим, що «імунітет» вищого керівництва правоохоронних органів, заснований на залученні їх до партійної номенклатури, не дозволяв здійснити принципове оновлення через масштабну переатестацію, а участь вищих чиновників міліції у діяльності родинно-земляцьких угруповань в партійному середовищі робив їх вразливими лише у випадку поразки того чи іншого угруповання у боротьбі з конкурентами. Таким чином, навіть втративши частину підлеглих, які засуджувалися за різного роду злочини, в тому числі й виконуючи забаганки вищого керівництва, воно отримувало нових виконавців через заміщення їх попередників. ***Висновки.*** Зроблено висновок, що заходи у сфері реформування правоохоронних органів, посилення кримінальної репресії, а головним чином, економічні перетворення більшовицької влади сприяли зміні якісної структури злочинів та їх кількісних характеристик, що обумовлювало заходи кримінально-правового контролю за злочинністю, який наприкінці 1920-х років ускладнювався не лише різким загостренням соціальних відносин на селі, а й нездатністю працівників правоохоронних органів контролювати всі сільські населені пункти, оскільки економічні можливості заможних селян і середняків певний час ще дозволяли організовувати досить ефективний спротив, який виливався у масові порушення законів. Тому, на думку вищого керівництва СРСР, найбільш ефективним засобом придушення опору селянства політиці примусового вилучення у нього результатів праці стала політика колективізації сільського господарства.

Key words: правоохоронні органи, владні структури, населення, громадськість, протидія злочинцям.

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SPECIFICITIES OF REGULATORY FRAMEWORK FOR LIABILITY FOR ENDANGERMENT IN CRIMINAL LEGISLATION OF SOME POST-SOVIET STATES

Abstract. ***Purpose.*** The purpose of this article is to study the specificities of the regulatory framework for liability for endangerment in the criminal legislation of some post-Soviet countries (Republic of Azerbaijan, Republic of Belarus, Republic of Armenia, Georgia and Republic of Kazakhstan). ***Results.*** The article analyses the experience of establishing criminal liability for endangerment of such post-Soviet states as the Republic of Azerbaijan, the Republic of Belarus, the Republic of Armenia, Georgia, and the Republic of Kazakhstan. Given the different degrees of social dangerousness, it is proposed to use the experience of the Republic of Belarus and Georgia and to distinguish between the acts of deliberate abandonment of a person in danger without aid and putting the victim in harm's way by the perpetrator according to different parts of Article 135 of the Criminal Code of Ukraine. Moreover, the latter socially dangerous act is proposed to consider as a qualified corpus delicti of endangerment. The author supports the idea, implemented in the law on criminal liability of the Republic of Kazakhstan and to supplement Article 135 of the Criminal Code of Ukraine with Part 4, providing for such a specially qualified corpus delicti of endangerment, as the acts provided for in the previous parts of Article 135 if they caused the death of two or more persons. ***Conclusions.*** It is concluded that the experience of some post-Soviet states in establishing criminal liability for endangerment is quite interesting and deserves special attention in the context of modernisation of the current version of Article 135 of the Criminal Code of Ukraine. In particular, the ideas of expanding the sanction of Part 1 of Article 135 of the Criminal Code of Ukraine with such basic alternative punishments as correctional (Criminal Code of the Republic of Azerbaijan) and community service (Criminal Code of Georgia), to distinguish the act of abandonment from putting the victim in harm's way by the perpetrator between different parts of the article (Criminal Code of the Republic of Belarus and Georgia), to supplement Article 135 of the law on criminal liability with other specially qualified corpus delicti of endangerment (Criminal Code of the Republic of Kazakhstan) etc.

Key words: law, endangerment, crime, criminal code, punishment, corpus delicti.

1. Introduction

For many centuries in the territory of modern Ukraine, the socially dangerous act of endangerment has been criminalised. Currently, criminal liability for committing this crime is provided for in Article 135 of the Criminal Code.

Recently, frequent discussions in academic circles arise regarding the need to introduce a number of amendments to the current version of Article 135 of the Criminal Code of Ukraine. The study of the specificities of the regulatory framework for liability for endangerment in the criminal legislation of foreign countries is potentially capable of demonstrating the ways of modernisation of Article 135 of the Criminal Code of Ukraine, and of establishing its main shortcomings and controversial provisions.

In the context of this article, we will consider the specificities of the regulatory framework for liability for endangerment in the criminal legislation of individual countries that were part of the USSR. The relevance of such study is due to the fact that the collapse of the USSR became the starting point for the independent development of legislation (including criminal legislation) of the States that were part of it. Almost 30 years have passed since then, so, of course,

the legislation of each of them has undergone significant changes. Some of these countries even have similar problems as Ukraine.

It should be noted that the issue of analysing foreign experience in establishing criminal liability for committing a socially dangerous act has been and is under focus in the works by domestic scientists such as Yu.V. Alexandrov, V.V. Babanina, I.O. Bandurka, Yu.V. Baulin, V. I. Borysov, A.A. Vozniuk, O.A. Hrytenko, V.K. Hryshchuk, V.P. Yemelianov, O.S. Ishchuk, I.M. Kopotun, M.Y. Korzhanskyi, V.M. Kuts, O.M. Lytvynov, I.I. Mitrofanov, Ye.S. Nazymko, A.M. Orleans, Yu.V. Orlov, Ye.O. Pylypenko, V.F. Prymachenko, E.L. Streltsov, V.V. Sukhonos, Ye.V. Fesenko, P.L. Fris, M.I. Khavroniuk, V.V. Shablystyi, N.M. Yarmysh, and others. Despite this, the experience of the post-Soviet states in terms of establishing criminal liability for endangerment remains insufficiently researched.

The purpose of this article is to study the specificities of the regulatory framework for liability for endangerment in the criminal legislation of some post-Soviet countries (Republic of Azerbaijan, Republic of Belarus, Republic of Armenia, Georgia and Republic of Kazakhstan).

2. Peculiarities of the regulatory framework for liability for endangerment

Let us begin with the experience of the Republic of Azerbaijan. The law on criminal liability of this state was adopted in late 1999 (entered into force on September 01, 2000). This legal regulation consists of two parts: General and Special.

According to the Criminal Code of the Republic of Azerbaijan, the act of endangerment is criminalised and is included in Chapter Eighteen 'Crimes against life and health' of Section VIII 'Crimes against the person' (Criminal Code of the Republic of Azerbaijan (approved by the Law of the Republic of Azerbaijan, 1999).

Therefore, as in the Ukrainian law on criminal liability, the generic object of this criminal offense is social relations ensuring human life and health.

Article 143 of the Criminal Code of the Republic of Azerbaijan has the same title as Article 135 of the Criminal Code of Ukraine and provides for three alternative types of punishment (a fine of 1500 to 2000 manats or correctional labour for up to 2 years, or deprivation of liberty for up to 6 months) for deliberate abandonment of a person in a life-threatening or health-threatening condition or deprived of the opportunity to take measures for self-preservation in cases when the perpetrator had the opportunity to assist this person and was obliged to take care of him or her, or he or she him-/herself put the victim in harm's way (Criminal Code of the Republic of Azerbaijan (approved by the Law of the Republic of Azerbaijan, 1999).

Therefore, unlike Article 135 of the Criminal Code of Ukraine, Article 143 of the Criminal Code of the Republic of Azerbaijan consists of only one part and does not provide for qualified corpus delicti of endangerment.

In our opinion, such a decision of the legislator of the Republic of Azerbaijan looks quite controversial, because, for example, in case of death of a person who was endangered, the degree of social dangerousness of a criminal offense increases significantly, and therefore, the establishment of qualified corpus delicti of this crime is not just appropriate, but even a necessary step on the part of the state.

In addition, considering the degree of social dangerousness of endangerment, we believe that the decision to establish a penalty in the form of a fine in the sanction of Article 143 of the Criminal Code of the Republic of Azerbaijan is inappropriate, because we assume that in most cases this measure of state coercion is insufficient for further re-socialisation of the convicted person. The idea of establishing punishment in the form of correctional labour looks interesting.

Regarding the content of the sanction of Article 143 of the law on criminal liability of the Republic of the South Caucasus, the decision not to provide for imprisonment is surprising. This situation may theoretically lead to the fact that in a number of cases the offender, firstly, will receive a measure of coercion insufficient for correction, and, secondly, during the serving of the sentence will continue to pose a potential danger to social surrounding.

Moreover, similar to the domestic provision, Article 135 of the Criminal Code of the Republic of Azerbaijan characterises corpus delicti of criminal offense in the form of endangerment by a sign of knowledge.

Allowing for the judicial practice, V.M. Savytska came to the conclusion that Ukrainian courts in criminal cases consider knowledge as a feature that characterises the intellectual moment of intent, and therefore is part of this mandatory feature of the subjective side of a criminal offense as guilt, and is a full awareness of the offender of certain facts or circumstances (Savytska, 2020).

The indication of knowledge is extremely important, as it enables to bring to criminal liability the person who has endangered the victim due to negligence.

Thus, the provision of the Criminal Code of the Republic of Azerbaijan, which enshrines

criminal liability for endangerment, contains both debatable and quite interesting provisions. In particular, the experience of this Caucasian State in terms of expanding the sanction of the relevant provision by adding such an alternative type of punishment as correctional labour seems interesting.

Next, the experience of the Republic of Belarus in establishing criminal liability for endangerment should be analysed. The law on criminal liability of our northern neighbour was adopted in July 1999. This legal regulation consists of a General and a Special Part.

3. Endangerment in the criminal legislation of the Republic of Belarus, Georgia and Kazakhstan

As in the legislation of the previous state, the Republic of Belarus provides for criminal liability for endangerment. Article 159 of Chapter VII 'Crimes against human' of the Special Part of the Criminal Code of the Republic of Belarus is entitled 'Endangerment' and consists of three parts.

Part 1 of Article 135 of the Criminal Code of the Republic of Belarus states:

1. Failure to provide a person in danger with the necessary and clearly urgent assistance, if it could have been provided by the perpetrator without danger to his or her life, health or health of other persons, or failure to notify the relevant institutions or persons of the need for aid – shall be punishable by community service or a fine, or correctional labour for up to one year' (Criminal Code of the Republic of Belarus, 1999).

Therefore, in the law on criminal liability of the Republic of Belarus the legislator of this state decided to combine corpus delicti of endangerment and failure to assist. It should be noted that in the Criminal Code of Ukraine, these criminal offenses are delimited by Articles 135 and 136, because these socially dangerous acts, although quite similar in content, nevertheless, differ from each other in objective and subjective terms. At the same time, failure to assist a person in danger is a priori a form of endangerment.

These arguments indicate the ambiguity of the decision to combine the criminal offenses of endangerment and failure to assist a person in a life-threatening condition.

Part 2 of Article 159 of the Criminal Code of the Republic of Belarus (Criminal Code of the Republic of Belarus, 1999) provides for punishment in the form of arrest or deprivation of liberty for up to 2 years with or without a fine for deliberate abandonment of a person who is in a life- or health-threatening condition and is deprived of the opportunity to take measures for self-preservation due to minority, old age, illness or due to his or her helpless state, in cases when the perpetrator had the opportunity to assist the victim and was obliged to take care of him or her.

The disposition of this provision is partially similar to the provision of Part 1 of Article 135 of the Criminal Code of Ukraine, however, unlike the latter, it does not contain an indication of criminal liability for endangerment a person in case when the perpetrator put the victim in harm's way. This fact is explained by including this criminal offense in the content of Part 3 of Article 159 of the Criminal Code of the Republic of Belarus by the Belarusian legislator.

It should be noted that the sanction of Part 2 of Article 159 of the Criminal Code of the Republic of Belarus differs significantly from Part 1 of Article 135 of the Criminal Code of Ukraine. For example, if the domestic provision establishes for punishment such as restriction or deprivation of liberty, the Belarusian provision establishes two main punishments (arrest or restriction of liberty) and additional one – a fine.

Thus, the law on criminal liability of Ukraine provides for more severe penalties for endangerment (which, given the degree of social dangerousness of this act, we consider rather a positive difference). Moreover, another alternative punishment in the form of arrest enshrined in the sanction of Part 1 of Article 135 of the Criminal Code of Ukraine could be of interest.

As noted above, Part 3 of Article 159 of the Criminal Code of the Republic of Belarus establishes criminal liability for deliberate endangerment by a person who, through negligence or with indirect intent, put the victim in a harm's way. The sanction of this provision provides for punishment in the form of arrest or imprisonment for up to 3 years with a fine (Criminal Code of the Republic of Belarus, 1999).

The idea of establishing a more severe punishment for the act of endangerment by a person who him-/herself put the victim in harm's way generally looks quite interesting. Indeed, the creation of such conditions indicates a persistent anti-social behaviour of the perpetrator, so perhaps it is appropriate to qualify this crime of endangerment as provided for in Article 135 of the Criminal Code of Ukraine. Moreover, such a distinction between acts in the form of endangerment and putting the victim in harm's way has already been practiced in the content of legal regulations that have been in force in different historical periods in the territory of our state (for example, the Criminal Code of the Ukrainian SSR in 1922 (The Criminal Code of the Ukrainian SSR, 1924)).

Next, the experience of establishing criminal liability for endangerment in another post-Soviet state – Georgia is considered. It was Georgia that became one of the first states of the former USSR (of course, along with the Baltic States), which not only declared intentions, but also took real steps in building a democratic society.

The law on criminal liability of Georgia, as in the case of the above-mentioned states, was adopted in 1999. Chapter XXI of the Special Part of the Criminal Code of Georgia is entitled 'Endangerment of Human Life and Health'. Criminal liability for the act of endangerment is provided for in Articles 127-128 of the Chapter.

Article 127 (Criminal Code of Georgia: dated July, 1999) provides for punishment in the form of a fine or house arrest for a term of months to two years, or imprisonment for a term of up to two years for putting a person in a harm's way who is deprived of the opportunity to take measures for self-preservation.

Therefore, similar to the Criminal Code of the Republic of Belarus, in the law on criminal liability of Georgia the acts of endangerment of the victim and putting the victim in harm's way are delimited by different provisions (in case of the Criminal Code of the Republic of Belarus, by parts of one article, and in case of the Criminal Code of Georgia, by different articles of the Special Part). Moreover, even the sanction of Article 127 of the Criminal Code of Georgia is quite similar to the sanction of Part 3 of Article 159 of the Criminal Code of the Republic of Belarus, because both provisions provide for basic alternative types of punishment such as imprisonment and detention (in case of Georgia, house arrest). The main difference between these elements of the legal provisions is that in the law on criminal liability of Georgia for the commission of this crime the least severe type of the main alternative punishment is a fine, while in the sanction of Part 3 of Article 159 of the Criminal Code of the Republic of Belarus it is detention (a fine can be imposed only as an additional punishment).

It seems that in view of the increased degree of social dangerousness of the act in the form of putting the victim in harm's way by the perpetrator (even in comparison with abandonment of a person in a life-threatening condition and being deprived of the opportunity to take measures for self-preservation), the sanction of the Belarusian provision looks more successful, because the imposition of a fine for committing this criminal offense, at least in the vast majority of cases, is insufficient.

Article 128 of the Criminal Code of Georgia is called 'Endangerment'. This provision states:

'Abandonment of a person who is in a life-threatening condition and is deprived of taking measures for self-preservation, if the perpetrator was obliged to take care of him or her and was able to provide assistance, –

shall be punished by a fine, or correctional labour for a term up to one year, or community service for a term of 120 to 140 hours, or house arrest for a term of 6 months to 2 years, or imprisonment for a term up to 2 years' (Criminal Code of Georgia: dated July, 1999).

It follows from the content of the stated provision that the criminal offense provided for in Article 128 of the Criminal Code of Georgia is considered as more dangerous than that contained in Article 127 of this legislative act. Moreover, the decision of the Georgian legislator to provide for punishment such as community service in the sanction of Article 128 of the Criminal Code looks interesting. In certain cases, this type of punishment can be quite effective, because it has a double benefit: 1) it disciplines the perpetrator of endangerment and contributes to his or her further re-socialisation; 2) it plays an excellent preventive function for potential criminal offenses, because to a certain extent it hits their reputation, has a certain demonstrative and instructive role.

As in the above-mentioned Criminal Code of the Republic of Azerbaijan and the Republic of Belarus, the law on criminal liability of Georgia does not contain qualified elements of endangerment such as the commission of these actions by a mother in relation to a new-born child, if the mother was not in a condition caused by childbirth, and the death of the person who was endangered or other serious consequences, which, in our opinion, is a certain drawback of these legislative documents.

Let us consider the legislative provisions regarding the establishment of criminal liability for endangerment of a Central Asian state, the Republic of Kazakhstan.

The Criminal Code of the Republic of Kazakhstan was adopted in July 2014. Traditionally, this legal regulation consists of General and Special Parts. Article 119 'Endangerment' of Chapter I 'Criminal offences against a person' of the Special Part of the law on criminal liability of this state consists of 4 parts.

The disposition of Part 1 of Article 119 is almost identical to the disposition of Part 1 of Article 135 of the CC of Ukraine. However, in contrast to the domestic provision, the sanction of Part 1 of Article 119 of the Criminal Code of the Republic of Kazakhstan provides for milder types of punishment: a fine of up to 10 monthly calculation indices or correctional labour in the same amount, or community service for up to 120 hours, or detention for a term of 45 days.

Part 2 of Article 119 of the Criminal Code of the Republic of Kazakhstan provides for punishment in the form of a fine of up to 2000 monthly calculation indices or correctional labour in the same amount, or restriction of liberty for up to 2 years, or imprisonment for the same period for committing through negligence the actions listed in Part 1 of this provision, if they caused severe or moderate harm to the health of the victim (Criminal Code of the Republic of Kazakhstan, 2014).

If the above actions caused the death of a person who was endangered, the actions of the perpetrator are qualified under Part 3 of Article 119 (Criminal Code of the Republic of Kazakhstan, 2014), which provides for punishment in the form of restriction of liberty for up to 3 years or imprisonment for the same term.

It is clear that the consequence of the crime of endangerment described above carries a higher degree of social dangerousness than causing grievous or moderate bodily harm, therefore, such a principle of construction of Article 119 of the Criminal Code of the Republic of Kazakhstan, at least, deserves attention.

If the above actions of the perpetrator caused the death of 2 or more persons, he or she shall be liable under Part 4 of this provision, the sanction of which provides for punishment such as restriction or imprisonment for up to 5 years (Criminal Code of the Republic of Kazakhstan, 2014).

The idea to qualify endangerment, which led to the death of two or more people, as specific looks interesting. In particular, Part 2 of Article 115 of the Criminal Code of Ukraine is based on a similar principle.

Given the exceptional degree of social dangerousness of such a criminal offense, we assume that the consolidation of the relevant provision in Article 135 of the Criminal Code of Ukraine (as part 4) would be quite a reasonable step.

4. Conclusions

Therefore, it should be noted that the experience of some post-Soviet states in establishing criminal liability for endangerment is quite interesting and deserves special attention in the context of modernisation of the current version of Article 135 of the Criminal Code of Ukraine. In particular, the ideas of expanding the sanction of Part 1 of Article 135 of the Criminal Code of Ukraine with such basic alternative punishments as correctional (Criminal Code of the Republic of Azerbaijan) and community service (Criminal Code of Georgia), to distinguish the act of abandonment from putting the victim in harm's way by the perpetrator between different parts of the article (Criminal Code of the Republic of Belarus and Georgia), to supplement Article 135 of the law on criminal liability with other specially qualified corpus delicti of endangerment (Criminal Code of the Republic of Kazakhstan) etc.

We consider the analysis of the experience of the regulatory framework for liability for endangerment in the EU Member States to be a promising area for further research.

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ОСОБЛИВОСТІ РЕГЛАМЕНТАЦІЇ ВІДПОВІДАЛЬНОСТІ ЗА ЗАЛИШЕННЯ В НЕБЕЗПЕЦІ У КРИМІНАЛЬНОМУ ЗАКОНОДАВСТВІ ОКРЕМИХ ДЕРЖАВ ПОСТРАДЯНСЬКОГО ПРОСТОРУ

Анотація. ***Метою*** статті є дослідження особливостей регламентації відповідальності за залишення в небезпеці у кримінальному законодавстві окремих держав пострадянського простору (Азербайджанська Республіка, Республіка Білорусь, Республіка Вірменія, Грузія та Республіка Казахстан). ***Результати.*** У статті проаналізовано досвід встановлення кримінальної відповідальності залишення в небезпеці таких держав пострадянського простору, як Азербайджанська Республіка, Республіка Білорусь, Республіка Вірменія, Грузія та Республіка Казахстан. З огляду на різний ступінь суспільної небезпеки запропоновано скористатись досвідом Республіки Білорусь та Грузії та розмежувати діяння у вигляді завідомого залишення без допомоги особи, яка перебуває в небезпечному для життя стані від поставлення винним потерпілого в небезпечний для життя стан різними частинами ст. 135 КК України. При цьому останнє суспільно небезпечне діяння пропонується розглядати в якості кваліфікованого складу залишення в небезпеці. Підтримано ідею, яка реалізована в законі про кримінальну відповідальність Республіки Казахстан та доповнити ст. 135 КК України ч. 4, в якій передбачити такий особливо кваліфікований склад залишення в небезпеці, як діяння, передбачені в попередніх частинах ст. 135, якщо вони спричинили смерть двох або більше осіб. ***Висновки.*** Зроблено висновок, що досвід окремих держав пострадянського простору в частині встановлення кримінальної відповідальності за залишення в небезпеці є доволі цікавим та заслуговує на окрему увагу в контексті модернізації чинної редакції ст. 135 КК України. Зокрема, доречними виглядають ідеї розширити санкцію ч. 1 ст. 135 КК України такими основними альтернативними покараннями, як виправні (КК Азербайджанської Республіки) та громадські роботи (КК Грузії), розмежувати різними частинами статті діяння у вигляді залишення без допомоги особи, яка перебуває в небезпечному для життя стані від поставлення винним потерпілого в небезпечний для життя стан (КК Республіки Білорусь та Грузії), доповнити ст. 135 закону про кримінальну відповідальність іншими особливо кваліфікованими складами залишення в небезпеці (КК Республіки Казахстан) тощо.

Ключові слова: закон, залишення в небезпеці, злочин, кримінальний кодекс, покарання, склад кримінального правопорушення.

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BY-LAWS OF LEGAL FRAMEWORK FOR ACTIVITIES OF PROSECUTOR'S OFFICE AS AN ACTOR OF SECURITY AND DEFENCE SECTOR

Abstract. ***Purpose.*** The purpose of the article is to characterise the legal framework for the Prosecutor's Office as an actor of the security and defence sector, provided for in the provisions of by-laws. ***Results.*** The author emphasises the importance of outlining and characterising such legal framework for the Prosecutor's Office activity, which is provided for in by-laws. It is emphasised that the effectiveness of the protection of national interests from potential and real threats, as well as the performance of certain areas of their activities, directly depends on how fully and qualitatively the legal framework for functioning of the security and defence sector, as well as its individual actors, in particular the Prosecutor's Office of Ukraine, is determined. It is revealed that by-laws, which define the legal framework for the activities of the Prosecutor's Office as an actor of the security and defence sector, acquire a special status in the system of regulatory and legal mechanism. It is emphasised that in the context of the declaration of martial law, in the need of the prompt respond to potential and real threats to the national security of our state, the by-law regulatory level of public relations under the study is of particular importance. The by-laws that provide for the legal framework for the activities of the Prosecutor's Office of Ukraine as an actor of the security and defence sector are identified. The by-laws that define the legal framework for the activities of the Prosecutor's Office as an actor of the security and defence sector, allowing for the legal force of each of them, are analysed. ***Conclusions.*** It is established that the adoption of such regulations enables to define the full powers of the relevant structural units of the Prosecutor's Office in a more efficient way, to adjust their tasks and functions, to detail certain areas of activities of the Prosecutor's Office as an actor of the security and defence sector. It is noted that by-laws cannot establish new areas of activities of the Prosecutor's Office or give it additional full powers. They address issues related to the support of a certain area of activities, coordination and interaction, as well as many other organisational principles of the functioning of the Prosecutor's Office as a security and defence sector entity. It is proposed that Article 4 of the Law of Ukraine "On the Prosecutor's Office" should be supplemented with a new part: "2. The organisational framework for the activities of the Prosecutor's Office may be provided for by other legal regulations".

Key words: Prosecutor's Office, security and defence sector, legal framework, legal regulations, by-laws.

1. Introduction

The effectiveness of the protection of national interests from potential and real threats, as well as the performance of certain areas of their activities, directly depends on how fully and qualitatively the legal framework for functioning of the security and defence sector, as well as its individual actors, in particular the Prosecutor's Office of Ukraine, is determined. Analysis of the legal framework for the activities of the Prosecutor's Office as an actor of the security and defence sector is crucial in the context of studying the system of such actors in general and determining the place of this body in it.

The legal framework for the activities of security and defence sector entities has been under study in scientific works by Yu.I. Andriievska, O.M. Bandurka, K.V. Bondarenko, V.K. Horodenko, O. V. Dzhafarova, V.V. Krykun, A.H. Moseiko, O.O. Panova, S.P. Ponomarov, V.B. Pchelin, V.L. Synchuk, G.P. Sytnyk, N.A. Simonian, V.V. Sokurenko, M.M. Stefanchuk, V.P. Tiutiunnyk, V.V. Tsyhanov, S.O. Shatrava, O.M. Shevchuk, and others. However, despite the significant contribution of such achievements, many issues remained little researched or not researched at all. In particular, the issue of the legal framework

for the activities of the Prosecutor's Office as a security and defence sector entity has not been addressed.

The purpose of the article is to characterise the legal framework for the Prosecutor's Office as an entity of the security and defence sector, provided for in the provisions of by-laws.

2. Regulatory and legal mechanism for the activities of the Prosecutor's Office

The place of by-laws is determined by the fact that the legal framework cannot fully foresee the whole range of situations to be legally regulated, as a result of which the legislative level provides for the possibility to independently regulate social relations by the authorities, which, for example, allows to quickly determine the competence of various state bodies, the rights and duties of their officials and employees (Pchelin, 2011). In the context of the declaration of martial law, in the need of the prompt respond to potential and real threats to the national security of our state, the by-law regulatory level of public relations under the study is of particular importance.

As a component of the regulatory legal system of the activities of the Prosecutor's Office as an actor of the security and defence sector, by-laws in their totality can be considered as an independent system. This is due to the fact that the system, as an integral complex of interrelated elements, which, being a lower system, are at the same time elements of a higher system (Alekseev, Panyn, 1999). It should be noted that by-laws that provide for the legal framework for the activities of the Prosecutor's Office of Ukraine as an actor of the security and defence sector should be considered as the structural elements of this system. That is why such system will be much more branched than the higher system under consideration, since there will be much more actors authorised to adopt by-laws defining the legal framework for the activities of the Prosecutor's Office as a security and defence sector entity. We will analyse these legal regulations considering the legal force of each of them.

It should be noted that the possibility of applying the by-laws provided for by the legal framework for the Prosecutor's Office is not mentioned in the current national legislation. According to paragraph 14 of part 1 of Article 92 of the Constitution of Ukraine, the activities of the Prosecutor's Office shall be determined exclusively by the laws of Ukraine (Constitution of Ukraine, 1996). Moreover, according to part 1 of Article 4 (legislation on the Prosecutor's Office and the status of prosecutors) of the Law of Ukraine "On the Prosecutor's Office", the organisation and activities of the Prosecutor's Office of Ukraine, the status of prosecutors are determined by the Constitution of Ukraine, this and other laws of Ukraine, and international treaties in force, consented by the Verkhovna Rada of Ukraine as binding (Law of Ukraine On the Prosecutor's Office, 2014). We argue that these legislative provisions do not quite correspond to the real activities of the Prosecutor's Office as an actor of the security and defence sector. Indeed, the legal status, full powers of the Prosecutor's Office, the main areas of their activities can be regulated only by the laws and international treaties of Ukraine. However, the issues related to the organisational framework for such activities of the Prosecutor's Office, including as an actor of the security and defence sector, are mostly regulated by by-laws, as evidenced by the analysis below.

Primarily, the regulations of the President of Ukraine, who, in accordance with the provisions of Article 106 of the Basic Law of Ukraine, on the basis and in pursuance of the Constitution and laws of Ukraine, issues decrees and orders that are binding should be mentioned (Constitution of Ukraine, 1996). The examples of legal regulations of the President of Ukraine, providing for the legal framework for organising the activities of Prosecutor's Office as an actor of the security and defence sector, are as follows: Decree of the President of Ukraine "On the Symbols of the Prosecutor General's Office" of October 6, 2021 No. 506/2021; Decree of the President of Ukraine of September 22, 2014 No. 737/2014, which approves the list of positions of military prosecutors and investigators of military Prosecutor's Office and the maximum military ranks for these positions; Decree of the President of Ukraine "On state protection of the Prosecutor General's Office of Ukraine and ensuring the security of the Prosecutor General of Ukraine" of September 23, 1998 No. 1059/98; Decree of the President of Ukraine of June 11, 2021 No. 231/2021, which approves the Strategy for the Development of the Justice System and Constitutional Justice for 2021–2023; etc.

The Cabinet of Ministers of Ukraine is another entity that, by adopting the relevant by-law, determines the legal framework for organising the activities of the Prosecutor's Office as an actor of the security and defence sector. According to Article 117 of the Constitution of Ukraine, the Cabinet of Ministers of Ukraine within its competence issues resolutions and orders that are binding (Constitution of Ukraine, 1996). An example of such by-laws, which define the legal framework for organising the activities of the Prosecutor's Office as an actor of the security and defence sector, is Resolution 1392 of the Cabinet

of Ministers of Ukraine of September 7, 1998, which approves the List and description of uniforms of the Prosecutor's Office's officials who have been assigned class ranks; Resolution 505 of the Cabinet of Ministers of Ukraine "On streamlining the structure and conditions of remuneration of prosecutors" of May 31, 2012; Resolution 205 of the Cabinet of Ministers of Ukraine of April 15, 205, which approves the Procedure for reimbursement of unforeseen expenses in connection with the recall of prosecutors from annual basic or additional paid leave; Resolution 346 of the Cabinet of Ministers of Ukraine of May 27, 2015, which approves the Procedure for allocation of funds for the burial of a prosecutor or a person dismissed from the position of a prosecutor and determination of their amount; Resolution 1090 of the Cabinet of Ministers of Ukraine of December 9, 2015, which approves the Procedure for payment of monthly bonuses for long service to prosecutors and other employees of the Prosecutor's Office; etc.

3. Departmental legal regulations on the activities of the Prosecutor's Office

Therefore, today a fairly significant number of by-laws are adopted by the above-mentioned supreme public authorities to define the legal framework for the organisation of the activities of the Prosecutor's Office, including as an actor of the security and defence sector. Mostly, such acts regulate general issues of organisation of Prosecutor's Office' activities related to their staffing, financial, material and technical support, etc. The next group of by-laws will define the legal framework for the activities of the Prosecutor's Office as an actor of the security and defence sector in individual areas of their functioning. These are regulations of the Prosecutor's Office. According to Article 9 of the Law of Ukraine "On the Prosecutor's Office", the Prosecutor General issues orders on issues covered by his/her administrative full powers, within the scope of his/her authority, on the basis of and in pursuance of the Constitution and laws of Ukraine. Moreover, orders of the Prosecutor General, which are legal regulations, come into force from the day of their publication, unless otherwise provided by the act itself, but not earlier than the day of publication (Law of Ukraine On the Prosecutor's Office, 2014).

Nowadays, a significant number of these by-laws define the legal framework for the organisation of the activities of the Prosecutor's Office as an actor of the security and defence sector in certain areas, for example: Order 402 of the Office of the Prosecutor General "On the procedure for representation in court by the Prosecutor's Office, ensuring participation in the consideration of cases by the courts, a party or a third party in which the Prosecutor's Office, their officials and employees (self-representation) appear" of September 2, 2020, which was adopted to increase the efficiency and improve the organisation of activities regarding the Prosecutor's Office representation in court, ensuring participation in court hearings, in which the Prosecutor's Office, its officials and officers (self-representation) are a party or a third party (Order of the Office of the Prosecutor General On the procedure for representation in court by the Prosecutor's Office, ensuring participation in the consideration of cases by the courts, a party or a third party in which the Prosecutor's Office, their officials and employees (self-representation) appear, 2020); Order 4/1gn of the Prosecutor General's Office "On the organisation of prosecutorial supervision over the observance of laws by bodies that conduct investigative activities of December 3, 2012, in accordance with the provisions of which prosecutorial supervision is carried out by the relevant departments of the Prosecutor General's Office of Ukraine (Order of the Prosecutor General's Office on the organisation of prosecutorial supervision over the observance of laws by bodies that conduct investigative activities, 2012); Order 223 of the Prosecutor General's Office of Ukraine "On Order of the Prosecutor General's Office on the organisation of prosecutorial supervision over the observance of laws by bodies that conduct investigative activities, 2012" of September 18, 2015, which was adopted to ensure proper organisation of the work of the Prosecutor's Office of Ukraine in the field of international cooperation in criminal proceedings and effective supervision in this area (Order of the General Prosecutor's Office on the organisation of the work of the Prosecutor's Office of Ukraine in the field of international cooperation, 2015); Order 28 of the Prosecutor General's Office "On the approval of the Procedure for coordinating the activities of law enforcement agencies in the field of combating crime" of February 8, 2021, which defines the main tasks, principles, forms and procedure for coordinating the activities of law enforcement agencies in the field of combating crime (Order of the Prosecutor General's Office on the approval of the Procedure for coordinating the activities of law enforcement agencies in the field of combating crime, 2021); Order 370 of the Prosecutor General's Office "On the specifics of the organisation of the activities of specialised prosecutors' office in the military and defence sphere" of November 22, 2021, adopted to ensure the proper organisation of the work of specialised Prosecutor's Office in

the military and defence sector to perform certain functions, delimitation of their full powers with independent structural units of the Prosecutor General's Office, regional and district Prosecutor's Office (Order of the Prosecutor General's Office on the specifics of the organisation of the activities of specialised prosecutors' office in the military and defence sphere, 2021); etc.

In addition, a number of by-laws that define the legal framework for the organisation of the activities of the Prosecutor's Office as an actor of national security are adopted by the Prosecutor's Office together with other state authorities. For example, Joint Order of the Office of the Prosecutor General, the Ministry of Internal Affairs of Ukraine, the Security Service of Ukraine, the Ministry of Environmental Protection and Natural Resources of Ukraine, the Ministry of Agrarian Policy and Food of Ukraine of June 16, 2022 No. 94/363/150/226/356, which approves the Procedure for interaction between the Prosecutor's Office, the National Police of Ukraine, the Security Service of Ukraine, authorised state supervision (control) bodies, state specialised institutions during the detection and pre-trial investigation of criminal offenses against the environment; Joint Order of the National Agency of Ukraine for detection, search and management of assets derived from corruption and other crimes, the National Anti-Corruption Bureau of Ukraine, the Prosecutor General's Office of Ukraine, the Security Service of Ukraine, the Ministry of Internal Affairs of Ukraine, the Ministry of Finance of Ukraine of 20 October 2017 No. 115/197-o/297/586/869/857, which approves the Procedure for interaction in the consideration of appeals of the authorities, which conduct pre-trial investigations, prosecution and execution of requests from foreign states to identify and trace assets; Joint Order of the Prosecutor General's Office of Ukraine and the National Anti-Corruption Bureau of Ukraine of September 30, 2019 No. 215/114, which approves the Procedure for cooperation between the Office of the Prosecutor General and the National Anti-Corruption Bureau of Ukraine on certain issues; etc.

4. Conclusions

Therefore, the analysis reveals that by-laws should be considered as an independent group of legislation, the provisions thereof determine the legal framework for the organisation of the activities of the Prosecutor's Office as an actor of the security and defence sector. The adoption of such regulations enables to define the full powers of the relevant structural units of the Prosecutor's Office, to adjust their tasks and functions, to detail certain areas of activities of the Prosecutor's Office as an actor of the security and defence sector in a more efficient way. Moreover, by-laws cannot establish new areas of activities of the Prosecutor's Office or give it additional full powers, since this can be done only by adopting new laws or making appropriate changes to existing ones. Meanwhile, by-laws address issues related to the support of a certain area of activities, coordination and interaction, as well as many other organisational principles of the functioning of the Prosecutor's Office as a security and defence sector entity. Therefore, Article 4 of the Law of Ukraine "On the Prosecutor's Office" should be supplemented with a new part: "2. The organisational framework for the activities of the Prosecutor's Office may be provided for by other legal regulations".

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ПІДЗАКОННІ НОРМАТИВНО-ПРАВОВІ АКТИ, ЩО ВИЗНАЧАЮТЬ ПРАВОВІ ЗАСАДИ ДІЯЛЬНОСТІ ОРГАНІВ ПРОКУРАТУРИ ЯК СУБ'ЄКТІВ СЕКТОРУ БЕЗПЕКИ І ОБОРОНИ

Анотація. ***Мета.*** Метою статті є здійснення характеристики правових засад діяльності органів прокуратури як суб'єктів сектору безпеки і оборони, які закріплені в положення підзаконних нормативно-правових актів. ***Результати.*** Акцентовано увагу на важливості виокремлення та здійснення характеристики такої групи правових засад діяльності органів прокуратури, яка визначена в підзаконних нормативно-правових актах. Наголошено, що від того, наскільки повно й якісно визначено правові засади функціонування сектору безпеки і оборони, а також його окремих суб'єктів, зокрема прокуратури України, напряму залежить ефективність здійснення як у цілому захисту національних інтересів від потенціальних і реальних загроз, так і реалізації окремих напрямів їх діяльності. З'ясовано, що особливе місце в системі нормативно-правового регулювання посідають підзаконні нормативно-правові акти, що визначають правові засади діяльності органів прокуратури як суб'єктів сектору безпеки і оборони. Підкреслено, що в умовах оголошення воєнного стану, необхідності максимально швидко реагувати на потенційні та реальні загрози національній безпеці нашої держави, підзаконний рівень регламентації досліджуваної сфери суспільних відносин набуває особливого значення. Виокремлено підзаконні нормативно-правові акти, які закріплюють правові засади діяльності органів прокуратури України як суб'єктів сектору безпеки і оборони. Здійснено аналіз підзаконних нормативно-правових актів, що визначають правові засади діяльності органів прокуратури як суб'єктів сектору безпеки і оборони, з урахуванням юридичної сили окремого з них. ***Висновки.*** Встановлено, що за допомогою прийняття таких актів стає можливим в більш оперативний спосіб визначити повноваження відповідних структурних підрозділів прокуратури, скорегувати їх завдання та функції, деталізувати певні напрями діяльності органів прокуратури як суб'єктів сектору безпеки і оборони. Зазначено, що підзаконні нормативно-правові акти не можуть встановлювати нові напрями діяльності прокуратури або ж наділяти її додатковими повноваженнями. Вони вирішують питання, пов'язані із забезпеченням певного напряму діяльності, здійснення координації та взаємодії, а також багато інших організаційних засад функціонування органів прокуратури як суб'єктів сектору безпеки і оборони. Запропоновано, ст. 4 Закону України «Про прокуратуру» має бути має бути доповнена новою частиною: «2. Організаційні засади діяльності прокуратури можуть бути визначені іншими нормативно-правовими акта».

Ключові слова: органи прокуратури, сектор безпеки і оборони, правові засади, нормативно-правові акти, підзаконні нормативно-правові акти.

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EXAMINATION OF A WITNESS IN CONDITIONS ENSURING THEIR SAFETY

Abstract. The purpose of the article is to study the organizational, tactical, procedural, and psychological features of witness interview while simultaneously taking measures to ensure his safety. ***Research methods.*** The scientific article is written by using general philosophical and special methods of scientific knowledge: dialectical, formal-logical, logical-legal, comparative, generalization, etc. ***The results.*** The tactics of questioning a witness are formed considering their status (eyewitness, witness, expert, whistleblower, confidant, etc.), age, and depend on the investigative situation in a specific criminal proceeding, real and potential threats to such persons, their relatives and dear ones. If there are sufficient grounds to believe that the witness's life is in danger, his interrogation should be conducted in conditions ensuring the confidentiality of personal information. In the case of illegal influence on the witness after giving his testimony, it is advisable to re-interview him with a pseudonym assigned to him. Obtaining objective information from minors and simultaneously ensuring their safety depends on the skillful organization of the procedure of their interview with the participation of a legal representative and a psychologist. Hearing a witness in a court session by an investigating judge during a pre-trial investigation via video conference is the most expedient for tactical reasons when the witness's life and health are in danger. ***Conclusions.*** A scientific analysis of the peculiarities of questioning persons with the status of a witness in conditions that ensure their safety made it possible to state that the format and tactics of their conduct depend on the age of the interrogated person, the investigative situation, his personal characteristics, the trust of authorized persons in his testimony, etc. The safety of the witness, his family and relatives are priority over the possibility of obtaining evidence through questioning the witness in criminal proceedings.

Key words: witness, criminal proceedings, procedural status, guarantees, security.

1. Introduction

At the stage of pre-trial investigation, rights and freedoms of participants in criminal proceedings, including witnesses, are mostly exercised through authorized persons – investigator, inquirer, detective, prosecutor, and investigating judge. The Criminal Procedure Law defines an exhaustive list of investigative (search) actions that can be carried out by mentioned authorized persons for collecting and verifying evidence in criminal proceedings and which are necessary for the proper performance of criminal justice tasks.

The Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) includes the following investigative (search) actions: interrogation (simultaneous interrogation of two or more persons who have already been questioned) (Articles 224–226, 232); presentation for identification: person (Article 228), things (Article 229), corpse (Article 230); search of a person's home or other possessions (articles 233–236); inspection: locality, premises, things and documents (Article 237), corpse (Article 238), corpse related to exhumation (Article 241); investigative experiment (Article 240); conducting an examination (Articles 242–243) (Criminal Procedure Code of Ukraine, 2012). At the same time, the legislator defines investigative (search) actions during which security measures are applied to participants in criminal proceedings: the questioning of a witness and the simultaneous questioning of two or more already questioned persons in a court session by an investigating judge during a pre-trial investigation, including remotely (Part 1 Article 225, Part 2 Article 232 of the CPC of Ukraine); identification without visual and audio observation of the person who is presented for identification (Part 4 of Article 228 CPC of Ukraine); interrogation/identification by video conference

during the pre-trial investigation (Article 232 of the CPC of Ukraine).

Hypothetically, a witness may be involved in all of the listed investigative (search) actions, and during some of them, they may be in danger, there may be a risk of its occurrence. And this is not surprising, because among all participants in criminal proceedings, the figure of a witness is the most vulnerable. In most cases, the relevant subject of legal relations has reliable and extremely important information for criminal proceedings, which can become a key moment in solving the tasks of criminal proceeding (Klymchuk, Marko, Priakhin, Stetsyk, Khytra, 2021, 208).

The most common investigative (research) action, during which a decision is made to keep the identity of a witness confidential, is an interrogation. This is dictated by the need to ensure their safety and protection against threats, blackmail, attempts at physical influence, destruction of property, etc.

The widespread use of witness testimonies in criminal proceedings and, in some cases, the insufficiency of the scientific development of ensuring their reliability in the conditions of such an external factor as a threat to the safety of the vital interests of their bearer, actualize the study of organizational tactical, procedural and psychological features of the interrogation of a witness with the simultaneous adoption of measures to ensure their safety.

The problems of obtaining and verifying testimonies of participants in criminal proceedings during the pre-trial investigation have long been the subject of scientific research. Certain aspects of the interrogation of witnesses taken under protection were analyzed by such scientists as: Yu. Andreiko (Andreiko, 2015, pp.123–131), G. Denisenko (Denysenko, 2020), S. Karpushyn (Karpushyn, 2016), Yu. Lozynska (Lozynska, 2018), O. Solyonova (Solonova, 2018), S. Tomin (Tomyn, 2018, pp. 431–436), and others. The scientific achievements of the above and other scientists in criminal procedural law and criminology are the basis for the study of organizational tactical, procedural and psychological features of witness interrogation in conditions that ensure their safety.

2. Procedural and organizational aspects of questioning a witness taken under protection

Witness interview belongs to verbal investigative (search) actions, that is, actions during which verbal information is received, which constitutes such a source of evidence as the testimony of a witness.

The person of the witness is the object of research both in criminology and in criminal procedural law, and the laws studied within the scope of these sciences have a clearly expressed and generally recognized difference. However, the difference in the subjects of criminology and criminal procedural science does not exclude a partial coincidence of the objects of research (Belkin, 1970, p. 40). Moreover, the combination of such an integrative approach will contribute to the development of the most effective tools for obtaining reliable testimony of a witness in the conditions of ensuring his safety.

Examining the procedural aspect of the testimony of a witness, it should be noted that the use of information as evidence provided by witnesses, who are subject to security measures at the pre-trial investigation stage, is generally consistent with the provisions of the European Convention on Human Rights. At the same time, the European Court of Human Rights emphasizes the impossibility of passing a sentence solely on the basis of the testimony of such witnesses, which in any case must be confirmed by other evidence (Case of Van Mechelen and others V. the Netherlands, 1997).

In addition, it is worth mentioning that not disclosing the personal data of witnesses who are interrogated in conditions that exclude their visual observation limits the accused's right to defense, since he cannot fully assess the credibility of such testimony. There are known cases in judicial practice when anonymous witnesses are involved not for the purpose of ensuring their safety but for providing false testimony and avoiding criminal liability. Thus, pre-trial investigation bodies can engage such persons in order to realize the procedural interests of the accused party, thereby abusing the right.

The foregoing points to the need to develop effective mechanisms for the protection of witnesses in criminal proceedings and, at the same time, to standardize and practically implement the procedures for obtaining testimony. At the same time, it should be emphasized that the practical absence of methodical recommendations regarding the organization of interview of a witness taken under protection may lead to certain limitations in the application of tactical methods of obtaining such testimony, which may have negative consequences for both the interrogated person and the entire criminal proceedings. The above confirms the importance of developing a typical program of actions of an authorized person who conducts an interview upon real or potential threat to the life, housing, health, property of the witness, their relatives and close ones.

It is axiomatic that the tactics of questioning witnesses who are not interested in solving the case should be reduced to a detailed

reproduction of the circumstances important for the investigation using tactical techniques aimed, in particular, at restoring forgotten facts in their memory (Heselev, Prysiazhniuk, Sokolova, Shcherbakova, 2012, p. 277). For example, during the questioning of witnesses in the proceedings on the receipt of an illegal benefit by an official, the following are found out: the source from which the person received the illegal benefit or with the help of which he made a bribe, the origin of funds, the circle and location of persons, the way of life of criminals, etc. (Andreiko, 2015, p. 128).

At the same time, when interrogating a witness taken under protection, the investigator must choose options for tactical decisions depending on the investigative situation that has developed in the criminal proceedings. Consequently, if the person is unknown to the suspect and his close circle, the questioning of such a witness, taken under protection, should be conducted without specifying the real data about his identity (surname, first name, patronymic, etc.) and assign him the pseudonym of the participant of the investigation (investigative) actions If the suspect knows the witness, then it is necessary to change the information about the person being interviewed and draw up two records of the interview of the said witness: one – with real information about the person being interviewed, which may contain true, but meaningless statements; the other – with fictitious personal data (pseudonym), but with reliable information about the circumstances of the criminal offense. The simultaneous drawing up of two records of the interview of a witness who is subject to security measures allow diverting suspicion from him on the part of the suspect.

In order to ensure the confidentiality of information about the person for whom security measures have been taken, the investigator must carefully think through the sequence and wording of questions during the interrogation. In the protocol of witness review, along with his personal data, the text of his testimony is contained, the analysis of the features of which makes it possible to establish the identity of the interrogated by the style of the presentation, the content of the information provided, its source, etc. In this regard, it is expedient for the investigator to record the testimony, keeping only the content of evidentiary information in the text of the protocol, omitting some non-essential details. At the same time, it is advisable to use words and sentences that do not contain stylistic and syntactic features of the interrogated language. In cases where a witness declares to the investigator about illegal influence on him after he has already been questioned in criminal proceedings, in order to keep information about his identity secret, it is advisable to conduct the interrogation again with the assignment of a pseudonym to the witness of investigative (search) action.

3. Organization of the interview of a minor witness in conditions that ensure their safety

Underage witnesses can fall under a negative impact during investigative (search) actions. In this connection, there is a problem of obtaining objective information from such a specific category of participants in criminal proceedings while simultaneously ensuring their safety. This is due to the fact that the behavior of minors is influenced by the perception of social space. Criminal proceedings involving minors must be carried out with the application of special rules that equally ensure an increased level of protection of the rights and interests of all minors, regardless of their procedural status.

If a minor is an accidental witness to a criminal offense, the question of his interrogation as a witness should be decided only with the consent of his legal representative, because there is a threat to the safety of the child, which is more important than even obtaining information that has evidential value. If the legal representative objects to the questioning of a minor witness, conducting investigative (search) actions with his participation is inadmissible. If the legal representative agrees to question the minor as a witness, the investigator must take possible measures to ensure the safety of the child.

In this situation, the information about the personal data of the minor witness should be classified as much as possible. It should be taken into account that the participants in the criminal process who have an interest in it – the suspect, the accused, their defense attorneys – have access to the materials of the criminal proceedings and can obtain information about the data of the minor witness. Under such circumstances, the investigator must ensure the confidentiality of the specified information in the event of a threat to the safety of a minor.

The legal representative of a minor witness must be explained the situation in connection with which the child is involved in participating in criminal proceedings as a witness, as well as the possible risks for him related to this. Only after that, the legal representative should express his decision regarding the possibility of the child's participation as a witness.

In addition, the legal representative should be made aware of the obligation to report information about persons who express an interest in a child witness in criminal proceedings. If such an interest was expressed before the minor was invited as a witness, the legal representative must report this fact.

When receiving information about the legal representative committing actions directed against the child's interests, the information must be verified, and in case of confirmation, the issue of replacing the legal representative and bringing him to justice should be decided.

The participation of a psychologist is an unconditional guarantee of the protection of the rights of minors in the conduct of investigative (search) actions with their participation. The intellectual features of a child, depending on his age, are determined by a child psychologist, who can give a conclusion about his mental state, the ability to perceive and reproduce the received information, intellectual features that affect the behavior and development of the child, the feasibility of involving him in participation in investigators (search) actions.

In our opinion, the question of questioning a minor should be decided by an authorized person after consultation with a psychologist. We consider it inappropriate to interrogate a child under the age of 6, as his consciousness is not sufficiently formed to understand the information received, and its static reproduction may lead to an incorrect assessment of the event that took place.

In addition, in order to ensure the safety of a minor witness, all persons who have information about his participation should be warned of criminal liability for its disclosure, as it is of value for the pre-trial investigation. Such an approach will ensure the safety of a minor witness involved in investigative (search) actions, will allow obtaining objective information without causing the child various stressful conditions.

4. Interrogation of witnesses who assist in the investigation of criminal offenses

A different tactical approach should be used during the interrogation as witnesses of persons involved in criminal proceedings, i.e., whistleblowers, confidants, knowledgeable persons, etc.

In accordance with Part 2 of Art. 256 of the CPC of Ukraine, persons who, during confidential cooperation, participated in the conduct of secret investigative (research) actions, may be questioned as witnesses with the provision of confidentiality of information regarding them and the application of security measures provided for by current legislation (Criminal Procedure Code of Ukraine, 2012). Whistleblowers, as persons who provide assistance in preventing and combating corruption, can be both persons cooperating with the investigation (entered into a plea agreement) and witnesses in criminal proceedings (Tomma, 2019, p. 300). Depending on the circumstances of the event in criminal proceedings on receiving an illegal benefit by an official, the intermediary can be both a suspect and a witness. In such criminal proceedings, the subject of questioning of the mediator's witness is the circumstances of his involvement as a mediator, the amount of remuneration, etc. (Andreiko, 2015, p. 130).

Scientific sources substantiate the opinion about the possibility of questioning an expert during a pre-trial investigation. This is related to the provision of paragraph 1, part 5 of Article 69 of the Criminal Procedure Code of Ukraine, according to which the expert is obliged to give a reasoned and objective written opinion on the questions put to him, and if necessary, to explain it (Criminal Procedure Code of Ukraine, 2012). During the pre-trial investigation, the expert, if necessary, may be questioned by the investigator, prosecutor, investigating judge as a witness in a specific proceeding regarding the conclusion given by him within the meaning of Part 1 of Article 65 of the CCP of Ukraine. An essential feature of the expert's testimony is that it is an explanation, clarification and addition to the content of the conclusion, and therefore, the facts previously limited by the given conclusion are its continuation (Vorobchak, 2019, p. 46).

In addition, knowledgeable persons who did not give a conclusion about which the questioning is being conducted are most often questioned as witnesses to obtain information about those circumstances for the investigation of which special knowledge is required. Such evidence mainly consists in providing reference and explanatory assistance on certain issues that require knowledge in certain fields of knowledge (Pchelina, 2021, p. 362). Taking into account the fact that the testimony of knowledgeable persons who provide assistance in criminal proceedings as specialists may contradict the interests of the parties to the criminal proceedings, there is a possible risk of putting pressure on them, their relatives and friends.

It is worth noting that the list of procedural, organizational, and tactical problems during the interrogation of a witness taken under protection is not limited to those presented in the article. In today's conditions, the procedure for obtaining and verifying the testimony of the specified subject of the criminal process as part of his interrogation at the court session by the investigating judge during the pre-trial investigation, remotely in the video conference mode (Part 1 of Article 225, Part 2 of Article 232 of the CPC of Ukraine) requires special attention of Ukraine), at the request of a competent body of a foreign state (Article 567 of the CPC of Ukraine), and should become the subject of further scientific investigations.

5. Conclusions

Thus, the tactics of witness interrogation are formed considering the typical interrogation program of a person with the status of a witness (eyewitness, witness, expert, whistleblower, confidant, etc.), his age, and depends on the investigative situation in a specific criminal proceeding, real and potential threats to such persons, their relatives and friends.

If there are sufficient grounds to believe that the life, housing, health, property of the witness, his family and relatives are in danger, his interrogation should be conducted in conditions that ensure the confidentiality of personal information. In cases where a witness declares to the investigator about illegal influence on him after he has already been interrogated in criminal proceedings, in order to keep the data about his identity secret, it is advisable to conduct the interrogation again with assigning the pseudonym of the participant of the investigative (search) action to the witness.

Obtaining objective information from minors and ensuring their safety at the same time depends on the skillful organization by investigators of the procedure of questioning such a witness with the participation of a legal representative and a psychologist, taking measures to ensure the confidentiality of information about the child. A different tactical approach should be used during the interrogation as witnesses of persons involved in criminal proceedings, i.e., whistleblowers, confidants, knowledgeable persons, etc., the interrogation subject of which depends on their procedural status; they are interrogated according to the rules of witness interrogation.

When deciding on the expediency of questioning a witness, the authorized person should remember that there is no need to expose the witness, his relatives and friends to danger, to risk evidence, the presence of which largely depends on the sense of personal security of the person giving evidence, that expose the suspect in the commission of a criminal offense. For tactical reasons, it is advisable to interrogate a witness in a court session by an investigating judge during a pre-trial investigation (Article 225 of the Criminal Code of Ukraine) or via video conference (Article 232 of the Criminal Code of Ukraine).

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ДОПИТ СВІДКА В УМОВАХ, ЩО ЗАБЕЗПЕЧУЮТЬ ЙОГО БЕЗПЕКУ

Анотація. ***Мета.*** Дослідити організаційні, тактичні, процесуальні та психологічні особливості допиту свідка з одночасним вжиттям заходів щодо забезпечення його безпеки. ***Методи дослідження.*** Наукова стаття написана з використанням загальнофілософських та спеціальних методів наукового пізнання: діалектичного, формально-логічного, логіко-юридичного, порівняльного, узагальнення та ін. ***Результати.*** Тактика допиту свідка формується залежно від його статусу (очевидець, свідок, експерт, викривач, довірена особа тощо), віку, а також залежить від слідчої ситуації в конкретному кримінальному провадженні, реальних і потенційних загроз таким особам, їх родичам і близьким. За наявності достатніх підстав вважати, що життєвим благам свідка загрожує небезпека, його допит повинен проводитися в умовах, що забезпечують конфіденційність відомостей про особу. У разі незаконного впливу на свідка після дачі ним показань доцільно провести його повторний допит під присвоєним йому псевдонімом. Від умілої організації процедури їх допиту за участю законного представника та психолога залежить отримання об'єктивної інформації від неповнолітніх і водночас забезпечення їх безпеки. Допит свідка в судовому засіданні слідчим суддею під час досудового розслідування в режимі відеоконференції є найбільш доцільним з тактичних міркувань, коли існує загроза життю та здоров'ю свідка. ***Висновки.*** Науковий аналіз особливостей допиту осіб, які перебувають у статусі свідка в умовах, що забезпечують їхню безпеку, дав змогу констатувати, що формат і тактика їх проведення залежать від віку допитуваної особи, слідчого. ситуація, його особисті характеристики, довіри уповноважених осіб до його показань тощо. Безпека свідка, його рідних та близьких є пріоритетною перед можливістю отримання доказів шляхом допиту свідка у кримінальному провадженні.

Ключові слова: свідок, кримінальне провадження, процесуальний статус, гарантії, безпека.

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Tarasenko, Oleh (2022). Actors of detection of criminal offenses related to illegal content on the internet and the scope of their search activities. *Entrepreneurship, Economy and Law*, 7, 124–130, doi

ACTORS OF DETECTION OF CRIMINAL OFFENSES RELATED TO ILLEGAL CONTENT ON THE INTERNET AND THE SCOPE OF THEIR SEARCH ACTIVITIES

Abstract. ***Purpose.*** The purpose of the article is to identify the actors of detection of criminal offenses related to illegal content on the Internet and the scope of their search activities. ***Results.*** The structure of the multilevel system of actors responsible for preventing criminal offenses related to illegal content on the Internet is determined, which is a totality of state bodies whose activities are fully or partially related to the prevention of using the Internet for unlawful purposes. The actors of the detection system are identified depending on the functions performed by them in the detection process: operational units, functions thereof include response to criminal offenses in the field of computer technology; operational units involved in the implementation of priority measures in the commission of criminal offenses related to illegal content on the Internet; confidants who perform "blocking" of objects where criminal intentions can be realised; employees of other law enforcement units who can receive primary information about the commission of criminal offenses related to illegal content on the Internet; state control bodies, functions thereof include ensuring cybersecurity of the state, and counteracting criminal offenses related to illegal content on the Internet (State Centre for Cyber Defence and Counteraction to Cyber Threats of the State Service of Special Communications and Information Protection of Ukraine). ***Conclusions.*** The scope of search activities during the detection of signs of placement and/or dissemination of illegal content is distinguished enabling to conclude that they have significant differences from the "classical" scope of search, due to the fact that the electronic environment in which the search for factual data is carried out is formed by a totality of information carriers, software and hardware for automated information processing and telecommunication networks (material media, electric fields and signals, means of their processing, communication channels, etc.)

Key words: illegal content on the Internet, criminal offenses, detection, actors, scope of search activities.

1. Introduction

The development of the information society gives new impetus to traditional threats and creates fundamentally new challenges for combating cybercrime. In such context, it is of particular importance to find new opportunities for active counteraction, timely detection of signs of criminal offenses in cyberspace, including the commission of criminal offenses related to illegal content on the Internet. Although Ukraine began to enter the information space only in the early 1990s, this caused a sharp surge in computer crime, which requires to develop appropriate legal tools, adapting them to new technologies, to define the actors who will use them and to identify the scope of their search activities The relevancy of this problem is also determined by the rapid development of a new type of illegal activities – transnational computer crimes, a sharp increase in criminal computer professionalism, active migration of criminals and organisation of their actions, international nature, which significantly complicates the criminogenic situation (Borysova, 2007, p. 17) and necessitates close consolidation of these actors with foreign and international bodies that perform identical functions in their own countries. The search for signs of these criminal actions is carried out within the organisational and tactical system

of detection of criminal offenses related to illegal content on the Internet. One of the main elements of this system is its actors, since their list determined, the functions and scope of application of search competence established are a prerequisite for identifying persons who commit (prepare to commit) criminal offenses related to illegal content on the Internet, establishing the circumstances related to the preparation for the commission of criminal offenses, as well as the place and time of its commission (Tarasenko, 2021, p. 266).

Several scientists have studied this issue. For example, D.S. Kosinova, K.I. Ivchuk, O.V. Cherniavskyi considered the issue of regulating the procedures for identifying the facts of threats in the field of cybersecurity in the context of implementing cybersecurity policy in the EU and Ukraine (Kosinova, Ivchuk, Cherniavskyi, 2021); T.V. Stanislavskyi made scientifically based proposals to increase Ukraine's ability to adequately counter cybersecurity threats and develop a national cybersecurity system, including by creating a system for their detection (Stanislavskyi, 2020). Several scholars argue that the detection of criminal offenses is the prerogative of all law enforcement bodies. For example, M. Borchakovskyi consistently builds a system of detection of criminal offenses and defines: areas and places of detection of latent criminal offenses (Borchakovskyi, 2016, pp. 17–19). Other scholars consider in detail certain elements of search activities not related to the commission of cybercrime (places of search for criminal offenses (Iermakov, 2019, pp. 241–246), areas and places of search activities (Shapovalov, 2018, pp. 304–314)); accordingly, they do not extrapolate them to the state system for detecting these criminal offenses. Therefore, in fact, the issues of identification of actors of search activities and their search full powers in this field remain unexplored.

The purpose of the article is to identify the actors of detection of criminal offenses related to illegal content on the Internet and the scope of their search activities.

2. Specificities of detection of criminal offenses in the field of computer technology

One of the elements of the detection system is its actors. Formally, the detection of criminal offenses in the field of computer technology, communication networks, etc., belongs to the functions of response units to cybercrime, but given the specifics of criminal offenses related to illegal content on the Internet, and that their consequences (material damage) can also be reflected in the performance of other units, then, in our opinion, other operational units can also be attributed to the actors (not in full, but in terms of certain functions performed to counter these offenses). The actors are identified depending on the functions performed by them in the detection process:

1) operational units, functions thereof include response to criminal offenses in the field of computer technology;

2) operational units involved in the implementation of priority measures in the commission of criminal offenses related to illegal content on the Internet;

3) confidants who perform "blocking" of objects where criminal intentions can be realised.

The analysis of scientists' opinions allows to attribute to the actors of detection also other law enforcement officers who can receive primary information about the commission of criminal offenses related to illegal content on the Internet.

It should be noted that the scope of these criminal offenses allows a number. of state control bodies, functions thereof include ensuring cybersecurity of the state, and counteracting criminal offenses committed in the field of computer technology, to be listed as the actors of detection:

Decree of the President of Ukraine No. 242/2016 of June 7, 2016 approved the Regulation on the National Coordination Centre for Cyber Security (Decree of the President of Ukraine On the National Coordination Centre for Cyber Security, 2016) (headed by the Secretary of the National Security and Defence Council, and composed of almost all heads of law enforcement bodies or their deputies). The competence of the National Coordination Centre for Cybersecurity is provided for by Part 2 of Article 5 of the Law of Ukraine "On Basic Principles of Cybersecurity of Ukraine", in particular, the Centre coordinates and controls the activities of the security and defence sector entities that ensure cybersecurity, submits proposals to the President of Ukraine on the formation and clarification of the Cybersecurity Strategy of Ukraine (Law of Ukraine On Basic Principles of Cyber Security of Ukraine, 2017).

The task of performing all procedures, including regulatory ones, is entrusted to the State Service of Special Communications and Information Protection of Ukraine (Law of Ukraine On the State Service of Special Communications and Information Protection of Ukraine, 2006), functions thereof include: accumulation and analysis of data on the commission and/or attempts to commit unauthorised actions against information resources in information and telecommunication systems, as well as their effects, informing law enforcement bodies to take measures to prevent and deter criminal offenses in this field; support

for the functioning of the governmental computer emergencies response team of Ukraine CERT-UA, created as teams of experts engaged in collecting information about cyber incidents, their classification and neutralisation); coordination of cybersecurity entities' activities on cyber defence; implementation of the organisational and technical model of cybersecurity, implementation of organisational and technical measures to prevent, detect and respond to cyber incidents and cyber-attacks and eliminate their effects; informing about cyber threats and appropriate methods against them; ensuring the implementation of an information security audit system at critical infrastructure facilities, establishing requirements for information security auditors, their certification (recertification); coordination, organisation and conducting of vulnerability audits of communication and technological systems of critical infrastructure facilities; ensuring the functioning of the State Centre for Cyber Defence (clauses 85-92 of the Law (Law of Ukraine On the State Service of Special Communications and Information Protection of Ukraine, 2006), Cyber Centre UA 30 (The National Security and Defence Council has adopted a strategy for the development of cybersecurity in Ukraine for 5 years, 2021)). In case of detection of cyber incidents and cyber-attacks that may pose a threat to the national security or defence capability of the state, the State Centre for Cyber Defence and Counteraction to Cyber Threats of the State Service of Special Communications and Information Protection of Ukraine informs the National Coordination Centre for Cybersecurity in the prescribed manner, as well as provides the necessary information from the State Register of Critical Infrastructure Objects, to form (adjust) the Cybersecurity Strategy of Ukraine and other strategic decisions in this field (Stanislavskyi, 2020, pp. 69-70). Regarding the participation in the detection of criminal offenses, the Administration of the State Special Communications Service of Ukraine proposed the Protocol of joint actions of the main actors of cybersecurity, cyber defence and owners (managers) of critical information infrastructure and during the prevention, detection, elimination of cyberattacks and cyber incidents, as well as in eliminating their effects (June 2019) (Order of the State Special Communications Administration On Approval of the Procedure for Coordination of Activities of Public Authorities, Local Self-Government Bodies, Military Formations, Enterprises, Institutions and Organisations Regardless of Forms of Ownership on Prevention, Detection and Elimination of Unauthorised Actions on State Information Resources-Telecommunication systems, 2008), according to which information is exchanged when taking measures to respond to cyber incidents and cyber-attacks (Draft Order of the Administration On Approval of the Protocol of Joint Actions of Major Cyber Security Entities, Cyber Security Entities and Owners (Managers) of Critical Information Infrastructure Facilities and in Preventing, Detecting, Terminating Cyber Attacks and Cyber Incidents, and in Eliminating Their Consequences, 2021). According to this procedure, in case of detection of an attempt to commit and/or commission of unauthorised actions in relation to information and telecommunication systems, the said entities shall perform the following actions: measures to immediately inform the State Service of Special Communications by sending an appropriate electronic message in the form established by this Procedure; the security administrator of the information and telecommunications system in respect of which attempts or unauthorised actions have been detected, shall take measures to inform CERT, which performs the functions of coordinator within the State Service of Special Communications, within 24 hours; owners/managers of information and telecommunication systems shall take measures to preserve (fix) the signs of unauthorised actions and implement, among other things, the recommendations of the coordinator, as well as physical access of his representatives to take measures to block and localise the negative effects of unauthorised actions and restore the system's performance.

Although the Protocol shall logically apply to both key actors of cybersecurity, actors of cyber defence and owners (managers) of critical information infrastructure, but the justification for its development (Analysis of the regulatory impact of the draft resolution of the Cabinet of Ministers of Ukraine on approval of the Protocol on joint actions of key actors of cybersecurity, actors of cyber defence and owners (managers) of critical information infrastructure during prevention, detection, cessation of cyberattacks and cyber incidents their consequences, 2021) states that its norms do not apply to cyber incidents that are not related to unauthorised actions against state information resources. Similarly, the Law (Law of Ukraine On Basic Principles of Cyber Security of Ukraine, 2017) does not apply to internal (local) computer networks that do not interact (are not connected to global computer networks). The relations that develop when using social networks, as well as "private" information electronic resources (apparently, non-state resources), are not regulated by the Law of Ukraine "On the Basic Principles of Cybersecurity in Ukraine" under certain conditions,

such as the absence of information, which protection is established by law (Dovhan, Doronin, 2017, p. 97).

This problem has already been considered in a slightly different context by scientists who argue that in general, the problem of developing and implementing organisational and legal mechanisms for strategic management of the development of cyber security of these objects is especially relevant in ensuring the cyber protection of critical infrastructure (Stanislavskyi, 2020, p. 54). However, the issue of ensuring interaction between the National Coordination Centre for Cybersecurity, the State Centre for Cybersecurity (Cyber Centre UA 30 (The National Security and Defence Council has adopted a strategy for the development of cybersecurity in Ukraine for 5 years, 2021)), Governmental Computer Emergency Response Team of Ukraine (CERT-UA) and other computer emergency response teams, as well as their interaction with international cyber defence centres remains uncertain. In our opinion, the effective implementation of the search function requires the staff of critical infrastructure facilities to involve a person who has the functions of countering cyber threats and interacting with the State Centre for Cyber Defence, and the central authorities that control the areas containing critical infrastructure facilities, shall have tasks defined in the regulatory documents (which regulate their activities) to provide information about such objects to the State Centre for Cyber Defence (indicating the critical state of such objects, a list of possible threats, actions during the implementation of such a threat for each of the possible situations and the ability to provide cyber defence on their own).

3. Specificities of the competence of the actors of the system of detection of criminal offenses related to illegal content on the Internet

Considering the competence of the actors, the issue of applying their search functions to certain areas should be under the focus, since it is the precise distribution of their full powers by places of search that ensures its effectiveness (areas where signs of criminal offenses can be detected, the main places where it is possible to obtain information about the commission of these criminal offenses or preparation for them). For these criminal offenses, these places are specific that the signs of the use of illegal content can be detected not only by the actors of search activities (or law enforcement activities), both in electronic form and in the form of material traces arising in the case of a criminal offense with the use of illegal content posted on the Internet. Accordingly, the primary information comes to operational units already in processed (distorted) form, and may not come at all (if the actors are not interested in providing such information to law enforcement bodies). A significant factor influencing the positioning of certain places as search areas is a difference between the concept of "criminal acts committed through the placement and dissemination of illegal content on the Internet" and the concept of "criminal offenses related to illegal content on the Internet", because in the second case the search areas can be unlimited and not subject to definition. Therefore, we consider not the scope of search for signs of criminal offenses related to illegal content on the Internet, but the places where actors can detect signs (facts) of placement and/or dissemination of illegal content.

The scope of search during detection of signs of placement and/or dissemination of illegal content has significant differences from the "classical" scope of search, and the place of direct commission of an illegal act with the use of computer technologies (primarily network technologies) (the place where the actions of the objective side of the criminal offense were committed) and the place of harmful consequences (the place where the result of the illegal act occurred) do not coincide (Holubiev, 2003, p. 143). In order to identify the signs of placement and/or dissemination of illegal content, it is necessary to link the information to specific technical means of its storage, transmission, reception and processing, that is, to specify the places of possible commission of a criminal offense.

In our opinion, such places are:

1) computer, which is a set of technical means and system software, enabling automated processing of information and obtaining the result in the required form;

2) automated systems processing data such as technical means, their processing (means of computing and communication), as well as methods and procedures, software;

3) computer (information) networks, which are a totality of geographically dispersed data processing systems, means and/or systems of communication and data transmission, which provides users with remote access to its resources and collective use of these resources;

4) telecommunication networks (telecommunication networks), which are a complex of technical means of telecommunications and facilities designed for routing, switching, transmitting and/or receiving signs, signals, written text, images and sounds or messages of any kind by radio, wire, optical or other electromagnetic systems between end equipment (Law of Ukraine on Telecommunications, 2003). The places of search do not include all of them, but only those that can be identified on

the basis of already available data (the victim's computer system; the victim's provider's server; the offender's computer system; the provider's servers and computer systems of third parties used by the offender (both without their knowledge and with their knowledge); other places of the network used by the offenders) (Spyropulos, 2013, p. 17);

5) places where malicious programs are created (directly at one of the workplaces of the automated information system in the organisation; at the place of residence of a person on his/her personal computer, etc;

6) separate premises or their complex, where automated systems with the corresponding technical complex of their activity support are located;

7) electronic media that ensure its safety;

8) organisations that assign addresses on the Internet, which during registration of a network on the Internet, are given a network identifier depending on the class (further identification of nodes in subnets of the network is carried out by the organisation-owner, and when a person connects to the Internet, his/her computer becomes part of the network and is assigned an IP address (which can be dynamic or static);

9) state regulatory authorities in the field of communications;

10) telecommunications operators, telecommunications providers;

11) manufacturers and suppliers of equipment, materials and means in the field of communications and informatisation, television and radio broadcasting equipment;

12) enterprises, institutions and organisations that use information or telecommunication technologies in their economic or business activities.

4. Conclusions

Therefore, the actors of the detection system are identified depending on the functions performed by them in the process of search activities: operational units, functions thereof include response to criminal offenses in the field of computer technology; operational units involved in the implementation of priority measures in the commission of criminal offenses related to illegal content on the Internet; confidants who perform "blocking" of objects where criminal intentions can be realised; employees of other law enforcement units who can receive primary information about the commission of criminal offenses related to illegal content on the Internet; state control bodies, functions thereof include ensuring cybersecurity of the state, and counteracting criminal offenses related to illegal content on the Internet (State Centre for Cyber Defence and Counteraction to Cyber Threats of the State Service of Special Communications and Information Protection of Ukraine). The scope of search activities during the detection of signs of placement and/or dissemination of illegal content is distinguished enabling to conclude that they have significant differences from the "classical" scope of search, due to the fact that the electronic environment in which the search for factual data is carried out is formed by a totality of information carriers, software and hardware for automated information processing and telecommunication networks (material media, electric fields and signals, means of their processing, communication channels, etc.)

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СУБ'ЄКТИ ВИЯВЛЕННЯ КРИМІНАЛЬНИХ ПРАВОПОРУШЕНЬ, ПОВ'ЯЗАНИХ З ОБІГОМ ПРОТИПРАВНОГО КОНТЕНТУ В МЕРЕЖІ ІНТЕРНЕТ ТА СФЕРИ ЇХ ПОШУКОВОЇ ДІЯЛЬНОСТІ

Анотація. ***Мета.*** Мета статті полягає у виокремленні суб'єктів виявлення кримінальних правопорушень, пов'язаних з обігом протиправного контенту в мережі Інтернет, та сфери їх пошукової діяльності. ***Результати.*** Визначено структуру багаторівневої системи суб'єктів, які уповноважені запобігати кримінальним правопорушенням, пов'язаним з обігом протиправного контенту в мережі Інтернет, що становить собою сукупність державних органів, діяльність яких повністю або в певній її частині пов'язана із недопущенням використання мережі Інтернет у протиправних цілях. Суб'єктів системи виявлення визначено залежно від функцій, що виконуються ними в процесі пошукової діяльності: оперативні підрозділи, до функцій яких відноситься протидія кримінальним правопорушенням у сфері комп'ютерних технологій; оперативні підрозділи, які беруть участь у проведенні першочергових заходів при вчиненні кримінальних правопорушень, пов'язаних з обігом протиправного контенту в мережі Інтернет; конфіденти, які здійснюють «перекриття» об'єктів, де можуть бути реалізовані злочинні задуми; працівники інших підрозділів правоохоронних органів, які можуть отримати первинну інформацію про вчинення кримінальних правопорушень, пов'язаних з обігом протиправного контенту в мережі Інтернет; державні контролюючі органи, до функцій яких віднесено забезпечення кібербезпеки держави, а, відповідно, і протидію кримінальним правопорушенням, пов'язаним з обігом протиправного контенту в мережі Інтернет (Державний центр кіберзахисту та протидії кіберзагрозам Державної служби спеціального зв'язку та захисту інформації України). ***Висновки.*** Виокремлено сфери пошукової діяльності під час виявлення ознак розміщення та/або обігу протиправного контенту та зроблено висновок, що вони мають суттєві відмінності від «класичної» сфери пошуку, що пояснюється тим, що електронне середовище, в якому здійснюється пошук фактичних даних, утворюється сукупністю носіїв інформації, програмно-технічних засобів автоматизованої обробки інформації та телекомунікаційними мережами (матеріальними носіями інформації, електричними полями та сигналами, засобами їх оброблення, каналами зв'язку тощо).

Ключові слова: протиправний контент в мережі Інтернет, кримінальні правопорушення, виявлення, суб'єкти, сфери пошукової діяльності.

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THE CONCEPT OF STATE RESPONSIBILITY TO A PERSON UNDER UKRAINIAN AIR LAW

Abstract. The article **aims** to study the legal regulation of Ukraine's responsibility to a person under air law. The research objective is to determine the basis of Ukraine's responsibility to a person under national air law. ***Research methods.*** The article uses the logical method of cognition, comparative analysis, and the method of theoretical research. An innovation involves a comprehensive attempt to determine the legal prerequisites (legal grounds, factual grounds, and conditions of state responsibility) based on international law and national legislation, in particular public and private law. The present study relies on a critical analysis of the norms of international air law and modern national law of Ukraine and law enforcement. The study **concluded** that the foundations of the concept of Ukraine's responsibility are laid in a universal international treaty – the Convention on International Civil Aviation of 1944. The central pillar of state responsibility is the recognition of the State's complete and exclusive sovereignty and ensuring the safe use of airspace. Ukraine has recognized the obligation to ensure flight safety and thus is responsible to a person for the safe use of sovereign airspace for aviation purposes, which is also confirmed by the constitutional obligation of Ukraine to ensure human rights and freedoms. In case of violation of such an obligation and causing harm to an individual, Ukraine will bear legal responsibility under the European Convention for the Protection of Rights and Fundamental Freedoms of 1952, the Constitution of Ukraine, the Law of Ukraine "On Transport", and Air and Civil Codes, which will take the form of compensation for moral and material damage, i.e., payment of funds. For causing harm to a person, Ukraine will bear civil liability under the Convention for the Unification of Certain Rules for International Carriage by Air of 1999, and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952. If a violation of the principle of safe airspace is committed by public authorities or officials, they will be subject to criminal, administrative, disciplinary, and civil liability.

Key words: individual, state, responsibility, air law, international legal responsibility, Ukraine.

1. Introduction

According to the definition of A.A. Kozlovskyi and Z.I. Boyarska (Kozlovskyi, Boyarska, 2010, pp. 8–12), the air law of Ukraine is a complex branch of law, which, firstly, constitutes an independent system of law with its specific branch and interbranch institutions; secondly, as a set, comprises a block of norms of another law branch (e.g., transport law): constitutional law, civil law, administrative law, criminal law, economic law, environmental law, land law, etc. Scientist V. V. Kostitskyi (Kostitskyi, 2008, pp. 4–9) notes that air law should not be identified with aviation law, as it is a broader branch of law regulating sovereignty, the general principles of airspace use for economic needs, environmental safety of the airspace, aviation law (current air law), and statutory regulation of the placement of high-rise buildings.

However, within this article, we deal with the concept of the Ukrainian State's responsibility to an individual under air law in terms of aviation law, that is, the branch of law regulating the application of air law toward civil aircraft flights. Scant attention has recently been paid to the responsibility of the State of Ukraine in air law. The following authors devoted their contributions to separate aspects of state responsibility in air law: O.V. Malovatskyi, V.V. Kostytskyi, A.A. Kozlovskyi, Z.I. Boyarskyi, O.M. Hrihorov, O.V. Brusakova, H.V. Tsyrot, K.A. Vazhna, P. Dempsey, N.M. Onishchuk, and J. Crawford.

The article aims to study the concept of Ukraine's responsibility under air law and determine the status of regulation of the State's responsibility to an individual. The article is a scientific attempt to establish whether Ukraine, under current legislation,

is responsible to an individual for airspace use for aviation purposes. The methods used in the study involve comparison, which allows ccorrelating the change in the responsibility concept; the method of logic was used to draw conclusions based on assumptions; analysis and theoretical research include attempts of scientific cognition of state responsibility under air law.

An innovation is the determination of state responsibility following the national air legislation of Ukraine. The present study relies on a critical analysis of modern developments of Ukrainian scientists, norms of law, and practice regulating different aspects of state responsibility to an individual for using the airspace.

2. Constitutional legal foundation of the state responsibility concept

Article 3 of the Constitution of Ukraine as of June 28, 1996, No. 254k/96-BP stipulates that human being, his or her life and health, honour and dignity, inviolability and security are recognised in Ukraine as the highest social value. Human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State.

It can be assumed that the above article of the Constitution enshrines the legal principle – the responsibility of the State to the individual. In other words, it is reasonable to assert that Ukraine has undertaken to act in the interests of the individual to ensure their rights and freedoms, and it is this obligation that constitutes the essence of Ukraine's functioning as a state. Our assumption is justified by paragraph 4 of item 2 of the Decision of the Constitutional Court of Ukraine dated 30.05.2001 No. 7-rp/2001 (case on the liability of legal entities): the court clarified that the Constitution of Ukraine enshrined the principle of the responsibility of the State to the individual for its activities, which is primarily manifested in the constitutional definition of the State's duties specified in Articles 3, 16, 22 of the Constitution. Moreover, such responsibility is not limited only to the political or moral responsibility of public authorities to society but also has certain features of legal responsibility, i.e., the application of public measures (in the present case – constitutional or international law) to the State and its bodies for failure to perform or improper performance of their duties.

The above supports our previous assumption that the Constitution of Ukraine enshrines the obligation of Ukraine (as a State) to guarantee the observance of human rights and freedoms; in case of violation of such obligations, legal responsibility comes to the State in the form of constitutional-legal or international-legal implications.

Thus, pursuant to the Constitution, the responsibility of Ukraine as a State to an individual is nothing more than the liability of the State to comply with obligations to ensure the inviolability of human rights (*primary duty*), and if human rights guaranteed by the Constitution are violated, a new obligation (*secondary duty*) arises to restore violated rights that entails applying public-legal and international-legal measures. This is how international legal responsibility is defined in the modern doctrine of international law (Crawford, 2013, pp. 45-92). However, it should be noted that the State may also be subject to private or civil law liability for violating international legal and constitutional obligations. Such an assumption is substantiated by paragraph 3 of the decision of the Constitutional Court of Ukraine dated 30.05.2001, No. 7- рп/2001, which declares that the division of legal responsibility according to the branch structure of law into civil, criminal, administrative and disciplinary is generally recognized. The conclusion must be interpreted with reference to paragraph 22 of Article 92 of the Constitution of Ukraine, which ascertains that exclusively the laws of Ukraine determine the principles of civil liability, acts that are crimes, administrative or disciplinary offenses, and ensuing liability. Such norms should be understood in such a way that exclusively the laws of Ukraine shall regulate the principles of civil liability (general grounds, conditions, forms of liability, etc.), the grounds for criminal, administrative and disciplinary liability, acts that are crimes, administrative or disciplinary offenses (the formal elements of offenses that constitute their bodies), and liability for them.

The logical conclusion is that the Constitution of Ukraine enshrines the constitutional liability of Ukraine, as a State, to act in such a way as to ensure the exercise and observance of human rights and freedoms, which transformed into a legal principle – the responsibility of the State to an individual for its activities. And if the State does not comply with obligations to ensure human rights and freedoms, there emerges a responsibility of the State: not only moral or political responsibility of public authorities, but specific criminal, administrative, disciplinary, civil, and international legal responsibility.

In turn, the constitutional grounds for certain types of liability are enshrined in Articles 80, 81, 91 of the Constitution – the responsibility of public authorities; Articles 56, 64, 153 of the Constitution – everyone has the right

to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of state authorities. At the same time, the very grounds, conditions, consequences and acts that constitute an offense shall be defined in special laws (Part 22 of Article 92 of the Constitution of Ukraine). Moreover, the legal responsibility of the State under national legislation follows branch nature, that is, each type of responsibility, depending on law branches, is characterized by its own special features.

However, the constitutional and legal concept of the responsibility of the State to an individual will be incomplete if the foundations of the State's international responsibility under the current Constitution are omitted.

In particular, Article 55 of the Constitution of Ukraine establishes that everyone has the right to appeal for the protection of his or her rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organisations of which Ukraine is a member or participant, and Article 152 of the Constitution of Ukraine obliges the State to compensate for material or moral damage inflicted on physical and legal persons by the acts or actions deemed to be unconstitutional. In the event that a court verdict is revoked as unjust, the State compensates the material and moral damages inflicted by the groundless conviction (Article 62 of the Constitution of Ukraine) (decision of the Constitutional Court of Ukraine dated 30.05.2001 No. 7-rp/2001 (case on liability of legal entities).

Part 1 of Article 9 of the Constitution of Ukraine stipulates that international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine.

In view of these provisions, it can be argued that Ukraine, as a State, is responsible to a person not only under the Constitution but also international legal treaties, according to which it is assumed obligations to respect and guarantee human rights. The Convention for the Protection of Human Rights and Fundamental Freedoms of 1950 (European Convention) is an unconditional and most successful example of the State's obligation to respect human rights. Ukraine acceded to the Convention in 1997.

The preamble of the European Convention states that its parties have the primary responsibility to secure the rights and freedoms defined in this Convention, and if the European Court of Human Rights (ECHR) finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party (Article 41 of the European Convention). Following the above provisions, in case of violation of human rights, which are guaranteed by the European Convention, Ukraine can be brought to international legal responsibility in the form of fair satisfaction. It is essential to realize that satisfaction involves not only the payment of funds but may oblige the State to take other actions aimed at restoring violated human rights (Tisnogub, 2022). In this context, it is emphasized that the European Convention provides for a special mechanism for the responsibility of the State to a person when it becomes a defendant before the court for violated human rights, but the legal basis is the international legal obligation of the State to a person for the observance of their rights. And this mechanism, unfortunately, is the exception, rather than the general rule. The traditional way of protecting a violated human right against a State is provided for in Article 33 of the European Convention, which stipulates that any High Contracting Party may refer to the Court any alleged breach of the provisions of the Convention and the Protocols thereto by another High Contracting Part. In other words, there is a generally accepted doctrinal understanding of the responsibility of a State in international law under which it is responsible for breach of international obligations to another state, but not to a person, and therefore the institution of diplomatic protection is applied (Crawford, 2006). Cases of appeals to the ECHR against Ukraine are quite numerous; there are also many cases of the State's appeal on the side of the injured persons against another contracting party to the European Convention based on Article 33, in particular, Ukraine filed nine lawsuits against the Russian Federation (ECHR 069 (2021) 23.02.2021), and the Kingdom of the Netherlands joined the lawsuit of its citizens against the Russian Federation regarding the consequences of the downing of MH-17, a passenger plane that conducted the flight over the territory of Ukraine in 2015.

Therefore, from the above, it is possible to come to a preliminary conclusion that the Constitution of Ukraine has enshrined the foundations of the concept of Ukraine's responsibility to a person, the main thesis of which is: "the State acts responsibly before a person in compliance with his or her rights that lays the groundwork for directing state activities". The thesis is the legal basis of the constitutional principle of the responsibility of the State (state authorities) to a person. If the principle is violated, Ukraine bears responsibility, grounds, conditions, forms, types, the consequences of which

should be defined in the law. At the same time, the responsibility of the State for fulfilling international legal obligations to respect human rights goes beyond the regulation of national legislation and is established by international treaties and other norms of international law. Indeed, the Constitution of Ukraine, implementing the principle of the State's responsibility to the individual, established constitutional mechanisms for recognizing and implementing the decision of international institutions as a reaction to Ukraine's violations of human rights.

3. International legal foundations of the state responsibility concept under the air law of Ukraine

Ukrainian scientists, involving O.M. Grigorov (Grigorov 2020, pp. 82–85), argued that although air law originated from fragmented national regulations, it was developed in international law, in particular, international treaties. The international legal framework of air law or the conditional constitution of modern international law is created by the Convention on International Civil Aviation of 1949 (Chicago Convention of 1944) (Dempsey 2015, pp.1–18). The States which acceded to the Chicago Convention of 1944 have agreed on certain principles and arrangements in order that international civil aviation may be developed in a safe and orderly manner and that international air transport services may be established on the basis of equality of opportunity and operated soundly and economically. According to Article 1 of the 1944 Chicago Convention, the contracting States recognize that every State has complete and exclusive sovereignty over the airspace above its territory. The principle is specified in the 1944 Chicago Convention through a range of provisions, in particular Article 6, which provides exclusively for the authorization of using the sovereign airspace for international regular traffic; Article 8 highlights that no aircraft without a pilot are prohibited from flying in sovereign airspace without the authorization of the relevant State. The State which owns the airspace over its territory shall establish rules for the use of airspace (Articles 11, 12); determines prohibited and restricted areas for flights (Article 9), as well as States shall take measures to prevent the spread of diseases (Article 14) and implement customs policies (Articles 10, 23, 24), policies for determining charges for the use of airspace and airports (Article 15) and establish standards and requirements for the technical condition of aircraft and their documentation (Article 25-39). Thus, recognizing the complete and exclusive sovereignty of the States over the airspace over their territories, the 1944 Chicago Convention recognizes the full authority of the State and its bodies to regulate the airspace use over the territory of a sovereign State. Ukraine acceded to the Chicago Convention on September 9, 1992. At the same time, since Ukraine has been authorized to establish the procedure for using the airspace, on the other hand, Ukraine is responsible for the consequences of establishing such an order and its observance by all entities that use the airspace. On the one hand, Ukraine is responsible to other States that are the Parties to the 1944 Chicago Convention, which is confirmed by Article 12 of this Convention, which obliges the States to ensure that aircraft comply with flight regulations and maintain that such requirements are uniform and meet accepted international standards (Article 37 of this Convention). On the other hand, Ukraine is responsible for establishing the rules for the airspace use and its actual use in a manner consistent with Article 3 of the Constitution of Ukraine, which proclaims that human rights and freedoms and their guarantees determine the content and direction of the State's activities. The best example of the correlation between Ukraine's international legal obligations arising from the 1944 Chicago Convention and constitutional obligations to respect human rights can be illustrated by the human right to life.

Article 27 of the Constitution of Ukraine stipulates that every person has the inalienable right to life. No one shall be arbitrarily deprived of life, and Article 50 of the Constitution of Ukraine holds that everyone has the right to an environment that is safe for life and health. In turn, the preamble of the 1944 Chicago Convention contains an obligation of the States Parties to ensure the safety of the use of airspace for civil aviation purposes. In addition, as stipulated by Article 9 of the Constitution of Ukraine, international treaties that are in force, agreed to be binding by the Verkhovna Rada of Ukraine, are part of the national legislation of Ukraine. Hence, one can argue that Ukraine, by virtue of the provisions of the 1944 Chicago Convention and the Constitution of Ukraine, undertook both to the Participating States to ensure the safe use of airspace within its territory and to a person by virtue of the provisions of the Constitution to ensure the safe use of airspace and prevent violations of human rights during the use of airspace. Consequently, Ukraine has implemented the principle of ensuring (securing) the safety of civil aviation in domestic air law, which is designed to guarantee the observance of the human right to life. And, in case of its violation, it will bear responsibility, both international and legal responsibility, in accordance with the Constitution and laws of Ukraine.

4. The state responsibility concept for ensuring the safety of civil aviation exemplified by a bilateral agreement between the United States and Ukraine

As of the date of writing the present article, Ukraine is a party to seventy bilateral international treaties on international air traffic, twenty-six of which are with the countries of the European Union, and numerous treaties governing air transportation. We have noted above that the 1944 Chicago Convention guaranteed that the sovereign airspace of any State shall be used only upon the prior authorization of the State exercising sovereignty over the airspace. One of the ways to implement such sovereignty is the conclusion of international treaties which are the groundwork for international air traffic, including air transportation.

Agreements on international air traffic are mainly typical and slightly different in content. One of the last agreements concluded by Ukraine is the Air Transport Agreement between the Government of the United States of America and the Government of Ukraine, which was ratified by the Verkhovna Rada of Ukraine on November 4, 2015.

The preamble of the agreement indicates that it is based on the Convention on International Civil Aviation of 1944, and it should be understood that in the development of the convention's principles, Ukraine and the United States agreed to use the airspace of Ukraine and the United States in the manner provided for in this agreement. We will immediately pay attention to Article 6 "Safety" and Article 7 "Aviation Security", which are of fundamental importance. Article 6 stipulates that to ensure the safety of air transportation, each Party shall recognize as valid certificates of airworthiness, certificates of competency, and licenses issued by another Party. However, if a State fails to comply with the minimum safety standards provided for in the 1944 Chicago Convention and fails to remedy the deficiencies, the other State may take action against the air carrier of the non-compliant State. The above provisions stipulate the obligation of Ukraine to ensure proper requirements for aircraft and training of their crews to guarantee the safety of air transportation of passengers. In case of violation of such provisions, restrictive measures may be applied to Ukrainian carriers, e.g., annulment of documents issued by Ukraine, which entails a ban on flights over the territory of the United States. The current article provides for the obligation of Ukraine to ensure carriers (enterprises and organizations) comply with international standards of aviation safety. In international law, these standards are covered by the term "aviation safety" (Malovatskyi, 2018, pp.66-80). Due to Ukraine's non-compliance with flight safety standards, it will be liable to the United States, and carriers (enterprises and organizations) will be indirectly liable in the form of a ban on transportation (suspension of flights). The responsibility of Ukraine will be to suspend or annulment the air traffic agreement based on the provisions of Article 60 of the Vienna Convention on the Law of Treaties (1969).

Such examples are numerous in international law (Rokita, 2000, pp. 236 The consequences of non-compliance with aviation safety standards by the state, including in international air law with the participation of Ukraine, are regulated by international treaties, which have been called the source of private international air law (Tsirat 2021, pp.1.36). These area as follows: the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 – Ukraine acceded to the Convention in 2008; the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952 (Rome Convention), which may subsequently be supplemented with the Convention on Compensation for Damage Caused by Aircraft to Third Parties of 2009, which has not yet entered into force, and the Convention on Compensation for Damage Caused by Aircraft to Third Parties in the Event of Unlawful Interference of 2009, which has also not entered into force. These conventions enshrine the property (civil) liability of the carrier or aircraft operator for causing harm to a person as a result of a violation of an international air carriage contract or causing damage to a foreign aircraft on the surface. It is decisive that, in accordance with Article 2 of the Convention for the Unification of Certain Rules for International Carriage by Air of 1999, the state or its enterprise is liable to a passenger – a person – for causing damage in the event of non-fulfillment of obligations under the contract of international air carriage. A similar provision is available in article II of the Protocol to Amend the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed at Rome on 7 October 1952, as of 23 September 1978, which establishes that responsibility for damage caused by an aircraft registered in a State will born by the air carrier. It can be concluded from the above that the Ukrainian legislation has transformed the principle of ensuring the safety of civil aviation, which was first enshrined in the Convention on International Civil Aviation of 1944. Accordingly, Ukraine is responsible for compliance with international legal obligations to ensure flight safety to the United States and bears civil liability to a person for violation of the obligation to ensure the safety of trans-

portation based on the Chicago Convention of 1944, the Convention for the Unification of Certain Rules for International Carriage by Air of 1999, and the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome on October 7, 1952. The responsibility of the State, and that part of the relevant legal institution relating to specific civil liability, is regulated in Ukrainian civil legislation, which will be covered below.

5. The state responsibility concept for compliance with aviation safety under Ukrainian air law as exemplified by a bilateral agreement between the United States and Ukraine

Analyzing the most important aspects of Ukraine's responsibility for compliance with international obligations to ensure the safe use of the airspace for air transportation, we will again refer to the 2015 Air Transportation Agreement between the Government of the United States of America and the Government of Ukraine. In accordance with Article 7 "Aviation Security" of the Agreement, the Parties reaffirm that their obligation to each other to protect the security of civil aviation against acts of unlawful interference forms an integral part of this Agreement. Moreover, the Parties to the Agreement have determined that a range of international treaties concluded to against acts of unlawful interference in the security of civil aviation are part of this agreement, namely: the Convention on Offences and Certain Other Acts Committed on Board Aircraft, adopted in Tokyo on 14 September 1963, the Convention for the Suppression of Unlawful Seizure of Aircraft, signed in The Hague on 16 December 1970, the Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation, signed at Montreal on 23 September 1971, and the Protocol for the Suppression of Unlawful Acts of Violence at Airports Serving International Civil Aviation, Supplementary to the 1971 Montreal Convention, signed at Montreal on 24 February 1988. Pursuant to the above conventions, any act of physical influence on the crew or aircraft, threatening with destruction or damage, as well as unlawful seizure of control thereof, is an act of unlawful interference with civil aviation safety, and each of the parties to these Conventions is obliged to define it in national legislation as a crime and to prosecute persons for their commission. In turn, Ukraine and the United States agreed that in case of non-fulfillment of obligations to ensure aviation security in accordance with the standards of the International Civil Aviation Organization, the other party has the right to stop aircraft flights in its airspace. In addition, in case of the agreement's violation, the provisions of Article 60 of the Vienna Convention on the Law of Treaties of 1969 and the Air Transportation Agreement between the Government of the United States of America and the Government of Ukraine of 2015, which fully complies with paragraph c) of Article 3 of the Convention on International Civil Aviation of 1944, which provides for the right of a state to stop flights, may be applied to Ukraine equally as to the United States. It should also be noted that since the agreement between Ukraine and the United States includes, as part of it, conventions for the suppression of acts of unlawful interference with civil aviation safety, according to which Ukraine and the United States are obliged to comply with the obligations arising from them, and thus, they are responsible for their non-compliance. From the above considerations, two theses follow: for violation by Ukraine of Article 7 of the 2015 air traffic agreement, the United States has the right to stop the flights of any aircraft, and not only state ones. This may mean that aviation undertakings, whether public or private, are responsible for the failure of States to comply with an international obligation. The responsibility of the State for violation of international obligations enshrined in the Convention aimed at preventing and combating acts of unlawful interference with civil aviation safety should be determined by Ukraine in national criminal legislation. As a result, it is essential to mark that Ukrainian legislation transformed the principle of aviation security, which was recognized by the Convention on International Civil Aviation of 1944, and concludes bilateral international agreements on air traffic for its development. By relying on such agreements, Ukraine agreed to be responsible for compliance with international legal obligations to ensure aviation security to the United States and to enshrine in national legislation that acts violating the principle of aviation security are a criminal offense. Therefore, it can be reduced to the thesis that Ukraine is responsible to the person for the introduction of law and order under which acts violating civil aviation safety were recognized as crimes and prosecuted.

6. Ukraine, state authorities, and state aviation enterprises as liable parties

We have already mentioned above that Ukraine has complete and exclusive sovereignty over the airspace within its territory, which, according to Article 1 of the Convention on International Civil Aviation of 1944, provides for the prohibition of the use of Ukrainian airspace without its consent. Article 13 of the Constitution of Ukraine logically corresponds to the above provision, which enshrines that the atmospheric air within the territory of Ukraine is the object of property rights

of the Ukrainian people. Ownership rights on behalf of the Ukrainian people are exercised by bodies of state power and bodies of local self-government within the limits determined by this Constitution. According to part 2 of Article 19 of the Constitution of Ukraine, bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine. Moreover, according to Article 8 of the Constitution, the principle of the rule of law is recognised and effective in Ukraine. As a result of compliance with the above constitutional provisions, Part 2 of Article 3 of the Constitution stipulates human rights and freedoms and their guarantees determine the essence and orientation of the activity of the State. The State is answerable to the individual for its activity. To affirm and ensure human rights and freedoms is the main duty of the State. Thus, it can be argued that Ukraine and state authorities, exercising the right of the Ukrainian people to airspace over the territory of Ukraine, are obliged to act in the interests and with respect for human rights and bear responsibility for non-compliance with specific constitutional norms.

Such a conclusion, in particular, is confirmed by the Law of Ukraine "On Transport" No. 232/94-BP dated November 10, 1994. Article 3 of the law establishes that the purpose and task of public management in the field of transport is to protect the rights of citizens while receiving transport services and the safe functioning of transport. Public management of transport activities is carried out through the implementation of economic (tax, financial, credit, tariff, and investment) and social policies, including subsidies for passenger transportation. Therefore, Ukraine fulfils the exclusive functions of public administration in the field of aviation transport (tax, financial, tariff, and control functions) and can act as an investment entity, in particular, act as an actor of enterprises engaged in aviation and transport activities. The implementation of the state policy on transport is carried out through the central executive body, which ensures the formation and administration of the state policy on transport – the Ministry of Infrastructure of Ukraine. Accordingly, the activities of Ukraine, as a state in the field of aviation transport, are divided into ones that purely derive from the exercise of power – legislative and administrative management of civil aviation, and activities that derive from power but have a purely economic effect, in particular, investment and establishment of aviation enterprises that are participants in commercial relations.

Notwithstanding the fact that Law No. 232/94-VR does not contain a well-formulated statement that public authorities are responsible to a person for violating their rights. However, this follows from the interpretation of the provisions of part 2 of Article 3 of the Constitution of Ukraine in a logical connection with Article 3 of Law No. 232/94-VR, which regulates that the purpose and task of public administration in the field of transport is to protect the rights of citizens when receiving transport services and the safe functioning of transport. The logical consequence of non-fulfillment of such obligations by a public body, which has led to violation of human rights, will be the occurrence of responsibility for the state and the public authority in the form of compensation for material and moral damages inflicted by unlawful decisions, actions or omission, as provided for in Article 56 of the Constitution of Ukraine.

Another aspect of the activities of state authorities in the aviation industry is investment, which, in accordance with the Law of Ukraine "On Investment Activity" No. 1560-XII as of September 18, 1991, enshrines that state investment is carried out by public authorities at the expense of the state budget in investment objects, in particular property rights in aviation enterprises. In turn, Article 16 of Law No. 1560-XII stipulates that transport enterprises are obliged to ensure the safety of life and health of citizens, the safety of aircraft operation, environmental protection, and Article 14 of this Law stipulates that transport enterprises ensure the safety of goods and luggage from the time they are accepted for transportation and until they are issued to recipients, unless otherwise provided by the contract. Therefore, it follows from the legislation that aviation enterprises established with the participation of the state are responsible for the safety of persons and the preservation of private property handed over for transportation.

Having studied the above provisions of the legislation of Ukraine, it is possible to conclude that in terms of transport, in particular air transport, Ukraine exercises the powers of the people of Ukraine to manage airspace over the territory of Ukraine in two main aspects: exclusively the implementation of public power – statutory regulation and control over the use of airspace for air traffic; exercise of authority – disposal of state property (budget funds) and investment in aviation enterprises that carry out commercial activities. And accordingly, aviation enterprises are responsible for non-compliance with legislative provisions on ensuring human transport safety and for violation of luggage storage during transportation. Consequently, Ukraine, state authorities

and aviation enterprises based on state property are liable to a person under the current legislation of Ukraine, in particular, the Constitution of Ukraine, the Law of Ukraine "On Transport" No. 232/94-VR dated November 10, 1994, the Law of Ukraine "On Investment Activity" No. 1560-XII dated September 18, 1991, special laws, provisions of the Air Code of Ukraine and the Civil Code of Ukraine, which we will consider below.

7. Public law oundations of the state responsibility concept under Ukrainian air law

Ukraine, exercising the right to complete and exclusive sovereignty over the airspace, which is part of its territory, adopted the Air Code of Ukraine as of May 19, 2011, No. 3393-VI, which regulated aviation activities and the procedure for using the airspace of Ukraine. The relevant activity of Ukraine is aimed at ensuring aviation safety. In accordance with Article 4 of the Air Code, Ukraine has acceded to the Convention on International Civil Aviation of 1944, and therefore is responsible for fulfilling international obligations arising from this Convention, and for guaranteeing and creating safe conditions for society, protecting interests during civil aviation activities and using Ukrainian airspace. From the above provision of the Air Code, it is evident that Ukraine, as a subject of international law, bears international legal responsibility for compliance with international obligations arising from the principle of ensuring civil aviation (in the aspect of flight safety and aviation security), which is fundamental in international air law (Malovatskyi, 2018, pp. 66–80) and for creating safe conditions for society during the use of airspace. Confirmation of this statement is found in the Law of Ukraine "On the State Program of Aviation Security of Civil Aviation" No. 1965-VIII as of March 21, 2017, which enshrined mandatory measures for ensuring the safety of civil aviation and protecting international civil aviation from unlawful interference, the Aviation Security Manual (Doc 8973), as well as other international acts and acts of Ukrainian legislation.

The Air Code specifies that the airspace of Ukraine can be used not only for the purposes of air traffic but also for state aviation to maintain national security and defense of the state and protection of the population, which are entrusted to the Armed Forces of Ukraine (paragraph three of part 4 of Article 4 of the Air Code of Ukraine). In other words, in addition to state regulation of airspace use for commercial transportation, Ukraine can use the airspace for state defense and protection of the population. The relevant issue is poorly studied and will be covered in an individual article. Hence, it can be argued that in case of Ukraine's violation of the obligation to ensure security, it will be responsible to a person.

Specification of Ukraine's responsibility to a person is set out in Section XVIII of the Air Code "Liability for violation of civil aviation legislation". In particular, Article 126 of the Air Code states that legal entities and individuals whose activities are related to the use of the airspace of Ukraine, development, manufacture, repair and operation of aviation equipment, implementation of economic activities in civil aviation, air traffic services, and aviation security are liable for unlawful actions under the law.

The above provisions do not indicate that Ukraine, as a State, is responsible for violating law and committing a civil aviation offense. However, this is probably justified due to the fact that the State is an organization of public power, which is represented by public authorities exercising the powers of the State (Kozubra, 2015, pp.103) based on state sovereignty, which legitimizes such powers (Bukhanevych, O.M., Ivanovska, A.M. & Kyrylenko, V.A. 2022, pp. 84–93). In particular, the Ukrainian science of law has a strong legal tradition of separating the responsibility of the State and officials who are empowered on its behalf to exercise power (Onishchenko, 2009), and when it comes to the State's criminal responsibility, it is represented by officials (Vazhna 2019, pp. 129–140).

Such our assumptions are supported by the norms of Article 126 of the Constitution of Ukraine which marks that if an offense committed by state authorities or an aviation enterprise, they are liable. In our opinion, such liability is administrative, which is proved by Article 127 of the Air Code of Ukraine, Article 111-112 of the Code of Ukraine on Administrative Offenses, which provides for liability for violation of flight rules; criminal, which is stipulated by Articles 269, 276, 278, 280, 281 of the Criminal Code of Ukraine, in particular, Article 276 of the CCU "Violation of traffic safety rules or operation of railway, water or air transport" and Article 281 of the CCU "Violation of air flight rules"; disciplinary liability, which may occur for non-fulfillment or improper fulfillment of official duties by civil servants, which is provided for in Section 2 "Principles of disciplinary liability" of the Law of Ukraine " On Civil Service" No. 889-VIII as of 10.12.2015; or civil liability, which is provided for in the Civil Code of Ukraine and discussed below.

Having studied the public law fundamentals of the concept of Ukraine's responsibility in legislation, it should be noted that Ukraine as a State is responsible for compliance with its international obligations arising from the Convention on International Civil Aviation of 1944

to other states, in particular for compliance with the principle of civil aviation safety. National air legislation transformed Ukraine's obligations under the 1944 Convention on International Civil Aviation to the Air Code of Ukraine, which enshrined its obligation to regulate, control and use its sovereign airspace in a safe way for a person. In turn, it is established that officials (civil servants) are responsible for violation of the safe use of airspace, if such acts constitute an offense, under the Criminal Code of Ukraine, the Air Code of Ukraine, the Code of Administrative Offenses of Ukraine, the Law of Ukraine "On Civil Service", and the Civil Code of Ukraine.

8. Private law foundations of the state responsibility concept under Ukrainian air law

The fundamentals of the private legal concept of Ukraine's responsibility under air law are laid down in the Constitution of Ukraine and derive from the principle of state responsibility for its activities before a person. As mentioned above, Ukraine within the sovereign airspace has the exclusive power to adopt laws and accordingly regulate the use of airspace. In addition, part 3 of Article 152 of the Constitution of Ukraine provides that laws and other legal acts, or their separate provisions, that are deemed to be unconstitutional, lose legal force from the day the Constitutional Court of Ukraine adopts the decision on their unconstitutionality. Article 56 of the Constitution of Ukraine also stipulates that everyone has the right to compensation, at the expense of the State or bodies of local self-government, for material and moral damages inflicted by unlawful decisions, actions or omission of bodies of state power, bodies of local self-government, their officials and officers during the exercise of their authority. Following the above provisions, it is reasonable to argue that if Ukraine has not complied with its obligations to ensure safe use of the airspace and such a violation was committed by adopting an unconstitutional act or committing a violation of the law by a public authority and these actions caused damage to a person, Ukraine or a public authority is obliged to bear responsibility in the form of compensation for damage. The term of harm, methods of its determination, and measures to be taken to compensate for it are enshrined in the Civil Code of Ukraine No. 435-IV as of 16.10.2003 (hereinafter referred to as the CC). In particular, Chapter 82 of the CC fixes the general grounds for civil liability. Article 1175 of the CC provides that the damage caused to an individual via the adoption by a public authority of a normative legal act that has been declared unlawful and annulled is compensated by the state, regardless of the fault of officials of such bodies. Article 1173 of the CC establishes that damage caused to an individual by unlawful decisions, actions or omissions of a public authority, in the exercise of their powers, shall be compensated by the state or a local self-government body, regardless of the fault of such bodies. Article 1174 of the CC also stipulates that damage caused to an individual by unlawful decisions, actions or omissions of an official of a public authority, in the exercise of their powers, shall be compensated by the state, regardless of the fault of that person. In our opinion, the provisions of Article 1177 of the CC, which established that damage caused to an individual who has suffered from a criminal offense is compensated under the law or at the expense of the State Budget of Ukraine in cases and in the manner prescribed by law, have become particularly relevant. It follows from the above that if Ukraine, a state body, or an official violates human rights (commits an offense or a crime) and causes harm to a person by such actions, Ukraine is obliged to compensate for the damage regardless of the presence of guilt.

Damage, according to Articles 22 and 23 of the CC, is *material damage, which* is understood as losses suffered by a person due to the destruction or damage of a thing, as well as expenses that a person has incurred or must incur to restore their violated right (real damage) and lost profit; *moral damage* is inflicted physical pain and suffering, mental suffering, humiliation of honor and dignity of an individual. By relying on the above articles, it is seen that, as a general rule, material damage (losses) and moral damage are compensated in full, in the form of payment of funds.

Having previously summarized the above, it can be concluded that if Ukraine, a public authority, or an official violates the provisions of the current air legislation ensuing in violation of human rights, the state will bear civil liability for such unlawful actions. In other words, if the state commits an offense from which guilt is excluded, then it will be liable.

At the same time, civil law contains the responsibility for actions that do not constitute an offense: it occurs for actions not prohibited by law but for harmful or risky actions – using a source of increased danger. In particular, Article 1187 of the CC provides that damage caused by a source of increased danger is compensated by a person who owns a vehicle, the use of which creates increased danger. A person who carries out activities that are a source of increased danger shall be liable for damage caused, unless he/she proves that the damage was caused due to force majeure or intent of the person affected Since the aircraft

is undoubtedly an object of increased danger, the State using such an object is responsible to the person for causing damage. In addition, Ukraine has consented to be bound by the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface, signed in Rome on 7 October 1952, which specifies the mechanism and extent of State liability if it operates an aircraft which, as a result of its accident, has caused damage to human rights. As well as the current Civil Code of Ukraine, the responsibility of the State under this Convention is the obligation to compensate for damage through the payment of funds.

Another type of liability that is usually separated in civil law is contractual liability or, as some scholars suggest "liability and other consequences of failure to fulfill civil obligations" (Dzera, O.V., Velykanova, M.M. & Bilenko, M.S. 2022. pp. 106–115).

Thus, part 18 of Article 100 of the Air Code of Ukraine provides that the provisions of the Civil Code of Ukraine that air transportation contracts, including charter transportation and other civil law relations related to air transportation that are not regulated by the provisions of this Code or international treaties of Ukraine, shall be subject to the Civil Code of Ukraine. As stipulated by Article 908 of the CC, the carriage of cargo, passengers, baggage, and mail is conducted under a contract of carriage. Responsibility for violation of the contract, delay in transportation, damage, or loss of baggage and cargo, as well as for causing injury and death of a person is determined following the provisions of Articles 920-928 of the CC. Also, in the case of international air transportation, Ukraine recognized the force of the Convention on the Unification of Certain Rules for International Air Transport of 1999, which supplements the Civil Code of Ukraine with norms on the carrier's liability and the limits of monetary compensation for damage caused in the form of payment of funds.

Having examined the private law fundamentals of state liability under air law, it is possible to conclude that Ukraine, following current air law, is liable if it commits, in the person of state authorities or officials, an offense from which the subjective aspect of the offense is excluded – guilt. The consequence in civil law is tort liability, which involves compensation for the damage caused, i.e., payment of funds. Ukraine is also responsible for causing harm to a person by high-risk objects – an aircraft, and for violating an air transportation contract. Moreover, tort liability and contractual liability in air law are specified in international treaties concluded by Ukraine.

9. Conclusions

As a result, having analyzed the concept of state responsibility to a person under the air law of Ukraine, it can be said that fundamentals of the concept of state responsibility are laid in a universal international treaty – the Convention on International Civil Aviation of 1944. The central pillar of the responsibility of the State is the recognition of its full and exclusive sovereignty over the airspace over the state territory, which, on the one hand, vest the State with exclusive powers to regulate the airspace use but in such a way as to ensure flight safety and aviation security and the safe use of aviation for persons. Ukraine recognized that the obligation to ensure the safe use of airspace is mandatory for through implementing bilateral international agreements on air traffic, in particular the 2015 Air Traffic Agreement between the US Government and the Government of Ukraine. Ukraine, in turn, by relying on the Constitution, recognized that it acts to ensure the rights and interests of a person and is responsible to a person for violating his or her rights. Thus, we can conclude that if Ukraine violates its international flight safety obligations, which will harm a person, then, depending on the consequences for a person, it will be liable in accordance with the norms of current international law: the Vienna Convention on the Law of Treaties of 1969, the European Convention for the Protection of Rights and Fundamental Freedoms of 1952, the Constitution of Ukraine, the Law of Ukraine "On Transport", and the Air and Civil Codes, which will take the form of compensation for moral and material damage, i.e., the payment of funds. An individual type of civil liability will be borne by the State for violation of contracts for the international carriage of passengers by air under the provisions of the Convention for the Unification of Certain Rules for International Carriage by Air of 1999 and for damage caused by non-contractual relations on the basis of the Convention on Damage Caused by Foreign Aircraft to Third Parties on the Surface of 1952. Hence, if violations of the principle of ensuring the safe use of the airspace are committed by public authorities or officials, exercising their powers, they bear criminal, administrative, disciplinary, and civil liability in accordance with the norms of the current legislation of Ukraine. Therefore, it should be emphasized that the concept of state responsibility under the air law of Ukraine is based on the norms of international and national law, as well as the norms of public and private law, which confirms the theses that air law covers the norms of various law branches, and their interaction on the regulation of legal relations constitutes particular complexity and needs further research.

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КОНЦЕПЦІЯ ВІДПОВІДАЛЬНОСТІ ДЕРЖАВИ ПЕРЕД ЛЮДИНОЮ В ПОВІТРЯНОМУ ПРАВІ УКРАЇНИ

Анотація. Ця стаття має на ***меті*** дослідження правового регулювання відповідальності України в повітряному праві перед людиною. Завданням цієї статті є визначення підвалин відповідальності України перед людиною у національному повітряному праві. ***Методи дослідження.*** У статті використано логічний метод пізнання, метод порівняльного аналізу та метод теоретичного дослідження. Новим є комплексна спроба визначити правові передумови (правові підстави, фактичні підстави та умови відповідальності держави) на підставі норм міжнародного права та національного законодавства, зокрема публічного та приватного права. Це дослідження ґрунтується на критичному аналізі норм міжнародного повітряного права та норм сучасного національного права України та практики застосування права. У **результаті дослідження** були зроблені **висновки** про те, що основи концепції відповідальності України закладені в універсальному міжнародному договорі – Конвенції про міжнародну цивільну авіацію 1944 року. Центральною підвалиною відповідальності держави є визнання за державою повного та виключного суверенітету та забезпечення безпечного використання повітряного простору. Україна визнала обов'язок забезпечення безпеки польотів, а відповідно є відповідальною перед людиною за безпечне використання суверенного повітряного простору для цілей авіації, що також підтверджено конституційним обов'язком України забезпечувати права і свободи людини. У випадку порушення такого зобов'язання та завдання шкоди людині, Україна буде нести юридичну відповідальність згідно норм Європейської конвенції про захист прав і основоположних свобод 1952 року, Конституції України, Закону України «Про транспорт», Повітряного та Цивільного кодексу, що буде мати форму відшкодування моральної та матеріальної шкоди, у формі сплати грошових коштів. За завдання шкоди людині Україна буде нести цивільну відповідальність за Конвенцією про уніфікацію деяких правил міжнародних повітряних перевезень 1999 року та Конвенцією про шкоду, завдану іноземним повітряним судном третім особам на поверхні 1952 року. Якщо порушення принципу забезпечення безпечного використання повітряного простору допустять органи державної влади чи посадові особи, вони будуть піддані кримінальній, адміністративній, дисциплінарній та цивільній відповідальності.

Ключові слова: особа, держава, відповідальність, повітряне право, міжнародно-правова відповідальність, Україна.

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