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Oleksandra Hryshchenko,
PhD in Law, Assistant Professor at the Department of Law, Philosophy and Political Science, T.H. Shevchenko National University "Chernihiv Colehium", 53, Hetman Polubotko street, Chernihiv, Ukraine, postal code 14013, pravo3000@bigmir.net
ORCID: *orcid.org/0000-0002-3725-8094*

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SANCTION AS A LEGAL CONSTRUCTION IN CIVIL LAW

Abstract. The ***purpose of the article*** is to determine the essence of a sanction in the mechanism of legal regulation of civil relations.

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

Results. The author has studied sanctions as a legal construction in relation to legal means, which is a legal means and an instrument for the legal regulation of a certain action of the subject aimed at its active use in order to achieve the appropriate goal. It has been analyzed the legal process under which sanctions act as the main working elements of law, the mechanism of legal regulation, legal regimes and lead to juridical consequences and concrete results. The author states that the sanction category in jurisprudence is one of the most ambiguous: a) a sanction means a specific part of the legal norm, which provides for regulations on consequences, which occur in the case of non-compliance with the rule set out in the dispositive part of norms; b) a sanction means an act of a competent state body, which allows (approves, "authorizes") committing a particular action by a person; c) a sanction means those negative property effects which occur if a person commits illegal acts; d) a sanction is considered as one of the types of negative property effects imposed on the defaulting debtor in the case of non-performance or improper performance of his incurred obligation.

Conclusions. Sanctions in civil law are negative consequences established by law or contract, which are applied in the case of non-fulfillment (improper fulfillment) of a civil obligation, violation of prohibitions, restrictions, and other circumstances outlined in the law. The state ascertains sanctions through the use of coercion. Sanctions are elements of the mechanism of legal regulation of civil relations. Sanctions have negative effects for a person who has not fulfilled a civil obligation established by law or contract. Sanctions in civil law are designed to protect civil rights and interests. Sanctions are a legal construction in civil law.

Key words: elements of mechanism of legal regulation of civil relations, protection of civil rights, legal remedy, civil liability.

1. Introduction

The study of civil sanction is relevant to law enforcement in terms of civil liability because under para. 22, p. 1 of art. 92 of the Constitution of Ukraine dated June 28, 1996 (Konstytutsiia Ukrainy, 1996), fundamentals of civil liability shall be determined exclusively by the laws of Ukraine. At the same time, it is important to single out sanctions that are not means of civil liability and determine essential features of sanctions in civil law; it allows distinguishing them from other legal categories that is critical to law enforcement when settling the issue of a concurrent application of several related legal constructions to legal relations. Maintaining an effective legal mechanism of the legal regulation of civil relations is impossible without imposing sanctions. The current civil legislation of Ukraine lacks a legal definition for the concept of "sanction". The Civil Code of Ukraine (further – the CC of Ukraine) uses the concept of "sanction" once in p. 1 of art. 354: "Deprivation of the ownership right to property (confiscation) may be applied to a person by the court decision as a sanction for committing a crime in the cases specified by the law". Thus, the study of the essence of sanctions in civil law through characterizing them as a legal remedy is of scientific interest.

Analysis of research and publications. The concept of sanctions has always captured the attention of law theorists. Profound studies of sanctions have been conducted by such legal scholars as V. Oriekhov (Oriekhov, 2008) et al. A domestic scientist N. Navalnieva characterized sanctions as legal remedies ensuring

the functioning of the mechanism of legal regulation of civil relations (Navalnieva, 2019a; Navalnieva, 2019b).

Modern researchers mainly analyze civil sanctions in the context of civil liability by considering civil liability as a type of sanctions in civil law or determining the essence of civil liability and the essence of sanctions, e. g., I. Kanzafarova (Kanzafarova, 2007, pp. 89–92), O. Kot (Kot, 2017, pp. 236–237), I. Romashchenko (Romashchenko, 2016, pp. 40–43).

Previously unsettled issue. The study of civil sanctions in terms of civil liability is crucial to law enforcement because under para. 22, p. 1 of art. 92 of the Constitution of Ukraine dated June 28, 1996 (Konstytutsiia Ukrainy, 1996), fundamentals of civil liability shall be determined exclusively by the laws of Ukraine.

The purpose of the research is to determine the essence of sanctions in the mechanism of legal regulation of civil relations.

2. Determining the legal nature of sanctions

The "Modern legal encyclopedia" defines a sanction (from Latin "sanctio" – an irrevocable decision) as follows: 1) a component of the legal norm which, in the case of non-fulfillment, administers measures of state influence, mainly in the form of coercion; 2) statutory procedure for the obligatory approval by a prosecutor (the court) of decisions about taking coercion measures in cases set by the law (Navalnieva, 2019b, p. 40; Zaichuk, 2010, p. 298).

Domestic researchers N. Kuznetsova and N. Navalnieva prove that the mechanism of legal regulation conveys the active part of brining law in line with social relations. Under specific conditions (juridical facts), the legal rule containing an abstract universally binding rule of conduct works with physical acts (omissions of subjects) and thus creates a new form – legal relations within which subjective rights and obligations of the subjects are realized (Kuznetsova, 2011, p. 47; Navalnieva, 2019b, p. 41).

Ukrainian scholars S. Pohribnyi and O. Kot have noted: "Justified the need to restore the status of the Civil Code of Ukraine as a root act for all social relations of private law nature. In order to implement the idea of having the Civil Code of Ukraine as a root act of private law, attention is paid to the necessity to reexamine the mechanism of ensuring the status of the Civil Code of Ukraine as the basic act of Ukrainian civil laws. Moreover, the mechanism grounded in part 2 of article 4 of the Civil Code of Ukraine has appeared to be ineffective. At the same time, the Civil Code of Ukraine has been amended by any laws without regard to the specifics of the mechanism of civil regulation of such relations" (Pohribnyi, Kot, 2021, p. 106).

The author establishes that under p. 1 of art. 216 of the CC of Ukraine, an invalid transaction does not entail legal consequences, except for those related to its invalidity. In case of invalidity of a transaction, each party shall be obliged to return in kind to the other party everything it has acquired in pursuance of the transaction, or, if such return is impossible, including in cases where the acquisition consists in the use of property, work performed, or services provided, to reimburse the value of the acquired at the prices existing at the moment of reimbursement (Tsyvilnyi kodeks Ukrainy, 2003).

3. Application of a sanction to a subject of civil law

It is worthwhile mentioning that sanctions are imposed on a specific person – a subject of civil legal relations. The consolidation of a sanction in a legal norm at the very stage of regulating civil relations contributes to harmonizing civil relations, identifying those negative consequences to which a person will be subjected if he/she violates a subjective civil obligation. For example, p. 4 of art. 376 of the Civil Code of Ukraine states that if the land parcel owner (user) objects against recognition of the property right in the real estate for a person that has fulfilled or is fulfilling unauthorized construction of this real estate on his/her land parcel or if this violates the rights of other persons, the real estate shall be subject to demolition by the person that has fulfilled (is fulfilling) unauthorized construction or at its own cost (Tsyvilnyi kodeks Ukrainy, 2003).

A domestic scientist O. Dzera notes that p. 3 of art. 228 of the CC of Ukraine provides for different legal consequences of an invalid transaction. Its content shows that in case of the violation of requirements for the transaction's compliance with the interests of the state and society, it can be held invalid. Therefore, this norm does not obligate the court to hold that kind of a transaction invalid that gives grounds to attribute it to the category of disputed transactions. If this is not the case, general legal consequences in the form of a bilateral or unilateral restitution envisaged in art. 216 of the CC of Ukraine must be applied (Dzera, 2011; Navalnieva, 2019a; Tsyvilnyi kodeks Ukrainy, 2003).

Let's consider sanctions in the civil law of Ukraine. The author covers civil sanctions more thoroughly. The modern explanatory dictionary contains the following interpretations of the word "to sanction": to find something legal, to approve something; (from Latin *sanction* (*sanctionis*) – an inviolable law); approval; adop-

tion by the supreme authority; influence measures, punishment in case of breach of the law; influence measures imposed by a bank to violators of financial, cash, calculation, and credit discipline (Dubichynskyi, 2014, p. 641). The "Modern legal encyclopedia" defines a sanction as 1) a component of the legal norm which, in case of nonfulfillment, administers measures of state influence, mainly in the form of coercion; 2) statutory procedure for the obligatory approval by a prosecutor (the court) of decisions about taking coercion measures in cases set by the law (Zaichuk, 2010, p. 298).

The author shares the opinions of domestic civil law scholars that the sanction category in jurisprudence is one of the most polysemic. Firstly, a sanction is interpreted as a defined part of the legal norm, which entails regulations related to consequences which must occur in case of breach of a rule set out in the norm's dispositive part. Secondly, a sanction is interpreted as an act of the competent state body which permits (approves, "sanctions") a person to commit a particular action. Thirdly, a sanction is interpreted as those negative property consequences that occur in the case of a person's illegal actions. Fourthly, a sanction is interpreted as one of the types of negative property consequences imposed on a defaulting debtor in case of his/her nonfulfillment or improper fulfillment of the obligation incurred (Navalnieva, 2019b, p. 41).

The article needs to analyze the property nature of sanctions in civil law because most sanctions are characterized by such nature. Therefore, according to p. 2 of Art. 625 of the CC of Ukraine "a debtor that delayed to fulfill the monetary obligation shall pay the debt amount given the established rate of inflation for the whole term of delay plus three per cent of annual interest of the delayed sum, unless another interest is established by the agreement or the law" (Tsyvilnyi kodeks Ukrainy, 2003).

Sanctions may entail both negative property consequences and negative personal non-property or organizational consequences. Thus, "if the personal non-property right of a natural person is violated in a newspaper, a book, a film, a TV or radio program, etc. which is going to be released, the court may forbid to release the relative information (p. 1 of art. 278 of the CC of Ukraine). According to para. 2, p. 1 of Art. 110 of the CC of Ukraine, "a legal entity shall be liquidated by the decision of the court on the recognition of the legal entity state registration ineffective due to violations made in the course of its creation, which cannot be removed, as well as in other cases provided by the constituent documents" (Tsyvilnyi kodeks Ukrainy, 2003).

Foreign legal scientific literature provides five definitions of the term "sanction". A sanction is considered as a part of the legal norm, which has a reference to measures of state coercion (influence) related to a violator. A sanction is a state measure applied to a violator of the established norms and rules, forms, and measures of liability specified in legal norms, which have a punitive nature. A sanction is a permit, approval of something by the competent authority. A sanction is a coercive measure designed to ensure imposition and fulfillment of responsibility for an offense. A sanction is an encouragement (Navalnieva, 2019b, p. 42).

Some scholars regard sanctions as "a coercive measure intended to achieve the objective and exercise responsibility for an offense coincides with its interpretation as a state measure applied to the violator of established norms and rules". As for encouraging sanctions, it is worth mentioning that their existence is controversial in scientific law literature (Navalnieva, 2019b, p. 42).

In terms of characteristics of sanctions as a legal construction in correlation with legal remedies, it is essential to consider a sanction as a legal construction in correlation with legal remedies through which the legislator ensures the effectiveness of the mechanism of legal regulation of civil relations. A Ukrainian scientist of private law M. Sibilov defines "a legal remedy as a complex legal phenomenon, which is based on law and embodies its regulatory effect and, at the same time, is a relevant instrument of legal regulation and a subject's particular action focused on its active use to achieve a specific goal (interest)" (Sibilov, 2014, p. 404).

The author analyzes legal remedies which are characterized by M. Sibilov, who determines seven levels. The first level comprises legal remedies which stipulate a legal status of persons immanent in private law (a legal entity of private law, private-law legal personality of persons). The second level comprises legal remedies which ensure the body of objects of private law. The third level comprises legal remedies which ensure the emergence and functioning of private legal relations (juridical facts of private law, transactions, subjective rights, and obligations). The fourth level comprises legal remedies which ensure the statics of property relations. The fifth level comprises legal remedies which ensure the creation of objects of human creative (intellectual) activity. The sixth level comprises legal remedies which ensure the dynamics of property relations. The seventh level comprises legal remedies which ensure the protection of rights in the field of private law (Sibilov, 2014, p. 408). The article's author holds that the same levels should be applied in civil law.

Civil sanctions may be attributed to legal remedies which ensure the protection of civil rights and interests. Thus, p. 7 of art. 376 of the CC of Ukraine envisages that "in case of essential deviation from the project, which contradicts the public interests or violates the rights of other persons, or essentially violates construction norms and regulations, the court, upon the plaint of a relevant state body or a local government, may oblige the person who has fulfilled or is fulfilling construction to undertake necessary reconstruction. If such reconstruction is impossible or the person who has fulfilled or is fulfilling this construction refuses to conduct reconstruction, this real estate, upon the court decision, shall be subject to demolition at the expense of the person who has fulfilled or is fulfilling construction. The person who has fulfilled or is fulfilling unauthorized construction shall be liable to reimburse expenses related to bringing the land parcel to the previous condition. Summing up the above, it is essential to mark that the application of such sanctions as the demolition of an object of unauthorized construction and reimbursement of expenses related to bringing the land parcel to the previous condition focuses, first of all, on the protection of public interests and private interests of owners of land parcels" (Tsyvilnyi kodeks Ukrainy, 2003).

Thus, following parts 2–4 of art. 352 of the CC of Ukraine "if the owner of the historical and cultural monument does not take measures for its preservation, particularly due to impossibility to create the necessary conditions for this, the court may decide on its buyout on a claim of the state body for protection of the historical and cultural monuments. In case of the urgent need to create conditions for the monument of history and culture preservation, an action for its buyout may be filed without the warning. The bought-out monument of history and culture shall become the property of the state. In this case, it is occurred protected civil legal relations aimed at securing a monument of history and culture through civil remedies, in particular, by applying such a civil sanction as the buyout of the monument of history and culture" (Tsyvilnyi kodeks Ukrainy, 2003).

As a domestic scholar N. Navalnieva has proved, "a polysemic concept of a sanction belongs to any negative consequences prescribed by the legal norm, e. g., prevention measures, precautions, protection measures or responsibilities" (Navalnieva, 2019b, p. 43). A domestic scientist I. Romashchenko rightly notes that "despite a broad interpretation of negative consequences, not all protection methods result in negative consequences, and not all protection methods result in an unfavorable outcome for offenders". For example, due to the recognition of the right, an offender may not be subjected to negative consequences. In case of contesting the person's ownership, his right is protected by its recognition; however, it does not affect the person who does not recognize the right. In this context, one can assert that not all ways of the protection of civil rights are sanctions (Romashchenko, 2016, p. 42–43). In fact, not all ways of the protection of civil rights and interests are civil sanctions.

N. Navalnieva has analyzed the features of legal remedies, which can assist in identifying the features of civil sanctions as legal remedies in the mechanism of legal regulation of civil relations. In N. Navalnieva's opinion, legal remedies have the following features:

1) they express all general resumptive legal ways of securing the interests of a legal subject, accomplishing desired objectives (the way a social value of the constructs and law in general is manifested);

2) they reflect informative-energy qualities and resources of law that gives them special legal effect focused on eliminating obstacles to meeting interests of the participants in legal relations;

3) they act as the basic working parts (elements) of the effect of law, the mechanism of legal regulation, legal regimes (i. e., a functional part of law);

4) they lead to legal effects, specific results which have a particular degree of the effectiveness of legal regulation;

5) they are guaranteed by the state (Navalnieva, 2019b, p. 44).

4. Conclusions

Sanctions in civil law are negative consequences established by law or contract, which are applied in the case of non-fulfillment (improper fulfillment) of a civil obligation, violation of prohibitions, restrictions, and other circumstances outlined in the law. The state ascertains sanctions through the use of coercion. Sanctions are elements of the mechanism of legal regulation of civil relations. Sanctions have negative effects for a person who has not fulfilled a civil obligation established by law or contract. Civil sanctions are designed to protect civil rights and interests. Sanctions are a legal construction in civil law.

Prospects for further research involve studying the ways of exercising and protecting subjective civil rights.

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Олександра Грищенко,
кандидат юридичних наук, старший викладач кафедри права, філософії та політології, Національний університет «Чернігівський колегіум» імені Т.Г. Шевченка, вулиця Гетьмана Полуботка, 53, Чернігів, Україна, індекс 14013, pravo3000@bigmir.net
ORCID: *orcid.org/0000-0002-3725-8094*

САНКЦІЯ ЯК ПРАВОВА КОНСТРУКЦІЯ В ЦИВІЛЬНОМУ ПРАВІ

Анотація. ***Метою статті*** є визначення сутності санкції в механізмі правового регулювання цивільних відносин.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. Досліджено санкції як правову конструкцію у співвідношенні з правовими засобами, що є інструментом правового регулювання певною дією суб'єкта, спрямованою на активне його використання з метою досягнення відповідної цілі. Проаналізовано правовий процес, у якому санкції є основними працюючими елементами дії права, механізму правового регулювання, право-

вих режимів та приводять до юридичних наслідків, конкретних результатів. Констатовано, що категорія «санкції» у правознавстві є однією з найбільш багатозначних, під нею розуміється: а) визначена частина правової норми, у якій передбачені приписи стосовно наслідків, що мають настати в разі недотримання правила, викладеного в диспозитивній частині норм; б) акт компетентного на те державного органу, яким дозволяється (схвалюється, «санкціонується») можливість вчинення певною особою відомої дії; в) ті негативні майнові наслідки, які настають у разі вчинення особою протиправних дій; г) один із різновидів негативних майнових наслідків, що покладаються на несправного боржника в разі невиконання чи неналежного виконання прийнятого ним на себе зобов'язання.

Висновки. Санкції в цивільному праві – це певні негативні наслідки, встановлені законом або договором, які застосовуються в разі невиконання (неналежного виконання) цивільно-правового обов'язку, порушення заборон, обмежень та в інших випадках, встановлених законом. Санкції забезпечуються державою шляхом застосування примусу. Санкції є елементами механізму правового регулювання цивільних відносин. Санкції призводять до негативних наслідків для особи, яка не виконала цивільний обов'язок, встановлений законом чи договором. Санкції в цивільному праві спрямовані на захист цивільних прав та інтересів. Санкції є правовою конструкцією в цивільному праві.

Ключові слова: елементи механізму правового регулювання цивільних відносин, захист цивільних прав, правовий засіб, цивільно-правова відповідальність.

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Petro Guyvan,
PhD in Law, Honored Lawyer of Ukraine, Professor, Poltava Institute of Business, 7, Sinna street, Poltava, Ukraine, postal code 36000, lawjur01@rambler.ru
***ORCID:** orcid.org/0000-0003-3058-4767*

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CRITICAL ANALYSIS OF THE NORMATIVE RULE ON THE INTERRUPTION OF THE STATUTE OF LIMITATIONS WHEN FILING A LAWSUIT: TERMINATION OF THE STATUTE OF LIMITATIONS

Abstract. This work is devoted to the study of the current scientific issue of the interruption of the statute of limitations with the filing of a civil lawsuit. Therefore, the ***purpose of the research*** is to clarify the real nature of the claim and its impact on the possibility of further re-appeal to the court.

Research methods. When conducting legal analysis of the relevant issue, such general and special scientific methods of cognition as dialectical, formal-legal, historical-legal, analysis and synthesis and comparative-legal were involved.

Results. The author argues that the concept of interrupting the statute of limitations and initiating a new course of any lawsuit is downright outdated and inconsistent with the real nature of the statute of limitations. After all, with the proper filing of a lawsuit, the right to sue, which is enshrined in the claim, is realized by going to court. Under Ukrainian and international law, the right to protection can be exercised only once. A properly filed lawsuit must be considered, and a decision must be made on it. The current legislation does not contain such legal constructions that would allow to talk about the re-protection of the same right after the process. Nor can the position that a new course should begin when the violation continues after the interruption cannot be supported. The fact is that from each violation may arise only one right to sue, the content of which is a substantive claim. Since it has already been implemented, no other claim can arise, so there will be no new statute of limitations.

Conclusions. Therefore, it can be concluded that re-filing the same claim is essentially impossible. What is the term with the lawsuit interrupted? The filing of a lawsuit interrupts the statute of limitations for some of the claims for which the right to sue has not been exercised. However, such a legislative construction should be interpreted only narrowly: it is not a part of the same claim not covered by the claim, and not any claims of the creditor. And as a general rule, filing a lawsuit within the statute of limitations leads to early termination of the right to sue due to its exhaustion.

Key words: interruption of the statute of limitations, repayment of the right to sue, termination of the term.

1. Introduction

The statute of limitations begins from the time when the holder is aware of the violation of his right. There can be only one limitation period for the same overdue obligation. This course ends after the expiration of the established term. However, in some cases the period from the beginning to the end may be longer than indicated in Articles 257 and 258 of the Civil Code of Ukraine. As a general rule, any term, including statute of limitations, expires continuously. However, during the statute of limitations, which has already begun, circumstances may arise that affect its course. This is a possibility established by law in the presence of certain circumstances of suspension and interruption of the statute of limitations (Articles 263, 264 of the Civil Code of Ukraine). It should be borne in mind that the terms "suspension", "interruption", normatively related to the statute of limitations, do not mean interruption or suspension of time as a form of existence of matter. It is only a question of the possibility of crediting certain periods of time to the statute of limitations. Therefore, these legal categories are nothing more than special ways of calculating the duration of the substantive right to sue. It can be seen

that the legislative introduction of mechanisms to suspend and interrupt the statute of limitations is a compensatory structure aimed at protecting the interests of the creditor, built to balance the obvious, at first glance, the focus of the ancient institution to protect the debtor.

2. The uncertainty of the legal definition of "interruption of the statute of limitations"

If the issues concerning the suspension of the statute of limitations are not problematic at all, the normative provision of its interruption is quite debatable. The law defines an exclusive list of circumstances that entail the interruption of the statute of limitations. They are listed in Article 264 of the Civil Code of Ukraine (further – CCU): these are the actions of a person that testify to the recognition of his duty and the proper filing of a lawsuit. There is a long-standing controversy in science about the meaning, legal content and consequences of the impact of these circumstances on the adjustment of the procedure for calculating the statute of limitations by interrupting it. However, this applies both to factors related to the recognition of debt (to a lesser extent and exclusively to the manifestations of outward signs of such recognition), and related to the filing of a lawsuit (the main controversy here).

However, the real controversy arises when doctrinal analysis comes to the rule of Part 2 of Art. 264 of the CCU, which indicates the interruption of the statute of limitations in the event of a lawsuit. Let's start with the fact that in the literal sense of this rule, any lawsuit, even made improperly or unreasonably interrupts the statute of limitations. In fact, this is certainly not the case. Civil science has long determined that a statute of limitations is interrupted only if the claim is properly filed (Novitskiy, 1954, pp. 191–192; Pushkar, 1982, p. 211). Such an act refers only to those claims that were subsequently accepted for consideration by law enforcement agencies. This is about the way the commented provision of the law is interpreted in scientific works and commentaries (Sergeev, 2001, pp. 53–54), but this rule does not directly follow from the normative act, which is a shortcoming of the latter, which needs to be corrected. Moreover, the provision on the interruption of the statute of limitations by a properly filed lawsuit was contained in the main civil document of 1963 (Part 1 of Article 79 of the Civil Code of the Ukrainian SSR).

However, this is not the key challenge of the area under. The fact that our civilization and law enforcement practice lack understanding of the juridical content of this legal superstructure is of greater concern. This leads to differences in the legal nature of the commented rule and, most sadly, common and unjustified errors in its practical application. In the civil law literature, most lawyers state quite succinctly: the statute of limitations is interrupted by filing a lawsuit against the debtor, without analyzing the legal purpose of the new course starting from the moment of interruption, and its other consequences (Samoylenko, 2003, pp. 10–11). As a result, the literature has widely spread obviously incorrect expressions: "When a lawsuit is filed, a new statute of limitations begins under the same requirements for the same debtor" (Kharitonov, 1999, p. 157). Sometimes we even can find a statement that this new term continues regardless of the resolution of the litigation on the merits, i. e., when the decision will be made (Sviatohor, 2002, p. 8).

In practical application, the abstractness of the constructed syllogism and its ineffectiveness have repeatedly manifested itself. However, despite the illogical nature of the new statute of limitations after filing a lawsuit, some researchers still try to justify it with reference to the provisions of procedural law on the suspension of the process. There is, in particular, the view that filing a lawsuit leads to a break in the statute of limitations (in fact, its suspension) until the end of the proceedings (Pushkar, 1982, p. 212). According to another approach, a person needs to be given a new statute of limitations to protect his or her violated right, let us say in commercial litigation, if the proceedings are terminated without considering the merits by leaving the claim unconsidered, given that the case is not subject to civil litigation (Horovets, 2005, p. 108). In this context, we should also mention the thesis of O.S. Ioffe and his followers: after the end of the process, a new course of limitation begins (Ioffe, 1967, pp. 338–339; Sviatohor, 2002, p. 8; Pushkar, 1982, p. 212).

If we accept these positions, we will certainly reach to the absurd conclusion: the trial also takes place within the statute of limitations. At least a certain part of the trial, because in the case of lengthy proceedings, suspension of proceedings and several revisions of court decisions, it may turn out that the final court decision, which should protect civil law, will take place outside the new statute of limitations. As you know, the statute of limitations is a period for filing a claim, not the term of judicial protection - the forced implementation of the right of the individual. Threfore, a completely legitimate question arises: why do we need a new limitation course after the substantive right to sue was properly fully realized during the previous one? This question usually confuses researchers who are talking about interrupting the statute

of limitations in the event of a lawsuit. At best, they ignore it or offer completely unacceptable interpretations. Thus, many publications on this topic argue that the new accounting of the statute of limitations should be done from the moment of the elimination of circumstances that led to the suspension of proceedings, or from the moment of leaving the claim without consideration, and so on (Ilinykh, 1973, p. 13).

In general, these concepts boil down to the fact that with the filing of a lawsuit, the statute of limitations does not end but is interrupted, and a new course begins first. Let us disagree with this statement. Let us ask the question: what is the subject of the new limitation course, which will begin from the moment the process is resumed? It cannot recognize the creditor's right to judicial protection, as he has already exercised it by filing a lawsuit. Nor can it be a claim of the successor, as he enters the process after the predecessor has exercised the right to sue and acts within the powers that belonged to the latter. In our opinion, the above construction is created largely artificially: it does not reflect the real need for legal regulation of indirect relations, does not correspond to their real essence (Guyvan, 2019a, pp. 86–87).

3. Criticism of the concept of interruption of the statute of limitations in any lawsuit

All these theoretical constructions, which in their idea are designed to directly justify ineffective legal tools, deserve critical evaluation. They are primarily related to the appointment and procedure for calculating the new limitation period, which should start from the moment of interruption. Thus, can the same substantive right to judicial protection be exercised twice (or more times) if it has already been properly exercised? Obviously not. A properly filed lawsuit must be considered, and a decision must be made on it. The current legislation does not contain such legal constructions that would allow talking about the re-protection of the same right after the process. The decision of the court on the merits of the dispute (no matter how many times it is reviewed, no matter how long the trial is, the right to judicial protection is considered realized at the time of the initial claim, from this period the duration of public procedural legal relationship is calculated) resolves protection and removes dispute. Therefore, some researchers flatly indicate the absence of any statute of limitations after filing of lawsuit and in the process of litigation. According to I.B. Novitskiy, the court decision responds to the plaintiff's request, and it eliminates the need to file a new lawsuit, and at the same time eliminates the question of statute of limitations (Novitskiy, 1954, p. 190). The closure of the proceedings leads to the same consequences. As for the termination of the process as a result of leaving the statement of claim without consideration, the current legislation explicitly indicates the non-application of the rule on changing the procedure for calculating the statute of limitations in this situation.

Nor can the position that a new course should begin when the violation continues after the interruption cannot be supported. The fact is that from each violation may arise only one right to sue, the content of which is a substantive claim. Since it has already been implemented, no other claim can arise, so there will be no new statute of limitations.

The common understanding in the literature of civil law that the filing of a lawsuit interrupts the statute of limitations and begins a new course of action on the same requirements to the same defendant is nothing but a residual element of the previous mechanism of legal regulation of these relations. The fact is that under Russian law of pre-revolutionary times, the statute of limitations was considered a way to repay unrealized substantive law (Engelman, 2003, p. 398). According to this concept, the right, the implementation of which the holder does not take active action, is gradually extinguished. Given that at that time there was no division into regulatory and protective legal relations, this rule applied to all substantive subjective rights. Sometimes it extended to procedural relations: for example, failure of procedural actions by the plaintiff after the initiation of proceedings in the case after a certain statute of limitations terminated not only the right to defense, but also the protected civil law. Therefore, a person's authority to defend his violated subjective right was revoked not only in the case of prolonged failure to file a lawsuit, but also when he did not follow the already filed lawsuit in the official places. It is logical that a new long-standing course was needed to calculate the ten-year period of absence. But even according to this theory, the new course of the statute of limitations began not from its interruption, but only from the time when the movement in the case ceased, i.e., from the moment of the last action of the plaintiff. At the same time, the time of active proceedings could not be included in the new course, as the authorized person was not inactive (Engelman, 2003, pp. 457, 462).

If this rule were applied today, it would be logical to introduce a provision on the new statute of limitations after filing a lawsuit, but only from the moment from which the active actions in the law enforcement process ended. However, modern legislation has established other material and procedural consequences of the plaintiff's unjustified refusal to participate in the case, and the term is not a key cri-

terion for the exercise of a person's procedural right to participate in the dispute. The current civil theory unequivocally estimates the statute of limitations not as a time to repay the substantive law, but as a term for the exercise of protection and legal authority to obtain judicial protection of the violated subjective right. This significantly changes the evaluative approach to determining the role of the statute of limitations. The exercise of the right to judicial protection, which arose after the violation, may occur if the entitled person has applied to the court within the established (statute of limitations) period. In this case, the statute of limitations does not apply to the period of enforcement of the claim by the court, but only regulates the duration of the claim.

4. Construction of a modern adequate mechanism for interrupting the statute of limitations

We must agree with the position set out in the literature that the current stage of the development of private law puts on the agenda the issue of exemption of the Civil Code of Ukraine from structures that destroy its integrity, violate the principles of its systemic nature as a pivotal act of private law (Kuznetsova, Kokhanovska, 2016, p. 51). In the context of this study, the primitive interpretation of the normatively established rule, according to which the interruption and the new course of the statute of limitations appears after the filing of a lawsuit, does not correspond to the inner essence of the relationship governed by it. As we have convincingly proved, there are no legal and substantive grounds for interrupting the statute of limitations on the same claims against the same infringer with the filing of a lawsuit. However, Part 2 of Art. 264 of the CCU still highlights such an interruption. Consequently, the question arises: is filing a lawsuit aspect interrupting the statute of limitations, and does such an action entail the termination of this period? We have to admit that modern civil doctrine is not able to unambiguously assess these differences between the two commented phenomena. Is there really such a discrepancy? Maybe the truth is somewhere in the middle and takes into account the arguments of both polar points of view? Let's try to determine how and under what conditions the statute of limitations is interrupted and whether it is interrupted at all.

It should be noted that at present there is no consensus on the specific requirements interrupting the statute of limitations when filing a lawsuit, and how, in fact, to understand the concept of "filing a lawsuit for part of the claim"? In our opinion, the existing differences are caused by insufficient awareness of the legal nature of such a legal phenomenon as statute of limitations. Let's try to carry out its scientific analysis once again. The statute of limitations is the time of existence of the protective subjective substantive right – the claim. Any subjective right, including that covered by the statute of limitations, has a carrier and a counterparty to whom the legal claim is addressed. Therefore, the interruption and the beginning of a new course of existence of a certain right means that the procedure for calculating the duration of this particular relationship with the same subject composition changes. On the other hand, the realization of the claim (the right to sue in the material sense) is done by applying to a judicial authority (filing a lawsuit). Such an appeal, made by an authorized person in the prescribed manner, simultaneously terminates the protection of the right to sue, because the latter can be made only through its one-time implementation. Accordingly, the period of claim ends prematurely.

Therefore, filing a lawsuit interrupts the statute of limitations on some of the claims for which the right to sue was not exercised. However, such a legislative construction should be interpreted only narrowly: it is a part of the same requirement not covered by the lawsuit. For example, the debtor owes the creditor UAH 1,000, but the latter is suing only for the recovery of UAH 600. Consequently, the claim for recovery of the remaining funds (UAH 400) begins to be delayed again from the time of filing the lawsuit due to the interruption of the statute of limitations. Other claims continue to be repaid as a general rule, although they have a common basis for implementation. For example, filing a lawsuit for the performance of duty does not affect the statute of limitations on the claims of the same right holder for damages or penalties, although these claims have a common ground – the offense and the statute of limitations for them may well have begun simultaneously.

Taking into account all the above arguments, we can conclude the following. After the expiration of the statute of limitations, the protection right, even if not exercised, continues to exist, despite the fact that the claim is lost due to its non-realization. Otherwise, both the statute of limitations and the subjective right itself are terminated in connection with its implementation (execution) (Article 599 of the CCU). Thus, we see that filing a lawsuit either does not affect the statute of limitations for the relevant requirements, or leads to an interruption (Part 2 of Article 264 of the CCU) or termination of the statute of limitations. Given the above, we can note the following mechanism of influence on the calculation of the statute of limitations in case of filing a claim by the entitled

person, which requires appropriate reflection in civil law: 1) the statute of limitations is terminated; 2) the statute of limitations is interrupted when filing a lawsuit in the prescribed manner in the circumstances provided for in Part 2 of Art. 264 CCU.

As evident, regardless of the course of further consideration of the case and its effectiveness, the proper filing of the lawsuit terminates the statute of limitations at the request of a certain person of the same content and to the same debtor, and does not interrupt it. Even in the case of refusal to satisfy the claim due to the expiration of the statute of limitations, the right to protection (substantive right to sue) is considered terminated not from the moment of entry into force of the court decision (Tsikalo, 2004, pp. 3, 12), but from the expiration of the statute of limitations. This fact of expiration of the statute of limitations and the corresponding termination of the protection right is only fixed by the subsequent court decision. Moreover, it would be expedient to address this issue more widely in view of the uncertainty about the existence of a particular legal relations. Unfortunately, the civil law contains rules according to which the legal status of a party to the relations is determined not at the time of its entry into them, but later. In other words, the circumstances that appeared after some time have a decisive influence on the content of the legal relationship, which arose earlier, and the term of its existence. For example, this applies to the specified regulatory rules on the rejection of the claim due to the omission of the statute of limitations or leaving the claim by the court without consideration.

In these cases, the introduced procedure makes it possible to construct rules that allow the use of reverse mechanisms in determining the content of subjective law in the previous period: the omission of the statute of limitations after its nominal duration or the fact that the statute of limitations continued to expire. It should be noted that this approach is undesirable and quite dangerous. After all, it leads to a violation of one of the basic principles of civil law– the certainty of the content of the legal relationship at the time of its validity.

5. Conclusions

Despite the obvious fact that after the realization of the claim it ceases to exist, the literature continues to express views on the interruption of the statute of limitations on the same requirements to the same debtor in the event of a lawsuit (Lebedeva, 2003, p. 180). In fact, there can be no subjective substantive law that cannot be exercised under any circumstances. After the proper filing of the claim, i. e., the commission of the action by which the right to sue is exercised, re-filing an identical claim against the same person is not possible (a lawsuit left unconsidered in the future is equated to an improper one). If the phenomenon itself does not exist, then there is no period of its existence in space. From this point of view, it is necessary to critically evaluate the concept of "renewal of the statute of limitations", which is found in the literature (Romaniuk, 2018, p. 11). It is quite logical that after the termination of the right to sue, the period of existence of the right ceases – the statute of limitations. Therefore, based on the conclusions of the study, it is essential to agree with the thesis that after the filing of a lawsuit, the statute of limitations can not expire, because it loses its legal essence. This regulatory mechanism should reflect the Ukrainian civil law: the statute of limitations on the same requirements for the same defendant is terminated with the filing of a lawsuit. In addition, it is a clear need of the time to adjust the legislation in this area, which must result in the introduction of a rule to terminate the statute of limitations after the lawsuit is filed properly (Guyvan, 2019b, pp. 121–125).

Therefore, Chapter 19 of the Civil Code should be supplemented by an article entitled "Termination of the statute of limitations" in the following version: "The statute of limitations is terminated if one of the below vents occurred in the course of its duration: 1. Terms specified in Art. 257–259 of CCU ended. 2. Filing a claim by the creditor in full against all debtors. 3. Voluntary performance of a security obligation during the statute of limitations. 4. Termination of overdue obligation in a manner other than performance" (Guyvan, 2012, p. 326).

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Петро Гуйван,
кандидат юридичних наук, заслужений юрист України, професор, Полтавський інститут бізнесу, вулиця Сінна, 7, Полтава, Україна, індекс 36000, lawjur01@rambler.ru
ORCID: *orcid.org/0000-0003-3058-4767*

КРИТИЧНИЙ АНАЛІЗ НОРМАТИВНОГО ПРАВИЛА ПРО ПЕРЕРИВАННЯ ПОЗОВНОЇ ДАВНОСТІ В РАЗІ ПРЕД'ЯВЛЕННЯ ПОЗОВУ: ПРИПИНЕННЯ ДАВНІСНОГО СТРОКУ

Анотація. Статтю присвячено дослідженню актуального наукового питання про переривання позовної давності з пред'явленням цивільного позову. Відтак ***метою роботи*** є з'ясування реальної сутності позовного домагання та його впливу на можливість подальшого повторного звернення до суду з позовом.

Методи дослідження. Під час проведення правового аналізу зазначеного питання були використані такі загальнонаукові та спеціально-наукові методи пізнання, як діалектичний, формально-юридичний, історико-правовий, порівняльно-правовий, а також аналіз і синтез.

Результати. Автор обстоює тезу, що концепція щодо переривання позовної давності та початку нового перебігу під час будь-якого пред'явлення позову є відверто застарілою та такою, що не узгоджується з реальною сутністю позовної давності. Адже в разі належного пред'явлення позову якраз і відбувається реалізація закладеного в позовному домаганні права на позов шляхом звернення до суду. В українському та міжнародному праві встановлено, що здійснити право на захист можна лише один раз. Належно пред'явлений позов має бути розглянутий, за ним обов'язково приймається рішення або ухвала. Чинне законодавство не містить таких юридичних конструкцій, які давали би змогу говорити про повторний захист того ж права після закінчення процесу. Також не може бути підтримана думка, згідно з якою новий перебіг має початися, коли після переривання продовжується порушення. Річ у тім, що з кожного порушення може виникнути лише одне право

на позов, змістом якого є матеріально-правова вимога. Оскільки вона вже реалізована, інша позовна вимога виникнути не може, відтак не буде існувати й новий перебіг давності.

Висновки. Отже, повторне подання того самого позову неможливе за своєю природою. Який же строк із позовом переривається? Пред'явлення позову перериває давність за частиною вимог, щодо яких право на позов не було реалізоване. Однак таку законодавчу конструкцію варто тлумачити тільки звужено: ідеться про не охоплену позовом частину однієї й тієї ж вимоги, а не про будь-які вимоги кредитора. А за загальним правилом пред'явлення позову в межах позовної давності призводить до дострокового припинення права на позов у зв'язку з його вичерпаністю.

Ключові слова: переривання позовної давності, погашення права на позов, припинення строку.

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Daria Kravchuk,
Postgraduate Student at the Department of Civil Law Disciplines, National Academy of Internal Affairs of Ukraine, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, daria.levchenko@me.com
ORCID: *0000-0002-3314-0056*

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CHARACTERISTICS OF TEMPORAL EVALUATION CONCEPTS OF CIVIL LAW

Abstract. ***Purpose.*** The purpose of the article is to identify and implement temporal evaluation concepts in civil law.

Results. Technically defined time-based concepts and time-based evaluations are identified. The category of "concept of temporal evaluation" and the purpose of their application in law are revealed. Temporal evaluation concepts are evaluation concepts not defined by law relating to the time limits for the existence of certain legal phenomena, procedures, actions and conduct that shall provide for the free choice of the conduct of the party to the civil relations by means of a free evaluation within the specific law application situation, but in the manner and limits prescribed by law. Their presence in law is related to the need to define clearly the time limits for the existence of particular legal phenomena: subjective rights, legal obligations, legal guarantees and legal status, etc. When searching for temporal evaluation concepts for their depiction and classification, it is necessary to distinguish them from technically defined temporal concepts, which also are present in legal regulations.

Conclusions. Technically defined temporal concepts are calculated using the metric properties of time (when referring to the duration of time) or by specifying a point in time or event that is clearly known to occur (but it is not always known exactly when it takes place). In turn, evaluative temporal concepts, as already mentioned, are based on a social understanding of time, specified during law application in the light of specific circumstances. The temporal categories in civil law, somehow related to time, enable to determine the correct time interval, have their own specificities, and therefore cannot be replaced by a general philosophical category of time. The description of temporal evaluation concepts enables to understand their essence, their application specificities, impact on the legal relationship, which will further serve as starting points for the classification of related unifying criteria, accordingly, this article will be the basis for further research on the topic.

Key words: evaluation concepts, temporality, legal time, temporal evaluation concepts, time limits.

1. Introduction

Civil legal relations shall in any case be governed by a time-limit established by the provisions of the Civil Code of Ukraine and other civil legislation. The effective civil legal relations will depend, in particular, on the clear regulation of the temporal criteria, which in turn requires the improvement of their legislative regulation. An obstacle to achieving this goal is the proliferation of temporal evaluation concepts in civil law, which complicates law application. Given that the basis for the improvement of legislation is, in a certain way, the theoretical work of legal scholars and the scarcity of research in this area, the description of the temporal evaluation concepts of civil law is increasingly relevant.

In general, evaluation concepts in law have been under study throughout the existence of legal science. In this context, the focus should be on the works by scientists, such as: S. Vilnianskyi, M. Baru, V. Zherebkin, T. Kashanina, M. Lukyanenko, V. Kosovych, D. Levina. However, most of the studies by these authors show the dynamics and theoretical issues of interpreting only individual evaluation concepts in law, while the issue of temporal evaluation concepts in science is uncertain.

Therefore, the ***purpose of the article*** is to identify and implement temporal evaluation concepts in civil law.

2. General characteristics of temporal evaluation concepts

Temporal evaluation concepts are evaluation concepts not defined by law relating to the time limits for the existence of certain legal phenomena, procedures, actions and conduct shall provide for the free choice of the conduct of the party to the civil relations by means of a free evaluation within the specific law application situation, but in the manner and limits

prescribed by law. Their existence in law is related to the need to define clearly the time limits for the existence of certain legal phenomena: subjective rights, legal obligations, legal guarantees, legal status, etc.

When searching for temporal evaluation concepts for their depiction and classification, it is necessary to distinguish them from technically defined temporal concepts, which also are present in legal regulations.

Technical definition is one of the most essential features of law expressed in the clarity, unambiguity and conciseness of legislative provisions, makes the public order strict and accurate, and allows avoiding arbitrary interpretation and application of legal provisions (Babaev, 2004, p. 205). Their presence in law is related to the need to define clearly the time limits for the existence of some legal phenomena: subjective rights, legal obligations, legal guarantees and legal status, etc. Technically defined temporal concepts are calculated using the metric properties of time (when referring to the duration of time) or by specifying a point in time or event that is clearly known to occur (but it is not always known exactly when it takes place). In turn, evaluative temporal concepts, as already mentioned, are based on a social understanding of time, specified during law application in the light of specific circumstances.

3. Forms of the expression of temporal evaluation concepts

An analysis of the Civil Code of Ukraine makes it possible to conclude that temporal evaluation concepts are expressed in the following forms:

1. *"From the moment", "at the moment"* are the most used in the provisions of the State Civil Code of Ukraine, in particular: in Article 25, part 2 of the Civil Code of Ukraine, the civil legal capacity of a natural person arises at the moment of his/her birth; in Article 91, part 4 of the Civil Code of Ukraine, the civil legal capacity of a legal entity arises from the moment of its establishment; in Article 451, part 1 of the Civil Code of Ukraine, intellectual property right to performance arises from the moment of its first implementation; in Article 631, part 2 the treaty enters into force from the moment of its conclusion.

In general, the word "moment" has several meanings. In medieval times, for example, a "moment" was a unit equal to 1.5 minutes or 1/40 of an hour (Vikipediia: vilna entsyklopediia, 2021). In Ukrainian, the interpretation of this concept means a certain period, a stage in life, in the development of something (Rusanivskyi, 2010).

In law, the moment can be defined as the beginning or end of a certain action, of interaction between legal entities, objects, provisions, facts, processes, phenomena, etc. This notion records their occurrence, modification or termination by reference to a certain legal fact (from the moment of signing, at the moment of birth).

2. *"Immediately"* is used, in particular, in: Article 337, part 1 of the Civil Code of Ukraine, a person who has found a lost thing shall immediately inform the person who has lost it, or the owner of the object, and return the found thing to that person; in Article 557, part 1 of the Civil Code of Ukraine, the debtor who has fulfilled an obligation secured by a guarantee shall immediately inform the guarantor; in Article 644, part 1 of the Civil Code of Ukraine, if an offer to conclude a contract has been made orally and no time limit has been specified therein, the contract is concluded, when the person to whom the proposal has been made shall immediately declare its acceptance.

With regard to time, immediate action is considered a special (highest degree) manifestation of urgency (Bratel, 2017, p. 32). In modern Ukrainian, "immediate" is interpreted as being done, straightaway, without delay; urgently (Busel, 2005, p. 750). Specifically, such an indication in a certain civil law provision implies the immediate, prompt performance of the action, obligation and duty provided for in it.

3. *"Temporarily"* is used, in particular in: Article 99, part 3 of the Civil Code of Ukraine, the powers of a member of an executive body may be terminated at any time or it may be suspended from the exercise of powers; Article 379, part 1 of the Civil Code of Ukraine, the dwelling of a natural person is a dwelling house, an apartment or other dwelling designed and suitable for permanent or temporary residence in it; Article 597-4, part 2 of the Civil Code of Ukraine, the agreement on trust may provide for the user's right to lend an object of trust to third parties.

"Temporal" means continuing, existing or acting for some time" (Busel, 2005, p. 1450). The use of such temporal concept in civil law provisions provides for the limitation of a certain action, event which the provision shall regulate by a timeframe that will always have a beginning and an end.

4. *"Permanently"* is used, in particular: in Article 29, part 1 of the Civil Code of Ukraine, the place of residence of a natural person is the dwelling in which he/she resides permanently or temporarily; in Article 243, part 1 of the Civil Code of Ukraine, the commercial representative is the person, who permanently and independently acts as the representative of entrepreneurs when they conclude contracts in the field of entrepreneurial activity;

in Article 816 of the Civil Code of Ukraine, the tenant and the persons residing permanently with him.

In the "Explanatory dictionary of the modern Ukrainian language", the category "permanent" means "continuous all time, without interruption or disconnection; constant, uninterrupted; always present, which constantly accompanies anyone, anything; obligatory, mandatory; intended for long-term; not temporal" (Busel, 2005, p. 1084). A similar definition is given in the "Dictionary of the Ukrainian language" (Bilodid, 1970–1980). From this interpretation it should be concluded that the category "temporal" is opposite to the category "permanent". However, in some civil law provisions, the category "continuously" is used with certain temporal limitations, which will be further discussed in detail.

5. *"Timely"* is used, in particular: in Article 255, part 2 of the Civil Code of Ukraine, written applications and notifications submitted to the liaison office before the end of the last day of the period shall be considered timely; in Article 538, part 2, para. 2 of the Civil Code, a party who knows in advance that he or she will be unable to perform his or her duty shall notify the other party in timely manner; in Article 815, part 3, the tenant shall be obliged to remit rental payments in timely manner.

Most frequently, the category "timeliness" arises when there are different terms established by law which, inter alia, describe the legal procedure (Bolokhov, 2013, p. 31). According to the "Explanatory dictionary of the modern Ukrainian language", "timely" means "happening when necessary, in due time; which meets the needs, requirements of the given moment; relevant, actual" (Busel, 2005, p. 1300). The category "timeliness" is to serve as a technical legal requirement for a sequence of significant actions in the implementation of provisions.

6. *"In case of necessity"*, is used, in particular: in Article 1295, part 3 of the Civil Code of Ukraine, the testamentary executor cannot refuse to exercise his powers in case of necessity to take urgent measures, which being delayed may cause damages for the heirs; in Article 914, part 1 of the Civil Code of Ukraine, the carrier and the owner (holder) of freight may conclude a long-term agreement in case of necessity to carry out regular transportation.

Necessity is a system of connections and relations that leads to change, progress, development in a rigid direction with rigid results. In other words, necessity is a link that necessarily leads to an event (Vikipediia: vilna entsyklopediia, 2021).

In philosophy, a necessary phenomenon is one that is uniquely determined by a certain field of reality, assumed on the basis of knowledge of it and insurmountable within it (Onatskyi, 1962, p. 1123). Furthermore, necessity arises when the conditions, causes and grounds that determine the existence of a given phenomenon converge in a certain way. The way determines the sequence of connection between the phenomena. Therefore, necessity is a combination of conditions, causes and grounds in a certain way that determines the existence, occurrence, development and functioning of certain phenomena (Inozemtseva, 2014, p. 116).

Using the category "necessity" as a temporal estimation concept, it should be noted that it arises only at a certain time and continues, exists for some relevant interval, so it is always characterized by the moments of beginning and termination. Necessity may have not yet arisen, or it may have already passed (Rabinovych, 1999, p. 13).

7. *"Before / until"* are used, in particular: in Article 124, part 2 of the Civil Code of Ukraine, a member of a general partnership shall be liable for the partnership's debts, weather they occurred before or after his/her/its joining the partnership; in Article 938, part 2 of the Civil Code of Ukraine, if the period of storage in the storage contract is not fixed and cannot be determined on the basis of its conditions, a depositee shall be obliged to store an object until the time when a depositor claims the object back.

In Ukrainian, morphological and semantic properties of "*do*" [before, till] is a preposition, a link-word which, together with the genitive case of nouns, as well as some numerical and pronouns, expresses the relation between the objects, relation between action, state or feature and subject matter (Vikipediia: vilna entsyklopediia, 2021).

In the context of temporal evaluation concepts, the category "before / till" can be interpreted as a lexico-semantic time component only indirectly oriented to the reflection of ontological time, since it is used in the sentence and is aimed at the expression of temporal features of an action. That is, if in a civil law provision, the preposition "before / till" are used in a temporal meaning, then they usually used in the construction "a duty to be performed defined by the provision" – "before, till" – "a certain act which must precede the performance of the duty specified in the wording of the provision". Therefore, the category "before / till" is generalized and always specified by a certain action in the wording of the very provision.

8. *"After"* is used, in particular: in Article 777, part 1 of the Civil Code of Ukraine, after the expiry of the contract, a tenant that diligently fulfils his/her/its obligations pur-

suant to the rent agreement shall have a preferential right to the other persons to conclude a new rent agreement; in Article 836, part 1 of the Civil Code of Ukraine, if after the termination of the contract, the user failed to return an object, the lender shall have the right to claim its forced return and reimbursement for the damage caused; in Article 919, part 2 of the Civil Code of Ukraine, freight not released to the recipient at his request within 30 days after expiration of the delivery period shall be construed as lost, unless a longer period is established by the agreement or the transportation codes (statutes).

Similar to the category "before/until", the temporal concept "after" can be characterised. It is also generalized and specified in the text of the very provision. In the dictionary, the word is interpreted as "in some time; then, later." It is used in determining actions, events, etc., followed by another action, event, etc. (Busel, 2005, p. 982). The design of the use of the temporal term "after" in a civil law provision will be as follows: "a duty defined by the provision to perform" – "after" – "a certain act that has occurred (or should have occurred) before the performed duty specified in the provision".

9. *"Reasonable time"* is used, inter alia: in Article 564, part 2 of the Civil Code of Ukraine, the guarantor shall consider the creditor's claim together with the documents attached thereto within the time established in the guarantee, and, in its absence, within a reasonable time, to establish the conformity of the requirement and the documents attached thereto with the terms of the guarantee; in Article 690, part 2 of the Civil Code of Ukraine, the seller shall be obliged to accept (remove) the goods not accepted by the buyer (recipient) or to dispose of them within a reasonable time; in Article 704 of the Civil Code of Ukraine, if the agreement does not establish the term for the goods delivery to submit them to the buyer, the goods shall be delivered within a reasonable time after the buyer's claim is received.

In general, neither practice nor civil law provides for established practice or criteria for calculating a reasonable time, which clearly demonstrates that the concept is evaluative. The temporality of the concept is characterized by the limitation of certain time-limits within which an act determined by the relevant provision of law shall be performed. However, the very provision, which specifies the use of the concept of "a reasonable time" does not directly define the limits of such period, which in practice leads to conflicts in the future. The implementor of law must determine, on the basis of factual circumstances and on the basis of certain guidelines, which time is reasonable, since the legislator states this as incorrectly as possible.

10. *"Urgent need", "urgent case", "urgent necessity", "urgent actions"* are used, in particular: in Article 776, part 2, para. 2 of the State Civil Code of Ukraine, major repairs shall be conducted within the period prescribed by the agreement. If such period is not determined in the agreement or the repair is *urgent*, it shall be conducted within a reasonable time; in article 352, part 3 of the Civil Code of Ukraine, in case of the *urgent* need to create conditions for the monument of history and culture preservation, an action for its buyout may be filed without the warning; in Article 250, part 3, a representative cannot refuse to perform actions assigned by a proxy, if these *actions are urgent* or such that are aimed at prevention of inflicting losses to a person whom he/she represents, or to any other persons; in article 284, part 5 of the Civil Code of Ukraine, in *urgent* cases, upon a real threat to the life of a natural person the medical aid is provided without consent of a natural person or his/her parents (adoptive parents), a guardian, a tutor.

As follows from the mentioned provisions, the word "urgent", used in different wordings, makes them temporal. In the dictionary, it is defined as not to be postponed; to be performed, decided immediately (Busel, 2005, p. 734). In the context of implementing procedural legal facts, the urgency is linked to the need to take a certain action as soon as possible.

4. Conclusions

The given examples of the use of temporal evaluation concepts are not exhaustive and can be found in civil law provisions independent of the field of legal relations regulated by law. The temporal categories in civil law, somehow related to time, allows determining the correct time interval, having their own specificities, and therefore cannot be replaced by a general philosophical category of time. The description of the temporal evaluation concepts enables to understand their essence, their application specificities, impact on the legal relationship, which will further serve as starting points for the classification of related unifying criteria, accordingly, this article will be the basis for further research on the topic.

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Дар'я Кравчук,
аспірантка кафедри цивільно-правових дисциплін, Національна академія внутрішніх справ України, площа Солом'янська, 1, Київ, Україна, індекс 03035, daria.levchenko@me.com
***ORCID:** 0000-0002-3314-0056*

ХАРАКТЕРИСТИКА ТЕМПОРАЛЬНИХ ОЦІНОЧНИХ ПОНЯТЬ ЦИВІЛЬНОГО ПРАВА

Анотація. ***Метою статті*** є виокремлення та здійснення аналізу темпоральних оціночних понять у цивільному праві.

Результати. Розрізняють формально визначені часові поняття та часові оцінні поняття. Розкрито категорію «поняття часової оцінки» та мету застосування цих понять у праві. Тимчасові оціночні поняття – це не визначені законодавством оціночні поняття, які стосуються часових меж існування певних правових явищ, процесів і дій та забезпечують самостійний вибір поведінки учасника цивільних відносин шляхом вільної оцінки в межах конкретної правозастосовної ситуації, дозволених законом. Їх існування у праві пов'язане з необхідністю чіткого визначення часових меж існування тих чи інших правових явищ: суб'єктивних прав, юридичних обов'язків, правових гарантій, правового статусу тощо. У процесі пошуку тимчасових оціночних понять для їх характеристики та класифікації необхідно відрізняти їх від формально визначених часових понять, якими також наповнені нормативно-правові акти.

Висновки. Формально визначені тимчасові поняття розраховуються з використанням метричних властивостей часу (коли йдеться про тривалість часу) або шляхом вказівки на певний момент часу чи подію, про яку точно відомо, що вона відбудеться (проте не завжди точно відомо, коли це станеться). Своєю чергою оцінні часові поняття, як уже зазначалося, ґрунтуються на соціальному розумінні часу, яке конкретизується під час правозастосування з урахуванням конкретних обставин. Темпоральні категорії в цивільному праві тією чи іншою мірою пов'язані зі строком, забезпечують можливість правильного визначення часового проміжку, мають свою специфіку, тому не можуть бути підмінені загальною філософською категорією часу. Характеристика темпоральних оціночних понять дає змогу зрозуміти їх суть, особливості вживання, вплив на правовідносини, що надалі буде слугувати відправними точками для класифікації певних об'єднуючих критеріїв. Відповідно, стаття стане основою для подальших досліджень вибраної тематики.

Ключові слова: оціночні поняття, темпоральність, правовий час, темпоральні оціночні поняття, часові межі.

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Ludmyla Sapeiko,
PhD in Law, Associate Professor, Associate Professor at the Department of Civil Law and Procedure of the Faculty № 6, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, luda.slv@gmail.com
ORCID: *orcid.org/0000-0001-6911-8283*

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PROCEEDINGS IN THE CASES OF GRANTING PERMISSION FOR THE ENFORCEMENT OF ARBITRATION AWARDS: PROBLEMS AND AREAS OF IMPROVEMENT

Abstract. The ***purpose of the article*** is to study the peculiarities of proceedings in cases of granting permission to enforce arbitration awards in civil cases and find ways to improve the current civil procedural legislation.

Research methods. In the course of the research, both general scientific and special methods of cognition have been used.

Results. The author has clarified the essence of the procedure for appealing to enforce arbitration awards in civil cases; elicited problems of the judicial procedure for granting permission to enforce arbitration awards; made proposals to optimize the current laws in legal relations under concern.

Conclusions. The procedure for enforcing arbitration awards requires improvement. The legal issues that need to be settled within the current legislation include the resolution of the conflict between the norms of the Civil Procedure Code of Ukraine and the Law of Ukraine "On Courts of Arbitration" in terms of determining the competent court authorized to consider the case of the issuance of an executive document. This power should be assigned to the court of appeal, as it is currently enshrined in civil procedural law. In addition, the legal requirement for requesting the case from the arbitration court by the state court is unfounded, given the nature of proceedings in cases of granting permission for the enforcement of arbitration awards. It is argued that legal grounds for a refusal to issue a writ of execution to enforce arbitration awards (arbitral panel, which made the arbitration award, did not meet statutory requirements; the arbitration award contains ways to assert the rights and protected interests not provided by law; the permanent arbitration tribunal did not provide the relevant case at the request of the court) should be excluded from art. 486 of the Civil Procedure Code of Ukraine.

Key words: arbitration award, executive document, powers of competent court.

1. Introduction

The 2004 Law of Ukraine "On Courts of Arbitration" became an essential legal basis for protecting violated property and non-property rights and interests of natural and legal entities in arbitral tribunals, which are independent non-governmental bodies established by agreement or the relevant decision of persons interested in the legal procedure to settle disputes arising in civil and commercial relations. Although arbitral tribunals are separated from the state judiciary, they have broad powers to consider civil and commercial disputes and hence take procedural measures; however, they are not authorized to address legal issues which the legislator attributes to the exclusive jurisdiction of state courts. In particular, it refers to the issuance of a writ of execution for enforcing an arbitration award, which can be realized only by the state court. This procedure has some shortcomings, and thus, the study of granting permission to enforce arbitration awards is relevant from theoretical and practical perspectives.

In legal doctrine, problems of the enforcement of arbitration awards have been covered by the contributions of such scientists as I.O. But, Yu.O. Kotviakovskyi, V.A. Rekun, D.M. Sibilov, N.S. Stasiv et al. The scientists' developments are of great scientific interest and lay a theoretical groundwork for this article.

The purpose of the research is to study the peculiarities of proceedings in cases of grant-

ing permission to enforce arbitration awards in civil cases and find ways to improve the current civil procedural legislation. The research tasks are to clarify the essence of the procedure for appealing to enforce arbitration awards in civil cases; identify problems of the judicial procedure for granting permission to enforce arbitration awards; make proposals to optimize the current laws in legal relations under concern. Research methods: in the course of the research, both general scientific and special methods of cognition have been used.

2. Control functions of the competent court in terms of the enforcement of arbitration awards

In accordance with the procedure provided by the current legislation, arbitral tribunals have powers to consider civil and commercial cases and make the relevant awards, but they are not authorized to decide on their enforcement. Granting permission to enforce arbitration awards and issuing writs of execution are attributed to the courts of general jurisdiction and commercial (state) courts. This article focuses exclusively on the operation of the courts of general jurisdiction in the realm under consideration.

As a rule, the need to enforce the arbitration award may arise in the absence of its voluntary execution by the obligor. However, this is not always about a deliberate failure to comply with the arbitration award. Thus, I.O. But rightly notes that the current legislation of Ukraine does not set a period during which the defendant can comply with the decision voluntarily; therefore, the person, in whose favor the decision was made, is free to demand direct execution and immediately initiate the procedure for acquiring an executive document in the competent state court in the manner prescribed by law (But, 2016, p. 185).

The procedure for issuing a writ of execution for enforcing the arbitration award is established in art. 56 of the Law of Ukraine "On Courts of Arbitration" (hereinafter – the Law) and Chapter 4 of Section IX of the Civil Procedure Code of Ukraine (hereinafter – the CPC of Ukraine). In particular, art. 483 of the CPC of Ukraine statutorily stipulates that the issuance of a writ of execution for enforcing the arbitration award shall be considered by the court at the request of the person in whose favor the arbitration award was made. The application for a writ of execution for enforcing the arbitration award shall be submitted to the appellate court at the place of settlement of a dispute by arbitration within three years from the date of the approval of the arbitration award.

A similar legislative provision is reflected in art. 56 of the Law, which sets that the application for the issuance of an executive document may be submitted to the competent court within three years from the date of the approval of the arbitration award. At the same time, art. 2 of this Law interprets the term "court of competent jurisdiction" as a local general court or a local commercial court at the place of consideration of the case by the arbitral tribunal. Thus, there is a legal inconsistency in determining the court of competent jurisdiction authorized to consider the case of issuing an executive document (writ), which the legislator shall resolve by amending the Law of Ukraine "On Arbitration Courts" and assigning this power to appellate courts, as provided in the CPC of Ukraine.

As Yu.O. Kotviakovskyi notes, when issuing an executive document for an arbitration award, the court of competent jurisdiction actually agrees to enforce the decision it did not take (Kotviakovskyi, 2017, p. 25). In this way, the state apparently exercises indirect control over the compliance of arbitration awards with statutory requirements, as well as the rights and interests of the parties and other interested persons.

Many scholars draw attention to the control functions of the state under the enforcement of arbitration awards. Thus, N.S. Stasiv, studying this issue in the historical context, holds that even though the state has statutorily enshrined the right of a person to take a dispute to arbitration, control over the enforcement of arbitration awards has been assigned to state bodies – courts of general jurisdiction. Today, this type of control is manifested, in particular, when the arbitration award is subject to enforcement within the proceedings on the issuance of a writ of execution for enforcing the arbitration award. Moreover, the author points out that the statutory consolidation of proceedings for issuing a writ of execution for the enforcement of the arbitration award is based on a historically determined desire of the state to reserve control over the enforcement of the relevant decisions (Stasiv, 2020a, p. 84).

In D.M. Sibilov's opinion, the conclusion of an arbitration agreement and consideration of the case by an arbitration court does not deprive official judicial institutions of their control. The scientist rightly remarks that arbitration awards, which are not acts of justice, have an executive force which is realized through the incorporation of their content in the decisions and executive documents of official judicial institutions (Sibilov, 2021, pp. 40, 46).

One should also agree with the standpoint that granting permission to enforce arbitration awards by the competent state courts through issuing an executive document is a practical implementation of their control function

over arbitration proceedings (Kotviakovskyi, 2017, p. 24).

3. Peculiarities of the judicial examination of an application for a writ of execution for enforcing an arbitration award

The legislator enshrines a legal mechanism for settling the issuance of an executive document by the court of competent jurisdiction. As stipulated in art. 485 of the CPC of Ukraine, an application for a writ of execution to enforce the arbitration award shall be unilaterally considered by the judge within fifteen days from the date of its receipt in the courtroom with notice of the parties. Moreover, the non-appearance of the parties or one of the parties duly notified of the date, time, and place of the hearing shall not preclude the judicial examination of the application. A similar provision is available in art. 56 of the Law.

Following the examination of the application for issuing a writ of execution to enforce the arbitration award, the court decides on issuing a writ of execution or a refusal to issue a writ of execution to enforce the arbitration award.

It should be noted that under the above provision of the CPC of Ukraine, in considering an application for a writ of execution to enforce the arbitration award at the request of one of the parties, the court requires a case from the permanent arbitral tribunal which stores it. In this case, there is a legal conflict with the provisions of the Law "On Courts of Arbitration" because under the provisions of p. 2 of art. 56 of the Law, in considering an application for issuing an executive document, the competent court must request the case from the permanent arbitral tribunal which stores it. Thus, the CPC of Ukraine indicates the option of resolving this issue if the parties care, and the case cannot be called on if they have not required it. At the same time, the Law imperatively obliges the court of competent jurisdiction to take action without making it dependent on the parties' will. However, the purpose of such a request is unclear in both cases. Moreover, if the case is requested from the permanent arbitration court, the term of consideration of the application for issuing a writ of execution is significantly increased. The case must be forwarded to the state court within five days from the date of receipt of the request. In this case, the period for consideration of the application for issuing a writ of execution for the enforcement of the arbitration award shall be extended to thirty days from the date of its receipt by the court.

In addition, a lack of the statutory indication of the option of requesting the case, which the arbitration court considered, by the court to resolve a specific dispute catches attention. It seems that the above is due to the fact that the Law does not regulate the storage of such cases at all if a writ of execution has not been issued for them. Part 2 of art. 54 of the Law only deals with the storage of case materials considered by the arbitration court to resolve a specific dispute for which enforcement documents have been issued. They must be kept in the court of competent jurisdiction, at the place of issuance of the executive document.

Noting the legislative inconsistency, the author believes that there is no need for requesting the case from a permanent arbitral tribunal or arbitral tribunal to resolve a particular dispute, given that in deciding on the issuance of a writ of execution to enforce the arbitration award, the state court is not authorized to review arbitration cases as an appellate or cassation authority is.

4. Grounds for a refusal to issue a writ of execution to enforce an arbitration award

Within proceedings in the case of granting permission to enforce the arbitration award, the court must ascertain the absence or existence of grounds for a refusal to issue a writ of execution stipulated in art. 486 of the CPC of Ukraine and synchronized with the provisions of part 6 of art. 56 of the Law. The analysis of these norms contributes to the conclusion that most of the listed grounds for a refusal to issue a writ of execution to enforce the arbitration award are legally justified, but some of them are contradictory.

First of all, the author dwells on the grounds of the first conditionally defined group which, given the essence of the procedure under the study, have an explicit legal and practical focus, so their regulation and preservation in procedural law are necessary. Thus, the court must refuse to issue a writ of execution to enforce the arbitration award if: the arbitration award has been revoked by the court on the date of the approval of the decision upon the application for issuing a writ of execution; the case in which the arbitration award has been made is not under the jurisdiction of the arbitral tribunal by law; the deadline for applying for a writ of execution has been missed, and the court has not recognized reasons for its omission as valid; the arbitration award has been made in a dispute not provided for in the arbitration agreement, or this arbitration award has resolved issues beyond the scope of the arbitration agreement (if the arbitration award has resolved issues that go beyond the arbitration agreement, it may be revoked only in the part which concerns the relevant); the arbitration award is invalidated; the arbitral tribunal decided on the rights and obligations of persons who did not participate in the case.

While exercising such powers, the court fulfills the control function over the arbitration award, which is mentioned above and which must be assigned to the state as represented by judicial authorities as the only authorities executing justice through authorized professional judges. In this context, the author cannot agree with V.A. Rekun who proposed – for the interests of cases, for the interests of enterprises, organizations and in order to relieve state courts of the obligation to issue executive documents in arbitration cases which they did not consider – to allow one or more permanent arbitral tribunals to issue enforcement documents in cases in an experimental fashion (Rekun, 2009, p. 268).

In addition, the author believes that activities of the judicial body cannot be purely formal towards the issuance of an executive document. The state court must assess the arbitration award as to its compliance with the law; however, it is essential to keep in mind that the issuance of a writ of execution enforces the arbitration award and hence has some substantive effects on the interested parties, including debtors. The position of I.O. But is convincing, as follows: given that the interested party appeals to the court with a statement, the purpose of which is to guarantee the state enforcement of the arbitration award, the court of competent jurisdiction must make sure that the arbitration award is indeed lawful. At the same time, the court of competent jurisdiction should be endowed not with audit functions (i. e., not to review the case and the arbitration award, make a new decision, or change it) but control ones, incl. a refusal to issue a writ of execution on the grounds of the arbitration award's non-compliance with the law (But, 2016, p. 190).

Therefore, if the court finds the above circumstances amidst the procedure concerned, it must respond accordingly, i. e., a refuse to issue a writ of execution to enforce the arbitration award. At the same time, it should be noted that the establishment of these grounds by the court is not legally related to requesting the case from the arbitral tribunal. The conclusion on the availability of preconditions for refusing to issue a writ of execution can be made only on the basis of the documents obligatorily attached to the application: the original arbitration award (or a duly certified copy thereof) and the original arbitration agreement (or a duly certified copy thereof), or a valid court decision revoking the arbitration award or declaring the arbitration agreement invalid.

The statutory imposition of an obligation on the state court to establish the potential availability of other grounds for a refusal to issue a writ of execution in proceedings for granting permission to enforce arbitration awards is unjustified and contradicts the essence of this procedure. In particular, para. 8, p. 1 of art. 486 of the CPC of Ukraine entails that the court shall refuse to issue a writ of execution to enforce the arbitration award if the permanent arbitral tribunal has not provided the specific case at the court's request. The author has previously defended the position that requesting the case from the arbitral tribunal does not meet the objectives and competence of the state court in the context of the legal goal to be achieved through a system of procedural actions in the proceedings on the case of granting permission to enforce the arbitration award. It seems that requesting for the arbitration case's materials should take place only in the case of initiating another type of proceedings – proceedings in cases of appeal against arbitration awards, challenging awards of international commercial arbitration. The scientific community has other arguments in favor of the exclusion of such a ground for a refusal to issue a writ of execution for enforcing the arbitration award as failure to provide materials of the arbitration case, which also deserves attention, at the court's request. For example, N.S. Stasiv notes that the refusal to issue a writ of execution on the grounds of the arbitral tribunal's failure to provide the materials of the arbitration case at the request of the court is a sanction applicable to the applicant who does not have objective options to comply with the requirements of the court decision, and, therefore, shall not be liable (Stasiv, 2020b, p. 7).

The legislator regards the cases when the arbitration award contains ways to defend the rights and protected interests not provided by law as grounds to refuse to issue a writ of execution for the arbitration award (item 7, p. 1 of art. 486 of the CPC of Ukraine). This legislative provision is in discord with provisions of other regulations, in particular art. 16 of the Civil Code of Ukraine. I.O. But has studied this issue within his dissertation (But, 2016, pp. 191–193). Today, the current wording of p. 2 of art. 16 of the Civil Code of Ukraine outlines general methods of the protection of civil rights and interests. However, it is also consolidated the norm under which the court may protect a civil right or interest in a different way established by an agreement or law or a court in cases specified by law. That kind of the vision of ways to protect a right is reflected in the procedural rules. In particular, art. 5 of the CPC of Ukraine establishes that when executing justice, the court protects the rights, freedoms and interests of natural persons, the rights and interests of legal entities, state and public interests in the manner prescribed by law or

agreement. If the law or agreement does not determine an effective way to protect the violated, unrecognized or disputed right, freedom, or interest of the person who has appealed to the court, the court may determine a method to protect the right, which is not contrary to law, following the requirement stated by such a person. Arbitration courts also should be authorized to apply such an approach to determining methods to protect rights. Therefore, the ground provided in para. 7, p. 1 of art. 486 of the CPC of Ukraine should be excluded.

Among other things, pursuant to the current procedural law, the court refuses to issue a writ of execution for enforcing the arbitration award if the arbitral panel, which made the arbitration award, did not meet the statutory requirements, i. e., the requirements of Section III of the Law of Ukraine "On Courts of Arbitration". However, the establishment of the relevant circumstances cannot be implemented by the court on the assumption that the court should not request for an arbitration case, as well as go beyond its powers in proceedings of granting permission to enforce arbitration awards, i. e., in deciding on the issuance of a writ of execution, as in order to conclude the arbitral panel's non-compliance with the statutory requirements, it is necessary to conduct a substantive trial with mandatory examination and evaluation of relevant evidence indicating such a circumstance, which cannot occur in the proceedings. In the author's opinion, the consideration of this issue should take place only on the initiative of interested persons, who should apply to the court of competent jurisdiction and provide the necessary evidence to confirm their position. This will ensure the dispositive and adversarial nature of civil proceedings and avoid the acquisition of features of the investigative process. Many scientific contributions are devoted to dispositive and adversarial principles as fundamental categories of civil proceedings and the court's role in such proceedings. In particular, V.A. Kroitor and V.Yu. Mamnytskyi, studying the adversarial principle, note that the law is based on the point that civil proceedings are conducted on an adversarial basis, but with the active assistance of the court, i. e., on the terms of their cooperation, to consider the case effectively (Kroitor, Mamnitskyi, 2019, p. 41). It is essential to support this position as the court can only assist interested parties in exercising their rights, but it cannot undertake such rights.

One should draw attention to the fact that the above ground is available in the list of grounds for revoking the arbitration award, but only within proceedings on the case of appeals against arbitration awards, challenging awards of international commercial arbitration. This type of proceedings is the only possible and optimal procedure for establishing that the arbitral panel, which made the decision, did not meet the statutory requirements. Therefore, to differentiate court competence and avoid duplication of judicial powers in various proceedings, para. 6, part 1 of art. 486 of the CPC of Ukraine also needs to be abolished, but such a ground must be preserved in para. 4 of p. 2 of art. 458 of the CPC of Ukraine.

5. Conclusions

The procedure for applying for the enforcement of arbitration awards requires improvement. The legal issues that need to be resolved in the current legislation include the elimination of the conflict between the norms of the CPC of Ukraine and the Law of Ukraine "On Arbitration Courts" in terms of determining the court of competent jurisdiction authorized to consider the case on the issuance of an executive document. This power should be assigned to the court of appeal, as it is currently enshrined in civil procedural law. In addition, the legal requirement for requesting the case by the state court from the arbitration court is unfounded, given the nature of the proceedings in cases of granting permission to enforce arbitration awards. It is argued that legal grounds for refusing to issue a writ of execution to enforce arbitration awards (arbitral panel, which made the arbitration award, did not meet statutory requirements; arbitration award contains ways to assert the rights and protected interests not provided by law; the permanent arbitration tribunal did not provide the relevant case at the court's request) should be excluded from art. 486 of the CPC of Ukraine. Although the article resolves some controversial issues, the procedure concerned requires further studies in this regard.

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Людмила Сапейко,
кандидат юридичних наук, доцент, доцент кафедри цивільного права та процесу факультету № 6, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61080, luda.slv@gmail.com
ORCID: *orcid.org/0000-0001-6911-8283*

ПРОВАДЖЕННЯ У СПРАВАХ ПРО НАДАННЯ ДОЗВОЛУ НА ПРИМУСОВЕ ВИКОНАННЯ РІШЕНЬ ТРЕТЕЙСЬКИХ СУДІВ: ПРОБЛЕМИ ТА НАПРЯМИ ВДОСКОНАЛЕННЯ

Анотація. ***Мета статті*** полягає в дослідженні особливостей провадження у справах про надання дозволу на примусове виконання рішень третейських судів у цивільних справах, а також у пошуку шляхів удосконалення чинного цивільного процесуального законодавства.

Методи дослідження. У процесі дослідження застосовувалися як загальнонаукові, так і спеціальні методи пізнання.

Результати. З'ясовано сутність процедури звернення до примусового виконання рішень третейських судів у цивільних справах. Встановлено проблематику судового порядку надання дозволу на примусове виконання рішень третейських судів. Вироблено пропозиції щодо оптимізації чинного законодавства в окресленій сфері правовідносин.

Висновки. Встановлено, що процедура звернення рішень третейських судів до примусового виконання потребує свого вдосконалення. До правових питань, які необхідно вирішити в чинному законодавстві, належить усунення колізії між нормами Цивільного процесуального кодексу України та Закону України «Про третейські суди» в аспекті визначення компетентного суду, уповноваженого розглядати справу щодо видачі виконавчого документа. Це повноваження має залишатися за апеляційним судом, як це закріплено на сьогодні в цивільному процесуальному законодавстві. Крім того, необґрунтованою видається законодавча вимога про витребування державним судом справи з третейського суду з огляду на сутність провадження у справах про надання дозволу на примусове виконання рішень третейських судів. Наведено аргументи на користь того, що мають бути виключені зі ст. 486 Цивільного процесуального кодексу України такі правові підстави для відмови у видачі виконавчого листа на примусове виконання рішення третейського суду: а) склад третейського суду, яким прийнято рішення, не відповідав вимогам закону; б) рішення третейського суду містить способи захисту прав та охоронюваних інтересів, не передбачені законом; в) постійно діючий третейський суд не надав на вимогу суду відповідну справу.

Ключові слова: рішення третейського суду, виконавчий документ, повноваження компетентного суду.

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Yulia Sus,
Postgraduate Student at the Department of Civil Law and Procedure of the Faculty of Law, Leonid Yuzkov Khmelnytsky University of Management and Law, 57, Proskurivska street, Khmelnytsky, Ukraine, postal code 29013, yulia.sus@ukr.net
ORCID: *orcid.org/0000-0001-9733-3909*

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LEGAL REGIME OF JEWELS AS AN OBJECT OF MATRIMONIAL PROPERTY

Abstract. The ***purpose of the research*** is to study the nature of jewels as property and clarify the expediency of classifying jewels as the private property of the husband or wife, as well as proving the need to modify the list of assets belonging to the private property of one of the spouses.

Research methods. To accomplish the objectives of the work, general scientific and special methods of cognition have been used.

Results. The author has analyzed the concept of jewels, specified the properties that distinguish them from other personal items. The defining characteristic of jewels can be considered the price of such an item. The properties of jewels indicate the need for their statutory division into those that have a low cost and expensive ones. Expensive jewels differ in purchase motive and purpose. The purchase of jewels by the spouses may be followed by a desire to recover the spent money with time and make a profit. An analysis of the legislation of other states has shown that the value of jewels is taken into account in the case-law of England under the division of property and the laws of Spain.

Conclusions. It is not advisable to combine jewels and other personal items into one group, which is covered by the private property regime of one of the spouses. Given the development of socio-economic relations in terms of the property status of the spouses, property value, the purchasing power of the people, expensive jewels should be attributed to matrimonial property. The consolidation of the criterion of the value of jewels will throw light on the property relations of the spouses and secure justice and balance of interests of each spouse. Jewels, the value of which exceeds 20 minimum wages, must be subject to the legal regime of matrimonial property established by art. 60 of the Family Code of Ukraine. Relevant amendments should be made to the provisions of p. 2 of art. 57 of the Family Code of Ukraine by specifying in personal items "a jewel, the value of which does not exceed twenty minimum wages set for the able-bodied population as of January 1 of the particular year on the day of purchase".

Key words: jewels, piece of jewelry, cost, personal items, private property of wife or husband, ownership of matrimonial property, joint funds of spouses.

1. Introduction

As a result of the registration of marital relations, a married couple obtains personal non-property and property rights and obligations, a joint legal regime of property – a matrimonial property regime. According to art. 60 of the Family Code of Ukraine (hereinafter – the FC of Ukraine), property acquired by spouses during the marriage as joint property is their matrimonial property (Verkhovna Rada of Ukraine, 2002). At the same time, each spouse may have property belonging to him/her on the right of personal ownership. The problems caused by the establishment of a legal regime of personal property are one of the most challenging which occur in law enforcement practice when resolving family matters. Articles 57, 58 of the FC of Ukraine list assets that are the separate property of the wife/the husband and specify circumstances that lead to such a legal property regime (Verkhovna Rada of Ukraine, 2002). Among them, jewels hold a special place, which are mainly expensive items, that may cause litigation in the division of matrimonial property.

Social and socio-economic relations are constantly evolving, including the property status of spouses, property value, purchasing power of the population, etc. Legislation should respond to such changes. Therefore, a topical area of modern legal science is the analysis of the expediency of classifying jewels as the separate property of the husband or wife to ensure fair regulation of matrimonial property relations.

2. The concept of jewels under domestic law

From the moment of marriage registration, the presumption of community property acquired by spouses, except for cases established by law, comes into force (Lepekh, 2013, p. 85). Thus, according to p. 1 of art. 57 of the FC of Ukraine, the wife/husband possesses the following: property he/she acquired before the marriage; property he/she acquired in the marriage but on the basis of a deed of gift or succession; property he/she acquired in the marriage but for his/her personal finances. An individual group of the property belonging to the private ownership of only one of the spouses consists of personal items. According to p. 2 of art. 57 of the FC of Ukraine, the separate property of the wife and husband includes personal items, incl. jewels, even if they have been purchased for the joint money of a married couple (Verkhovna Rada of Ukraine, 2002).

It should be noted that p. 2 of art. 24 of the Marriage and Family Code of Ukraine states that the rule of the division of personal items does not apply to jewels and luxury articles, even if they were used by only one spouse (Verkhovna Rada of the Ukrainian Soviet Socialist Republic, 1969). However, the rule was changed with the adoption of the FC of Ukraine.

The current legislation classifies jewels as personal items. The case law attributes the following to the latter: clothing, accessories, hygiene products, cosmetics, and other items that satisfy the daily needs of each spouse. The FC of Ukraine does specify these items; the term is evaluative, and the court, given the item's properties, shall decide whether a particular item belongs to personal ones. The defining characteristic is regularity and daily use, as well as satisfaction of the needs of only husband or wife.

Neither the FC of Ukraine nor other legislative acts contain a statutory definition of jewels. This concept is also evaluative: in each specific case, the court decides whether the item is expensive. Following the explanatory dictionary of the Ukrainian language, a jewel is an item of high cost and value; fine jewelry, jewelry (Bilodid, 1973).

Therefore, jewels can entail jewelry, various products containing precious metals and gems, watches, antique accessories, unique objects used by one of the spouses, etc.

From the economic perspective, the jewelry market is a part of the luxury market, which meets the status needs of consumers (Skubilina, Volovyk, 2017, p. 355). Luxury articles are not vital, one can do without them in everyday life, but society considers them desirable. The motives that usually guide people in purchasing jewelry are different and individual. Among them are collecting rare or pieces of jewelry of great worth, emphasizing social status, and investing money. There are such kinds of jewelry: designer; artistically valuable; exclusive; with rare gemstones. Such purchase motives distinguish jewels from other objects that are designed to satisfy the daily needs of one of the spouses.

Precious metals and gems, or products made of them, as a kind of jewels can be the object of investment – an investment that can make a profit after a while. Moreover, such an object can be a piece of jewelry with certified investment gems. In such cases, they are not solely an individual accessory or decoration of a man or woman. The advantages of investing in precious metals and products are an aesthetic pleasure from ownership, long service life without loss of product performance, and the constant growth of their cost (Skubilina, Volovyk, 2017, p. 355). In particular, over the past 10 years, precious gemstones have gone up in price by more than 110% (Knight Frank, 2019). Today, pieces of jewelry are often provided with a product passport and other documents confirming their uniqueness or value as well as belonging to a person.

Given the above, the price of an item can be considered the defining characteristic of jewelry. According to this criterion, among pieces of jewelry, one should differentiate between low-cost and high-cost items. However, the current legislation embodies only one property of such items – regular use for personal needs, individual use by a man or a woman. In order to consolidate value characteristics of jewelry at the legislative level, one may use the criterion of comparison with the size of the minimum wage, which takes into account the dynamics of prices, costs of living, and its changes, etc.

The considered properties of jewels as personal items indicate the need for their statutory division into low-cost and expensive. In the author's opinion, the legal regime of matrimonial property should apply to expensive jewelry. Each of the spouses is a legally equal participant, incl. in terms of possession, use and disposal of property acquired by them for joint funds during the marriage.

According to arts. 69, 70 of the FC of Ukraine, the wife and husband have the right to partition matrimonial property irrespective of marriage dissolution; the wife's and the husband's shares are equal unless the agreement between them or marriage contract provides otherwise (Verkhovna Rada of Ukraine, 2002). The Ruling of the Supreme Court dated December 16, 2015 in case № 6-2641цс15 noted that the interpretation of property as matrimo-

nial is conditioned not only by the fact that it was acquired during the marriage but also by the couple's joint investment or contribution to property acquisition. Thus, the criteria that allow classifying the property as matrimonial are: 1) the time of acquisition of such property; 2) the funds for which the property was acquired (source of acquisition); 3) the purpose of property purchase, which allows granting it the legal status of matrimonial property. The norm of article 60 of the FC of Ukraine on the acquisition of the right to joint matrimonial property is considered to be correctly applied if the acquisition of property meets the above criteria (Supreme Court of Ukraine, 2015).

The author believes that such an approach to determining the legal regime is fair, as well as to the acquisition of an expensive precious item, even if it is used by one of the spouses. At the same time, the purpose of property acquisition, which gives it the legal status of matrimonial property, may involve investing money, maintaining the social standing of the family (not only of one spouse), etc.

Following the current approach of the legislator, neither the purpose of property acquisition nor the source of acquisition (the funds for which the property was purchased) is taken into account when determining the legal regime. Thus, p. 2 of art. 57 of the FC of Ukraine stipulate that jewelry is the separate property of the wife or husband, even if it was purchased for the joint money of spouses (Verkhovna Rada of Ukraine, 2002).

In view of the above, the author holds that it is inappropriate to link jewelry and other personal items in one group, which is covered by the regime of separate property of one of the spouses. The defining features of personal items are regularity and daily use, the satisfaction of the living needs of only man or woman. At the same time, expensive jewelry is characterized by special value, investment attractiveness, and other motives for purchase. Consequently, expensive jewelry should be subject to the matrimonial regime and community property, if it was acquired during the marriage.

3. Legal regime of jewels in foreign countries

In most European countries, the regime of jewels is not outlined separately in the rules of marital property. In particular, it is absent in the legislation of Lithuania, Latvia, Poland, and Finland. Thus, the list of personal property of one of the spouses is set out in art. 33 of the Family and Guardianship Code of Poland (Sejm of Poland, 1964). It includes: 1) property acquired before marriage; 2) property acquired by inheritance or as a gift unless the deceased or the grantor decided otherwise; 3) property that satisfies the personal needs of one of the spouses; 4) non-transferable rights that can be used by only one person; and other types which do not mention jewels.

Finland's marriage law does not stipulate a special legal regime for jewels. However, the following personal items are attributed to the group of property that one of the spouses cannot dispose of without the consent of the other: any necessary tools used by one of the spouses; movable property intended for the personal use of the other spouse or children; movable property that is part of communal household assets used by both spouses (Section 35 of the Marriage Act (Ministry of Justice of Finland, 1929)).

German law refers to jewels as a personal item. Section 1476 of the German Civil Code stipulates that the property, which remains after fulfilling matrimonial property obligations, belongs to spouses in equal shares. At the same time, following paragraph 2 of section 1477, each spouse may get items intended solely for his/her personal use, including clothing, jewelry, and tools (Federal Ministry of Justice of German, 2002).

Article 101 of the Dutch Civil Code also contains a rule according to which each spouse may demand the return of his/her clothes, valuables, professional and business equipment, papers, and souvenirs belonging to his/her family when dividing the marital property. The division may be established by a divorce agreement or by a judge (States General of Netherlands, 2012).

Attention should also be drawn to the content of art. 1346 of the Civil Code of Spain, which attributes, inter alia, clothing and personal items that are not of appreciated value to the personal property of each spouse (paragraph 7) (Ministry of Grace and Justice of Spain, 1889).

In England, the wife is usually free to keep her jewelry presented by her husband during the partition of property. Exceptions are situations under which one can demonstrate that the grantor's firm intention was to reclaim jewels in case of marriage dissolution. British lawyers note that the easiest way to demonstrate the "solid intention" is a prenuptial or postnuptial agreement. At the same time, it is marked that the case is complicated if the value of jewels constitutes a significant share of assets owned by a couple. Matrimonial assets are usually divided so as to achieve a fair division between the parties. In some cases, jewels are subject to sale to strike a balance (Austin Kemp Solicitors Limited, 2016).

If a man and woman have failed to agree upon the portion of the property after divorce, the case is litigated. Both parties are obliged

to disclose their financial status fully during the trial. Disclosure is implemented through filling out financial statements in the E Form that, together with supporting documents, contains complete information on the property, personal assets, investments, savings, liabilities, business assets, pensions, and income. In addition, it must contain personal belongings worth more than £ 500, incl. jewelry and other precious items. These items are registered along with the indication of their current value. The current value is usually interpreted as the reasonable resale value of the item rather than an insurance appraisal. The court considers the value of all assets that will later be divided between the spouses to achieve a fair division. The higher the value of jewelry compared to the total value of other assets, the more likely it will be considered under division (Anthony Gold Solicitors LLP, 2019).

In the USA, the situation varies depending on the state. Thus, in the case of "Lane Edward Williams v. Lisa Lyon Williams" as of March 26, 2019, heard by the Tennessee Court of Appeals (Court of Appeals of Tennessee at Jackson, 2019), the wife asserted that her husband gave her jewelry during the marriage. Meanwhile, the husband stressed that the jewelry, valued at $ 161,535.42, was common property and was purchased as an investment. The court marked that the Tennessee case law confirms this argument, as it is an asset acquired during the marriage. However, the court applied the provisions of §§ 36-4-121 (b)(2)(D) of the Tennessee Code that "[property] acquired by spouses at any time as a gift, by will or descent" is individual property. During the trial, the court took into account that the wife wore the jewelry in question and did not know of any intention of the husband to resell these items. As a result, the Court of Appeal recognized these products as personal property of the wife, which is not subject to fair division. (Martin Heller Potempa & Sheppard, 2019).

Therefore, the consolidation of a separate legal regime of jewels among the rules on the matrimonial property is not common to European practice. In Germany and the Netherlands, jewels are items intended solely for the personal use of one of the spouses and which he/she may be required to return in case of property division. In Spain, the criterion for personal items, which may be attributed to the personal property of only the husband or wife, is the lack of their extraordinary value. The case law of England draws attention to the value of jewels used by one of the spouses: the higher the value of jewelry compared to the total value of other assets, the more likely it will be considered by the court under division. However, each spouse is obliged to disclose information about personal belongings (including jewelry and other valuables), the amount of which exceeds £ 500 (approximately 18 thousand hryvnias).

4. Conclusions

The high cost is what distinguishes jewels from other personal items, which belong to the private property of one of the spouses. The defining properties of expensive jewels are also purchase motives and purpose. The purchase of jewels by the spouses may be followed by a desire to recover the spent money with time and make a profit. The value of jewels as an aspect that must be taken into account when determining the legal status of matrimonial property is recognized in Spanish law and the case law of England.

Consequently, the author holds it necessary to introduce the following amendments into the provisions of part 2 of art. 57 of the FC of Ukraine: "Personal private property of the wife and husband is individual items, including jewels, the value of which does not exceed twenty minimum wages set for the able-bodied population as of January 1 of the particular year on the day of purchase".

Accordingly, jewels, the value of which exceeds 20 minimum wages, should be subject to the legal regime of matrimonial property established by art. 60 of the FC of Ukraine.

The consolidation of the criterion of the value of jewels will bring certainty to the property relations of the spouses, and the consideration of valuables acquired during the marriage as matrimonial property will contribute to the fairness and balance of interests of each spouse.

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Юлія Сусь,
аспірант кафедри цивільного права та процесу юридичного факультету, Хмельницький університет управління та права імені Леоніда Юзькова, вулиця Проскурівська, 57, Хмельницький, Україна, індекс 29013, yulia.sus@ukr.net
ORCID: *orcid.org/0000-0001-9733-3909*

ПРАВОВИЙ РЕЖИМ КОШТОВНОСТЕЙ ЯК ОБ'ЄКТА ВІДНОСИН СПІЛЬНОЇ СУМІСНОЇ ВЛАСНОСТІ ПОДРУЖЖЯ

Анотація. ***Метою статті*** є дослідження природи коштовностей як майна та з'ясування доцільності віднесення коштовностей до особистої приватної власності чоловіка чи дружини, а також доведення необхідності внесення змін до переліку майна, що належить до особистої приватної власності одного з подружжя.

Методи дослідження. Для досягнення цілей роботи використовуються загальнонаукові та спеціальні методи наукового пізнання.

Результати. Проаналізовано поняття коштовностей, виділено властивості, що відрізняють їх від інших речей індивідуального користування. Визначальною характеристикою коштовностей можна вважати саме ціну такого предмета. Властивості коштовностей свідчать про необхідність нормативного їх розмежування на коштовності низької вартості та коштовності високої вартості. Коштовності високої вартості відрізняються мотивом і метою придбання. Купівля подружжям коштовностей може супроводжуватися бажанням через деякий час повернути витрачені грошові кошти та отримати прибуток. Проведено аналіз законодавства інших держав, який показав, що вартість коштовностей враховується в судовій практиці Англії під час поділу майна та в законодавстві Іспанії.

Висновки. Встановлено, що недоцільно об'єднувати коштовності та інші речі індивідуального користування в одну групу, на яку поширюється режим особистої приватної власності одного з подружжя. З огляду на розвиток соціально-економічних відносин у частині майнового стану подружжя, вартість майна, купівельну спроможність населення необхідно віднести коштовності високої вартості до спільної сумісної власності подружжя. Закріплення критерію вартості коштовностей внесе визначеність у майнові правовідносини подружжя та сприятиме дотриманню справедливості й балансу інтересів кожного з подружжя. На коштовності, вартість яких перевищує 20 мінімальних заробітних плат, має поширюватися правовий режим спільної сумісної власності подружжя, встановлений у ст. 60 Сімейного кодексу України. Відповідні зміни варто внести до положення ч. 2 ст. 57 Сімейного кодексу України шляхом визначення серед речей індивідуального користування «коштовність, вартість якої на день придбання не перевищує двадцятикратного розміру мінімальної заробітної плати, встановленої для працездатних осіб на 1 січня відповідного року».

Ключові слова: коштовності, ювелірний виріб, вартість, речі індивідуального користування, особиста приватна власність дружини чи чоловіка, право спільної сумісної власності подружжя, спільні кошти подружжя.

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Iryna Baliuk,
PhD, Associate Professor, Associate Professor at the Department of Business and Corporate Law, Institute of Law of Kyiv National Economic University named after Vadym Hetman, Yuriy Ilyenko street, 81, Kyiv, Ukraine, postal code 04050, irina@kneu.edu.ua,
ORCID: *orcid.org/0000-0003-4434-6946*

Olga Namiasenko,
PhD, Associate Professor, Associate Professor at the Department of Business and Corporate Law, Institute of Law of Kyiv National Economic University named after Vadym Hetman, Yuriy Ilyenko street, 81, Kyiv, Ukraine, postal code 04050, namiasenko.olga@gmail.com
ORCID: *orcid.org/0000-0002-9368-1698*

Olena Shcherbakova,
Assistant Professor at the Department of Health and Environment, Kyiv National University of Construction end Architecture, Povitroflotskyi avenue, 31, Kyiv, Ukraine, postal code 03037, elenym111@gmail.com
ORCID: *orcid.org/0000-0002-7474-6214*

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LEGAL EXPERT IN COMMERCIAL PROCEEDING IN UKRAINE

Abstract. ***The purpose of the article*** is to clarify the concept and legal nature of an expert in the field of law in commercial litigation, his authorities; justify the difference in the role of an expert and legal expert in commercial proceedings; identify shortcomings and possible advantages of including a legal expert in the litigation experience.

Research methods. The work is performed on the basis of philosophical, general and special scientific methods of cognition. Historical, logical, dialectical, comparative-legal, system-structural and some other methods were used in the process of work.

Results. Because of the legal unification of the commercial, civil and administrative proceedings, a new participant in the judicial proceeding has appeared for the first time – a legal expert, which is named in the Commercial Procedure Code of Ukraine as an expert in the field of law (expert in law). The legal position of the expert in the field of law and procedural issues of his participation, authorities, etc. are considered. It is important to study the related issues, such as the analogy of law, the legal expert concludes about. Attention is also paid to the comparison of Ukrainian and European norms regulating the participation in the trial of a legal expert and attorneys general to provide qualified legal assistance to a judge.

Conclusions. Problems related to the participation of the legal expert can be divided into two groups. The first one includes the shortcomings of the legislation in determining the requirements for the identity of an expert in the field of law: education, professionalism, citizenship, and etc. The second group of problems deals with the powers of a legal expert in litigation. In particular, we are talking about the expert conclusions about the application of the analogy of law. Most objections are due to the fact that the application of law and analogy of law has always been considered as the prerogative of the court, so the involvement of an expert into these issues is inappropriate. Inadequate legal regulations of the institute of legal expert cannot ensure its proper functioning.

Key words: lawsuit, legal expert, expert in law, expert in the field of law, attorney general, qualified legal assistance to a judge.

1. Introduction

The main purpose of justice is to restore the violated right. The entire trial is designed to ensure that a lawful and reasoned judgment is reached. The emergence of new types of business relationships and the constant complication of their legal regulation have led to conflicts and difficulties for judges to apply legal rules. The judge, as the main participant in the trial, is obliged not only to make a fair and lawful

decision in a timely manner but also to ensure a lawful procedure for its adoption. In such circumstances, the judge requires professional legal assistance in the application of law when resolving a complex dispute. This approach is reflected in the emergence of a completely new concept in procedural law – the legal expert (the expert in the field of law).

In 2017, the Ukrainian procedural legislation was substantially changed and unified that resulted in the adoption of the new version of the Commercial Procedure Code of Ukraine, the Civil Procedure Code of Ukraine, and the Code of Administrative Procedure of Ukraine. In accordance with the law and judicial practice, one used to consider inadmissible to adress legal questions to court experts, in particular, about the compliance of certain normative acts with the requirements of the law, the legal evaluation of the parties' actions, since such matters are exclusively under court jurisdiction. The updated Commercial Procedure Code of Ukraine (Art. 70) (Hospodarskyi protsesualnyi kodeks Ukrainy, 1991), the Civil Procedure Code of Ukraine (Art. 73) (Tsyvilnyi protsesualnyi kodeks Ukrainy, 2004) and the Code of Administrative Procedure of Ukraine (Art. 69) (Kodeks administratyvnoho sudochynstva Ukrayiny, 2005) in the wording of the Law of Ukraine № 2147-VIII of October 3, 2017 (Pro vnesennia zmin do Hospodarskoho protsesualnoho kodeksu Ukrainy, Tsyvilnoho protsesualnoho kodeksu Ukrainy, Kodeksu administratyvnoho sudochynstva Ukrainy ta inshykh zakonodavchykh aktiv, 2017) provide for the inclusion of a law expert in litigation participants. The content of all the mentioned articles regarding the procedural status of a legal expert is identical in all codes. The provisions of the articles on the content of the expert's opinion in the field of law and the assessment of the expert's opinion in the field of law by the court are also identical (Art. 108, 109 of the Commercial Procedure Code of Ukraine, Art. 114, 115 of the Civil Procedure Code of Ukraine, and Art. 112, 113 of the Code of Administrative Procedure of Ukraine). In addition, his position is also governed by the provisions of the articles of the relevant codes regarding the general rights and obligations of all parties to the trial.

Significant changes in the understanding of the role and importance of the judge, as well as the appearance in the trial of an expert in the field of law, led to numerous controversies. When discussing the emergence of a new litigant, scholars and practitioners tend to be critical of its legal certainty.

The goal of this publication is to clarify the concept and legal nature of an expert in the field of law in commercial litigation, analyze his powers, compare the concept and meaning of an expert and a legal expert in the commercial process, identify the disadvantages and possible advantages of including a law expert in trial participants, and study foreign experience.

2. The status of a legal expert in commercial proceeding

The analysis of the rules of the Commercial Procedure Code of Ukraine indicates that there are some shortcomings in the regulation of the status of an expert in the field of law, including the use of definitions. Thus, in the text of the Commercial Procedure Code of Ukraine and other procedural codes, the terms "law expert" and "expert in the field of law" are used. At first glance, such inconsistency is not fundamental, but in the case of divergent interpretations, this may raise controversy over the identification and involvement of experts for examination. In our view, the definitions used are not identical.

The concept of an "law expert" is broader than an "expert in the field of law", since a law expert can be a specialist both in the field of law and other areas of dispute. Thus, an expert in the field of law can only be a lawyer. For example, when settling economic disputes, issues of economics, management, finance, etc. may arise. In such a case, it is necessary to contact not only lawyers but also to involve specialists in the relevant field. In our opinion, the authority of the expert to draw conclusions about the analogy of law and the content of foreign law indicates the need to use a single term "expert in the field of law" in the procedural codes.

Other scientists also support this approach and point out that, in spite of giving an opinion exlusively on specific issues, such a person should be an expert in the field of law in general, and not only on the issues about which the conclusion is drawn. In view of the above, the person should be referred to as an "expert in the field of law" and not a "law expert" (Riabchenko, 2017).

Another drawback of the legal regulation of the procedural status of an expert in the field of law is the uncertainty of his legal nature in an economic litigation. According to Art. 70 of the Commercial Procedure Code of Ukraine, only a natural person can be an expert in the field of law. In Ukraine, legal expertise is currently carried out by legal entities, research institutes and universities, etc. We believe that the judge should be empowered to formally involve the above bodies and organizations acting by their representatives for expert examination in the field of law.

An individual, who is an expert in the field of law, must simultaneously meet two conditions:

1) have a scientific degree; 2) be recognized as a specialist in the field of law. These requirements are not clearly stated. The degrees of Candidate of Science (PhD (Law)) and Doctor of Science are awarded in Ukraine. Therefore, given the legislature's ambiguity and the fact that the decision to admit an expert in law is taken by a court, it is likely that the judge can decide on the rank of the expert's science degree. The second condition is that such a person must be a recognized legal practitioner. The ambiguity of the criteria and the evaluative nature of such a requirement raises even more questions. Who should be considered as a specialist: a scientist with experience or more publications, a practicing lawyer with a recent degree, or a lawyer of a well-known organization?

The following issues are of interest: whether it is necessary to take into account that a specialist practices within one field of law, but he obtained a scientific degree in another, or many scientific papers have been published in one field of law, but specialist has become a famous only for a single expression of his own opinion in another field etc.

The procedural codes also do not specify whether the parties' consent is required for a specialist to be recognized as an expert in law. In addition, the issue of who will determine such professionals is not regulated: the judge personally, or the judge should refer to scientific, higher education institutions, or to a specially established organization. Alternatively, it is possible to provide for a court appeal to the Scientific Advisory Board at the Supreme Court. The Scientific Advisory Board is composed of highly qualified legal experts to prepare scientific opinions on the Supreme Court's activities. The Scientific Advisory Board may draw up a recommended list or register of professionals who may participate in the litigation as experts in the field of law.

The issue of creating expert registers is relevant to all European countries. The study "Civil-law expert reports in the EU: national rules and practices" emphasizes that public registers must become more widespread in order to enable experts to be appointed by judges from outside the country where a given expert usually works (Nuée, 2015). The legislation of Ukraine does not set clear requirements for the citizenship of legal experts. However, scholarly publications suggest that foreign law professionals be involved in drawing conclusions about the true content of foreign law (Butyrska, 2018).

The decision on the engagement of an expert in the field of law to the participation in the case, as well as the attachment of his opinion to the case file, is taken by the court. However, the judge and any participant in the case may initiate the involvement of such an expert in the case. The participant in the case submits such a proposal to the court or an appeal executed as a statement (written or electronic), which is submitted to the judge hearing the case. In addition, according to Art. 108 of the Commercial Procedure Code of Ukraine, the parties in the case have the right to submit the opinion of an expert in the field of law, who did not participate in the trial.

Regardless of who initiated the involvement of the expert in the field of law in the case, the final decision on his participation is made by the judge. Regardless of whether an expert in law was involved in the case, the judge may not take his opinion into account in the final decision on the case, if he has a different reasoned opinion on the matter for which such expert was involved. However, if the expert in law participated in the case and the judge rejected his opinion, it should remain in the case file.

The rights and responsibilities of an expert in the field of law are set out in Art. 70 of the Commercial Procedure Code of Ukraine, as such, which are inherent only to him, in reality they are characteristic of some other participants in the lawsuit (specialist, translator). Responsibilities include: appearing at a court summons, answering court questions, providing explanations. The rights of an expert in law include: the right to know the purpose of his call to court, to refuse to participate in a trial if he does not have the appropriate knowledge. An expert in law is also entitled to the payment of services and compensation for costs associated with subpoena. In the absence of objections from the parties to the case, an expert in law may participate in the video conference way.

The results of the legal expert's litigation are drafted in a written opinion. An expert in law is involved in the case in two instances: 1) the need to apply the analogy of law (analogy of legal act); 2) in terms of the content of foreign law rules in accordance with their official or generally accepted interpretation, practice, doctrine in the foreign country concerned.

The analogy of legal act is understood as the possibility of applying acts of legislation governing similar in content relations in case they are not regulated by the normative legal act on a specific situation. The analogy of law applies where it is impossible to use the analogy of legal act to regulate such relations. In this case, the unregulated legal relations are governed in accordance with the general principles of law. Applying the analogy of law or the analogy of legal act is a part of the competence of any lawyer, and even more so of a judge. That is why we believe that empowering an expert in law to rule on the analogy of law is false: it degrades

the status of judges and provokes disrespect for judicial professional competence. The judge is the bearer of legal knowledge. The training of judges is aimed at obtaining them the skills to apply the law in a particular case, including the law by analogy (Baliuk et al., 2021; Baliuk, Namiasenko, 2019).

If a question arises as to the content of the rules of a foreign law according to their official or generally accepted interpretation, practice of application, doctrine in the respective foreign country, there may indeed be a need for the assistance of a specialist, especially in a court of first instance.

The assessment of the expert's opinion in the field of law is carried out by the court under the norms of Art. 109 of the Commercial Procedure Code of Ukraine. Pursuant to the article cited above, the opinion of an expert in the field of law is not evidence but has an auxiliary (advisory) character and is not binding on the court.

In its decision the court may refer to the expert's opinion in the field of law as the source of the information and must draw its own conclusions on the relevant issues. The opinion of the legal expert cannot contain an assessment of the evidence, an indication of the reliability or inaccuracy of one or the other evidence, of the advantages of one evidence over the other, of what decision should be taken as a result of the case. Therefore, the legislator has made it clear that an expert in the field of law is not involved in the process of judicial evidence and that his opinin is not one of the means of proof and has nothing to do with the decision-making process.

3. Legal expertise in the Court of Justice of the European Union

Some domestic scholars consider the activity of an expert in the field of law in Ukraine similar to that of the Advocate General in the Court of Justice of the European Union (Zozulia, 2017). We partially agree with this statement. If one considers the activity of an expert in the field of law as an activity of interpretation of law, then his function is similar to that of the Advocate General in the Court of Justice of the European Union. However, the legal certainty of the status of domestic experts in the field of law differs significantly from that of Advocates General.

The primary purpose of the Advocates General is to ensure that the Community law is maintained in the interpretation and application of European Union rules in the most complex of cases. It is the duty of the Advocate General to submit in open court a fully impartial, independent and reasoned opinion on a case before the Court of Justice of the European Union. Whereas judges, first and foremost, ensure that the rules of procedure are adhered to and make the final decision, taking into account the views of the Advocates General.

The Advocates General and the Judges of the Court of Justice of the European Union are appointed by the governments of the Member States, by common accord, in accordance with Art. 139 of the Treaty establishing the European Atomic Energy Community (Dohovir pro zasnuvannia yevropeiskoho spivtovarystva z atomnoi enerhii, 1957). They are recruited from persons with impeccable reputations and independents who possess the qualities necessary for the performance of official functions in high judicial positions in their countries, or are legal experts of high and generally recognized competence. The term of their activity is set by the EU legislation, and it is stipulated that the composition of the Judges and the Advocates General will be renewed periodically. When the term of office expires, such a person may be reappointed. In addition to periodic renewal and death, their functions may be terminated individually by resignation. The number of Judges is almost double that of Advocates General.

Both the Advocates General and the Judges are selected by the same criteria, and their activities are secured and guaranteed in the same way; it is not surprising that the Advocate General's Opinion almost always form the basis of a judgment of the Court of Justice of the European Union. The Court of First Instance (formerly the Tribunal) has no Advocates General, but judges themselves may be involved in the performance of the functions of Advocate General. A judge involved in the role of Advocate General in any case may not participate in the determination of the case.

In addition, Advocates General have some influence over litigation. In the process, of course, the status of Advocates General and Judges is somewhat different. According to Art. 16 (5) of the Protocol (№ 3) on the Statute of the Court of Justice of the European Union judges may seek the advice of the Advocate General, where it considers that a case before it is of exceptional importance, the Court may decide, after hearing the Advocate General, to refer the case to the full Court (Protokol (№ 3) pro Statut Sudu Yevropeiskoho Soiuzu (Protokol pro Statut Sudu Yevropeiskoho ekonomichnoho spivtovarystva), 1957).

At the same time, following Art. 20 of the Protocol (№ 3), the oral procedure includes, inter alia, the hearing of the submissions of the Advocate General. However, where it considers that the case raises no new point of law, the Court may decide, after hearing the Advocate General,

that the case shall be determined without a submission from the Advocate General.

Advocates General are also vested with supervisory functions and can interfere with litigation on their own initiative. According to Art. 62 of the Protocol (№ 3) in the cases provided for in the Treaty on the Functioning of the European Union, where the First Advocate General considers that there is a serious risk of the unity or consistency of Union law being affected, he may propose that the Court of Justice review the decision of the General Court. The Court of Justice shall decide whether or not the decision should be reviewed.

4. The essence of the legal nature of the person providing legal assistance to the judge

Comparing the legal nature of the Advocate General and the legal expert in Ukraine, we seek to find out the legal support for the functioning of the legal expert according to the purpose of his appearance in the domestic litigation.

The legal nature of the Advocates General lies in their similarity to the status of judges of the Court of Justice of the European Union. A legal expert is a participant in the trial, he may be involved in litigation under conditions determined by the procedural law at the discretion of the judge.

In most cases, the Court of Justice of the European Union considers cases with the assistance of the Advocates General. The Advocate General's Opinion is not binding on the Court in its decision, but in practice the Court generally always takes into account the Opinion of the Advocate General. At the same time, the involvement of an expert in law in litigation is not necessary in the current legislative certainty, and at the same time it degrades the status of a judge. The legislator does not state that the experts in the field of law are involved in the most important cases, but outlines the focus of their involvement.

It is common ground that the Advocate General, as well as the legal expert in Ukraine, provide legal assistance to the court in the form of its own opinion in a particular case.

5. Conclusions

The result of changes in the procedural codes in Ukraine was the emergence of a new participant to the case – a legal expert (an expert in the field of law). Issues related to the involvement of the legal expert can be divided into two groups. The first one is the shortcomings of the legislation in determining the requirements for the personality of the legal expert: education, professionalism, citizenship, etc. The second group of problems relates to the competence of an expert in the field of law in litigation. In particular, it is an expert's opinion on the application of the analogy of law and legal act. The fact that the application of law and legal act by analogy has always been considered a prerogative of the court, and therefore the involvement of an expert in law in these matters is inappropriate, is most objectionable. The imperfect legal regulation of the expert in law institute cannot ensure its proper functioning.

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Ірина Балюк,
кандидат юридичних наук, доцент, доцент кафедри підприємницького та корпоративного права, Юридичний інститут Київського національного економічного університету імені Вадима Гетьмана, вулиця Юрія Іллєнка, 81, Київ, Україна, індекс 04050, irina@kneu.edu.ua
ORCID: *orcid.org/0000-0003-4434-6946*

Ольга Намясенко,
кандидат юридичних наук, доцент, доцент кафедри підприємницького та корпоративного права, Юридичний інститут Київського національного економічного університету імені Вадима Гетьмана, вулиця Юрія Іллєнка, 81, Київ, Україна, індекс 04050, namiasenko.olga@gmail.com
ORCID: *orcid.org/0000-0002-9368-1698*

Олена Щербакова,
старший викладач кафедри охорони праці і навколишнього середовища, Київський національний університет будівництва та архітектури, Повітрофлотський проспект, 31, Київ, Україна, індекс 03037, elenym111@gmail.com
ORCID: *orcid.org/0000-0002-7474-6214*

ЕКСПЕРТ ІЗ ПИТАНЬ ПРАВА В ГОСПОДАРСЬКОМУ ПРОЦЕСІ УКРАЇНИ

Анотація. ***Мета статті*** – з'ясувати поняття та правову природу експерта в галузі права в господарському судочинстві, його повноваження; обґрунтувати різницю у значенні в господарському процесі експерта та експерта в галузі права; визначити недоліки й можливі переваги включення до складу учасників судового процесу експерта в галузі права; дослідити іноземний досвід із відповідного питання.

Методи дослідження. Роботу виконано на підставі філософсько-світоглядних, загальнонаукових та спеціально-наукових методів пізнання. У процесі роботи використовувалися історичний, логіко-юридичний, діалектичний, порівняльно-правовий, системно-структурний і деякі інші методи.

Результати. Унаслідок уніфікації правового регулювання господарського, цивільного та адміністративного процесів уперше з'явився новий учасник судового процесу, якого назвали експертом у галузі права (експертом із питань права). Розглянуто правове становище експерта в галузі права, його повноваження та процедурні питання його участі тощо. Важливим є дослідження пов'язаних питань, зокрема аналогії права й закону, про що експерт у галузі права приймає висновок. Увагу приділено також порівнянню українських і європейських норм регулювання участі в судовому процесі експерта в галузі права та генеральних адвокатів для надання кваліфікованої правової допомоги судді.

Висновки. Проблеми, які стосуються участі експерта в галузі права, можна умовно поділити на дві групи. До першої належать недоліки законодавства у процесі визначення вимог до особи експерта в галузі права: освіта, професійність, громадянство тощо. Друга група проблем стосується повноважень експерта в галузі права в судовому процесі. Зокрема, йдеться про висновки експерта з питань застосування аналогії закону та права. Найбільше заперечень викликає той факт, що засто-

сування права та закону за аналогією завжди вважалося прерогативою суду, а тому залучення експерта із цих питань є недоречним. Недосконала правова регламентація інституту експерта в галузі права не може забезпечити належне його функціонування.

Ключові слова: позов, експерт із права, експерт у галузі права, експерт із питань права, генеральний прокурор, кваліфікована юридична допомога судді.

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Alla Helych,
PhD in Law, Associate Professor, Associate Professor at the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 19, Henerala Rodimtseva street, building 1, office 12, Ukraine, postal code 03041, allagelich888@gmail.com
ORCID: *orcid.org/0000-0002-5113-4311*

Yuliia Helych,
PhD in Law, Associate Professor, Associate Professor at the Department of Constitutional and Administrative Law, National Transport University, 1, Mykhaila Omelianovycha-Pavlenka street, Kyiv, Ukraine, postal code 01010, juliagfree@gmail.com
ORCID: *orcid.org/0000-0002-6884-6550*

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LICENSING OF NON-BANKING ACTIVITIES IN UKRAINE: FEATURES OF PUBLIC ADMINISTRATION

Abstract. The ***purpose of the article*** is to consider the peculiarities of the implementation of public administration in the field of licensing of non-banking activities in Ukraine, to determine the boundaries of state regulation and identify shortcomings in legal regulation.

Research methods. The paper is executed by applying the general research and special methods of scientific cognition.

Results. The authors have analyzed the legal regulation of non-banking financial services markets, the legal status of non-banking financial institutions, the relevant powers of the National Bank of Ukraine, as well as the features of licensing activities for the provision of non-banking financial services. The Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets" establishes general legal principles in the field of financial services, regulatory and supervisory functions of financial services. In general, the authors refer to various special legal statuses of non-banking institutions that have separate legal regulation of the order of creation and operation, in particular: credit unions, pawnshops, leasing companies, trust companies, insurance companies, funded pension institutions, investment funds and companies, other legal entities, the exclusive activity of which is the provision of financial services. It should be argued that there is a need to discuss the unification of legal status and types of economic activity (especially given the common approaches to licensing their activities). In addition, having its own powers of the National Bank of Ukraine in relation to rule-making activities, there is no special need for additional regulation.

Conclusions. Legal regulation of financial services markets requires further improvement in terms of consistent separation of certain groups: banking services and non-banking financial services. The legal status of non-banking financial institutions should be reviewed in view of the changes specified by Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets". The authors believe that the National Bank of Ukraine's authority to regulate the entire financial services market is a transitional one amidst self-regulation of the financial services market. The grounds for granting and terminating licensing activities within the framework of committing offenses and non-compliance with licensing conditions should be clarified.

Key words: licensing, non-banking financial institution, state regulation, public administration, National Bank of Ukraine, economic freedoms, financial services market.

1. Introduction

The market of financial services has the appropriate specifics, given the general definition of state regulation of economic activity, state influence on the financial market, as well as the limits of public interference in the economic activities of market participants. The performance of certain functions of the public sector in a market economy (for example, support, incentives, mobilization, control, etc.) in the financial services market is an indicator of the efficiency of the domestic economic system.

Under conditions of deregulation, approaches to the so-called non-banking financial services market have been changed. Thus, the procedure for public management in this area has changed, and new approaches to licensing and supervision have been formed. The authors believe that such legislative approaches are the basis for further changes, in particular, regarding the formation of self-regulation of the financial services market.

The purpose of this publication is to consider the features of the implementation of public administration in the field of licensing of non-banking activities in Ukraine, to determine the boundaries of state regulation and identify shortcomings in legal regulation.

The methodological basis of the research is economic and legal views on the proportional regulation of relations, the central bank's place and role, as well as the effectiveness of public administration in the relevant market.

2. Legal regulation of the markets of non-bank financial services in Ukraine

The legal literature draws attention to the existence of various models of state intervention in the exercise of economic freedoms in the light of respect for human rights and proportionality. As a result, there is: 1) the concept of transaction costs (any agreement requires some time and effort, which has a material dimension and affects the final price of the product, service or item on the market, resulting in regulated contracts and guarantees of compliance); 2) value theory (analysis of the permissible limits of state intervention in economic freedoms through clarifying the constitution's goals and principles); 3) the theory of values (interventions are considered through the recognition of some values, which serve as the main criterion for the legitimacy of decisions of public administration) (Savchyn, 2020, pp. 62–63).

Mechanisms of state regulation of the economy in the generalized sense are sets of interrelated methods, tools, and forms of targeted regulatory influence of the state, which are grouped into mechanisms according to areas for regulating business, regulation of monetary and fiscal spheres, investment and innovation, etc. (Bodrov et al., 2010, p. 130).

General legal principles of financial services, regulatory and supervisory functions of financial services are established by the Law of Ukraine "On Financial Services and State Regulation of Financial Services Markets" (hereinafter – Law № 2664). In addition, the Preamble of the Law defines its purpose – to create a legal framework to protect the rights and interests of clients of financial institutions, individuals – entrepreneurs providing financial services, legal support and development of a competitive financial services market in Ukraine, legal support for a single state policy financial sector of Ukraine.

In view of this, it seems that Law № 2664 is aimed at the implementation of the theory of values, which is generally correlated with the constitutional principle of the state system, formed in Art. 3 of the Constitution of Ukraine.

According to the development strategy for the financial services market, special attention is paid to the non-banking financial market, in particular, to bring the regulatory environment closer to international standards by implementing the rules of IAIS (International Association of Insurance Supervision), IOPS (International Organization of Pension Supervision), IOSCO (International Organization of Securities Commissions) and EU acts (Strategy for the Development of the Financial Sector of Ukraine until 2025, 2021, p. 8).

Law № 2664 separately regulates the tasks and powers of the National Bank of Ukraine in the field of state regulation of non-bank financial services markets. This legislative approach is driven by the need to reduce the number of regulatory and supervisory authorities in non-banking financial services markets by dividing the functions of the National Commission for State Regulation of Financial Services Markets among other bodies for state regulation of financial services markets.

In fact, the regulator was replaced, leaving the main tasks of regulation, as well as the separation of non-banking financial services from the object of regulation. Thus, in accordance with Art. 27 of the Law № 2664, the National Bank of Ukraine carries out:

1) strategy generation and implementation of development and solution of systemic issues of the functioning of financial services markets in Ukraine;

2) state regulation and supervision of the provision of financial services and compliance with the relevant legislation;

3) protection of the rights of consumers of financial services by applying measures of influence within their powers in order to prevent and stop violations of the law in the financial services market;

4) generalization of the practice of application of the legislation of Ukraine on financial services and markets and development of proposals for their improvement;

5) development and approval of binding regulations on issues within its competence;

6) coordination of activities with other state bodies;

7) introduction of internationally recognized rules for the development of financial services markets.

3. Non-banking institutions

The legal status of a non-bank financial institution is quite specific. Thus, Law № 2664 does not provide a separate definition and features of this institution. In accordance with the Regulations on the procedure for issuing a license to transfer funds in national currency without opening accounts, approved by the Resolution of the Board of the National Bank of Ukraine dated August 17, 2017 № 80, it is established that: *non-banking institution* – a non-banking financial institution or postal operator with a valid license (sp. 15, p. 4); *non-bank financial institution* – a legal entity that is not a bank in accordance with the legislation of Ukraine and is entered in the Register of Financial Institutions in the manner prescribed by the legislation of Ukraine (sp. 16, p. 4).

That is, in one case it is about licensing, and in another – the presence of the organization in the register (which is a consequence of licensing). Obviously, it would be more appropriate for the law to differentiate between the legal status of a bank and a financial institution in order to avoid logical errors (the ratio of generic and specific concepts).

I.V. Borysov defines financial institutions as participants in the financial services market, which are created and operate in "modified" ("complicated") organizational legal forms, which arise by including in the structure of elements of basic organizational legal forms of legal entities additional, functional legal means that reflect the special requirements for the relevant types of legal entities depending on the economic and legal interests of their founders / participants (Borysov, 2016, pp. 3–4).

In general, we are talking about various special legal statuses that have separate legal regulation of the order of creation and operation, in particular: credit unions, pawnshops, leasing companies, trust companies, insurance companies, funded pension institutions, investment funds and companies, other legal entities, exclusive the type of activity of which is the provision of financial services. Thus, it should be argued that there is a need to discuss the unification of legal status and types of economic activity (especially given the common approaches to licensing their activities).

4. Powers of the National Bank of Ukraine

Given the changes in the legal regulation of licensing of non-banking financial activities and the tasks of the National Bank of Ukraine, the question arises as to the ability of this constitutional body to perform them. Thus, according to Part 2 of Art. 99 of the Constitution of Ukraine, the main function of the domestic central bank – the National Bank of Ukraine – is to ensure the stability of the currency. A separate norm stipulates that the Council of the National Bank of Ukraine develops the basic principles of monetary policy and monitors its implementation, and the legal status of the Council of the National Bank of Ukraine is determined by law (Art. 100).

Keeping in mind this constitutional wording, the Law of Ukraine "On the National Bank of Ukraine" delimits the main function (Art. 6), under which the National Bank of Ukraine must proceed from the priority of achieving and maintaining price stability in the country and other functions (Art. 7), which, in particular, includes the implementation of *state regulation* and *supervision on an individual and consolidated basis* in the markets of non-banking financial services for non-banking financial institutions and other persons who are not financial institutions but have the right to provide certain financial services and other laws of Ukraine (sp. 8-1, p. 1).

Referring to the licensing of non-banking financial services, we should focus on certain powers of the National Bank of Ukraine in the field of state regulation of non-banking financial services (Art. 28 of Law № 2664), namely:

– issues non-banking financial institutions and persons who are not financial institutions but have the right to provide certain financial services, licenses to conduct financial services, determines the procedure for their issuance, suspension, renewal and revocation (cancellation);

– determines the requirements for persons who intend to conduct financial services activities, including requirements for their ownership structure, corporate governance system, risk management and internal control, conditions of financial services activities, the implementation of which requires a license (license conditions), and the procedure for monitoring their compliance;

– establishes mandatory criteria and standards of capital adequacy and solvency, liquidity, profitability, asset quality and risk of operations, compliance with the rules of financial services and other indicators and requirements that limit the risks of transactions with financial assets;

– provides information on requests for information, provides conclusions on the attribution of transactions to financial services;

– imposes restrictions on the combination of certain types of financial services;

– determines the professional requirements for managers, chief accountants (persons responsible for accounting, including on the basis of contracts) of financial institutions and may require dismissal of persons who do not meet the established requirements for such

positions, or termination of relevant contracts;

– sets the conditions and procedure for conducting internal audit (control) in financial institutions;

– establishes the procedure for approval in accordance with this Law of the acquisition or increase of significant participation in a financial institution.

Such a legislative approach is to some extent sufficient to regulate the provision of non-bank finance, in particular in terms of licensing. In addition, having its own powers of the National Bank of Ukraine in relation to rule-making activities, there is no special need for additional regulation.

However, according to Art. 34 of the Law № 2664, separate norms on licensing of non-banking financial services are established. Thus, the principles of licensing activities for the provision of non-banking financial services, which essentially duplicate the constitutional provisions of Art. 8, part 4 of Art. 13, Art. 19 of the Constitution of Ukraine: 1) freedom and equality of rights of economic entities; 2) a comprehensive analysis, which provides for a comprehensive analysis by the National Bank of Ukraine of each person to make decisions in the field of licensing; 3) legal certainty and reasonable doubt, which provides for the establishment of regulations in the field of licensing requirements for persons, the conditions of their activities and documents submitted by them to the National Bank of Ukraine within licensing procedures, as well as granting the National Bank of Ukraine rights, if there is reasonable doubt as to compliance with such requirements, or if there is information that requires further evaluation, require clarifications, clarifications and/or additional documents necessary to ensure that the requirements are properly met.

5. Features of licensing activities for the provision of non-banking financial services

The classification of the procedure for licensing economic activity depending on the specifics of legal regulation is proposed and substantiated in the legal literature: 1) general – unified procedure established by the Law of Ukraine "On Licensing of Economic Activities"; 2) special – based on the general provisions of the law, but has certain features defined by a special law; 3) special – is fixed by special laws and does not provide for the extension of the law (Averianova, 2019, p. 3).

According to p. 2 of Art. 34 of the Law № 2664, the National Bank of Ukraine within its competence in the field of state regulation of non-banking financial services issues licenses for financial services to *non-banking financial institutions* and *persons who are not financial institutions* but have the right to provide certain financial services, (according to sp. 3–9, 11 p. 1 of Art. 4): trade in currency values; attraction of financial assets with the obligation to return them later; financial leasing; lending, including on the terms of a financial loan; providing guarantees; financial payment services; in the field of insurance; factoring.

According to Art. 35 of the Law № 2664, a person who intends to conduct a certain type of financial services subject to licensing, applies to the National Bank of Ukraine for a license, which must contain: 1) information about the identity of the applicant (name, location, banking details, identification code); 2) other information specified by regulations of the National Bank of Ukraine; 3) if the applicant has branches, other separate divisions, which will carry out activities on the basis of the obtained license, the application shall indicate their location.

The license application shall be accompanied by documents, the exhaustive list and requirements for the content of which are established by laws on regulation of certain financial services markets and regulations of the National Bank of Ukraine (these are resolutions of the Board of the National Bank of Ukraine: March 26, 2021 № 26 and December 24, 2021 № 153).

The National Bank of Ukraine shall decide on the issuance of a license or refuse to issue it within 30 working days from the date of receipt of the application for a license and the full package of documents attached to the application, unless otherwise provided by law (Art. 36 of the Law № 2664). The grounds for deciding to refuse to issue a license are:

1) inaccuracy of the information provided by the applicant;

2) non-compliance of the applicant and/or submitted documents with the requirements of the law and/or regulations of the National Bank of Ukraine, which determine the procedure and conditions for issuing a license established for the activity specified in the application for a license.

According to Art. 38 of the Law № 2664, in the case of a decision to issue a license, the National Bank of Ukraine no later than the next working day from the date of its adoption: makes an appropriate entry in the State Register of Financial Institutions or the Register of Persons who are not financial institutions but have the right to provide certain financial services; provides the applicant with an extract from the relevant register on the issuance of a license (the license takes effect from the date of entry by the National Bank of Ukraine of the entry in the relevant register).

The grounds for revoking (revoking) a license to provide financial services (Art. 38-1) should be analyzed separately, in particular those that are not related to the violation of licensing conditions or other violations of the law, namely:

– detection of the fact (facts) *of non-banking financial institution or a person* who is not a financial institution, but has the right to provide certain financial services, *risky activities* that threaten the interests of depositors and/or other creditors of such institution (person). The list of signs, the presence of which is the basis for the conclusion of the National Bank of Ukraine on the conduct of non-banking financial institution or a person who is not a financial institution but has the right to provide certain financial services, law of order;

– non-provision of any financial service by a non-banking financial institution or a person who is not a financial institution, but has the right to provide certain financial services, *within one year from the date of obtaining the license*.

The first ground is revealed in the Regulation on the application by the National Bank of Ukraine of measures of influence in the field of state regulation of activities in the markets of non-banking financial services, approved by the Resolution of the Board of the National Bank of Ukraine of February 1, 2021 № 12. Thus, such signs include systematic violations of the legislation on consumer protection and advertising in the field of financial services (for advertising that is considered unfair advertising); as well as certain violations of credit unions, insurers, non-bank financial institutions licensed to provide guarantees (p. 9 of the Regulation), which in general should be characterized as violations of the law and not risky activities in understanding the nature of entrepreneurship.

In turn, failure to provide any financial services within a year from the date of obtaining a license appears to violate the freedom to conduct business, as it does not correlate with violations of licensing conditions or other legislation (of course, it is not a matter of concealing business "shelf", "fiction" or "paper" organizations).

6. Conclusions

Summing up some results, the authors consider it appropriate to pay attention to the following. Legal regulation of financial services markets needs further improvement in the sequential separation of certain groups: banking services and non-banking financial services, which will promote unity in approaches to public financial management in general. The legal status of non-banking financial institutions, determined by separate laws, should be reviewed keeping in mind changes defined by Law № 2664. There is some doubt about the need to authorize the National Bank of Ukraine to regulate the entire financial services market. The authors believe that this approach is transitional in the context of the formation of self-regulation of the financial services market. The grounds for granting and terminating licensing activities within the framework of committing offenses and non-compliance with licensing conditions should be clarified that will promote good faith practice in the financial services market.

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Алла Гелич,
кандидат юридичних наук, доцент, доцент кафедри теорії та історії держави та права, Національний університет біоресурсів та природокористування України, вулиця Генерала Родимцева, 19, корпус 1, офіс 12, Україна, індекс 03041, allagelich888@gmail.com
ORCID: *orcid.org/0000-0002-5113-4311*

Юлія Гелич,
кандидат юридичних наук, доцент, доцент кафедри конституційного та адміністративного права, Національний транспортний університет, вулиця Михайла Омеляновича, 1, Київ, Україна, індекс 01010, juliagfree@gmail.com
ORCID: *orcid.org/0000-0002-6884-6550*

ЛІЦЕНЗУВАННЯ НЕБАНКІВСЬКОЇ ДІЯЛЬНОСТІ В УКРАЇНІ: ОСОБЛИВОСТІ РЕАЛІЗАЦІЇ ПУБЛІЧНОГО УПРАВЛІННЯ

Анотація. ***Мета статті*** – розглянути особливості реалізації публічного управління у сфері ліцензування небанківської діяльності в Україні, визначити межі державного регулювання та встановити недоліки правового регулювання.

Методи дослідження. Роботу виконано на підставі загальнонаукових та спеціальних методів наукового пізнання.

Результати. У статті проаналізовано правове регулювання ринків небанківських фінансових послуг, правовий статус небанківських фінансових установ, повноваження Національного банку України в цій сфері, а також особливості ліцензування діяльності з надання небанківських фінансових послуг. Загальні правові засади у сфері фінансових послуг, регуляторні й наглядові функції фінансових послуг встановлені Законом України «Про фінансові послуги та державне регулювання ринків фінансових послуг». Загалом ідеться про різні спеціальні правові статуси небанківських фінансових установ, які мають окреме правове регулювання порядку створення та діяльності, зокрема кредитних спілок, ломбардів, лізингових компаній, довірчих компаній, страхових компаній, накопичувальних пенсійних установ, інвестиційних фондів і компаній, інших юридичних осіб, виключним видом діяльності яких є надання фінансових послуг. Варто стверджувати, що є необхідність обговорення уніфікації їхнього правового статусу та видів господарської діяльності (особливо з огляду на єдині підходи до ліцензування їхньої діяльності). Крім того, з огляду на власні повноваження Національного банку України щодо нормотворчої діяльності немає особливої потреби в додатковому регулюванні.

Висновки. Правове регулювання ринків фінансових послуг потребує вдосконалення щодо послідовного виокремлення окремих груп – банківських послуг та небанківських фінансових послуг. Правовий статус небанківських фінансових установ доцільно переглянути з огляду на зміни, визначені Законом України «Про фінансові послуги та державне регулювання ринків фінансових послуг». Вважаємо, що покладення на Національний банк України повноважень щодо регулювання всього ринку фінансових послуг є перехідним в умовах формування саморегулювання ринку фінансових послуг. Варто уточнити підстави для надання та припинення ліцензійної діяльності в межах вчинення правопорушень і невиконання ліцензійних умов.

Ключові слова: ліцензування, небанківська фінансова установа, державне регулювання, публічне управління, Національний банк України, економічні свободи, ринок фінансових послуг.

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

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NATURE AND CONTENT OF INTERNAL LABOUR REGULATIONS AS AN ELEMENT OF THE EMPLOYER'S ECONOMIC POWER

Abstract. The ***purpose of the article*** is to reveal the nature and content of the internal labour regulations as an element of the employer's economic power.

Results. In the article, the analysis of scientific views allows revealing general theoretical approaches to the interpretation of the concept of "internal labour regulations". The internal labour regulations cannot be reduced to legal relations in the case of individual actors of labour law, moreover, their system, implying these legal relations. The internal labour regulations of any organisation are designed for employees who are not personified, that is, for everyone and not only those who work, but also those who will work in the future. If the internal labour regulations are considered from the perspective of the legal regulatory mechanism, they are part of it as a provision of objective law. In order for a legal relationship to arise, it is necessary to have a certain legal fact, for example, an employment contract, an agreement of a transfer to a branch, a representation, etc.

Conclusions. It is concluded that, at the present stage, the internal labour regulations can be considered as a social and legal category based on economic power, the content of which is a set of rules of labour conduct for participants in general labour subordinate to the employer, among which legal rules formulated by the employer and adopted directly by the labour collective, with the participation of its elected bodies or the employers themselves, play a decisive role. Currently, technological provisions, that is, the legal rules of inactivity of technological process are developed, improved and applied by the employer personally. The technological process is closely linked to the protection of employees' work, and thus to the protection function of trade unions. From this perspective, the participation of trade union bodies, if not in the elaboration of technological rules, then in their application, would seem justified. However, in a market economy and well-understood competition of organisations, the State considers this aspect of the internal labour regulations as a priority for the employer, which ensures mobility and efficiency in the recovery of technology, the technological process and legal rules they mediate.

Key words: internal labour regulations, economic power, employee, employer.

1. Introduction

Labour relations, which have undergone fundamental changes in the context of the transition to a market economy, now require a fundamentally different approach to the legal regulatory mechanism, changes in its methods and types. This has also affected attitudes towards the very idea of the legal regulatory mechanism for labour relations. A number of works have emerged that treat both individual elements and the entire legal regulatory mechanism differently. It is now clear that the existing level of theoretical and practical knowledge of the various elements of the legal regulatory mechanism governing labour relations, their optimum expression and technical legal establishment is not sufficient to ensure an effective legal regulatory framework in the present circumstances and requires further special development. In particular, the internal labour regulations, apart from the role of a local regulation, are an important element of the employer's economic power.

In scientific works, the nature and content of internal labour regulations have been considered by: N.T. Mykhalenko, L.O. Syrovatska, N.A. Tymonov, V.M. Smirnov, D.V. Zhuravlov, L.V. Mohilevskyi, V.M. Lebediev, O.S. Pashkov, P.D. Pylypenko, N.M. Khutorian, and many others. However, in spite of the large number of scientific achievements, scientists have rather superficially researched the internal labour reg-

ulations as an element of the employer's economic power.

Therefore, the ***purpose of the article*** is to reveal the nature and content of the internal labour regulations as an element of the employer's economic power.

2. The history of the establishment and development of internal labour regulations

The literature review reveals that the concept of internal labour regulations has long been under focus of scholars. However, there is still no generally accepted understanding of the term. L.S. Tal' was one of the first to define the content of the internal regulations of the economic entity. He argued that the regulations created within organisations were private legal regulations. What he interpreted the private legal regulations as a kind of objective right, since it was based on law-making (regulatory) factors capable, in accordance with the legal views of society and the perception of persons subject to these regulations, to establish binding rules of conduct (Tal', 1919, p. 50). According to L.S. Tal', the regulatory expression of the will of private individuals are the internal labour regulations, collective agreements and other regulatory agreements.

In Soviet labour law, N.T. Mikhailenko studied the internal labour regulations. He defined it as a system of rules for the conduct of workers and officials of socialist enterprises, organisations and institutions aimed at the full and rational use of working time, increasing productivity and producing sound products (Mikhailenko, 1972, p. 209). V.M. Smirnov defined the internal labour regulations on the basis of the system of legal relations that develop within the company (institution) in the course of performing production tasks which ensure the exercise of subjective rights and duties by all participants in the work process (Smirnov, 1980). L.A. Syrovatska considered the internal labour regulations as "the regulations governing conduct, interaction between employees at a specific enterprise, institution, organisation in the process of work" (Syrovatskaia, 1998, p. 228). According to her, it is determined by the rules of the internal labour regulations and, in some industries, by disciplinary regulations (Syrovatskaia, 1998, pp. 228–229).

Therefore, in most cases, in the field of labour law, the internal labour regulations are understood as prescriptions based on the provisions of objective law; as the application of these provisions in labour relations; or as the procedure for the labour conduct of the participants in the joint work, subject to a local legal regulation – the internal labour regulations. Indeed, all of these elements occur, in one way or another, in the analysis of internal labour regulations. First, it is not possible to present the internal labour regulations of any organisation without the existence of legal provisions that contain rules for the labour conduct of employees subordinate in the course of work to the employer and his/her representatives. Second, the mere existence of such provisions is meaningless, except for the purpose of their adoption – implementation, strict compliance by all participants in the joint work process in a given organisation. Third, all rules of labour conduct in an organisation should normally be systematized in such a way that they are accessible and understandable to all employees of the organisation.

Therefore, the determination of internal labour regulations requires to distinguish, first, its regulatory basis and, second, its role in determining the work conduct of the employees of the organisation. The regulatory basis of the internal labour regulations cannot be reduced to only one local regulation, as L.A. Syrovatska has done, or to the entire set of labour law, which contains generally binding prescriptions emanating from the State (N.A. Timonov). In both cases, there are extreme trends in internal labour regulations.

The internal labour regulations cannot be reduced to legal relations in the case of individual actors of labour law, moreover, their system, implying these legal relations. The internal labour regulations of any organisation are designed for employees who are not personified, that is, for everyone and not only those who work, but also those who will work in the future. The internal labour regulations of any organisation are designed for employees who are not personified, that is, for everyone and not only those who work, but also those who will work in the future. If the internal labour regulations are considered from the perspective of the legal regulatory mechanism, they are part of it as a provision of objective law. In order for a legal relationship to arise, it is necessary to have a certain legal fact, for example, an employment contract, an agreement of a transfer to a branch, a representation, etc.

A.P. Sarkisov's identification of the internal labour regulations with the regime of legal relations in organizing the use of labour (legal relations in respect of the internal labour regulation) (Sarkisov, 1984, pp. 9–10) does not withstand scrutiny. When a researcher attempts to incorporate labour relations or its individual elements into the internal labour regulations, he avoids any possibility of demonstrating the practical significance of this category of labour law, to reveal the possibilities corre-

sponding to the phases (stages) in the realization of this legal phenomenon, equates it, in whole or in part, with the exercise by employees of their rights and obligations at work, that is, in the final analysis, one way or another, reduces the internal labour regulations to labour discipline, which is intolerable. To a certain extent, the internal labour regulations of an organisation can be equated only with the regulatory basis of labour discipline, as with the set of provisions containing rules of labour conduct of employees. This system (set) of rules of labour conduct includes not only legal provisions but also other social provisions, such as traditions, customs, public organisations' provisions operating in the enterprise. For example, the role of the trade union and the requirements of the statute regarding the union member's attitude to work and to his or her work duties. Customs and traditions are so closely related to legal rules of labour conduct that they are often approved by the standard-setting bodies of enterprises and incorporated into the content of local regulations, including the internal labour regulations. Without any analysis or even considering of social provisions in the formation of the internal labour regulations, it is difficult to understand the mechanism of its effectiveness, since it is only through joint action, joint application of legal provisions with other social provisions, implying rules of conduct in the course of work, can ensure proper order in the organisation.

In a market economy, the internal labour regulations can be considered as a "regulatory formalisation of economic power" (Lebedev, 1999, p. 98). The internal labour regulations of an organisation are a complex social phenomenon. It is indeed based on economic power, modified in the process of social partnership. Economic power in the market has become a necessary element of the organisational unity of the legal entity. The social partnership of the employer and the employees has a certain impact on economic power, deforming it in a certain way. When jointly developing and adopting local regulations, the employer and employees of the organisation, their representatives are equally obliged to abide by the standards contained therein.

3. Role of economic power of the organisation in making internal labour regulations

The analysis of economic power in an organisation initially requires consideration of the issue of power as a social phenomenon. This will enable to define more precisely the nature of economic power and its role in making the internal labour regulations.

In the course of social development, relations of power and subordination have developed among members of society. Without internal coordination and order, the creation, development and functioning of social groups, institutionalized associations and labour collectives are impossible. All this requires to regulate properly human conduct to ensure their joint activity (Afanas'eva, 1968, p. 41). Power as a social phenomenon performs the regulatory function, subordinating the conduct of people in the process of their interaction.

Economic power in an organisation is a form of power as a social category. Therefore, this definition of power, with a few exceptions, is also applicable to the analysis of economic power. L.S. Tal' was one of the first to study economic power in the organisation. He argued that economic power was the legal position of an employer as head of an enterprise in relation to other persons forming part of a given social unit (Tal', 1916, p. 30). He identified regulatory, managerial and disciplinary powers (Tal', 1919).

Subsequently, V.M. Smirnov wrote that the regulatory authority is the right of the head of production alone or together with the trade union to issue local provisions of law. In his opinion, power in question is the totality of the law-making powers of the administration, exercised within the limits strictly established by the State (Smirnov, 1972, p. 34). The modern period, as noted above, is characterized by the absence of strict regulatory mechanism for the internal life of the organisation by the State and its bodies. The State sets standards for the legal regulatory mechanism for labour which cannot be worsened. The competence of the administration is determined, first of all, by the organisation's statute and by the job descriptions drawn up and adopted by the organisation itself.

Managerial power means the authority of the head to properly organise the production process and assign the work duties to individual employees (Smirnov, 1972, p. 34). The autonomy of the organisation in a market economy entitles the employer (his/her representative) to form, at his/her discretion, the technological process in the organisation, taking into account the market conditions for goods and services, logistics and other factors, affecting the freedom of the employer to choose the technology of the production process. Disciplinary power is the authority to impose disciplinary measures on those who violate labour discipline and to reward employees for excellent performance. These types of power, which are characteristic of the employer, constitute a single concept of managerial and disciplinary power. It is a social phenomenon that reflects the essence of society (Smirnov, 1972, p. 34).

According to L.S. Tal', "economic power should be exercised within its scope, should be manifested in legal forms" (Tal', 1916; Postovalova, 2018). In modern Ukrainian conditions, first, the power of the owner of an organisation is limited by the State and by peremptory provisions. Second, the will of the labour collective also influences the formation of economic power within the framework of social partnership, one of the forms of which is local standard-setting. Third, using economic power, the employer forms the technological process in the organisation. In turn, the technological process is chosen by the employer on the basis of objective and subjective factors influencing his/her choice. Therefore, the will and interests of the employer and the executive and managerial power of the owner in the organisation are deformed.

The mission of economic power in an organisation is to form a certain manner of action (conduct) of a work collective or individual worker; to determine the scope of proper conduct and to ensure that every employee is subordinate to one's interests and to the will of the employer and his or her representatives. The interests and will of the employer constitute the internal content of economic power. The essence of power is its ability to influence the conduct of people (Tikhomirov, 1968, p. 25; Kravchenko, 2012), to subordinate social groups and individuals to its will and interests. Economic power in the organisation is at the heart of and a sine qua non of managing the employment of hired workers. For management it is common to have power and organizing foundations. Power, including economic power, imparts a stable character to the management structure, bringing it into operation, ensuring the achievement of goals, harmonizing and regularizing (Barnashov, 1973, p. 9) the actions of participants in general, subordinate, contractual work.

4. Conclusions

Therefore, at the present stage, the internal labour regulations can be considered as a social and legal category based on economic power, the content of which is a set of rules of labour conduct for participants in general labour subordinate to the employer, among which legal rules formulated by the employer and adopted directly by the labour collective, with the participation of its elected bodies or the employers themselves, play a decisive role. Currently, technological provisions, that is, the legal rules of inactivity of technological process are developed, improved and applied by the employer personally. The technological process is closely linked to the protection of employees' work, and thus to the protection function of trade unions. From this perspective, the participation of trade union bodies, if not in the elaboration of technological rules, then in their application, would seem justified. However, in a market economy and well-understood competition of organisations, the State considers this aspect of the internal labour regulations as a priority for the employer, which ensures mobility and efficiency in the recovery of technology, the technological process and legal rules they mediate.

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Сергій Лукаш,
доктор юридичних наук, професор, директор, Сумська філія Харківського національного університету внутрішніх справ, вулиця Миру, 24, Суми, Україна, індекс 40000, Serhii_Lukash@ukr.net
ORCID: *orcid.org/0000-0003-2957-8052*

СУТНІСТЬ ТА ЗМІСТ ВНУТРІШНЬОГО ТРУДОВОГО РОЗПОРЯДКУ ЯК ЕЛЕМЕНТА ГОСПОДАРСЬКОЇ ВЛАДИ РОБОТОДАВЦЯ

Анотація. ***Метою статті*** є розкриття сутності та змісту внутрішнього трудового розпорядку як елемента господарської влади роботодавця.

Результати. У статті з огляду на аналіз наукових поглядів учених розкрито загальнотеоретичні підходи до тлумачення поняття «внутрішній трудовий розпорядок». Внутрішній трудовий розпорядок не може бути зведений до правових відносин, коли йдеться про окремих суб'єктів трудового права, а тим більше – до їх системи, елементами якої ці правові відносини є. Внутрішній трудовий розпорядок будь-якої організації розрахований на найманих робітників, коло яких не персоніфікується, тобто на всіх і кожного з тих, хто не лише працює нині, а й влаштується на роботу в майбутньому. Якщо розглядати внутрішній трудовий розпорядок із погляду механізму правового регулювання, то він вписується в такий його елемент, як норма об'єктивного права. Для виникнення правового відношення необхідна наявність певного юридичного факту, до якого можна віднести, наприклад, трудовий договір, угоду про переведення до філії чи представництва тощо.

Висновки. Констатовано, що на сучасному етапі внутрішній трудовий розпорядок можна розглядати як соціально-правову категорію, засновану на господарській владі, зміст якої становить сукупність норм трудової поведінки учасників спільної, підлеглої роботодавцеві праці, серед яких визначальну роль виконують юридичні правила, сформульовані роботодавцем та прийняті трудовим колективом безпосередньо, за участю його виборних органів або роботодавцем самостійно. У цей час технологічні норми, тобто юридичні правила недіяльності технологічного процесу, розробляються, удосконалюються й застосовуються роботодавцем одноосібно. Технологічний процес тісно пов'язаний з охороною праці працівників, а отже, й із захисною функцією профспілок. Із цього погляду здавалася би виправданою участь профспілкових органів якщо не в розробленні, то хоча б у застосуванні технологічних норм. Однак у ринкових умовах господарювання та цілком зрозумілої конкуренції організацій держава вважає цей аспект внутрішнього трудового розпорядку пріоритетом роботодавця, що забезпечує йому мобільність та ефективність у відновленні технології, технологічного процесу й опосередкованих ними правових норм.

Ключові слова: внутрішній трудовий розпорядок, господарська влада, працівник, роботодавець.

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

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PRESENT STATE OF ANTI-DISCRIMINATION POLICY IN UKRAINE UNDER THE TRANSFORMATION OF POLICE ACTIVITY

Abstract. The ***purpose of the article*** is to reveal the present state of anti-discrimination policy in Ukraine under the transformation of police activity.

Results. The article covers the key issues of making national anti-discrimination policy, considering the specificity of reforming and developing the law enforcement function of the state, in particular, the provision of high-quality police services. The strategic documents reflecting content and areas of realization of police competence in this field are classified and described. It is noted that establishment of a democratic state is possible only through the formation of civil society based on the principles of the rule of law and human and civil rights. The duty to effectively involve interested members of the population in the management of public affairs and human-cantered functioning is entrusted to public authority.

Conclusions. It is concluded that nowadays, four main levels of public anti-discrimination policy in Ukraine, generally interrelated and complementary, can be found in the relevant strategic documents of state significance. They reflect the basic content of the exercise of police competence in this field, taking into account other socially significant tasks of the law enforcement function of the state, such as: the first level is the area of public policy on the development of civil society and mechanisms for the realization and protection of subjective rights of the population; the second level is the area of public policy regarding the development of the scope of the principle of non-discrimination for specific categories of the population; the third level is the area of public policy on regional development, reform of local self-government and territorial organization of power; the fourth level is the area of public policy on reforming the law enforcement sector of the state.

Key words: anti-discrimination policy, civil society, National Police of Ukraine, human and civil rights, law enforcement function, non-discrimination principle, strategic documents.

1. Introduction

The functioning of all the elements of the national legal mechanism for preventing and combating discrimination is due to public policy established in this field. Consolidated and conceptual guidelines on the fundamental areas of public authority make it possible to effectively implement international human rights prescriptions and prevent the violation or restriction of rights, freedoms and legitimate interests of the individual on any grounds.

The Ministry of Internal Affairs of Ukraine and the National Police of Ukraine are actors authorised to exercise the general powers of the central executive authorities to combat discrimination. To a large extent, they are entrusted by law and entire society with the vital task of implementing relevant public policy. Consequently, what is needed now is a clear specification of the issue in terms of domestic policing.

The ***purpose of the article*** is to clarify the present state of Ukraine's anti-discrimination policy under the transformation of police activities.

2. Features of state anti-discrimination policy

Currently, state anti-discrimination policy in Ukraine has four levels, the first is of a fundamental role and is a basis for the development and sustainable existence of democracy and all its institutions. Without an established civil society, which is fully provided with civilized means and ways for the exercise and protection of the rights, freedoms and legitimate interests of the individual, it is impossible to combat discrimination effectively. Only a high level of legal culture, legal awareness, equal interaction with

citizens and other important factors can create in society a common plane of mutual respect and treatment of all people as equals.

Over recent years, the above mentioned has been reconsidered by the Ukrainian authorities and detailed in the National Strategy for promoting the development of civil society in Ukraine for 2016–2020, approved by № 68/2016 Decree of the President of Ukraine as of February 26, 2016, aimed at creating a favourable environment for the development of civil society and establishment of effective cooperation between the public authorities and local authorities based on partnership; additional opportunities for the realization and protection of civil rights and freedoms and for meeting public interests through the use of forms of participatory democracy, public initiative and self-organization (Decree of the President of Ukraine on promoting the development of civil society in Ukraine, 2016).

This clearly underscores the above-mentioned statement that the establishment of a democratic state is possible only through the formation of civil society based on the principles of the rule of law and human and civil rights. The duty to effectively involve interested members of the population in the management of public affairs and human-cantered functioning is entrusted to public authority.

It has been recently updated the most important strategic document, the National Human Rights Strategy approved by the Presidential Decree № 119/2021 as of March 24, 2021, which is aimed at ensuring the primacy of human rights and freedoms as a determining factor in making public policy and the exercise of powers by public authorities. Its implementation should result in a systematic approach to human rights and freedoms, the coordination of the activities of authorities, civil society institutions and economic entities, and the establishment of an effective mechanism for the realization and protection of human rights and freedoms, elimination of systemic shortcomings underlying the violations identified by the European Court of Justice (Decree of the President of Ukraine on the National Strategy in the Sphere of Human Rights, 2021).

An analysis of this legal regulation shows that the legislator has adopted a well-established concept of the civilized world: failure to respect the non-discrimination principle is a direct violation of human and civil rights and freedoms. The public authorities should build such a functional model, which will allow an effective counteraction to discriminatory manifestations within the state's framework for protection of legal rights. Moreover, the Strategy is based on a number of principles, among which is equality and non-discrimination in ensuring human and civil rights and freedoms, which is provided for in a separate paragraph 8 Prevention and Combating Discrimination.

The second level covers the area of public policy regarding the development of the scope of the non-discrimination principle for specific categories of the population, especially national minorities, women and persons with disabilities. Such areas are now under the focus of the main vectors of making public policy.

The Law of Ukraine "On National Minorities in Ukraine" defines that our state guarantees national minorities (groups of Ukrainian citizens, who are not Ukrainians by nationality, show a sense of national self-awareness and community among themselves), regardless of their national origin, equal political, social, economic and cultural rights and freedoms, supports the development of national identity and expression. The central executive authorities authorized by the President of Ukraine are responsible for making public policy on inter-ethnic relations and protecting the rights of national minorities (Law of Ukraine "On National Minorities in Ukraine", 1992).

Negative stereotypes found in society regarding persons belonging to the Roma national minority complicate the participation of their representatives in the public life of territorial communities. This deepens exclusion and leads to discriminatory practices, in particular, the dissemination of utterances intended to degrade or to call for violence against individuals or groups of individuals due to their real or perceived membership of a particular nationality, religion, sex or other characteristics and have a negative impact on the enjoyment of human rights (Order of the Cabinet of Ministers of Ukraine "On Approval of the Strategy for Promoting the Realization of the Rights and Opportunities of Persons Belonging to the Roma National Minority in Ukrainian Society until 2030", 2021).

Recently, in the international arena, the promotion of gender equality has been increasingly developed, affecting the relevant component of Ukraine's State anti-discrimination policy. In view of the fact that members of the police force, especially district police officers, are one of the key actors in preventing and combating domestic violence and gender violence, in which, according to official statistics, the absolute majority are women, the National Action Plan for the Implementation of Recommendations provided for in the concluding observations of the Committee on the Elimination of Discrimination against Women for Ukraine's eighth periodic report on the implementation of the Convention on the Elimination of All

Forms of Discrimination against Women up to 2021, approved by Order № 634 of the Cabinet of Ministers of Ukraine of September 5, 2010, underlines that this law enforcement body is of importance.

In particular, it is a matter of: priority to take measures to combat corruption and impunity effectively and to fulfil the previous commitment to prevent, investigate, prosecute and punish violence against women by state and non-state actors; systematic training on human rights, in particular, women's rights, for all law enforcement officers, introduction and implementation of a code of conduct; appropriate training for investigators; police officers to increase their capacity to investigate, document and prosecute perpetrators of sexual violence, etc. (Order of the Cabinet of Ministers of Ukraine "On approval of the National Action Plan to implement the recommendations set out in the concluding observations of the UN Committee on the Elimination of Discrimination against Women to the eighth periodic report of Ukraine on implementation of the Convention on the Elimination of All Forms of Discrimination against Women", 2018).

The third level is the area of public policy on regional development, reform of local self-government and territorial organization of power, which is also the leading element in Ukraine's public anti-discrimination policy in view of the police performance in combating discrimination. For example, district police officers will be able to perform obligations duly and to contribute properly to the exercise and protection of the subjective rights of citizens, provided well-developed amalgamated territorial communities, where each member is objectively perceived as an equal member, there is a strong tradition of mutual assistance and support, etc.

The corresponding area of national policy is among strategic documents:

1) The State Strategy for Regional Development up to 2020, approved by Decision № 385 of the Cabinet of Ministers of August 6, 2014, defines the objectives of public regional policy and the main tasks of central and local executive authorities and local self-government bodies aimed at achieving those objectives; implies the coherence of such policy with other public policies aimed at territorial development. The advisability of preparing a new document in accordance with European standards for a period synchronized with EU planning and budget cycles, taking into account the influence of such global spatial development trends, which Ukraine cannot avoid: urbanization, depopulation of villages, change of settlement system (Resolution of the Cabinet of Ministers of Ukraine "On approval of the State Strategy for Regional Development until 2020", 2014);

2) The Concept for reforming local self-government and territorial organization of power in Ukraine, approved by the Order № 333-p of the Cabinet of Ministers of Ukraine ad of April 1, 2014, determines the areas, mechanisms and terms for the formation of effective local self-government and territorial organization of power for the establishment and maintenance of a full-fledged living environment for citizens, and for the provision of high-quality and accessible public services; establishment of institutions of direct people's power, meeting the interests of citizens in the territory concerned, harmonization of the interests of the state and territorial communities (Order of the Cabinet of Ministers of Ukraine "On approval of the Concept of reforming local self-government and territorial organization of power in Ukraine", 2014);

3) The Action plan for the implementation of a new stage of reforming local self-government and territorial organization of power in Ukraine for 2019–2021 approved by Order № 77-p of the Cabinet of Ministers as of January 23, 2019 defines the components of organizational and legal, financial, logistical and other support for the implementation of the new territorial framework for the activities of the authorities at the community and district levels; the transfer (decentralization) of executive power to local self-government and its distribution on the basis of the principle of subsidiarity; an appropriate resource base for the exercise of local self-government authority; maintenance of an effective system of service in local self-government bodies; development of forms of direct people's power: elections and referendums (Order of the Cabinet of Ministers of Ukraine "On approval of the action plan for the implementation of a new stage of reforming local self-government and territorial organization of power in Ukraine for 2019–2021", 2019).

3. Reform of the state law enforcement sector, the area of public policy

As well as the above-mentioned vectors for providing a set of highly effective human rights tools, the fourth level, implying the area of public policy on reforming the law enforcement sector of the state, is equally important. On the other hand, this level is significantly functional, without which it is virtually impossible to implement the national legal mechanism for preventing and combating discrimination.

In the case of the police, this is because, even if hypothetically idealistic democratic systems of the state and society based on the best international practices was made, with unprofessional, corrupt police officers the protection

of human and civil rights and freedoms would turn into distortion. Indeed, the violation of the principles of the rule of law and legality will not allow the development of the principles of justice and equality at all levels of society.

This is based on the ongoing processes of reform of all public administration in the country, since good governance is a prerequisite for European integration. In order to ensure an effective making of public policy in various fields, it is planned to establish a professional, efficient, effective and accountable system of central executive authorities. Improvement of the quality of administrative services, the legality and predictability of administrative actions enhance the position of the state in international ratings and are also important for increasing citizens' confidence in the state. The Strategy for public administration reform in Ukraine for 2022–2025, approved by Order № 831-p of the Cabinet of Ministers of July 21, 2021 (Order of the Cabinet of Ministers of Ukraine "On some issues of public administration reform in Ukraine", 2021) is aimed to build a capable service and digital state in Ukraine that ensures the protection of the rights and interests of citizens on the basis of European standards and experience.

The public administration reform, based on the principle of human-centrism, permeates the entire modern chain of executive authority. The Strategy for the development of bodies of the Ministry of Internal Affairs up to 2020, approved by Order № 1023 of the Cabinet of Ministers as of November 15, 2017, proclaims the observance and safeguarding of human rights and fundamental freedoms as a key value in the activities of the bodies of the Ministry of Internal Affairs (Order of the Cabinet of Ministers of Ukraine "On approval of the Strategy for the development of the system bodies of the Ministry of Internal Affairs for the period up to 2020", 2017). Moreover, the effective making of public anti-corruption policy is an important component of police reform. In this regard, the main bodies of the relevant national policy are: Law of Ukraine "On the fundamentals of state anti-corruption policy in Ukraine (Anti-Corruption Strategy) for 2014–2017", the Strategy of communications in prevention and combating corruption, Anti-corruption programme of the Ministry of Internal Affairs of Ukraine for 2020–2022 approved by Order № 84 of the Ministry of Internal Affairs of Ukraine as of January 31, 2020, the Anti-corruption programme of the National Police of Ukraine for 2019–2021 approved by Order № 246 of the National Police of Ukraine as of March 20, 2019.

4. Conclusions

Nowadays, four main levels of public anti-discrimination policy in Ukraine, generally interrelated and complementary, can be found in the relevant strategic documents of state significance. They reflect the basic content of the exercise of police competence in this field, taking into account other socially significant tasks of the law enforcement function of the state, such as: the first level is the area of public policy on the development of civil society and mechanisms for the realization and protection of subjective rights of the population; the second level is the area of public policy regarding the development of the scope of the principle of non-discrimination for specific categories of the population; the third level is the area of public policy on regional development, reform of local self-government and territorial organization of power; the fourth level is the area of public policy on reforming the law enforcement sector of the state.

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

СУЧАСНИЙ СТАН АНТИДИСКРИМІНАЦІЙНОЇ ПОЛІТИКИ УКРАЇНИ В УМОВАХ ТРАНСФОРМАЦІЇ СФЕРИ ПОЛІЦЕЙСЬКОЇ ДІЯЛЬНОСТІ

Анотація. ***Метою статті*** є з'ясування сучасного стану антидискримінаційної політики України в умовах трансформації сфери поліцейської діяльності.

Результати. У статті розкрито головні питання формування й реалізації національної антидискримінаційної політики з урахуванням специфіки широкого реформування та розвитку правоохоронної функції держави, зокрема надання якісних поліцейських послуг. Здійснено класифікацію та охарактеризовано відповідні стратегічні нормативно-правові акти, які розкривають основний зміст і напрями реалізації компетенції поліції в зазначеній сфері. Наголошено на тому, що побудова демократичної держави можлива лише через утвердження громадянського суспільства, яке існує на принципах верховенства права та забезпечення в найкращий спосіб прав людини і громадянина. На публічну владу покладено обов'язок із дієвого залучення зацікавлених представників населення до управління державними справами, а також функціонування всієї владної вертикалі виключно в межах концепції людиноцентризму.

Висновки. Зроблено висновок, що на сьогодні доцільно виокремити чотири основні рівні державної антидискримінаційної політики України, які загалом мають взаємопов'язаний і взаємодоповнюючий характер та розкриваються у відповідних стратегічних документах державного значення. Вони розкривають основний зміст реалізації компетенції поліції в зазначеній сфері з урахуванням інших соціально значимих завдань правоохоронної функції держави, зокрема: перший рівень – напрям державної політики щодо розвитку громадянського суспільства та механізмів реалізації й захисту суб'єктивних прав населення; другий рівень – напрям державної політики щодо

розвитку сфери дотримання принципу недискримінації за окремими категоріями населення; третій рівень – напрям державної політики щодо регіонального розвитку, реформування місцевого самоврядування та територіальної організації влади; четвертий рівень – напрям державної політики щодо реформування правоохоронної сфери держави.

Ключові слова: антидискримінаційна політика, громадянське суспільство, Національна поліція України, права людини та громадянина, правоохоронна функція, принцип недискримінації, стратегічні документи.

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Igor Ivanov,
Candidate of Juridical Sciences, Candidate of Technical Sciences, Honoured Worker of Transport of Ukraine, Chairman, Zaporozhoblavtotrans Association, 30, Pokrovska street, Zaporizhzhia, Ukraine, postal code 69063, ieivanow@gmail.com
ORCID: *orcid.org/0000-0002-9650-1293*

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PROBLEMS OF THE USE OF VIDEO SURVEILLANCE AND VIDEO ANALYTICS SYSTEMS IN ACTIVITIES OF THE NATIONAL POLICE BODIES (UNITS)

Abstract. ***Purpose.*** The purpose of the article is to highlight problematic issues of the use of video surveillance and video analytics systems in the activities of the National Police bodies (units).

Results. The article considers the specificities and problems of the use of video surveillance and video analytics systems in the activities of the National Police of Ukraine. It is established that the use of video surveillance systems and video analytics by police officers opens up new possibilities for crime prevention, contributes to effective and accurate decision-making for detecting crimes, including in "hot pursuit". It is noted that now only one information subsystem "Harpoon" of the information and telecommunication system "Information portal of the National Police of Ukraine" operates but has a limited functionality to work with the flow of video information and cannot fully meet users' requests. It is determined that the legal and regulatory mechanism for the use of video surveillance and video analytics systems in Ukraine is in the early stages. In many regions of our state, the scope of regional programmes for crime prevention, public safety and public order "Safe City" provides for the development and improvement of video surveillance and video analytics systems. Statistical data and examples of "hot pursuit" detection with the help of video surveillance systems and video analytics are examined. Problematic issues in the operation of these systems are identified. The Information portal "Harpoon" and video analytics software ULA are analysed.

Conclusions. The study makes proposals for the development of a unified video analytics software with a high potential and its warranty. It is proposed to leave video cameras on the balance sheet of local self-governments, but to transfer the processing and storage of information received from them to the state level – to create single or multiple mirror servers in different parts of the country, to which all services concerned will be able to access after having legally obtained the relevant login and password. This will allow controlling access to information properly and standardizig the necessary processes.

Key words: video surveillance, video analysis, software product, access to and protection of information, legal and regulatory framework.

1. Introduction

The active development of information processes and the introduction of new inventions, achievements and technologies into production and managerial processes have led not only to the possibility of the progressive development of our state but have also increased the number of crimes and improved the means and methods of committing them. Therefore, the use of video surveillance and video analytics systems by bodies (units) of the National Police of Ukraine (further – NPU) is increasingly relevant, since it opens up new possibilities for crime prevention, contributes to effective and accurate decision-making for detecting crimes, including in "hot pursuit".

The video surveillance and video analytics systems of the NPU are rapidly improving in today's environment, but urgent problems in their use arise, both in legal and technical terms. Now only one information subsystem "Harpoon" of the information and telecommunication system "Information portal of the National Police of Ukraine" (IPNP) (Order of the Ministry of Internal Affairs of Ukraine "On approval of the Instruction on formation of the information subsystem «Harpoon» of the information and telecommunication system «Information portal of the National Police of Ukraine»", 2018) operates, but has a limited functionality to work with the flow

of video information and cannot fully meet users' requests, which has limited video flow functionality and is unable to fully implement user requests. It should also be noted that the NPU, which are the main users of video surveillance and video surveillance systems, require an appropriate legal and regulatory mechanism, which unfortunately does not exist at present. An analysis of the regulations in force shows that the legal and regulatory mechanism for the use of video surveillance and video analytics systems in Ukraine is in the early stages. Therefore, the issue of the further development of the system of video surveillance and video analysis, as well as the legal and regulatory mechanism for its use by bodies (units) of the National Police of Ukraine, becomes particularly relevant.

The use of video surveillance systems and video analytics in the activities of the police were studied by I.V. Bondarenko, V.M. Kardash, I.B. Kochetkova, O.M. Kliuev, O.V. Maknytskyi, V.O. Myroshnychenko, M.O. Rusylo, and others. However, the dynamics of modern information development confirm the relevance of studying this problem.

The ***purpose of the article*** is to highlight problematic issues of the use of video surveillance and video analytics systems in the activities of the National Police bodies (units).

2. Identification of the required range of video surveillance and intrusion detection equipment

Scientific and technological progress determines an increase in the range of video surveillance equipment and its penetration into all sectors of human activity. In 2015, after the adoption of the Law of Ukraine "On the National Police" (Pietkov, 2020), they took on a larger scale in the work of the NPU. The main objectives of video surveillance systems and video analytics are to prevent offences, reduce their number, bring perpetrators to justice and increase the public's sense of security. I.V. Bondarenko, V.M. Kardash, and O.M. Kliuev argue that "Video surveillance systems assist the bodies and units of the National Police of Ukraine in crime prevention" (Bondarenko, 2005; Kardash, 1999; Kliuiev, 2010).

To date, the NPU's bodies (units) use several types of video surveillance equipment: chest video recorder (body cam); dashcam; video cameras in administrative buildings, public places and roads; intelligent video-analytics software, digital video information that helps to solve the following tasks: aggressive and inappropriate behaviour of citizens towards police officers, abuse of power by police officers, unjustified use of physical force against citizens, as well as prevention of crimes and offences by prompt response to events, detecting crimes in "hot pursuit".

This study focuses directly on the use and problems of video surveillance and video analysis. In many regions of our state, the scope of regional programmes for crime prevention, public safety and public order "Safe City" provides for the development and improvement of video surveillance and video analytics systems. The territorial bodies of the National Police are primarily interested in introducing such systems, since their use has a positive impact on the detection and investigation of criminal offences and on the prevention of administrative offences.

According to the NPU, more than 38,000 CCTV cameras were installed under the regional programmes "Safe City" in Ukraine, of which 18,708 were installed in regional centres, 19,846 in other cities and towns of the state. It should be noted that information from 21,946 video cameras is given the Emergency Operations Centres of the General Directorates of the National Police in the Regions (GDNP) for further use in the performance of official duties. More than 3 thousand of these cameras are connected to the software of IS Harpoon IPNP, as well as other video analytics systems integrated into the IPNP system, thanks to which cities, such as Kyiv, Dnipro, Odesa, Chernivtsi, Chernihiv, have improved the tendency to detect crimes just committed.

For example, police officers of the Department of Organizational and Analytical Support and Operational Response of the GDNP in the Dnipropetrovsk region (dispatchers and emergency operations analysts) thanks to the reactions of the video analytics system ULA software complex, in real time mode, timely respond and guide in detail police units to detect transport in search, in accordance with information subsystem Wanted vehicles of the IPNP. As a result of the measures taken, in the last four years, 476 wanted vehicles were seized (in 2018 – 77; in 2019 – 243; in 2020 – 141; in the first half of 2021 – 15). In particular, on November 9, 2018, the department of 102 of the GDNP in Dnipropetrovsk region received a report from a citizen about the theft of two state license plates from his car Geely in Dnipro. In 10 minutes, the dispatcher with the help of the video analytics software ULA discovered the car Skoda-Superb on which the stolen state license plate was mounted and guided the police that detained the vehicle and persons of Caucasian nationality who were inside.

It should be noted that only an intelligent video analytics system, as a multiplier of force, augmenting the efforts of limited police personnel, can provide a greater long-term return

on investment in video surveillance. Through intelligent elements, the video analytics software can: perform continuous data processing; perform rapid search by vehicle registration numbers; determine hard evidence in court, etc. (Action plan of the National Police of Ukraine aimed at improving the system of rapid response to offenses or events during the IV quarter of 2020 and 2021, 2020).

It should be noted that, in order to improve the effectiveness of its work, the Ministry of Internal Affairs has drawn up the Strategy for the development of the system of the Ministry of Internal Affairs of Ukraine (Order of the Cabinet of Ministers of Ukraine "On approval of the Strategy for the development of the system of the Ministry of Internal Affairs of Ukraine until 2020", 2017), Concept of the program of informatization of the system of the Ministry of Internal Affairs of Ukraine and central executive bodies, whose activities are directed and coordinated by the Cabinet of Ministers of Ukraine through the Minister of Internal Affairs of Ukraine for 2021–2023 (Order of the Ministry of Internal Affairs of Ukraine "On announcing the decision of the board of the Ministry of Internal Affairs of Ukraine", 2021), with a view to maximizing the use of information and communications technology in the performance of official duties, including video surveillance systems.

However, to date, the NPU own no unified powerful video-analytics software product. Currently, the IP Harpoon operates in the IPNP system of the NPU (Regulations on the information and telecommunication system "Information Portal of the National Police of Ukraine", 2017), but its functional capacity is significantly reduced in comparison with the functional software of video analytics ULA, and is designed for statistical comparison of information received from the video cameras with transport information recorded in the IPNP system about wanted vehicles, and in case of its detection dispatchers DOASOR of the GDNP are informed by automatic creation of electronic card 102 of IPNP, which also contributes to the detection of crimes (Order of the Ministry of Internal Affairs of Ukraine "On approval of the Instruction on the organization of response to statements and notifications about criminal, administrative offenses or events and operative informing in bodies (units) of the National police of Ukraine", 2020).

In connection with the above, individual GDNP additionally use the video analytics software product ULA, developed by Odesa private enterprise LanTek. This video analytics software functionally allows to determine the direction of a car, its characteristics, the track of a route over a certain period, etc. At the same time, the use of such software, developed by private enterprises, has a negative impact on the budget of the country or the Ministry of Internal Affairs of Ukraine, the NPU and the GDNP, since, in addition to the purchase, it is necessary to budget its waranty annually, which in 2021 is estimated to be 1 million 197 UAH (Lytvin, 2021). In our view, these costs could have been avoided if the NPU had a similar unified video analytics product, the warranty thereof the Department of Information Analysis Support (DIAS) of the NPU was free.

At the same time, in Ukraine, together with the positive aspects of the application of the capabilities of video surveillance systems and video analytics by the NPU, problematic legal issues regarding their use, as well as inadequate protection of the information received, exist. In particular, video surveillance data greatly facilitates the work of the NPU, but any such case could potentially collapse in court, law does not find such evidence admissible. A lawyer could convince a judge that such evidence had been obtained in an irregular manner and therefore could not be admitted.

3. Ways to address the problematic issues of video surveillance and intrusion detection

The Association of Ukrainian Human Rights Monitors (further – Association UMDPL) systematically examines problematic issues in the use of video surveillance and video analytics in the work of the NPU. In particular, on 15 October 2019, during a round table at the Ukrainian Media Crisis Centre, M.V. Kameniev, an expert of the Association UMDPL, drew attention to the absence of a legislative basis for the establishment of video surveillance systems in public places. Individual local self-governments have only approved the Regulations on the operation of video surveillance systems, but all of them have shortcomings (Decision of the Kirovohrad City Council "On approval of the Program of implementation of the video surveillance system for the protection of public order in Kirovohrad", 2011). This potentially poses a risk that an order of a court or other authorized body can ban the use of cameras installed. The second problem is the uncertainty of who can access the digital data of these cameras. According to M.V. Kameniev, the results of the inspections revealed that access to video information and its retention period were different, and that the requirements for the protection of such information were not met. There is almost no warning of filming, although there should be a warning at the video surveillance sites and information on who is conducting the video surveillance and how to contact them.

The situation regarding the use of video-analytics software, such as the identification of license plates of vehicles and faces has also not been regulated. This functionality exists in many of the installed CCTV cameras. In addition, in Ukraine, in most cases faces of individuals are not considered as personal information to be protected under the Law of Ukraine "On Personal Data Protection" (Law of Ukraine "On Personal Data Protection", 2010). As of May 2021, 224 cameras operate in Kyiv that functionally provide facial identification (Karpenko, 2021).

However, according to the case law of the European Court of Human Rights, an individual's face is personal data. I.Yu. Lishchyna, Deputy Minister of Justice of Ukraine, Commissioner for the European Court of Human Rights, argues that video surveillance systems are widely used in European Union countries, but there are clear requirements for the use of cameras, namely that the use of data does not violate citizens' rights to personal data protection and privacy" (Myroshnychenko et al., 2020).

In our opinion, it is most appropriate to leave video cameras on the balance sheet of local self-governments, but to transfer the processing and storage of information received from them to the state level – to create single or multiple mirror servers in different parts of the country, to which all services concerned will be able to access after having legally obtained the relevant login and password. This will enable to properly control access to information and standardize the necessary processes.

In addition, it should be underlined that Chinese-made cameras of Hikvision are most often used in Ukraine, which are of good functionality, rather reliability and of simple configuration. However, there are legal concerns about their use, since the company, 42% of which is owned by the Chinese government, has been on is on the U.S. Department of Commerce sanctions list for China's human rights violations. In April 2021, due to the violation of the rights of Uighurs in the re-education camps of China, EU countries abandoned the use of video cameras Hikvision, installed in EU countries in 2020 for temperature measurements. Previously, in 2020, the Government Pension Fund Global of Norway, which invested oil and gas revenues in various companies, excluded the Chinese company Hikvision from investing because it was involved in serious human rights violations (Savenas, 2019).

In addition, in 2019, Lithuanian researcher Thomas Savenas underlined the vulnerability of the video camera Hikvision, namely inadequate protection of information (in video cameras backdoor is set allowing to remotely get administrative access to video cameras, even after the manufacturer has updated their software, to date it remains in question) (Savenas, 2019).

It should be noted that in 2021, the Security Service of Ukraine was also not stayed away from this security problem and made recommendations to the National Police of Ukraine on underscoring negative factors when using video surveillance and video analytics systems of software of foreign manufacture by subordinate bodies and units.

In order to address the above-mentioned problems with regard to the regulatory mechanism for the use of video surveillance and video analytics systems by bodies and units of the NPU, and the implementation of a security monitoring system, that is, a large-scale use of technical means and devices, in particular with the functions of photo, audio, video recording, that enable to record and early detect offences, to identify various objects, and moreover, pursuant to the Plan of legislative work of the Verkhovna Rada of Ukraine for 2021, the Ministry of Internal Affairs of Ukraine and the NPU are planning to draft and submit the draft Law of Ukraine On Security Monitoring Systems to the Verkhovna Rada of Ukraine for consideration and adoption (Order of the National Police of Ukraine "On approval of the Action Plan of the National Police of Ukraine for the implementation of the Plan of legislative work of the Verkhovna Rada of Ukraine for 2021", 2021).

4. Conclusions

The analysis of the material on the introduction of video surveillance and video analytics systems in the activities of bodies (units) of the NPU allows concluding that it is necessary to develop this trend. Therefore, in order to improve the performance of the video surveillance and video analytics systems, we propose:

– the Department of Information and Analytical Support of the NPU to develop a unified video analytics software with a high potential and its warranty;

– to further develop the draft Law of Ukraine "On Security Monitoring Systems", which provides for: basic concepts and principles of video surveillance and video analytics systems; the scope of the Law; forms; the format; protocols for the information exchange; the terms of its storage; the places where they may be installed; the procedure for informing the public about video surveillance and their rights in the video surveillance zone; the obligations of the entities installing the systems; the procedure for access to the information received; technical specifications and equipment unification.

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Ігор Іванов,
кандидат юридичних наук, кандидат технічних наук, заслужений працівник транспорту України, голова, Асоціація «Запорожоблавтотранс», вулиця Покровська, 30, Запоріжжя, Україна, індекс 69063, ieivanow@gmail.com
ORCID: *orcid.org/0000-0002-9650-1293*

ПРОБЛЕМАТИКА ЗАСТОСУВАННЯ СИСТЕМИ ВІДЕОСПОСТЕРЕЖЕННЯ ТА ВІДЕОАНАЛІТИКИ В ДІЯЛЬНОСТІ ОРГАНІВ (ПІДРОЗДІЛІВ) НАЦІОНАЛЬНОЇ ПОЛІЦІЇ УКРАЇНИ

Анотація. ***Метою статті*** є виокремлення проблемних питань у застосуванні органами (підрозділами) Національної поліції України у своїй діяльності систем відеоспостереження та відеоаналітики.

Результати. У статті розглянуто особливості та проблематику застосування в діяльності Національної поліції України систем відеоспостереження та відеоаналітики. З'ясовано, що використання поліцейськими систем відеонагляду та відеоаналітики відкриває нові можливості для профілактики злочинності, сприяє ефективному й точному прийняттю рішень із метою розкриття злочинів, зокрема й «по гарячих слідах». Констатовано, що наразі в Національній поліції України функціонує лише одна інформаційна підсистема «Гарпун» інформаційно-телекомунікаційної системи «Інформаційний портал Національної поліції України», у якої функціонал роботи з потоком відеоінформації обмежений – вона не здатна повною мірою реалізувати запити користувачів. Визначено, що використання систем відеоспостереження та відеоаналітики в Україні перебуває на ранніх стадіях правового регулювання. У багатьох регіонах нашої держави в межах регіональних програм профілактики злочинності, забезпечення публічної безпеки та порядку «Безпечне місто» передбачені заходи щодо розвитку та розбудови систем відеоспостереження й відеоаналітики. Проаналізовано статистичні дані та приклади розкриття злочинів «по гарячих слідах» за допомогою систем відеоспостереження та відеоаналітики. Окреслено проблемні питання роботи цих систем. Проаналізовано роботу інформаційного порталу «Гарпун» та програмного забезпечення відеоаналітики «ULA».

Висновки. Надано пропозиції щодо розроблення єдиного програмного забезпечення системи відеоаналітики з потужним потенціалом та його гарантійного супроводу. Запропоновано залишити відеокамери на балансі органів місцевого самоврядування, проте обробку та зберігання інформації, отриманої з них, передати на державний рівень – створити єдиний чи декілька дзеркальних серверів у різних частинах країни, до яких зможуть мати доступ усі зацікавлені служби після отримання в законному порядку відповідного логіну та паролю. Це дасть змогу належним чином контролювати доступ до інформації та стандартизувати необхідні процеси.

Ключові слова: відеоспостереження, відеоаналітика, програмний продукт, доступ до інформації та її захист, нормативно-правове регулювання.

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Roman Leshchenko,
PhD in Law, Associate Professor at the Department of Financial Law, Law Institute of Taras Shevchenko National University of Kyiv, 60, Volodymyrska street, Kyiv, Ukraine, postal code 01033, Leshchenko_Roman@ukr.net
ORCID: *orcid.org/0000-0003-2911-9575*

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HISTORICAL ASPECTS OF TAX SYSTEM ESTABLISHMENT IN UKRAINE

Abstract. ***Purpose.*** The purpose of the article is to study positive and negative historical aspects and stages of the tax system establishment of Ukraine.

Results. The article studies the tax system of Ukraine and the changes made during the independence of Ukraine. The positive and negative experiences of the tax system are considered. The focus is on the importance of considering the historical experience of tax establishment in the further reform of the tax system of Ukraine. It is underlined that nowadays the tax system of Ukraine cannot be called stable, because for more than 30 years, starting from the historical moment of adoption of the Law of Ukraine "On the Tax System", it has been undergoing frequent changes and reforms, review of taxes and charges, their amount and manner of levying, etc. For many years this long-standing reform of the tax system is due to its inefficiency. There is a lack of balance between the fiscal component of the tax system and encouraging businesses to be transparent. That is, in such circumstances, either the taxpayer is limited in economic growth or the State does not receive tax revenues, which results in inadequate financing of social benefits and wages.

Conclusions. It is concluded that constant changes in the tax system of Ukraine and attempts by the legislators to improve it, to increase its efficiency and to bring it into line with the realities of public life and the rapid development of trade activity have provoked to increasing tax evasion. Such imperfect legislative changes contribute to the existence of a significant shadow economy, which creates a lack of real national budget. Before introducing further changes in the tax system, the historical aspects of the tax system in Ukraine should be studied and thoroughly analysed in order to prevent the same errors. It is necessary to highlight the ideas and their implementation, especially those that have had a positive influence on the development of the tax system and to build an effective tax system aimed both at taking into account the interests of taxpayers and the interests of ordinary Ukrainians, who may not, for objective reasons, pay any taxes, but want a decent living.

Key words: fees, mandatory payments, taxes, tax system, tax law.

1. Introduction

The tax system in Ukraine is constantly undergoing fundamental or partial changes. Every year, hundreds of changes are made to tax legislation, despite the main principle of the tax system – the principle of stability. With the advent of the new administration lawmakers "differently" see the future tax system and try to reform it. Some taxes are abolished, and others are introduced or modified by combining several into one.

Given the permanent crisis of the Ukrainian economy, the proposed changes in the tax system, as experience shows, are ineffective, and vice versa, create discomfort and instability in legal relations "State – taxpayer". Therefore, to understand which tax system should be stable and effective, a detailed analysis of the historical aspects of its introduction and existence, as well as positive developments and shortcomings, should be undertaken.

In future, the legal and regulatory framework for the tax system should take into account the relevant research results of its historical introduction, existence and evolution, in order to avoid the same errors. Given that, the subject of the study is quite relevant.

Research into the historical aspects of the tax system in Ukraine is under focus in a considerable number of scientific works, from different perspectives of this topic. However, the establishment of Ukraine's tax system during the independence period has been little studied. Scientists, such as I.H. Kozynets, O.H. Kozynets, V.V. Kurian, A.V. Tkachenko, S.M. Yurii, F.O. Yaroshenko, and others studied

this problem.

The purpose of the article is to study positive and negative historical aspects and stages of the tax system establishment of Ukraine.

2. Stages of establishment and development of the tax system of Ukraine

Legal scholars still lack a unified approach to defining the stages of development of the Ukrainian tax system. However, this analysis enables to identify the most appropriate four basic stages of the tax system establishment in independent Ukraine: 1) 1991–1993; 2) 1994–1999; 3) 2000–2009; 4) 2010 – to date (Tkachenko, 2013, p. 129).

According to S.M. Yurii, the process of establishing the tax system in Ukraine has three stages: 1) 1991–1993; 2) 1994–1999; 3) 2000 – to the present day (Yurii, 2014, p. 288).

Other specialists argue that the evolutionary path of development of the tax system of Ukraine is sufficiently long and consists of stages that are generally in line with the general periodicity of the history of the State and the law of Ukraine:

1) the tax system of Kievan Rus (IX–XIII centuries);

2) the Lithuanian-Polish tax system (the beginning of XIV–XVII centuries);

3) the tax system of Hetmanshchyna (XVII–XVIII centuries);

4) the tax system of the Russian and Austro-Hungarian Empires (the end of XVIII – the beginning of XX centuries);

5) the tax system of the USSR (1917–1991);

6) tax system of independent Ukraine (since 1991) (Kozynets, Kozynets, 2018, pp. 88–89).

F.O. Yaroshenko groups the development of the Ukrainian tax system in stages as follows:

1) the oldest tax system of Kievan Rus (IX–XIII centuries);

2) monetary, natural tribute, corvee and other taxes of the Lithuanian-Polish era (the beginning of XIV century);

3) the tax system of the Cossack State (1648–1654): spoils of war, wine sales, royal grain monetary salary, and foreign trade;

4) the Moscow-Russian tax system (the middle of XVI – the beginning of XX century);

5) the tax system of the Soviet era (1917–1991);

6) the establishment and development of the Ukrainian tax system (1991–2001);

7) modernization of the State Tax Service of Ukraine (Yaroshenko, Pavlenko, 2002, pp. 41–42).

However, in our opinion, it is not necessary to consider aspects of the tax system establishment in Ukraine in times from Kievan Rus to the proclamation of independence of Ukraine in 1991, since tax relations at that time have no influence on the construction of a modern tax system and ancient experience is though very interesting, but not much useful. We believe that the study of aspects of the establishment of the tax system of Ukraine, starting in 1991, will be relevant in the light of the mistakes and achievements of the legislator of independent Ukraine.

According to V.V. Kurian, the tax system of modern Ukraine began its formation before the Verkhovna Rada of the Ukrainian SSR proclaimed the independence of Ukraine. On June 25, 1991 the Law of Ukraine "On the Tax System", which entered into force on November 1, 1991, while Verkhovna Rada of the Ukrainian SSR proclaimed the independence of Ukraine on August 24, 1991. Consequently, two months before Ukraine's declaration of independence, the legal foundations of the tax system of modern Ukraine were laid (Kurian, 2016, p. 73).

With the declaration of independence, Ukraine sought to create its own tax system, which was established at a difficult time of the development of statehood, under conditions of economic instability and hyperinflation. Tax legislation was developed on the basis of a regulatory framework inherited from the command-and-control system, and the basis of national tax policy was developed not only under the pressure of objective economic, but also political factors without adequate research and analysis of the micro- and macroeconomic effects of different taxes and their rates (Yurii, 2014, p. 287).

The advent of the domestic tax system took place against the backdrop of a profound economic crisis, a transitional and imperfect monetary system and political instability. Therefore, in the context of the economic and political crisis, together with the advent of the State of Ukraine, the acquisition of sovereignty by the State of Ukraine the process of establishing the domestic tax system took place and continues to this day (Donchenko, Oliinyk, 2019, p. 48).

3. Tax system of Ukraine at the present stage of State development

Nowadays the tax system of Ukraine cannot be called stable, because for more than 30 years, starting from the historical moment of adoption of the Law of Ukraine "On the Tax System", it has been undergoing frequent changes and reforms, review of taxes and charges, their amount and manner of levying, etc. For many years this long-standing reform of the tax system is due to its inefficiency. There is a lack of balance between the fiscal component of the tax system and encouraging businesses to be transparent. That is, in such circumstances, either the taxpayer is limited in economic growth or

the State does not receive tax revenues, which results in inadequate financing of social benefits and wages.

For example, according to article 5 of Law 1251-XII on the tax system of the Ukrainian Soviet Socialist Republic of 25 June 1991, the republican taxes, duties and compulsory payments include: tax on profits; tax on profits of foreign legal entities from activities in the Ukrainian SSR; tax on turnover; excise duty; value added tax; tax on exports and imports; tax on income; tax on the labour fund for collective farms; income tax on citizens; payment for natural resources; payment for land; forest income; environmental tax; State duty; vehicle ownership tax; customs duty (Law of the Ukrainian Soviet Socialist Republic "On the Taxation System", 1991).

At the time, the legislator seemed to have incorporated all known taxes into the tax system. It looked like only ancient "beard taxes" and "chimney taxes" were not included. Obviously, it was a completely imperfect tax system which involved inefficiency, complexity of administration, injustice and double or triple taxation of the same object.

Some experts stated that in 1991 there were 29 national and 16 local taxes and fees. This number was a heavy burden for enterprises and entrepreneurs who had just started their activities in the conditions of independent Ukraine. That is why this period is characterized as the most shadowy in our country's tax system (Molodetska et al., 2016, p. 711).

According to Law of Ukraine 3904-XII of February 2, 1994 on amendments and additions to the Law of the Ukrainian SSR "On the Tax System", the Law of the Ukrainian SSR "On the Tax System" was set out in a new edition. According to articles 14 and 15 of the new version of the Law of Ukraine "On the Tax System", national taxes and other compulsory payments were: 1) value added tax; 2) excise duty; 3) tax on the income of companies and organizations; 4) personal income tax; 5) customs duty; 6) State duty; 7) tax on the property of enterprises; 8) real estate tax of citizens; 9) tax on owners of vehicles and other self-propelled machines; 10) trading tax; 11) payment for the cost of exploration work; 12) payment for the special use of natural resources; 13) payment for pollution of the natural environment; 14) deductions and charges for the construction, repair and maintenance of roads; 15) contributions to the Fund for Chernobyl Disaster Mitigation and Social Protection; 16) contributions to the Fund for the Promotion of Employment; 17) contributions to the Social Insurance Fund of Ukraine; 18) contributions to the Pension Fund of Ukraine.

The local taxes and charges were: 1) hotel fee; 2) car parking fee; 3) market fee; 4) fee for issuing a warrant for an apartment; 5) resort fee; 6) fee for race at the hippodrome; 7) fee for win in races on the hippodrome; 8) fee from persons participating in the hippodrome betting; 9) advertising tax; 10) a levy on the right to use local symbols; 11) a levy on the right to cinema and television productions; 12) a levy on the right to hold local auctions, competitions and lotteries; 13) a municipal levy; 14) tolls for the transit of vehicles travelling abroad in border areas; 15) levies for the issuance of permits for the placement of objects of trade (Law of Ukraine "On Amendments and Addenda to the Law of the Ukrainian SSR «On the Taxation System»",1994).

It can be considered as the first tax system of independent Ukraine. Though it was too cumbersome, and some taxes, like the non-real estate tax, never worked, but it already seemed to be a more efficient tax system. Despite the fact that the tax system included all payments, even those that were not of tax nature, such as contributions to the Pension Fund of Ukraine, it ensured stable financing and development of the State until the adoption of the Tax Code of Ukraine in 2010.

Between 1994 and 2011, different taxes or levies supplemented the tax system or were excluded, but its effectiveness did not change much.

It was only with the adoption of the Tax Code of Ukraine in 2010, which entered into force on 1 January 2011, that the tax system acquired modern features that took into account certain international experience. But, unfortunately, with the adoption of the Tax Code of Ukraine, the tax system did not provide anti-shadowing effect of Ukraine's economy.

According to articles 9 and 10 of the Tax Code of Ukraine (revised as of January 1, 2011), national taxes and duties were:

– corporate income tax;
– individual income tax;
– value added tax;
– excise tax;
– first vehicle registration fee;
– environmental tax;
– rental payment for the transportation of oil and oil products through main oil and oil product pipelines, the transit transportation of natural gas through natural gas and ammonia pipelines on the territory of Ukraine;
– rental payment for oil, natural gas and gas condensate produced in Ukraine;
– fee for mineral resources use;
– land fee;
– fee for the use of radio frequency resource of Ukraine;

– fee for the special water use;
– fee for special use of forest resources;
– fixed agricultural tax;
– grape-growing, horticultural and hop-growing tax;
– customs duty;
– fee in the form of an additional levy to the current tariff for electricity and thermal energy except for electricity generated by qualified co-generation plants;
– fee in the form of an additional levy to the current tariff for natural gas for consumers of all forms of ownership.

Local taxes and fees include tax on real estate, other than land; single tax; fee for the certain business activities; fee for parking of vehicles; tourist fee (Tax Code of Ukraine, 2010). When adopting the Tax Code of Ukraine, the tax system was based on the 2010 Law of Ukraine "On the Tax System", which, in our opinion, was a mistake. It was necessary to introduce, for a transitional period of up to three years, an updated tax system, ensuring efficiency, growth of filling budgets at all levels and bringing the economy out of the shadows.

According to articles 9 and 10 of the Tax Code of Ukraine (amended as of January 1, 2021), national taxes and duties are: corporate income tax; individual income tax; value added tax; excise tax; environmental tax; rental payment; customs duty. Local taxes and fees include tax on real estate; single tax; fee for parking of vehicles; tourist fee (Tax Code of Ukraine, 2010).

The 2021 tax system in force, in our opinion, is significantly better than that of 1991, 1994 and better than that introduced with the adoption of the Tax Code of Ukraine in 2010. However, it is not without significant shortcomings, which make the economy shadowy. Therefore, an effective tax system is one of the main tasks of the legal experts in tax law and legislators in the coming years.

It should be noted that in accordance with Article 2 of the Law of Ukraine "On Succession of Ukraine" until the adoption of the new Constitution of Ukraine, the Constitution (Basic Law) of the Ukrainian SSR of 20 April 1978 was in force on the territory of Ukraine (as amended by Law of Ukraine 1554-XI of 17 September 1991 – Constitution of Ukraine) (Law of Ukraine "On Succession of Ukraine", 1991).

Article 97[1], parts 1 and 2, of the Constitution of Ukraine provides for that the Verkhovna Rada of Ukraine, in exceptional cases, by two thirds of the total number of people's deputies of Ukraine, may by law delegate to the Cabinet of Ministers of Ukraine, for a specified period, the power to issue regulatory decrees on separate issues, provided for by Article 97, paragraph 13, of the Constitution of Ukraine (The Constitution (Basic Law) of Ukraine, 1978).

The Cabinet of Ministers of Ukraine adopts decrees having the force of law for the exercise of delegated powers.

For example, Law of Ukraine 2796-XII of 18 November 1992 "On temporary delegation of powers to the Cabinet of Ministers of Ukraine to issue decrees in the field of legislative regulation" (in the revision of Law of Ukraine 2886-XII of 19 December 1992) the Verkhovna Rada has delegated to the Cabinet of Ministers temporary powers, until 21 May 1993, to issue regulatory decrees on matters provided for in article 97, paragraph 13, of the Constitution of Ukraine concerning real estate relations, entrepreneurship, social and cultural development, State customs, scientific and technical policy, credit and financial system, taxation, State wage policy and pricing (Law of Ukraine "On Temporary Delegation of Powers of the Cabinet of Ministers of Ukraine to Issue Decrees in the Sphere of Legislative Regulation", 1992).

With the adoption of the Constitution of Ukraine on 28 June 1996, the Constitution of Ukraine of 1978 ceased to have effect.

Since 1991 independent Ukraine has been characterized by rampant inflation, a lack of funds in the budget, chronic arrears in wages and pensions, and a lack of everyday goods and food in shops. Along with the crisis phenomena of the Ukrainian economy at the time of statehood establishment, the Ukrainian legislator faced the impossibility of making an effective tax system due to lack of experience, skills, analysis data in tax relations. In this context, the Verkhovna Rada of Ukraine, as a legislative body, was not in a position to address and overcome all these challenges in a timely manner and therefore transferred the powers to regulate, inter alia, taxation, by issuing decrees to the Cabinet of Ministers of Ukraine. In our view, that was the right decision at that time. It is understandable that such decrees were issued without any thorough elaboration, as there was no time or practice to do so in the context of the transition from communism to a market economy, and the country had to fill the budget with tax money very quickly. The Cabinet of Ministers of Ukraine issued the following Decrees: 1) № 13-92 "On income tax from citizens" of 26 December 1992; 2) № 18-92 "On excise tax" of 26 December 1992; 3) № 4-93 "On single customs rate of Ukraine" of 11 January 1993; 4) № 7-93 "On the State customs duty" of 21 January 1993; 5) № 24-93 "On trading tax" of 17 March 1993; 6) № 56-93 "On local taxes and duties" of 20 May 1993.

The shortcoming is that such decrees has been in force too long. Many decrees remain

in force today. In particular, Decree № 7-93 of the Cabinet of Ministers of Ukraine of January 21, 1993 "On State customs duty" is in force. Although the State customs duty is legally related to taxes, and more specifically to fees, it was not included in the Tax Code of Ukraine when it was drafted with the aim of artificially reducing the number of taxes (fees) to raise Ukraine in the World Bank Doing Business rating, which assesses business enabling environment. In particular, the lower a country's taxes, the higher its rating. For example, in 2012, Ukraine ranked 152nd; in 2014 – 112th; in 2016 – 83rd; and in 2020 – 64 (Doing Business-2020. Due to which Ukraine has risen to 64th place in the ranking, 2019). Although foreign direct investment in 2020 shows that Ukraine is not particularly affected by this rating. For example, in 2012, there were $8.4 billion in foreign direct investment; in 2020, there were minus $343 million in foreign direct investment (Foreign direct investment (FDI) in Ukraine, 2021). That is, the higher rating, the less amount of investment. We assume that even if Ukraine was in the top ten of this rating, ordinary Ukrainians would not get a better life from this. These ratings are only needed by politicians to have something to talk about at various talk shows for political PR about raising Doing Business ratings, such as 13 positions per year in 2016, and halving the shadow economy in two years. Obviously, records like that are all political manipulation. As soon as such politicians leave their posts, the shadow economy suddenly returns to its "natural" place for Ukraine, which according to different estimates is about 50% (The level of the shadow economy in Ukraine is 47.2% of GDP, 2018). At the same time, there are many different payments in Ukraine today, which by their legal nature are taxes (fees), but they are not included in the Tax Code of Ukraine artificially for the same purpose.

Moreover, according to Section XV, paragraph 4, Transitional provisions of the Constitution of Ukraine of 1996 (Constitution of Ukraine, 1996), within three years of the entry into force of the Constitution of Ukraine, the President of Ukraine had the right to issue decrees approved by the Cabinet of Ministers of Ukraine and signed by the Prime Minister of Ukraine on economic issues not regulated by law; accompanied by the draft law submitted to the Verkhovna Rada in accordance with the procedure established in article 93 of the Constitution. Such decree of the President of Ukraine took effect if within 30 calendar days from the date of submission of the draft law (with the exception of the inter-sessional period) the Verkhovna Rada of Ukraine would not adopt a law or reject a draft law submitted by a majority of its constitutional membership and would be in force until a law on these issues adopted by the Verkhovna Rada enters into force.

Thus, in accordance with Section XV, paragraph 4, Transitional Provisions of the Constitution of Ukraine, Decree № 727/98 of the President of Ukraine on the simplified system of taxation, accounting and reporting of small business entities of 3 July 1998 was issued and was in force until the adoption of the Tax Code of Ukraine. In our view, the promulgation of such decree was an erroneous decision, because its effects are still being felt in 2021 and will continue to be felt for a long time to come. The introduction of the simplified system came under pressure from street protests, on the one hand, and, on the other hand, from a political perspective, in the run-up to the 1999 presidential elections, with a view to mobilizing an entrepreneurial electorate. With the adoption of the Tax Code of Ukraine in 2010 there were attempts to eliminate the simplified tax system, but under pressure of "tax Maidan" the authorities did not find enough political will to eliminate the simplified system of taxation, accounting and reporting of small business entities. There was an extensive public debate on the issue implying only one idea as follows. Entrepreneurs in the simplified system of taxation, accounting and reporting do not have primary documents on the origin of the goods they trade and therefore cannot issue a cash cheque to the buyer. There were no other comments. This suggests that they are selling contraband, which for tens of billions of US dollars passes through customs without paying taxes to the budget, and only paying bribes to customs officers. The only people who get rich are the customs officers and the people involved.

Therefore, in our opinion, the development of the tax system can be divided into stages as follows:

1) from the day of independence on 24 August 1991 until the end of the possibility of regulating tax legal relations by decrees of the Cabinet of Ministers of Ukraine, namely until 21 May 1993;

2) from 22 May 1993 until the termination of paragraph 4 Transitional provisions of the Constitution of Ukraine from 1996, namely until 28 June 1999;

3) from the date of termination of the transitional provisions of the Constitution of Ukraine of 1996, namely from 29 June 1999, until the date of entry into force of the Tax Code of Ukraine, namely, until 1 January 2011;

4) from 1 January 2011 to date.

4. Conclusions

The constant changes in the tax system of Ukraine and attempts by the legislators to improve it, to increase its efficiency and to bring it into line with the realities of public life and the rapid development of trade activity have provoked to increasing tax evasion. Such imperfect legislative changes contribute to the existence of a significant shadow economy, which creates a lack of real national budget.

Before introducing further changes in the tax system, the historical aspects of the tax system in Ukraine should be studied and thoroughly analysed in order to prevent the same errors. It is necessary to highlight the ideas and their implementation, especially those that have had a positive influence on the development of the tax system and to build an effective tax system aimed both at taking into account the interests of taxpayers and the interests of ordinary Ukrainians, who may not, for objective reasons, pay any taxes, but want a decent living.

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Роман Лещенко,
кандидат юридичних наук, доцент кафедри фінансового права, Інститут права Київського національного університету імені Тараса Шевченка, вулиця Володимирська, 60, Київ, Україна, індекс 01033, Leshchenko_Roman@ukr.net
ORCID: *orcid.org/0000-0003-2911-9575*

ІСТОРИЧНІ АСПЕКТИ СТАНОВЛЕННЯ ПОДАТКОВОЇ СИСТЕМИ В УКРАЇНІ

Анотація. ***Метою статті*** є дослідження позитивних і негативних історичних аспектів та етапів становлення податкової системи в Україні.

Результати. У статті досліджено податкову систему України та зміни, що вносилися до неї за часів незалежності України. Розглянуто позитивний і негативний досвід становлення податкової системи. Наголошено на важливості врахування історичного досвіду встановлення податків у подальшій реформі податкової системи України. Обґрунтовано, що податкова система України сьогодні не може називатися стабільною, оскільки вже впродовж 30 років, починаючи ще з історичного моменту прийняття в 1991 р. Закону України «Про систему оподаткування», зазнає частих змін і реформувань, перегляду податків та зборів, їх розмірів, порядку справляння тощо. Така затяжна реформа податкової системи протягом багатьох років пов'язана з її неефективністю. Відсутня збалансованість між фіскальною складовою частиною податкової системи та заохоченням бізнесу до прозорої діяльності. Відповідно, у таких умовах виникає ситуація, за якої або платник податку обмежений у господарському зростанні, або держава не отримує податкові надходження, через що відсутнє достатнє фінансування соціальних виплат і заробітних плат.

Висновки. Констатовано, що постійне внесення змін до податкової системи України та намагання законодавців її вдосконалити, підвищити рівень її ефективності та узгодити з реаліями суспільного життя й стрімкого розвитку торговельної активності дедалі більше спонукають платників до ухилення від оподаткування. Такі недосконалі зміни законодавства сприяють існуванню значної тіньової економіки, що зумовлює відсутність реального наповнення бюджету країни. Перш ніж вносити якість чергові зміни до податкової системи, необхідно вивчити та ретельно проаналізувати історичні аспекти становлення податкової системи в Україні з метою недопущення одних і тих же помилок. Потрібно виокремити ідеї та їх реалізацію, особливо тих, що мали позитивний вплив на розвиток податкової системи, а також побудувати ефективну податкову систему, спрямовану на врахування інтересів як платників податків, так і пересічного українця, який, можливо, з об'єктивних причин не сплачує жодних податків, проте хоче гідних умов життя.

Ключові слова: збори, обов'язкові платежі, податки, податкова система, податкове законодавство.

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Leonid Mohilevskyi,
Doctor of Law, Professor, Honoured Lawyer of Ukraine, Vice-Rector, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, Leonid_Mohilevskyi@ukr.net
ORCID: *orcid.org/0000-0002-6994-6086*

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DISCIPLINARY AND MATERIAL LIABILITY AS A MEANS OF ENSURING LABOUR DISCIPLINE

Abstract. The ***purpose of the article*** is to describe disciplinary and material liability as a means of ensuring labour discipline.

Results. The article, on the basis of an analysis of the scientific views and the provisions of current legislation, clarifies the nature and content of disciplinary and material liability as a means of ensuring labour discipline. It is argued that, as well as punitive and remedial, liability is educational and stimulating, that is, it is aimed at raising the level of legal consciousness and legal culture of the parties to the legal relationship. The study reveals that the law considers "labour discipline" in four aspects: as a concept of labour law; as a principle of labour law; as an element of labour law; and as actual conduct. As a concept of labour law, labour discipline is a set of legal provisions governing the internal code of conduct and defining the labour duties of the parties to an employment contract, as well as the methods of ensuring performance of these duties. It is underlined that there are two aspects in the content of labour discipline: objective and subjective. Objective aspect means the order without which an enterprise cannot exist. To some extent, this order is governed by labour law and is formed as a specific part of legal order, adapted to the conditions of production and operating within the enterprise in the form of internal labour regulations. The subjective aspect is the performance of duties and the exercise of rights by the parties to employment relationship. The commission by an employee of a disciplinary misdemeanour, the exercise by the employer of disciplinary powers and the obligation of the violator of labour discipline to be punished also fall under the subjective aspect of labour discipline.

Conclusions. The concept of liability regulates the grounds for and the manner in which a party to labour relationship incurs additional onerous obligations (the type and measure of which are determined by law) in connection with the commission of a labour offence. As well as punitive and remedial, liability is educational and stimulating. In other words, it is aimed at raising the level of legal consciousness and legal culture of the parties to the legal relationship. It is aimed at their education for necessary conscious lawful behaviour as the most appropriate and beneficial for these persons and society as a whole.

Key words: labour discipline, disciplinary liability, material liability, employee.

1. Introduction

When signing an employment contract, the person (employee) undertakes to observe discipline established in the enterprise (organization or institution), determined by the legislation in force, as well as internal (local) regulations of the organization. The main purpose of the concept of labour discipline is to determine the conduct of an individual in the performance of one's work duties. In addition, the concept aims to establish the efficient operation of the enterprise (institutions, organizations) and to ensure the efficient realization of labour and productive resources. Therefore, discipline is a prerequisite for the efficiency of an enterprise, institution or organization.

Some issues related to ensuring of labour discipline were studied in scientific papers by V.I. Prokopenko, M.Y. Baru, Y.Y. Ivchuk, A.Y. Ryzhenkova, T.R. Kolomoiets, T.M. Yamnenko, N.M. Onishchenko, O.F. Skakun, R.B. Topolovskyi, O.V. Smirnov, and many others. However, despite a large number of scientific contributions, the legal literature lacks comprehensive research on disciplinary and material liability as a means of ensuring labour discipline.

Thus, the ***purpose of the article*** is to describe disciplinary and material liability as a means of ensuring labour discipline.

2. Scientific approaches to defining labour discipline

First of all, it is necessary to focus on the essence of the concept "labour discipline" under the framework of the relevant problem".

For example, A.O. Bakanin considers the concept of labour discipline in the narrow and broad meanings. According to him, in the first case, discipline "means the duty of everyone to work, strictly observing the rules of labour regulations established in enterprises, businesses, institutions"; broadly, labour discipline is a form of social communication between people in the process of teamwork (Bakanin, 1955, p. 14). Labour discipline is reflected in workers' direct perception of the regulations and in their actual behaviour in the exercise of their labour powers. Subjectively, labour discipline is the compliance or incompliance of the behaviour of an individual worker with the statutory requirements, that is, the observance or non-observance of discipline (Malikov, 2004, p. 123).

According to V.V. Zhernakov, as a concept of labour law, labour discipline is a set of legal provisions governing the internal code of conduct and defining the labour duties of the parties to an employment contract, as well as the methods of ensuring performance of these duties (Zhernakov et al., 2012). It is a set of legal provisions that regulate the subject matter such as: 1) organization's internal labour regulations; 2) mutual rights and duties of workers and employers; 3) measures for rewarding success in work; 4) disciplinary penalties on employees for misconduct in the workplace (Hruzinova, Korotkin, 2003).

The law considers "labour discipline" in four aspects: a) as a concept of labour law; b) as a principle of labour law; c) as an element of labour law; d) as actual conduct. As a concept of labour law, labour discipline is a set of legal provisions governing the internal code of conduct and defining labour duties of the parties to an employment contract, as well as the methods of ensuring performance of these duties. As a principle of labour law, labour discipline provides for employees' duty to observe discipline at work and employers' right to require employees to perform only those duties which are prescribed by law in force, local regulations and employment contracts. Moreover, labour discipline is an element of labour law relations, implying the worker's duty to comply with labour discipline of the entity and with its internal labour regulations. Labour discipline as actual behaviour is the status and level of compliance with work duties by employees in a particular enterprise, institution or organization (Zhernakov et al., 2012).

There are two aspects in the content of labour discipline: objective and subjective. The objective aspect means the order without which an enterprise cannot exist. To some extent, this order is governed by labour law and is formed as a specific part of legal order, adapted to the conditions of production and operating within the enterprise in the form of internal labour regulations. The subjective aspect is the performance of duties and the exercise of rights by the parties to employment relationship. The commission by an employee of a disciplinary misdemeanour, the exercise by the employer of disciplinary powers and the obligation of the violator of labour discipline to be punished also fall under the subjective aspect of labour discipline.

An important guarantee of the proper performance of their work duties by the parties is the concept of liability in labour law. H.I. Uhriumova emphasises that disciplinary liability is a form of labour and legal liability and is one of the legal forms of influence expressed in the application of disciplinary sanctions against an employee, who has committed a disciplinary offence, by an employer vested with disciplinary authority (Uhriumova, 2005, p. 79). Disciplinary liability under labour law is the duty of the employee to answer for his/her breach of labour discipline to the employer and to be disciplined under labour law. A labour offence as grounds for disciplinary liability (traditionally referred to as a disciplinary misdemeanour) is a guilty, unlawful or improper performance of the duties by an employee under the labour legislation, collective agreements and labour contracts, which result in violations of the internal labour regulations of enterprises (Pylypenko, 2006).

According to V.V. Sereda, disciplinary liability is generally considered in two aspects: 1) as a certain response to a disciplinary misdemeanour in employment relations, the possibility of disciplinary sanctions against the offender, as defined in the labour law; 2) as an effect of the non-fulfilment or improper performance of work duties by a particular worker, with the application of sanctions for violation of labour discipline. In this aspect, disciplinary liability implies the duty of the offender to answer for disciplinary misdemeanour committed and to suffer the negative effects of personal, organizational or property constraints. The employer's response to a disciplinary misdemeanour is to demand an explanation from the offender of labour discipline; to impose sanctions on the employee in the manner prescribed by labour law (Sereda, 2014, p. 19).

A.M. Perunova argues that disciplinary liability is the duty of the employee to respond to the owner or a body authorized by him for the disciplinary misdemeanour committed and to suffer disciplinary action, provided for in labour law. That is, in labour relations, a worker is subject to disciplinary liability only to the owner and not to the State, as is the case of administrative and criminal liability, and the owner

has disciplinary liability towards the employee (Perunova, Selezen, 2009). A disciplinary action may be imposed on the grounds of a labour disciplinary misdemeanour and without direct and actual damage to property of an employer. Its purpose is to influence labour discipline violator by imposing on him/her the obligation to bear unfavourable legal effects of a personal, material or organizational nature for violation of his/her work duties, with a view to influencing his/her consciousness and will and to changing them in the way provided by the employment contract, as well as developing an employee's sense of responsibility for the proper performance of his or her duties and for the prevention of further violations – compensation for property damage caused (Zhernakov et al., 2012).

3. Particularities of material liability

With regard to material liability, contrasting disciplinary liability, which is primarily punitive, it is remedial. Material liability, as a fundamental concept of labour law, is to ensure that the conduct of individuals is in accordance with the standards adopted by the State. This liability, contrasting disciplinary liability, is bilateral, since not only the employee is liable to the owner or authorized body, but also the owner is liable to the employee for causing damage to his/her property or health. Therefore, liability under labour law is a statutory duty of a party to an employment contract to compensate for damages caused to another party by unlawful and guilty acts (Prokopenko, 2000). In the absence of such damage, material liability shall not arise. Therefore, the ground for material liability is a labour offence.

According to S.M. Prylypko, the employee's liability under labour law has three purposes: protection of the employer's property from damage, loss, theft and compensation for injury caused by the employee. Bringing a worker to material liability does not preclude disciplinary actions on the guilty party, since the guilty employee both commits a labour disciplinary offence (disciplinary misdemeanour) and inflicts damage to property (a property labour offence); guarantees to protect the worker's wages from excessive, illegal and unjustified penalties in case of material liability. This objective of material liability guarantees teaching the employee an attentive, careful, diligent, caring attitude to the employer's property, transferred to him/her for the performance of his/her work, to prevent further damage to the employer's property (Zhernakov et al., 2012).

O.M. Korotka identifies the following elements of liability as the concept of labour law.

First, material liability is an autonomous form of legal liability and can be applied alongside other types of liability, such as disciplinary, administrative and criminal.

Second, it is a bilateral mutual duty to compensate for the damage caused by wrongful acts to the other party to the employment relations.

Third, it arises only when a property offence has been committed, resulting in direct property damage to the other party to labour relations.

Fourth, liability of the parties to an employment contract arises only for damage caused in connection with the performance of labour or official duties.

Fifth, the purpose of liability of the parties to employment relations is to prevent the occurrence of damage and, at the same time, to protect the earnings of an employee from unreasonable deductions.

Sixth, material liability is, by its legal nature, a sanction for a labour-related property offence committed by an employee or owner or an authorized body due to failure to perform one's labour duties (Korotka, 2003, pp. 22–23).

4. Conclusions

The concept of liability regulates the grounds for and the manner in which a party to labour relationship incurs additional onerous obligations (the type and measure of which are determined by law) in connection with the commission of a labour offence. As well as punitive and remedial, liability is educational and stimulating. In other words, it is aimed at raising the level of legal consciousness and legal culture of the parties to the legal relationship. It is aimed at their education for necessary conscious lawful behaviour as the most appropriate and beneficial for these persons and society as a whole.

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Леонід Могілевський,
доктор юридичних наук, професор, заслужений юрист України, проректор, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, Leonid_Mohilevskyi@ukr.net
***ORCID:** orcid.org/0000-0002-6994-6086*

ДИСЦИПЛІНАРНА ТА МАТЕРІАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЯК ЗАСОБИ ЗАБЕЗПЕЧЕННЯ ДИСЦИПЛІНИ ПРАЦІ

Анотація. ***Мета статті*** полягає в тому, щоб надати характеристику дисциплінарній і матеріальній відповідальності як засобам забезпечення дисципліни праці.

Результати. У статті з огляду на аналіз наукових поглядів учених та норм чинного законодавства з'ясовано сутність і зміст дисциплінарної та матеріальної відповідальності як засобів забезпечення дисципліни праці. Аргументовано, що відповідальність має, окрім карального й правовідновлювального, також виховний і стимулюючий характер, тобто її дія спрямовується на підвищення рівня правової свідомості та правової культури сторін правовідносин. З'ясовано, що у праві категорія «дисципліна праці» розглядається в чотирьох аспектах: як інститут трудового права, як принцип трудового права, як елемент трудових правовідносин, як фактична поведінка. Як інститут трудового права дисципліна праці є сукупністю правових норм, що регулюють внутрішній трудовий розпорядок і визначають трудові обов'язки сторін трудового договору, а також методи забезпечення виконання цих обов'язків. Наголошено на тому, що у змісті трудової дисципліни виокремлюють дві сторони – об'єктивну та суб'єктивну. Під об'єктивною стороною розуміється певний порядок, без якого не може існувати підприємство. Цей порядок у певній частині регулюється нормами трудового права та формується як особлива, специфічна частина правопорядку, що пристосована до умов виробництва й діє в межах конкретного підприємства у вигляді внутрішнього трудового розпорядку. Суб'єктивну сторону становлять виконання обов'язків та здійснення прав сторонами трудових правовідносин. Учинення працівником дисциплінарного проступку, реалізація роботодавцем дисциплінарного повноваження та обов'язок порушника трудової дисципліни понести покарання також належать до суб'єктивної сторони дисципліни праці.

Висновки. Інститут відповідальності регламентує підстави виникнення та порядок реалізації стороною трудових правовідносин додаткових обтяжливих обов'язків (вид і міра яких визначаються законодавством), що покладаються на неї у зв'язку з вчиненням трудового правопорушення. Відповідальність, окрім карального та правовідновлювального, має також виховний і стимулюючий характер. Тобто її дія спрямовується на підвищення рівня правової свідомості та правової культури сторін правовідносин. Виховання їх відбувається в дусі необхідності свідомої правомірної поведінки як найбільш доцільної та корисної для цих осіб і суспільства загалом.

Ключові слова: дисципліна праці, дисциплінарна відповідальність, матеріальна відповідальність, працівник.

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Oleksandr Morhunov,
Doctor of Law, Associate Professor, Dean of the Faculty № 3, Kharkiv National University of Internal Affairs, 27, Lev Landau avenue, Kharkiv, Ukraine, postal code 61080, Morhunov_Oleksandr@ukr.net
ORCID: *orcid.org/0000-0003-2259-3620*

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PUBLIC ADMINISTRATION IN THE FIELD OF PHYSICAL CULTURE AND SPORTS: THEORETICAL PRINCIPLES AND APPROACHES TO DEFINITION

Abstract. The ***purpose of the article*** is to analyse and generalise scientific approaches to defining the category of "public administration in the field of physical culture and sports" contained in domestic and foreign scientific literature, as well as to formulate an original author's perspective on its concepts and components.

Results. The article studies theoretical approaches to defining the essence and features of public administration in the field of physical culture and sports. The focus is on public administration through making public policy on physical culture and sports. It is emphasised that the formation of the principles of public administration of physical culture and sports in this regard should take into account the concept of good governance. The author underlines the section of the European Charter of Local Self-Government, which defines a number of principles of local self-government, including: 1) the free resolution of issues not excluded from the scope of competence; 2) protection of territorial borders of local self-government bodies, determination of own internal administrative structures; 3) free performance of functions by local elected representatives; 4) administrative supervision of local self-government bodies only in the manner and in cases provided by the constitution or law; 5) own adequate financial resources, which they can freely dispose of within their powers; 6) cooperation and creation of consortia with other local governments to perform tasks of common interest; 7) use of legal remedies to ensure the free exercise of their powers. It should be noted that the European Charter of Local Self-Government defines the protection and strengthening of local self-government in various European countries as an important contribution to the development of Europe on the principles of democracy and decentralisation.

Conclusions. It is concluded that the leading role of the state in the development of sports and physical culture is immutable and relevant today. However, no less important for the modern development of physical culture and sports is the understanding of the different legal status of the participants in the relevant legal relations, including not only state and local governments, but also civil society institutions. Their role in the development of these fields cannot be underestimated. It should be understood that only the interaction of all actors of legal relations contributes to the development of physical culture and sports.

Key words: principles, physical culture, sports, public administration, Ukraine.

1. Introduction

The formation of the principles of public administration of physical culture and sport from this perspective should take into account the concept of good governance (Morhunov, 2018a, pp. 67–68). During the 1980s and 1990s, an increasing number of countries abandoned the traditional model of public administration. The rigid form of government that characterises most of countries in the XX century is being transformed into flexible economic market relations, changing the role of authorities in society and the relationship between public administrators and objects of public administration. Public administration becomes an integral part of the social order, required for the activity and coexistence of the population, both individuals and society. During this period, a new paradigm for the state building, based on the involvement of the public in the management, openness of government, use of the latest technologies, was formed (Loshchyna, Kovtun, 2018, p. 103). Unquestionably, in the context of the democratisation of the political process

in Ukraine, the task of organising the system of state power on the basis of the principles of democratic governance and approximation to the interests and needs of citizens is increasingly relevant (Rebkalo et al., 2010, p. 34). To that end, modern processes of democratisation of Ukrainian society and reform of the system of public administration of Ukraine include not only the application of new managerial technologies, but also the introduction of innovative and effective administration models. Public administration models such as New Public Management, Governance and Good Governance have been successfully tested by many developed countries around the world (Meltiukhova et al., 2010, p. 16).

General issues of public administration, particularly in the field of physical culture and sport in Ukraine, were under focus in the works by: V.B. Averianov, O.F. Andriiko, V.B. Antoniuk, O.M. Bandurka, O.I. Bezpalova, Yu.P. Bytiak, V.M. Harashchuk, S.M. Husarov, O.V. Dzhafarova, O.Yu. Drozd, M.M. Dolhopolova, V.V. Karpenko, Yu.V. Kovbasiuk, H.I. Kovtun, L.V. Kozlova, T.O. Kolomoyets, V.K. Kolpakov, A.T. Komziuk, O.V. Kuzmenko, O.I. Mykolenko, R.S. Melnyk, O.M. Muzychuk, N.R. Nyzhnyk, A.Yu. Oliinyk, N.M. Onishchenko, O.V. Orlova, N.M. Parkhomenko, S.P. Pohrebniak, V.F. Pohorilko, A.I. Rybak, O.Yu. Salmanova, O.Yu. Synyavska, V.V. Sokurenko, I.D. Pastukh, I.M. Pakhomov, V.V. Chumak, R.V. Shapoval, O.S. Yunin and others. However, we believe that the perspectives of the scientific community require some adjustment and generalisation in connection with the implementation in Ukraine of reforms in respect of managerial processes, introduction of the updated principles of good governance and managerial decentralisation in the activities of state and local authorities.

The ***aim of the article*** is to analyse and generalise scientific approaches to defining the category of "public administration in the field of physical culture and sports" contained in domestic and foreign scientific literature, as well as to formulate an original author's perspective on its concepts and components.

2. Features of the concept of "good governance" and the program "SIGMA"

According to A.A. Pukhtetska, the European concept of governance, involving an aspect of good governance, is now popular in Ukraine. At the same time, the scientist emphasises that the principles and standards of good governance developed by international and European regional organisations have not been endorsed enough in Ukrainian legislation, mostly due to the lack of a scientific basis for the introduction of principles and standards of good governance in the domestic legal system (Pukhtetska, 2010, p. 36).

It should be noted that the term "good governance" is currently used and applied by a wide range of public institutions in the international community in general and the European Community in particular. However, despite the pervasiveness and relevance of the concept, the category is not clearly defined, as well as not exhaustive in its characteristics, scope and objectives (Karabin, 2016, pp. 64–65). However, in general, good governance is a definite conceptual framework that defines the possibility of achieving a result in an existing governance system. Orientation to the principles of good governance in a democratic society provides certain values of understanding of development prospects in Ukraine (Akhmad, 2018, p. 245). The concept of good governance has evolved in European legal doctrine on the basis of and subject to the two fundamental principles for the construction of the legal systems of the leading Western European countries – democracy and the rule of law (Pukhtetska, 2010, p. 36).

The concept takes into account the social context in the reform of public administration, namely in the field of bringing universal standards such as professionalism, political neutrality, decency, avoidance of conflicts of interest, etc. The very concept of "good governance" includes a democratic and efficient system of government, successful public institutions, corresponding quality of public services and the ability to meet to new public needs. "Good governance" requires public trust in government, providing for transparency, personal integrity, high ethical standards, respect for the law, responsibility, involvement and solidarity with citizens (Meltiukhova et al., 2010, p. 17).

The concept of good governance reflects the state (qualitative and quantitative characteristics) of the key relationships between public authorities and individuals in society, as well as a number of indicators (indices) important for a democratic society to assess the conditional approximation of a country to "pure types" of principles and standards of good governance. This conditionality is explained by the different methods and subjects of governance surveys (monitoring), the differences in the democratic models of the organisation of the state power in general and the executive one in particular (Pukhtetska, 2010, p. 36).

With regard to the concept of good governance, it should be noted that among the principles of European administrative law is the principle of good governance or good administration. It implies combined requirements of equitable consideration and the use of best

practices (techniques) in management, as well as the introduction of an ombudsman institution to deal with complaints of bad governance (administration) in the activities of EU institutions and organisations (Herheliuk, 2014, p. 124). Along with this principle as one of the principles of European administrative law, the same group of principles is singled out among those of the European Administrative Space, which is a space shaped by EU policies and regulations, in which national governments play an active role, in which member states' governments shall, for the sake of uniformity of citizens' rights and freedom of enterprise in the EU, guarantee a uniform level of quality and efficiency of administrative services. In other words, a common administrative space is only possible when administrative principles, rules, procedures and provisions are applied equally in a certain territory within the scope of the national constitution (Prylypchuk, 2016, p. 48).

It should be noted that the principles of European administrative law and the principles of the European administrative space are not considered to be equivalent concepts, as well as the principles of the administrative law of Ukraine and the principles of public administration (Morhunov, 2018b, pp. 104–105), as we have concluded above. According to A.A. Pukhtetska, "despite the fact that the basic component of the two above-mentioned definitions is the word "principle" (starting points, basic assumptions, etc.), they should not be identified... The literature review leads to the conclusion, supporting the perspectives of the majority of legal experts in administrative law who have studied this question in depth, that the concepts of "principles of European Administrative Space" and "European principles of administrative law" are not identical, although very close. The main difference between them is that the former is part of the latter..." (Pukhtetska, 2015, p. 8). The principles of good governance are enshrined in a number of instruments.

The catalogue of standards followed by the European Union identifies two categories of standards: global standards of public administration and good governance, complied by states in different parts of the world, politicians, officials and civil servants, and purely "European" standards, that is, standards of European governance for participants in the complex, multi-level, polycentric decision-making, policy-making and coordination process in the EU to comply with (Voityk, 2017, p. 21). The White Paper on European Governance, providing for a series of recommendations and proposals for strengthening democracy in Europe (Prokopenko et al., 2009) identifies five principles of good governance: openness, participation, accountability, effectiveness and coherence (European governance. White book, 2001, pp. 11–12). Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration makes proposals for member states to follow the principles of good administration: 1) lawfulness; 2) equality; 3) impartiality; 4) proportionality; 5) legal certainty; 6) taking action within a reasonable time limit; 7) participation; 8) respect for privacy; 9) transparency (Recommendation CM/Rec(2007)7 of the Committee of Ministers to member states on good administration, 2007). These lists of principles, when compared, vary considerably.

The basic principles of administration are systematised and described in the basic provisions of SIGMA's "European Principles for Public Administration". SIGMA is one of the most prestigious think tanks of EU, a joint initiative of the Organisation for Economic Co-operation and Development and the European Union (Melnychenko, 2017). The concept of the European Administrative Space, proposed by SIGMA in 1999, included elements such as reliability, predictability, accountability and transparency, as well as technical and managerial competence, organisational capability, financial stability and public participation (Melnychenko, 2017). It should be noted that in addition to defining the six principles of good governance, SIGMA provides tools for monitoring their implementation in countries that have and intend to become members of the EU, thereby deepening European integration.

The monitoring mechanism provides for a comprehensive set of quantitative and qualitative indicators describing both the prerequisites for successful reforms (appropriate laws, policies, structures and procedures), as well as the actual implementation of reforms and their effects (how administration works in practice). In order to assess the progress made by a country in the application of the Principles, these indicators measure the development of the relevant components of public administration, giving an overall rating from 0 (the lowest) to 5 (the highest). SIGMA collects information and data needed to monitor the results and progress in the course of assessment in different countries. This tool can also be used by national public authorities (such as institutions responsible for coordinating or implementing public administration reform) or local think tanks or civil society organisations (Melnychenko, 2017). Ukraine is one of those countries.

3. The state of public administration in Ukraine

In 2018, SIGMA experts once again evaluated the state of affairs in public administration

in Ukraine and the progress that the country has achieved through reforms. Experts highlighted both positive and negative developments. Among the latter there are: weak governance and coordination mechanism for public administration reform. While the mechanisms are described in the Action Plans, only the Coordinating Council for Public Administration Reform functions at the political level, and only in matters, related to the Public Administration Reform Strategy in Ukraine for 2016–2020, but not to issues related to the Public Finance Management Strategy for 2017–2020. Coordination bodies have been established at the administrative level but are not functioning (Halunko et al., 2018, p. 20). These and other conclusions and recommendations of SIGMA experts enable to conclude that it is advisable to further improve public administration in Ukraine, for which the establishment of its principles is one of the priority tasks.

As mentioned above, there is no consensus in international standards on the principles of good governance. Even greater differences exist in the author's interpretations of the lists. Nowadays, standards of good governance in the work of European researchers include: adequate legislation; legitimacy; participation; transparency in decision-making; access to information; good administration; appropriate staff; proper financial and budgetary management; efficiency; responsibility and supervision. Domestic scholars have proposed the principles of good governance, such as:

– the principle of participation in decision-making and proper response;

– the principle of openness and transparency;

– the principle of virtue and moral conduct;

– the principle of efficiency, competence and sustainability;

– the principle of innovation and openness to changes;

– the principle of stability and long-term orientation;

– the principle of respect for human rights and cultural diversity;

– the principle of social cohesion and accountability (Halunko et al., 2018, p. 43).

Obviously, these lists of principles of public administration do not coincide. There are principles available to all of these lists (openness, transparency, responsibility, accountability, effectiveness, etc.). There are different principles (virtue and moral behaviour, innovation and openness to change, respect for privacy, taking action within a reasonable time limit, etc.).

This diversity requires to analyse the above and other perspectives in respect of the principles of good governance in order to achieve the objective of identifying the principles of public administration in the field of physical culture and sport, on the basis of principles of good governance recognised at the international level. The importance of the latter should not be underestimated.

According to K.I. Chyzhmar, the significance of the above-mentioned principles of good governance for public administration in Ukraine is that they set standards and encourage public servants to ensure public interest. "The essential difference between the principles of good governance in the EU member states and Ukraine is that they are not just ideas based on one's goodwill but are actually implemented at all levels of public administration, effectively protected against violations by independent monitoring bodies, the justice system, the judiciary and parliamentary control" (Halunko et al., 2018, p. 42). Ukraine is currently not a member of the EU. However, these principles are important for the development and regulation of public administration in Ukraine.

To date, the principles and standards of good governance developed by international and European regional organisations have not yet been fully enshrined in Ukrainian legislation. Such a situation entails low ratings of Ukraine. For example, according to the World Economic Forum, Ukraine ranked 89 out of 83 (The Global Competitiveness Report, 2018) on the Global Competitiveness Report in 2015–2016, thus increasing its position. However, in the category "Burden of Government Regulation," Ukraine takes 67th place, in "Incidence of corruption" – 109th place, "Efficiency of government" – 115th place, "Strength of auditing and reporting standards" – 120th place among 140 compared countries (The Global Competitiveness Report, 2018, pp. 575–577). These disappointing results point to the need for further reforms in public administration and the updating of the legal framework. The principles of good governance cannot be overestimated in order to achieve these objectives.

According to SIGMA experts, regulatory requirements, together with other EU guidelines and recommendations, are the basis of the "Principles" in the areas covered by the *acquis*. In other areas, the Principles draw on international standards and requirements as well as the successful experiences of EU member countries and the Organisation for Economic Cooperation and Development (OECD). The minimum criterion for good governance is that countries comply with these basic principles (Melnychenko, 2017). Therefore, although Ukraine is not a member of the EU, the com-

mitments undertaken in European integration processes with a view to deepening European integration and Ukraine's membership in the European Union require an analysis of the principles of the European Administrative Space with regard to public administration and the approximation of Ukrainian legislation to EU legislation in this field, bringing public administration into line with European and international standards in this field.

Evidently, the "standards of European Governance are predominantly in the form of "soft" standards, that is, the White Books and Communications of the European Commission, recommendations of conferences of ministers responsible for public administration, SIGMA recommendations, etc. However, they cannot be ignored: for example, in the process of the latest enlargement, each candidate country had to meet the Copenhagen and Madrid criteria in order to gain EU membership and show positive results in SIGMA evaluation (Voityk, 2017, p. 21). According to A.A. Pukhtetska, one of the strategic priorities of Ukraine's public policy is integration into European structures with a view to obtaining full membership in the EU, which is a prerequisite for the fulfilment of the Copenhagen and Madrid criteria, which, inter alia, require the alignment of the administrative capacity of the candidate countries' public authorities with the performance criteria of the EU member states' public administrations (Averianov, 2007, pp. 101–104). Therefore, the identification of the principles of public administration in the field of physical culture and sport to be observed in Ukraine should be based on the principles of good governance defined at the international level.

The focus should be on the section of the European Charter of Local Self-Government, which defines a number of principles of local self-government, including the free resolution of issues not excluded from the scope of competence; protection of territorial borders of local self-government bodies, determination of own internal administrative structures; free performance of functions by local elected representatives; administrative supervision of local self-government bodies only in the manner and in cases provided by the Constitution or law; own adequate financial resources, which they can freely dispose of within their powers; cooperation and creation of consortia with other local governments to perform tasks of common interest; use of legal remedies to ensure the free exercise of their powers. It should be noted that the European Charter of Local Self-Government defines the protection and strengthening of local self-government in various European countries as an important contribution to the development of Europe on the principles of democracy and decentralisation (Chumak, 2019).

4. Conclusions

Therefore, the leading role of the state in the development of sports and physical culture is immutable and relevant today. However, no less important for the modern development of physical culture and sports is the understanding of the different legal status of the participants in the relevant legal relations, including not only state and local governments, but also civil society institutions. Their role in the development of these fields cannot be underestimated. It should be understood that only the interaction of all actors of legal relations contributes to the development of physical culture and sports.

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Олександр Моргунов,
доктор юридичних наук, доцент, декан факультету № 3, Харківський національний університет внутрішніх справ, проспект Льва Ландау, 27, Харків, Україна, індекс 61000, Morhunov_Oleksandr@ukr.net
ORCID: *orcid.org/0000-0003-2259-3620*

ПУБЛІЧНЕ АДМІНІСТРУВАННЯ У СФЕРІ ФІЗИЧНОЇ КУЛЬТУРИ І СПОРТУ: ТЕОРЕТИЧНІ ЗАСАДИ ТА ПІДХОДИ ДО ВИЗНАЧЕННЯ

Анотація. ***Метою статті*** є аналіз та узагальнення наукових підходів до визначення категорії «публічне адміністрування у сфері фізичної культури і спорту», що містяться у вітчизняній та іноземній науковій літературі, а також надання авторського формулювання цього поняття та його складників.

Результати. У статті досліджено теоретичні підходи до визначення сутності й особливостей державного управління у сфері фізичної культури та спорту. Акцент зроблено на державному управлінні через формування державної політики у сфері фізичної культури і спорту. Наголошується на тому, що формування засад державного управління фізичною культурою і спортом у зв'язку із цим має враховувати концепцію належного управління (good governance). Звернено увагу на розділ

Європейської хартії місцевого самоврядування, що визначає низку принципів місцевого самоврядування, якими є, зокрема, такі засади: 1) вільне вирішення питань, не виключених зі сфери компетенції; 2) охорона територіальних кордонів органів місцевого самоврядування, визначення власних внутрішніх адміністративних структур; 3) вільне виконання функцій місцевими виборними представниками; 4) адміністративний нагляд за органами місцевого самоврядування лише в порядку та у випадках, передбачених конституцією або законом; 5) власні достатні фінансові ресурси, якими вони можуть вільно розпоряджатися в межах своїх повноважень; 6) співпраця та створення консорціумів з іншими органами місцевого самоврядування для виконання завдань, що становлять спільний інтерес; 7) використання засобів правового захисту для забезпечення вільного здійснення своїх повноважень. Окремо варто вказати на те, що Європейська хартія місцевого самоврядування визначає захист і зміцнення місцевого самоврядування в різних країнах Європи як важливий внесок у розвиток Європи на принципах демократії та децентралізації.

Висновки. Констатовано, що провідна роль держави в розвитку спорту й фізичної культури є незмінною та актуальною сьогодні. Однак не менш важливим для сучасного розвитку фізичної культури і спорту є розуміння різного правового статусу учасників відповідних правовідносин, серед яких – не тільки органи держави та місцевого самоврядування, а й інститути громадянського суспільства. Їх роль у розвитку вказаних сфер не можна применшувати. При цьому необхідно розуміти, що лише взаємодія всіх суб'єктів правовідносин сприяє розвитку фізичної культури та спорту.

Ключові слова: засади, фізична культура, спорт, публічне адміністрування, Україна.

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Vitalii Oksin,
Doctor of Law, Leading Researcher, Scientific Institute of Public Law, 2a, H. Kirpy street, Kyiv, Ukraine, postal code 03035, 6222410@ukr.net
***ORCID:** orcid.org/0000-0001-6080-7752*

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CORRUPTION AS A GLOBAL PHENOMENON AND ITS IMPACT ON THE SPACE INDUSTRY DEVELOPMENT

Abstract. The ***purpose of the article*** is to reveal the issues of combating corruption in the space industry.

Results. This study analyses corruption, its impact on the space industry development, because in the context of the rapid development of new space technologies, building a new model of the space economy and the world rethinking of the prospects of the space industry, the development of its unknown spaces is an extremely relevant issue. In the international arena, the active condemnation of all forms of corruption, including bribery, began in the second half of the twentieth century, what is more at the advent of international legal anticorruption mechanisms its existence was recognized exclusively in the field of transnational business, and over time, discussions of corruption in public administration began in the world. Corruption is, first and foremost, a conscious choice of everyone, whether active or passive. In general, corruption is a pervasive phenomenon, which includes, on the one hand, manifestations of any abuse of a special status and, on the other hand, the motivation and active action to implement them by other persons concerned. In other words, it is a two-way relationship, a symbiosis of needs and benefits.

Conclusions. It is proved that corruption in the space industry is a cumulative indicator of its existence in the state, in its main sectors. Public-private partnership in the field of space activities implies both positive and negative aspects. In this case, corruption exists in the public sector in general and in the space industry, in particular. The space industry is slowing down in development because the funds that should potentially be spent on research and development of outer space are not used for their intended purpose. Accordingly, there is no innovation activity, technological progress is minimal. Therefore, the priority is to eradicate corruption both in the world and in individual countries, because it, like a viral infection, tends to migrate, threatening all of humanity.

Key words: corruption, anti-corruption, space industry, space activities, outer space, world cooperation, transnational business.

1. Introduction

It is evident that corruption is a negative phenomenon that permeates all sectors of both public and state sectors, not just in two, but in many countries around the world.

The current existence of this phenomenon is historically determined and quite natural. For thousands of years, corruption has either been encouraged or banned. It is clear that this was done in different ways, by different authorized entities and with the use of tools that met the needs of the time. However, it should be understood that corruption is, first and foremost, a conscious choice of everyone, whether active or passive.

The international community has long identified corruption as a mass phenomenon, a global disease that is gradually poisoning key areas of national and global economic development. The space industry is no exception, as space has always been a source of inspiration for researchers and scientists, who, by the way, have greatly expanded human knowledge about it, which has greatly improved our daily lives (Concini, Toth, 2019).

The commercial interest of private businesses in space technology encourages them to seek forms of cooperation with government institutions that have a powerful administrative resource and technological heritage of the era of "military space race". At the same time, the state is interested in attracting material, financial, intellectual and other types of private investment for the qualitative renewal of its production and service facilities (Malysheva, Hurova, 2019, p. 73). Currently, this situation is the starting point for the exploration and use of outer space within the framework

of public-private partnership, the development of which depends significantly on national policy, legal regulators and the economic basis created by the state. However, public-private partnership in the field of space activities implies both positive and negative aspects. In this case, corruption exists in the public sector in general, and in the space industry in particular. The space industry is slowing down in development precisely because the funds that should potentially be spent on research and development of outer space are not used for their intended purpose.

Therefore, in the context of the rapid development of new space technologies, construction of a new model of space economy and the world rethinking the prospects of the space industry, it is extremely important to study whether corruption affects the development of space industry.

Some features of understanding the essence of the category of "corruption" are highlighted in the works by scientists such as: D. Zabroda, V. Zavhorodnii, Y. Kovalenko, O. Tkachenko, and others. The issues of the development of space activities were considered in the works by scientists such as: L. Soroka, N. Malysheva, H. Hurova, and others. However, in the proposed way, their scientific research has not addressed this topic.

The ***purpose of the article*** is to reveal the issues of combating corruption in the space industry.

2. Development trends in the space industry

As soon as people shifted from abstract thinking to the practical use of outer space for peaceful purposes, space law emerged. This happened on October 4, 1957, when the first satellite flew around the planet to an altitude of more than 200 kilometres above the state borders of sovereign states. None of them protested to the state, an owner of the first satellite, which led to the first rule of space law "instant principle", that is, any country has the right to launch into orbit civilian artificial satellites without asking permission from other states (Kobzar, Danylenko, 2019). Since then, a rapid development of the space industry has begun, initially under the monopoly of governments, the only entities that could afford complex and risky projects (Christensen, Magnus, 2019), associated with space exploration and development. Today, a review of the space environment shows the dynamics of change, that is, space activities are not exclusively the prerogative of government institutions, but of new companies, from small businesses with two people to large corporations that have many different business concepts. In addition, companies that have been involved in space for decades are rethinking and adjusting their approaches in the context of the changes that are taking place (Christensen, Magnus, 2019).

Nowadays, the rocket and space industry of Ukraine has two priority state tasks: creation and implementation of space, as well as rocket and space, projects in accordance with the "National target scientific and technical space program of Ukraine" (Order of the Cabinet of Ministers of Ukraine "On approval of the Concept of the National target scientific and technical space program of Ukraine for 2021–2025", 2021), focused on solving economic problems and increasing the economic return from the use of space products (satellite information received from national Earth observation devices, satellite communications, telecommunication broadcasting, navigation services, research and experiments); creation of modern missile weapons for the needs of the Armed Forces of Ukraine with a focus on ensuring the return on public investment through possible subsequent exports (Soroka, 2021).

In view of the persistent lack of budget funds and forecast data on the economic development of the state for the near and future, it is quite problematic to solve these problems with the traditional approach. Given that the vast majority of enterprises in the space industry are state-owned, and private companies have only just begun to participate in commercial space activities, a possible way out of this situation is to expand public-private partnerships.

According to Art. 1 of the Law of Ukraine "On Public-Private Partnership", public partners can be: the State of Ukraine, the Autonomous Republic of Crimea, territorial communities represented by relevant state bodies and local self-governments (Law of Ukraine "On Public-Private Partnership", 2010). In the field of space activities, the state acts as a partner in the person of the State Space Agency of Ukraine.

3. Corruption manifestations in the space industry

In the author's opinion, corruption in the space industry should be considered broadly. Corruption of officials, who are public figures directly involved in the development of the space industry, is only one side of the phenomenon under study. In addition, the issues of combating corruption in the field of budgeting, administrative services, education, aerospace and defence industry, the interaction of government and business are important. Accordingly, corruption in the space industry is a cumulative indicator of its existence in the state, in its main sectors.

Given the urgent need for the fastest adaptation of the space industry to the conditions of a market economy, taking into account all the above, it is necessary to amend the Law

of Ukraine "On Public-Private Partnership" and provide for:

– the status of public policy granted to relations between the state and its private partners in the space industry;

– a clear transparent mechanism for interaction of organizations and enterprises of the industry with private partners (to minimize corruption risks), providing maximum motivation for their involvement in practical activities (public-private partnership in space should be attractive to business);

– the right to establish legal structures in the space industry of Ukraine with the participation of public and private partners, a share of public property thereof can be used to implement business ideas that will expand Ukraine's international activities in this field;

– when creating public-private partnership structures, safeguards for private partners on mandatory retention in the production of space technology and their support, despite changes in management, the need to consolidate assets with their further division into segments according to new business strategies with shifting emphasis towards more profitable products, etc. (Law of Ukraine "On Public-Private Partnership", 2010).

According to the Bank of America Merrill Lynch, the main driving force of the new space race will be the interests of the defence industry, but Space Age 2.0 will be characterized by other factors: innovation of private companies, business, attracting new countries, reducing the cost of space launches (Bank of America Merrill Lynch, 2017). This, in turn, will stimulate all actors in space activities to find optimal forms of cooperation (public-private cooperation, international cooperation, etc.). Therefore, minimizing corruption factors is a priority for the Ukrainian political elite. And although Ukraine, according to the Corruption Perceptions Index (CPI)[1], is not one of the ten least corrupt countries, but it is hoped that the space industry will set an example for other sectors in preventing corruption and bring the country to the top of the rankings. After all, in countries where society is free from corruption, transparent, decision-making on anti-corruption policy is responsible and conscious and, accordingly, its implementation is fair. Citizens, first of all, respect themselves and others, violation of their rights is considered unacceptable. There are mostly no discriminatory manifestations, as it is not expedient to talk about the absolute in this case, but it is quite possible to assert the ideal. Society is really endowed with the opportunity to influence the government by exercising its constitutional right to participate in various political and economic decisions. Citizens and the authorities are subject to the rule of law, but have the right to freely express their views, honest and open media and their own moral and ethical right to oppose corrupt officials and businessmen.

4. Conclusions

All countries are different, and in all aspects. There are no identical ones. Some have the rule of law, the state apparatus functions harmoniously, the economy is constantly developing, citizens are socially protected, and young people develop their talents and skills. And others are in chaos – citizens complain about the government, retirees and young people are vulnerable, almost unprotected, and the ruling elite has all the possibilities beyond comprehension – unprecedented wealth: offshore accounts, own aircraft and ships, foreign villas or even palaces.

It is clear that in such conditions, the space industry of a particular country is somewhere better and somewhere less developed. However, in conclusion, the main question posed in this study should be answered: does corruption affect the development of the space industry? Yes, of course, it affects. If this phenomenon did not have global consequences, would the international community take its eradication so seriously? The answer is obvious.

Global cooperation in the fight against corruption is the main mechanism for reducing its manifestations. Sharing experiences, holding joint discussions, including seminars and symposiums, as well as providing material, informational or other resources to "outsider" countries in the process of eradicating corruption in their territory are the key to protecting the world from its mass spread. These are tools for its containment, which in modern conditions are complemented by low innovation, which, by the way, prove its effectiveness.

The space industry is slowing down in development precisely because the funds that should potentially be spent on research and development of outer space are not used for their intended purpose. Accordingly, there is no innovation activity, technological progress is minimal.

Therefore, the priority is to eradicate corruption both in the world and in individual countries, because it, like a viral infection, tends to migrate, threatening all of humanity.

[1] For example, Denmark is rightly considered one of the least corrupt in the world. This is confirmed by the annual analytical results of the Corruption Perceptions Index (CPI), an indicator calculated since 1995 by Transparency International (the organization itself does not conduct its own surveys, but calculates the Index based on 13 studies of reputable international institutions and research centres) (Transparency International, 2019). Thus, in recent years, Denmark is the undisputed leader in the world, which with small fluctuations, but retains its position in the top ranking – the least corrupt countries.

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Віталій Оксінь,
доктор юридичних наук, провідний науковий співробітник, Науково-дослідний інститут публічного права, вулиця Г. Кірпи, 2А, Київ, Україна, індекс 03035, 6222410@ukr.net
ORCID: *orcid.org/0000-0001-6080-7752*

КОРУПЦІЯ ЯК ГЛОБАЛЬНЕ ЯВИЩЕ ТА ЇЇ ВПЛИВ НА РОЗВИТОК КОСМІЧНОЇ ГАЛУЗІ

Анотація. ***Метою статті*** є з'ясування питань протидії корупції в космічній галузі.

Результати. Роботу присвячено аналізу явища корупції, його впливу на розвиток космічної галузі, адже в умовах стрімкого розвитку нових космічних технологій, побудови нової моделі космічної економіки та загалом переосмислення світом перспектив космічної галузі, освоєння її невідомих просторів це питання є вкрай актуальним. На міжнародній арені активне засудження всіх видів корупції, зокрема хабарництва, розпочалося з другої половини XX ст. На початку зародження міжнародно-правових механізмів протидії корупції її існування визнавалося виключно у сфері транснаціонального бізнесу, з плином часу у світі починаються обговорення корупції також у державному управлінні. Корупція – це насамперед свідомий вибір кожного незалежно від того, який характер вона має – активний чи пасивний. В узагальненому значенні корупція – це всеосяжне явище, до складу якого входять, з одного боку, прояви будь-якого зловживання особливим статусом, а з іншого – спонукання та активні дії до їх втілення іншими зацікавленими особами. Тобто це двосторонній зв'язок, симбіоз потреб і вигод.

Висновки. Доведено, що корупція в космічній галузі проявляється як сукупний показник її існування в державі, у головних її секторах. Державно-приватне партнерство у сфері космічної діяльності несе в собі, крім позитивних моментів, ще й негативні. У цьому разі йдеться про існування проявів корупції в державному секторі загалом, а отже, і в космічній галузі. Космічна галузь гальмується в розвитку саме тому, що кошти, які потенційно мали би спрямовуватися на дослідження й освоєння космічного простору, використовуються не за цільовим призначенням. Відповідно, інноваційна діяльність відсутня, а технологічний прогрес мінімальний. Тому пріоритетом є викорінення корупції як у світі загалом, так і в окремо взятих країнах, адже це явище, як і вірусна інфекція, має тенденцію до міграції, загрожуючи при цьому всьому людству.

Ключові слова: корупція, протидія корупції, космічна галузь, космічна діяльність, космічний простір, світова кооперація, транснаціональний бізнес.

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Vira Kachur,
PhD in Law, Associate Professor, Head of the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, kachur_v@nubip.edu.ua
ORCID: *orcid.org/0000-0002-4372-491X*

Sergey Kozin,
Doctor of Law, Associate Professor at the Department of Theory and History of State and Law, National University of Life and Environmental Sciences of Ukraine, 15, Heroiv Oborony street, Kyiv, Ukraine, postal code 03041, kozinsergey@nubip.edu.ua
ORCID: *orcid.org/0000-0001-7640-4579*

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THE STRUCTURE OF LEGAL CULTURE OF PERSONALITY

Abstract. The ***purpose of the article*** is to review and develop theoretical and methodological knowledge relating to elements of legal culture of a personality.

Results. This article covers the diversity of scientific approaches to the phenomenon of legal culture, its role in building the state guided by the rule of law. The article conducts the theoretical and methodological study of the structure of legal culture of personality composed of the three blocks of elements, namely: a) intellectual elements (understanding of the essence and relevance of law, ability to learn, cognize, adopt legal experience, evaluate the results of legal activities etc.); b) motivational elements (the confidence in the need for lawful conduct, respect for law, rights and freedoms of an individual, the desire to acquire legal knowledge, intolerance of undemocratic exercise of state power in society, etc.); c) elements resulting from the intellectual and motivational impact (legal knowledge, skills and abilities, lawful behaviour, legal experience, the level of legal consciousness, etc.). The study makes proposal to consider legal culture of the personality as a set of legal knowledge, skills and abilities, objectified in the form of lawful behaviour and legal consciousness of the person, resulting from one's intellectual abilities and motivation.

Conclusions. The authors came to the conclusions that the structure of legal culture of the personality can be expressed in the form of three blocks of elements: 1) intellectual elements: an understanding of the essence and relevance of law, an ability to learn, cognize, adopt legal experience, evaluate the results of legal activities, etc.; 2) motivational elements: the confidence in the need for lawful conduct, respect for law, rights and freedoms of an individual, the desire to acquire legal knowledge and other competencies, intolerance of undemocratic exercise of state power in society, etc.; 3) elements resulting from the intellectual and motivational impact: legal knowledge, skills and abilities, lawful behaviour, legal experience, the level of legal consciousness, effectiveness of legal performance, civil and legal activity in the exercise of subjective rights, freedoms and duties, etc.

Key words: culture, legal culture, structure of legal culture of personality, legal culture of society, intellect, motivation.

1. Introduction

In the context of the reform of public authorities, the implementation of integration policies and the development of a democratic legal state, legal culture has become increasingly important as a social guarantee of the rule of law, a factor in the stable law and order, the exercise of the people's power, etc.

Legal culture, as a relatively autonomous criterion for the conduct of members of society, reflects the processes related to legal activities in society in the form of law-making and law application. Culture as a social phenomenon depends on the progressive orientation of an individual's activity in society. Legal culture, in turn, is part of the entire culture of society, connecting and pervading all sectors of human activity (Savchenko, 2020).

The need to form socially important orientations of the personality is being updated at a time when Ukrainian statehood is being established, education is being made more humane, and society is transitioning to new social and economic relations. In these context,

legal education as a key factor for the success of the educational and legal transformation should be reconsidered (Prima, 2012).

Legal culture in general, and legal culture of the personality in particular, is the subject matter of interdisciplinary research, for example, for sociology, pedagogy, psychology, philosophy, jurisprudence, etc. The scientific and theoretical basis for the study of the structure of legal culture of personality is the works by Yu.P. Bytiak, V.O. Kachur, D.A. Prima, V.M. Selivanov, M.V. Tseluiko, I.V. Yakoviuk, and others.

The diversity of scientific research on the phenomenon of legal culture confirms its important role in social development. For a broader, more meaningful perception, it is advisable to enrich scientific and theoretical knowledge by analysing the structure of legal culture of the personality.

The purpose of the article is to review and develop theoretical and methodological knowledge relating to the elements of legal culture of a personality. In order to achieve this purpose, the following objectives are set: to outline approaches to understanding legal culture; to systematize the structural elements of legal culture of the personality; to propose an author's definition of legal culture of the personality.

2. Legal culture as an object of the study

The literature review contains different approaches to studying the issues of legal culture. In particular:

– according to historical approach, the study of historical experience, the analysis and evaluation of historical events, facts and previous theories in the context of their advent, formation, development and impact on legal reality are of particular importance. This approach accumulates knowledge of the very culture and legal culture of different peoples in different historical periods;

– the axiological approach enables to identify the characteristics and properties of phenomena, processes that meet the needs and interests of the personality and of society. According to this approach, legal culture is regarded as a set of legal values that arise and develop in the course of the legal development of society (equality, justice, the rule of law, guarantees of human rights and freedoms, etc.);

– according to a systemic approach, legal culture is characterized by certain features, the main ones being the relationship with other systems, integrity, internal structure, order, systemically important connections in the structure, uniting components and elements as parts of a single system, etc.;

– an anthropological approach is a set of views on the genesis of legal culture through the nature and essence of man, his place and purpose in the legal field. The human being is defined as the primary element in the advent of law and the state. The dynamics of social interaction gives rise to provisions of law, legal ideas and approaches, on the basis of which a system of legal values of the personality, social group, class and society is formed;

– according to epistemological approach, legal culture is considered as a system of knowledge of the person about one's rights and duties, the specificities of their exercise, etc. The process of cognition, accumulation of knowledge about the legal system, legal regulations in force and the legal means of protecting the rights and interests of individuals is important for forming the scope of values of legal culture;

– the structural and functional approach considers legal culture as a set of elements of legal reality in unity with their actual functioning. The structural aspect (statics) of legal culture characterizes its composition and internal organization. Functional (dynamics) describes the advent, development and interaction of elements of legal culture between one another and other social phenomena (Vlasenko, 2011).

Therefore, these approaches to understanding legal culture enable to define its essential characteristics as a complex and multifaceted phenomenon. The usefulness of studying legal culture from the perspective of legal sciences is that it is the foundation of the legal system, legal order, rule of law, realization of human rights and freedoms (Tykhomyrov, 2020).

Thus, the variety of definitions of legal culture is due to a matter of the study. In different fields of scientific knowledge, the definition of this term has its own implications.

However, the concept of "legal culture" is mostly defined through the generic concept of "culture", which is a multidimensional concept and is often defined in terms of the positive meaning of dynamic processes of social life, ensuring stable social development, formation of convictions, motives and views of people on goals and results of this development (Banakar, 2009, p. 15).

Legal culture, in its most general meaning, is one way of describing relatively stable patterns of legally oriented social behaviour. *Such behaviour depends on various factors, including the state of affairs in the legal professional performance, its regulatory framework, the dominant ideas of existing and desired law, values and legal mentality, etc. (Nelken, 2004).*

According to D. Nelken, legal culture is what we are, not just what we do (Nelken, 2004, p. 12).

The differentiation of legal culture is essential for the description of its structural elements. For example, in the theoretical legal sciences, legal cul-

ture, depending on the actor, is grouped into legal culture of society, legal culture of the social group and legal culture of the personality. There are other criteria for distinguishing between one type of legal culture and another. In particular, these are according to levels and depth of cognition of legal phenomena (domestic, professional, theoretical), according to the nature of the existence of legal culture (open and closed), and according to the nature of manifestations (external and internal).

3. Particularities of distinguishing the structural elements of legal culture

Within the scope of legal science approaches to identifying the structural components of legal culture, M.V. Tseluiko classifies the components, such as: "legal consciousness, legal relations, legality and legal order, lawful activity of actors of law, the very law, state and legal institutions, legal technology, legal act" (Tseluiko, 2010, p. 6). Depending on the bearer of legal culture, the structural components of legal culture are grouped into ones of society (level of development of legal culture and legal activity of society, level of development of legal performance and level of development of the entire system of legal provisions, level of development of law and culture of legal texts) and ones of the personality (legal ideological and theoretical perspectives, positive legal feelings, creative activities of an individual in the legal field, etc. (Tseluiko, 2010, p. 7).

Furthermore, the structure of legal culture is defined through the structure of the generic concept of "culture", which in its forms and categories reflects human activity, which manifests itself comprehensively from objective, subjective and regulatory aspects. Each of them – objective (activities), subjective (attitudes) and regulatory (social regulators) – forms separate parts of culture as a systemic phenomenon (Kachur, 2019).

The structure of personality's legal culture is identified in different ways. Some legal scholars emphasize elements, such as: a system of legal knowledge, skills, emotions, feelings, beliefs manifested in lawful behaviour (Bytiak, Yakoviuk, 2007), others add to this list results of legal practice, legal ideology and legal psychics (Prima, 2012).

In the legal encyclopaedia edited by Yu.S. Shemshuchenko, "legal culture of the personality is expressed in its three main dimensions: legal cultural orientations, activities for their realization, results of the implementation of these orientations" (Shemshuchenko, 2003, p. 537). In the first dimension, the personality is expected to acquire knowledge and skills to use the law. The second is characterized by the person's creative activity in the legal field, in the course of which one acquires or develops one's rights, knowledge and skills. The third dimension expresses the internal potential of legal culture (Shemshuchenko, 2003, p. 537).

V.M. Selivanov presents the more extensive list of elements of the model of legal culture of personality. In particular, these are: "awareness of the essence of law, its social and personal value as a manifestation of justice and a guarantor of the inalienable rights and freedoms, honour and dignity of every human being; awareness of the necessary primacy of law over the state; knowledge of the Constitution and the law, their assessment in terms of the essence of law and legal ideals; knowledge of own rights, freedoms and duties; respect for the rights and freedoms of every individual, a conscious desire to translate the principles of the law into practice, a habit of lawful behaviour, a personal awareness of being a free person and subject of real rights and freedoms and the ability to exercise them; civil and legal activism in the exercise of one's political, other civil rights, freedoms and duties; intolerance of any breach of law and order, terror against the human being by the state" (Selivanov, 1999, p. 76).

In our opinion, it is possible to describe the structure of legal culture of the personality in the most precise way by highlighting the internal relationships between its components, which it would be useful to systematize in clusters of elements as follows.

Intellectual elements are an understanding of the essence and relevance of law, an ability to learn, cognize, adopt legal experience, evaluate the results of legal activities; an ability to solve the problems of legal practice, etc.

Motivational elements are the confidence in the need for lawful conduct, respect for law, rights and freedoms of an individual, the desire to acquire legal knowledge, intolerance of undemocratic exercise of state power in society, etc.

Elements resulting from the intellectual and motivational impact are legal knowledge, skills and abilities, lawful behaviour, legal experience, the level of legal consciousness, effectiveness of legal performance, civil and legal activity in the exercise of subjective rights, freedoms and duties, etc.

The analysis of relationships between the components of legal culture of the personality should be based on the definition of "intellect" in pedagogy. This concept is defined through the mental capacity of the human being and means the ability to orient in, adequately reflect and transform the environment, to think, to learn, to know the world and to adopt social experiences; the ability to solve prob-

lems, make decisions, act wisely (Honcharenko, 1997, p. 146).

Therefore, an understanding of the essence and value of law, the ability to learn, to know and to adopt legal experience and to evaluate the results of legal activity, is the basis for the formation of the motives, attitudes and values of lawful behaviour. All of this helps the person to interpret, create and reproduce social reality by shaping behavioural patterns consistent with generally accepted social values.

Perception of motivation as a set of internal driving forces, motivating the person to perform, determines the behaviour, form of activities, making these activities oriented towards the achievement of personal goals and goals of the organization (Kolot, 2002, p. 12), as a process of forming motives, attitudes, value orientations, and their action as an internal cause of conduct objectified in the form of action or inaction (Diakova, 2017, p. 133), enables to see the relationship between the structural components of legal culture of the personality. Therefore, the motivation of a person's lawful conduct arises from his or her legal socialization and education. At the present stage of development of the theory of law, it is clear that law is not limited to the role of a regulator but is effective in the social field, encouraging actors of law to adopt certain forms of behaviour and interaction, ensuring their inclusion in the social organization system (Abramova, Shvachka, 2011).

4. Conclusions

The results of the study make it possible to conclude as follows:

1. The description of the structural elements of legal culture of the personality becomes more qualitative, provided that the internal relationships between them are clarified.

2. The systematization enables to express the structure of legal culture of the personality in the form of three blocks of elements:

– intellectual elements are an understanding of the essence and relevance of law, an ability to learn, cognize, adopt legal experience, evaluate the results of legal activities, etc.;

– motivational elements: the confidence in the need for lawful conduct, respect for law, rights and freedoms of an individual, the desire to acquire legal knowledge and other competencies, intolerance of undemocratic exercise of state power in society, etc.;

– elements resulting from the intellectual and motivational impact are legal knowledge, skills and abilities, lawful behaviour, legal experience, the level of legal consciousness, effectiveness of legal performance, civil and legal activity in the exercise of subjective rights, freedoms and duties.

3. Legal culture of the personality is considered as a set of legal knowledge, skills and abilities, objectified in the form of lawful behaviour and legal consciousness of the person, resulting from one's intellectual abilities and motivation.

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Віра Качур,
кандидатка юридичних наук, доцентка, завідувачка кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, kachur_v@nubip.edu.ua
ORCID: *orcid.org/0000-0002-4372-491X*

Сергій Козін,
доктор юридичних наук, доцент кафедри теорії та історії держави і права, Національний університет біоресурсів і природокористування України, вулиця Героїв Оборони, 15, Київ, Україна, індекс 03041, kozinsergey@nubip.edu.ua
ORCID: *orcid.org/0000-0001-7640-4579*

СТРУКТУРА ПРАВОВОЇ КУЛЬТУРИ ОСОБИСТОСТІ

Анотація. ***Метою статті*** є узагальнення та розвиток теоретико-методологічних знань щодо складників правової культури особистості.

Результати. У статті висвітлено різноманітність наукових підходів до розуміння феномену правової культури, її ролі в розбудові правової держави. Здійснено теоретико-методологічне дослідження структури правової культури особистості, склад якої можна відобразити у вигляді трьох блоків елементів, зокрема: а) елементи інтелектуальної сфери (розуміння сутності й цінності права, здатність навчатися, пізнавати, переймати юридичний досвід, оцінювати результати юридичної діяльності тощо); б) елементи мотиваційної сфери (переконаність у необхідності правомірної поведінки, повага до права та прав і свобод особи, прагнення до здобуття правових знань, нетерпимість до недемократичного здійснення державної влади в суспільстві тощо); в) елементи, що є результатами впливу інтелектуально-мотиваційної сфери (правові знання, уміння й навички, правомірна поведінка, правовий досвід, рівень правосвідомості тощо). Запропоновано правову культуру особистості розуміти як сукупність правових знань, умінь і навичок, які об'єктивуються у формі правомірної поведінки та правової свідомості особи, є результатом її інтелектуальних здібностей і мотивації.

Висновки. Констатовано, що структуру правової культури особистості можна відобразити у вигляді трьох блоків елементів: 1) елементів інтелектуальної сфери: розуміння сутності й цінності права, здатність навчатися, пізнавати, переймати юридичний досвід, оцінювати результати юридичної діяльності тощо; 2) елементів мотиваційної сфери: переконаність у необхідності правомірної поведінки, повага до права та прав і свобод особи, прагнення до здобуття правових знань та інших компетентностей у юридичній сфері, нетерпимість до недемократичного здійснення державної влади в суспільстві тощо; 3) елементів, що є результатами впливу інтелектуально-мотиваційної сфери: правові знання, уміння й навички, правомірна поведінка, правовий досвід, рівень правосвідомості, ефективність юридичної діяльності, громадянсько-правова активність у здійсненні суб'єктивних прав, свобод та обов'язків тощо.

Ключові слова: культура, правова культура, структура правової культури особистості, правова культура суспільства, інтелект, мотивація.

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Oleksandr Babikov,
PhD in Law, Associate Professor at the Department of Criminal Law and Procedure, Kyiv University of Law of the National Academy of Sciences of Ukraine, Lawyer, 7A, Akademik Dobrokhotov street, Kyiv, Ukraine, postal code 03142, Alexander_Babikov@ukr.net
ORCID: *orcid.org/0000-0002-9190-2658*

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DISTINCTION BETWEEN COVERT INVESTIGATIVE (SEARCH) ACTIONS AND OPERATIONAL-TECHNICAL MEASURES AND SEARCH OPERATIONS (PART 2)

Abstract. The ***purpose of the article*** is to study the essence of the organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures, i. e., SO, OTM and CI(S)A.

Results. The second part of research studies the issues of using material media, subjects, documents and samples obtained during search operations, operational and technical measures, intelligence and counter-intelligence operations in criminal proceedings. Different approaches to evaluating such information, conditions and grounds for their use as evidence are identified; the reasons of finding these materials of operative-search, intelligence and counter-intelligence activities inadmissible are stated. For example, according to the Supreme Court's evaluation of the admissibility of evidence of the materials of an operative-search case, the materials lack data that an operative-search case has been instituted against a convicted person (it is a prerequisite for SO and OTM). The OSC, from which the prosecutor has presented materials, was to close based on article 9-2, para. 7 of the Law of Ukraine "On OSA", owing to the lack of evidence which indicate signs of crime in the actions of the person within relevant time, while materials have been destroyed in the manner provided by law. The rulings of investigative judges of the Court of Appeal that have resoluted operational-technical measures against this person have not been available to the defence and court. These became a ground for finding the documents provided by the prosecution resulting from OSA as inadmissible evidence. Common features and differences of operational-technical, search operations and counter-intelligence activities are analysed, considering the case law of the ECHR and the Supreme Court; criteria for the use of information from such measures in criminal proceedings are identified. The focus is on the statutory gaps that prevent the use of counterintelligence materials to prove the guilt of a person in committing criminal offenses, as well as on the ways to eliminate them. The study considers issues of the possibility of using a factual data from operative-search activities based on an evaluation by the Constitutional Court of Ukraine.

Conclusions. It is concluded that organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures mentioned above vary significantly. On the one hand, this eliminates their equation and, on the other hand, underlines the need to streamline and further regulate operative-search, intelligence and counter-intelligence activities at the legislative level.

Key words: covert investigative (search) actions, search operations, operational-technical measures, documents in criminal proceedings, evidence, admissibility of evidence, investigative actions.

1. Introduction

In the first part of our study, the focus was on the grounds for OSA, counter-intelligence activities as a form of operative-search activities, and the classification of these procedural measures, aimed at obtaining evidence in criminal proceedings, etc. In this case, we would like to start with a certain feature of the organization of counter-intelligence activities. Furthermore, in our study, we focus on the use of covert methods and means in counter-intelligence activities, including the use of operational, operational and technical, special forces and means, *defined by the by-laws of the SSU* (Law of Ukraine "On Counterintelligence Activities", 2020).

In fact, sometimes operational, operational and technical measures in counter-intelligence activities are large-scale, mass inter-

ception (monitoring) of telecommunications and the acquisition of communication data (billing information) from operators and providers of telecommunications without applying for permission from the investigating judge, the court. Intercepted telecommunications messages using real-time filters to determine the significance of intercepted information, in the absence of a decision by the investigating judge to authorize such measures in respect of a particular person, the material selected and preserved shall be referred for analysis. In terms of criminal procedure, the implementation of such measures is considered a violation of fundamental human and civil rights and freedoms due to insufficient judicial control over such activities (Judgment of the European Court of Human Rights "Big Brother Watch and others v. The United Kingdom", 2018).

The ***purpose of the article*** is to study the essence of the organizational framework, grounds and procedure for the conduct, requirements for recording and use of measures such as SO, OTM and CI(S)A.

2. The regulatory framework for using the results of operative-search, counter-intelligence activities as evidence in criminal proceedings

In the ECtHR's legal opinion in respect of operational and technical measures, in the absence of information on the personal data of the person whose rights are restricted by such measures in the decision on their conduct, such actions are not in conformity with the requirements of article 8 of the Convention (Judgment of the European Court of Human Rights "Azer Ahmadov v. Azerbaijan", 2021).

The issue of whether results of operative-search and counter-intelligence activities can be used as evidence in criminal proceedings is still under discussion.

The Criminal Procedure Law clearly establishes that CI(S)A are a form of investigative actions, their results recorded in the investigation reports, media, documents obtained during their conduct, objects, belongings and samples shall be used as evidence in criminal proceedings.

With regard to materials of operative-search activities, the use of investigation reports drawn up on the basis of operational and technical measures, records, belongings and objects received as evidence in criminal proceedings, either in the Criminal Procedure Code or in the Law of Ukraine "On operative-search activities" are not decided.

To a certain extent, the Supreme Court has made a point of discussion on this issue, concluding in Judgement of 12 May 2021 in case № 750/10362/17 (proceedings 51-5319 km 20) that the materials, which contain factual data on unlawful actions of individuals and groups of persons, collected by operational units in compliance with the requirements of the Law of Ukraine "On operative-search activities", subject to the requirements of article 99 of the CPC of Ukraine, are documents and can be used as evidence in criminal proceedings. Declassifying and making available to the defence the investigation reports on OTM and the Court of Appeal's ruling to conduct them, if warranted, is sufficient for them to be examined during proceedings and to grant appropriate assessment. At the same time, it should be borne in mind that the materials of the OSC, in particular, the investigation reports of the operational and technical measures, are not sufficient to find the information contained in them evidence in criminal proceedings. This is due to the fact that the defence shall be given the opportunity to check the admissibility of such evidence, in particular, regarding compliance by the operational unit with the requirements of the Law of Ukraine "On operative-search activities" on the grounds and procedure for the introduction of the OSC, the conduct of operational and technical measures, including the availability of appropriate judicial authorization when such measures involve interference in private communication.

According to the Supreme Court's evaluation of the admissibility of evidence of the materials of an operative-search case, the materials lack data that an operative-search case has been instituted against a convicted person (it is a prerequisite for SO and OTM). The OSC, from which prosecutor has presented materials, was to close based on article 9-2, para. 7 of the Law of Ukraine on OSA, owing to the lack of evidence which indicate signs of crime in the actions of the person within relevant time, while materials have been destroyed in the manner provided by law. The rulings of investigative judges of the Court of Appeal that have allowed operational-technical measures against this person have not been available to the defence and court (Resolution of the Supreme Court, 2019). These became a ground for finding the documents provided by the prosecution resulting from OSA as inadmissible evidence.

With regard to the option of using a factual data from operative-search activities the Constitutional Court of Ukraine stated, in its decision 12рп/2011 as of 20 October 2011 (case № 1-31/2011) that the interpretation of the provisions of article 62 of the Constitution of Ukraine leads to the conclusion that an accusation shall not be based on evidence obtained by unlawful means, including factual evidence obtained as a result of opera-

tive-search activities by an authorized person without respect for constitutional provisions or in violation of the procedure established by law.

These legal perspectives point at two key aspects:

1. Materials obtained in the course of operative-search activities can be used as evidence – documents (only in cases when the information recorded in them has been obtained in a manner prescribed by the Law of Ukraine "On the OSA" and when fixing and writing such documents by the operating unit have complied with the requirements of the Law of Ukraine "On OSA" and Chapter 21 of the CPC of Ukraine.

2. Compliance with the requirements of the Law of Ukraine "On OSA" and Chapter 21 of the CPC of Ukraine may be verified by the parties to the criminal proceedings by examining the causes and grounds for the introduction of the OSC, the progress of OTM and compliance with the requirements for the preparation of such documents, compliance with the legal regulations governing such activities.

The possibility of verifying admissibility of evidence is a fundamental guarantee of human and civil rights and freedoms in criminal proceedings and the adoption of a lawful and fair decision.

The issue of whether counter-intelligence materials could be used as evidence in criminal proceedings remained a matter of debate.

Proponents of the use of CIA results argue that, in counter-intelligence searches, authorized operational units have the right to conduct search operations using operational, operational and technical forces and means. In cases where the results of counter-intelligence activities are recorded in accordance with the requirements established by law for investigation reports of OTM, which are drawn up during operative-search activities, the parties can verify their propriety and admissibility, such material can be used as a basis for initiating a pre-trial investigation and as evidence in criminal proceedings – a document.

In addition, courts (Judgment of the Ordzhonikidze District Court of the city of Mariupol, 2017) have, in some cases, find such investigation reports as inadmissible evidence. This legal position is based on the fact that an investigation report on the results of a covert search operation is drawn up on the basis of article 7, part 2, para. 6 of the Law of Ukraine "On counter-intelligence activities", article 8, part 3 of the Law of Ukraine "On operative-search activities". The above provisions of the laws authorize appropriate measures for the prevention, timely detection and termination of intelligence, terrorist and other attacks on the security of the State of Ukraine, obtaining information for the purposes of counterintelligence. However, according to the provisions of articles 223 and 246 of the CPC of Ukraine, investigative (search) actions are actions aimed at gathering (collecting) evidence or verifying evidence already collected in a particular criminal proceeding. From the perspective of the court, the purpose and focus of the measure are decisive for assessing its results and the possibility of using them as evidence. If the CIA's target is other than that of criminal proceedings, the documents drawn up in the course of the CIA cannot be used in criminal proceedings.

In addition, the results of the CIA were found inadmissible because the prosecution did not provide the parties to the criminal proceedings and the court with an appropriate ruling that had authorised such measures (Judgment of the Selidovo City Court of the Donetsk Region, 2017), or because such results were used in criminal proceedings without a permission of the Court of Appeal (Judgment of the Kramatorsk City Court, 2017).

Ratio decidenti by the Supreme Court (Resolution of the Supreme Court, 2018) is somewhat different. The Panel of Judges concluded that since counter-intelligence activities had been conducted on the basis of article 5 of the Law of Ukraine "On combating terrorism", articles 1, 7 of the Law of Ukraine "On counterintelligence activities" and the Determination of the Head of the Court of Appeal, the information collected can be used in criminal proceedings.

Therefore, the court admits the use of the results of counter-intelligence activities in cases when such results are drawn up in compliance with the requirements of Law of Ukraine "On OSA", in presence of the permission of the judge of the Court of Appeal to take such measure.

3. Relevance and admissibility of using the results of operative-search, counter-intelligence activities as evidence in criminal proceedings

There is currently no clear answer to the possibility of using the results of CIA in criminal proceedings. However, it should be noted why the use of counter-intelligence materials as evidence in criminal proceedings is questionable in terms of propriety and admissibility:

1) the objective of counter-intelligence activities is not to seek and record evidence in criminal proceedings or to safeguard the interests of criminal proceedings;

2) the procedure for counter-intelligence activities is determined by by-laws of the SSU

and not by the CPC or other law, which considerably reduces guarantees of human rights and freedoms and especially when it comes to interference in private personal communication;

3) some counter-intelligence search measures, similar to those in CI(S)A, as opposed to the latter, may be carried out without the authorization of the investigating judge or court;

4) unlike operative-search activities or criminal proceedings, the grounds for counter-intelligence activities may be information or data obtained illegally, in violation of the procedure established for OSA or criminal proceedings;

5) the identification of the elements of a criminal offence, including the preparation or attempted commission thereof, constitutes grounds for entering the URPI and the initiation of a pre-trial investigation, consequently, the continuation of counter-intelligence searches in such cases may lead to the substitution of a criminal proceedings, which provide certain safeguards to parties to proceedings; for the quasi-intelligence process that does not contain such guarantees;

6) by regulating activities in which fundamental human rights and freedoms are restricted (violated), including interference in private communication, violation of the inviolability of housing, the legislator has provided that such actions by the State (its authorized bodies) are permitted as an exception, for the purpose of detecting, terminating, under certain conditions and in a clearly regulated manner, in order to ensure proper judicial control of the observance of human rights and freedoms, as well as the possibility of verifying the evidence collected in such manner to be proper and admissible.

The specificity of intelligence and counter-intelligence activities, in my view, precludes the possibility of carefully and sufficiently developing the sources and manner of recording evidence obtained. The exclusivity and peculiarity of the conditions for conducting CI(S)A are ensured by the possibility to use their results in other criminal proceedings, inter alia, to prove a person's guilt in the commission of an offence, the investigation thereof is not related to obtaining the permission of the investigating judge to conduct CI(S)A. This function is performed by the investigating judge of the Court of Appeal, who shall determine and evaluate the interests of criminal procedure and the safeguarding of human and civil rights and freedoms. In such cases, the investigating judge evaluates the "exceptional" conditions under which information about another crime is obtained, its gravity, the manner in which information is obtained, the interests of the criminal proceedings in the course of which such information was obtained, and in other proceedings in which the prosecution proposes to use such confirming.

Even so, the very fact that the investigating judge has been asked to authorize the use of the results of CIA is questionable, since the only ground for the permission may be the prosecutor's request invoked in the criminal proceedings. The mechanism for making a similar application during intelligence, counter-intelligence measures (in the course of intelligence cases and counter-intelligence searches) is not provided for by law.

The totality of these arguments, in my view, rule out the possibility of using counter-intelligence materials in criminal proceedings as evidence. However, the information collected from such activities may be grounds for entering the URPI and the initiation of a pre-trial investigation.

4. Distinction between the sources of legal regulation for the conduct of CI(S)A, operative-search, intelligence and counter-intelligence activities

The distinction between CI(S)A and search operations, intelligence, and counter-intelligence measures is also based on the sources of the legal regulatory framework for their conduct and implementation.

The CPC of Ukraine and the Instruction on the organization of covert investigative (search) actions and the use of their results in criminal proceedings, approved by Order № 114/1042/516/1199/936/1687/5 as of 16 November 2012, hereinafter – the Instruction) define the procedure for CI(S)A.

It should be borne in mind that according to article 9 of the CPC of Ukraine, the legal basis for criminal proceedings is the Constitution, the CPC, international treaties and other legislation. At the same time, laws and other legal regulations of Ukraine, the provisions thereof relate to criminal proceedings, shall be in compliance with the CPC, while legal regulations, which contradict it, are not applicable.

The Constitution of Ukraine, the Law of Ukraine "On OSA", the CC, the CPC, the Tax and Customs Codes, Laws of Ukraine regulating the activities of State law enforcement bodies, other legal regulations and international treaties are the legal framework for operative-search activities.

While article 8 of the Law of Ukraine "On OSA" refers to the relevant articles of Chapter 21 of the CPC of Ukraine governing the procedure for operational and operational-technical measures, the detailed regulatory mechanism for the forms and methods of operative-search activities is provided by the relevant depart-

mental orders drawn up by each law enforcement body independently.

The legal basis for the conduct of intelligence and counter-intelligence activities is the Constitution of Ukraine, international treaties in force, the laws of Ukraine "On intelligence", "On counter-intelligence activities", "On OSA" etc., and by-laws.

However, contrasting CI(S)A and OTM, the procedure for intelligence and counter-intelligence measures is not governed by laws, but by-laws drawn up by the SSU and other bodies authorized to conduct them.

For example, the regulatory mechanism for the performance of a special assignment has its specificities.

The procedure for the performance of special assignments in the course of operative-search activities, in accordance with article 8, part 1, para. 8 of the Law of Ukraine "On OSA", is defined by the provisions of article 272 of the CPC of Ukraine.

However, the procedure for the organization and conduct of intelligence (special) tasks by personnel and persons involved in confidential cooperation, including during their membership in terrorist or other criminal organizations, transnational criminal groups and other organizations that pose external threats to the national security of Ukraine are defined by-laws of the intelligence agencies (Law of Ukraine "On Intelligence", 2020).

In such context, the development and institutionalization in law of general requirements for the conduct of CI(S)A, SO, OTM, intelligence and counter-intelligence activities, taking into account fundamental guarantees of human and civil rights and freedoms, will allow equating these forms of collecting covert information and using them in criminal proceedings.

5. Conclusions

The key distinctions between CI(S)A and SO, OTM, intelligence and counter-intelligence measures make it possible to conclude that the organizational basis, grounds and procedure for conducting, requirements for recording and use of the above-mentioned measures vary significantly. On the one hand, this eliminates their equation and, on the other hand, underlines the need to streamline and further regulate operative-search, intelligence and counter-intelligence activities at the legislative level.

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Олександр Бабіков,
кандидат юридичних наук, доцент кафедри кримінального права та процесу, Київський університет права Національної академії наук України, адвокат, вулиця Академіка Доброхотова, 7А, Київ, Україна, індекс, 03142, Alexander_Babikov@ukr.net
ORCID: *orcid.org/0000-0002-9190-2658*

ВІДМІННІСТЬ НЕГЛАСНИХ СЛІДЧИХ (РОЗШУКОВИХ) ДІЙ ВІД ОПЕРАТИВНО-ТЕХНІЧНИХ ТА ОПЕРАТИВНО-РОЗШУКОВИХ ЗАХОДІВ (ЧАСТИНА 2)

Анотація. ***Метою статті*** є дослідження сутності організаційних засад, підстав і порядку проведення, вимог до фіксації та використання таких заходів, як оперативно-розшукові заходи, оперативно-технічні заходи та негласні слідчі (розшукові) дії.

Результати. Другу частину дослідження присвячено питанням використання матеріальних носіїв інформації, предметів, документів і зразків, що одержані під час оперативно-розшукових, оперативно-технічних, розвідувальних та контррозвідувальних заходів у кримінальному судочинстві. Окреслено різні підходи до оцінки таких відомостей, умови та підстави використання їх як доказів; наведено причини, через які матеріали оперативно-розшукової, розвідувальної та контррозвідувальної діяльності визнавалися недопустимими. Так, наприклад, під час оцінювання матеріалів оперативно-розшукової справи щодо допустимості доказів Верховний Суд звернув увагу на те, що в наданих матеріалах відсутні дані про те, що оперативно-розшукова справа була заведена стосовно засудженої особи (це є обов'язковою умовою для проведення оперативно-розшукових та оперативно-технічних заходів). Оперативно-розшукову справу, з якої прокурором надано матеріали, було закрито на підставі п. 7 ст. 9-2 Закону України «Про оперативно-розшукову діяльність» у зв'язку з невстановленням у передбачені законом строки даних, які вказують на ознаки злочину в діях особи, а самі матеріали були знищено у встановленому законом порядку. Ухвали слідчих суддів апеляційного суду, які містили дозволи на проведення оперативно-технічних заходів щодо цієї особи, стороні захисту не відкривалися та не були надані суду. Зазначені обставини стали підставою для визнання наданих стороною обвинувачення документів, складених за результатами оперативно-розшукової діяльності, недопустимими доказами. Проаналізовано спільні риси та відмінності оперативно-розшукових, розвідувальних і контррозвідувальних заходів, з урахуванням судової практики Європейського суду з прав людини та Верховного Суду визначено критерії, за яких одержану під час проведення таких заходів інформацію можна використовувати у кримінальному процесі. Окрему увагу приділено прогалинам у законодавстві, які перешкоджають використанню матеріалів контррозвідувальної діяльності для доведення вини особи у вчиненні кримінальних правопорушень, окреслено шляхи їх усунення. Розглянуто питання можливості використання фактичних даних, одержаних у результаті оперативно-розшукової діяльності, з огляду на оцінку, яку надав у своєму рішенні Конституційний Суд України.

Висновки. Зроблено висновок, що організаційні засади, підстави та порядок проведення, вимоги до фіксації і використання вищезазначених заходів суттєво відрізняються. З одного боку, це виключає їх ототожнення, а з іншого – вказує на необхідність упорядкування й додаткової регламентації оперативно-розшукової, розвідувальної та контррозвідувальної діяльності на рівні законів.

Ключові слова: негласні слідчі (розшукові) дії, оперативно-розшукова діяльність, оперативно-технічні заходи, документи у кримінальному провадженні, докази, допустимість доказів, слідчі дії.

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Kyrylo Muraviov,
Doctor of Law, Associate Professor, Head of the Department of Administrative, Financial and Banking Law, Educational and Scientific Institute of Law named after Prince Volodymyr the Great of the Interregional Academy of Personnel Management, 2, Frometivska street, Kyiv, Ukraine, postal code 03039, donkirill@ukr.net
ORCID: *orcid.org/0000-0002-4422-4116*

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INTERNATIONAL STANDARDS OF STATE PENAL POLICY

Abstract. The ***purpose of the article*** is to analyse international standards of state policy in the field of execution of criminal penalties and provide recommendations for the implementation of relevant positive experience of foreign countries in domestic legal practice.

Results. International standards of state penal policy are studied. Foreign experience in the organization and operation of penal institutions is analysed. The main measures for its implementation in Ukraine are defined. It is stressed that the implementation of European and international standards of the execution of criminal punishments should be carried out taking into account the domestic political, economic and social specificities of the state. In keeping with its policy of European integration, the government of Ukraine shall fulfil all the commitments made by influential European organizations and abide by the proclaimed penitentiary standards. It is noted that Ukraine already has positive changes in the reform of this field. The focus is on the positive experience of introducing paid cells in pre-trial detention centres, as well as on the need to further improve this field. It is established that the Ministry of Justice of Ukraine, in accordance with the tasks assigned to it, shall be directly responsible for the area of the execution of criminal punishments and for the system of detention and probation institutions. It is revealed that foreign countries practice institutional linkage between the judiciary and the penitentiary service. In Ukraine, the administrative system governing the execution of criminal punishments is imperfect and inefficient.

Conclusions. It is concluded that there are significant problems in the social, economic, political and legal development of the system of penal institutions in Ukraine today. Therefore, the review of international practice in implementing this policy in a number of highly developed countries allows highlighting the positive aspects of their experience to be taken into account in the further development of domestic penal policy.

Key words: international standards, public penal policy, Ministry of Justice of Ukraine, State Penitentiary Service of Ukraine.

1. Introduction

The reform of public administration and law enforcement has led to a restructuring of managerial (organizational) interrelations, both within the bodies and between the different public administrators. However, despite some recent measures to improve the penal framework for the execution of punishments, this field remains imperfect today and requires a study of positive foreign experience in the execution of criminal punishments as more progressive and effective.

An additional argument in this context is provided by the numerous decisions of the ECHR concerning complaints by convicted persons from Ukraine, which establish facts of torture, inhuman or degrading treatment had been inflicted by the administration of the closed penitentiary institutions in respect of persons serving sentences in the form of the deprivation of liberty for a certain period. In the context of globalization, the problem of serving sentences in the form of the deprivation of liberty for a certain period should be considered not only within one legal system, but also in comparison with penal legislation and its application in other countries, even if there are differences in the socio-economic and political development of each state.

The purpose of the article is to analyse international standards of state penal policy and to make recommendations for the introduction of positive experiences of foreign states.

It should be noted that the study of the international framework for the execution of criminal punishments and law enforcement functions by penal institutions have been studied by many domestic and foreign legal scholars, such as Ye.Yu. Barash, I.H. Bohatyrov, O.M. Dzhuzha, O.V. Lisitskov, O.B. Ptashynskyi, V.M. Trubnykov, V.H. Khyrnyi, D.V. Yahunov, and others. However, the analysis of international standards of state penal policy is still topical and remains to date insufficiently studied in view of the present needs.

2. International penitentiary regulations

According to V.H. Khyrnyi, numerous international conventions and agreements adopted by international (including European) organizations attest to the relevance of problems in the execution and serving of sentences in foreign countries (Khyrnyi, 2012, p. 78).

For example, the international legal framework governing the penitentiary service includes a number of laws and regulations, including the General Declaration of Human Rights, the International Convention for the Protection of Human Rights and Fundamental Freedoms, the Code of Conduct for Law Enforcement Officials, the Declaration on the Protection of All Persons from Being Subjected to Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, European Prison Rules, Standard Minimum Rules for the Treatment of Prisoners, the European Convention for the Prevention of Torture or Inhuman or Degrading Treatment or Punishment, Basic Principles on the Use of Force and Firearms by Law Enforcement Officials and others.

It should be noted that the main purpose of the above-mentioned international penal declarations, conventions, treaties, etc. is focused on the humanization of the penitentiary system, "mitigation" of serving sentences for convicts using the latest methods of influence and ensuring full respect for their rights and freedoms, opportunities for resocialization, learning, education, cultural development, proper living and sanitary conditions, etc.

In keeping with its policy of European integration, the Government of Ukraine shall fulfil all the commitments made by influential European organizations and abide by the proclaimed penitentiary standards.

The positive European experience can be adapted to Ukrainian realities, provided that the most effective legislative structures of the penitentiary systems in different states are carefully studied and used in the criminal and penitentiary law of Ukraine (Shkuta, 2016).

According to O.M. Krevsun, Ukraine consistently and purposefully fulfils its obligations in respect of reforming the penitentiary system with a view to bringing the conditions of detention of convicted persons as close as possible to international standards and rules for the treatment of convicted persons. In recent years, as crime rates have increased significantly, problems of custodial sentences are under focus in foreign countries. For example, they are reflected in subordinate legal regulations, in scientific publications, in national and international debates, in the extensive discussion at scientific conferences and in the concerns of official bodies and entire society (Krevsun, 2016, p. 125).

According to Ye.Yu. Barash, a comparative analysis of foreign experience in implementing organizational and legal forms of administration enables to identify certain institutional models of penitentiary systems, depending on whether the penitentiary system belongs to one or another state agency:

1) the model wherein the penitentiary system is fully accountable to the Ministry of Internal Affairs or its equivalent;

2) the model wherein the penitentiary system is fully administered by the Ministry of Justice;

3) the model wherein the penitentiary system is under the unified Ministry of Justice and Internal Affairs (Police);

4) the model wherein the penitentiary system is under a separate state department, which is not subject to either the Ministry of Justice or the Ministry of Internal Affairs;

5) a mixed model wherein different types of punishment or procedural coercive measures are administered by different agencies (penal institutions, in which convicted persons are held, are under the Ministry of Justice, while pre-trial detention is under the Ministry of Internal Affairs) (Barash, 2012, p. 364).

This problem and task are also mentioned in Law of Ukraine № 2713-IV on the State Penitentiary Service of Ukraine of 23 June 2005, which, inter alia, underlines that in order to organize international cooperation in the execution of criminal punishments, the State Penitentiary Service of Ukraine cooperates with the relevant authorities of foreign states and international organizations on the basis of international agreements (Law of Ukraine "On the State Penitentiary Service", 2005).

The study reveals that the main international regulations on the activities of penal institutions and the treatment of convicts are European Prison Rules made by the CoE and United Nations Standard Minimum Rules for the Treatment of Prisoners adopted on 30 August 1955 (Law of Ukraine "On the State Penitentiary Service", 2005). They are recognized by the international community as

the basic instrument for making penal policy by legislatures, courts and prison administrations.

The Rules lay down the basic principles of the penitentiary system, namely: unconditional respect for the human rights of convicted persons, which remain with them except those deprived of or restricted by a court decision (Minimum standard rules for the treatment of prisoners, 1955). Emphasis is placed on the minimum need for such restrictions, the criterion thereof is to meet the main purpose of punishment, that is, to return the convicted person to full public life. This objective also requires conditions of detention similar to living in society. It is noted, however, that the violation of that principle could not be justified by a lack of resources. The penitentiary principles include a non-discriminatory approach, cooperation with social services and social organizations, independent monitoring and control of the activities of penal institutions. Personnel play a major role in achieving the objective of the penitentiary system, when they are carefully selected, trained and provided with working conditions.

Moreover, these legal sources have become indispensable for the interpretation of the international concept of the protection of human rights, which is a fundamental part of international human rights law. It should be borne in mind, however, that each country considers this problem in its own way. For example, S.V. Luchko, comparing some penitentiary systems of foreign countries, identifies typical features of their functioning, namely: all penitentiary systems are established for the purpose of isolating persons who have committed a crime from society; convicted persons in penal institutions are held in both solitary confinement and shared accommodation; the system of lighter solitary confinement has been established, which provided for the isolation of prisoners in cells, but allowed them to stay together in school and church (Luchko, 2012, p. 5).

3. Particularities of the world's penitentiary systems

Yu.O. Vreshch and A.O. Radchenko justify the relevance for Ukraine of international legal instruments adopted by the Council of Europe or its Parliamentary Assembly or Committee of Ministers classifying them into common instruments (Convention for the Protection of Human Rights and Fundamental Freedoms (1950)) and special ones (European Prison Rules (1987), Recommendation R (92) 16 of the Committee of Ministers to Member States on the European Rules on Community Sanctions and Measures, Recommendation Rec (2006) 13 of the Committee of Ministers to Member States on the use of remand in custody, the conditions in which it takes place and the provision of safeguards against abuse with an Explanatory Note, Recommendation Rec (2003) 22 of the Committee of Ministers to Member States on conditional release (parole) and others). Moreover, it is emphasized that the recommendatory nature of the vast majority of these standards cannot be invoked as grounds for ignoring or not considering them, since they play a decisive role in the system for the protection of human rights and fundamental freedoms, that the pursuit of such standards is an indicator of the civility of national penitentiary systems from the perspective of international law. However, the unconditional striving for implementation of European and international penitentiary standards shall be realised taking into account the national political, economic and social specificities of the state (Vreshch, Radchenko, 2019, p. 129).

In the Germany, justice is represented in each Land by the Ministry or Department of Justice, and at the federal level by the Federal Ministry of Justice. The judicial authorities are responsible for supervising the work of the general and specialised courts and for providing logistical and human resources for judicial institutions. In addition, both at the Federal and Länder levels, the judiciary supervises the activities of the advocacy and the notary. In the Federal Republic of Germany, the prosecutors of the Land Courts are under the jurisdiction of the Länder Ministries of Justice. The Federal Prosecutor-General of the Germany is attached to the Federal Court and is under the authority of the Federal Ministry of Justice. However, the prosecution system is decentralised and the Prosecutor-General cannot give guidance to the Länder Prosecutors (Sukharev, 2001, pp. 174–175).

In France, the Minister of Justice plays a leading role in justice. He is ex officio a member of the Superior Council of Magistracy and is the Vice-President of that institution. The Superior Council of Magistracy is headed by the President of France, who, in his absence, is replaced by the Minister of Justice. Prosecutors are structurally under the guidance and control of senior officials and are subordinate to the Minister of Justice (Medvedchuk, Kostytskyi, 1999, p. 14). The French Ministry of Justice is also responsible for the penitentiary system. It is the Ministry of Justice that is responsible for this system, both in terms of personnel and in terms of methodology and logistics. Moreover, the Ministry of Justice plays a leading role in the drafting and drawing of relevant conclusions in respect of judicial organization, substantive law and procedure (Fedkovych, 2007, p. 54).

The United States has also made a significant contribution to the development of the world's penitentiary idea and system. The U.S. penitentiary system consists of prisons, which are divided into federal, state, and local municipal or district prisons. The activities of federal prisons are regulated by special legislation: provisions of the Section "Prison and prisoners", Chapter XVII "Codified criminal and criminal procedure legislation". Federal and state prisons fall into four categories: high security, medium security, low security, minimum security. Local prisons hold persons who have been remanded in custody as well as convicted persons who have been sentenced by the court to short terms of imprisonment. Special penal institutions, reformatory or, in other words, training school, have been set up for juvenile offenders. The most common punishments in the United States are fines, imprisonment and probation. It should be noted that there is no "prosecutor supervision" in the USA. All prison-related matters are decided by the Governor. He appoints a Governor's Commission composed of eight ordinary citizens of the state. It is up to the Commission to decide on the question of conditional release, their decision is final and not subject to appeal, and it is open to all those who wish to joint it (Chomakhashvili, Mykytas, 2011).

An interesting innovation in the United States is that, in order to reduce the burden on the country's budget, the privatization of prisons and the massive construction of private prisons have begun. Companies that own and operate prisons, camps, detention centres or restitution centres sign a contract with the federal, state or district governments. They undertake to maintain a certain number of prisoners in accordance with state standards, ensuring an appropriate level of security. For each prisoner, the management company receives a guaranteed sum of money from the budget. The advantages of these institutions are that there are no strikes, unemployment or other problems connected with employment. In these establishments, 100% of all military helmets, flak jackets, shirts, trousers, tents, backpacks and flasks are made. In addition to military equipment and uniforms, prisoners produce 98% of the installation equipment market, 36% of household appliances, 30% of headphones, microphones, megaphones and 21% of office furniture, as well as aviation and medical equipment and much more. Prisoners even train guide dogs for the blind (Kovalev, Sheremeteva, 2013).

In our opinion, this experience is quite useful for Ukraine in the future to relieve not only the budget of the country but also citizens from paying tax on the maintenance and financing of prisons. For example, the first steps towards reforming the penitentiary system in our state are the introduction of paid cells in pre-trial detention centres. Paid pre-trial detention centres have been operating in Ukraine since May 2020. For example, the cost of accommodation in a cell in Kyiv depends on the period for which payment is made: UAH 2,000 per day, UAH 8,000 per week and UAH 12,000 per month. UAH 2,000 per day. The money that comes from the paid cells goes to the refurbishment of free ones. This innovation has been immediately welcomed and has created a real a resonance. According to the Ministry of Justice of Ukraine, since the establishment of paid cells in pre-trial detention centres, the total budget has exceeded UAH 2.2 million.

Therefore, it is necessary for Ukraine to continue along these lines, which will considerably improve the situation of penal bodies and institutions and to a certain extent improve the conditions of detention of convicted persons.

The experience of the Netherlands is equally useful for the Ukrainian penitentiary system, where prisons are rightly recognized as institutions with the most modern means of protection and psychiatric rehabilitation of convicts in Europe. In particular, the Dutch penitentiary system is managed by the National Agency of Correctional Institutions (NACI). It is important to stress that the main current objective of the NACI sector is to modernize the Dutch penitentiary service in order to save money and reduce recidivism (the target is to reduce recidivism to 10% by 2020) through quality preparation for release and the involvement of more partners, such as municipalities, probation services, various public organizations, corporations and social services, etc. The use of modern electronic equipment, electronic bracelets and directions in TBS institutions (for persons with mental disabilities), used in the Netherlands, may become the latest practice for Ukraine (Bohunov, 2011).

An international legal analysis of the organization of the judiciary (as in the United States of America, France and the Federal Republic of Germany) shows that there is no uniform universal model of judicial organization in foreign countries. Each state has its own judicial system, depending on its legal system and state structure. At the same time, despite the different organizational structure of the judicial bodies and units of each of these countries, one common feature is the existence of two main systems of administration of justice: centralised (at the level of the Ministry of Justice) and decentralised (at the level of regional bodies and units of justice) (Mykultsia, 2012, p. 171).

The main tasks of the Ministry of Justice in the field of the execution of punishments are

to ensure making of public policy on the execution of criminal punishments and probation; to establish a system of supervisory, social, educational and preventive measures for convicted persons and persons taken into custody; to monitor the observance of human and civil rights and the requirements of the penal law, the exercise of the legitimate rights and interests of convicted and remand prisoners (Resolution of the Cabinet of Ministers of Ukraine "On approval of the Regulation on the Ministry of Justice of Ukraine", 2014).

Therefore, the Ministry of Justice, in accordance with the tasks assigned to it, shall be directly responsible for the area of the execution of criminal punishments and for the system of detention and probation institutions.

Therefore, an analysis of foreign experience in the operation of the system of penal bodies and institutions reveals that foreign states practice institutional linkage between the judiciary and the penitentiary service. In Ukraine, the administrative system governing the execution of criminal punishments in Ukraine is imperfect and inefficient.

4. Conclusions

Therefore, an analysis of foreign experience in the execution of punishments makes it possible to argue that there are significant problems in the social and economic, political and legal development of the system of penal bodies and institutions in Ukraine today. Therefore, the review of international practice in implementing this policy in a number of highly developed countries enables to highlight the positive aspects of their experience to be taken into account in the further development of domestic penal policy.

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Кирило Муравйов,
доктор юридичних наук, доцент, завідувач кафедри адміністративного, фінансового та банківського права, Навчально-науковий інститут права імені князя Володимира Великого Міжрегіональної Академії управління персоналом, вулиця Фрометівська, 2, Київ, Україна, індекс 03039, donkirill@ukr.net
ORCID: *orcid.org/0000-0002-4422-4116*

МІЖНАРОДНІ СТАНДАРТИ ДЕРЖАВНОЇ ПОЛІТИКИ У СФЕРІ ВИКОНАННЯ КРИМІНАЛЬНИХ ПОКАРАНЬ

Анотація. ***Метою статті*** є здійснення аналізу міжнародних стандартів державної політики у сфері виконання кримінальних покарань та надання рекомендацій щодо впровадження відповідного позитивного досвіду іноземних держав у вітчизняну юридичну практику.

Результати. Досліджено міжнародні стандарти державної політики у сфері виконання кримінальних покарань. Проаналізовано зарубіжний досвід організації та діяльності установ виконання кримінальних покарань, визначено основні заходи щодо його впровадження в Україні. Наголошено на тому, що імплементація європейських і міжнародних стандартів у сфері виконання кримінальних покарань має бути реалізована з урахуванням національної політичної, економічної та соціальної специфіки нашої держави. Тримаючи курс на європейську інтеграцію, уряд України має виконати всі зобов'язання, які висувають впливові організації Європи, і дотримуватися проголошених пенітенціарних стандартів. Зазначено, що в Україні вже спостерігаються позитивні зміни до реформування розглядуваної сфери. Виділено позитивний досвід упровадження платних тюрем у слідчих ізоляторах та наголошено на необхідності подальшого вдосконалення цієї сфери. Визначено, що Міністерство юстиції України, відповідно до покладених на нього завдань, має безпосередньо нести відповідальність за напрям виконання кримінальних покарань, систему установ тримання осіб під вартою та пробації. З'ясовано, що в іноземних державах досить поширена практика організаційного зв'язку юстиції та служби виконання покарань. Натомість в Україні адміністративна система управління сферою виконання покарань є недосконалою та малоефективною.

Висновки. Констатовано, що сьогодні в Україні простежуються суттєві проблеми в питаннях соціально-економічного та політико-правового розвитку системи органів та установ виконання покарань. Унаслідок узагальнення міжнародної практики здійснення вказаної політики в низці високорозвинених країн вважаємо за доцільне виокремити позитивні моменти їхнього досвіду, які надалі повинні бути враховані у процесі вдосконалення вітчизняної політики у сфері виконання покарань.

Ключові слова: міжнародні стандарти, державна політика у сфері виконання покарань, Міністерство юстиції України, Державна кримінально-виконавча служба України.

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Yuliia Sukhomlyn,
Candidate of Juridical Sciences, Associate Professor at the Department of Criminal Procedure, National Academy of the Internal Affairs, 1, Solomianska square, Kyiv, Ukraine, postal code 03035, Yuliia_Sukhomlyn@ukr.net
ORCID: *orcid.org/0000-0002-5699-6914*

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CHANGE OF SUSPICION OR NEW SUSPICION: GROUNDS FOR A PROPER DECISION

Abstract. The ***purpose of the article*** is to distinguish the concept of a change of suspicion previously notified from a notification of a new suspicion under article 279 of the Criminal Procedure Code of Ukraine, determine the grounds for the investigator, the inquiry officer or the prosecutor to take one of these decisions; as well as the effects of failure to comply with the provisions of the legislation in force in the event of a groundless procedural decision to change suspicion previously notified or to notify a new one.

Results. The article analyses one of the main procedural decisions of the investigator and the prosecutor at the pre-trial investigation stage – a notification of suspicion, which is a special form of procedural notification in criminal proceedings. The decision-making regarding notification of a person is considered as a result of the intellectual activity of authorised officials, which may have legal effects for all participants in criminal proceedings, provided that requirements for the time of, procedure for and parties to its serving are met. A reasoned analysis of the distinction of the concepts of "new suspicion" from the "change of previously notified suspicion" has been carried out from the perspective of the legal nature and the essence of these concepts, based on the practice of their application in the practice of pre-trial investigation bodies, prosecution and trial.

Conclusions. Suspicion is primarily based on the assumption that a person is involved in the commission of an offence, and the preparation of a notification of suspicion is only a conclusion that is not final and will be further verified during the pre-trial investigation. As the pre-trial investigation is not completed after notification of the suspect, the proving continues and provides for appropriate actions to verify the suspicion, confirm or refute it. This study focuses on this issue of the possibility to establish new facts and circumstances of the commission of a criminal offence, on the ground thereof the competent authority decides to notify a new suspicion or to change the previously notified suspicion. In order to notify a new suspicion, the investigator, the inquiry officer or the prosecutor shall establish new evidence or circumstances that lead to a different view of the circumstances of the commission of the criminal offence and enable to interpret them in the light of another definition according to the Criminal Code of Ukraine. At the same time, the new suspicion may be a completely separate document, which does not repeat the preliminary suspicion. A change of the definition of an act attributable to a suspect in fact involves a refusal by the investigator, an inquiry officer or the prosecutor of previously notified suspicions and a further pre-trial investigation to define the commission of a new criminal offence.

Key words: notification of suspicion, new suspicion, change of previously notified suspicion, investigator, prosecutor, court.

1. Introduction

The notification of suspicion is the starting point for the process of bringing a person to justice, and thus the main stage of the pre-trial investigation, providing for the collection of evidence against a suspect for a criminal offence.

P. Bilenchuk, Y. Hroshevyi, O. Mykhaylenko, O. Tatarov, V. Tertyshnyk, L. Udalova, O. Faraon, O. Khablo, V. Shybiko, O. Shylo, and others made a significant contribution to the study of the concept of notification of suspicion and criminal liability of a person.

The purpose of the article is to distinguish between the concept of a change of suspicion previously notified and a notification of a new suspicion under article 279 of the Criminal Procedure Code of Ukraine, determine the grounds for the investigator, the inquiry officer or the prosecutor to take one of these decisions; as well as the effects of failure to comply with the provisions of the legislation in force in

the event of a groundless procedural decision to change suspicion previously notified or to notify a new one.

2. Specificities of notification of suspicion to a person

The Criminal Procedure Code of Ukraine (hereinafter – CPC) clearly defines the moment at which a person acquires the status of a suspect, namely, who has been notified of suspicion under articles 276–279 of the CPC, detained on suspicion of having committed a criminal offence and in respect of whom a notification of suspicion has been drawn up but it has not been not served due to failure to establish the whereabouts of the person, however, provided all means have been used as specified by the CPC to serve a notification (art. 42 of the CPC). Therefore, suspicion is a procedural decision of a prosecutor or investigator approved by the prosecutor, which shall be based on evidence gathered during the pre-trial investigation and meet the requirements of belonging, sufficiency and credibility (Criminal Procedure Code of Ukraine, 2012).

The law establishes a specific time limit for the service of a notification of suspicion to a person apprehended at the scene of a criminal offence or immediately after it has been committed, which is 24 hours from the moment of apprehension. It is clear that this period is short enough to permit a full and complete examination of evidence and to establish all the circumstances of the criminal offence committed, which may affect the accuracy of the criminal offence classification. This is why, as a rule, a prior legal classification of an offence is made, which may be further modified (art. 214 of the CPC) (Criminal Procedure Code of Ukraine, 2012).

The decision to notify a person of suspicion, although based on the assumption that a person is involved in the commission of an offence and is made not according to the final outcome of the investigation. In turn, this may also include the change of the notification of suspicion or the notification of a new suspicion in view of circumstances that have been revealed in the course of further investigation. Therefore, during the pre-trial investigation, the investigator, inquiry officer or the prosecutor may not confine themselves to notifying suspicion only once, since it is certain that circumstances will be established requiring a change of suspicion or the notification of a new suspicion.

In practice, there is an opinion that, in order to avoid presumptions and changes in the classification of a criminal offence, it is appropriate to proceed with the notification of suspicion at the end of the pre-trial investigation immediately prior to the filing of the indictment. However, this postulate does not meet modern requirements and directly violates the Constitution of Ukraine, the principles of criminal procedure and the international legal instruments ratified by Ukraine, especially in the cases provided for in article 276, part 1, para. 1, 2 of the CPC (Kaplina, 2017, pp. 73–80).

Obviously, during the pre-trial investigation a great deal of evidence relevant to the criminal proceedings has been found. However, an investigation by collecting evidence of guilt against a particular person effectively deprives the latter of the fundamental constitutional right to a defence, since a person in respect of whom a number of procedural acts are being carried out does not acquire the necessary status. Therefore, the notification of suspicion is in the context of article 276 of the CPC is a sound and correct procedural act that fully respects the principles of criminal procedure, such as legality and the right to a defence, the adversarial nature of parties and their freedom to present to the court their evidence and to prove their credibility before the court, etc.

Therefore, an effective pre-trial investigation, resulting into a reasonable, incontrovertible, objective and fair suspicion, will be conducted only if changed circumstances, relevant to a criminal offence, or of the detection of new ones, will be taken into account accordingly and the notification of suspicion adjusted on a reasoned basis (Faraon, 2014, pp. 402–403).

In view of this, the legislature has provided for in article 279 of the CPC the possibility of notifying new suspicions or of changing previously notified suspicions on reasonable grounds. However, neither selection of one of the options of nor the exhaustive grounds for the new suspicion are explained and in general distinguished by the CPC.

For example, the change of suspicion notification may be due both to a worsening of the suspect's situation and to an improvement in his or her situation, and considering that once a person has been notified of a suspicion, the function of protection is exercised and the grounds for the notification of suspicion are conducted in an adversarial manner. This is why the defence's rebuttal of the factual circumstances that have been grounds for the preliminary suspicion may be another reason to correct suspicion (Kaplina, 2017, pp. 73–80).

According to the explanatory dictionary of the modern Ukrainian language, the concept of "change" implies a transition, transformation of something into something qualitatively different, and the concept of "new" means one that has occurred, developed, did not exist before, has been recently created (Busel, 2005, p. 851). On the basis of these concepts, it is clear that the change of the notification of suspicion is

possible only in the case of a pre-existing preliminary suspicion, which requires modification, and that a new suspicion can only arise if no suspicion has been notified at all. For example, in his ruling of 6 September 2019 in the case of the appeal against the notification of suspicion, the judge of the Ternopil City District Court of the Ternopil Region explained that the change is an amendment that alters anything previous. The change of the notification of suspicion in the broad meaning of the term implies: not corroborating part of the notification of suspicion; supplementing the notification of suspicion; changing the notification of suspicion (Decision of the Ternopil City District Court of the Ternopil Region, 2019).

Therefore, the grounds for changing the notification of suspicion are:

– the unestablished event of the crime alleged against the suspect;

– the absence of elements of a crime in the acts of a person;

– the unproved participation of a suspect in one or more of the offences of which he or she is accused in suspicion notification;

– unestablished aggravating circumstances;

– established mitigating circumstances;

– established circumstances that change the classification of the act (attempt, completed offence, repetition, continuing offence);

– established circumstances leading to a change of the assessment of the degree of complicity of the suspect, including the termination of criminal proceedings on rehabilitative grounds against other persons (Sukhov, 2020).

3. Changing of previously notified suspicion

In the absence of corroboration of certain facts stated in the notification of suspicion, such as the commission of an episode or separate act, qualifying element or an over-classification of cumulative offences, two situations are possible: the change of classification or no change is required. This is the main criterion for deciding whether to give effect to a notification of the change of suspicion previously notified or to notify a new suspicion. In evaluating the available evidence obtained during the pre-trial investigation from the moment the person is notified of suspicion, it may be necessary to change the classification, which in turn implies not supplementing or clarifying the previous facts, but notifying new suspicion notification, which is generalised in place of the earlier one.

Therefore, the application of these definitions regarding the concept of "suspicion" in criminal proceedings reveals that the difference between the concept of "change of previously notified suspicion" and "new suspicion" is that "change of previously notified suspicion" takes place only if there is a prior suspicion and if it is necessary to change it, and a "new suspicion" is drawn up only if, on a separate fact, the person has not yet been notified of suspicion at all.

It should be noted, however, that as a result of the change of a previously notified suspicion, the investigator, prosecutor and other participants in the proceedings will already have to deal with the existence of a new suspicion in the criminal proceedings, which has arisen as a result of the changes of a previous suspicion.

In the presence of the grounds provided for in article 279 of the CPC of Ukraine, the investigator or prosecutor shall decide on: what name the document shall have if changes in the criminal proceeding entail the change of the previously notified suspicion and the occurrence of new criminal offences, which require a "new suspicion notification" and termination of parts of the previously notified suspicion?

In such case, at first glance, the previously notified suspicion changes, as part of the change concerns the clarification of previously known circumstances of criminal offences, but in presence of new facts, other criminal offences, composing one criminal proceeding, the prosecutor shall notify a person of new suspicion. Logically, in this case, the question arises as to what procedural action should be taken: to change suspicion or to notify a new one. Whether it is necessary to take two procedural actions at once: to notify a change of suspicion previously notified and separately to notify a new suspicion, even if it is not appropriate, but the law does not give a clear interpretation on this matter.

It is clear that, in situations of dispute, not clearly regulated by the Criminal Procedure Code, investigators and prosecutors, on the basis of their own experience and practice, in some regions, notify new suspicions and in others, combine criminal proceedings after the notification of a new suspicion or the change of previously notified one (Faraon, 2014, p. 405).

However, as a result of this sequence of actions in criminal proceedings, a number of other problematic issues arise, such as several notifications of suspicion in one criminal proceeding and the absence of one generalised suspicion, which may cause some confusion and disorientation on the part of the defence and consequently complicate the work of the pre-trial investigation, the prosecution and the court.

Therefore, the purpose of a pre-trial investigation in the form of an objective, proven, incontrovertible and fair suspicion can only be achieved if the notification of suspicion is clearly corrected and substantiated. Bearing in mind that the pre-trial investigation does not end at the stage of notifying the person

of suspicion, but rather takes off, as a result, new evidence may be discovered or taken together with the existing evidence, a new assessment is provided, prompting the investigator, the public prosecutor to reconsider suspicion already existing and decide whether it should be changed, left unchanged or the new suspicion should be notified.

Grounds for another evaluation of evidence may require the change of classification, which clearly involves notification of a new suspicion, since a change of the definition indicates that another criminal offence has been committed or that the elements of an incriminated criminal offence have been changed. In this case, the re-drafted notification of suspicion should be consolidated on the basis of available evidence and not in addition to the existing notification, but in lieu of the earlier one. This means that the prior notification of suspicion, while remaining in the records of the criminal proceedings, is no longer valid (Sukhov, 2020).

It should be noted that, in this situation, a different decision, without taking into account the legal effects and without notifying the person of the new suspicion, and only by modifying the existing notification of the investigator, the prosecutor knowingly supplements the previous suspicion, which has actually ceased to exist. As a consequence, such a decision by an investigator or a prosecutor may be appealed, a notification of suspicion can be cancelled by the courts.

The most difficult question is always whether the change of previously notified suspicions is, in essence, the notification of a new suspicion. Considering provisions in article 279 of the CPC, which clearly provide for not only the possibility of changing existing suspicion, but also for the notification of a new one, the answer to the question will be negative. However, the law in force does not set an unambiguous limit separating a new suspicion from a change of suspicion previously notified (Criminal Procedure Code of Ukraine, 2012).

If during the pre-trial investigation no new evidence contradicting or refuting the earlier classification but giving grounds for clarifying the factual circumstances of the criminal offence (place, time, means, etc.) is established, the investigator or prosecutor shall notify a change of suspicion previously notified. The grounds for the change shall be indicated in the notification of the change of suspicion previously notified. At the same time, absolute duplication of the text of the notification of suspicion in respect of the same legal regulations and the same circumstances of the criminal offence committed is inadmissible. The "change" implies the indication of new evidence or the result of another assessment of existing evidence, to which reference should be made in the text of the document, rather than reciting already existing evidence at random. It should be borne in mind that the change of suspicion previously notified is not a standalone document unrelated to previous suspicion, as it is the fundamental basis of the notification and is the basis for its amendment (Decision of the Ternopil City District Court of the Ternopil Region, 2019).

4. Conclusions

To sum up, in order to notify a new suspicion, the investigator, the inquiry officer or the prosecutor shall establish new evidence or circumstances that lead to a different view of the circumstances of the commission of the criminal offence and enable to interpret them in the light of another classification according to the Criminal Code of Ukraine. At the same time, the new suspicion may be a completely separate document, which does not repeat the preliminary suspicion. A change of the definition of an act attributable to a suspect in fact involves a refusal by the investigator, an inquiry officer or the prosecutor of previously notified suspicions and a further pre-trial investigation to define the commission of a new criminal offence.

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Юлія Сухомлин,
кандидат юридичних наук, доцент кафедри кримінального процесу, Національна академія внутрішніх справ, площа Солом'янська, 1, Київ, Україна, індекс 03035, Yuliia_Sukhomlyn@ukr.net
ORCID: *orcid.org/0000-0002-5699-6914*

ЗМІНА ПІДОЗРИ ЧИ НОВА ПІДОЗРА: ПІДСТАВИ ПРИЙНЯТТЯ ПРАВИЛЬНОГО РІШЕННЯ

Анотація. ***Метою статті*** є розмежування понять зміни раніше повідомленої підозри та повідомлення про нову підозру, передбачених у ст. 279 Кримінального процесуального кодексу України; визначення підстав для прийняття слідчим, дізнавачем, прокурором одного з вказаних рішень, а також наслідків недотримання норм чинного законодавства в разі прийняття необґрунтованого процесуального рішення щодо зміни раніше повідомленої підозри або повідомлення про нову.

Результати. Статтю присвячено аналізу одного з основних процесуальних рішень слідчого, прокурора на стадії досудового розслідування – повідомлення про підозру, яке є особливим видом процесуального повідомлення у кримінальному провадженні. Досліджено прийняття рішення про повідомлення особі як результат інтелектуальної діяльності уповноважених службових осіб, що може спричинити юридичні наслідки для всіх учасників кримінального провадження за умови дотримання вимоги щодо строків, процедури та суб'єктного складу осіб, які залучаються до його вручення. Здійснено ґрунтовний аналіз щодо розмежування понять «нова підозра» та «зміна раніше повідомленої підозри» з позиції правової природи й сутності цих понять та з огляду на практику їх застосування у практичній діяльності органів досудового розслідування, прокуратури та суду.

Висновки. Підозра насамперед ґрунтується на припущенні про причетність особи до скоєння злочину, а підготовка повідомлення про підозру – це лише висновок, який не є остаточним і буде додатково перевірений під час досудового розслідування, оскільки після повідомлення особи про підозру досудове розслідування не завершується, а процес доказування триває та передбачає відповідні дії для перевірки підозри, її підтвердження чи спростування. Саме питанню щодо можливості встановлення нових фактів та обставин вчинення кримінального правопорушення, на підставі яких спеціальний уповноважений орган вирішує питання про повідомлення нової підозри або зміну попередньо повідомленої підозри, присвячена ця робота. Для повідомлення про нову підозру слідчому, дізнавачеві, прокуророві необхідно встановити нові докази чи обставини, які спонукають поглянути на обставини вчинення кримінального правопорушення з іншого ракурсу, що дає змогу трактувати їх у світлі іншої кваліфікації з позиції Кримінального кодексу України. При цьому нова підозра може бути абсолютно самостійним документом, який не повторює попередню підозру. Зміна кваліфікації діяння, яке інкримінується особі підозрюваного, фактично передбачає відмову слідчим, дізнавачем, прокурором від раніше повідомленої підозри та продовження здійснення надалі досудового розслідування за фактом вчинення кримінального правопорушення за новою кваліфікацією.

Ключові слова: повідомлення про підозру, нова підозра, зміна раніше повідомленої підозри, слідчий, прокурор, суд.

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Roman Maydanyk,
Doctor of Law, Professor, Academician of the National Academy of Legal Sciences of Ukraine, Head of the Department of Civil Law, Institute of Law of Taras Shevchenko National University of Kyiv, 60, Volodymyrska street, Kyiv, Ukraine, postal code 01033, roman.maydanyk@gmail.com
ORCID: *orcid.org/0000-0003-1661-0535*

REVIEW OF THE MONOGRAPH "CORPORATION: EXPERIENCE OF PHENOMENOLOGICAL RESEARCH" BY ANATOLIY KOSTRUBA

The problem of the formation of corporate relations in Ukrainian civil law is widely discussed by both representatives of civil society and representatives of other branches of legal science. At the present stage of the development of legal doctrine, corporate legal relations are considered from the perspective of proprietary, binding, and corporate legal approaches, each of which contains the priority of the same elements in the structure of legal relations. In addition, some scholars investigate corporate relations in the context of the parity of their rights. The study of the relevant issue has attracted the great attention of modern scientists such as V.A. Vasyliva, I.V. Spasybo-Fatieieva et al. However, the mentioned problematic issues have not been covered. Legal relations are one of the fundamental categories of legal theory. They are the means which gain inertia in the structure of legal matter. They put law into effect: rights are exercised, and legal obligations are fulfilled. Therefore, examining elements of corporate legal relations, their uniqueness or variability, method, and sequence of accumulation is relevant to the science of civil law in Ukraine.

The study of the nature of subjective civil rights and legal obligations in the structure of corporate legal relations is the subject of the monographic research of A.V. Kostruba that characterizes its relevance.

The monograph "Corporation: experience of phenomenological research" by A.V. Kostruba (Doctor of Law, Professor, Professor at the Department of Civil Law of the Educational Scientific Law Institute of Vasyl Stefanyk Precarpathian National University) is characterized by scientific novelty, which demonstrates the author's profound knowledge in theoretical and practical aspects of the dynamics of corporate legal relations.

The author elucidates the legal essence of a corporation. The analysis of economic categories of corporate governance from the standpoint of law allowed the scientist to investigate the form of a legal entity not only in the context of the legal means of realizing the interests of its beneficiaries. A legal entity is an element of the economic system of society, the activities of which are directly aimed at meeting the needs of a group of persons in the development of productive forces and relations.

It should be noted that the study of a legal entity in terms of economics and management science allowed the author to expand the horizons of understanding the legal entity, consistently including issues of the interaction between society and corporations in the spectrum of scientific interest. The researcher managed to establish the nature of relations that arise between a legal entity and a person who is "hidden behind its veil".

The second aspect of the problem raised in the monograph is the focus of a legal entity in the social environment in which it is involved. A legal entity as a participant of social interaction cannot but influence the social processes taking place in society that suggests the social responsibility of the legal entity to society for the outcomes of its activities.

Thus, the coverage of three interdisciplinary aspects of activities of a legal entity (the aspect of social interaction of the legal entity, the proper governance of the legal entity, and the aspect of its responsibility for the outcomes of the legal entity's activity in society) allowed defining the model of a corporation as the legal entity, the feature of which is the factor of unity of persons who are part of it, form its essence, and embody it in society differently from persons who make it up. It is worth noticing the position of the scientist that a corporation is marked by the state of relations between it and its members, which is the concentration of interest around the purpose of its activities. This approach specifies its activities.

[1] Коструба А.В. Корпорація: досвід феноменологічного дослідження : монографія. Київ : Талком, 2021. 406 с. ISBN 978-617-8016-31-9.

The monograph under consideration is an attempt to systematically analyze the theoretical foundations of the legal personality of a corporation in the social environment. The scientist presents his vision of the theory of a legal entity to the academic community, studies the mechanism of corporate governance and the peculiarities of the implementation of corporate legal relations. The logical conclusion is the study of the mechanism of protection of corporate relations in the context of the substandardness of the chosen means. The research relies on a significant scientific and theoretical framework and a representative volume of factual evidence, which ensures the objectivity and veracity of the findings. The author's work is characterized by logical harmony, conceptual integrity, and depth of penetration into the roots of the problem.

The monographic research "Corporation: experience of phenomenological research" by Anatoliy Kostruba, Doctor of Law, Professor, Professor at the Department of Civil Law of the Educational Scientific Law Institute of Vasyl Stefanyk Precarpathian National University, can be recommended for publication.

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