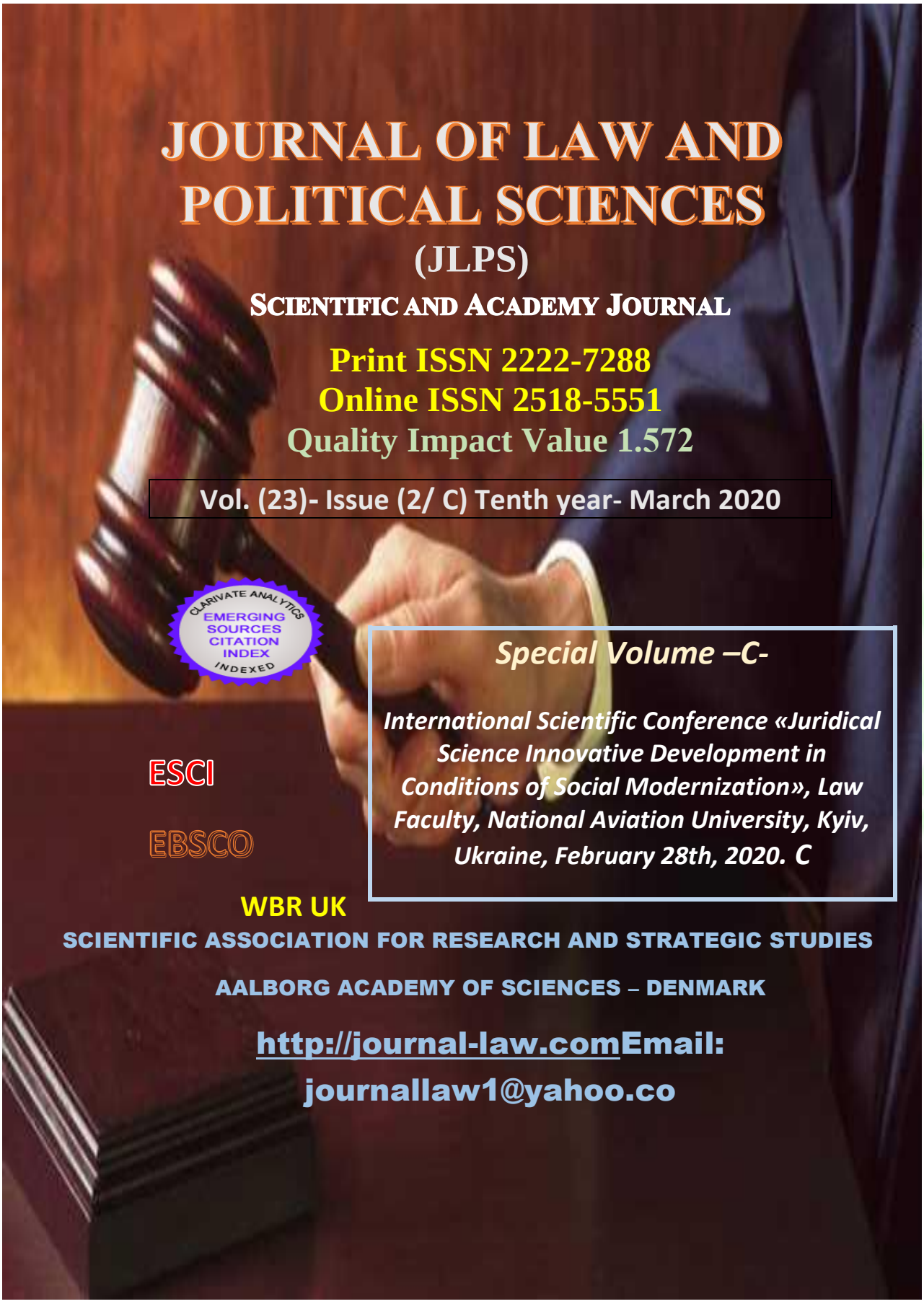

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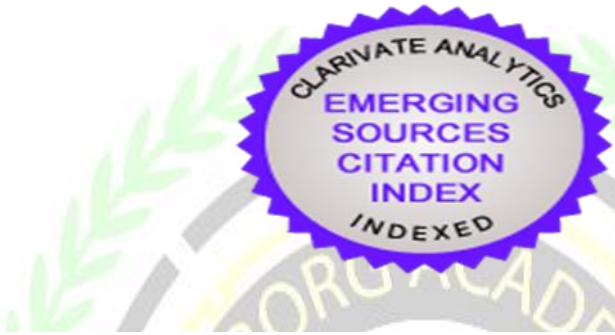

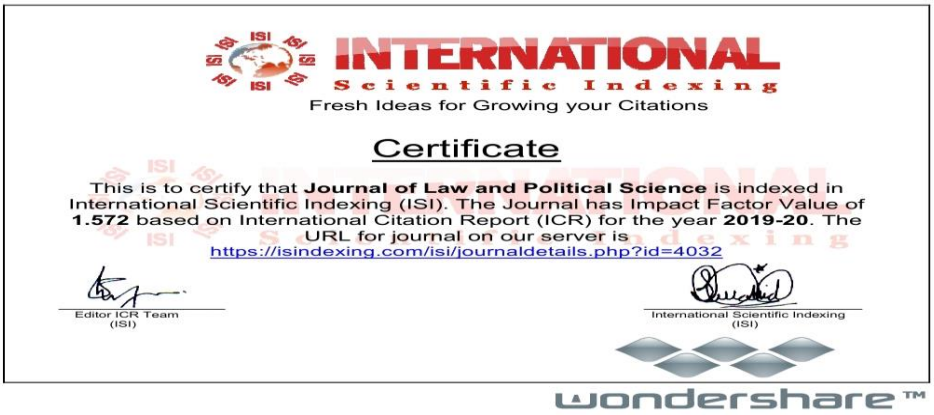

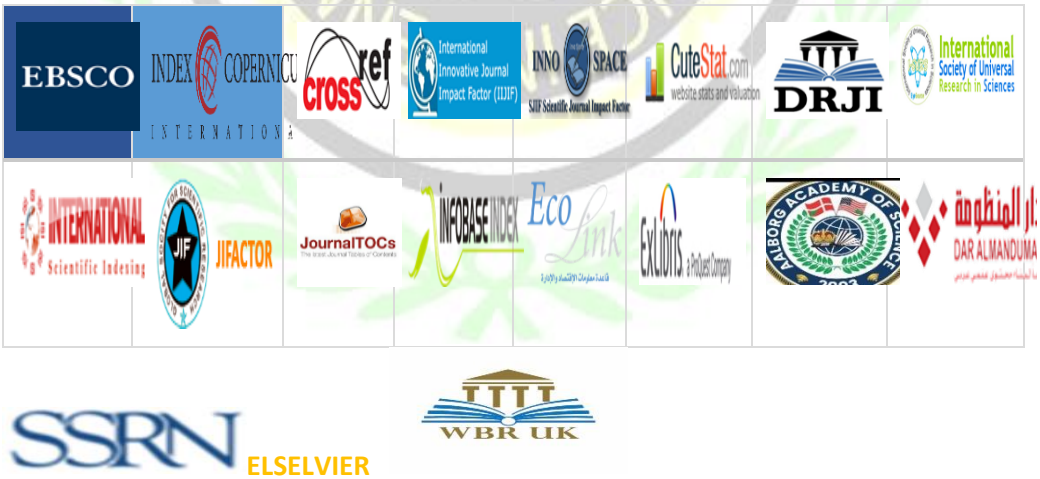

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GLOBALIZATION OF LEGAL IDEOLOGY IN THE CONTEXT OF MODERN SOCIETY TRANSFORMATIONS

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Abstract

The legal ideology can be recognized as the most stable element of the legal system, which causes its fairly long period of formation. Nevertheless, the rapid pace of modern society development and the globalization of all spheres of public life lead to the fact that even legal ideology can waver under such an onslaught and begin to show signs of internationalization. The purpose of the article is formulated as identifying the features of the transformation of legal ideology, as well as determining the optimal model of convergent

processes of legal ideology. The paper supports and further substantiates the concept of global law, since "global law" (in contrast to the international legal system) provides for a movement towards a common legal ideology based on the convergence of basic values and methods of influence.

Keywords: globalization, legal awareness, legal consciousness, legal ideology, legal system, transformation processes.

INTRODUCTION

Legal ideology is of significant scientific interest, since it is also a well-researched phenomenon, as well as one that is undergoing changes in connection with the globalization processes of modern society. This can not be ignored by the fact that legal ideology is often considered as a set of methods of legal influence or methods of different types of influence on the legal situation, but very rarely as a synergistic phenomenon.

The legal ideology problematic is quite popular in the legal doctrine. So, in the most recent studies, where the analysis of the rule of law is of great importance, it is stated that "rule of law as an ideal is itself ideological, as it comprises contested concepts such as certainty, equality, stability, and legality".[1] And thus legal ideology is transferred from the plane of reasoning about "fragile things" to a completely praxeological plane, since the whole democratic world is based on the idea of the rule of law.

Absolutely fair just a few years ago "legal ideology has, unlike other types of ideologies, a monistic character, since it is based on a system of legal norms that has no alternative for a particular state",[2] it does not seem so clear today,

[1] Lees, & Shepherd, 2018.
[2] Lutskyi, 2015.

when even the foundation of the legal system in the form of legal ideology does not stand up to globalization.

And for good reason T. Arvind and L. Stirton noticed that the sphere of jurisprudence, legal doctrine and ideology, despite the seeming study "has remained shrouded in what is almost an air of mystique".[1] But it could be added that as a result of significant external influence, the legal ideology acquires even more vague features.

The above makes it clear, the legal ideology is undergoing such changes as a result of the globalization of all spheres of public life that recently the problems associated with it have not weakened, but have risen to a new level of scientific thought.

Purpose of the Study.

The purpose of the scientific article is formulated as identifying the features of the transformation of legal ideology, as well as determining the optimal model of convergent processes of national legal ideology and its borrowed elements.

Object and Subject of the Study.

The object of the research is the legal system of the society. While its subject can be called legal ideology as a structural component of the legal system.

Methodological Basis of the Study and Methods.

The main methodological principles of writing this scientific work are dialectical, value-based, human-centered, cross-social approaches, as well as the principle of determinism. They create a doctrinal basis for the analysis of legal ideology as an intersectoral complex phenomenon that is at least at the

[1] Arvind, & Stirton, 2016.

intersection of law, psychology, sociology, and political science. It is also impossible to ignore the axiological principle. Since the values initially embedded in the legal ideology will have a decisive impact on the formation of the legal consciousness of a particular society.

As for research methods, the most used general scientific methods are the system method (since the legal system, which is recognized as part of the legal ideology, is part of higher-order systems. This system can also be called global legal reality), as well as cybernetic and synergetic methods (since legal ideology within a single legal system can be subject to the laws of synergetics, and as part of a globalized legal continuum - cybernetics).

Of the special legal methods, the method of legal comparativism will definitely be used, since globalization provides for the mutual influence of legal systems.

The statistical method will become the basis for justifying the perception of legal ideology and legal awareness in their dynamics. In this regard, it is advisable to take into account data obtained approximately ten years ago and today. The formation of a stable legal ideology is a fairly long process (in comparison with other legal phenomena), so a decade is quite acceptable for obtaining data on changes.

RESULTS AND DISCUSSIONS

THE FIRST TOPIC: LITERATURE REVIEW, DEBATABLE TERMS AND MAIN CATEGORIES

As mentioned above, legal ideology belongs to one of the most ambiguous categories of jurisprudence. It is analyzed in different contexts and in completely different meanings, which makes it necessary to agree on the terms used.

In some scientific works, ideology is considered exclusively as a part of the political system and its influence on the law and, consequently, the rights to it is investigated.[1,2,3,4,5] This approach is indeed common, but the question of political ideology can be left out of the scope of our study. Some authors add related spheres of social life to this bunch (politics and law), such as Economics,[6] culture or society.[7,8]

Emma Lees and Edward Shepherd consider legal ideology, on the one hand, as a form of political thinking, but, on the other hand, as a structural component of the legal culture that affects the decision-making by judges.[9] This makes it possible to separate political ideology from legal ideology, and to consider ideological aspects within various social subsystems. This seems to be quite true, since the political and legal system have their own characteristics and laws of development. In this regard, political ideology cannot be considered fully as a legal phenomenon, and Vice versa. “The

[1] Gordon, 2011.
[2] Novkov, 2008.
[3] Marks, 2010.
[4] Kennedy, 2012.
[5] Norrie, 1991.
[6] Sanjukta, 2019.
[7] Mezey, & Niles, 2005.
[8] Alidou, & Alidou, 2008.
[9] Lees, & Shepherd, 2018.

potential illumination provided by ideology to understanding the practice of law is located in a 'prevalent' notion of ideology premised on enduring conflict between opposing political outlooks, rather than a 'pure' notion of ideology used to express the conceptual branch of political science".[1]

UK's the legal doctrine completely naturally for the characteristics of its legal system deduces the legal ideology from the judicial power.[2] This seems to be true for the relevant legal tradition, but not for legal science as a whole set of knowledge.

Legal ideology is also considered as a system of legal ideas, theories, concepts, norms based on certain scientific knowledge and political views [3], or as a system of views, ideas, and theories about the nature and social purpose of law, and the possibility of using it to solve social problems [4]. Both definitions are essentially similar, but a functional aspect has been added to the latter. This is certainly regarded as a plus, since it makes it possible to evaluate the legal ideology in action, and not as a "dead" set of theories and teachings.

Thus, legal ideology should be considered in the structure of the legal system.[5] But this is not the end of the problem, since one group of researchers defines legal ideology as a structural element of the legal system as a whole (along with the legal system of law and legal practice). The second one considers it already in the structure of legal consciousness (highlighting legal ideology and legal psychology in legal awareness).

[1] Halpin, 2006.
[2] Arvind, & Stirton, 2016.
[3] Shemshuchenko, 2009.
[4] Voplenko, 2000.
[5] Alekseev, 1981.

So, according to some authors, legal ideology is the idea of an ideal legal system, which changes depending on the realities of public life.[1] In another sense it is part of legal awareness along with legal psychology and legal behavioral factors.[2]

In modern scientific works, legal ideology is considered as a whole, having internal unity, created on the basis of philosophical or religious teachings, a mechanism for influencing the system of ideas on public, group and individual legal consciousness in order to legitimize (delegitimize) the system of positive law, legal practice, ensuring the unity and reproduction of the legal system by translating legal ideas into the normative attitudes of the addressee's consciousness and forming appropriate models of legal behavior.[3]

Now there is a tendency even to form the legal ideology of certain branches of law and discuss its impact on the legal systems of states and even on the legal system of international law.[4] This approach takes place, but as a more special case of the expression of ideology in law. We are more interested in analyzing legal ideology as a single functional complex of ideas, approaches, and theories that form the doctrinal basis for building a system of sources of law (the system of law) and their implementation in real legal actions (i.e., legal practice). In other words, in this scientific article legal ideology will be understood as a structural component of the legal system.

THE SECOND TOPIC: LEGAL IDEOLOGY AND ITS ROLE IN THE ABSTRACT MODEL OF THE LEGAL SYSTEM AND THE LEGAL SYSTEM OF CERTAIN STATES

[1] Lutskyi, 2014.
[2] *Ibid*.
[3] Mihaylov, 2017.
[4] Scott, 1994.

The legal system in the general theory of law is an existential personification of various legal phenomena, which, however, for systematization and ease of perception can be reproduced in the unity of its elements, which in the complex reflects not just a set of legal phenomena, but the place and role of each of them, functional relationships between individual elements, as well as within the entire legal system.

Legal reality is represented by a multi-factor, non-linear phenomenological picture, the change of vectors of which occurs in some places under the influence of even the slightest fluctuations in its components, most of which are mobile and relatively unstable, because the normative component and related legal practice are dynamic entities. Against this background, a certain stability of the legal system is determined by the legal ideology, which, although it goes a long way, but at the same time, is an objective constant of many legal phenomena that operate within individual states and supranational entities.

Paying tribute to all the fundamental research of legal ideology and the vast scientific heritage of specialists representing all social branches of knowledge without exception, and moving to the plane of interdisciplinary analysis, this component of legal reality remains almost immense for rational perception. In support of this, we can cite the apt expression of M. Kozyubra, who argues that

> *"law is such a complex, multi-colored, multi-faceted, multidimensional and multi-valued phenomenon, in which spiritual, cultural and ethical principles, domestic and international, civilizational and universal aspects, scientific truth and values of good and justice, achievements of legal theory and practical legal experience, legal ideals, institutional and normative education and legal relations are closely intertwined, it*

is simply not possible to squeeze all this into the framework of some universal definition".[1]

Guided by the above-mentioned, repeatedly tested thesis, the definition of law can only be approximate and corresponding to a certain social formation and historical stage of development, the aspect. This is compounded by the fact that, despite all the relativity of legal ideology, it is, nevertheless, the foundation of the entire legal system, consolidating at the doctrinal level, philosophical, historical, social, psychological and many other principles of law.[2]

Metaphysics and dialectics, rationalism and empiricism, naturalism and anthropology, historicism and realism, idealism and materialism found a response in legal doctrines, reproduced in the corresponding models of law.[3] In other words, any legal system is nothing more than an external basic model for the concept of law. And, unlike other (basic or derivative), rather mobile components of legal reality, legal ideology is a very stable entity that permeates the legal system "from top to bottom". It can be cultivated by the ruling elite, can be planted from the outside or go through a long difficult path of formation. But, what is most important, in a certain period of time it reflects the collective legal awareness of the population, their perception of the right and attitude to it. In the same plane are the conclusions of M. Tsymbalyuk, who, according to the definition of the concept of legal awareness, considers the dialectic of legal awareness and law, the dependence of its content on the concept of law, which is its basis.[4] But, starting from the above, we can go

[1] Koziubra, 2010.
[2] Mikhailina, 2018.
[3] Zaiets, 1997.
[4] Tsymbaliuk, 2004.

further, recognizing that not only legal awareness depends on the basic concept of law. Embodying ideology, legal awareness extrapolates it to all elements of the legal system, receives from them a "feedback" that, accumulating over time or exponentially can change the direction of even paradigm institutions.

Thus, it was revealed that the legal ideology can be recognized as the most stable element of the legal system, which causes its fairly long period of formation. Nevertheless, the rapid pace of modern society development and the globalization of all spheres of public life lead to the fact that even legal ideology can waver under such an onslaught and begin to show signs of internationalization.

THE THIRD TOPIC: GLOBALIZATION AND ITS IMPACT ON THE LEGAL IDEOLOGY INTERNATIONALIZATION

At the present stage of society's development, it becomes quite obvious that legal ideology can function according to its own laws, determined by internal and external factors. Internal factors include the political regime of a particular country, the peculiarities of the state mechanism functioning, the type of legal awareness that dominates in the society, and the ratio of the state and scientific components of the social system. The main external factor in this case can be called globalization processes, which are steadily gaining momentum around the world. At the present stage, globalization affects even the legal and state systems of those countries that have remained relatively isolated for a long time. Accordingly, an acute practical and doctrinal problem is the identification of patterns of legal ideology transformation processes under the influence of globalization. It is also problematic to maintain a balance between preserving the identity of the national legal ideology and

borrowing the characteristic features of the legal ideology of other legal systems.

In the light of the above, it would be worth paying close attention to the globalization processes in law. Although its scientific assessment is still extremely heterogeneous both in law and in other fields. “It was only a few decades ago that globalisation was held by many, even by some critics, to be an inevitable, unstoppable force”.[1] But some skeptics claim that “globalization has peaked, and there is a significant and underappreciated risk that the world will start to de-globalize in coming years”.[2] Of course, such risks always exist, but so far, reality, as well as statistics, proves that internationalization is only gaining momentum, despite the active and passive resistance of some states, communities and individuals. There are areas that are subject to globalization in the first place, but there are also more stable ones. Legal ideology can also be attributed to the latter, although even this phenomenon gradually lends itself to processes of interpenetration.

Sometimes internationalization is not evaluated correctly, so we can fully support the statement that “globalization also isn’t a static force. We associate globalization today with the shipping container, the 1950s invention that increased the efficiency and lowered the cost of the global trade in goods. Or with the outsourcing of jobs in advanced economies and the rebirth of great trading economies like China’s”.[3] It is worth noting that this is not the case at all. In contrast to calculable categories, changes in the law can occur for a long time imperceptibly, and become apparent only at the stage of their inevitability.

[1] Saval, 2017.
[2] Shearing, 2019.
[3] Donnan, & Leatherby, 2019.

"Globalization of law may be defined as the worldwide progression of transnational legal structures and discourses along the dimensions of extensity, intensity, velocity, and impact. We propose that a theory of the global penetration of law will require at least four elements – actors, mechanisms, power, and structures and arenas. ... We propose that the farther globalizing legal norms and practices are located from core local cultural institutions and beliefs, the less likely global norms will provoke explicit contestation and confrontation".[1]

This deep assessment of legal globalization is fully supported, but at the same time makes us think about the place of legal ideology in the four elements described. It is possible to find arguments in favor of at least two. Legal ideology can be considered as an arena in which all legal actions unfold, since it is initially the basis of all legal processes in society and the state. It creates the basis for understanding what the internal and external image of legal norms will be. However, it is worth noting that this approach will not be fully justified. The arena, as a rule, is faceless, while the legal ideology has a functional beginning. That is, it does not exist by itself, but as a description of the logical process of building all legal phenomena in a particular society. Thus, in order to fully understand the logic of the legislator, his goals, means, as well as the interests and motives of the recipients of legal norms, it is best to turn to the legal ideology. Legal ideology is a kind of matrix that fits all legal phenomena into the legal reality. It provides answers to the questions: why the content of legal norms is such; why a specific action is provided for a certain legal responsibility; how the Creator of legal norms perceives other participants in legal relations (whether they take into account their interests

[1] Halliday, & Osinsky, 2006.

or are guided more by the interests of the state); finally, how the recipients of legal norms relate to the legislator, the state, and the law as a social institution (which ultimately affects the motivation of their behavior). In connection with the mentioned activity component, legal ideology can be associated with the mechanism rather than with the arena of the law. So, imagine that this mechanism, this matrix, fails, which is what happens in connection with globalization. Legal processes lose their predictability because the very basis of their existence is violated. Even if the influence is positive, which is not uncommon in modern societies, it will always be a stressful situation for legal ideology. And the faster and deeper the changes, the more stress there will be. It should be recognized that the legal system is quite conservative and always naturally lags behind society. Some of the gaps in legal regulation are explained by the emergence of new relations that have not yet been laid down in law. While legal ideology is not just conservative, it creates a basis for the existence and functioning of law for years, and points to the fundamental "rules of the game" in the legal field.

Law has traditionally been the province of the nation state, whose courts and police enforce legal rules. By contrast, international law has been comparatively weak, with little effective enforcement powers. But globalization is changing the contours of law and creating new global legal institutions and norms.[1] But at present, almost all States are losing this prerogative. The law is still aimed at recipients within the state, but there are many spheres of life where the international or even supranational element is

[1] Globalization of Law. *Global Policy Forum*. Retrieved from www.globalpolicy.org/globalization/globalization-of-law.html.

decisive. "During the past several decades globalisation has affected many if not all areas of law to a striking extent".[1,2]

International law, trade law, international trade law, criminal law and other branches of law are also affected by globalization. Moving away from nearby and approaching the far has made the law as a global phenomenon.[3] And if this is more than obvious for commercial and contract law, the internationalization of public branches of law, including constitutional and criminal law, is truly surprising. Criminal law is directly related to state coercion, which means that it is most firmly tied to the system of values and capabilities of a particular state. But if criminal law is transformed under the influence of external factors, this is a consequence of changing the legal ideology itself. Ideology, in turn, is strongly influenced by globalization factors.

In particular, "criminal law is a system of the highest values and norms. In fact, when the criminal protection of legal values is raised in the form of criminal titles, the importance of these rules becomes increasingly apparent to everyone. The mission of criminal law becomes more important when linked with human values and global human rights because some of the values of the global human rights are also part of criminal law, and hence the protection of them, jointly in the age of globalization, has been assigned to both parts of the law.[4] But initially, these world values must penetrate into a specific system and at least gain a foothold there.

[1] Trubek, et al., 1994.
[2] Snyder, 2004.
[3] Shirin, & Abbas, 2019.
[4] *Ibid*.

The scientific and practice-oriented literature notes that "globalization demands a new kind of legal practitioner. The new-age lawyer, whether they be a corporate lawyer or criminal defense attorney, should be an industry expert or an authority on the law as specialized domains such as project finance ... The legal professionals who work for global clients must be able to conduct themselves in a foreign language and be well-versed with international norms and usages as the interface lawyers that were found in foreign desks of international law firms have become a relic of the past".[1] This means only one thing, that globalization completely changes the legal ideology, and through it not only legal norms, but also the order of their implementation (that is, the sphere of legal practice). Thus, lawyers are no longer fully "tied" to the national system of law, but are obliged to take into account at least the legislation of another legal system (or supranational rules of conduct), and as a maximum to understand the legal ideology of building another legal system and be ready to accept it.

This gives some researchers reason to talk about the international legal system. So, it is claimed "the ideology of international law does not deny that international politics mayinfluence the international legal system".[2] Although this approach raises some concerns, since the legal system (if we are not talking about its ideal model) is still a national phenomenon. In the "international legal system", its three basic components (legal ideology, system of law, and legal practice) are lost and not fully visualized. Therefore, in our opinion, the term international legal reality or international legal landscape would be more appropriate.

[1] Globalization's Effect on the Legal Industry, 2018.
[2] Scott, 1994.

Some researchers go even further and suggest the concept of global law, rather than international law, for discussion.

> *"By transforming borders and de-territorializing behavior, globalization raises a host of questions and concerns fundamental to law. Many commentators argue that international law and national law are no longer adequate categories for the totality of "law" today, and offer an array of new concepts such as transnational law, global law, global legal pluralism, etc., to help us understand law in the global space".*[1]

And this position is recognized as fully justified, since "global law" (in contrast to the international legal system) provides for a movement towards a common legal ideology based on the convergence of basic values and methods of influence.

CONCLUSIONS

Legal ideology is the basis of the entire legal system, consolidating at the doctrinal level philosophical, historical, social, psychological, and many other principles of law. Any legal system is nothing more than an external basic model for the concept of law. And, unlike other (basic or derivative), rather mobile components of legal reality, legal ideology is a very stable entity that permeates the legal system "from top to bottom". But, what is most important, in a certain period of time it reflects the collective legal awareness of the population, their perception of the right and attitude to it. Embodying legal ideology, legal awareness extrapolates it to all elements of the legal

[1] Garcia, 2016.

system, receives from them a "feedback" that, accumulating over time or exponentially can change the direction of even paradigm institutions.

It can be concluded that the legal ideology is the most stable component of the legal system, the reverse side of which is the longest period of its formation. But, given the globalization processes, even this is not so clear. And even legal ideology undergoes changes under the influence of external legal, social or state factors.

Only integrative legal awareness, which forms an integrative legal understanding, can ensure the progress of modern society. Against the background of general humanization, the impulses of natural law somehow penetrate even into those systems of law and philosophical and legal teachings, for which this was previously completely unusual and, moreover, unacceptable. This logically fits into the thesis of accelerating convergent processes in law and modifying the legal consciousness in this regard. Thus, the processes of polarization of philosophical and legal trends at this stage can be considered complete and note the activation of integration processes, which is not just reflected in the legal consciousness, but occurs through it.

The existence of law, first of all, finds its manifestation in the legal consciousness in all its specificity, or, conversely, integrativity (which is typical for the modern period of development of society). Thus, the integrative (pluralistic) approach to legal ideology is determined by the actual transformations of legal consciousness and the correlation in its plane of all components of the national legal system, similar components of the legal systems of other states, the philosophical foundations of the ontology of society, law and the state, as well as a set of non-legal factors.

So, the legal ideology can be recognized as the most stable element of the legal system, which causes its fairly long period of formation. Nevertheless,

the rapid pace of modern society development and the globalization of all spheres of public life lead to the fact that even legal ideology can waver under such an onslaught and begin to show signs of internationalization.

The paper supports and further substantiates the concept of global law, since "global law" (in contrast to the international legal system) provides for a movement towards a common legal ideology based on the convergence of basic values and methods of influence.

The most acceptable model of global legal ideology can be recognized as borrowing positive legal phenomena, but not giving in to the violation of basic human rights in favor of globalization. At the present stage, it is possible to observe how societies based on humanistic legal ideology lose out to traditional societies and are sometimes powerless to migrate. This approach destroys the very idea of an open, multicultural society and causes skepticism about the possibility of developing a global legal ideology. While the observance of a simple basic principle: the freedom of one person ends where the freedom of another begins, – it may well create a foundation for legal ideology in a global sense.

All of the above makes it possible to draw a conclusion about legal ideology as a phenomenon subject to both cybernetic and synergistic laws. In particular, globalization affects the legal ideology from the outside, but it also transforms the system from the inside. Legal ideology gradually “absorbs” phenomena that were initially perceived as foreign. But the problem is that both positive and negative aspects are integrated into the legal ideology. Moreover, some negative phenomena tend to be perceived by society as positive or cause negative consequences later, if this is not taken into account in the future, and measures are not taken to minimize them. This will only

lead to the fact that without a "positive balance", the construction of a global legal reality will fail.

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EDUCATIVE FUNCTION OF LAW: MODERN CHALLENGES AND PROSPECTS

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Abstract

Problem statement of an educative function of law investigation is connected with its topicality in conditions of modern challenges in the globalized world and the practical need to suggest the prospectives of its further development and improvement. Purpose is to determine prospective directions of the development and improvement of an educative function of law under modern challenges and conditions. The study concluded that perspective directions of an educative function of law improvement and further development it is

possible to divide into two directions. “The general increase of legal knowledge in society” may be implemented by the increase of mastering of jurisprudence in primary, secondary, high, graduate and andragogic education according to the renewing of state’s educational programs on the level of law. “The improvement and further development of effective, qualitative and competitive educational training of future specialists in the sphere of jurisprudence” requires the transformation of traditional law education into modern interdisciplinary polyculture innovative legal education as the standard of the modern reality.

Keywords: function of law, educative function of law, legal consciousness, legal culture, modern legal education, polyculture legal education.

INTRODUCTION

Scientific, Practical Problems.

Problem statement of an educative function of law investigation is connected with its topicality in conditions of modern challenges in the globalized world and the practical need to suggest the prospectives of its further development and improvement. Cognition of significant issues of an educative function of law in conditions of global changes, social transformations and modern challenges to form legally conscious and cultured civil society is still valuable for juridical science and practice. Even in the era of total informatization general and special educational influence of a state does not lose its significance in the improvement of present and formation of future generations. That is why the scientific research of the mentioned above is still interesting and debatable for specialists in different spheres, including lawyers, philologists, sociologists, and even psychologists.

The mentioned juridical function became a subject of scientific interest in different countries of the world. In accordance with David A. Funk, modern jurisprudential opinion is by no means unanimous concerning the educational possibilities of law.[1] Olga Skakun connected this function with juridical education, growing of general respect to law and formation of legal culture of an individual and a society.[2] Svetlana Levina paid her attention to a conceptual base and place of the mentioned function in a system of juridical functions, particularities of its mechanism and issues of its implementation.[3] This researcher with Valeriy Bayev investigated an educative function of law in a structure of legal education, made the analysis of its specific influence on future specialists in the sphere of law and gave a rather valuable contribution to the understanding of legal nihilism in modern society.[4]

At the same time, the role of an educative function of law in modern conditions of social reality is still not investigated enough. Thus, it is possible to say that nowadays this question is still opened that explains the topicality of this article.

Purpose of the Study.

Purpose of the article is to determine prospective directions of the development and improvement of an educative function of law under modern challenges and conditions. To achieve this aim it is needed to perform the following *tasks:* 1) to consider a concept, attributes, and content of an educative function of law, and determine its place in a system of juridical functions; 2) to analyze a mechanism of an educative function of law in

[1] David, 1972, p. 292.
[2] Skakun, 2001, p. 225, 226.
[3] Levina, 2010, p. 273.
[4] Bayev, Levina, 2011, p. 8-12.

modern conditions; 3) to investigate particularities and issues of the effective educational function's of law implementation under modern challenges, and suggest prospective directions of its improvement and further development.

Object and Subject of the Study.

The mentioned tasks are to investigate a subject of the article that is an educative function of law in modern conditions of social development taking into account the legally regulated ideological-cultured sphere of its functioning and implementation that is an object of the paper.

Research Methodology and Materials.

To achieve the aim of the article, general-scientific and special-legal *methods* of cognition have been used. By using the dialectical method, the current conceptual framework and issues of an educative function of law have been formulated. The formal-dogmatic method contributed to the development of the author's explanation of the current state, issues, further development, and improvement of an educative function of law. The formal-legal method gave the opportunity to suggest the directions of an educative function of law development and improvement in modern conditions.

RESEARCH RESULTS

Investigating a concept of an educative function of law, we have to admit that it is directly connected with functions of law and the understanding of a term "educative" in relation to the mentioned functions of such a social regulator as law. Thus, we have to analyze the conceptual understanding of an educative function of law as a phenomenon of reality in its connection and interrelation with the system of juridical functions and an educative policy of a country as a method of general and individual influence on society's formation. At the same time, legal thinking concerning this function includes the analysis of its attributes, mechanism of its implementation, some

particularities of its functioning, on the base of which it is predicted to suggest the direction of its improvement and further development under the modern conditions and challenges.

THE FIRST TOPIC: EDUCATIVE FUNCTION OF LAW: CURRENT STATE AND ISSUES

Performing of state's tasks is to form a system where all of its elements improve such a state in different directions of its development. The essential element of this system belongs to society. Its nature determines state policy in its forming. On the one hand, a society forms a state by different forms like referenda and elections, etc. On the other hand, a state has mechanisms to form, change and even grow a society that it needs. Of course, in reality, both of the mentioned above processes operate together and at the same time, making their unvisible internal inter influence that is expressed in external results and consequences. Today's society develops under the world's challenges of different directions and content in conditions of global changes, economic crises, and spiritual searchings of a person and mankind. Nowadays, a society by its nature is mostly multicultural, informataized and internally transformed by the permanent influence of massive culture. It is rather difficult to rule such a society without the understanding of the mentioned above. More else, we think, that it is impossible to improve and develop such a society via the state's ruling not paying the proper attention to its internally changed essential values that determine its further existence. At the same time, among effective instruments of society's growing, we still see a state as an organization of public power on a certain territory that is capable to regulate and protect its inhabitance by the existed legal, economic, political, social and material mechanisms. We believe that even in the era of

global digital transformations of different directions and nature, diversity of religions and believes a state has its enough power and ability to be an ideological compass for a modern society. Just the effective performing of this task may make stability in society's existence and development in the direction of respect and internal support of the state's policy, values, and further development. More else, we think that a good state's policy in the achievement of this task may never be less important than improving a state's economy. Just ideologically directed and grouped society is capable to be different by its needs, values, and nature. We are talking about a civil society that is a generator of its country's economic development not because it is just declared policy of its state but an internal ideological principle of its future existence on the base of the legitimate type of its conduct within the territorial boundaries of such a state. That is why we are sure that nowadays a state has to play a leading role in the mentioned above to educate its society by the implementation of an educative function of law under a proper state policy in this issue. The mentioned above is still an open question in jurisprudence that originates the need for its scientific investigation to disclose a conceptual base, attributive features and the role of an educative function of law in modern times.

SECTION 1.1. A PLACE AND SIGNIFICANCE OF AN EDUCATIVE FUNCTION OF LAW IN A SYSTEM OF JURIDICAL FUNCTIONS IN MODERN CONDITIONS

To reveal the importance of an educative function of law in a system of juridical function, it is needed to understand such a system, its elements, and the role of each of them. First of all, it is important to define a function of law. We have to admit that this concept has a dichotomous nature. On the one

hand, it describes the social significance and the value of law as a social phenomenon. On the other hand, it determines the main directions of the law's influence on social relations and its individuals. There are different points of view concerning the structural content of juridical functions and their division in accordance with different criteria of their classification. According to the legal influence on social relations, functions of law are divided into two groups that are general-social and special-legal. In theory of law special-legal or so-called special-social functions are divided into regulative and protective. At the same time, general-social functions of law are represented differently by different scientists in the field of law. We support a well-known approach in theory of law to fill them by political, economical and social-cultural functions.

In our point of view, an educative function of law is included in the social-cultural subtype of juridical functions. At the same time, its functioning has an influence on social-cultural relations and other types of relations. In this connection analyzing general-social functions of law, Oksana Myronets rightfully admitted that they should be understood as its regulative and protective directions of influence on social relations in a whole and their economic, political, social-cultural spheres in particular in accordance with economical-political level, ethical and moral standards and norms that exist on a certain stage of a society's historical development.[1] On this base, we have to conclude that an educative function of law is performed by regulative and protective legal rules that regulate, protect legal relations but have generally educative influence on their participants at the same time. This peculiarity explains the special place of an educative function of law in the

[1] Myronets, 2019, p. 9.

system of juridical functions and its significant role that is expressed in its general constant influence on all spheres of legal regulation. As Svetlana Levina emphasizes, although the educational function of law is not the main function of law, it has a significant role in the system of functions of law, in the general mechanism of legal influence.[1]

Modern conditions of state and social development and transformation require adequate and quick juridical reflection. At the same time, ways and forms of the mentioned reaction of law on the mentioned changes always have to take into account the existence of permanent educative influence of law that is made unconsciously by any legal rule on every member of social relations. That is why every legal rule to be effective has to be educative enough to satisfy such a social need.

Part 1.1.1. Traditional and Modern Conceptual Understanding of an Educative Function of Law

Traditionally this function of law is understood as generally-legal influence on a spiritual sphere and brining up the respect to law.[2] In this regard, David A. Funk defined the seventh major function of law that is to serve as an instrument of conscious change, either of society or of particular individuals in that society.[3] We have to support their points of view and admit that traditionally an educative function of law was an instrument of state and law influence on participants of social relations. I.e. its concept will always include the so-called measure of educative influence on their will and consciousness to form a legal type of their conduct.

[1] Levina, 2010, p. 274.
[2] Skakun, 2001, p. 226.
[3] David, 1972, p. 288.

At the same time, this function in the modern stage of the world's development has to be understood taking into account such changes and new conditions. According to Valeriy Bayev and Svetlana Levina, its conceptual basis is at the intersection of the research fields of Theory of State and Law, Pedagogy, Psychology, Cultural studies, Sociology, Philosophy, etc.[1] That is why, in conditions of new challenges, global changes and social transformations, in our point of view, a modern concept of an educative function of law has to be revealed as the regulative-protective influence of law on subjects of social relations with the aim to form a deep level of their legal consciousness and culture and internally conscious orientation on legitimate type of their conduct to develop, improve and stabilize the choice of lawful behavior of an individual and society.

PART 1.1.2. Significant Attirbutive Characteristcts of an Educative Function of Law

Analyzing an educative function of law, it is quite important to determine its attributes because they reveal its content. Firstly, it has generally-individual nature that describes its educative influence on society in general as an ideological instrument and on a separate individual to form his/her own internal conscious arrangements on legitimate type of legal conduct. Secondly, an educative function of law is directly and indirectly but the ideology of a state that is accepted and even it is possible to say approved by it to develop a country's political, economic and socio-cultural direction of its present and future existence. In religious and secular society just the proper implementation of an educative function of law allows to stable a society in its critical periods under transforming challenges and changes. In this regard,

[1] Bayev, Levina, 2011, p. 9.

we may define the third attribute of this function that is in its potential adaptive ability to change individuals' type of thinking, their needs and even expectations from their country and law to function effectively in legal and state system where they live and perform their daily life activity.

At the same time, by changing separate individuals by the use of the educative function of law a state may change the whole society step by step or even immediately. Of course, we prefer the first type of change because they are less economically traumatic. We think that revolutionary changes may be accepted just in conditions of an immediate reaction on crimes against humanity where the educative function of the law expresses its general humanistic ideological character. But in relatively stable conditions of state's development just systematical and gradual changes may bring to the effective result that, of course, maybe achieved by the educative function of law.

In this regard, we support David A. Funk that defined it as the change of individuals and society and admited that in the present state of knowledge, it may be said that one of the major functions of law is to change society non-systemically, and to cause deviant individuals to conform to ends chosen by certain groups or individuals in society.[1]

THE SECOND TOPIC: EDUCATIVE FUNCTION OF LAW: FUTURE DEVELOPMENT AND IMPROVEMENT

The future development and improvement of the mentioned legal function may be understood just after analyzing its present issues of functioning and implementation. It is possible to divide them into internal and external that

[1] David, 1972, p. 288, 293.

express its essential properties and potential possibilities. Internal issues of education function of law are connected with the internal personal possibilities and abilities of a person to change and adapt his/her level of legal consciousness and culture. External ones depend on a socio-economical and political state of a country where such a person lives as in the environment to bring up a separate individual and a whole society with a high level of legal culture and consciousness.

In this regard, David A. Funk emphesises that in order for law to be used as an instrument of conscious social change, some individual, individuals, or group must desire the change and use law as an instrument to effect that change. In a democracy, the persons consciously desiring change may be a majority of the politically active people or an elite group of opinion leaders. In an authoritarian government, the primary power-holder or power-holders may be the persons desiring change.[1]

In spite of a state's type and its political regime, the main task of an educative function of law is to bring up high legal consciousness and form stimulus of citizens' legitimate conduct.[2]

SECTION 2.1. MODERN CHALLENGES TO AN EDUCATIVE FUNCTION OF LAW IN CONDITIONS OF SOCIAL GLOBAL TRANSFORMATIONS

It is needed to take into account that today's world is global by its nature; a today's society is mucticultural and transformed in its adaptive possibilities to economical, political and social-cultural changes, modern challenges of its

[1] David, 1972. p. 288.
[2] Levina, 2010, p. 273.

excistence in digital era that provided total informatiozation and progressive influence of massive culture values and standards.

We agree with Mykola Holovatyi who analysing multiculturalism as a means of nations and countries interethnic unity achieving, concludes: a) it is a specific, historically objective phenomenon of societal life, which ensure real social advancement; b) multiculturalism policy should be secured through a political dialogue among countries and nations; c) in multicultural, multiethnic societies, a state ideology is the unifying factor of the entire society that is based on the principles of multiculturalism, democracy, and humanism.[1]

Modern global trends and economic reality changed the look of the world, the contents of societies that are full of different cultures, priorities, and values. To implement the policy of human rights protection and prevention of their violations, every state has to pay its attention to the education of such a type of society according to its multicultural needs.[2] Each state should form a sufficient effective mechanism for the implementation and guarantee of this right at the national level to all its citizens without any discrimination.[3]

To our mind, the multicultural nature of a modern society determines the directions and content of its educative influence. In this regard, it has to include traditional and innovative measures of the influence. But it is needed to admit that even traditional ways to bring up a needed type of an individual and a society have to be transformed under the needs of multicultural nature and digital possibilities of a separate individual and a society as a whole. The essence of such measures may be understood by the investigation of a

[1] Holovatyi, 2014, p. 18.
[2] Myronets, Burdin, Tsukan, Nesteriak, 2019, p. 584.
[3] Pyvovar, 2018, p. 8395.

mechanist of the educative function of law implementation that will be done in the next subsection. At the same time, we have to say that a modern stage of social development has already generated a new requirement for an educated person that is multidisciplinary by its nature. We are talking about multi nature of a modern education that has to include knowledge from a specialty, knowledge of several (at least two) languages as a must, real ability to use digital technologies (at least basic) and internally formed conscious readiness to multicultural communication that may include different religion, ethnic, morality, and habits nature.

Under the mentioned above, an educative function of law in its understanding as the right upbringing of every separate individual leads to the creation of a cultural, socially active and law-abiding society.[1]

PART 2.1.1. Theoretical Understanding of a Mechanism of an Educative Function of Law Implementation

A mechanism of an educative function of law influence is connected with a mechanism of an educative influence of law that is concentrated in legal education. We have to admit that it is not just to grow a lawyer with the specific type of juridical knowledge but bring up a highly educated person with some knowledge of juridical nature to regulate own behavior and protect his/her own interests and rights. Thus, such a person is a basic cell of a society where legal knowledge is implemented to legal consciousness, legal culture and leads to the conscious legitimate choice of own legal conduct.

[1] Levina, 2010, p. 277.

As Olga Skakun correctly defined, a mechanism of legal education is the procedure for transferring legal ideas and guidelines contained in the public consciousness into the minds of the educated (individuals, public groups).[1]

Functional elements of such a mechanism of legal education include: 1) public legal consciousness; 2) a system of rules of law; 3) ways and means of legal education; 4) the consciousness of an educated person, who need his/her enrichment by the legal ideas and guidelines contained in the public consciousness.[2]

The effectiveness of the mentioned mechanism is described in the level of legal consciousness and legal culture of an individual and a society. That is why it is possible to say that the level of its implementation depends on the effectiveness of its means.

Among them it is needed to define the following: 1) legal education; 2) legal propaganda; 3) legal practice of state bodies and other organizations; 3) lawful behavior of citizens; 4) self-education.[3]

In our point of view, the role of legal education in the meaning of knowledge in the sphere of jurisprudence for every individual for the regulation of own conduct and protection of own rights, interests and freedoms is significant in our today's society. We are sure that the understanding of the values of legal education in conditions of modern social reality is rather wider than just special education of lawyers. According to Valeriy Bayev and Svetlana Levina, legal education is a holistic upbringing of a person, his/her needs, morality, intellect, will.[4]

[1] Skakun, 2001, p. 483.
[2] Levina, 2010, p. 274; Skakun, 2001, p. 483.
[3] Skakun, 2001, p. 482.
[4] Bayev, Levina, 2011, p. 11.

We think that legal propaganda, on the one hand, is a style of social life that may be provided in a country by a system of primary, secondary, high, graduate and even andragogic education. On the other hand, it is the reaction of bodies of state power on offences where they are not to hide offenders by using the corruptive mechanisms but bring them to legal liability in spite of the legal and social status of such an offender. By using mass media legal propaganda may become an effective instrument of a general educative instrument in a state.

Concerning the third element, we may admit the possibility of its efficiency just in conditions of legitimate conduct of public authorities and other organizations that use law in their activity. It is described in the educative influence of police, courts and judges, prosecutors, lawyers and even heads of legal entities when they implement the law by using or applying legal rules, performing of their duties or observance of prohibitions.

Lawful conduct of citizens, foreigners or even people without citizenship, in our opinion, depends on their legal consciousness and legal culture. Thus, the educative function of law in this regard has been already investigated above.

Special attention we would like to pay to self-education in the sphere of law. Modern life requires constant growth of legal knowledge for personal use and protection in conditions of global changes and challenges. Our today's reality dictates the urgent need for self-forming of legal competence not even for special achievements in the juridical sphere but ordinary safety under the changeability of law, the general increase of criminality and presence of crises of different nature. "Legal competence of an individual is the ability of an individual to satisfy his/her own cultural needs through self-development and self-education; the ability to independently recognize and

master the peculiarities of norms of behavior ... understanding the need for legitimate behavior ... ."[1]

PART 2.1.2. The Directions of an Educational Function of Law Effective Functioning in Modern Conditions

On the basis of the mentioned above, in our opinion, the prospects of an educative function of law future improvement it is possible to divide into several directions. The first one is connected with the general increase in legal knowledge in society. The second one is connected with the improvement and further development of effective, qualitative and competitive educational training of future specialists in the sphere of jurisprudence.

Speaking about the first direction, we have to admit that the need for general legal knowledge for daily use is out of the debate. The modern global world puts a person in conditions of fast reaction on changes and challenges to survive and keep his/her safety. We are sure that the legal education of an individual is his/her internal mentally-legal state in which he/she takes a decision concerning legal or illegal types of his/her conduct. The quality of such a state depends on the level of his/her legal consciousness and culture that are results of internal acceptance of some knowledge of legal nature. Thus, general legal education as a transfer of legal knowledge to be accepted by an ordinary individual is not just important but significant for the legal existence and lawful functioning of such an individual. That is why we are sure of the importance of the general legal education of individuals.

In this respect, according to Valeriy Bayev and Svetlana Levina, the mission of legal education should be to eradicate legal nihilism and increase the level of legal culture of an individual by weakening the influence of a

[1] *Ibid.*, p. 10.

local moral culture, which plays the role of a leading social regulator opposing the law.[1]

The growing up of the society with a legitimate type of legal conduct ideologically oriented on disputes resolution by peaceful means within the law is a primary function of a modern state. We suppose the implementation of this task may be effective just in conditions of polyculture education.[2]

Analyzing the overcoming of the legal nihilism of youth, Valeriy Bayev and Svetlana Levina admitted that it is important to actualize the role of educational institutions and impose increased requirements on the discipline of students for their moral education and their legal competence.[3]

We agree with the mentioned above and may add that the education has to be performed in a polyculture educational environment because it "may provide ethnic tolerance in the form of conscious tolerance to the individual differences of other people, religions, beliefs, cultures, worldviews, lifestyles, values; it leads to the development of internal focus not on confrontation and hostility, but on a constructive dialogue of cultures, ethnic groups, mutual understanding, and assistance."[4]

Speaking about the second direction, we have to admit the multi direct need of juridical education change under modern conditions. It includes internal and external sub directions and is to change an education institution, a law teacher and even his/her teaching methods of law because the look and requirements of a modern law student have been changed in the digital era.

[1] *Ibid*.
[2] Myronets, Burdin, Tsukan, Nesteriak, 2019, p. 584.
[3] Bayev, Levina, 2011, p. 10.
[4] Myronets, Burdin, Tsukan, Nesteriak, 2019, p. 585.

Gerald F. Hess, Michael Hunter Schwartz, Nancy Levit defined fifty ways to promote teaching and learning and organized their ideas into five categories, presented in the following order: 1) institutional and administrative support; 2) adjunct professor support; 3) feedback from students; 4) collaborations with colleagues; and 5) self-assessment, reflection, and development.[1]

As Nancy P. Johnson admitted, many law schools are undergoing curricular reform, which may or may not include changes in teaching legal research. Many challenges remain for teachers of legal research. As students progress through law school and become new lawyers their research skills become more sophisticated and build on the foundation given to them during their first-year course.[2]

Law education possesses the tools necessary to create outstanding classroom experiences. It remains for law to incorporate these borrowed education strategies mindfully into legal education. To do so will enhance and improve the teaching and learning process and build law education into a training ground for the finest critical-thinking practitioners.[3]

At the same time, Gerald F. Hess, Michael Hunter Schwartz, Nancy Levit admitte that law schools can implement a wide variety of institutional and administrative support approaches to improve teaching and learning. These strategies fit into six categories: 1) faculty hiring, evaluation, and compensation policies; 2) support for faculty growth as teachers; 3) support for the scholarship of teaching and learning; 4) rewards for extraordinary

[1] Gerald, Schwartz, Levit, 2018, p. 697.
[2] Johnson, 2009, p. 40.
[3] Borman, Haras, 2019, p. 391.

teaching accomplishments; 5) scheduling support; and 6) other institutional or administrative manifestations of support for teaching and learning.[1]

On the base of the mentioned above, not analyzing the details of law education changes, we may emphasize that nowadays to implement an educative function of law, the modern law education has to be transformed under requirements and conditions of reality to train highly qualified jurists that may solve practical issues in globally changed digital society with the use of an interdisciplinary approach.

CONCLUSIONS

In conditions of global changes and social transformations under modern challenges, the role of an educative function of law is quite significant. The perspective directions of its future development and improvement are based on the following results.

1. As a direction of an educative influence on individuals and a society in a whole, an educative function of law has the following attributive characteristics: 1) generally-individual nature that describes its educative influence on a society and an individual; 2) accepted and approved ideology of a state; 3) potential adaptive ability to change individuals' type of thinking, their needs, and expectations from their country and law.

2. In a system of juridical functions an educative function of law is included to its general-social ones but it is implemented as a regulative and protective function of law in the social-cultural sphere.

[1] Gerald, Schwartz, Levit, 2018.

3. In modern conditions a mechanism of an educative function of law includes: 1) public legal consciousness; 2) a system of legal norms; 3) ways and means of legal education; 4) the consciousness of an educated person.

4. Particularities and issues of the effective educational function of law implementation under modern challenges are based on the lack of legal consciousness and legal culture of individuals, public officers and even a great part of a whole society that is multicultural by its nature.

5. Prospective directions of an educative function of law improvement and further development it is possible to divide into two main directions:

- the general increase of legal knowledge in society;

- the improvement and further development of effective, qualitative and competitive educational training of future specialists in the sphere of jurisprudence.

In our point of view, both of them have to be investigated by juridical science with the next suggestions to improve the legislation on practical educative influence on individuals and our society.

We think that the first direction may be implemented by the increase of mastering of jurisprudence in primary, secondary, high, graduate and andragogic education according to the renewing of state's educational programs on the level of law.

The implementation of the second direction, to our mind, requires the transformation of traditional law education into modern juridical education. With this intention, interdisciplinary polyculture innovative legal education as the standard of modern reality needs its further scientific investigation, appropriate legislative changes with the next practical consequences of effective and qualitative nature.

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THE NEWEST APPROACH TO THE SYSTEM OF GENERAL SOCIAL GUARANTEES OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

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Abstract

It is known that under the conditions of instability in the case of changing the vectors of political development of Ukraine, the demand of times is to rethink social standards in the modern society, and therefore it requires updating knowledge and the mechanism of providing general social guarantees of the status of the Ukrainian people. The purpose of the article is to systematize modern knowledge about the general social guarantees of the constitutional and legal status of the Ukrainian people. For this purpose, the classification of these guarantees is carried out in the work, the features are defined and new definitions of the concepts of varieties of these guarantees are

formulated. The dialectical connection of general social guarantees and special legal guarantees in the formation of the constitutional and legal status of the Ukrainian people is shown. One maintains the position that it is the mixed type of economic system of the state that is optimal for providing the socio-economic guarantees of the constitutional and legal status of the Ukrainian people. The obtained results will help to further identifying the drawbacks of the state and legal mechanism of providing universal social guarantees of the constitutional and legal status of the Ukrainian people and to find ways of their solution.

Keywords: constitutional and legal status, general social guarantees, socio-political guarantees, socio-economic guarantees, socio-cultural guarantees, Ukrainian people.

INTRODUCTION

Scientific, Practical Problems.

Under the current conditions of globalization and deepening integration ties of Ukraine with other countries, international state entities and influential world organizations, the Ukrainian people are influenced by the various factors that do not always meet the needs and interests of the majority or certain population groups, including citizens of Ukraine, who are abroad. In such periods of social changes and transformations, the preservation of the constitutional and legal status of the Ukrainian people is a top priority for the state. In general, there are good reasons to recognize that guaranteeing the constitutional and legal status of the Ukrainian people is an important task of the state and local self-government and an actual direction of development of the national legal system. After all, for the further development and improvement of the national society, the state, the law and other social

institutions, the public authorities should place the status of the Ukrainian people at the center of state policy.

One of the instruments for achieving the above-mentioned is the general social guarantees that the state should apply to its citizens. However, it is known that under the conditions of instability in the case of changing the vectors of political development of Ukraine, the demand of times is to rethink social standards in the modern society, and therefore it requires updating knowledge and the mechanism of providing general social guarantees of the status of the Ukrainian people. Therefore, in spite of the rather wide range of scientific works that contain scientific achievements in this field (for example, K. Babenko, Yu. Barabash, L. Kryvenko, A. Kolodiia, V. Pohorilko, A. Selivanov, Y. Todyka, A. Frantsuz, Yu. Shemchushenko etc.), the above-mentioned confirms that there is the need to develop new knowledge, including existing experiences.

Purpose of the Study.

The purpose of the article is to systematize modern knowledge about the general social guarantees of the constitutional and legal status of the Ukrainian people. For this purpose, the classification of these guarantees is carried out in the work, the features are defined and new definitions of the concepts of varieties of these guarantees are formulated.

The object of the research is the field of constitutionalism in Ukraine. *The subject of the research* is the general social guarantees of the constitutional and legal status of the Ukrainian people, theoretical aspects and the mechanism of their formation and provision.

Research Methods.

Research tools are general scientific methods of cognition (analysis, synthesis, generalization, comparison, etc.), which, in combination with

special legal methods, contributed to the achieving of the goal of the research, and the main approach became a gnoseological approach. Thus, the formal and logical method was used while studying the concepts of "social and economic guarantees", "socio-political guarantees", "social and cultural guarantees", etc. The use of the formal-legal method facilitated the analysis of the current constitutional legislation of Ukraine, as well as the development of recommendations for improving the theoretical basis for further legislative changes. The system and structural method allowed to consider the content of general social guarantees of the constitutional and legal status of the Ukrainian people, and the comparative and legal method was applied in comparing the types of guarantees of this status.

RESULTS AND DISCUSSION

THE FIRST TOPIC: CONCEPTS AND FEATURES OF GENERAL SOCIAL GUARANTEES OF THE UKRAINIAN PEOPLE

The purpose of guarantees, and above all social ones, is to provide the most favorable conditions for the realization of the constitutional and legal status of the Ukrainian people. At the same time, it is necessary to realize that guarantees are a means that provides a transition from the possibilities provided by regulatory legal acts to the current reality. International and domestic experience shows that the effectiveness of guarantees depends on the level of development of civil society, democratic, social, rule of law state, the state of the economy, availability of democratic institutions, actuality of the political system of society, functioning of perfect law and legislation, level of legal consciousness, legal culture of the population, etc. And the

guarantees themselves, in order to be effective, shall be a system of agreed conditions, means and methods that ensure the actual implementation and comprehensive protection of the constitutional and legal status of the Ukrainian people.

Thus, there are good reasons to claim that generally social guarantees are not aimed at providing a specific sphere of public life, but they have a positive impact and contribute to the realization of legal phenomena in any public relations, including elements of the constitutional and legal status of the Ukrainian people.

Considering all the above-mentioned, it can be claimed that *the general social guarantees of the constitutional and legal status of the Ukrainian people is a system of conditions, means and ways of ensuring the legal position of the Ukrainian people in the national society and state, among other nations, foreign societies and states, international associations, which are operating in the fields of politics, economics and cultural life.*

Hereafter we will focus on the features of this concept. This definition implies the following characteristics of the general social guarantees of the constitutional and legal status of the Ukrainian people:

1) it is a system of conditions. With regard to this characteristic, we would like to draw your attention to the fact that, under the condition, one understands a certain real circumstance, rules, regulations that make it possible to implement, establish, create and operate something or contribute to something.[1] That is, it is such a system of circumstances, rules, regulations that ensure the primary and systemically important legal position of the

[1] Academic Interpretative Dictionary, 1979, p. 441.

Ukrainian people in the national society and the state, among other peoples, foreign societies and states, international associations;

2) it is a system of means. In this case, the means is a certain technique, a special action, tool that allow you to do something, to achieve something;[1]

3) it is a system of methods. It is appropriate to point out that a method is a certain action (sequence of actions), a technique or a system of techniques that enables to do something, accomplish something, achieve something.[2] In this regard, it should be acknowledged that the means and methods, as components of the general social guarantees of the constitutional and legal status of the Ukrainian people, are very closely interconnected, since both are interpreted as a certain technique, an action aimed at achieving the projected result. At the same time, the analysis of the available definitions of means and methods shows that the latter are characterized by greater consistency and systematicity;

4) the conditions, means and methods, in other words, guarantees exist to ensure the legal position of the Ukrainian people in the national society and the state, among other nations, foreign societies and states, international associations. Specifying this characteristic, it is necessary to emphasize that ensuring the legal status of the Ukrainian people is considered one of the broadest categories of this conceptual and categorical series. Ensuring the constitutional and legal status of the Ukrainian people, from our point of view, includes activities aimed at its approval, arrangement of conditions, realization, security, protection and restoration of primary quality in case of damage. *Confirmation* of the constitutional and legal status of the Ukrainian

[1] Academic Interpretative Dictionary, 1973, p. 307.
[2] Legal Encyclopedia, 2003.

people is its consolidation, regulation of such status in the system of regulatory and legal and other legal acts. Under *the arrangement of conditions*, as a component of ensuring the constitutional and legal status of the Ukrainian people, it is necessary to consider the formation of the most favorable atmosphere for implementation, not only in the political system, but also in the economic and cultural ones, for its full, actual and real implementation. Such conditions may be recognized the following ones: civil society, democracy, sovereignty, the rule of law state, the welfare state, national property, freedom of creativity, etc. *Implementation*, as a component of ensuring the constitutional and legal status of the Ukrainian people, is its direct actual implementation in public and social relations. For example, in the process of elections, referenda, public debates on constitutional projects, public law-making initiatives, etc. *Security* of the constitutional and legal status of the Ukrainian people is an activity aimed at removing obstacles to its implementation, combating violations of the elements of status and, above all, the rights and duties of the Ukrainian people. The security of the constitutional and legal status of the Ukrainian people is carried out in the form of prevention, warning, denial of possible violations. *Protection* of the constitutional and legal status of the Ukrainian people takes place in cases of its violation and foresees the provision of adequate repudiation, removal of something that violates the sovereignty of the Ukrainian people, territorial integrity of Ukraine. Effective protection always requires an adequate response to the violation. That is why part 1 of Article 17 of the Constitution of Ukraine provides that "Protection of the sovereignty and territorial integrity of Ukraine, ensuring its economic and information security are the most important functions of the state, the cause of the entire Ukrainian people", and part 2 "The defence of Ukraine and protection of its sovereignty,

territorial integrity and inviolability shall be entrusted to the Armed Forces of Ukraine".[1] *Reproduction* of the constitutional and legal status of the Ukrainian people is the restoration of its primary quality, full capacity (in theoretical and practical terms) to satisfy the needs and interests of the Ukrainian people in all spheres of life;

5) conditions, means and methods, that is guarantees are functioning in the sphere of politics, economy and cultural life, that is in the most important spheres of life of society and this is certainly the most important feature of the general social guarantees of the constitutional and legal status of the Ukrainian people.

THE SECOND TOPIC: POLITICS, ECONOMICS, CULTURE AS SPHERES OF EXISTENCE OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

These spheres (politics, economics, culture) are the specific determinants that influence the constitutional and legal status of the Ukrainian people, hereat let us consider further their essence.

According to encyclopedic data, *politics* (Greek πολιτικα – state or public affairs) is a system of goals and means for their achieving of one or another state in the sphere of int. and ex. life",[2] or as a public domain, related to the use of state power. Policy implementation, both internal and external, to a large extent takes place at different levels of government, rather than at meetings or sessions of organizations. The degree of participation of the population in political activities is dissimilar in different countries: thus in

[1] Constitution of Ukraine, No. 254k/96-VR.
[2] Legal Encyclopedia, 2002, p. 629.

open societies, people have greater freedom to participate in the exercising political power compared to totalitarian regimes, where such a right is granted to only a limited number of groups.[1] Moreover they claim that politics (from the Greek πολιτικ – self-government activities in polis (city-state) and herein after "statecraft" and governance of society) – activities concerning solving the issues of public life or its certain part, related to the making responsible decisions in the field of relations between different social groups, states and peoples, the struggle for gaining or retaining state power, as an instrument of regulating and forming these relations. Politics is a strategic level management activity concerning internal and external legal relations and interactions. The instruments and methods of policy are diplomacy, trade, migration policy, cooperation in global projects and international cooperation, scientific and educational projects, forceful (military) competition and political, economic and military alliances etc.[2]

Economics, no matter what the country, is a sphere of public life, which covers the production of products and services, their exchange, distribution of created goods and their consumption in society.[3] Sometimes, several conceptions of the economics are formulated, in particular: "economics is a set of social relations in both production and non-production spheres, that is, the economic basis of a certain social order; the national economy of a particular country or its industry; science that studies the specifics of industrial relations in a particular field or field of social production (for example, transport economics, labor economics, etc.).[4]

[1] Oxford Illustrated Encyclopedia, 2000, p. 207.
[2] Legal Encyclopedia, 2002.
[3] Radionova, Kravchenko, Radchenko, 2005, p. 9.
[4] Zavadskiy, Osovska, Yushkevych, 2006, p. 79.

In general, different definitions of *culture* are distinguished, but the most famous of them are: socio-attributive definition, considers it an immanent characteristic or parameter of society; the phenomenological interpretation of culture considers it as a coherent unity of the ways and products of human activities, in which its activity is realized and which serves as its self-improvement, satisfaction of needs, harmonization of relations between a human and society, a human and nature; understanding of culture as a sphere of self-affirmation and development of the essential powers of a human considers culture and a human as one unit, since culture lives in people, in their creativity, activity, experiences, and at the same time people live in culture; in the axiological plane culture is referred to as a set of material and spiritual values; sign and informational concept substantiates the idea of culture as a system of expressions, texts, languages that materialize meanings, etc.[1] Therefore, it is not unreasonable to claim that culture is a fundamental concept that has two broad meanings: 1) customs, civilization and the achievements of a particular era or people; 2) the arts and other manifestations of the intellectual achievements of mankind in their totality. Culture is one of the most complex concepts in terms of definitions.[2]

Characterizing the general social guarantees of the constitutional and legal status of the Ukrainian people, it should be noted that they are, to a large extent, conditioned by the level of development of politics, economics and culture. That is, by developing these spheres of public and state life, the Ukrainian people will simultaneously guarantee and improve their constitutional and legal status.

[1] Shevniuk, 2005, pp. 61–67.
[2] Oxford Illustrated Encyclopedia, 2000, p. 139.

And one more notice concerns the characteristics of the general social guarantees of the constitutional and legal status of the Ukrainian people, namely, one would like to draw attention to their extreme importance. After all, even the most advanced special legal guarantees are not capable to ensure the constitutional and legal status of the Ukrainian people, if in society and the state there are no political, economic and cultural conditions, means and ways for its realization. At the same time, it must be acknowledged that the general social guarantees of the constitutional and legal status of the Ukrainian people can function effectively, ensuring its realization only in dialectical unity with the special legal ones.

THE THIRD TOPIC: TYPES OF GENERAL SOCIAL GUARANTEES OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

Traditionally, in the theory of state and law, constitutional law and other legal sciences, general social guarantees are classified as political, economic and cultural. We are convinced that this classification should be applied concerning the general social guarantees of the constitutional and legal status of the Ukrainian people.

SECTION (3.1) GENERAL SOCIO-POLITICAL GUARANTEES OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

Political guarantees are an appropriately oriented policy of the state, its focus on creating conditions that ensure a decent life and free human development, stability of political structures, their ability to reach civil harmony, overcoming destabilization in society, proper levels of political culture of citizens, the ability to assert, protect their political rights in any

instance, at any level.[1] Or emphasize that "... political guarantees are an element of the political system of society, certain conditions, methods and means that ensure the use of the mechanism of power of the people for the purpose of exercising the rights and freedoms of human and citizen" .[2]

Adapting these definitions to the subject matter of our research, it can be asserted that the general *social political guarantees* of the constitutional and legal status of the Ukrainian people is a system of conditions, means and ways of securing the legal status of the Ukrainian people in national society and state, among other nations, foreign societies and states, international organizations operating in the field of politics.

To the political guarantees of the constitutional and legal status of the Ukrainian people can be referred the following ones: people's sovereignty, democracy, people power, pluralism, humanism.

Considering *national sovereignty* as a political guarantee of the constitutional and legal status of the Ukrainian people, it is important to emphasize that the Legal Encyclopedia provides that "national sovereignty (from French "souverainete", originally - the top, the supreme power, from the Latin "superus" – high) – one of the basic principles of international and constitutional law, which provides the recognition of *the people* as the ultimate source of power in the state and its exclusive right to change the constitutional order. The people exercise their power directly (referenda, elections, and other forms of *direct democracy*) and through representative bodies and officials of the state and local self-government. The principle of

[1] Rimarenko, et. al., 2005, p. 70.
[2] Magnovsky, 2003, p. 11.

sovereignty of the people interacts with the derivative principles of state and national sovereignty".[1]

Summarizing the above-mentioned, there is every reason to argue that sovereignty of the people, as a political guarantee of the constitutional and legal status of the Ukrainian people, determines the position under which the Ukrainian people: 1) is the ultimate source and power holder; 2) his power is the highest in the domestic political and legal system, which, first of all, means the right to form and delegate his powers to representative bodies of power, to control them; 3) it is he who has the right to make the final power decisions, including the establishment and change of the constitutional order; 4) his power is universal, that is, it extends to all spheres of social life; 5) it is independent of any internal or external entities; 6) due to its previous features, it has its status in the state, which is enshrined in the Constitution of Ukraine; 7) people's sovereignty itself is the basis for the formation and functioning of domestic national and state sovereignties. At the same time, people's, national and state sovereignty in Ukraine are objectively interacting and complementary ones.

Undoubtedly, *democracy* is one of the most important social and political guarantees of the constitutional and legal status of the Ukrainian people. Democracy is a form of organization of a society, its state-political system, which is based on the recognition of the people as a source of power, consistent implementation of the principle of equality and freedom of people, their real participation in the management of affairs of the state and society.[2]

[1] Legal Encyclopedia, 2002, pp. 61-62.
[2] Legal Encyclopedia, 1999, p. 61.

Democracy, as a guarantee of the constitutional and legal status of the Ukrainian people, should be distinguished from sovereignty of the people, since democracy is a broader social phenomenon, and hence a political and legal category, as it covers itself and extends not only to the sphere of politics and law, but also to economic, social, spiritual and other relationships.[1] However, it shall be acknowledged that democracy and sovereignty of the people are often identified. For example, one claims that "… *direct democracy (pure democracy)* is a system of forms of direct free will of the people as a holder of sovereignty and ultimate source of power in Ukraine through its direct participation in established representative bodies of state and local self-government bodies and direct making decisions on issues envisaged by the Constitution of Ukraine and the laws of Ukraine".[2]

The analysis of this definition allows to the conclude that direct democracy and direct sovereignty of the people are equally defined, which, in our view, is not justified, since, as already noted, democracy ensures the realization of the constitutional and legal status of the Ukrainian people in all spheres of social life (politics, economics, social and spiritual life of society). In general, there is every reason to argue that the full constitutional and legal status of the Ukrainian people can exist and be improved only under the conditions of advanced democracy.

As for *sovereignty of the people*, as a general social political guarantee of the constitutional and legal status of the Ukrainian people, it is defined as follows "… it is an independent exercising of own will by the people concerning their own interests (in general or concerning the part of society or

[1] Todyka, 2007, p. 108.
[2] Sovhuria & Shuklina, 2018, p. 204.

individuals), or concerning other peoples and states, under their agreement, with the assistance of political parties, their blocs, other components of the mechanism of direct democracy, or without them".[1]

The consolidation of democracy in the constitutional legislation ensures the systematic, complete, fundamental nature of the constitutional and legal status of the Ukrainian people, creating the most favorable conditions for its implementation and guarantee. At the same time, there is every reason to argue that the effectiveness of the constitutional and legal status of the Ukrainian people is determined not only by the consolidation of its elements in the constitutional legislation or, even by the existence of the established organizational and legal mechanism for its implementation, but also by the high level of legal consciousness and culture that are theoretic and ideological basis of sovereignty of the people.

Pluralism, as a general social political guarantee of the constitutional and legal status of the Ukrainian people, allows the existence of various beliefs, views, positions and points of view that reflect the diversity of interests in society. "Pluralism (from German "Pluralismus", from Latin "pluralis"-plural) is a fundamental principle of human coexistence, which envisages a diversity of views, approaches, positions, concepts in legal, political, economic, cultural and other activities. Pluralism is one of the most important criteria for democracy and humanism in the development of society and the state, incompatible with ideological monism, nationalized social and political life, monopolization and centralization of power and government".[2]

[1] Skrypniuk, 2010, p. 354.
[2] Legal Encyclopedia, 2002, p. 578.

According to the above-mentioned, "pluralistic democracy is a form of democratic system in which the dominant tendency to arrange social life (social, political, moral) is based on pluralism. The peculiarity of socio-political practice of pluralistic democracy is that it is caused by the processes of interaction and confrontation of factors of pluralistic structure of society – different branches of government (legislative, executive, judicial), parties, entities of entrepreneurship (from small enterprises to large corporations) and mass-media communications, public unions, associations, individuals, etc. Under the conditions of mature pluralistic democracy, these processes are ultimately aimed at reconciling or balancing different value orientations and practical interests in order to ensure the integration of society on the basis of preserving (which does not exclude renewal and variability) the very institution of pluralism.[1]

Taking into account the afore-mentioned, it can be claimed that pluralism, as a general social guarantee of the constitutional and legal status of the Ukrainian people: firstly, is not only a political guarantee, as it extends to all other spheres of social life, and hence the constitutional and legal status of the Ukrainian people; secondly, it is enshrined in normative-legal acts, that is, first of all, Art. 15, which states that "Social life in Ukraine is based on the principles of political, economic and ideological diversity",[2] Articles 34, 35, 36 and others of the Constitution of Ukraine; thirdly, its practical implementation guarantees the possibility of existence in the environment of the Ukrainian people, national society and state, various theories, doctrines, conceptions, views, approaches, positions, beliefs; fourthly, it prevents the

[1] Shinkaruk, 2002, p. 489.
[2] Constitution of Ukraine, No. 254k/96-VR.

emergence of etatism, usurpation, nationalization, monopolization and centralization of public power and thereby guarantees it for the Ukrainian people.

Considering *humanism* as a universal political guarantee of the constitutional and legal status of the Ukrainian people, it is first of all appropriate to note that the "Oxford Illustrated Encyclopedia" states that humanism is a system of views that to some extent examines a human as the center of the universe. There is no rigorous theory of humanism, but any worldview that claims that the only value in the world is a human or, more broadly, that she is a true measure of values, can be called humanistic.[1]

From the point of view of legal science, "humanism in law (from the Latin "humanus" – human, humanistic) is one of the most inherently organic qualities of law. In the philosophical and sociological sense, law is a general measure of freedom, equality and justice in society, which shall determine the specific content of each specific legal norm. It is such social values as freedom, equality, justice constitute the essence of humanism. First of all and foremost, law is a system of behavioral standards by which members of the society should act in certain situations, so that their interests correspond with the interests and needs of other people, the state and public interests" .[2]

Humanism, in the form of norms, principles, their totality, that is institutions, to the greatest extent, enshrined in the international treaties, covenants and agreements. In Ukraine it was proclaimed in Art. 3 of the Fundamental Law of Ukraine, which states: "An individual, his life and health, honor and dignity, inviolability and security shall be recognized in

[1] Oxford Illustrated Encyclopedia, 2000, p. 65.
[2] Legal Encyclopedia, 1998, p. 660.

Ukraine as the highest social value. Human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State. The State shall be responsible to the individual for its activities. Affirming and ensuring human rights and freedoms shall be the main duty of the State".[1]

Summarizing the above-mentioned, there is every reason to state that humanism, as a general social political guarantee of the constitutional and legal status of the Ukrainian people, is intended: firstly, to recognize a person, first of all a citizen of Ukraine, as the highest social value; secondly, to introduce into the relations of the Ukrainian people with all other social institutions the principles of freedom, equality, justice; thirdly, to reconcile the interests of the Ukrainian people with the needs of certain individuals, state and public interests; fourthly, to guarantee life and health, honor and dignity, inviolability and security of an individual and the citizen of Ukraine; fifthly, to determine the essence and direction of the activities of the Ukrainian state; sixthly, to impose responsibility of the Ukrainian state for its activities to an individual and, above all, the Ukrainian people; and, seventhly, to form the main duty of the state, which is to assert and ensure human rights and freedoms, and accordingly the Ukrainian people.

SECTION (3.2) GENERAL SOCIO-ECONOMIC GUARANTEES OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

In the encyclopedic data, *socio-economic guarantees* provide an appropriate environment for free exercising rights and freedoms, this is both

[1] *Ibid.*, p. 660.

social stability, and adequate production opportunities, and a broad system of institutions enabling all kinds of social needs to be served".[1] Sometimes they claim that "… economic guarantees are the conditions, methods and means of a country's economic system, which includes a market economy, a mode of production, various forms of ownership, economic freedom of members of the society and their associations for the actual realization of rights and freedoms. At its core these are basic guarantees of society with elements of the superstructure (system of economy)" .[2]

Based on the above-mentioned definitions, it can be stated that the *general social economic guarantees of the constitutional and legal status of the Ukrainian people* is a system of conditions, means and ways of ensuring the legal position of the Ukrainian people in the national society and the state, among other nations, foreign societies and states, international associations that operates in the sphere of economics.

From our point of view, the most important general social and economic guarantees of the constitutional and legal status of the Ukrainian people should be recognized: a) nationwide and private property; b) a mixed economic system; c) freedom of economic activities.

The value of *national and private properties*, as a general social and economic guarantees of the constitutional and legal status of the Ukrainian people, is that they are intended to provide the property basis for the life of the entire Ukrainian people and its most important representatives - the citizens of Ukraine.

[1] Constitution of Ukraine, No. 254k/96-VR.
[2] *Ibid.*

Undoubtedly, in order to guarantee the constitutional and legal status of the Ukrainian people, the most important is the consolidation of the property rights of the Ukrainian people in Articles 13 and 14 of the Constitution of Ukraine, which shows the understanding its social utility and national purpose by the legislator, which consists in guaranteeing the interests of the whole Ukrainian people. That is why the mentioned guarantee is provided in part 4 of Art. 13 of the Constitution of Ukraine, which establishes a rule according to which "The State ensures the protection of the rights of all subjects of the right of property and economic management, and the social orientation of the economy. All subjects of the right of property are equal before the law".[1] The same can be said concerning private property, because in part 1 of Article 41 is stipulated that "Everyone has the right to own, use and dispose of his or her property, and the results of his or her intellectual and creative activity", and in part 4 of Article 41 of the Constitution of Ukraine is stipulated that "no one shall be unlawfully deprived of the right of property. The right of private property is inviolable".[2]

At the same time, it should be acknowledged that the effectiveness of securing the property rights of the Ukrainian people as a general social economic guarantee of the constitutional and legal status of the Ukrainian people causes significant damage to the equivalence of the property of the Ukrainian people with the rights of state and communal property. In connection with what conclusions such as the following are offered, "… in view of the content of the current civil legislation, the recognition of the Ukrainian people in the provisions of the Civil Code of Ukraine as a subject

[1] *Ibid.*
[2] *Ibid.*

of property rights is of declarative nature. This construction does not carry a meaningful civil legal burden, since no real mechanisms for the realization of this right have been developed in the classical civil sense. It is necessary to complete the provisions of the Civil Code of Ukraine on the procedure for exercising the property rights of the Ukrainian people by state authorities, outlining their civil status herein, or to abandon the civil declaration of the property rights of the Ukrainian people, noting the forms of private, state and communal property".[1]

Exploring the *mixed economic system* as a general social economic guarantee of the constitutional and legal status of the Ukrainian people, first of all, it should be noted that it is a certain modification of the market economy. The latter in economic science is defined ambiguously, namely: "A market economy is an economic system based on the principles of free enterprise, in which the role of the main regulator of economic relations is played by the market. A market economy is a form of economic organization, in which the coordination of actions is carried out on the basis of interaction in the markets of free private producers and free individual consumers. A market economy is a socio-economic system that is developing on the basis of private property and commodity-money relations. A market economy is based on the principles of freedom of enterprise and choice. Market economy is an economy organized on the basis of market self-regulation, in which the coordination of participants' actions is carried out by the state, namely directly by the legislative and judiciary power, and the executive power – but indirectly, through the introduction of various taxes, fees, benefits, etc. It is

[1] Legal Encyclopedia, 2003.

an economy in which only the decisions of buyers, suppliers of goods and services determine the structure of distribution".[1]

In the legal science is stated that "a market economy is a system of economic and legal relations related to the exchange of goods and services, which results in demand, supply, and price. It is based on the principles of free enterprise, the variety of forms of ownership of the means of production, market pricing, contractual relations between economic entities, limited state interference in economic activity".[2]

Taking into account the above-mentioned, it can be argued that the advantages of a market economy are that it ensures equality of different forms of ownership, economic initiative, freedom of enterprise, free competition, contractual relations between economic entities, limited state interference in economic activity, etc. However, it is also clear from the above definitions that it is not capable to provide socio-economic guarantees for social entities, fair distribution of public goods, equality of different social statuses. It can cause economic crises, bankruptcy, unemployment, lumpenization and polarization of the society to the very poor and the extremely rich.

Therefore, the mixed economic system as a general social economic guarantee of the constitutional and legal status of the Ukrainian people is the most optimal, because it ensures the functioning of different forms of ownership, equal status of economic entities, high level of development of productive forces, the most appropriate combination of market economy and its state regulation, the formation of a "middle class" among the population, and, in this regard, civil society, social protection of citizens, that is Ukrainian

[1] *Ibid.*
[2] *Ibid.*

citizens. In addition, it is the mixed economic system that can become the socio-economic basis for the existence of a welfare state in the country.

Freedom of economic activities, as a general social economic guarantee of the constitutional and legal status of the Ukrainian people, means an opportunity to form its economic policies, economic strategies and tactics, to implement them, to exercise basic economic functions, to establish economic relations with other countries, to be guided by the economic interests of the Ukrainian people. It is indisputable that the implementation of freedom of economic activities requires economic potential and sound economic prospects.

The basis of freedom of economic activities is the presence of equal, independent and effectively functioning private, collective, state and property of the Ukrainian people. The latter, as an assessment criterion and a source of private, collective and state ownership, can ensure freedom of economic activities of all entities engaged in economic activity.

SECTION (3.3) GENERAL SOCIO-CULTURAL GUARANTEES OF THE CONSTITUTIONAL AND LEGAL STATUS OF THE UKRAINIAN PEOPLE

Generally social cultural guarantees of the constitutional and legal status of the Ukrainian people are the system of conditions, means and ways of ensuring the legal position of the Ukrainian people in the national society and the state, among other nations, foreign societies and states, international associations operating in the sphere of culture.

Generally, as the social cultural guarantees of the constitutional and legal status of the Ukrainian people should be recognized: a) the development of national culture and the culture of indigenous peoples and national minorities;

b) protection of cultural heritage; c) development and functioning of the Ukrainian language.

The development of national culture and culture of indigenous peoples and national minorities, as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people, is envisaged by Articles 11 and 12 of the Constitution of Ukraine and the Law of Ukraine "On Culture" of December 14, 2010 No. 2778-VI. According to the latter "… culture is a collection of the material and spiritual heritage of a certain human community (ethnos, nation), accumulated, enshrined and enriched over a long period, passed from generation to generation, encompassing all kinds of art, cultural heritage, cultural values, science, education and reflects the level of development of this community".[1]

Guaranteeing the development of national culture and culture of indigenous peoples and national minorities in Art. 11 of the Constitution of Ukraine, is done through the obligation of the state: 1) to promote the consolidation and development of the Ukrainian nation, its historical consciousness, traditions and culture; 2) to promote the consolidation and development of the ethnic, cultural, linguistic and religious identity of all indigenous peoples and national minorities. Throughout this Art. 12 of the Constitution of Ukraine imposes a duty on the whole country, that is, on the Ukrainian people, society and the state to take care of satisfying ethnic-cultural and language problems of Ukrainians living outside the state".[2]

Undoubtedly, the development of national culture and culture of indigenous peoples and national minorities, as a nationwide cultural

[1] Law of Ukraine, No 2778-VI.
[2] *Ibid.*

guarantee of the constitutional and legal status of the Ukrainian people, is first of all outlined in the Law of Ukraine "On Culture" of December 14, 2010 No. 2778-VI, which provides the sections: "Rights and responsibilities in the field of culture"; "Financing and providing economic activity of cultural institutions"; "Social guarantees of employees in the field of culture"; "Public participation in the development of the cultural sphere"; "International Cultural Relations"; "Responsibility for violation of the Law on culture".[1]

In this way, through the rights and obligations, financing and ensuring the economic activity of cultural institutions, social guarantees of employees, public participation in the development of the cultural sphere, international cultural ties, responsibility for violation of the legislation on culture guarantees the constitutional and legal status of the Ukrainian people in the field of culture. Throughout this, paragraph 1 of part 1 of Article 3 of the Law of Ukraine "On Culture" of December 14, 2010 No. 2778-VI recognizes that the main basis of state policy in the field of culture is "recognition of culture as one of the main factors of identity of the Ukrainian people – citizens of Ukraine of all nationalities ...", and paragraph 1 of part 2 of Article 4 states determines that the state as a priority creates the conditions for "the development of the culture of the Ukrainian nation, indigenous peoples and national minorities of Ukraine".[2]

The protection of cultural heritage, as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people, is regulated by parts 4 and 5 of Article 54 of the Constitution of Ukraine, which respectively states: "Cultural heritage is protected by law" and "The State ensures the

[1] *Ibid.*
[2] *Ibid.*

preservation of historical monuments and other items of cultural value, takes measures to return to Ukraine items of cultural value, which are outside its borders"[1]. According to some scientists, in the English literature in terms of the definition of "cultural property", two concepts "cultural values" and "cultural property" are used. In the first case, the key meaning is "values" – attitude, beliefs, character, code, conduct, conscience, ethics, ideals, integrity, morals, mores, scruples, sense of duty, sense of honor, standards, that is, the emphasis is on the moral and spiritual characteristics of cultural society. Thus, in the work it is indicated that in any given society, values represent the standards by which behavior is evaluated, not necessarily the actual behavior. Instead, in the second case, the key meaning is "property" – property, that is, material value, that is subject to movement and protection from illegal actions, such as it is mentioned in the titles of the Conventions: Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property[2] or the European Convention on Offences relating to Cultural Property (ETS No.119[3]).[4] That is, historical monuments and other items of cultural value are recognized as the heritage of the Ukrainian people, protected by law, and only the state ensures their preservation and takes measures to return to Ukraine those, which are beyond its borders.

The protection of cultural heritage, as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people, is provided in detail by the Laws of Ukraine "On Protection of Cultural Heritage" of June

[1] *Ibid*.
[2] UNESCO, Convention, dated 14th November, 1970.
[3] European Convention, ETS 119, 1985.
[4] Yurinets, Pyvovar, I., Pyvovar, Y., 2018.

8, 2000 No. 1805-III,[1] "On Export, Import and Return of Cultural Property" of 21 September 1999 No. 1068-XIV, which states that "cultural property is an object of material and spiritual culture of artistic, historical, ethnographic and scientific importance and are subject to preservation, reproduction and protection in accordance with the legislation of Ukraine…",[2] "On Protection of Rights to Industrial Designs" of December 15, 1993 No. 3688-XII,[3] "On the protection of rights to trademarks for goods and services" of December 15, 1993, No. 3689-XII,[4] and other regulatory acts.

The development and functioning of the Ukrainian language, as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people, is regulated by Article 10 of the Constitution of Ukraine, in which, part 1 states that "the State language in Ukraine is Ukrainian language", part 2 states that "the State ensures a holistic development and functioning of the Ukrainian language in all spheres of public life throughout Ukraine", and in part 5 states that "The use of languages in Ukraine is guaranteed by the Constitution of Ukraine and determined by law".[5]

The analysis especially of part 5 of Art. 10 of the Constitution of Ukraine, assures that a holistic development and functioning of the Ukrainian language is guaranteed in all spheres of social life and throughout Ukraine. This is also confirmed in the Decision of the Constitutional Court of Ukraine (Case on the use of the Ukrainian language) of December 10, 1999 No. 10-rp/99, which states that "The provisions of Article 10 of the Constitution of Ukraine, according to which "the official language in Ukraine is Ukrainian", should be

[1] Decision in the Case No. 1-6/99, dated December 14, 1999.
[2] *Ibid.*
[3] *Ibid.*
[4] *Ibid.*
[5] *Ibid.*

understood as the Ukrainian language as a state language is an obligatory means of communication throughout the territory of Ukraine, when exercising powers by state authorities and local self-government bodies (the language of acts, work, record keeping, documentation, etc.), as well as in other public spheres of public life defined by law (part 5 of Article 10 of the Constitution of Ukraine)".[1]

Under the current conditions, the law referred to in the Decision of the Constitutional Court of Ukraine is, first and foremost, the Law of Ukraine "On Ensuring the Functioning of the Ukrainian Language as State" of April 25, 2019 No. 2704-VIII. In this legislative act in part 2 and 3 of Art. 1 states that "the status of the Ukrainian language as the one state language is conditioned by the state-forming self-determination of the Ukrainian nation. The state status of the Ukrainian language is an integral element of the constitutional order of Ukraine as a unitary state".[2] That is, the definition of the development and functioning of the Ukrainian language, as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people, is conditioned, firstly, by the state-forming self-determination of the Ukrainian nation, and, secondly, by an integral element of the constitutional order of Ukraine.

In addition, the mentioned Law of Ukraine establishes responsibility for the distortion and creation of obstacles and restrictions in the Ukrainian language exercising, introduces, in accordance with part 1 of Art. 49 position of the Commissioner for the Protection of the State Language in order to promote the Ukrainian language functioning as a state language in the spheres

[1] *Ibid.*
[2] *Ibid.*

of public life defined by him, throughout the territory of Ukraine,[1] which may also be considered as a general social cultural guarantee of the constitutional and legal status of the Ukrainian people.

CONCLUSIONS

To summarize, it should be noted that the general social guarantees of the constitutional and legal status of the Ukrainian people should be classified into political, economic and cultural ones. People's sovereignty, democracy, people power, pluralism and humanism are political guarantees. Economic guarantees are national and private property, mixed economic system, freedom of economic activities, and cultural ones are development of national culture and culture of indigenous peoples and national minorities, protection of cultural heritage, development and of the Ukrainian language functioning.

General social political guarantees of the constitutional and legal status of the Ukrainian people is a system of conditions, means and ways of securing the legal status of the Ukrainian people in national society and state, among other nations, foreign societies and states, international organizations operating in the field of politics.

General social economic guarantees of the constitutional and legal status of the Ukrainian people is a system of conditions, means and ways of ensuring the legal position of the Ukrainian people in the national society and the state, among other nations, foreign societies and states, international associations that operates in the sphere of economics.

Undoubtedly, this study examines the most general and important social guarantees of the constitutional and legal status of the Ukrainian people.

[1] *Ibid.*

However, we note that the lion's share of them is occupied by generally socio-political guarantees, which, in fact, are extended to other spheres of social life. The results of the research in this work form a system of knowledge about the general social guarantees of the constitutional and legal status of the Ukrainian people, which can serve as a scientific basis for further investigation of certain types of guarantees, in order to identify the drawbacks of the state legal mechanism for providing such guarantees and finding ways to solve them.

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RISKS OF DEPRIVATION OF THE OWNERSHIP RIGHT BY THE EXAMPLES OF THE NATIONALIZATION AND RE-PRIVATIZATION

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Abstract

The article is focused on the relevant problems of characterizing the existing risks of the ownership rights in Ukraine and on the mechanism of overcoming them. The research objective is to define the risks of deprivation of the ownership right by the examples of nationalization and re-privatization. It has been determined that there is a potential risk of deprivation of the ownership right in Ukraine as a result of nationalization and re-privatization. It has been argued that the risk of deprivation of the ownership right is the likelihood of

negative consequences of deprivation of the ownership right due to political, social, economic factors and/or the influence of negative internal and external factors. It has been offered to study the legal mechanism of managing the risk of deprivation of the ownership right as a complex system (set of means, methods, forms), which assist in legal regulation (regulatory, individual) and identification, reduction of the potential risk of deprivation of the property in order to satisfy the interests of the owner and ensuring the protection of his subjective rights. Its practical elements have been revealed.

Keywords: ownership, mechanism, nationalization, deprivation, re-privatization, risk, management.

INTRODUCTION

Scientific, Practical Problems.

The legal regime of the pwnership right in Ukraine is gradually losing its stability as a result of ongoing military conflict, declining economic development indicators, impoverishment of the population, and forcible takeover of enterprises. The facts of nationalization and re-privatization that have recently emerged in Ukraine also destabilize the property relations. There are enough examples of these grounds for deprivation of property. Thus, on April 22, 2005, the Commercial Court of Kyiv adopted the decision on the annulment of the purchase and sale agreement of the batch of shares of the OJSC "Kryvorizhstal", as well as on June 11, 2005 the resolution of the Cabinet of Ministers of Ukraine "On measures related to the declaration of invalidity of purchase and sale agreement of the batch of shares of the OJSC "Kryvorizhstal",[1] which regulated the re-privatization of the enterprise.

[1] VRU, 2005

On December 18, 2016, they adopted the decision about nationalization of the bank of the PJSC CB "PrivatBank".[1] The fact of taking into consideration of a number of bills by the legislative agency is of particular concern. These bills provide nationalization, namely: "On nationalization of the property of the "ATB" trading network",[2] "On nationalization",[3] etc. This gives the opportunity to make the assumption that private property in Ukraine is at risk. Besides, risk assessment techniques and recommendations on the ways and methods of reducing or avoiding risk of deprivation have not been developed in Ukraine.

Problems of nationalization and re-privatization have already been the subject matter of scientific research. Thus, N.R. Boichuk in the article "Nationalization, Requisition and Expropriation as Grounds for the Acquisition of Corporate Rights by the State: Some Issues of Legal Regulation"[4] considers the peculiarities of the transfer of corporate rights into state ownership. The research conducted by O.M. Klymenko "Problems of Legal Uncertainty and Qualification of the Concepts of "Privatization" and "Deprivation" is focused on the analysis of the uncertainty of the concepts of re-privatization and deprivation.[5] S.S. Yatsenko in the paper "Nationalization of the PJSC "CB PrivatBank"", thoroughly considered the modern example of nationalization and provided legal assessment.[6] Risk management was researched in the article of M. Velykanova "Risk Management and Its Stages: Economic and Legal Analysis".[7] Despite the contribution of researchers to

[1] VRU, 2016
[2] VRU, 2015
[3] On nationalization, 2014
[4] Boichuk, 2019
[5] Klymenko, 2013
[6] Yatsenko, 2019
[7] Velykanova, 2017

the development of scientific risk constructions, deprivation and protection of the ownership right, the mechanism of deprivation risk management have been considered in Ukraine only partially. Besides, the interest in these issues is due to the efforts to protect the property by both national owners and investors. This indicates the feasibility of studying this topic.

Purpose of the Study.

The purpose of the article is to determine the risks of deprivation of the ownership right by the examples of nationalization and re-privatization. To achieve this objective, it is necessary to address the following tasks: to determine the risks of legal ownership regime in Ukraine; to evaluate the possibility of nationalization and re-privatization; to identify the legal mechanism for managing the risk of deprivation of the ownership right.

The object of the study is public relations in the sphere of deprivation of the ownership right by the examples of nationalization and re-privatization. *The subject matter of the* study is the legal mechanism for managing the risk of deprivation of the ownership right in Ukraine, which may arise as a result of nationalization and re-privatization.

Research Methods.

The research methods were chosen to identify the risks of the ownership right in Ukraine in case of applying nationalization and re-privatization and the mechanisms to overcome them. Thus, the method of structural and genetic analysis of regulatory acts and court cases was applied to identify the facts of nationalization and re-privatization from 2005 to 2019 (the study period was selected taking into account the fact of primary re-privatization in Ukraine in 2005 of the OJSC “Kryvorizhstal” and the moment of writing the paper). In order to define the interpretation of the term of “risk”, the author has analyzed the legislative terminology (as of January 10, 2020), which is available on the

official website of Verkhovna Rada of Ukraine. The method of analysis and synthesis assisted to identify the elements of risk of certain legal phenomena and to determine the single structural shares in their combination to develop the concept of "risk of deprivation of the ownership right". The dogmatic and dialectical methods were used to establish the definition of the legal mechanism for managing the risk of deprivation of the ownership right. Cognition of the grounds for deprivation of the ownership right was carried out by using the systematic and structural method, which made it possible to isolate the most risky grounds of terminating the ownership for owners and investors in the form of nationalization and re-privatization from the system. The axiological approach made it possible to emphasize the value of the ownership right and to characterize the exclusive nature of nationalization and re-privatization. Due to the application of the hermeneutical and legal method and in order to establish the risks of the ownership right in Ukraine, the author carried out legal understanding of the texts of laws.

RESULTS AND DISCUSSION OF THE RESEARCH

THE FIRST TOPIC:

MANAGING THE RISK OF DEPRIVATION OF THE OWNERSHIP RIGHT

Identifying the mechanisms for reducing or avoiding the risk of deprivation of the ownership right in Ukraine while applying nationalization and re-privatization, it is appropriate to begin by establishing the terminological definition of the term of "risk". This need arises because the risk can be considered as a scientific category in the aspect of economic risk theory, as well as an applied legal indication of the possibility of negative consequences for the protected object. Each country independently determines the range of risks. However, they are not defined as an exclusive legal phenomenon; their list will always be open, since the risk is only an assumption. Therefore, the scientific foundation of risk assessment and risk management is still somewhat shaky on some issues, in the sense that both theoretical work and practice rely on perspectives and principles that could seriously misguide decision-makers.[1] Risk management must be obligatory carried out while investing and acquiring and exercising the ownership. Herewith, the quantitative assessment of the degree of risk associated with the direct acquisition of commercial property for investment purposes is practically nonexistent.[2]

The concept of "risk" is contained in more than forty-two regulations in Ukraine.[3] This concept is most broadly defined in the Law of Ukraine "On the Fundamental Principles of State Supervision (Control) in the Field of

[1] Terje, 2015 p. 22
[2] Sykes, 1983, p. 253
[3] Term of "risk", 2020

Economic Activity", in particular we distinguish between acceptable risk (which does not imply a maximum level of admissibility due to social, economic, technical and political factors) and the risk (as a possibility of occurrence of negative cobsequences taking into account quantitative and qualitative indicators).[1] Legal risk is a type of the risk – it is "the likelihood of losses or additional losses, or failure to obtain the planned revenues due to the parties failing to comply with the terms of the contracts because of their non-compliance with the requirements of the law" (paragraph 49 of the Regulations on the organization of risk management system in banks of Ukraine and bank groups approved by the Resolution of the Board of the National Bank of Ukraine No. 64 dated from June 11, 2018.[2] The letter of the National Bank of Ukraine "On Legal Risk Management" dated from September 30, 2010, No. 47-112/6860-16891 indicates that there is an existing and potential risk to capital, which may arise as a result of: 1) non-compliance with the legislation by the subjects; 2) ambiguous interpretation of the norms of law and rules.[3] The source of the risk is a dispute or conflict, which can result in: payment of penalties, damages, damage to reputation, deterioration of the legal security, etc. The risk with respect to property rights (in the narrow sense) is enshrined in the Art. 323 of the Civil Code of Ukraine and concerns accidental destruction and accidental damage to property.[4] Economists and lawyers to prevent risks are trying to develop the risk management system. In this regard, M. Velykanova accurately indicates that the risk management is a process aimed at detection, identification,

[1] VRU, 2007
[2] VRU, 2018
[3] VRU, 2010
[4] VRU, 2003

assessment and influence on the risk in order to avoid, control or minimize its consequences.[1] In spite of the sufficient number of regulatory acts regulating risks, the scientific works of determining the "risk of deprivation of the ownership right" are practically not enshrined.

Summarizing the above, it is appropriate to define the urgent need to distinguish such an independent category as the "risk of deprivation of the ownership right". Formation of this concept will allow owners and investors to: 1) to develop a strategy for the protection of the ownership right in case of negative consequences that threaten and / or lead to deprivation of the ownership; 2) to prevent the ambiguous interpretation of legal norms that regulate or initially establish the deprivation of the ownership right; 3) to clearly understand the potential negative impact for a stable legal ownership regime in the state. We believe that the risk of deprivation of the ownership right is the likelihood of adverse effects of deprivation of the ownership right as a result of political, social, economic factors and/or the influence of negative internal and external factors.

The risk of deprivation of the ownership right is potential and accepted. Potential risk of deprivation of the ownership right is laid down in Part 5 of the Art. 41 of the Constitution of Ukraine, which states that forced termination of the ownership right is possible on the basis of law grounded on public necessity.[2] The legislation of Ukraine distinguishes between two grounds that may be motives for deprivation of the ownership right: public necessity (that is, exclusive necessity stipulated by the national interests or the interests of territorial community, to guarantee which compulsory alienation is

[1] Velykanova, 2017, p. 23
[2] VRU, 1996

permissible) and the public need (we talk about the Art. 1 of the law of Ukraine "On Alienation of Land Plots, Other Immovable Property Placed on Them Being in Private Property, for Public Purposes or Public Use Necessity".[1] Thus, public necessity always leads to deprivation of property, since it is of an exceptional nature and is used for forced alienation. The above norms prove that the risk of deprivation of the ownership right is potential in the result of establishing the possibility of the state at any time and in any volume to carry out deprivation of property. These potential possibilities are always known to the future owner while purchasing a property object.

Acceptance of the risk of deprivation of the ownership right is the fact that the owner acquiring the property understands both his rights, obligations and the possibilities of deprivation of property (i.e. there is the principle: ignorance of the law does not relieve him of responsibility). In this regard, we can assume the existence of the concept of agreement between the owner and the state, according to which the owner accepts the potential risk of deprivation of property, and the state guarantees the exclusivity of such deprivation, as enshrined in the Art. 321 of the Civil Code of Ukraine "Inviolability of Property Rights".[2] The exclusive nature of the forced alienation of the ownership rights is a guarantee of the state for a stable legal regime of property. Such a mutual balance of interests between the owner and state in deprivation of property emphasizes: 1) the value of property for the state; 2) the interest of the state in stable ownership of the property, which has a direct connection with the regime of legality and payment of taxes, maintaining the real estate fund.

[1] VRU, 2009
[2] VRU, 2003

This suggests the following considerations: the owner must understand and assume the risk of deprivation of the ownership right while acquiring the property right, and therefore, he agrees to the possibility of the negative consequences of the deprivation of property when acquiring the property. As a result, he or she needs to independently develop the strategy for managing the risk of the deprivation of the ownership right – it is the system of actions aimed at identifying, assessing potential risk and protecting the subjective rights of the owner, in order to avoid or minimize the adverse effects of its occurrence.

Managing the risk of deprivation of the ownership right, from the point of view of the law, is a chain of actions: understanding the risks while acquiring property rights – identifying the risks in exercising property rights – reducing the negative effects while protecting property rights in case of deprivation. This chain of actions is included in a broader category – "management mechanism" than just management, since the "mechanism is the system of processes, techniques and methods that become an important tool for achieving both short and long-term goals through the adoption of correct and timely decisions".[1] Besides, the structure of the mechanism may include legal facts (decisions on appropriate deprivation of property), norms of law (specific regulation of relations of forced termination of property), legal relations. Therefore, the legal mechanism for managing the risk of deprivation of the ownership right should be considered as a complex system (a set of means, methods, forms), which assist to carry out legal regulation (regulatory, individual) and identification, reduction of potential risk of deprivation of property in order to satisfy the interests of the owner and protection of his

[1] Andriichuk, 2013, p. 10

subjective rights. Let us consider the possibility of applying this mechanism on such coercive grounds of the ownership right as nationalization, re-privatization.

THE SECOND TOPIC: NATIONALIZATION AND RE-PRIVATIZATION OF PROPERTY

We would like to emphasize that the possibility of nationalization, re-privatization is not denied by the Civil Code of Ukraine. Thus, paragraph 2 of the Art. 346 of the Civil Code defines the grounds for termination of property rights and states that "property rights may be terminated in other cases prescribed by law".[1] Therefore, the Art. 346 of the Civil Code of Ukraine has an open disposition, which allows the application of other grounds not specified by the current law, in particular nationalization and re-privatization. Let us turn to the study of these grounds for deprivation of property.

Historically, nationalization in Ukraine is associated with the actions of the Soviet power, which originally built the economy on nationalized private property. In particular, the legislative form of the nationalization of the housing stock was carried out in the Art. 1 of the Housing Law of Ukraine dated from November 01, 1921,[2] the Art. 22 of the Civil Code of Ukrainian SSR in 1922[3] and other regulatory acts. Nowadays, the Law of Ukraine "On the Rehabilitation of the Victims of Repression of the Communist Totalitarian Regime of 1917-1991"[4] has recognized nationalization of property during the communist regime as a form of repression. In spite of the negative experience

[1] Civil Code, VRU 2003
[2] Housing Law, 1921
[3] Civil Code, 1922
[4] VRU, 1991

of nationalization, it gradually ceased to have a "demonic" appearance in the last five years and has become one of the elements of economic relations. As a result, the public's legal awareness of nationalization of property was changed, it got more practical meaning and sometimes support. A bright example is the consumers' appeal to court to protect their rights and interests, demanding to nationalize the PJSC "Kyivenerho". They believe that the PJSC Kyivenerho, as a monopolist, performs unreasonably artificial actions of disconnecting them from electricity, rendering poor services, not unduly overestimating tariffs.[1]

Recently, nationalization has also received widespread discussion in Ukrainian scientific community. N.R. Boichuk, highlighting the features of nationalization, indicates that it: is the state's internal act, an instrument of economic policy of the state, is of universal importance, provides for the transfer of the ownership right to the state, has a compensatory character, is carried out on the basis of a specific legal act, is a compulsory act, the object of nationalization is the private property of both citizens of Ukraine and foreign persons.[2] The position of the researcher on the above issue should be supported. S.S. yatsenko analyzing the nationalization of the PJSC CB "Privatbank", rightly states that interference of the state into human rights may not be unlawful, if we establish its necessity and proportionality, in particular its orientation to a legitimate aim and necessity in a democratic society.[3] In addition to scientific research, nationalization is the subject matter of legislator's regulation; and recently there are bills on nationalization. Thus, the draft laws "On Nationalization" stipulate that "nationalization is the

[1] District Administrative Court Decision, 2018
[2] Boichuk, 2019, p. 50-52
[3] Yatsenko, 2019, p. 88

forced alienation of objects of the ownership right (land plots, natural resources, mines, plants, factories, banks, other real estate, etc.) in favor of the state on the basis and in the manner established by the Law".[1]

Considering different views on nationalization, it should be noted that nationalization of property is an exception to the normal state of legal relations and legal regime of property objects. Its application must be justified by social necessity and comply with the principles of civil law, such as fairness, integrity and reasonableness. We believe that nationalization has recently been used in bad faith. This is evidenced by the bill "On the Nationalization of Property of the ATB trading network", which states that: "The nationalization of the property of the ATB trading network is carried out on the grounds of public necessity – to prevent the financing of terrorism and illegal armed groups and to create a nationwide retail trading network of social orientation".[2] It should be noted that the criminal proceedings in regard to financing terrorism were not proved in court. Besides, the designation of nationalization in the form of "creation of a nationwide retail social network" at the expense of the private owner does not meet the criterion of social necessity and only emphasizes the abuse of law by the state. Therefore, this bill is a false example of destabilization of property relations and can only indicate the desire of forcible takeover of the enterprise by separate financial groups. This bill indicates that there are risks to the ownership regime in Ukraine.

Nationalization of property should be considered as a forced alienation of private property for the benefit of the state, in cases provided by law, with

[1] On Nationalization, 2014
[2] VRU, 2015

compensation for the real value of the property and the damage caused. It can be divided depending on: 1) the duration of the establishment of the legal regime of nationalization on the object – ongoing and one-time; 2) purpose of compensation – paid and free of charge; 3) transfer of property into state or municipal property – nationalization and municipalization. Modern cases of emerging relations of nationalization have a "hybrid" character, i.e. artificial combination of different institutions in the sphere of deprivation of private property. Hybrid nationalization arises, when the fact of nationalization is fictitiously covered up by other legal mechanisms, such as a lawsuit claiming the nationalization of property, a decision by executive authorities, or re-privatization.

Nationalization in the first case may be carried out, in particular for the purpose of forcible takeover of property. In this case, its hybridity is due to the fact that the judgment substitutes the law on nationalization. An attempt to nationalize the enterprise through the court has already taken place, as evidenced by the mentioned above example about the claim for nationalization of the PJSC "Kyivenergo".[1] This is the most dangerous manifestation of the risk of nationalization, since the owner finds himself in a state of accidental risk, which is not provided by law and is initiated by an interested person in nationalization. The presence of this type of risk prevents the stability of the legal regime of the ownership in the state. In contrast, the potential risk of nationalization involves the adoption of the law on nationalization.

Another hybrid kind of nationalization is the decision-making of the agency or agencies of executive power on nationalization. This kind of

[1] Decision of District Administrative Court, 2018

nationalization was applied to the PJSC CB "Privatbank". It is described by S.S. Yatsenko, who draws attention to the system of facts and decisions that led to nationalization: 1) on December 18, 2016 the PJSC "CB Privatbank" was declared insolvent on the basis of the decision of the Board of the National Bank of Ukraine No. 498-rsh / BT and the Deposit Guarantee Fund adopted the decision No. 2859 "On the introduction of the interim administration in the PJSC "CB Privatbank", which started its withdrawal from the market; 2) on December 18, 2016, there was the adoption of the Presidential Decree No. 560 on the implementation of the decision of the National Security and Defense Council of Ukraine "On urgent measures to ensure national security of Ukraine in the economic sphere and to protect the interests of the depositors"; 3) on December 18, 2016, the Cabinet of Ministers of Ukraine adopted the Resolution No. 961 "Some issues of ensuring the stability of the financial system", which finally made the decision to nationalize the PJSC "CB Privatbank" by purchasing for one hryvnia; 4) on December 21, 2016, the Minister of Finance of Ukraine concluded the agreement with the Deposit Guarantee Fund No. BV-744/16/13010-05/131 on the purchase for one hryvnia of all shares of the PJSC "CB Privatbank".[1] At the same time, the International Monetary Fund supported the nationalization of the country's largest bank, PrivatBank.[2] The above-mentioned system of actions of the executive authorities actually replaced the law on nationalization, had no grounds in the form of public necessity, and therefore indicating the existing risks for the stable legal regime of property.

[1] Yatsenko, 2019, p. 82
[2] IMF stated, 2019

Regarding re-privatization, it is the return of property to the state after its privatization in case the privatization transaction is declared invalid or violation of essential conditions of the privatization obligations. In this regard D. I. Pohribnyi defines re-privatization through the act of return of property to the state ownership.[1] Therefore, re-privatization by its legal nature is the ground for termination of obligations, while nationalization is a substantive legal phenomenon. O.M. Klymenko rightly emphasizes that the identification of re-privatization (deprivation) and nationalization is not sufficiently substantiated.[2] This view should be agreed, with the clarification that re-privatization can be used to cover up the fact of nationalization. In fact, nationalization took place in relation to the OJSC "Kryvorizhstal" and was formalized by the court decision and resolution of the Cabinet of Ministers of Ukraine.[3] This conclusion follows from the fact that the enterprise was not left state-owned but subsequently sold. Thus, the feasibility of returning the enterprise to state ownership was not achieved. Moreover, the enterprise was profitable at that time, in particular in 1999 the profitability of "Kryvorizhstal" was 14.82%, in 2000 – 33.7%. In the following years, the level of profitability did not fall below 30%.[4] Therefore, privatization and re-privatization of "Kryvorizhstal" were carried out outside the regime of stability of property legal relations, which also emphasizes the existence of property risks in the form of possible re-privatization.

Summarizing, it is appropriate to determine that there is a real risk of deprivation of the ownership right in Ukraine through the application of

[1] Pohribnyi, 2008 p. 6
[2] Klymenko, 2013, p. 69
[3] VRU, 2005
[4] Kryvorizhstal, 2005

nationalization and re-privatization. To prevent this possibility, it is necessary to develop a legal mechanism for managing the risk of deprivation of the ownership right in Ukraine. It should be noted that there is no clear system of action to overcome this risk at the legislative level. Therefore, the owners, lawyers need to establish this legal mechanism independently. For example, by adopting a separate risk management document.

We would like to offer such a model of legal mechanism for managing the risk of deprivation of the ownership right, in the aspect of nationalization and re-privatization. This mechanism may cover the following systematic elements of management: 1) establishing the risk management units at the legal entity level; 2) carrying out constant monitoring of legislation and case law in the field of forced termination of the ownership right, change of political regime, indicators of economic development; 3) appeal against decisions on deprivation of property in the courts of Ukraine and the ECHR; 4) refusal from "unreliable" property objects (for example, acquired at a lower price than their market value, obtained as a result of forcible takeover or participation in privatization processes with a corruption element); 5) formation of reserves to cover possible losses; 6) the distribution of property between several owners, including legal entities and individuals.

CONCLUSIONS

It has been determined that there are real risks of deprivation of the owmership right in Ukraine by the examples of nationalization and re-privatization, which is proved by the facts of their application. The risk of nationalization and re-privatization is a potential and accepted by the owner, due to the existence of the concept of an agreement between the owner and the state, according to which the owner accepts the potential risk of

deprivation of property, and the state guarantees the exclusiveness of such deprivation. It has been determined that the risk of deprivation of the ownership rights is the likelihood of negative consequences of deprivation of the ownership right due to political, social, economic factors and / or the influence of negative internal and external factors. To reduce or avoid it, at the owner level, it is necessary to develop the legal mechanism for managing the risk of deprivation of the ownership right, which is a complex system (set of means, methods, forms), which assists to carry out legal regulation (regulatory, individual) and identification, reduction of potential risk of deprivation of property in order to satisfy the interests of the owner and to protect his subjective rights. It may cover the following systemic elements of management: 1) to establish the risk management units at the legal entity level; 2) to carry out constant monitoring of legislation and case law in the field of forced termination of the ownership right, change of political regime, indicators of economic development; 3) to appeal against decisions on deprivation of property in the courts of Ukraine and the ECHR; 4) to refuse from “unreliable” property objects (for example, acquired at a lower price than their market value, obtained as a result of forcible takeover or participation in privatization processes with a corruption element); 5) to form reserves to cover possible losses; 6) to distribute property between several owners, in particular legal entities and individuals.

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LEASE AGREEMENT IN THE CONCEPT OF CIVIL CODE OF UKRAINE RECODIFICATION

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Abstract

In the context of the Concept of Recodification of the Civil Code of Ukraine, it is crucial to record the progressive acquis communautaire on the application of the provisions of legal institute for leasing and their objective doctrinal evaluation. The aim of this article is the doctrinal substantiation of the substantive nature of the right to lease real estate and lease relations when using property that by its features does not correspond to the characteristics

of an object of an agreement. Legislative assessment in the recodified Civil Code of Ukraine of the long-term use of someone else's real estate as a real right is a prerequisite for strengthening the legal mechanism for protecting the lessee's rights and will facilitate the development of small and medium-sized businesses in Ukraine.

Keywords: lease (contract), property law, obligations, rights of succession, lessee's rights, protection of lessee's rights and interests, lease of structural elements of buildings.

INTRODUCTION

Scientific, Practical Problems

The recodification of the Civil Code of Ukraine is an objectively predetermined legislative process in which its provisions are evaluated and re-evaluated from the point of view of effective enforcement and objective doctrinal analysis. This process is aimed at strengthening the legal mechanism for the exercise and protection of subjective civil rights, ensuring the stability of civil law regulation, the development of economic relations and property turnover.

Extrapolating these tasks to the institute of temporary use of other people's property, it should be noted that today it is extremely important to find additional legal instruments that would ensure the stability of these relations. As contractual and judicial practice proves today, the guarantee of this stability is the long-term lease of real estate use, the possibility of the lessor's influence on the behaviour of third parties and the publicity of the lease relationship. It is possible to achieve these legal effects by rethinking the legal nature of the lessee's rights.

At the same time, the search for innovative ways of doing business has forced to expand the contractual sphere of using other people's property, going beyond the classic requirements for the subject of the contract. This "generic" increase is caused by the extension of the meaningful meaning of the concept of "use", which in the present conditions is no longer limited to the understanding of direct use, but indicates the benefit in any manifestation not prohibited by law.

These tendencies of development of relations of use of other people's property should receive deep doctrinal understanding and be reflected in the recodified Civil Code of Ukraine.

Literature Review

The legal nature of tenant rights has been the subject of intense scholarly debate, resulting in three doctrinal approaches to addressing this issue in civil science. The first of these is the obligation which is advocated by the author of the scientific and practical commentary, edited by I.V. Spasibo-Fateeva and E.S. Sukhanov in the scientific book "The Property Law". The rights of the tenant of real estate are considered as quasi tangible in the textbook "Property Law" by R.A. Maidanik. The representatives of the third concept (L.T. Kokoeva in the dissertation "The main problems of civil law regulation in lease relations") advocate the position that as a result of the conclusion of the lease contract there are two separate types of legal relations: tangible and obligatory.

Purpose of the Study

The aim is the doctrinal justification of the proprietary nature of the right to lease real estate and lease relations when using the property, which by its features does not correspond to the characteristics of an object of an agreement.

Object of research – social relations that arise in the process of temporary use of someone else's property. *Subject of research* – legal nature of the lessee's rights.

Research Methods

The methodological basis of this study is the general and special scientific methods: dialectical (it became the basis of the whole article, which made it possible to analyse the sustainable development of the lease relationship and the obligation of the lease agreement for a new owner of a property); historical and legal (contributed to studying the evolution and chronology of the development of concepts of the obligation-legal and pecuniary-legal nature of lease relations); comparative-legal (allowed to conduct comparative analysis of legal provisions of legislative acts of Ukraine and the states of general and continental law, as well as materials of judicial practice of judicial instances of Ukraine and other states); systemic-structural (allowed to find out the place of agreements under which the property is transferred to use, which by its features does not correspond to the characteristics of an object of a lease agreement in the system of contractual models of a lease); formal legal (used to interpret the provisions of regulations).

The empirical materials of this study include theoretical articles by experts in the field of civil science, legislation (Civil Code of France, German Civil Code, Civil Code of Ukraine (2003), Law of Ukraine "On state registration of real rights to real estate and their encumbrances" (2010), Law of Ukraine "On Land Lease" (2004)), case law materials (the Supreme Economic Court of Ukraine, Plenum of the Supreme Economic Court of the Republic of Belarus (2012), Plenum of the Supreme Arbitration Court of the Russian Federation (2011)), etc

THE FIRST TOPIC: DOCTRINAL AND LEGISLATIVE APPROACHES TO ADDRESSING THE LEGAL NATURE OF THE LESSEE'S RIGHTS

For a long time the question of the legal nature of lessee's rights remains debatable in the spectrum of content analysis of a lease agreement. The various views expressed in the legal literature on this subject are characterised as diametrically opposed (defining the rights of a lessee solely obligatory or proprietary), and the attempt to find the "golden mean" by defining the right of a lease as a mixed right, which is characterised simultaneously by signs of obligatory and proprietary rights.

With regard to the civil law doctrine, all theoretical approaches to addressing the legal nature of lessee's rights can be divided into groups on the basis of the criterion of this right essence, which is proved by the representatives of each of them.

The first group of researchers believe that the right to lease is a proprietary right.[1] The main arguments relied on by the representatives of this scientific position are the legislative consolidation that the right "devolves with" a property to a new owner and the possibility of a lessee to use substantive legal means to protect their rights. However, in authors' view, more expedient is the reasoning of the authors of one civil law textbook of the Russian Federation that the proprietary nature of the lessee's rights stems from his titular ability to use an individually determined property in his own interests and independently of others, not from the features of lease right "to devolve" or providing a lessee with remedies. These features are the result of the

[1] Levenson, 1968.

definition of the right to lease as a proprietary right and do not require additional regulatory confirmation.[1] Thus,

"in the case of leasing use of a property as, inter alia, ownership, it is carried out independently of all third parties, including an owner, and without their assistance; to refrain from acts that may interfere with the tenant is the responsibility of these persons to a lessee."[2]

"However, it is difficult to agree with an unequivocal assessment of the nature of the lease relationship as purely real. ... Is it possible to say that after the transfer of the leased property to a lessee, the figure of a lessor disappears and the relationship between them in relation to the rented property terminates? No. Even if the property is transferred but, for example, without the accessories or necessary documents, etc., a lessee is not able to use the rented property. Most importantly, the transfer of the property is the result of a lessor's actions. In addition, the relationship "lessor-lessee" is not limited to the fact of the transfer of property: a lessor undertakes, as a general rule, overhauling the property, has the right in many cases to demand termination of an agreement, etc."[3]

The second group of scientists uphold the strictly binding legal nature of lessee's rights.[4] Usually, the main arguments for the validity of this scientific position are the fact that the said right arises as a result of the conclusion of an agreement, the main focus of which is to give the right to use a property to a lessee, as well as the timeliness, duration of the right to use of a lessee. At

[1] Abramova, Averchenko, & Baigusheva, 2010.
[2] Rybalov, 2005.
[3] Kokoeva, 2004.
[4] Spasibo-Fateeva, 2013.

the same time, the researchers define the admissibility of lessee's tight to use remedies and consolidation of the feature to devolve regarding law of obligation as "a special legal instrument that confirms not the change of the law of obligation essence, but the attempt of the legislator to give the subject of the obligation additional opportunities in order to protect his rights."[1]

Proponents of the antithetical concept, denying the binding nature of lesse's rights, state that the temporary nature of these rights cannot serve as a reason to challenge their substantive legal nature, since indefiniteness cannot be regarded as an exclusive feature of proprietary right only because it is not inherent in all their rights. For example, an easement, the right to use a dwelling space by a testamentary failure, are expressly defined in the law as proprietary rights with a fixed term of existence.

The emergence of a symbiosis of proprietary right and law of obligation as a result of the conclusion of a lease agreement is seen by representatives of the theory of "mixed" lessee's rights.[2] For example, it may be appropriate to distinguish two objects in agreement scope: the first-class entity – the obligated entity's actions, and the second-class entity – property.

Thus, in studies of the legal nature of lessee's rights, there are both polar concepts, and there is an attempt to approximate these positions, by modelling a "mixed" substance, which is inherent in the combination of features of proprietary right and law of obligations.

In addition to the scientific views considered, the doctrine of civil law has another scientific position, supporters of which believe that the conclusion of a lease agreement does not create a mixed legal relationship, and there are

[1] *Ibid.*
[2] Doroshkova, 2002.

two separate types of legal relationship: the relationship between a lessor and lessee, which are binding, and relations between a lessee who owns a lessor's property and third parties, including an owner of the property – his counterparty.[1] In the context of such an approach to solving an issue of legal nature of a lessee, the opinion of M.M. Agarkov deserves attention,

"the distinction between absolute and relative legal relations is the difference between legal relations and not institutions. Within the same institute legal relations can be both absolute and relative. For example, a real estate institute covers material competences… and strictly binding."[2]

In strengthening the right to the existence of each concept, the position of the legislator on resolving the issue on the right to lease devolving with a property and the possibility of using a lessee as the title holder of remedies of protection of their rights was and remains important. It should be noted that the normative acts of different historical periods trace a different approach to resolving the raised issue: in some cases the legal provisions were aimed at strengthening the legal position of a new owner of the leased property, in others – protecting the interests of a lessee.

Thus, studies of the institute of property lease in Roman law show that lawyers of that time saw in lessee's rights the exclusively binding legal nature. This is evidenced by their unequivocal position in the matter of lessee's rights "devolving", which the Romans resolved as follows: "if a lessor had alienated the leased property before the expiration of the lease a new owner was not bound by the contract of his predecessor."[3] Therefore, a lessee continued to use a property only when its new owner consented.

[1] Kokoeva, 2004.
[2] Agarkov, 1940.
[3] Novitsky, & Peretersky, 2000.

Otherwise, a lessor was liable to a lessee for failing to fulfil his obligation to provide the opportunity to use a property.

A similar situation is also observed in the civil legislation of the pre-revolutionary period. In particular, the Code of Civil Laws of the Russian Empire did not have any legal norms that would determine the status of a lessee as a title holder, who has the right to apply the legal remedies to protect their rights. In addition, this statute did not imply a binding lease agreement for the new owner, which meant that if a lessor alienated the property leased out by him, the lease terminated.

And though Art. 1705 of the Code[1] contained a provision according to which "an owner is not entitled to refuse a lessee until the term of the lease, even if someone offered a higher price to him", but "the said article should be understood only in the sense that an agreement of property lease cannot be terminated unilaterally by an owner without damages."[2]

This state of legal regulation of lease relations at that time was predetermined by the doctrinal position of civilians, most of whom, in contrast to jurisprudence, regarded property lease as a binding legal relationship lacking in peculiar legal elements. The above mentioned circumstance with others (that a lessee own not the proprietary right that would devolve with the property, but the right to demand specific actions, in this case – to put the property into use and to maintain it in a proper state; that the relative right of a lessee collides face to face with the proprietary right of a new owner, that the latter does not participate in the conclusion of the lease agreement and therefore cannot be bound to any action) served as a basis for

[1] Stefanchuk, R., & Stefanchuk, M., 2009.
[2] Shershenevich, 1995.

the conclusion made by G.F. Shershenevich that the agreement of property lease is terminated with property alienation because it may not be mandatory for a buyer who did not participate.[1]

However, while remaining solely bound by the binding legal nature of lessee's rights, many researchers have pointed to the non-parity of this participant in the event of property alienation to a third party and sought ways to best address the problem. For example, D.I. Meyer believed that the fate of a lease relationship in such a situation depends on whether the previous lesser and the new owner of the property "agreed upon a lease" or entered into an agreement to alienate the thing "without consideration of the lease." At the same time, the Russian civil law scholars did not exclude the possibility of cases where, regardless of the above circumstances, the right to use the rent becomes a proprietary right of a lessee and becomes a right to another thing. As an example of such facts, he cites the lease of real estate with the condition of prepayment for rent for more than a year and the renting of a property under a contract concluded prior to the sale of the thing from public auction for enforcement. In these cases, according to D.I. Meyer, the property alienation cannot have the legal consequence of termination of a lease agreement.[2]

The Civil Code project has, to some extent, reconciled the proponents of the proprietary and binding nature of lease by establishing a binding agreement (within the term of the lease) for the purchaser only if the contract is entered into the patrimonial book, and also if the property is up to the time of its alienation was already in use by the lessee.[3]

[1] *Ibid*.
[2] Meyer, 1997.
[3] Ersh, 2003.

At that time, a similar rule already existed in the codified acts of Right-bank Ukraine. Thus, in the Civil Code of Eastern Galicia (Art. 231)[1] and the General Civil Code of the Austrian Empire (Art. 1095),[2] the lessee's right was considered to be proprietary if the lease or lease agreement was entered in public books (state registers). Moreover, such a right passed to the next owner of the property, which he exercised before the expiration of the agreement. It should be noted that the Civil Code of Napoleon had a significant influence on the modelling of the provisions of a civil code of the Austrian Empire and codified acts of other countries (Spain (1812), Haiti (1825), the US state of Louisiana (1825), Bolivia (1830), the Netherlands (1835), Chile (1855), the Canadian province of Quebec (1865) Portugal (1867), Argentina (1868)).[3]

Soviet legislation removed any restrictions on the obligation of a lease for a new owner. Article 169 of the Civil Code of the Ukrainian SSR in 1922 and Art. 228 of the Civil Code of the USSR in 1963 fixed the provisions according to which, in the case of transfer of ownership of the property that was leased from a lessor to another person, the lease agreement remained valid for the new owner, without any restrictions. The same rule applied in the case when the property was transferred by one state organisation to another. Thus, the leased property was encumbered by the lessee's right, which acquired the properties of the right of succession, which is characteristic of proprietary relations.[4]

Legislative position on the legal status of the lessee and the enshrining in the codified acts of the rule – "purchase does not destroy the lease", inevitably

[1] Kutateladze, & Zubarya, 2013.
[2] Stefanchuk, R., & Stefanchuk, M., 2009.
[3] Lafitsky, 2012.
[4] Kartseva, 2004.

affected the formation of scientific views of Soviet civil law scholars about the legal nature of his rights. A number of researchers at the time argued that, as a result of the lease agreement, the lessee acquires not only a binding legal (relative) but also a proprietary (absolute) power.[1]

In the current legislation of foreign countries, the solution of this issue is due to various factors. Thus, in England and the United States, depending on the subject of a lease, there are renting real estate (lease) and renting movable things (hire). Lease of real estate causes the acquisition by the lessee of limited property rights. In the case of hiring movable things, such hiring gives rise only to obligations which cannot oppose to third parties.[2] A similar situation occurs in other "common law" states, where in the case of alienation of immovable property, the property nature of the lease is formally recognised, enabling the lessee to retain his rights in the event of the alienation of the real property which has been transferred to him for use.

The law of the continental branch of law also holds the position of protecting the rights and interests of the lessee, defining the unconditional obligation of the lease for the new owner of a property such as the law of France. According to Art. 1743 of the French Civil Code, if the lesser sells the leased property, the buyer cannot evict a farmer or lessee who has a certified lease or agreement with the specified contracting date. However, this rule is dispositive, and Art. 1744 of this Code refers to the obligation of the lessor to recover damages in accordance with the procedure laid down in Art. 1745, Art. 1746, unless the lease agreement stipulates the possibility of

[1] Pronina, 1963.
[2] Kartseva, 2004.

evicting the lessee in the event of the sale of the leased property, there are no other arrangements for damages.[1]

The German Civil Code (in particular, par. 571, which is entitled "The purchase of a property does not terminate the lease relationship") states that when the leased land is alienated to a third party by the lessor, the purchaser enters into the rights and obligations of the lessor, are conditioned by the lease agreement, which was concluded even when the alienator was the owner of the land. At the same time, par. 580 provides that the provisions for the lease of land also apply to the lease of residential and other premises.[2]

Similar legal position is reflected in Swiss law. According to par. 261 and 290 of the Law on Obligations (Part Five of the CC of Switzerland) in the case of alienation of the leased property before the expiration of the agreement "lease relationships along with the ownership of the property transfer to the purchaser."[3]

Authors' analysis of the legislative solution to the obligation of the lease agreement for the new owner of the property leads to the conclusion that, in most countries, the feature of "devolving" inherent in proprietary rights is connected with the lease of real estate.

Giving the features of proprietary rights to the lessee's rights ensures that all his powers under the agreement are retained, that is, the opportunity to counter his rights under the lease agreement to a third party and, first of all, to a new owner.[4]

[1] French Civil Code.
[2] German Civil Code.
[3] Sukhanov, 2017.
[4] Vasilyev, 1993.

National legislator, in order to ensure the stability of employment relations, in Part 1 of Art. 770 of the Civil Code of Ukraine stipulated the automatic acquisition by the new owner of the property of the rights and obligations of the lessor, because in market conditions the feature of devolving remains a claimed property turnover.

At the same time, in the Ukrainian legislation, the right of a lease is defined as a proprietary right in the Law of Ukraine "On state registration of real rights to real estate and their encumbrances" (clause 2 of Part 1 of Art. 4), where among other property rights that are subject state registration, the right to lease land, the right to use (lease) the building or other capital structures and their separate parts are determined.[1] According to Part 1 of Art. 93 of the Criminal Code of Ukraine, the right to lease a land plot is a contract based on the term of paid ownership and use of the land plot required by the lessee for conducting business and other activities. It is noticeable that in the above definition, as well as in the definition of the lease itself (p. 1 of the Law of Ukraine "On Land Lease"),[2] the emphasis was shifted to a complex of competences having a material character.

In addition to these legal options, the lessee may lease the land without changing its intended purpose, if it is provided for by the lease agreement or is carried out with the written consent of the lessor. At the same time, the right to lease a land plot can be alienated, including sold at land auctions, as well as transferred as collateral, inheritance, paid into the authorised capital by the owner of the land plot – for a term up to 50 years, except in cases stipulated by law (Part 5 of Art. 93 of the Criminal Code of Ukraine).

[1] Law of Ukraine, No. 1878-VI.
[2] Law of Ukraine, No. 1211-IV.

However, in Chapter 58 of the Civil Code of Ukraine and in Section 5 of Chapter 30 of the Economic Code of Ukraine such opportunities for the lessee are not specified. Their legislative consolidation can be traced to the provisions of other chapters of these codified acts and separate laws. Thus, the introduction of the right of a lease as a contribution to the authorised capital of a business company can be implemented on the basis of Part 2 of Art. 115 of the Civil Code of Ukraine and Part 1 of Art. 13 of the Law "On Economic Associations". According to Part 7 of Art. 5 of the Law of Ukraine "On Mortgage", the right to lease or use real estate may serve as a mortgage. At the same time, the legal literature received a scientific justification for the possibility of pledging the lessee's property rights.[1] Expansion of the range of possible ways to manage the hired property was successfully explained by N. N. Kartseva. According to her, the said process is conditioned by the

"evolution of the development of lease relations, which over the past hundred years has become significantly complicated, since the needs of different entities in satisfying their own interests in various spheres of life have varied".[2]

The outlined approach to the legislative definition of the lessee's rights proves that the range of lessee's powers of land, as well as buildings or other capital structures, combines two types of civil rights. The first group consists of rights that are inherently binding. They arise from the moment the contract becomes legally significant and are realised through the active behaviour of the obligated counterparty. The second group is a labelled "right to lease" set of rights to own and use the property that the lessee acquires after the property

[1] Nizhny, 2007.
[2] Kartseva, 2004.

passed on to him. These rights are inherently proprietary. Both types of lessee's rights (binding and material) have a common ground for their occurrence (lease) and are interrelated, since the lessee`s ability to use the property determines the lessor's right to demand payment for the exploitation of his belongings. The legislative argument of this is Part 6 of Art. 762 of the Civil Code of Ukraine, according to which the lessee is exempted from payment for all time during which the property could not be used by him because of circumstances for which he is not responsible.

Analysing types of property rights, R.A. Maidanik defines the right to use the land and the right to use (lease) the building or other capital structures and their separate parts as one of the types of quasi-proprietary rights, which together form a peculiar component of the system of proprietary rights.[1] The content of such a right is constituted by the legal possibilities of owning and using this property to the extent necessary and sufficient to achieve the purpose of entry of a lessee in the relationship of the hire with the subject to the requirements of the intended purpose of the specified type of immovable property. In these circumstances,

"... the use of the property, inter alia, ownership, is conducted independently of all third parties, including the owner, and without their assistance; to refrain from acts that may interfere with the tenant is the responsibility of these persons to a lessee."[2]

Thus, the qualifying conditions for assessing the right to lease as a proprietary right from the position of the legislator is the limited composition of real estate (in particular, land and buildings or other capital structures (their

[1] Maidanik, 2019.
[2] Rybalov, 2005.

separate parts)), as well as the duration of use. Concerning the time criterion, the Supreme Economic Court of Ukraine stated a clear position on this issue. The Court of First Instance and the Court of Appeal concluded that the lease of immovable property with a term of less than three years was not included by the legislator in the list of proprietary rights. However, based on the legal concept of the proprietary right (which is a set of legal institutions, the rules of which allow a person to exercise his subjective civil rights to influence the property in his management, with or without a specific agreement of his will with the will others involved in this matter persons), it should also be attributed to the proprietary with all the legal consequences that accompany it.

However, the Supreme Economic Court of Ukraine noted that subjects of civil legal relations cannot by their own will create any kind of proprietary rights to another's property, and the rights of the entity to a thing can be classified as proprietary only if they are named as such in the law. The lease of immovable property with a term of less than three years is not included by the legislator in the list of proprietary rights, and therefore pointed to the erroneous conclusion of the courts of previous instance that it should also be attributed to proprietary law with all the legal consequences that accompany it.[1]

The optimality of this approach is obvious for modern domestic realities, since the lease of real estate is by far the most common way of attracting the passive part of fixed assets in the process of conducting business activities. Today, many small and medium-sized businesses, in the face of fierce competition, use the lease of real estate and want to be sure of its stability and

[1] UP, n.a., 2017.

the fate of the business case when changing the property owner. Guarantees of this stability are long-term lease use, the ability of the lessee to influence on the behaviour of third parties, and the publicity of the lease relationship. Taken together, they mediate the substantive nature of the right to lease real estate and provide "systematicity" as one of the main features of entrepreneurial activity.

THE SECOND TOPIC: THE LEGAL NATURE OF THE CONTRACTUAL MODELS UNDER WHICH THE PROPERTY IS TRANSFERRED INTO TEMPORARY USE, WHICH BY ITS FEATURES DOES NOT CORRESPOND TO THE CHARACTERISTICS OF AN OBJECT OF AN AGREEMENT

Another very important issue in the development of lease relations is the issue of renting someone else's property, in the process of using which the title holder remains the lessor. Thus, in the course of the evolution of property turnover, lease relations have diversified significantly, since the continuous development of commercial turnover causes business entities to attract on contractual principles foreign property whose features do not make it unconditional to regard it as the subject of a lease agreement. In particular, today, in practice, individuals enter into atypical agreements under which temporary elements of a building (wall, roof), optical fibres in available fibre-optic communication lines, satellite capacitance resources, etc. are paid for temporary use.

The state of modern legal regulation of relations for the transfer of property to use proves that the legislator has transferred the solution of these tasks into the domestic doctrine of law. However, legal science and contractual practice

today have not made a clear and unanimous position regarding the qualification of relations for the temporary use of these objects. Discussions are still underway between legal scholars and practitioners on whether it is advisable to extend these relations to the legal regulation of the lease of property.

Legal scholars have other opinions. Realising the legal nature and analysing the regulation of the lease of square meters in buildings, walls and other parts of premises and structures, R.A. Maidanik concluded that "certain areas of premises, walls, parking lots and other parts of the property can be transfer for the use under a lease agreement." At the same time, the researcher "does not exclude the possibility of regulating such relations through other types of agreements… (on the provision of services, joint activities, etc.).[1] In authors' opinion, the object of the agreement, under which the structural elements of the building are transferred to use, is the proprietary right, the admissibility of which is to be the subject of the lease agreement, defined in Part 2 of Art. 760 of the Civil Code of Ukraine (in particular, the right to place advertising means, antennas, solar panels, etc.). With regard to jurisprudence, the "green light" for the contractual use of parts of buildings (capital structures) and their structural elements is given by the higher courts of the Republic of Belarus[2] and the Russian Federation, extending the legal regulation of leasing to these relations.[3]

However, the lack of a unified, scientifically substantiated concept of the legal nature of the relations for the transfer to use of such objects and a clearly defined sphere of their legal regulation did not become an obstacle to the

[1] Maidanik, 2011.
[2] Supreme Economic Court of the Republic of Belarus, No 1.
[3] Supreme Arbitration Court of the Russian Federation, No. 73.

conclusion of the relevant lease agreements. Typically, in these cases, the modelling of the behaviour rules occurs using the provisions of Ch. 58 of the Civil Code of Ukraine, par.5 Ch. 30 of the Civil Code of Ukraine, Law "On the lease of state and communal property". Moreover, the large-scale application in practice of such contractual structures has given impetus to litigation in courts of law, caused by the violation of their parties' rights and the failure to fulfil or improper performance of their obligations. When deciding, courts also classify disputed material relationships as leases.

Higher courts should have to answer the question of the suitability of lease relationships for the contractual use of such objects. However, the plenum of the Supreme Economic Court of Ukraine, clarifying the correct and uniform application of the rules of law to commercial courts in the consideration of disputes related to the lease of property, did not specify in its resolution of May 29, 2013 its own position on the admissibility of the application to such legal relations of general provisions on renting.

In authors' view, when concluding an agreement for the purpose of placing, for example, advertising on the wall or roof of a building, a person gains for a temporary use, not a place on the outside of the structural element, but the right to place an advertising on a contracted area of a wall or roof space. A person shall exercise this right within the period specified in the agreement and at the payment agreed by the parties. In other words, the subject of such an agreement is property right, the admissibility of a lease which is determined by Part 2 of Art. 760 of the Civil Code of Ukraine. Such a statutory opportunity is not a know-how of the domestic legislator, since it was envisaged by pre-revolutionary legislation. In particular, Art. 1816 of the Civil Code of 1905 stated that the subject of the lease agreement could be

both movable and immovable property, as well as income-generating rights (a similar rule is found in the Halych Civil Code of 1797, p. 225).

Thus, the leasing of roofs, walls and other structural elements of buildings (capital structures) and their separate areas should be mediated by the contractual model of lease. Such an approach is the best option for settling this type of property relations, since it enables the use of legal instruments of the general provisions on the lease of Chapter 58 of the Civil Code of Ukraine.

The subject of a lease agreement under which the right to place advertising construction on the wall or roof of a building (capital structure) or the right to place a terminal, a service apparatus, an ATM, etc. in the building is the relevant proprietary right. At the same time, when the premises or a part of the premises are conveyed for the specified term for the specified apparatus or advertising means, the object of such contract is the respective real estate object.

The issue of leasing optical fibres in existing fibre-optic lines is directly related to resolving the issue whether the fibre-optic cable is a divisible or indivisible thing and, therefore, whether the optical fibre is the individual object of law. In the legal literature, there are lively discussions and substantiated multi-polar conclusions. Without the scientific debate on this, the authors believe that in view of the design of fibre-optic cables (the construction of one or more isolated optical fibres, enclosed in a shell, where apart from optical fibres and insulation there are screen, power elements and other structural elements), separate optical fibre without the structural elements of the cable cannot perform its functional purpose, and therefore it cannot be considered as an individual object of law.

By entering into a lease of optical fibres, the lessee has the opportunity to use not the optical-fibre cable and the optical fibre, but the right to transmit

digital information using this technology, which is inherently proprietary right. In view of this, the subject of the lease of optical fibres is also the proprietary right in which it benefits.

In the context of the problem raised, D.I. Meyer's scientific opinion is urgent that

> *"...any kind of property that gives any opportunity to use it may be the subject of a lease agreement, and it is not essential for understanding whether the lessee directly uses the leases property, satisfies with it any need, he should just have opportunity to gain for himself from the property any benefit."*[1]

CONCLUSIONS

Analysis of the legislation formation in the field of resolving the issue of binding lease agreement for the new owner of property, the laws of the states of general and continental law in this field and tendencies of domestic jurisprudence proves the validity of the legislative recognition of the material nature of th rights of the lessee of real estate, which follows from his title opportunity to use this property. The content of this right is constituted by the legal possibilities of owning and using real estate to the extent necessary and sufficient to achieve the purpose of entering the employment relationship. The qualifying conditions for assessing the right to lease as a proprietary right from the position of the legislator is the limited composition of real estate (in particular, land and buildings or other capital structures (their separate parts)), as well as the duration of use. Such a legislative approach will extend the lessee's legal guarantees and contribute to the stability of small and medium-

[1] Meyer, 1997.

sized businesses. The guarantee of this stability is the long-term lease of the real estate, the possibility of the lessee's influence on the behaviour of third parties and the publicity of the lease relations.

Continuous development of commercial turnover and the search for innovative approaches to mediating entrepreneurship stimulated contractual practice for the conclusion of lease agreements regarding structural elements of the building (wall, roof), optical fibres in existing fibre-optic communication lines, capacitive resources and satellite resources. Transfer of the use of these objects is appropriate to mediate with the contractual model of a lease. Such an approach is the best option for settling this type of property relations, since it enables the use of legal instruments of the general provisions on the lease of Chapter 58 of the Civil Code of Ukraine.

In order to broaden the prospect of lease relations development in Ukraine, to ensure the stability of their civil law regulation in the Concept of Recoding of Civil Law of Ukraine, it is extremely important to regulate the issues considered in the paper by fixing in the Civil Code of Ukraine the rights to lease real estate as one of the real proprietary rights and to detail the provisions on the lease of proprietary rights.

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PROTECTION OF AGROSPHERE OBJECTS THROUGH CRIMINAL LAW IN SUSTAINABLE DEVELOPMENT

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Abstract

Globalization of environmental and food problems facing now-living mankind generation and the need to preserve the agrosphere potential in order to meet the needs of future generations and to safeguard the natural human right to life and health make the issue of protection of agrosphere objects through criminal law even more relevant. In this connection, the legal doctrine has a high-priority task – to research and propose approaches to improve the mechanism of protection of agrosphere objects through criminal

law for the purpose of ensuring its sustainable development. The aim of this article is to develop a concept of protection of agrosphere objects in sustainable development through criminal law. An integrated approach to solving the problem of protection of agrosphere objects through criminal law in sustainable development will enable functioning of a viable mechanism of such protection, safeguarding the natural human rights to life, health, and safe environment. Globalization of mentioned problems calls for developing an effective international legal mechanism of criminal protection of agrosphere objects.

Keywords: agrosphere, sustainable development, human health, protection through criminal law, criminal liability, environmental crimes.

INTRODUCTION

Research Relevance and Problematics.

Agrosphere is a system able to satisfy food needs of the general public and to promote environmental interest because it is a sphere where business activities go with the use of natural resources and objects. Therefore, under current conditions, the problem of legal protection of its objects becomes of particular importance and acuteness. This stems both from the globalization of environmental and food problems facing now-living mankind generation and the need to preserve the agrosphere potential in order to meet the needs of future generations, including to safeguard the natural human right to life pronounced in Art. 3 of the Universal Declaration of Human Rights adopted by the United Nations General Assembly in 1948.

In Ukraine, agrosphere accounts for over 70% of its territory; it is the place of living and working of a considerable number of people (over 30%).

Moreover, the agrosphere is the primary source of food for the country's population and of raw materials of plant and animal origin for the industry. In this connection, the legal doctrine has a high-priority task – to research and propose approaches to improve the mechanism of protection of agrosphere objects through criminal law for the purpose of ensuring its sustainable development. This article becomes even more relevant due to the fact that the issues being analyzed herein taken as a whole have not been the subject of a separate thesis research or a case study. Philosophers, economic and legal scholars (V.I. Danilov-Danil'yan, V.S. Diyesperov, L.H. Melnyk, L. Hens) have dedicated their papers to researching various aspects of sustainable development; certain legal issues of agrosphere development have been addressed by P.F. Kulynych,[1] T.V. Kurman,[2] O. Radzivill[3]; issues of criminal liability for some environmental crimes have become the subject matter of scientific inquiries of criminal legal scholars (O.O. Dudorov,[4] V.V. Loktionova, N.V. Netesa, F.A. Lopushansky, O.Ya. Svyetlov, I.P. Lanovenko, K.M. Orobets, S.B. Havrysh and others). However, no integrated and cross-disciplinary research of problems of criminal law protection of agrosphere objects in sustainable development was conducted.

Hence, insufficient doctrinal working out, apparent lack of clear legislative regulation both nationally and internationally dictate the need for determining approaches to protect agrosphere and its separate objects through criminal law in sustainable development.

[1] Kulynych, 2011.
[2] Kurman, 2018.
[3] Radzivill, et. al., 2019.
[4] Dudorov, et. al., 2014.

Purpose of the Study.

The aim of this article is to develop a concept of protection of agrosphere objects through criminal law in the context of sustainable development. *Object of research* – law enforcement in agrosphere. *Subject of research* – mechanism of protection of agrosphere objects through criminal law.

Research Methodology and Materials.

Methodological basis of this research are the general and special scientific *methods:* dialectical (it has become a foundation of the entire article, which made it possible to analyze a sustainable development of agrosphere in conjunction with other legal phenomena, in particular, with its protection through criminal law, and a relevant array of regulatory instruments – in the dynamics of their development), axiological (establishing a connection between the sustainable development of agrosphere and exercising natural human rights to life, health, and environmental safety, etc.), synergism (elements of agrosphere and sustainable development in the system and in interaction with one another have been selected for this research), historical-legal (formation and chronological development of sustainable development concept and its legal platform), system-structural (it has contributed to analysis of a system of functions and tools of the mechanism of criminal law protection of agrosphere objects), comparative-legal (comparative analysis of criminal law rules and regulations of different countries and international treaties in respect of the protection of agrosphere objects), formal-legal (was applied in order to interpret certain provisions of statutory and international legal instruments relating to sustainable development of agrosphere and criminal liability for crimes committed in the agrosphere) and statistical (processing of statistical data relating to condition of agrosphere objects and criminal liability for environmental crimes).

The *empirical materials* of this research include theoretical articles of legal and economic science experts, international legal acts (The Universal Declaration of Human Rights, Agenda 21), legislation of Ukraine (Criminal Code of Ukraine (2001), Law of Ukraine On Key Principles (Strategy) of Public Environmental Policy of Ukraine for the Period until 2030 (2019); the Association Agreement between Ukraine, on the one part, and the European Union and the European Atomic Energy Community and their member states, on the other part (2014)), EU (Council of Europe Convention on the Protection of Environment through Criminal Law (ETS No. 172/1998), Treaty on European Union (1992), France (Environmental Code of France (2000)), Latvia (Criminal Code of Latvia (1998)) and other states which regulate public relations with regard to the criminal protection of agrosphere, statistics from UN, Ukraine, etc.

FINDINGS OF RESEARCH AND DISCUSSIONS

THE FIRST TOPIC: LEGAL FRAMEWORK OF SUSTAINABLE DEVELOPMENT OF AGROSPHERE

One of today's most pressing issues is the conservation, restoration, and rational use of natural resources caused by the predicted global environmental crisis. A constant adverse environmental impact implicates naturally the extinction of some live species, depletion of natural resources, weakening of biosphere resilience, as well as general deterioration of conditions and quality of livelihood of humans as living beings.

There is a myriad of factors that have an adverse impact on environmental conditions. V.I. Borysov rightly points out that crises-related environmental phenomena jeopardize the possibility of evolution of human civilization, and further degradation of natural systems results in destabilization of biosphere,

loss of its integrity and ability to sustain an environment safe for human life and health.[1]

Adverse effects mentioned above are particularly noticeable in agrosphere. After all, this is where economic, food, environmental, and social interests of the state, its people and members of agrobusiness merge together. Unfortunately, the economic factor has been predominant for many years. Over the last years, what we observe in Ukraine's agrosphere is the dominance of personal interests and influence of large agrobusiness holding companies aimed at making super-profits alongside rural impoverishment and depopulation, and negligence of environmental problems.

We should agree to the opinion of P.F. Kulynych that intensification of agricultural resources exploitation in general and utilization of agricultural lands in particular, which has become especially noticeable in the second half of XX century, is the major contributor to new problems in agrosphere; it lowers the level of natural resilience and balance of environment and lands as objects of respective social relations, and requires a significant strengthening of the role of law in supporting and sustaining its resilience and balance based on the large-scale and internally harmonized action plan.[2]

As you know, agricultural production together with industrial enterprises have a direct impact on human health and life expectancy. As noted by the experts, there is a certain connection between the natural population growth and death ratio, on the one part, and the level of agricultural land use planning and management of territory, ploughness of lands, application of mineral fertilizers, utilization of pesticides and pollutant emissions – on the other.[3]

[1] Netesa, 2013.
[2] Kulynych, 2011.
[3] Melnyk, Shapochka, 2015.

As of today, in Ukraine, 72% (in some regions even more than 88%) of agricultural lands are ploughed. Moreover, marginal lands are cultivated as well.[1] However, we know that even the slightest deviation of lands quality from the existing standard may carry a threat for people and other living creatures. Main risks that caused the diminishing of soil fertility due to commercial activities of people include erosion processes, dehumification, overconsolidation, flooding, bogging, acidification and pollution of lands with radionuclides, pesticides, and other organic substances, as well as heavy metals. In total, there are more than fifty sources of hazard, the majority of which are anthropogenic.

In recent years, the following degradation processes related to the condition of agricultural lands have become widely spread: (a) erosion has effected 57% of lands,[2] currently 60% of rich black soil is degraded; in general, the area of eroded arable land has increased by almost 1.5 times over the past years; (b) land pollution is observed on about 20% of territory; (c) acidification of soils – acid soils cover 17.7% of Ukraine's territory; (d) salinization and alcalination of soils; (e) flooding of lands – about 12% of Ukraine's territory constitute areas of natural and technogenic flooding; (f) landslides, soil disturbance, etc.[3] A considerable damage was caused to land resources and other nature-made objects as a result of military activities on Donbass territory. In particular, this refers to soil contamination with chemicals because of explosions of ammunition; destruction of cultivated lands and flora due to utilization of military machinery and construction of

[1] Land fund of Ukraine, 2016.
[2] Law of Ukraine, 2019.
[3] CMU, 2005.

defense structures; destruction of massive areas of forests due to fires and uncontrolled cuttings triggered by the military activities, etc.[1]

However, welfare and living conditions of current and future generations depend greatly on the condition of agrosphere. Its utilization in agricultural production by existing and exhausting means of industrial model may cause only the escalation of environmental crisis, ultimate depletion of environmental assets and other extremely negative consequences, including a threat to the survival of mankind itself.

As the professional literature states, agricultural activities associated with transformation of natural landscapes into cultivated lands go hand in hand with the drop in biological diversity and environmental sustainability of the latter. Therefore, the solution of issues regarding the rationale for the structure of use of agricultural lands in the systems of cultivated land farming shall be based on the application of social-nature approach that allows for factoring in the change in the condition of key components of a landscape as a result of agricultural activities, as well as principles of environmental management.[2] This may explain the fact that protection of agrosphere has become of particular relevance, which, in its turn, requires sustainable development of agricultural production which must be ensured by respective legal remedies.

Government regulation of exploitation of agrosphere resources in agricultural production, especially of agricultural lands, becomes relevant also due to the fact that in Ukraine agricultural activities on the main territory of these lands are done not by the owners but by the tenant farmers, who aim first of all at making profits from such activities and not at careful and

[1] Law of Ukraine, 2019.
[2] Melnyk, 2014, pp. 219-222.

environmentally sound use and preservation of both land plots, which do not belong to them, and environment. The implementation of urgent market of agricultural lands which has not been thought through and scientifically grounded may also create certain threats in this sphere.

Public policy aimed at protecting agrosphere was adopted in the majority of developed countries. Strategy that is based on the paradigm of sustainable development of agrosphere is marked by especially positive results. Therefore, currently, there is a critical need to determine the strategy of agrosphere development, which shall certainly be based on the principles of sustainable development and find its way into legislation both at the domestic and international levels.

There is all the more reason for this as the mankind faces another global problem – a food one, and its solution shapes humanity's future existence. Safeguarding national food security and providing people with sufficient amount of high-quality and safe plant and animal products and aquaculture, and industry – with necessary raw materials, has always been and remains a priority in the agriculture development. Ukraine, as it is fairly emphasized in the professional literature, is among the countries which have the highest-rated potential reserves of agrosphere. This is due to a high concentration of rich black soils (up to 30% of the world reserves), advantageous geographical location, favorable natural climatic conditions for the cultivation of the majority of agricultural crops of strategic importance, well established transportation infrastructure, etc.

Hence, Ukraine has a great potential to become one of the global leaders in the production of grain and other types of agricultural products. A proper development of agrosphere under the conditions of sustainability is able to pave the way to forming agro-ecological image of the state and boosting the

competitiveness of agricultural products of national producers both at the domestic and international markets.

Moreover, it makes sense to agree to the opinion of P.F. Kulynych that the values which cannot always be quantified or cost-estimated are being restored due to agrosphere. Although these values have not become imperatives of social development up to this day, their beneficial effect is doubtless. In particular, this refers to a significant contribution to: a) wildlife preservation; b) conservation of cultivated lands and agrarian biological diversity; c) supporting of life-sustaining activities on the considerable territory of the country, namely in rural localities; d) recovery and support of human health; e) development of recreational objects, etc. The above-mentioned functions of agrosphere are extremely important. In their entirety, they carry out some sort of non-food "mission" of agricultural production.[1]

Currently, their importance is not understood by our society sufficiently, therefore it remains not enough regulated by the legistation.

A concept of sustainable development as a foundation of economics of growth or "green economics" is becoming predominant in the world nowadays. Sustainable development becomes a key area of both international legal and domestic regulation in all spheres of human life and activities, including in the agrosphere. A sustainable development concept being in harmony with production, environmental and social aspects, as it appears, is able to help solving pressing issues of agrosphere and ensure natural human rights to life and health.

At the same time, ensuring sustainable development of agrosphere through legal means becomes especially relevant both for Ukraine and other countries

[1] Kulynych, 2011.

of the world. Since under globalization conditions, national economies become interdependent and interactive components of global economic system with common development factors. It has to do with forecasted global problems of food, ecological, and energy nature, and is driven by the need for: (a) ensuring food security; (b) sustainable development of rural localities, as well as (c) preservation of environment in the course of agricultural production activities, minimization of their adverse, anthropogenic and technogenic impact on the environment.[1]

The problematics stated above have become especially relevant in the context of Ukraine's opportunities for European integration.

The Law of Ukraine dated 16 September 2014 has ratified the Association Agreement between Ukraine, on the one part, and the European Union and the European Atomic Energy Community and their member states, on the other part entered into in Brussels.[2] Chapter 17 of the Association Agreement deals with agricultural development. It sets forth that the parties shall cooperate to promote agricultural and rural development, in particular, through gradual approximation of policies and legislation (Art. 403).

Pursuant to Art. 404 of this Agreement, the cooperation between the parties in the field of agriculture and rural development shall cover, *inter alia*, the following areas: a) promoting modern and sustainable agricultural production, respectful of the environment and of animal welfare; b) improving the competitiveness of the agricultural sector and the efficiency and transparency of the markets as well as conditions for investment; c) favoring innovation and promoting consultancy system to agricultural

[1] Kurman, 2018.
[2] VRU, 2014.

producers; d) promoting the policy of quality of agricultural products in the areas of product standards, production requirements and quality schemes; e) sharing knowledge and best practices of rural development policies to promote economic well-being for rural communities.

Provisions on sustainable development of agrosphere are laid down in the Law of Ukraine *On Key Principles of Public Agricultural Policy for a Period until 2015* dated 18 October 2005,[1] pursuant to Art. 1 whereof a public agricultural policy is aimed at sustainable development of the agricultural sector of national economy, systemic and integrated approach to measures for implementation of a public agricultural policy by all government and local authorities. It shall be based on the national priorities and incorporate the need of Ukraine's integration into the European Union and global economic area.

Therefore, transformation processes in the agricultural sector of economy must be implemented with due regard for environmental imperative, while the concept of sustainable development, in particular, the sustainable development of agrosphere, shall become a conceptual framework of public regulation of agriculture. Provisions of Art. 294, Chapter XIII of the Instruction (Nakaz) of Empress Catherine the Great, which she gave to the Legislative Commission for composing a New Code of Laws: "*There can be neither skillful Handicraftsmen, nor a firmly-established Commerce, where Agriculture is neglected, or carried on with Supineness and Negligence*…" seem quite well-founded in this regard.[2]

Sustainable development concept is not new in general. Its underlying ideas are known to the world since ancient times as they are based on

[1] Law of Ukraine, 2005.
[2] Aksyonov, 2001.

universal human values. At the international level, the concept of sustainable development was first disclosed in the Report "Our Common Future" (1987) developed by the UN World Commission on Environment and Development. It was enshrined in legislation at the international level in 1992, when at the UN World Conference on Environment and Development in Rio de Janeiro (so called "The Earth Summit" participated by 179 countries, including Ukraine) the sustainable development was determined as the strategy of mankind existence for XXI century, and *Agenda 21* was approved as well.[1] The Conference has also adopted the Rio Declaration on Environment and Development and the Statement of Principles for a Global Consensus on the Management, Conservation and Sustainable Development of All Types of Forests. At the Brazil Summit, the sustainable development was defined as a development that meets the needs of the present without compromising the interests and the ability of future generations to meet their own needs. After the Rio Conference (1992), the concept of sustainable development has become a fundamental pillar of national strategies and programmes. The principles of sustainable development in the context of environmental prosperity and well-being were incorporated in the legislation of each and all European countries.[2]

At international scale, this problem has always been on the agenda. The need to propagate ideas of sustainable development was further declared at other UN summits and conferences. In particular, at the Earth Summit + 5 (Rio de Janeiro, 1997) the Programme for the Further Implementation of Agenda 21 was adopted, where it was stated that economic development,

[1] United Nations Conference on Environment & Development Rio de Janerio, 1992.
[2] Ermolina, 2013, pp.110-112.

social development and environmental protection are interdependent and mutually reinforcing components of sustainable development.

In 2002, the Declaration on Sustainable Development was adopted at the World Summit on Sustainable Development in Johannesburg. This Declaration encompassed recommendations as to the priorities and further steps to enforce provisions of documents which were previously adopted, and the need for certain countries to adopt national strategies to develop their economies in that regard was substantiated.

At the next UN Conference on Sustainable Development (Rio + 20, Rio de Janeiro, 2012), the outcome document named "The Future We Want" was adopted, where a direction towards creating "green economy" in order to achieve sustainable development, poverty eradication and improving international coordination to support such development was determined.

The Resolution adopted by the United Nations General Assembly on 25 September 2015 "Transforming our world: the 2030 Agenda for Sustainable Development"[1] has reaffirmed the urge of a global community to end hunger, guarantee and protect human rights, and preserve the planet and its natural resources.

Provisions of these international legal instruments were further detailed in domestic laws of many countries – in the Germany's National Sustainable Development Strategy, the USA Sustainable Development Strategy, China's Programme on Sustainable Development ("China's Agenda 21 – White Paper on China's Population, Environment and Development in the 21st century"), the National Strategy of Sustainable Social and Economic Development of the Republic of Belarus for a period until 2020, etc. These provisions have

[1] United Nations General Assembly, 2015.

also been reflected in the Treaty on European Union. In particular, Art. 2 thereof sets forth that the Union seeks to promote economic and social progress and a high level of employment and to achieve harmonized, balanced and sustainable development, sustainable and non-inflationary growth, high level of competitiveness of economies, high level of protection and improvement of environment, rising standard of living, etc.[1]

Therefore, the legal science has a challenging task: to propose new and innovative approaches to the legal mechanism of ensuring sustainable development of agrosphere, which would consolidate organic and optimal combination of production of agricultural products and environmentally sound use of natural resources and sustainable development of rural localities. However, criminal protection of agrosphere and its separate objects, in particular, agricultural lands as the primary tool for agricultural production, shall become one of the elements of the above-mentioned mechanism. This is because criminal protection of agrosphere objects guarantee unavoidability of liability for environmental law violations in agrosphere.

THE SECOND TOPIC: INSTRUMENTS OF AGROSPHERE PROTECTION THROUGH CRIMINAL LAW

It should be noted that *Key Principles (Strategy) of Public Environmental Policy of Ukraine for the Period until 2030*, as approved by the Law of Ukraine on 28 February 2019, say that processes of globalization and social transformations have raised the priority of conservation of environment, and therefore call for urgent actions by the state. Ukraine's economic development has long been accompanied by the unbalanced exploitation of natural resources and low priority of issues associated with environmental

[1] Treaty on European Union, 1992.

protection, which made achievement of balanced (sustainable) development impossible. Therefore, a strategic goal of public environmental policy, including in agrosphere, is mitigating environmental risks in order to minimize their impact on public health, social and economic development of people, and ecosystems. The above-mentioned Law names the following primary causes of Ukraine's environmental problems: dominance of economic feasibility over environmental priorities; unsatisfactory level of compliance with environmental laws; unsatisfactory control over compliance with environmental laws, and failure to procure unavoidability of liability for their violations, etc.[1]

Increased number of sick people and death rate, disbalance of agro-ecosystems, degradation of nation's gene pool is a logical and inevitable consequence of accelerated rates of degradation of natural objects. Therefore, Ukraine seeks not only to implement public programmes of environmental protection, but also to establish and improve mechanisms of legal influence, including through criminal law, on those who violate environmental laws, since interaction of humans (society) with nature cannot happen under conditions of absolute freedom and shall be restricted by laws.

Legal foundation of Ukraine's environmental policy in agrosphere is laid down in the Constitution of Ukraine, which declares the state's obligation to guarantee a right of its citizens to the environment safe for life and health and environmental security.

Pursuant to Art. 16 of the Constitution, to ensure ecological safety and to maintain the ecological balance, and to preserve the gene pool of the Ukrainian people, is the duty of the State. Article 50 stipulates that everyone

[1] Law of Ukraine, 2019.

has the right to an environment that is safe for life and health, and to compensation for damages inflicted through the violation of this right, and that everyone is guaranteed the right of free access to information about the environmental situation. In its turn, the Constitution imposes an obligation on the citizens not to harm nature and to compensate for any damage he or she inflicted (Art. 66).[1]

Duties of citizens to take care of nature, to protect and rationally utilize its wealth in conformity with the requirements of the legislation on environmental protection and to refund losses caused by pollution or other adverse impact on the environment are set forth in the Law of Ukraine *On Environmental Protection* dated 25 June 1991 (Art. 12). Pursuant to Art. 70 of this Law, elements of environmental offences and crimes and the procedure for the prosecution of those responsible for such crimes under administrative and criminal laws shall be determined in the Code on Administrative Offences of Ukraine and the Criminal Code of Ukraine.

Based on the above, one of the principles of Ukraine's environmental policy in agrosphere is to ensure unavoidability of liability for environmental law violations. Having proclaimed these principles, Ukraine paves the way for a rule-of-law state, which based on the Constitution guarantees not only rights but also a viable mechanism of implementing constitutionals provisions. One of the effective elements of such mechanism is criminal remedies, which envisage imposing liability for offences committed against environment safe for people's life and health.

In support of importance of object of the offence being analyzed, we should refer to foreign criminal legislation.

[1] Constitution of Ukraine, 1996.

Thus, for example, in the Criminal Code of Latvia (1998) the chapter dedicated to offences against environment (XI) precedes the chapter on liability for crimes against person (XII).[1] This is explained by the fact that without favourable living environment humans are unable to survive as biological species, therefore protection of amenities created by civilization (public and social interests, property, etc.) loses its meaning. Similar thoughts concerning introduction of the same changes in the structure of the Criminal Code of Ukraine, namely as regards the placement of chapter on environmental crimes after the chapter on liability for crimes against human life and health, have been expressed in the domestic criminal law science reasoned by the fact that this way it would help recognizing the priority of human values when addressing environment-oriented tasks.[2]

It should be noted that lately an intensive development of environmental protection legislation through criminal law can be noticed internationally. Thus, respective reforms of national criminal codes aimed at the improvement of provisions on liability for environmental crimes took place. It's worth noting that environmental criminal laws are reformed in a similar way in the countries which differ substantially by their social and political traditions and social and economic development.[3]

The Convention on the Protection of the Environment through Criminal Law[4] adopted on 4 November 1998 in Strasbourg and ratified by Ukraine on 24 January 2006 is of great importance in this regard. This Convention plays a pivotal role in reformation of environmental criminal laws practically all

[1] Criminal Law. Law of the Republic of Latvia.
[2] Lopushansky, Svyetlov, Lanovenko, 1994.
[3] Luneev, 2010.
[4] Convention on the Protection of the Environment through Criminal Law, 1998, ETS No. 172.

over the world. Analysis of recommendations laid down in the legal instrument under review allows placing greater focus on such key aspects as: widening the scope of environmental objects and values; broadening types of criminally punishable acts; more vigorous use of structures of endangerment elements and their substantiated combination with materially defined and formally defined crimes to enhance preventive potential of criminal prohibitions; more vigorous application of pecuniary penalties with simultaneous increase in their amount; introduction of criminal liability of legal entities for environmental crimes associated with entrepreneurial, production, and other activities.

Moreover, the Resolution "Actions against transnational and organized crime, and the role of criminal law in the protection of environment: national experiences and international cooperation" adopted by the Ninth United Nations Congress on the Prevention of Crime and Treatment of Offenders (Cairo, 29 April – 8 May 1995) deals with promoting the inclusion of a discipline about the role of criminal law in environmental protection in the programs for studying criminal law and training of law enforcement officers and in the criminal justice system.[1] All stated above attest to attempts to form a mechanism of environment protection, including in agrosphere, through criminal law both nationally and internationally.

The Criminal Code of Ukraine envisages liability for environmental offences, including offences against environment's separate elements, in Chapter VIII of the Special Section "Crimes Against Environment". The Criminal Code of Ukraine establishes liability for the most socially-dangerous offences in environmental protection. Protection of environment,

[1] Dudorov, et al., 2014.

as stated above, is one of the state's functions. That is why Part 1 of Article 1 of the Criminal Code of Ukraine says that the objective of the Criminal Code of Ukraine is to provide legal protection of the environment, among other objects, which highlights special significance both of this object and of criminal remedies aimed at its protection.[1]

Analysis of foreign laws shows that standalone chapters (sections) similar to Chapter VIII of the Special Section of the Criminal Code of Ukraine with identical or analogues titles are incorporated into criminal codes of Albania, Mongolia, Poland, Germany, Spain, all CIS countries and Baltic states, Vietnam, Columbia, Salvador, Paraguay, Mexico. Environment, ecological security and natural resources, respectively, are recognized as the objects of offences in these countries.

Criminal codes of other countries such as Italy, France, Andorra, Sweden, Argentina, Hungary, Afghanistan, Belgium, Norway, Brazil, Bulgaria, Japan, Bolivia, Israel, Sudan, Uruguay, Switzerland, Philippines, Chile, Finland, Tunisia, India, Denmark, Indonesia, and Iraq do not contain special chapters (sections) establishing liability for environmental crimes.[2] This fact can be explained either by the lack of attention to relevant crimes or by their definition in certain laws or regulatory instruments accepted within interstate associations.[3] In these countries, considering indisputable blanket nature of criminal law rules, they are incorporated not in the criminal codes but in the integrated legislative instruments on environmental protection (for example, in the Environmental Code of France (2000)). Similarly, criminal prohibitions for committing environmental crimes stipulated in the laws of some states in

[1] Criminal codeks of Ukraine, 2001.
[2] Dodonov, Kapinys, Shcherba, 2010.
[3] Khavronyuk, 2006.

the USA, as a rule, are incorporated not in the criminal codes but in other legislative instruments – on health care, shipping and navigation, water, fishing, etc. Singapore, India, Finland, Sweden, Belgium, and Japan have solved this issue in a similar way: elements of environmental crimes are scattered in numerous environmental protection laws and other legislative instruments.

Crimes against environment (ecological offences) are understood as culpable socially-dangerous acts (actions or omissions to act) covered by criminal law which encroach on environment and its components, sustainable use and protection whereof ensure human livelihood and environmental security of people and territory, and consist in direct unlawful utilization of natural objects or in the illicit impact on them which results in adverse changes in the condition and quality of environment.[1]

Generic object of environmental crimes is such condition of environment and separate elements thereof which exclude hazard to human life or health; when protection, rational exploitation and restoration of natural resources are procured; proper ecological condition of biosphere is maintained.[2] Direct objects of environmental crimes include various elements of functioning of environment, which forms the basis for a system of mentioned crimes.

Additional objects of crime in question include human life and health, public health, and property. It is also important to note that specific nature of environmental crimes is that in many cases when defining elements of crime, a lawmaker stipulates criminal liability for actions resulting not only in damage to human life and health (actual injury) but also for a threat of such

[1] Luneev, 2010.
[2] Dudorov, et. al., 2014.

damage. Moreover, almost all actions punishable under Chapter VIII of the Special Section of the Criminal Code of Ukraine are criminalized due to consequences that arise in the form of damage to human life and health maintained.[1]

According to above classification of environmental crimes (by direct object), one of the types of crimes is crimes against established procedure for utilization of lands, mineral resources, territories and objects protected by the state (Articles 239, 239¹, 239², 240, 252 and 254 of the Criminal Code of Ukraine).[2]

We should note that the Constitution of Ukraine (Art. 14) declares the land as the fundamental national wealth that is under special state protection. This constitutional provision refers first of all to agricultural lands. This is due to the fact that Ukraine is a great agricultural state, which has the most valuable benchmark soils in the world. Enforcement of this constitutional provision depends, first of all, on the state's ability to ensure a proper land protection. [3]

As the land is of special importance for absolutely all aspects of mankind living, we have solid reasons to acknowledge that this natural resource plays a critical role among other environmental objects. Pollution, deterioration or other illicit treatment of lands, which represent space for human living and a basic and fundamental resource for agricultural production, trigger both substantial problems in production process and considerable deterioration of living conditions for humans in general, public health impairment, and loss of recreational attractiveness of territories. There are therefor currently all grounds to acknowledge the fact that pollution, deterioration and other

[1] Zinchenko, Volodina, 2019.
[2] Criminal code of Ukraine, 2001.
[3] Constitution of Ukraine, 1996.

offences against agricultural lands is an escalating and threatening environmental, economic and legal problem both for our state and for the whole world.

To strengthen criminal protection of agrosphere objects, the Concept of Public Target Programme of Development of Land Matters in Ukraine for a Period until 2020[1] approved by the Resolution of the Cabinet of Ministers of Ukraine dated 17 June 2009 focuses on the fact that situation around ownership, use and disposal of lands remains challenging and calls for immediate improvement.

To support the above, analysis of statistical data on the number of environmental crimes in Ukraine shows that their share in the general picture of criminality is small and amount to about 0.2%. We should note that the majority of articles of the Section of the Criminal Code of Ukraine that we have analyzed does not apply. However, latency of environmental crimes is 95-98%.[2]

CONCLUSIONS

Existing environmental and food problems become crucial and require immediate solution and legal protection of agrosphere objects. Enforcement of constitutional provisions aimed at environmental protection depends greatly on the state's ability to create and implement an effective and powerful mechanism to counter environmental offences, in particular, in agrosphere. Provisions on criminal protection of agroshpere objects are incorporated mostly in the national criminal and administrative legislation,

[1] CMU, 2009.
[2] Loktionova, 2013.

therefore, environmental criminal law of Ukraine does not possess a united arsenal of means and measures able to influence environmental offenders. Globalization of problems listed above calls for joining together efforts of global community and developing effective international legal mechanism of criminal protection of agrosphere objects. Therefore, we may state the following:

1. Maintaining the ecological balance in the environment, establishing the procedure for the use of natural resources, and protection of agrosphere objects are key areas of the state environmental security.

2. In order to protect the environment, we consider that an integrated and cross-disciplinary approach to solving the problem of protection of agrosphere objects through criminal law is the most effective. It will enable functioning of a viable mechanism of such protection, act as a guarantee that the natural human rights to safe environment, life, and health are observed. Through criminal protection of agrosphere objects unavoidability of liability for environmental law violations in agrosphere will be ensured.

3. The mechanism of criminal law protection of agrosphere objects is meant to perform the following functions: protective (protection of social relations in the agrosphere from criminal offences); preventive (prevention of violations in the agrosphere); motivating (implementation of measures of criminal law protection of agrosphere objects at the legislative level will motivate entities and individuals to comply with the laws in the agrosphere); axiological (settling the value of human rights to life, health, environmental and food safety, etc.), and security (creating conditions for sustainable development of agrosphere).

4. In sustainable development, the agrosphere as a system that combines production, social and ecological elements, will allow for meeting food needs

in harmony with conservation and growth of agricultural resources potential. This, consequently, will contribute not only to achieving strategic objectives of agricultural and environmental policy at the national level but also to solving global environmental and food problems internationally.

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PREVENTION AND COUNTERACTION OF DISCRIMINATION AT THE WORKPLACE

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Abstract

The lack of a clear and effective mechanism for preventing, and counteracting, and responding to any form of discrimination creares new forms of discrimination, especially in the field of wage labor, and exacerbates problems that have not yet been resolved. All this requires the implementation of effective legislative and operational practical measures that will ensure the effectiveness of preventing and combating discrimination both in the

particular organization where the employee works and in the whole society. The results of a sociological survey of the protection of workers from the manifestations of discrimination on the part of the employer and the labor collective in a specific region are presented. The authors of the study propose to define the concept of “factors of prevention and counteraction of discrimination in the sphere of labor relations”.

Keywords: employees' rights and freedoms limitation, discrimination, labor, mobbing, professional environment, psychological violence.

INTRODUCTION

Scientific, Practical Problems.

The right to work is a subjective, natural human right, recognized both nationally and internationally. However, along the way, the right to work is subject to certain restrictions and violations that result in discrimination. The problem of discrimination has no boundaries and is international in scope. The level of employees` discrimination reflects the peculiarities of the social policy of the state at the relevant stage of state development. However, the current realities of social insecurity, unemployment, ineffective employment policies, low wages, inequalities and poverty of the population, which lead to its polarization and migration, amid the shadow economy and corruption of the authorities, have not improved the situation in Ukraine in the fight against discrimination.

This problem and the ways to solve it remain on the agenda. It should be noted that a considerable part of Ukrainian scientists was engaged in the study of discrimination, its counteraction, and protection, in particular, the latest scientific developments covered the topics of non-discrimination in the field

of labor (I. Sakharuk), prevention and counteraction of discrimination (I. Fedorovich), prevention of discrimination in Ukraine in the context European integration (I. Kresin), age discrimination in labor relations (O. Tishchenko), discrimination in exercising the right to work (O. Yaroshenko), and others.

However, for the most part, the research was conducted without taking into account the systematic approach, which should reflect the mechanisms of the state policy in the sphere of combating and protecting against discrimination as one of the main directions of the harmonious development of society, which requires further scientific research in the mentioned field.

In the writings of foreign authors, there is much greater diversification of approaches to the definition of key concepts and categories, as well as much more detailed possible types and forms of existing forms of discrimination in the labor relations. In recent years, there has been an increasing amount of literature on diverse exposures of discrimination, for instance, experimental research on labor market discrimination (D. Neumark), analytic of the workplace discrimination: extension, critique, and future research agenda (D. Joseph), diagnosis of mobbing as discrimination in employee relations (P. Žukauskas), trajectories of perceived discrimination based on long-term associations with mental and occupational health (E. Gonzales), gender and age-based discrimination in employment (C. Duncan), discrimination among employees with disabilities (L. Snyder), gender sidelining and the problem of unactionable discrimination (J. Fink), the gay and lesbian perceived discrimination (D. Olson) and so on.

Purpose of the Study.

The purpose of the paper is to determine the effectiveness of public and private legal mechanisms to protect workers from discrimination as a negative phenomenon of society, and to reflect some trends in anti-discrimination based on sociological research.

The object of the research is discrimination in the field of labor relations. The *subject of the research* is a mechanism for preventing and combating discrimination in the workplace.

Research Methods.

Following the goal of the study, the authors applied a set of general empirical and special methods and techniques of scientific knowledge. Common methods of analytical knowledge (generalization, comparison, analysis, etc.) have been used to characterize the current state of discrimination in Ukraine and the problems of its prevention and counteraction. Using the dialectical method of scientific knowledge, common trends in the prevention and counteraction of discrimination were identified.

The comparative legal method was used in the process of revealing the conformity of national legislation of Ukraine with the provisions of international acts and studying foreign experience in preventing and combating discrimination. The sociological method is based on the study of the detection of the facts of discrimination and the effectiveness of the means, methods in the fight against discrimination in a particular region of Ukraine (183 respondents - employees of enterprises, organizations of Chernivtsi and Chernivtsi region). The logical-semantic method made it possible to improve the forms and methods of combating discrimination by defining the concept of “factors of preventing and counteracting discrimination in the sphere of labor relations”.**RESEARCH RESULTS**

THE FIRST TOPIC: LEGAL TRENDS IN THE PREVENTION AND COUNTERACTION OF DISCRIMINATION IN THE WORLD

Discrimination as a negative phenomenon has negative consequences both for individual categories of citizens and for society as a whole. It is especially evident in labor relations, since people who have acquired the status of workers, cannot be subjected to a single characteristic on certain grounds. Each of them performs work in an organization by the relevant profession, specialty and qualification has relevant experience, summarized by insurance experience, has the relevant criteria of legal personality: age, physical health, business qualities, mental abilities, relevant physiological features organism. Therefore, every employee can be a cause for discrimination on the part of both the employer and the members of the workforce. The employer-employee relationship is complex, which was generalized by L. Rassas, who pointed out: "Employers and employees often enter into working relationships absent a clear understanding of their mutual expectations. Quite often the parties also enter into working relationships without a basic understanding about the laws that govern the creating, maintaining, and ending of those employment relationships.[1]"

The national and international legal frameworks have developed their approaches to both the concept and the causes of discrimination. Under the International Convention on the Elimination of All Forms of Racial Discrimination, racial discrimination is recognized as "any discrimination, exception, limitation or preference based on race, color, ancestry, national or

[1] Rassas, 2020, p. 218.

ethnic origin, the purpose or effect of which is to destroy or diminish recognition, the exercise or enjoyment on an equal basis of human rights and fundamental freedoms in political, economic, social, cultural or any other spheres of public life.[1]" According to the Charter of Fundamental Rights of the European Union, it is forbidden to discriminate people by their gender, race, color, ethnic or social background, genetic characteristics, language, religion or belief, political or other views, belonging to national minorities, property status, ancestry, disability, age or sexual orientation.

The Law of Ukraine "On the Principles of Prevention and Counteracting Discrimination in Ukraine" defines discrimination as a situation in which a person or group of persons by their race, color, political, religious or other beliefs, gender, age, disability, ethnic and social origin, nationality, marital and property status, place of residence, language or other characteristics that were, are and may be valid or assumed, are subject to restrictions on the recognition, enjoyment or enjoyment of rights and freedoms in any form.[2] Despite the legal definitions of the concepts of discrimination provided for by international and national legal acts, in practice there are separate approaches to each cause of this negative phenomenon.

International and national law does not take into account the fact that an employee who is protected on one ground may be discriminated against on other grounds. The discrepancy between such theory and practice entails its negative legal consequences, among which is a simplified one. A key aspect of Gonzales` research can be found in the investigation of the age

[1] VRU, 1989.
[2] VRU, 2012.

discrimination. They suggest a need for expanded jurisprudence to support older employees in receiving fair treatment.[1]

Race, color, national or ethnic identity, gender, age, health status (including disability, HIV status), citizenship, marital and marital status, social status, occupation, financial status, place of residence, religion, denomination (affiliation with religious communities and organizations), philosophical and political beliefs, affiliation with citizens, belonging to a particular social group, education level, sexual orientation, criminal record and experience in prisons, language of communication - this is an incomplete list of features that often lead to discriminatory actions in Ukraine.[2] As a result of this axiom, legislative acts do not take into account the whole variety of adverse factors, life situations that may lead to discrimination. Such a system of equality, which is established at the international and national level does not actually and legally reflect the real personality of the person, protection of his dignity.

Ukraine has a National Human Rights Strategy, which aims to ensure that human rights and freedoms are prioritized as a determining factor in determining public policy, decision-making by public authorities and bodies Local Government. The implementation of the Strategy should result in the introduction of a systematic approach to the implementation of tasks and ensuring the coherence of actions of the state authorities and local self-government bodies in the field of human rights and freedoms, creation in Ukraine of an effective: accessible, understandable, predictable mechanism of realization and protection of human rights and freedoms.[3] As noted in the

[1] Gonzales, Marchiondo, Williams, 2019.
[2] UNU, 2013.
[3] PU, 2015.

Ukrainian and European reports on the implementation of the Association Agreement for 2018, Ukraine has made significant progress in the harmonization of its legislation with the European Union. In the section entitled “Social Policy and Labor Relations”, which provides for approximation of legislation on labor, anti-discrimination and gender equality, as well as on health and safety at work, current progress for 2018 is 70%.[1]

The EU Member States introduce practices to prevent any form of discrimination in all areas of society, including in the workplace. For example, in France, a training module was developed for representatives of the CFDT and members elected to the Paris Labor Court on issues of EU discrimination law. In Italy, some regional bodies have set up anti-discrimination advisory bodies, such as Emilia Romagna. A parliamentary committee has been set up in Sweden to consolidate the law on discrimination.[2]

Discrimination is a negative, violating phenomenon, destroying the principle of equality of rights and freedoms. Therefore, in the disclosure of the concept and nature of the category "discrimination", there is a need to define criteria that help determine what benefits and privileges violate and can destroy the principle of equality, because the principle of equality is the starting point, the basis for interpreting the prohibition of discrimination.[3] A special means of ensuring the principle of equality is the prohibition of discrimination. Such normative implementation of the principle of non-discrimination is one of the state guarantees.

[1] Hnatiuk, 2019.
[2] Application of Council Directive, 2000/43/EC.
[3] Iaroshenko, 2013.

International labor law treats avoidance of discrimination as one of the essential conditions for ensuring equality of opportunity for a person. An analysis of ILO Convention No. 111 "On Discrimination in Occupation and Occupation" gives grounds to claim that the concept of discrimination encompasses: any discrimination, prohibition or preference for race, color, sex, religion or religion. , political beliefs, foreign origin, or social origin and lead to the destruction or disruption of equality of opportunity or conduct in the field of work and occupation; any other distinction, suppression or advantage that results in the destruction or disruption of equality of opportunity or conduct in the field of work and occupation.[1]

The forms and content of discrimination can be influenced by various social, economic, political factors, as well as the mentality of the people. Therefore, "we will never completely solve the problem of discrimination and examine it in all its forms if we continue to focus on abstract categories and generalizations, rather than on specific consequences.[2]"

Discrimination is not a legal category, although it may manifest itself at both the law enforcement and regulatory level. Discrimination can manifest itself in the actions and omissions of the subject, but it is not the act (omission) in its literal sense.[3] Therefore, the perception of the right and its implementation in actual actions does not yet make one or another phenomenon legal and "active", meaning one that falls within the very concept of action. Although, discrimination is a negative phenomenon, manifested in any difference in the form of restrictions on labor rights and freedoms, gaining of all kinds of benefits, depending on circumstances that

[1] ILO, 1958.
[2] Uchellary, 2011, p.23.
[3] Hetmantseva, 2015, pp. 223-224.

are not related to the employee's business qualities and leads to a direct or indirect violation or the destruction of equality of opportunity for the exercise and enjoyment by employees of their labor rights, freedoms and legitimate interests. International community perceives equality before the law as a social justice, so throughout the history of all mankind, natural differentiation is based on age, health status, gender, specific professional skills. Hence, justice can be interpreted as paying attention to the differences of each worker, since the right to individuality is the highest degree of inherent human rights.

The actual differences between employees are a manifestation of their individuality. Therefore, the human factor must be considered precisely in the legal mechanism of labor-management as a unique demonstration of individuality in the process of work, the specifics of its physiology, mental and motor activity, peculiarities in behavior and in interaction with other people, workers, employer, technology, innovative technologies, innovative methods works, etc.

According to I. Ya. Kiselev, discrimination degrades the human dignity of workers, corrupts their consciousness, creates tension in the sphere of labor relations, feeds hostility of some groups of workers to others and, finally, is incompatible with the social world, even creates in some cases the dangers of international ones.[1] In each case, an employee who has been subjected to any form of discrimination on the part of the employer, or a collective, feels inequality of his legal status, deformation of his labor rights and obligations, which leads to degradation of his human dignity and self-esteem. As it was stated by Dennis Lloyd, people are not born equal not only in physical and mental development, but also in other ways. Therefore, the equality between

[1] Kyselev, 1999, p. 469.

them remains the need for a simple formality until it is clear how to further subdivide them into certain categories, according to the moral or social needs of a particular society.[1]

An example of the case is the case of Schnorbus v. Land Hessen from practical implementation of the protection of human rights in the labor market.[2] According to the provisions of national law, she was first required to pass the state examination, then to pass a professional internship and to pass the final examination. The applicant passed the first exam but was denied admission to the internship, citing the absence of vacancies. Because of this, her internship was postponed until the vacancy. The complainant claimed that this constitutes discrimination because the priority is given to male candidates who have served in the military. The ESC concluded that the provisions of national law governing the start of professional traineeships fall within the scope of the concept of "access to work" since such traineeships are considered "employment" both as an independent profession and as a stage in the process of gaining judicial qualification. This case demonstrates the processes that are taking place in Europe to step up the protection of citizens' labor rights against all forms of discrimination.

THE SECOND TOPIC: PREVENTION AND COUNTERACTION OF DISCRIMINATION IN UKRAINE

The Art. 2 of the Law "On the Principles of Prevention and Counteacting Discrimination in Ukraine" establishes that the legislation of Ukraine is based on the principle of non-discrimination, which stipulates irrespective of certain features: ensuring equality of rights and freedoms of persons and/or groups

[1] Dennys, 2002, p. 317.
[2] ECHR, Schnorbus v. Land Hessen, No. C-79/99 [2000] ECR I-10997).

of persons; ensuring equality before the law of persons and/or groups of persons; respect for the dignity of each person; ensuring equal opportunities for persons and/or groups of persons. In addition, Article 7 of the this Law sets out the main directions of the state policy on preventing and combating discrimination. This is because Ukraine has long lacked a legislative framework on the legislative definition of discrimination, its forms, prevention, and liability for discriminatory acts. The Law of Ukraine "On Equal Rights and Opportunities for Women and Men", for the first time, at legislative level defined the concept of gender discrimination as acts or omissions expressing any discrimination, exclusion or privileges on the grounds of sex, if they are aimed at restricting or prevention the recognition, enjoyment of equal rights for women and men.

This is especially pronounced concerning the vulnerable population groups: pregnant women, persons with disabilities, persons recognized as incapacitated, HIV-infected persons. Lack of pan-European consensus on a legislative ban on dismissal (refusal of employment, an extension of contract) due to, for example, its seropositive status cannot indicate broader discretion because there is a "clear tendency among Council of Europe member states" protection" of HIV-positive persons against any discrimination at work or in connection with work. According to the data of the UNCHR, workplace discrimination against people with HIV in the Philippines during 2018 included the refusal to hire, unlawful firing, forced resignation, and some employers may also disregard or actively facilitate workplace harassment of

employees who are HIV positive.[1] Similar conclusions are reached by other authors who investigate discrimination in this area.[2]

In Ukraine, the first such case was the case of Alexei Voloshyn, who disclosed his HIV status and achieved the restoration of his rights in the Novosanzharsky District Court. The reason for his appeal to the court was his dismissal from the position of the driver of the editorial board of the district newspaper after he became aware of his seropositive status. The court's decision upheld the claim by the district court, which awarded the plaintiff moral damages. However, several countries today are demonstrating a new approach to HIV as a disability (Canada, USA, United Kingdom, Germany, Norway).[3] Speaking about the moral, social needs of a particular society, one should not fail to mention such a category of citizens as incapacitated persons recognized as such by the courts.[4]

National legislation, namely, the Law of Ukraine "On Psychiatric Care"[5] prescribes that a person may be recognized temporarily (for a term up to five years) or permanently unfit as a result of mental disorder to perform certain activities (jobs, professions, services) that may pose an immediate danger to her or others. The state guarantees to such persons the establishment of compulsory quotas of jobs for employment of disabled persons with mental disorders, under the procedure established by law and supervision of observance of these quotas. However, as practice shows, such categories of workers are often discriminated against when hired by employers because of the latter's knowledge of the treatment of such persons in specialized medical

[1] Philippines, n.a., 2018.
[2] Newman, Nielsen, 2018, pp. 147-158.
[3] Zaiets, Martynovskyi, 2015, p. 22-23.
[4] Beus, Joseph, 2018, p. 147.
[5] VRU, 2000.

institutions. However, there is no list of jobs for disabled people suffering from mental disorders in Ukraine. By not recognizing such persons as subjects of employment, we automatically deprive them of their right to work, which is a natural, inalienable and subjective human right.

To ensure the equal enjoyment by persons with disabilities of all rights and respect for their dignity, the Convention on the Rights of Persons with Disabilities was adopted on December 13, 2006, which treats persons with disabilities with persistent physical, mental, intellectual or sensory impairments who, when interacting with different barriers may impede their full and effective participation in society, as well as others. The Convention stipulates that discrimination based on disability means any distinction, exclusion or restriction on the grounds of disability, the purpose or effect of which is to impair or deny the recognition, enjoyment or enjoyment of all human rights and fundamental freedoms in political, economic, social, cultural, civilian or any other fields.[1]

The Law "On the Fundamentals of Social Protection of Persons with Disabilities in Ukraine" recognizes a person with a persistent disorder of the body's functions, which, when interacting with the external environment, may lead to a limitation of its vital activity.[2] Improving disability policy should fulfill the following tasks: to ensure adequate social protection for persons with disabilities from another - to create conditions for the exercise of their right to work, using all the levers of social, economic, tax, state policy and, of course, European experience.

[1] Convention on Disability Rights, 2016.
[2] VRU, 1991.

Although human rights, sexual orientation and gender equality are currently among the most important resources of each country, [1] the mentality, and specificity of the development of Ukrainian society is not yet able to openly discuss the problems of persons with non-traditional sexual orientation and to protect their rights including in the workplace. The High Specialized Court of Ukraine for Civil and Criminal Cases in its letter of May 10, 2014 No. 10-644/0/4-14 explained to the courts of appeal that in order to properly ensure equality of labor rights of Ukrainian citizens, it is necessary to take into account the provisions of the Law of Ukraine[2]" Thus, taking into account the provisions of Part 2 of Art. 6 of the Law, any form of discrimination against persons and / or groups of persons on their specific grounds is prohibited, not only by state bodies, local self-government bodies, their officials, but also by legal and natural persons. When considering disputes arising in the sphere of labor relations, it should be borne in mind that the list of features by which there can be no privileges or restrictions in the exercise of citizens' labor rights is not exhaustive. In particular, it is inadmissible to violate the equality of labor rights of citizens not only based on the features mentioned in Part 2 of Art. 24 of the Constitution of Ukraine, Art. 2-1 Labor Code of Ukraine, Item 2 Part 1, Art. 1 of the Law, but also based on age, skin color, other physical features (weight, height, speech disorders, facial blemishes), marital status, sexual orientation, etc.

The Council of Europe Parliamentary Assembly (PACE) has adopted two instruments on discrimination based on sexual orientation and gender identity

[1] Herts, 2018, p. 7.
[2] High specialized court of Ukraine, 2014.

(Resolution 1728 (2010)[1] and Recommendation 1915 (2010).[2] These documents emphasize the need for a basic principle that human rights are universal and all people equally, acknowledge discrimination against LGBT persons baswd on their sexual orientation or gender identity, and determine with the member states of the CoE a range of measures that to ensure respect for human rights against LGBT people. Recent researches concerning discrimination against LGBT workers made such a conclusion: "We have a greater understanding of the manifestation of discrimination against LGBT workers, predictors of such behavior, and the consequences of this behavior.[3]" Nowadays, the scientific attention is focused now on the problems of hidden discrimination of gay and lesbian at different spheres of our lives. According to H. Roa and E. Olsonb, it was proved that even within the dichotomous methods of studying, victims of the depicted category always observed different forms of discrimination.[4]

The same situation with gay, lesbians, bisexual and transgender can be found in our country now. Ukraine acceded to the signatories to UNSCR A/HRC/17/L.9/Rev.1, where is stated that the dynamics of violent acts and discrimination in all regions of the world committed against persons on the grounds of sexual orientation and gender identity require the study of such practices and the search for effective mechanisms for international protection of human rights against such violations.

The widespread phenomenon of today is labor mobbing, the so-called psychological pressure.

[1] CU, Resolution, No. 1728.
[2] CU, Recommendation, No. 1915.
[3] Colella, King, 2018, p.186.
[4] Ro, Olson, 2020, p. 8.

As it was stated by the Lithuanian scientists: "Particular tactical decisions are conditioned by settled correlation relations of mobbing as discrimination in employees' relations and factors of organization climate. The model of managerial decisions of the intervention of mobbing as discrimination in employees' relations discloses that successful functioning of an organization(in the analyzed case – organization climate) depends on managerial decisions.[1]"

There is no concept of mobbing at the legislative level in Ukraine, but only the draft of the Law[2] proposes the following definition of mobbing, namely: intense, hostile and abusive atmosphere, psychological, physical, economic violence, including the use of electronic communications committed against an employee or group of employees of enterprises, institutions s, organizations and internally displaced persons, irrespective of ownership, type of activity and sectoral affiliation, as well as persons working under an employment contract with natural persons for the purpose of humiliating their human dignity, provoking or attracting an employee thereto to terminate the employment contract or force until the termination of membership in a trade union that is dismissed through mobbing.

In Ukraine, there are no systematic statistics on employers' victims of psychological distress in the professional environment. However, almost 83% of office workers suffered from mobbing - workplace harassment. This is evidenced by research data from the International HeadHunter recruitment portal. Almost half of those surveyed had been victims (46%), and almost as many had seen the phenomenon in the collective where they worked (40%).

[1] Žukauskas, Vveinhardt, 2010, p. 310.
[2] VRU, 2017.

Most often, mobbing is manifested in unfair criticism (40%), excessive workloads and engaging in work outcomes (34%), deliberate misinformation and obstacles in work (30%), open aggression and hostility (27%), denunciations and complaints (28%), gossip about the victim (25%), ridicule and jokes behind the back (28%).[1]

In the course of the research, the authors conducted surveys among the collectives of enterprises and organizations of Chernivtsi: "Bukovina-Baikal-3000," "Chernivtsioblenergo," "Seal-Trans" (interviewed 183 respondents) to identify the facts of the manifestation of mobbing in the work teams on the part of employers. The study found that 11.2% of the survey participants were interviewed, with a large proportion of the questions being put to the tests not related to their professional skills but aimed at identifying levels of psychological pressure in the professional environment. That is why we totally agree with the position of D. Neumark, who pointed out that the external validity problem is particularly severe with regard to these kinds of tests for statistical discrimination.[2] Due to the lack of legal mechanisms in countering and combating psychological harassment in the workplace, Ukrainians defend their violated rights in court, which cannot always restore justice. This is one of the reasons for the low enforcement practice. Thus, during the years 2012-2013, only 7 cases were found in the Unified Court Register, all of them concerning disability discrimination. The Strategic Discrimination Support Fund, set up by NGOs that are members of the CPA, received only 10 requests for assistance from vulnerable groups and/or their

[1] Tyzhden.ua, n.a., 2013.
[2] Neumark, 2018, p. 818.

advocates in 2012-2013. Among the cases supported, 4 concern people with disabilities, two are LGBT and one is HIV-positive.[1]

Against this background, there is an urgent need to put in place an effective mechanism for protecting workers both at the legislative and contractual levels. The state should be the guarantor of ensuring any oppression in the sphere of work, by adopting various programs, strategic development plans, effective social work in this field, using the experience of foreign countries. Only in this case, the declared goal can become a reality: "Workforce 2020 can be the most prosperous, flexible, intellectually stimulated, and safest workforce the world has ever known. But we can achieve this goal only if we take personal responsibility as individuals, employers, and citizens.[2]"

CONCLUSIONS

The following conclusion can be made on the basis of the research:

1. Trends in the spread of discrimination in the sphere of labor relations due to the lack of a comprehensive legislative mechanism for the protection of workers testifies to the system of crisis phenomena in the social sphere, which have a significant impact on the effectiveness of the employee's creative potential as a person in the modern world.

2. Factors for preventing and combating discrimination in the sphere of labor relations are a system of measures, methods, techniques implemented at the state and contractual levels of legal regulation in order to detect in a timely manner the facts of discrimination in the professional environment and to ensure effective protection of workers affected by discrimination, created

[1] Human Rights in Ukraine, 2012.
[2] Amico, Judy, 2020, p. 141.

by discrimination. for equal opportunities and the realization of the rights of employees as individuals and the development of their creative potential in the field of paid employment and respect for their dignity.

3. For many years, the fundamental principles of combating and protecting against discrimination contained in international legal instruments have remained norms of declaratory value, even in some developed countries of Europe. Particular attention in this aspect should be given to state, local authorities and members of the public, trade union bodies to identify facts and causes, evaluate the extent of discrimination in the professional environment and find ways to eradicate them. Particular attention in this area should be given to clarifying and establishing a social dialogue between workers and employers. Employees and employers should be responsive to each other's needs, including respect for their work responsibilities.The imperfection of national anti-discrimination legislation and the lack of an effective mechanism of protection lead to a violation of the rights of employees in the field of paid employment.

4. One of the main tasks of the rule of law and the welfare state should be the creation of a coherent mechanism for the protection of workers aimed at preventing and combating discriminatory phenomena in the workplace. Such manifestations of factors in society as humanity, respect, tolerance for one another should contribute to this. Creating an effective system of preventing and counteracting discriminatory phenomena will contribute to the creative development of working people, improve their quality of life and harmonize society as a whole.

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CONTEMPORARY FINANCIAL AND LEGAL FACTORS OF ACTIVITY AND THE STATUS OF COLLECTIVE INVESTMENT INSTITUTIONS IN UKRAINE

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Abstract

Admits traditional method, the competitive source of investment in Ukraine is the collective investment institutions. The legal regulation of the activities of collective investment institutions in Ukraine is complicated to apply, has many inconsistencies, the investment process is sophisticated for both internal and external investors. The elimination of these contradictions determines the relevance of the research, since the latest consistent research

of the current problems of applying the legislation of Ukraine to collective investment institutions is appropriate. The purpose of the research is to assessment of key factors of legal regulation of collective investment institutions in Ukraine, analysis of functioning problems of collective investment institutions in Ukraine and ways of addressing them. Regulatory inconsistencies in the status of collective investment institutions have been identified, proposals to enhance the activities of collective investment institutions have been formulated, proposals aimed to improve the effectiveness of state supervision of collective investment institutions have been suggested, proposals of taxing investors have been submitted.

Keywords: collective investment institutions, co-investment, financial intermediaries, financial operations, shareholder.

INTRODUCTION

Scientific, Practical Problems.

At a current stage of development of Ukrainian economy, there is an acute problem of finding and accumulating internal sources of finance investments in the real sector. Admits traditional method, the competitive source of investment in Ukraine is the collective investment institutions which seriously compete with banks to date. The legal regulation of the activities of collective investment institutions in Ukraine at the stage of active systematic approbation, the legislation is not codified, and therefore it is sophisticated to apply, has many inconsistencies, regulatory substitutions, which complicates the process of understanding the activity of collective investment institutions, mitigates the investment attractiveness of this type of investment, inhibits the attraction internal and external investors. The current consistent research of

urgent problems of applying the legislation of Ukraine to collective investment institutions is appropriate.

Such Ukrainian scientists have been studying this problem. Yu. Zhornokui considered co-investment institutions as subjective rights. V. Moroz outlined economic algorithms for the movement of funds with the participation of joint venture institutions. I. Chaikovska researched and identified the problems of practical attraction of investments through mutual investment institutions. V. Levchenko described an alternative non-banking mechanism for investing by individuals. Y. Fogelson outlined the prospects for the investment market with the participation of joint venture institutions in post-Soviet economies. O. Sheverdyna analyzed the mechanism of legal regulation of public administration of joint investment institutions

The Purpose of the Research.

The assessment of key factors of legal regulation of collective investment institutions in Ukraine, analysis of the functioning problems of referred objects and normative regulation of the activities of collective investment institutions, the formulation of proposals to address the contradictions in the regulation of collective investment institutions, in particular state supervision and the tax sphere, determining ways forward in addressing.

The research object: the mechanism of state regulation of the investment sphere, the activities of collective investment institutions. *The subject of research* is actual operations of the institutions of collective investment in Ukraine.

Research methods: special legal methods were applied. The method of specific sociological research was useful for us to analyze overall development of collective investment institutes in Ukraine; the utilization of content analysis allows us to separate the problems of tax policy in relation

to collective investment institutions; statistical method of research allows us to estimate the economic state of development of the collective investment institutions services market; the formal legal research method allowed us to assess the regulatory controls in the scope of collective investment institutions.

RESEARCH RESULTS

THE FIRST TOPIC: CURRENT STATE OF REGULATION OF COLLECTIVE INVESTMENT INSTITUTIONS (ANALYSIS OF THE THEORETICAL PROBLEM)

Since the adoption of the Law of Ukraine "On Collective Investment Institutions (Unit Funds and Corporate Investment Funds)", the Ukrainian stock market has received new players-participants - collective investment institutions.

In accordance with the Law of Ukraine "On Collective Investment Institutions (Unit Funds and Corporate Investment Funds)" dated March 15, 2001, collective investment institution is a corporate investment fund or an unit investment fund that carries out activities related to pooling (raising) funds of investors with the aim of profit from investing in securities of other issuers, corporate rights and real estate. Asset management company is a business company that carries out professional activity of managing assets of collective investment institutions on the basis of a license issued by the National Securities Commission and Stock Market.[1]

[1] Law of Ukraine, No. 5080-VI.

Relationships in the scope of collective investments are governed by the Law of Ukraine "On Collective Investment Institutions" and other normative-legal acts concerning stock's market functioning and on the activities of joint-stick companies in the section that does not contradict the norms of the Law of Ukraine "On Collective Investment Institutions", as well as other normative legal acts adopted in accordance with this Law.

The authors agree that the Law of Ukraine "On Collective Investment Institutions" defines the legal and organizational principles for the creation, operation and liabilities of collective investment entities, specifics of the management of these entities' assets, establishes the requirements as to the composition, structure and storage of such assets, specifics of the placement and turnover of securities of collective investment institutions, the procedure and extent of their disclosure of information with the aim of attraction and effective allocation of investors' financial resources.

The purpose of this Law is to govern relations arising in the field of collective investment for the establishment and operations of collective investment entities, to ensure guarantees of property rights to securities and protect the rights of stock market participants.

Since independence, Ukraine has adopted hundreds of laws designed to regulate new areas of public relations. Many of them predetermine and symbolize the transition from the past to the future, from the administrative to the market economy, so to speak, the transition to a new format of interaction between man, economy and the state. In our opinion, the Law of Ukraine "On Collective Investment Institutions (Unit and Corporate Investment Funds)" is one of these laws. The law has become the legal foundation on the basis of which several dozens of by-laws and regulations have been adopted. This law laid the foundations of a systematic approach to

legal regulation and established "rules of the game" in the collective investment market. The transitional provisions of the Law of Ukraine "On collective investment institutions" introduced a mechanism for the transformation of previously created investment funds and companies, created in accordance with the procedure established by law before the Law enters into force, in collective investment institutions. With the implementation of the Law of Ukraine "On Collective Investment Institution" the creation of investment funds and investment companies was prohibited.[1]

After the entry into force of the Law of Ukraine "On Joint Stock Companies", as noted by O.M. Pylypchuk arose the need to amend the Law of Ukraine "On Collective Investment Institution". The authors agree with this opinion, because the peculiarities of the creation, functioning and liquidation of corporate investment funds continued to be regulated by the norms of the Law of Ukraine "On Business Companies". After the adoption and entry into force of the Law of Ukraine "On Joint-Stock Companies", many practical problems arose regarding the application of the norms of this Law for corporate investment funds. This required the concentration of all legal norms governing the activities of corporate investment funds in one legislative act. The stability of the legislation governing collective investment is the basis for the sustainable functioning of this market sector.[2]

Adopted in July 2012, the Law of Ukraine "On Collective Investment Institutions" No. 5080-VI (Law) is aimed at ensuring the attraction and effective allocation of financial resources of investors, defines the legal and organizational basis for the creation, activities, termination of collective

[1] Moroz, 2011, p.99.
[2] Pylypchuk, 2017.

investment entities, especially the asset management of these entities establishes requirements for the composition, structure and storage of such assets, especially the issue, circulation, accounting and redemption of securities of collective investment institutions, and also order to order disclosure of information about their activities. We note that this Law came into force on January 1, 2014 and was the result of nearly twenty years of development of the investment funds industry in Ukraine. We believe that the system of legal regulation and the level of codification of this law has almost no analogues in the countries of the European Community, as well as the CIS countries.

The need for the adoption of the new Law on Collective Investment Institutions, according to O. V. Harahonych, is caused first of all by the need to determine the order of formation, activity and termination of collective investment institutions in the conditions that have arisen in connection with the adoption of the Law of Ukraine "On Joint Stock Companies" and improvement management systems for collective investment institutions, including systems for disclosing information about their activities, improving the order of creation, operation and liquidation of investment funds, increase the efficiency of state regulation of the system of collective investment institutions.[1]

In our opinion, in adopting the Law, the legislator was guided by the principle of "one scope - one law". Article 2 of the Law states that its effect extends to public relations arising in the field of collective investment in connection with the formation and activity of collective investment entities, in order to guarantee the ownership of the securities of the collective

[1] Harahonych, 2014, p. 28.

investment institutions and the protection of the rights of the participants of collective investment institution.

It is known that public relations in the field of collective investment include legal, economic, ethical and other relations. So, when managing a collective investment institution, social relations may arise that are not legal and are of significant importance, for example, an investor analyzing a collective investment market to select a collective investment institution. Legal relations in the field of collective investment are cross-sectoral nature and include civil law, constitutional law, administrative, financial, investment, criminal law and other legal relations. At the same time, according to the authors, using the concept of "collective investment", the Law does not disclose its content. In terms of legal theory, collective investment entities should be considered Asset Management Company and Corporate Investment Fund. Unit investment funds do not belong to the category of "collective investment entities" because they are an object of civil legal relations. Therefore, the Law should specify that its scope also extends to the public relations arising in the field of collective investment in connection with the creation and activity of unit funds.[1] Regarding the guarantees of the ownership rights of the securities of collective investment institution, they are provided, in particular, by the legal model of the collective investment institute, the diversification mechanism, the control over the activity of the asset management companies and joint venture companies, the establishment of the liability of the asset management companies, the limitation of the activities of the joint venture companies, asset management companies and collective investment institutions. The law

[1] Krynytsia, 2013, p. 99.

does not extend to public relations arising in connection with the formation and activities of other funds involved in investment activities. The Law applies only to the functioning of collective investment institutions, that is, to collective investment.

By structure, the Law on collective investment institution has a "deductive-inductive" symmetry. After regulating the most common and fundamental issues of joint venture, it proceeds to the structure, structure, procedure for determining the value of collective investment institution, net assets, placement, circulation, redemption of securities of collective investment institution, order of disclosure of information about collective investment institution, features of the legal status of Asset Management Company, custodian of assets of collective investment institution, value of assets of collective investment institution, the auditor (audit firm) and other more specific issues of collective investment.[1]

Despite all the advantages of the Law of Ukraine "On Collective Investment Institutions" over the previous law, this law does not solve a number of significant gaps in the legislation on collective investment. In particular, the issue of a common understanding of such important concepts as: the concept of "collective investment activity" and "asset management activity" has not been resolved. Today, there are conflicts in the interpretation of these concepts. In the process of further transformation of market relations in Ukraine, there was a need to distinguish between investors and institutional and unskilled ones. This division is fully consistent with international practice and has been partially embodied in Ukrainian law. Institutional investors in Ukraine are investment funds, unit funds of investment companies, non-

[1] UAIB, 2019.

governmental pension funds, insurance companies, and other financial institutions. Article 4 of the Law of Ukraine "On State Regulation of the Securities Market" defined asset management activity as a professional activity of a stock market participant - an asset management company, which conducts its activity for remuneration on its own behalf or on the basis of a relevant asset management agreement belonging to institutional property investors. A similar definition contains Art. 18 of the Law of Ukraine "On Securities and the Stock Market", according to which the activity of managing the assets of institutional investors is the professional activity of a stock market participant (Asset Management Company), which is carried out by it for a fee on its own behalf or on the basis of a relevant agreement on the management of the assets of institutional investors. In addition, in some legislative acts, asset management activities are limited only to the management of assets owned by institutional investors, the list of which is clearly defined. Therefore, it turns out that the Law on State Regulation of the Securities Market and the Securities and Stock Market of asset management, for example, an open-ended unit trust whose investors own its assets, is not considered professional asset management activities, since the institutional investor (Unit Fund) does not own these assets. Thus, in Ukrainian legislation there is no single approach to the interpretation of the concept of "asset management activities".

It should be agreed with the definition of such an activity, which offers M. M. Yermoshenko: "this is the professional activity of a stock market participant – asset management company, it is carried out for a fee on its own behalf or on the basis of an appropriate agreement on the management of

assets owned by institutional investors, investment investors and participants of pension funds on the basis of ownership".[1]

Prior to the introduction of the Law of Ukraine on Collective Investment Institutions, the United States Agency for International Development (hereinafter - USAID) made certain observations to the new law, as follows: The Act amends the Securities and Stock Market Act and separates corporate investment fund shares into a separate type of securities. This approach seems appropriate. The law defines a corporate investment fund as a legal entity, is formed in the form of a joint stock company and carries out exclusively collective investment activities. The procedure for creating a corporate investment fund is similar to the procedure for creating an ordinary joint-stock company with peculiarities due to the nature of the investment fund. The Markets in Financial Instruments Directive of ("MiFID") distinguishes among financial instruments, in particular, securities to be traded, and units in joint investment institutions. USAID specifically focuses on corporate governance of corporate investment funds. The regulation of the Law of Ukraine "On Collective Investment Institutions" of co-investment relations is unnecessary, as it is already defined by the Law of Ukraine "On Joint Stock Companies". A significant issue in USAID analytics is the exclusion of liability of collective investment institutions for reducing the value of assets.[2]

Since the fields of investment are sufficiently "mobile," the legal regulation should be appropriate. We convinced that the closest prospect for the development of legislation in the field of collective investment should be the coordination of terminology and simplification of state regulation.

[1] Sheverdyna, 2013.
[2] Pylypchuk, 2017.

Another component of the legal status of co-investment institutions in Ukraine is taxation of collective investment institutions. Investment fund management is managed by asset management companies licensed by the Stock Market Participant Commission. Funding and managing a fund is quite a complicated process. In terms of taxation there are preferences. The Tax Code of Ukraine provides that any income from the activities of a collective investment institution is exempt from income tax. That is, while most legal entities on the general taxation system must tax their profits at a rate of 18%, the profits of an investment fund are tax exempt. This tax regime is somewhat reminiscent of a distributed profit tax, because if the fund's received income remains in circulation and is not paid to investors, then no taxes should be paid. Only the distribution of profits of the collective investment institutions is subject to taxation, that is, the payment of dividends.

There is a peculiarity about dividends from co-investment institutions. There are no special benefits or investors (legal entities). Legal entities receive income, include it in the financial result and tax profits at a rate of 18% and only after that they can pay dividends to individual founders with a taxation of 6.5% (5% of income tax on individuals and 1.5% military levy). Since 2017, individual investors have received a more interesting norm: if earlier the tax rate on income tax on individuals on dividends from collective investment institutions was 18%, and it is only 9% in current year. This means that an individual investor of an investment fund can receive income from activities of collective investment institutions with a total tax burden of only 10.5% (9% personal income tax and 1.5% military levy). In addition, if the investor refrains from receiving dividends in the current period, then such a payment, respectively, the fulfillment of such a tax obligation can be deferred,

and the accumulated funds of the collective investment institutions can be used for further investments.

The above preferences are a sufficient reason for investors to open an investment fund and commence to carry out economic activities through it. However, even those who do not want to change the structure of their business can significantly optimize the tax burden on it due to the use of collective investment institutions. However, despite the existing shortcomings in legal regulation, collective investment institutions in Ukraine is showing steady growth. Thus, according to the Ukrainian Association of Investment Business, the total assets of the collective investment institutions in management, including those that have not yet reached the minimum asset standard, also increased by 3.3% for the 3rd quarter of 2019 and by 16.4% for the year (since the beginning of the year, the increase was 11.2 %), up to 348 304.6 million UAH.

Assets of existing collective investment institutions that have reached the minimum assets standard ("recognized" collective investment institutions) for the 3rd quarter had a similar increase (+3.3%), for 9 months of 2019 they grew by 14.5%, and for the last 2019 they slowed down to +15.8%. As of September 30, 2019, they amounted to 339,921.7 million UAH. Quarterly growth occurred almost exclusively at the expense of venture capital funds, the number of which continued to increase, although interval collective investment institutions also increased over this period (the number has not changed, but the cost of portfolio investment collective investment institutions has generally increased). Other sectors, including open-ended funds, suffered a decrease in assets amid further decline in stock indices in the 3rd quarter.

In July-September 2019, the net asset value of collective investment institutions ("recognized") assets accelerated quarterly growth to 3.7%, and decelerated to + 13.6% from September 2018 (from the beginning of the year - added 12.1%). As of September 30, 2019, the net asset value of stakeholders of collective investment institutions as a whole reached 264 302.1 million UAH.[1]

Revealing the general legislative characteristics of the collective investment institutions, it is necessary to consider such an important issue as state regulation. So, when assessing the risks of capital allocation, any investor is always interested in the issue of state control, its degree and limits.

THE SECOND TOPIC: NATIONAL SECURITIES AND STOCK MARKET COMMISSION

State regulation in the field of collective investment is carried out by National Securities and Stock Market Commission in accordance with the Law of Ukraine "On State Regulation of the Securities Market in Ukraine". With the release of this normative act, questions of the ambiguity of interpretation of some concepts arose. In order to eliminate the duality and ambiguity in the interpretation of terms, the Law defines them.[2]

To date, state regulation in this field regarding collective investment is carried out by the National Securities and Stock Market Commission, which operates in accordance with the laws of Ukraine "On State Regulation of the Securities Market in Ukraine" and "On the Depository System of Ukraine". In addition, other state bodies are vested with the functions of implementing the regulatory policy in the field of the circulation of securities and exercise

[1] UAIB, 2019.
[2] Chernadchuk, Sukhonos, Chernadchuk, 2005.

control over the activities of the participants in the securities market within the scope of their authority determined by applicable law.

The purpose of the activities of the National Securities and Stock Market Commission is to create, through its regulatory and supervisory functions, the conditions for the proper and efficient functioning of the securities market, to provide the monetary capital of the needs of the country's economy by creating a mechanism for accumulation, distribution and redistribution of funds from a person who possesses free investment resources to the person who needs such resources for development, creation of conditions for becoming powerful internal investors and providing protection that investor rights.[1]

The National Securities and Stock Market Commission carries out state regulatory activities in accordance with the requirements of the Law of Ukraine "On the Basics of State Regulatory Policy in the Sphere of Economic Activities".

The main activities of the National Securities and Stock Market Commission in the scope of regulation are:

- development of draft regulatory acts on the securities market;
- adoption of regulatory acts;
- amendments to regulatory acts;
- analyzing the regulatory impact of regulatory acts;
- monitoring the effectiveness of adopted regulatory acts.[2]

The control function of the Commission aims to facilitate compliance with legal requirements; prevention of violations (abuses) in the securities market;

[1] NSSMC, 2013.
[2] Zhornokui, 2015, p. 87.

ensuring the observance of the rights and interests of investors and other stock market participants; identification of trends and risks in the functioning of the stock market.

Control is carried out by the Commission by conducting scheduled and unscheduled inspections, respectively, in accordance with the current "Procedure for conducting inspections of compliance with the requirements of the securities legislation for professional activities in the stock market and the activities of self-regulatory organizations of professional stock market participants", approved by the Decision of the National Securities and Stock Market Commission from December 02, 2013 No. 161. Accordingly, inspection helps to identify problematic issues in risk-enhancing activities that may lead to securities market offenses and to formulate proposals with improvement of legislation to address deficiencies and gaps in the functioning of the stock market.

The structure of the National Securities and Stock Market Commission consists of its central office and territorial bodies, which are management and branches. In turn, the National Securities and Stock Market Commission is created by its Chairman and six members, who are appointed and dismissed by the President of Ukraine in agreement with the Verkhovna Rada of Ukraine.[1]

The National Securities and Stock Market Commission, within its competence, develops and approves legislative acts binding for central and local executive authorities, local authorities, securities market participants, their associations, and also monitors their implementation. It is within the competence of the National Securities and Stock Market Commission to

[1] Law of Ukraine, No. 448/96-VR

appeal (petition) to court or an economic court in connection with a violation of the legislation of Ukraine on securities. The Law of Ukraine "On State Regulation of the Securities Market in Ukraine" in Art. 7 in order to ensure compliance with the legal basis in the field of circulation of securities and the implementation of the functions of the National Commission for Securities and Stock Market, its main tasks are provided.[1]

The activities of the National Securities and Stock Market Commission are carried out in close cooperation with law enforcement agencies. In this regard, at the request of authorized persons of the National Securities and Stock Market Commission, law enforcement agencies provide the information at their disposal that is necessary to ensure proper control of the securities market. In the field of preventing and counteracting the legalization (laundering) of proceeds of crime from the state, financial monitoring is carried out, which is the measures that are carried out by the subjects of financial monitoring in the field of preventing and counteracting the legalization (laundering) of proceeds of crime or the financing of terrorism, including conducting state financial monitoring and primary financial monitoring.[2]

The privatization bodies are obliged to provide the National Securities and Stock Market Commission with the necessary documents on state-owned objects, which are to be privatized if the securities are issued in the course of privatization in accordance with the current legislation.

The executive authorities are obliged to provide the National Securities and Stock Market Commission with the necessary documents and

[1] *Ibid.*
[2] NSSMC, 2013.

information on matters within its competence in order to comply with the requirements of the current legislation on the securities market.[1]

However, in addition to their own powers, officials of the National Securities and Stock Market Commission are responsible for failure to perform or improperly discharge their official duties in accordance with the procedure established by the legislation of Ukraine. Unfortunately, caused by the securities market participants misconduct of the National Securities and Stock Market Commission during the exercise of control and administrative powers, is subject to full compensation at the expense of the state in accordance with the current legislation.

THE THIRD TOPIC: INVESTMENT ATTRACTIVENESS OF THE COLLECTIVE INVESTMENT INSTITUTIONS IN UKRAINE (PROSPECTS AND RECOMMENDATIONS FOR MINES)

Analyzing the current legislation and the state of activity of the collective investment institutions to improve the prevention of offenses, we agree with the comments of the National Securities and Stock Market Commission, which should be followed in the following measures:

- conducting periodic interviews with the management of individual participants of the securities market regarding applied business practices, existing conflicts of interest, the state of work with shareholders and investors, and measures taken to manage risks;

- holding conferences and seminars - periodic meetings with a wide range of securities market participants;

[1] NSSMC, 2013.

- clarification of legislation - recommendations on actions and application of practical measures that help improve compliance with the law have been made public.

The activities of collective investment institutions in Ukraine have their disadvantages, but there are ways to solve them.

The collective investment institutions system, in our opinion, is the best option for the population to access the securities market, including and stocks. With more than 150 years of history of operation, investment funds are in serious competition with banks for free funds. If to make a comparative characteristic of investing in a bank, to carry out self-management or in collective investment institutions, in the opinion of authors, collective investment institutions have significant advantages.

Table 1. *Comparative characteristic of investing in a bank*

Description	*Bank*	*Self-government*	*Collective investment institutions*		
			open-ended	*interval*	*closed-ended*
Income	minimal	depends on the qualification of the investor	average	average	high
Risk	minimal	depends on the qualification of the investor	average	average	high
Investor qualifications	zero	high	minimal	minimal	minimal
Taxation	not taxable	income from the sale of securities - minus the cost of their acquisition – 15%	dividends paid by asset management companies as a result of the distribution of profits of corporate investment funds and mutual funds are taxed at the rate of 5%. The investment income from the sale of the Fund's securities is taxed at the rate of 15% (occurs only with the termination of the ownership of the Fund's securities)		

Costs	minimal	broker's commission + trading terminal fee + other expenses	payment of compensation to the asset management company, custodian, registrar, property valuer and auditor, other expenses related to the management of the Fund. Their amount may not exceed 10% of the annual average value of the Fund's net assets		
Liquidity	high	depending on the objects and amount of investment	high	low	very low

Source: Authors.

In recent years, the Ukrainian collective investment institutions market has shown positive growth dynamics and provided investors with a high level of investment income that exceeded the yield on bank deposits.

In any field of activity there are pros and cons, and collective investment institutions activities are no exception. Therefore, in the opinion of the authors, identifying the problems of collective investment institution activities and how to solve them is an important issue in this research.

We consider that one of the main problems that do not allow to fully utilizing the investment potential of the collective investment institutions market is the low level of public awareness about collective investment institutions. The annual increase in the number of non-bank financial institutions, accompanied by an increase in the supply of financial services in the market, leads to the fact that market participants, as well as consumers of financial services, need to have access to information related to the activities of these institutions and characterize the general state of the financial services market. An effective information base helps to make sound conclusions about the prospects for the development of the financial services market of its

individual sectors, participants, etc.[1] The problem is precisely the lack of transparency and openness of investment companies in their relations with the consumer of financial services, lack of awareness. Unfortunately, individuals and legal entities that direct their funds to certain investment mechanisms in order to make a profit or achieve a social effect are not able to obtain the necessary public information to minimize the risks that may arise with their own funds.

We consider that one should pay attention to the opinion of Yu.B. Fogelson, who notes that in order to somehow solve the problems of risk assessment, the legislation of many countries requires financial institutions to disclose in an accessible form to consumers information about the risks associated with the acquisition by a customer of a proposed product's benefits and losses that may be caused by the acquisition of a certain product.[2]

The following of the example of this problem: if there is a goal to acquire housing through an collective investment institutions, or to put funds in order to make a profit, you cannot be sure that this financial institution is solvent and is able to rally the funds attracted by the consumer when a crisis occurs. Therefore, in our opinion, disclosure of information is of great importance in these markets. The current legislation does not provide consumers with specific information about where the investor's money is invested and what transactions are carried out with them. In practice, this information is also not published by financial institutions.

To solve this problem, we propose the following. The obligatory creation by each professional participant of the investment market of their site, on

[1] Levchenko, 2013, p. 123.
[2] Fogelson, 2010, p.124.

which all the necessary information for consumers regarding the investment of their funds would be clearly and understandably stated. In our opinion, information on the standards of solvency and financial stability of the company is important, understandable to investors and should be confirmed by an audit report and published on the company's website, as well as complete information about the movement of investments in collective investment institutions. In relation to persons planning to become investors of the relevant collective investment institutions, we believe that it would be appropriate to inform them about the collective investment institutions investments before making investments to conclude the relevant agreements.

Another global issue to support the development of investment funds is expanding their presence in different regions to allow more individuals to become participants. The best way to resolve this issue is to utilize an existing network of banking branches to provide co-investment services.[1] In this regard, it is necessary to establish cooperation with banking institutions and investment funds in the direction of the implementation of certificates of investment funds in bank branches. This approach will allow to realize the needs of the population in investment activities, will ensure the inflow into this sphere of significantly larger amounts of financial resources of private investors. The stimulating factor in the development of non-banking financial institutions in general and collective investment institutions in particular is the lack of reliable financial instruments in the domestic market in which the assets of the asset management company can invest. In particular, government

[1] Moroz, 2011, p.103.

bonds remain an unattractive investment instrument because of low liquidity and yield (below inflation).[1]

In our opinion, a significant problem remains the method of correct valuation of collective investment institutions net assets. The current regulation of the National Securities and Stock Market Commission, which regulates this issue, allows companies to arbitrarily evaluate the net assets of the collective investment institutions under their management. This leads to distortion of information, further undermines the confidence of the population. The issue of taxing investment income in various financial institutions remains unresolved. For example, the interest accrued on bank deposits is not taxable; at the same time the income received by citizens from investing in collective investment institutions collective investment institutions is taxed.

Perhapsthe biggest problem that impedes the development of institutional investors in Ukraine in general and the collective investment institutions in particular is the general state of the stock market development, its institutional immaturity. In this context, it is advisable to highlight the following negative properties of the stock market:

- the prevalence of the unorganized market over the organized;
- the presence of several trading platforms where securities are traded, which makes it difficult to control these operations;
- low stock market liquidity;
- small number of securities traded on the stock exchange, limited number of stock market instruments;

[1] Chaikovska, 2012.

- manipulation of market participants in order to overestimate the value of net assets of investment funds, etc.[1]

Thus, the incompleteness of the process of institutional formation of the collective investment institutions market suggests that it is ineffective and, in certain areas, the impossibility of using the potential of this institutional form in the aftermath of the crisis recovery in the financial sector of Ukraine. But on the other hand, a general decline in interest in financial investments and a sharp increase in their riskiness can be used to modernize this component of the financial system. For this purpose, the policy of the state should be directed to the systematic development of the collective investment institutions market and its infrastructure in order to eliminate the general underdevelopment and improve the quality parameters.

To solve a number of these problems, we join the current proposals that measures should be taken that will be aimed at revealing and strengthening the investment potential of the collective investment institutions.

- bringing the laws governing the activities of the collective investment institutions, with the requirements of European law and the adoption of the Investment Code (the process in this direction has commenced);

- strengthening control over issuers whose securities are traded on a regulated market in order to improve the quality of assets;

- expanding the investment tools available for collective investment institutions, including the introduction of high value derivative securities;

- preferential taxation of investors investing in collective investment institutions for the long term or reducing the rate of investment income taxation;

[1] Ryabchikova, 2010.

- improving the methodology for calculating the value of collective investment institutions net assets;

- Simplification of the procedure for issuing securities of collective investment institutions;

- conducting outreach to popularize among the population of Ukraine the implementation of investments in the collective investment institutions market.

Any field of activity has its shortcomings; the activity of collective investment institutions is no exception. The main disadvantages of the collective investment institutions are:

- low level of public awareness of collective investment institutions. The problem is precisely the lack of transparency and openness of investment companies in their relations with the consumer of financial services, lack of awareness. In our opinion, the solution to this problem would be to create a website as a source of information about a particular company;

- insufficiency in the internal market of reliable financial instruments, in which the funds of the asset management company can invest. In particular, government bonds remain an unattractive investment instrument because of low liquidity and lower yields (below inflation);

- the question of taxation of investment income in various financial institutions. So, for example, interest accrued on bank deposits is not taxable, while income received by citizens from owning funds in collective investment institutions is taxed;

CONCLUSIONS

The system of legislation in the scope of investment activity is branched and includes a significant number of regulatory documents. The reason for this state affair is the dynamism of relations in the scope, which is characterized by great complexity. To avoid deepening this problem, the legislator should pay more attention to optimize legal support of these relations. It is necessary to adopt investment code to carry out such optimization, where all prescriptions in the scope of investment will be systematized. It is also worth paying attention to the presence of pre-reform legislative acts, which in their content contradict the principles of legal alignment during the formation of market relations, as the investment scope is rapidly changing, and legal regulation should be appropriate. All of the above are key issues of financial security of Ukraine.

Since collective investment is a relatively new type of investment in Ukraine, the mechanisms of state regulation of this category of relations is only being formed, their effectiveness is tested by practice in the context of rapid changes in the economic environment under the influence of global factors and foreign experience.

The National Securities and Stock Market Commission as a public administration body, implements not only control, but also regulatory policy in the scope of regulation of collective investment institutions. The National Securities and Stock Market Commission is endowed with the function of standard-setting activity, which is a positive factor since access to company reporting is appeared as this commission is more knowledgeable about CII regulation.

The main function of CII is to accumulate investors' funds investing in securities of other issuers, corporate rights and real estate to profit.

Collective investment institutions is a powerful and real investment instrument for reactivation of Ukrainian economy.

In the activities of collective investment institutions in Ukraine, the following problems can be identified for further address:

- low level of public awareness of CII; the lack of transparency and openness of investment companies in their relations with the consumer of financial services. The creation of appropriate websites with easy access by the population is the solution;

- insufficiency in the internal market of reliable financial instruments, in which the funds of the asset management company can invest. In particular, government bonds remain an unattractive investment instrument because of low liquidity and lower yields (below inflation). Although at the end of 2019, the Ministry of Finance of Ukraine carries out successful issuance of government bonds, but for most investors, such investments are highly risky due to the economic situation in the country;

- the question of taxation of investment income in various financial institutions. So, for example, interest accrued on bank deposits is not taxable, while income received by citizens from owning funds in CII is taxed;

In our opinion, the fact that the National Securities and Stock Market Commission is endowed with the function of standard-setting activity is, on the one hand, an upside in that it knows more about the problematic aspects of the implementation of CII activities, because it has access to company reporting, and on the other hand, downside because of absence of codified act, many normative acts are adopted and their layering occurs, which leads to confusion in the concepts of various categories of CII.

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PRINCIPLES OF STATE CONTROL OVER COMPLIANCE WITH FOOD SAFETY LEGISLATION IN UKRAINE

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Abstract

The article deals with the peculiarities of legal regulation of state control over compliance with food safety legislation in Ukraine in the context of compliance with international requirements. It is emphasized that the relevance of such legal regulation is linked to societal concerns about food safety and quality. The purpose of the article is to find out the peculiarities of state regulation and quality control and food safety in Ukraine and the world in a comparative context. The most important results and conclusions. The Ukrainian legal regulation of state control in the field of food safety meets

European requirements and world practice. The legislation of Ukraine provides for a system of administrative sanctions for violations in the field of food safety, as well as the possibility of challenging measures of influence in an administrative and/or judicial order.

Keywords: administrative and economic sanctions, administrative and legal framework, food safety, hygiene of foodstuffs, legislative regulation, state control.

INTRODUCTION

Scientific, Practical Problems.

Concerns about the quality of food are felt all over the world. At the same time, population migration and foreign trade do not allow to solve this issue in each individual country, since artificial obstacles to the movement of goods across borders are both impossible and ineffective. States therefore seek to develop uniform approaches to the technological and administrative regulation of food safety and quality control. Among the most well-known regulatory acts should be mentioned Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission);[1] International standard ISO 22000:2005. «Food safety management systems. Requirements for any organization in the food chain»;[2] the Council Directive 93/43EEC of 14.06.1993 «On the hygiene of foodstuffs»[3] and others.

The problem of food safety has always been acutely urgent, and therefore one of the most discussed in different areas of science and technology, as well as administrative management. Monograph S. Bermouna (2015) provides

[1] Codex Alimentarius Commission.
[2] ISO 22000:2005.
[3] Council Directivem, No. 93/43EEC.

insights into the regulatory framework of Food Safety Management of some of the world's largest economies: European Union, United States of America and China[1]. Caroline Smith De Waal, Cynthia Roberts, David Plunkett (2013) review the legal framework for food safety in the US and the EU.[2] The adoption of the Food Hygiene I and II principles in 2004 completed the EU food law. Usenko, Iurynets, Pyvovar, Belkin (2019)[3] consider the specific features of food safety management in Ukraine in the context of the international standard ISO 22000: 2005.

In such circumstances, research into food safety legislation is relevant both in the context of understanding the level of legal regulation of this issue in individual countries and in comparative terms.

Purpose of the Paper is to find out the peculiarities of state regulation and quality control and food safety in Ukraine and the world in a comparative context.

Object/subject of study. Legal relations in the field of food safety control. The study addresses the mechanism of legal regulation of state control over compliance with food safety legislation in Ukraine in the context of compliance with international requirements.

Research Methods.

The methodology of the study is based on the methods of documentary analysis and synthesis, comparative analysis, objective truth, which made it possible to systematically trace the compliance of legal regulation in Ukraine with European norms, standards and rules. The research methodology is based on the use of a set of interrelated methods of scientific knowledge that

[1] Bermouna, 2015.
[2] Smith De Waal, Roberts, Plunkett, 2013.
[3] Usenko, Iurynets, Pyvovar, Belkin, 2019, p. 188-190.

provided a systematic approach to solving the tasks of the work, the unity of the legal content and the legal form of the results obtained. Methods of classification, grouping, systematic are used to streamline empirical information and carry out the classification of the studied legal phenomena (system of preventive measures, control measures, measures of administrative influence, measures to respond to deviations from regulatory indicators, etc.). Documentary analysis has made it possible to systematically examine the documentary sources of legal phenomena used in this work (Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission); International standard ISO 22000:2005; the Council Directive 93/43EEC; the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» and others). The comparative method was used to compare, on the one hand, the legislation of Ukraine and its compliance with European standards, on the other - the Council of Europe. The objective truth method is implemented by cross-checking the source data from multiple sources, relying on digital (statistical) material.

RESULTS AND DISCUSSION OF THE RESEARCH

THE FIRST TOPIC: LEGAL REGULATION OF FOOD SAFETY CONTROL: UKRAINE IN THE MODERN WORLD

Ukraine aims to become part of a single international and European food market. So, in January-September 2019 exports of agricultural products from Ukraine amounted to $ 15,6 bil., which is 22 % more than in the same period in 2018. Over this period, the share of agricultural products in the structure of total exports of goods from Ukraine amounted to 42,1 %, the share of exports increased from 37,1 % to 42,1 %.

In the commodity structure of exports, deliveries of crop products increased most of all – by 36 % or $ 2,4 bil. (for 9 months compared to the same period in 2018). This was significantly affected by the export of corn, which grew by $ 1,4 bil., or 61 %. Also, the export of finished foods increased by 12 % or $ 241 mil. In particular, export of sunflower meal increased (by 23 % or $ 134,3 mil.).

The export of Ukrainian agricultural products to the EU countries in January-July 2019 increased by 34.3 % compared to the same period in 2018 – up to $ 4,1 bil. Basically, they exported grain – $ 1,8 bil., butter – $ 921,9 mil., oilseeds – $ 385,4 mil., oilcake and other food industry waste – $ 345,5 mil., poultry – $ 117,3 mil., fruits, nuts, zest – $ 78.6 mil.[1]

So the topic and content of this article is not only of internal interest to Ukraine but also of international interest.

The problem of food safety has always been acutely urgent, and therefore one of the most discussed in different areas of science and technology, as well as administrative management (Kobrin, Postnova, Vinnikova, 2012;[2] Odarchenko, Sokolova, Maximov, 2013;[3] Galkina, 2017;[4] Usenko, Iurynets, Pyvovar, Belkin, 2019[5] and others). Monograph «An Insight into the Regulatory Framework of Food Safety Management. A comparative approach to food safety incident response in EU, US, China» (2015) provides insights into the regulatory framework of Food Safety Management of some of the world's largest economies: European Union, United States of America

[1] N.a., Delo.ua, 2019.
[2] Kobrin, Postnova, Vinnikova, 2012, p. 158-162.
[3] Odarchenko, Sokolova, Maximov, 2013, p. 105-109.
[4] Galkina, 2017.
[5] Usenko, Iurynets, Pyvovar, Belkin, 2019, p. 188-190.

and China.[1] The study has provided interesting results towards understanding discrepancies in food safety incident response from mainly a legal angle including some socio- legal aspects. The results have provided answers on how discrepancies in food safety incident response amongst different legal systems can be identified, sustained by an in- depth analysis of the applicable regulatory framework. Caroline Smith De Waal, Cynthia Roberts, David Plunkett (2013) review the legal framework for food safety in the US and the EU.[2] In particular, they note that the earliest food laws in the United States, dating from the 1600s to 1800s, were designed to combat economic deception and to protect American exports. The meat industry is regulated largely by the 1906 Federal Meat Inspection Act. European food law has been influenced by the formation of the European Economic Community and later the European Union. Food safety laws in the latter half of the twentieth century focused on developing a common market, but with the introduction of the General Food Law in 2002, the focus shifted to assuring high levels of food safety. The adoption of the Food Hygiene I and II principles in 2004 completed the EU food law. Grimak A.V., Velichko O.V., 2012;[3] Holostova A.M., 2015;[4] Vodyanka L.D., Kutarenko N.Ya., 2013;[5]. Vlasenko I.G., 2013;[6] Lapin O.V., Fridrif V.P., 2014;[7] Karas O., Kostyuchenko L., 2016;[8] Sliva Yu.V., Shtonda O.A., Semenyuk K.M., 2018;[9] Oschipok M., 2019;[10]

[1] Bermouna, 2015.
[2] Smith De Waal, Roberts, Plunkett, 2013.
[3] Grimak, Velichko, 2012.
[4] Holostova, 2015.
[5] Vodyanka, Kutarenko, 2013.
[6] Vlasenko, 2013.
[7] Lapin, Fridrif, 2014.
[8] Karas, Kostyuchenko, 2016.
[9] Sliva, Shtonda, Semenyuk, 2018.
[10] Oschipok, 2019.

Usenko A., 2019[1] explore various aspects of the HACCP[2] as a food safety tool.

To date, the following regulations are in force in the world in the field of food safety control: Joint FAO/WHO Food Standards Programme (Codex Alimentarius Commission); International standard ISO 22000:2005. «Food safety management systems. Requirements for any organization in the food chain»; the Council Directive 93/43EEC «On the hygiene of foodstuffs» and others.

In item 1 of Art. 59 of the EU-Ukraine Association Agreement provides for the approximation of the laws of Ukraine to those of the EU in the field of sanitary and phytosanitary measures. The general regulation of this issue is implemented in the Council Directive 93/43EEC «On the hygiene of foodstuffs».

In Ukraine, the principles of the system of controls and sanctions in the field of food safety are defined by the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare».

THE SECOND TOPIC: FOOD SAFETY PRINCIPLES UNDER COUNCIL DIRECTIVE 93/43EEC «ON THE HYGIENE OF FOODSTUFFS»

The Directive, in particular, presupposes that, in order to protect human health, the general rules on food hygiene that are to be observed as soon as possible during the preparation, processing, manufacture, packaging, storage,

[1] Usenko, 2019.
[2] Food Standard Agency, 2017.

transport, distribution, handling and sale or supply at the disposal of the consumer.

This Directive lays down general rules for the hygiene of foodstuffs, as well as methods of verifying compliance with those rules.

The systematic analysis of the requirements of the Directive shows that its key requirements for the food safety system are the following:

– preparation, processing, manufacture, packaging, storage, transport, distribution, handling or sale or disposal of foodstuffs be carried out in such a way as to comply with hygiene rules. Food business operators identify any aspect of their business that is essential to food safety, and ensure that proper safety procedures are established, implemented, followed and updated based on principles including those used to develop the HACCP system (hazard analysis and critical control points): analyze the potential food hazards of operations carried out within the food industry; identify the points of operations where food hazards may occur; identify which of the identified points are critical to food security («critical points»); identify and implement effective control and monitoring procedures at these critical points; review periodically and every change in technological operations the analysis of food hazards, critical control points and monitoring procedures (Art. 3);

– Member States shall facilitate the development of good hygiene practices which may be voluntarily adhered to by food business operators and which may be governed by them in accordance with the provisions of Article 3 (Art. 5);

– the competent authorities shall initiate controls in accordance with Directive 89/397/EEC to ensure that food business operators comply with the provisions of Article 3 of this Directive and, where appropriate, any provision established in accordance with Article 4 of this Directive. In doing so, they

shall take due account of the good hygiene practices referred to in Article 5 of this Directive, in accordance with the scope of such guidelines. The inspection carried out by the competent authorities includes a general assessment of the potential food safety hazards associated with the activities of the enterprise. Particular attention shall be paid by the competent authorities to the critical control points previously shown to the food industry to determine whether the monitoring and verification work is being carried out as it should be. Member States shall ensure that all premises used for the purpose of food production are inspected at intervals related to the risks associated with those premises (Art. 8);

– if, during the controls referred to in Article 8, the competent authorities find that non-compliance with the provisions of Article 3 or, if any, the provisions laid down in Article 4, may adversely affect the safety or safety of foodstuffs for human health, they take adequate measures (for example, the removal and / or destruction of a food product, the closure of the whole or part of the establishment for an appropriate period of time). In order to determine the risk to the health or safety of foodstuffs for human health, the nature of the foodstuff, the way it is handled or packaged, and any other operations to which the foodstuff is subjected to its delivery to the consumer should be taken into account. influence and/or storage. Member States shall take the necessary measures to ensure that any natural or legal person they control is entitled to challenge the sanctions applied by the competent authority on the results of the controls (Art. 9);

– Member States are to designate the competent authorities which are responsible for the official control of hygiene (Art. 12).

Since, as stated above, the analyzed Directive establishes general food hygiene rules and methods of verifying compliance with these rules, it is

necessary to trace and compare to what extent the requirements of this Directive comply with the legislation of Ukraine.

THE THIRD TOPIC: PRINCIPLES OF STATE REGULATION AND CONTROL OF FOOD SAFETY IN UKRAINE IN ACCORDANCE WITH THE LAW OF UKRAINE «ON STATE CONTROL OF COMPLIANCE WITH FOOD, FEED, ANIMAL BY-PRODUCTS, ANIMAL HEALTH AND WELFARE»

The principles of state regulation and control of food safety in Ukraine are determined by the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare».

This Law applies to relations related to the exercise of state control over the activities of market operators engaged in the production and/or circulation of food, other objects of sanitary measures and/or feed, including importation (forwarding) to customs. the territory of Ukraine of food and/or feed, in order to verify this activity for compliance with the legislation on food and feed, animal health and welfare. This Law shall also apply to relations related to the state control of animal by-products imported (shipped) into the customs territory of Ukraine, in order to check their compliance with the legislation on animal by-products. The effect of this Law also extends to related to the state control over the activities of market operators engaged in organic production and/or circulation of organic products, including import (shipment) to the customs territory of Ukraine, in order to verify this activity on compliance with legislation on food and feed, animal health and welfare, as well as legislation in the field of organic production, circulation and labeling of organic products.

According to Part 1 of Art. 3 of this Law, the effect of this Law extends to relations related to the exercise of state control over the activities of market operators engaged in the production and / or circulation of foodstuffs, other objects of sanitary measures and/or feed, including importation (forwarding) to the customs territory of Ukraine of food and/or feed, in order to verify this activity for compliance with the legislation on food and feed, animal health and welfare. This Law also applies to relations related to the state control of animal by-products imported (shipped) into the customs territory of Ukraine, in order to verify their compliance with the legislation on animal by-products. This Law shall also apply to relations related to the exercise of state control over the activities of market operators engaged in organic production and/or circulation of organic products, including importation (shipment) to the customs territory of Ukraine, in order to verify this activity for compliance legislation on food and feed, animal health and welfare, as well as legislation on organic production, circulation and labeling of organic products.

In the context of Article 12 of Directive 93/43EEC, the competent authorities in the field of state control are defined, the system and powers of which in the field of state control are defined in Article 7 of the Law. In particular, the competent authority in the field of state control: 1) organizes and exercises state control, including at the state border of Ukraine; 2) develops and implements a long-term plan for state control, which reports annually to the Government on the state of its implementation; 3) develop and implement a contingency plan for food and / or feed; 4) approve the annual plan of state control and the annual plan of state monitoring; 5) ensure pre-slaughter and post-mortem inspection of animals at the appropriate facilities, as well as post-mortem inspection of animals killed in hunting; 6) exercise state control over the implementation of permanent procedures based on

HACCP principles; 7) gives the persons, defined by this Law, the powers to carry out certain measures of state control, controls the legality and efficiency of their activity, deprives such authorities of the presence of the grounds specified by the legislation; 8) ensure the legitimacy and effectiveness of the activities of its structural units, territorial bodies and their officials; 9) establish in the annual plan of state control the periodicity of inspection, audit, sampling and laboratory tests (tests) for each capacity for production and/or circulation of food and / or feed; 10) approve, in accordance with the procedure established by the legislation, the periodicity of documentary checks, conformity checks, physical checks, laboratory examinations (tests) of goods imported (shipped) to the customs territory of Ukraine; 11) involve law enforcement bodies within the limits of their powers, if necessary, to exercise state control; 12) take within its powers measures to eliminate violations of this Law, legislation on foodstuffs, feeds, animal by-products, animal health and welfare, as well as to bring those responsible to justice under the law; 13) exercise other powers provided for by this Law.

Article 17 of the Law defines the principles of state control, among which are defined: 1) the priority of safety in matters of life and human health over any other interests and goals in the sphere of economic activity; 2) equality of rights and legitimate interests of all market operators; 3) guaranteeing the rights and legitimate interests of each market operator; 4) objectivity and impartiality of state control; 5) legality; 6) open, transparent, planned and systematic state control; 7) inadmissibility of duplication of state control measures; 8) presumption of lawfulness of the activity of the market operator, if the norm of law or other normative legal act issued on the basis of the law, or if the norms of different laws or different normative legal acts, or norms of one normative legal act allow ambiguous (multiple) interpretation the rights

and responsibilities of the market operator and / or the powers of the competent authority, other persons exercising state control; 9) orientation of state control on prevention of violation of legislation; 10) preventing the setting of targets or any other planning for holding market operators accountable or forcing enforcement; 11) risk and feasibility assessment; 12) observance of conditions of international treaties of Ukraine.

Article 18 of the Law sets out the requirements for state control measures. The state control shall be exercised by the competent authority, except in cases established by this Law. State control shall be exercised at a period sufficient to achieve the purposes of this Law. State control measures are implemented without warning (notification) by the market operator, except for audits and other cases where such warning is a necessary condition for ensuring the effectiveness of state control. An audit of ongoing procedures based on the HACCP principles shall be conducted subject to notification by the market operator no later than three working days prior to such an event. The notification shall be sent by registered mail at the location (place of residence) of the market operator specified in the Unified State Register of Legal Entities, Individuals – Entrepreneurs and Public Formations, and / or by sending an e-mail to the relevant address of the market operator indicated in the Unified State Register of Legal Entities. Individuals – entrepreneurs and public entities, or submitted personally for the receipt of the head or representative of the market operator. State control is exercised at any stage of production and circulation of food and feed. The frequency of implementation of the planned measures of state control of each capacity shall be determined on the basis of a risk-oriented approach and shall take into account: 1) identified risks associated with animals, food, feed, market operators, use of food or feed, processes, materials, substances, carrying out

activities or operations that may adversely affect the safety of food and/or feed, animal health and welfare; 2) results of implementation of previous state control measures; 3) the effectiveness of the procedures applied by the market operator to comply with food and feed law, animal health and welfare; 4) information that may indicate a discrepancy.

State control in the forms of inspection and audit is carried out using state control acts. The state control act should include a comprehensive list of issues to check for compliance by the market operator with food and feed, animal health and welfare legislation. Each such question should include a reference to the requirement of a legal act (article, part, paragraph, subparagraph, paragraph, etc.), which is subject to compliance by the market operator. If the results of inspection or audit reveal a discrepancy, the act of state control shall provide a detailed description of the relevant violations of the law. The act of state control is drawn up in two copies, one of which is handed over to the market operator within three working days from the date of its drawing up. During inspection and audit, it is forbidden to check the issues that are: absent in the act of state control; do not contain references to the requirement of the legislation of Ukraine (including the relevant article, its part, paragraph, subparagraph, paragraph, etc.), which is subject to compliance by the market operator. Inspection and audit without the use of the act of state control, and sampling without the use of the act of sampling is prohibited. State inspectors, state veterinary inspectors, other persons carrying out state control measures, as well as market operators have the right to record the process of state control by means of audio and video equipment, without interfering with the implementation of appropriate measures.

Article 19 of the Law defines the measures of state control that can be carried out: in the form of audit, inspection, pre-slaughter and post-mortem

inspection, sampling, laboratory examination (test), documentary verification, conformity check, physical inspection. Within the framework of state control measures, state monitoring is carried out.

The state monitoring is conducted by the competent authority in order to: 1) identify priority directions of the state policy in the field of food and feed, animal health and welfare; 2) development of measures to prevent the circulation of dangerous food and feed; 3) determination of the general level of contamination of food and feed by pesticide residues and veterinary preparations, other contaminants.

State monitoring involves the collection, systematic analysis and evaluation of: information on food and feed safety, animal health and welfare, including the identification of residues of veterinary drugs, pesticides and contaminants in food and feed, and the establishment of appropriate databases; complaints from individuals and legal entities about violations of the legislation on food and feed, animal health and welfare; other necessary information.

The annual state monitoring plan should be based on a risk-oriented approach and determine the number of samples of different types of food and feed and their laboratory tests (tests) according to the determined indicators in accordance with the methods established by the long-term state control plan.

Audit of ongoing HACCP-based procedures and ongoing procedures developed by the market operator to comply with hygiene requirements should include verification of the continuity and effectiveness of their application, including: 1) documentation; 2) record keeping; 3) processes affecting the safety of food and / or feed; 4) systems of internal control of the market operator; 5) corrective actions taken by the market operator as a result

of the analysis of discrepancies detected; 6) staff qualifications.

The results of the audit must be taken into account in determining the degree of risk of the operator's activity (capacity) and the frequency of implementation of planned state control measures.

The same person may not audit twice at the same capacity.

The inspection involves checking the compliance of market operators with the legislation on food and feed, animal health and welfare and compliance with their requirements to: 1) hygiene; 2) a plan of corrective actions developed and implemented by the market operator following preliminary inspections; 3) food and / or feed safety incidents.

Inspection may include verification of facilities, surrounding area, premises, equipment and supplies, vehicles, and food and feed; raw materials, ingredients, processing aids used for the preparation and production of food and feed, semi-finished products; objects and materials in contact with food; cleaning and care facilities and processes, as well as pesticides; marking, appearance and advertising.

The person conducting the inspection or audit is entitled to carry out simple investigations (tests) in the event of a reasonable suspicion of non-compliance or if such investigations are provided for in the annual plan of state control.

In the context of the requirements of Directive 93/43EEC, a planned system of controls is foreseen. In particular, there is a long-term plan of state control and an annual plan of state control. The long-term plan of state control should contain general information on the structure and organization of the system of state control, in particular: 1) the strategic goals of such plan and a description of how they are taken into account in determining the priorities of state control and the allocation of resources for its implementation; 2) the general organization and management of state control at the central and other

levels, including the exercise of state control of individual categories of capacity; 3) control systems applied in different fields and coordination of activities of structural subdivisions of the competent authority, its territorial bodies and subordinate state institutions, enterprises and organizations responsible for exercising state control, as well as other bodies of executive power in cases established by law; 4) implementation of state control measures by authorized persons; 5) training of state control personnel; 6) the methodology for determining the parameters by which laboratory tests (tests) are carried out in the case of routine and unplanned sampling, the method of determining the number of planned samples of different types of food and feed and their laboratory tests (tests), as well as other procedures necessary for implementation state control; 7) organization and implementation of measures in case of emergencies related to animal diseases, food poisoning or contamination of food and/or feed, as well as other risks to human health; 8) organization of interaction between the competent authority, its territorial bodies, authorized persons and other persons, who are empowered to carry out state control measures; 9) ways of ensuring compliance with all the requirements of Article 8 of the Law.

The long-term state control plan is implemented through the implementation of a set of annual state control plans. Planned state control measures are carried out in accordance with the annual state control plan. The annual plan of state control for the next year shall be developed and approved by the competent authority by December 1 of the current year. The annual state control plan should be consistent with the long-term state control plan, based on a risk-oriented approach and determine the number of samples of different types of food and feed and their laboratory tests (tests) according to certain indicators. An annual state control plan may include an annual state

monitoring plan. The annual plan of state control is revised at the same time as the long-term plan of state control, taking into account the provisions of Article 24 of the Law.

In the context of Article 9 of Directive 93/43EEC, Art. 65 of the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» provides for measures for liability for violations in the field of food safety, in particular for the following violations: 1) violation of the hygienic requirements for the production and/or circulation of food or feed, if it poses a threat to the life and/or health of humans or animals; 2) production and/or circulation of food or feed using unregistered capacity, if the obligation of its state registration is established by law; 3) production, storage of foodstuffs or feedstuffs without obtaining the operating permit for the respective capacity, if the obligation to obtain it is prescribed by law; 4) failure to comply with the statutory obligation to implement, at the facilities of a permanent procedure, based on the principles of the System of Hazardous Factors Analysis and Critical Control Point (HACCP); 5) the sale of non-compliant food or feed where it poses a threat to the life and/or health of humans or animals; 6) violations of the traceability requirements of food and feed law; 7) failure to comply with the obligation to recall or remove dangerous food or feed from circulation; 8) use, sale of unregistered objects of sanitary measures or feed additives, if the obligation of their state registration is established by law; 9) offering for sale or sale of unsuitable food or feed; 10) offering for sale or sale of food or feed that is harmful to human or animal health; 11) offering for sale or sale of perishable foodstuffs or feedstuffs whose shelf life has expired if, as a result, the foodstuffs or feedstuffs have not become harmful to human or animal health; 12) offering for sale or sale of non-perishable food or feed, the minimum shelf-life of

which has expired if the food or feed does not, as a result, become harmful to human or animal health; 13) violation of the safety parameters of the objects of sanitary measures or feedstuffs established by the legislation on food and feed; 14) failure to comply with a decision by an official of the competent authority, his or her territorial authority on the destruction of dangerous food products, processing aids, dangerous feeds or feed additives; 15) sale of products imported (sent) to the customs territory of Ukraine as trade (exhibition) samples or objects of scientific research in accordance with paragraph 5 of part eight of Article 41 of this Law, violation of requirements for their destruction or export (forwarding) outside Ukraine or other legal rules governing them; 16) failure to provide, untimely provision, provision of false information at the request of an official of the competent authority or its territorial authority; 17) refusal to allow an official of a competent authority or its territorial authority to exercise state control on grounds not provided for by law, or otherwise obstruct its lawful activity; 18) non-compliance, untimely implementation of the decision of the Chief State Inspector (Chief State Veterinary Inspector) on the temporary cessation of production and/or circulation of food and/or feed; 19) non-compliance, untimely fulfillment of the legal requirements (prescriptions) of the official of the competent body, its territorial body regarding elimination of violations of this Law, legislation on food and feed; 20) violation of the requirements of the legislation to provide information to consumers about food products, to provide inaccurate, unreliable and unclear to consumers information about food; 21) change in the food market operator information accompanying a food product in the case provided for in Article 5 of the Law of Ukraine «On Consumer Information on Food»; 22) the sale of non-compliant food or feed where it does not pose a threat to the life and / or health of humans or animals; 23)

failure to provide information to the consumer on substances and foodstuffs that cause allergic reactions or intolerance.

In the context of Article 9 of Directive 93/43EEC on guaranteeing the right of controlled entities to challenge sanctions applied by the competent authority on the results of controls, Article 15 of the Law provides for the right of controlled persons to appeal against decisions of control bodies and compensation for damages in case of recognition of the actions of such bodies wrongful. In particular, the market operator, during the implementation of state control measures, has the right to: 1) require from state inspectors, state veterinary inspectors, other persons who carry out measures of state control, compliance with this Law, legislation on food, feed, animal by-products, animal health and welfare; 2) check the presence of state inspectors, state veterinary inspectors, other persons carrying out state control measures, an official certificate (identification document); 3) receive copies of the direction for inspection or audit; 4) not allow state inspectors and state veterinary inspectors to carry out inspection and audit if: a) the inspection or audit is carried out in violation of the requirements for the periodicity of inspection and audit, established by the annual plan of state control, and in the absence of grounds for carrying out extraordinary measures of state control; b) the state inspector or the state veterinary inspector has failed to provide copies of the documents stipulated by this Law or if the provided documents do not meet the requirements of this Law; c) the state inspector or the state veterinary inspector has not entered a record of the implementation of the appropriate state control measure in the log of state surveillance (control) measures (in the case of providing such a log by the market operator); 5) be present during the implementation of state control measures, involve legal and natural persons in the implementation of such measures, provided that such persons

do not interfere with the implementation of appropriate measures; 6) require the non-disclosure of restricted information belonging to the market operator; 7) receive and get acquainted with the acts of state control, the acts of sampling, orders, orders, decisions; 8) submit in writing their explanations, remarks or objections to the acts of state control, to the acts of sampling within five working days from the date of receipt of such acts by the market operator; 9) to receive additional samples during the sampling for alternative laboratory testing (testing); 10) keep a log of the registration of state surveillance (control) measures and require the state inspectors and state veterinary inspectors to submit to it records on the performance of inspection and audit prior to their beginning; 11) to challenge in accordance with the procedure established by law the unlawful decisions, actions and omissions of officials of the competent authority and other persons carrying out the measures of state control; 12) for compensation in accordance with the procedure established by the Civil Code of Ukraine, damage (damages) caused (caused) by unlawful decisions, actions or omissions of officials of the competent authority and other persons who carry out state control measures.

CONCLUSIONS

The Ukrainian legal regulation of state control in the field of food safety meets European requirements and world practice.

Comparison of the system of legal regulation of state control in the field of food safety is made on the basis of the Law of Ukraine «On State Control of Compliance with Food, Feed, Animal By-Products, Animal Health and Welfare» and the system of requirements put forward to the system of legal regulation of state control in the field of food safety based on Council

Directive 93/43EEC «On the hygiene of foodstuffs». Both documents provide for guidance on food safety based on HACCP. Both documents provide for systematic inspection by the competent authorities, including an overall assessment of the potential food safety hazards associated with the activities of the enterprise. Particular attention shall be paid by the competent authorities to the critical control points previously shown to the food industry to determine whether the monitoring and verification work is being carried out as it should be. The legislation of Ukraine provides for a system of administrative sanctions for violations in the field of food safety, in particular for the following violations: violations of hygienic requirements for the production and / or circulation of food or feed if they pose a threat to the life and/or health of humans or animals; production and/or circulation of food or feed using unregistered containers, if the obligation of its state registration is established by law; failure to comply with the legal obligation to implement on-site procedures based on the principles of the Hazardous Factor Analysis and Critical Control Point (HACCP) system; others, as well as the possibility of challenging administrative and/or judicial action. Against this background, it is recommended that further studies and generalizations be made in the field of practical application of food safety guidelines, law enforcement practices and the system of protection of producers and consumers.

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ESTABLISHMENT OF THE INSTITUTE OF ADMINISTRATIVE RESPONSIBILITY IN THE LEGAL SYSTEM OF UKRAINE

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Abstract

The purpose of the article is to investigate the relations of the institute of administrative responsibility, which covers the definition of the concept of administrative responsibility, its content, functional purpose and role in law

enforcement activities of the state, the genesis of its formation and development, as well as features of its current legislative regulation and practical application. Taking into account the provisions of the current administrative and delictual legislation of Ukraine and the analysis of existing doctrinal conceptions, are expressed own positions concerning the issues regarding the concept of administrative responsibility, its features and normative and legal regulation, as well as the substantive and procedural features of its practical application. Discussions: involves positioning one's own points of view concerning the essence of administrative responsibility, defining its concept and content, and contemporary interpretation of certain provisions of this administrative and legal institute regarding its legislative regulation and practical enforcement.

Keywords: institute of administrative responsibility, administrative delict, administrative penalties, subjects of administrative responsibility, administrative and delictual legislation.

INTRODUCTION

Scientific, Practical Problems

The European integration course of Ukraine, deepening the democratization of our society, asserting the priority of human rights and freedoms in relations with the subjects of state-governmental powers require the further development of state-legal institutions of civil society, reforming the legal system, introducing reliable guarantees of observance of rights and freedoms of citizens, improvement of the mechanisms of administrative and coercive influence on the subjects of law in order to ensure the proper law and order in the state. Particularly relevant in this regard is the implementation of administrative law reform, which serves as a legal

instrument for the exercise of citizens' rights, freedoms and interests in the sphere of public administration, as well as an effective means of governmental influence of the state on various social processes. This includes administrative and delictual law, which is an integral part of administrative law. The latter has accumulated many problems related to both the proper performance of law enforcement tasks and the protection of the rights and freedoms of citizens and other subjects of law from unlawfully bringing them to such legal liability as administrative one. Together with other types of legal responsibility, administrative responsibility can be considered as a universal means of protecting the social relations governed by different areas of law. In other words, administrative responsibility is a kind of arsenal of effective legal sanctions that are used to influence the social relations of a great part of the industrial legal framework. This determines the importance of administrative responsibility not only as an administrative and legal institute, but also as a component of the whole domestic law enforcement system. Topical problems of this legal institute include, first of all, issues of clearer understanding of the concept, principles and essential characteristics of administrative responsibility, legal and factual grounds of its occurrence, as well as peculiarities of its practical application.

Analysis of recent research and publications. In due time a lot of attention was paid to **t**he issues of administrative responsibility in publications of the Soviet scholars, who examined administrative law, including such as Bakhrakh D.M., Veremeienko L.V., Yeropkin M.I., Kliushnichenko A.P., Koval L.V., Lazarev B.M., Lunov O.Ye., Yakuba O.M., etc. Among modern domestic scientists, such issues were investigated in works of the following scholars, who examined administrative law as Averianov V.B., Bytiak Yu.P., Holosnichenko I.P., Dodin Ye.V., Kolomoiets

T.O., Kolpakov V.K., Komziuk A.T., Kuzmenko O.V., Lukianets D.M., Mykolenko O.I., Mironiuk R.V., Shkarupa V.K., etc. These scientists have recently and thoroughly investigated the issues of development and establishment of the Institute of Administrative Responsibility, the current state of interpretation of its basic provisions and the problems of further improvement of its legal regulation and law enforcement practice.

Purpose of the Study.

The purpose of the article is to investigate the relations of the institute of administrative responsibility, which covers the definition of the concept of administrative responsibility, its content, functional purpose and role in law enforcement activities of the state, the genesis of its formation and development, as well as features of its current legislative regulation and practical application.

Research Methods.

In the process of preparing the article various research methods were used, in particular cognitive and semantic (to determine the etymology of certain concepts and terminological meanings of administrative responsibility), historical and legal (to disclos the genesis issues and development of the institute of administrative responsibility), logical and conceptual (to clarify the issues of legal regulation and peculiarities of practical application of administrative responsibility), etc.

RESULTS AND DISCUSSION

THE FIRST TOPIC: GENESIS OF ADMINISTRATIVE RESPONSIBILITY ORIGIN AND DEVELOPMENT WITHIN THE TERRITORY OF UKRAINE

Legal responsibility as a legal phenomenon in the theory of law is mostly understood as a kind of social retrospective liability, which is reflected in the negative reaction of the state, through its competent authorities to certain unlawful manifestations, which causes provided for by the law an obligation of the offenders to be accountable for their wrongful acts and to be punished in the form of separate adverse effects for them. In such an interpretation legal responsibility is considered, first of all, as one of the effective means of state coercion,[1] as the reaction to certain offenses provided by the sanctions of the legal rules and combined with the application of the corresponding sanctions. The application of legal liability measures entails for the offender the aggravating circumstances of property, moral, personal or other nature which he is obliged to endure. Thus, the offender "faces the music" for his misconduct.

Administrative responsibility is a special type of legal liability, characterized by the above-mentioned general features of the latter.

Concerning the social purpose of administrative responsibility, it has two essential features. On the one hand, this responsibility, as an important type of legal responsibility, one of the main types of state coercion, should ensure the proper performance of the tasks and functions of the state, the reliable protection of relevant social relations. On the other hand, the implementation

[1] Skakun, 2000, p. 466.

of its measures should be based on the strictest adherence to the principles of humanism, transparency, social justice and lawfulness.

Before considering the concept, content and features of this legal institute, let us touch upon the genesis of its origin and development within the territory of our country.

Features of legal responsibility, common for administrative responsibility, take origin from Roman law. Even in Roman times, such administrative sanctions as seizure, arrest, and fine were applied. Such types of administrative coercion could be applied both by the court and by individual public officials.

Legislative regulation of administrative and delictual relations within the territory of the Russian Empire began in the second half of the XIX century. Thus, by the Statute of Criminal Procedure (1861), for the commission of minor crimes and offences, magistrates could, among other sanctions, impose pecuniary penalties, admonitions, reprimands and warnings, as well as arrests up to three months or imprisonment in a workhouse. Governors and mayors were also empowered to file administrative cases on breaches of their binding orders.

During the Soviet Union, the process of forming administrative influence as response to minor offenses intensified. Initially, the All-Ukrainian Central Executive Committee and the Council of People's Commissars of the USSR issued the Resolution "On granting administrative bodies the right to take measures of administrative influence for "minor violations of law" (1927), which empowered the administrative department of district executive committees and the district executive committees with the right to apply separate measures of administrative influence to offenders. In the same year, with some improvement, these provisions were included into the

Administrative Code of the USSR. Therein, the legislator, along with judicial responsibility, for the first time used the term “administrative responsibility”. Later, this term is repeatedly used in some legal acts, which provided for administrative liability for certain offenses, in particular for violation of fire safety regulations, traffic rules, etc. In such cases, administrative liability (mostly in the form of a fine) was understood as liability that arises in administrative (extrajudicial one) proceedings.

An important role in further improving the distinguished Union-Republic legislation on the application of administrative responsibility was played to some extent by the unified Decree of the Presidium of the Supreme Soviet of the USSR “On further limitation of the use of fines imposed in administrative order” of June 21, 1961, which was the basis of the republican decree of the Presidium of the Supreme Soviet of the USSR, adopted with the same name of December 15, 1961. Herein after in appropriate regulatory and legal acts of soviet and republican importance was adopted by a legislative bodies, executive and administrative bodies and local councils of MPs have increasingly used the term “administrative responsibility”. In particular, in the Decree of the Presidium of the Supreme Soviet of the USSR “On Strengthening Responsibility for Hooliganism” of July 26, 1966 was stated that the use of fine, arrest and corrective labor for petty hooliganism is a measure of administrative influence, does not entail criminal convictions, and is not a ground for dismissal from work and does not terminate his/her length of service. At the same time, the need to adopt a unified legislative act on the procedure for applying administrative coercive measures was urgent at that time. At that time, more than 500 regulatiry acts of both Union and Republican importance were in operation USSR-wide. As a result of previous efforts by state and governmental authorities to develop such a unified

legislative act, the Supreme Soviet of the USSR adopted the Fundamentals Legislation of the Union of Soviet Socialist Republics and Union Republics on administrative offenses of October 23, 1980. On the basis of these Fundamentals, Republican codes of administrative offenses were adopted in the Union Republics. In particular, the Code of Ukraine on Administrative Offenses (hereinafter referred to as the CUAO) was adopted on December 7, 1984 and entered into force on June 1, 1985. It is still in force with significant changes and additions.[1]

For the first time in the Union Fundamentals, and then in the Code of Administrative Offenses, the definition of an administrative offense was made, which was identified with an administrative misconduct and by which was meant unlawful, guilty (intentional or negligent) action or non-enforcement that encroaches on public order, socialist property, rights and freedoms of citizens, the established management procedure and for which the legislation provides administrative responsibility. Until now, there was only a doctrinal definition of the concept of an administrative offense, which, incidentally, was interpreted arbitrarily by each author. Later, the word combination "socialist" property was removed from this definition, as well as the term "legislation" was replaced by the term "law". This could be explained in the first case by the fact that the forms of property protected by administrative penalties changed and expanded, and in the second one by the fact that administrative responsibility now could be established only by the Verkhovna Rada of Ukraine as a law (until this time with such powers were vested duly constituted authorities of The USSR and the Union Republics, the

[1] VRUSSR, 1984.

Union Government and the Governments of the Union Republics, as well as local councils and even their executive committees).

For the first time in the new Code of Ukraine on Administrative Offenses, the process and procedure rules regarding procedural support for the use of administrative responsibility also were clearly and thoroughly unified. Two of five sections of the Code had procedural purpose. They regulated the proceedings in cases of administrative offenses, as well as the procedure for executing resolutions on imposing separate administrative penalties. In fact, unlike similar codes of civil and criminal justice, where substantive and procedural rules were contained in different codes, the Code of Ukraine of Administrative Offenses was designed as a substantive and procedural codified law. It defined the basic principles and tasks of this administrative proceeding, the legal status of the participants of the proceedings, its general procedure and separate procedural terms, the list and content of the main procedural documents of such proceedings and the requirements for them, etc.

Therefore, with the adoption of the CUAO, there was a further improvement of the Institute of Administrative Responsibility. The range of administrative penalties in the process of its implementation, the totality of various social relations protected by administrative and legal sanctions, as well as the number of persons empowered to apply administrative responsibility measures in parallel with the courts was expanded.

Thus, if as a measure of administrative responsibility firstly were used fines, confiscation, warnings, corrective work, and often arrest, then in addition to the mentioned administrative penalties the CUAO in 1985 provided also usage of the paid withdrawal of the item, which became the object or administrative tool and money; deprivation of the special right

granted to a given citizen (in particular, the right to drive a vehicle, the right to hunt); administrative expulsion of foreign nationals outside the USSR.

Administrative penalties from various violations began to protect a wide range of social relations, which were formed primarily by the rules of substantive administrative law, as well as rules and other branches of law (financial, collective, labor, etc.). In the adopted Code of Ukraine on Administrative Offenses different types of administrative offenses were concentrated in eleven chapters according to the object and branch principle, that is, depending on the object of encroachment or branch (sphere) of committing an administrative offense.

The range of bodies and their officials thatr were empowered to hear cases over administrative offenses and to apply administrative penalties to the perpetrators was also expanded. In addition to local courts, such powers were vested specially created administrative commissions in the executive committees of village and district councils of MPs'; executive committees of village councils where no administrative commissions were created; law enforcement agencies (police); fire control bodies; bodies of certain types of transport, sanitary and epidemiological service, state inspections and other control and supervisory bodies. Their system and accountability to them of administrative jurisdiction cases are defined in a separate section of the Code of Ukraine on Administrative Offenses. At that time, the highest number of administrative offenses, both in qualitative terms (by types of administrative offenses) and in quantitative terms (these are the millionth indicators) were considered by law enforcement agencies (police).

The current administrative and delictual legislation of Ukraine today differs significantly from the penal legislation of the countries of Western Europe, where there is no clear differentiation between separate categories of

offenses and types of criminal responsibility for them, in fact, between measures of punishment for different offenses depending on their legal nature. In domestic law, such a difference is fundamentally noticeable. At its core, in our opinion, there are a number of factors.

Firstly, as before, even now the legislator is aimed at distinguishing minor, insignificant in their negative consequences offenses, which are recognized as administrative misconducts, from more dangerous social acts that are recognized as crimes.

Secondly, it is natural that criminal offenses should be subjected to criminal responsibility, which is implemented through the application of more severe penalties. According to the humanistic principles administrative offenses should be limited by less severe sanctions.

Thirdly, the vast majority of administrative offenses are committed mostly in the public-administrative sphere, in the process of exercising administrative (executive) power, they have, so to speak, administrative origin. However, crimes relate to encroachment on a much broader set of social relations.

Fourthly, the last but not least is the prompt response to certain unlawful acts (in particular, minor ones), the economic component and the simplified procedure of applying administrative responsibility in comparison with criminal ones.

Fifthly, the legislator clearly wish to discharge the judicial system from dealing with a large number of minor offenses by diverting this burden to administrative (governmental) bodies and their officials. The latter, in addition to the performance of their basic functional responsibilities in the field of public administration, is advisable to empower with certain administrative and jurisdictional powers to respond promptly to certain minor

offenses in the field of their governmental activities, including the use of guilty measures of administrative influence.

Notwithstanding the aforementioned distinguishing, administrative and criminal responsibility have been continuously interacting throughout their historical formation and development. This can be demonstrated by the following examples.

Often, the boundary between individual administrative offenses and crimes is unclear: for some time, some unlawful acts were classified as administrative offenses, which were later reclassified into crimes and vice versa. For example, for a long time, insulting a police officer in the Code of Ukraine on Administrative Offenses has been classified as an administrative offense, and later this unlawful act became a criminal offense. Bootlegging made for sale was initially regarded as a crime, and further was classified as an administrative offense.

And to date, legal theory has been debating whether administrative offenses should be attributed to a socially dangerous act, or only a socially harmful one. Some scientists believe that only crimes are socially dangerous (and this is legally defined in Article 11 of the Criminal Code of Ukraine) and that administrative misconducts are only socially harmful.[1] Others believe that the characteristic of administrative misconducts as well as crimes is social danger, only to a lesser extent.[2] When defining the concept of an administrative offense in the Code of Ukraine on Administrative Offenses, the legislator did not indicate this characteristic at all.

[1] Klyushnichenko, 1975, p. 201.
[2] Bahrach, 1969, p. 127.

Until the end of the last century, domestic legislation provided criminal responsibility for so-called offenses with administrative preclusion. That is, the same unlawful act, if it was committed for the first time, could only provide for administrative liability, but when it was repeated again within a year after the administrative punishment was applied to the offender, criminal responsibility had already arisen. As an example, one can name responsibility for petty hooliganism.

Since 1977, for almost twenty years, the institution of substitution of criminal responsibility for administrative one for minor crimes has been functioning under domestic criminal legislation. Taking into account the nature of the offense, the offender, aggravating or mitigating circumstances, at the discretion of the investigative and prosecutorial agencies or court against the person for committing a minor offense, administrative responsibility in the form of a fine, corrective labor or administrative arrest could be used instead of criminal responsibility. Unfortunately, for various reasons, this institute was not able to effectively use it in law enforcement practice, and the legislator subsequently rejected it. In our view, this was a rather flexible and humane way of educational punitive influence on the guilty person, which could be a viable alternative for the future introduction of the Code of criminal offenses in our legislation.

A closeness of the types of punishment provided by these types of responsibility affirms the closeness of tasks and functions of administrative and criminal responsibility. Thus, of the twelve types of criminal punishment, six coincide with similar types of administrative penalties, namely: fine, deprivation of the right to occupy certain positions or to be engaged in certain activities, community services, correctional work, confiscation. To this day it

is possible to attach arrest with detention in a guardhouse. Naturally, in the criminal law dimension these penalties are more severe.

Other examples of the closeness of administrative and criminal responsibility can be given. At the same time, there are a number of fundamental criteria for distinguishing these types of punitive responsibility. Such criteria, first of all, in addition to the severity of the nature of punishment measures, in our view, include the socio-legal consequences of bringing them to one or another type of responsibility. As you know, bringing to administrative responsibility unlike criminal one does not entail criminal convictions.

One can draw a line between mentioned types of responsibilities and the entities that are authorized to apply them. If only a court can bring to criminal responsibility, then more than fifty different bodies and officials are empowered with similar powers to apply administrative liability. These are courts, bodies of the National Police, administrative commissions, executive committees of village, settlement and city councils, bodies of the State Emergency Service, bodies of various types of transport, military commissariats, separate state inspections, etc. Among them, the broadest administrative jurisdiction is vested in the courts. Only the courts can impose the most severe administrative penalties on the perpetrators, including, for example, confiscation, paid seize of items, deprivation of special rights, correctional work, community service, community service, administrative arrest and detention in a guardhouse.

As a separate factor characterizing administrative responsibility can also be called a fairly simplified procedure for its application, in which the most of cases does not require a large number of participants in the proceedings, procedural documents, obtaining evidences within the shortened time limits

and the implementation of decisions, etc. Some scholars even argue that the key to distinguishing different types of legal responsibility is the procedure, the arrangement for applying the appropriate penalties.[1]

THE SECOND TOPIC: CURRENT VIEWS ON THE DEFINITION OF THE CONCEPT, MAIN FEATURES AND FCHARACTERISTICS OF THE APPLICATION OF ADMINISTRATIVE RESPONSIBILITY

Taking into account the provisions of the current legislation and the existing theoretical concepts, one analyzes the current views on the definition of the concept, main features and fcharacteristics of the application of administrative responsibility.

It should be noted that there is currently no legislative definition of administrative responsibility. In administrative law theory, a lot of scientific works have been devoted to defining the concept and essence of administrative responsibility at different times, including the Soviet period and up to now. Their analysis shows that the definitions of this concept in the specialized literature differs somewhat in content and approaches. It is necessary to take into account the specificity of certain periods of development of domestic administrative and delictual legislation. Thus, during the period when we used the institution of substitution of criminal responsibility for administrative one, concerning individuals, who committed so-called minor crimes, not only administrative offenses but also offenses carrying features of minor crimes were the actual reason for the occurrence

[1] Lukyanets, 2001, p. 24.

of administrative responsibility. And this could not be ignored in defining the concept and essence of the administrative responsibility.

Here are some examples of definitions of administrative responsibility available in the specialist literature.

Thus, I.P. Holosnichenko states that administrative responsibility is "a kind of legal responsibility, which is a set of administrative legal relations that arise in connection with the administrative penalties enforcement, stipulated by the norms of administrative law, to the individuals, who have committed an administrative offense by the authorized bodies (officials)".[1]

L.V. Koval notes that administrative responsibility is the application of mandatory rules, which operate in the sphere of governce and other areas of administrative penalties to the violators.[2]

Yu.P. Bitiak and V.V. Zyi believe that administrative responsibility should be understood as the "imposition on the offenders of compulsory rules that are applied in public administration, administrative penalties that entail for them a grave consequences of a material or moral nature".[3] S.S. Hladun has the same point of view, noting that, as a rule, authorized bodies of the executive power (their officials) directly bring to responsibility and only in some cases – the courts.[4]

V.K. Kolpakov notes that administrative responsibility is "a compulsory, in accordance with the established procedure, enforcement by the legal entity provided by the legislation for committing an administrative offense of the influence measures, which are accomplished by the offender."[5]

[1] Holosnichenko, 1991, p. 23.
[2] Koval, 1979, p. 186.
[3] Bitiak, & Zyi, 2014, p. 337.
[4] Hladun, 2004, p. 123.
[5] Kolpakov, 2008, p. 76.

D.M. Lukyanets understands under administrative responsibility "relations arising between executive bodies and natural or legal persons (under the conditions of absence of official subordination relations between them) concerning the commitment of the unlawful acts by the latter, envisaged by the legislation, and are applied to them penalties in administrative procedure provided by law".[1]

Similar views on the definition of the concept of administrative responsibility are expressed by some foreign scholars, who examined administrative law. Thus, Professor Popov L.L. writes that such responsibility is "the implementation of administrative and legal sanctions, the use of administrative penalties by the authorized body or official against citizens and legal entities that have committed the offenses".[2]

Thus, in most existing definitions, the concept of administrative responsibility is associated with the application of administrative penalties to those who have committed administrative offenses. Administrative misconduct and administrative penalty are the two starting legal categories for determining administrative responsibility. These are its cornerstones, the "supporting structures". The actual basis for the occurrence of administrative liability today is only the commitment of an administrative offense as a special type of offense, the responsibility for which, as a rule, involves the Code of Ukraine on Administrative Offenses. The materialized form of realization of administrative responsibility can be only administrative penalties and no other, even administrative and legal sanctions. As is indicated in Art. 23 of the CUAO, administrative punishment is a measure of

[1] Lukyanets, 2001, p. 34.
[2] Popov, & Sergin, 1975, p. 39.

responsibility for an administrative offense. And if other measures of legal influence (such as disciplinary punishments against military personnel, measures of influence under Article 24-1 of the CUAO, etc.) are applied to a person, who has committed an administrative offense, then such persons are considered as those, who were not brought to administrative responsibility. Relevant and legal consequences of the application of such sanctions (it cannot be a circumstance that burdens the responsibility under Article 35 of the CUAO; it should not be a qualifying constructive feature in determining the repetition of certain types of offenses, etc.).

It is generally accepted that the legislative definitions of particular legal concepts should not be cumbersome, overloaded in content and in different categories, difficult to understand and burdensome, especially for law enforcement entities. In our view, for example, there is no need to specifically state in our case that administrative responsibility is a type (structural part) of administrative coercion, which in turn is a kind of state coercion as a whole.

It seems that such a definition should not emphasize the possibility of applying administrative penalties only by executive authorities (their officials), because today judicial administrative and jurisdictional powers have expanded significantly.

It is illogical, in our view, when defining the concept of administrative responsibility, to consider it only retrospectively as the final result of its implementation, because it has a promising (positive) meaning as an abstract category (in general, it is functioning impersonally). Especially to combine its definition with the obligatory implementation of measures of its influence (according to V. Kolpakov and O. Kuzmenko).[1] In law enforcement practice,

[1] Kolpakov, & Kuzmenko, 2003, p. 252.

there is a steady tendency of non-compliance with regulations for the imposition of administrative penalties in 20-25% of cases due to various reasons. It is at least illogical to consider that, in such cases, the offenders were not brought to administrative responsibility. Besides, this problem is not only theoretical one and it also has an important legal enforcement value.

One is imposed by the definition of administrative responsibility as a specific form of reaction of the state represented by its competent authorities on commitment of administrative offenses, according to which persons, who have committed these offenses should face the consequences for their illegal actions ncur administrative penalties in the statutory forms and order.[1] However, this definition of administrative responsibility is somewhat cumbersome.

Therefore, administrative responsibility is mostly understood as the application to persons, who have committed administrative misconduct, administrative penalties, which entail for them aggravated consequences of property, moral, personal or other nature and are imposed by authorized bodies or officials on the grounds and according to the procerure, norms of administrative law.

Without claiming to be unquestionable and completeness of the made statements, the following definition can be used as a basis for defining this concept: administrative responsibility is a type of legal responsibility that forseees the enforcement of administrative penalties by administrative bodies (their officials) against persons who have committed administrative misconducts.[2]

[1] Goncharuk, & Sopilko, 2015, p. 7.
[2] *Ibid.*

Taking into consideration the provisions of the current legislation, let us distinguish the basic features of administrative responsibility.

1. First of all, it is one of the independent types of legal responsibility (along with criminal, disciplinary, civil ones, etc.), which serves as an important means of public order in the state. Today, administrative responsibility is the most common type of legal responsibility. Each year, about one million offenders are punished by administrative penalties in Ukraine.

2. As a specific form of legal response by the state, represented by its competent authorities, to such unlawful manifestations as administrative misconducts, administrative responsibility is one of the components of administrative coercion, which is realized by applying administrative penalties to guilty people. Its sanctions provide protection against violations not only of administrative and legal norms, but also of many other branches of law.

3. The legal basis for the occurrence of administrative responsibility is the current legislation on administrative offenses, first of all, the Code of Ukraine on Administrative Offenses, the Customs Code of Ukraine and some other legislative acts. Therefore, administrative responsibility is legislatively defined and is legally enforceable.

4. The commitment of an administrative offense (misconduct) is a actual ground for the occurrence of administrative responsibility.

5. In essence, administrative responsibility implies the legal obligation of the offender to answer to the competent state body (officials) for his misconduct and to incur certain punishment for this in the form of separate aggravating consequences for him. This is a negative consequence of the person’s unlawful activity.

6. Practical means of exercising administrative responsibility are autonomous repressive legal coercive measures – administrative penalties as a measure of this responsibility. They are multifaceted in content and may have a moral, material or physical impact on the offender.

7. In the process of applying administrative responsibility, specific legal relations between the authorities (officials) who apply it and the offenders are formed; and in such legal relationships, as a rule, there are no elements of official obedience.

8. Administrative responsibility shall be exercised in the forms and procedures established by law, which are clearly defined by administrative procedural norms. These norms, as was noted, are contained in sections IV and V of the CUAO.

9. The subjects of administrative responsibility are first and foremost natural sane persons who are sixteen years of age. At the same time, in some cases such entities may be legal persons (for example, while violation of certain traffic rules, fire safety rules, legislation on association of citizens, etc.). However, the CUAO is primarily focused on individuals only.

10. The Verkhovna Rada of Ukraine is empowered to establish administrative responsibility (adopts the Code of Ukraine on Administrative Offenses, other legislative acts on the establishment and application of administrative responsibility, amends and updates them, etc.). In the cases defined by Art. 5 of the Code of Ukraine on Administrative Offenses, local authorities are also empowered to make decisions on the management of natural disasters and epidemics, which imply administrative responsibility for their violation.

11. The powers to apply administrative responsibility (the right to impose administrative penalties) are vested in a considerable number of subjects (they

are specified in Section III of the Code of Ukraine on Administrative Offenses), which was already mentioned above. Despite the fact that in many cases administrative penalties are applied by the district (city) courts, administrative responsibility is mostly enforced out of court.

Administrative responsibility can be examined in two aspects: perspective (positive) as a constraining factor, responsibility "in general", existing abstractively, regardless of the committing a specific offense by a person, and retrospectively – as a result of committing a specific offense by a person, which arises as a certain administrative penalty.

CONCLUSIONS

Administrative responsibility is an important and effective means to combat with the most serious offenses, such as administrative misconducts. Its sanctions protect a large scope of public relations that are formed by the rules of administrative and many other branches of law in the most socially-saturated sphere, which is the sphere of public administration. This responsibility is multifunctional. Among its functions we can distinguish such social functions as: educational, prophylactic (preventive), encouraging, informative, communicative functions, as well as special ones (legal), including: – regulatory, law enforcement, punitive (repressive), compensatory (restoring) and other functions.

Modern domestic administrative and delictual legislation, which regulates relations of administrative responsibility, today is far from the needs of legal theory and law enforcement practice. The process of radically updating the basic codified law in the area of administrative responsibility has been delayed for decades. In other republics of the former Soviet Union, new codes

of administrative offenses were adopted decades ago. In Ukraine, however, only the amendments and additions to the Code of Ukraine on Administrative Offenses have been introduced since 1984. The National Code needs a foundation and fundamental reform of both the fundamental, principal provisions of substantive and legal substance and its accompanying procedural support, which covers the regulation of proceedings in administrative offenses and enforcement proceedings for the implementation of imposed charges.

To the issues that became imminent should be referred fundamentally new, systemic changes of modern administrative and delictual legislation related to, in particular, establishing the administrative responsibility of legal entities, determining the system of administrative penalties that may be applied to such persons, and procedural peculiarities of their application; with improvement of procedural features of the occurrence of administrative responsibility within the commitment of repeated offenses; with the possibility of adopting the Code of Criminal Misconducts, which undoubtedly will include extends the most socially dangerous administrative misconducs, etc.

Thus, the urgency of the existence of administrative responsibility of legal entities today is caused by the need to increase the effectiveness of the application of administrative and compulsory measures in various social spheres, in particular in architectural and construction, urban planning, sanitary and hygienic, ecological, financial and credit spheres, in the fields of public services and amenities, protection of labour housing maintenance and utilities board, business activities, antitrust activities, advertising activities, land relations, distribution of narcotic drugs and psychotropic drugs, weapons, fire safety, road safety, etc. For committing administrative offenses

in such spheres, administrative responsibility should be provided by law, along with citizens and officials, as well as legal entities, regardless of ownership.

At the same time, today it is equally important to improve the current edition of the current Code of Ukraine on Administrative Offenses. It is necessary to clarify certain concepts, terms, revision of the provisions of certain articles of this Code, both substantive and procedural content. This also applies to the removal of individual acts from the category of administrative-punitive offenses (the so-called "dead" articles), the prediction of the peculiarities of the occurrence of administrative responsibility of the so-called special subjects, in particular, members of Parliament and members of local councils, judges; clarification of certain procedural time limits, etc.

This demonstrates the urgent need to adopt a fundamentally new Code of Ukraine on Administrative Offenses.

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GENESIS OF THE DEVELOPMENT OF UKRAINIAN LICENSING IN THE CONTEXT OF GUARANTEES OF LICENSEES' RIGHTS

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Abstract

The article deals with the peculiarities of legal regulation of licensing of economic activity in Ukraine are considered in the article. It is emphasized that the relevance of such legislative regulation is related to the public's concern about the security of certain types of economic activity, but this should not violate the principle of freedom of economic activity. The purpose of the article is to find out peculiarities of legal regulation of licensing of economic activity in Ukraine. The most important results and conclusions. Ukrainian legal regulation of economic activity has evolved by consistently

limiting the pressure of the licensing authority on economic entities, finding the means to effectively protect the rights of the latter, on the one hand, and by the constant implementation by licensing authorities of their lobbying abilities to restore their previously limited rights. At present, the highest level of protection of the rights of economic entities has been reached by the adoption of the Law of Ukraine No. 139-IX on improving the procedure for licensing of economic activities.

Keywords: appeal in court, expert appellate council, license, license revocation, licensee, licensing authority.

INTRODUCTION

Scientific, Practical Problems.

The licensing problem is a complex theoretical and practical problem, as evidenced by the history of licensing and current experience in legal regulation. On the one hand, the technical and legal restriction of business activity through licensing is linked to public concern about the safety of certain types of business activity, but on the other hand, such restriction is an interference with the freedom to conduct business.

E. Bekirova[1], a Ukrainian researcher (2004), states that two extreme estimates of licensing have been approved in the world: a) licensing is extremely bureaucratic, contrary to market relations and must therefore be abolished; b) licensing is compatible with market relations and should be exercised by the authorities, but within clear limits, without causing damage to the development of constructive entrepreneurship. In the context of

[1] Bekirova, 2004.

licensing issues, S. Selimanova[1] (2016) emphasizes that in jurisprudence and law enforcement for a long time comparative jurisprudence has been effectively used to study good international experience in order to improve national law.

Thus, this paper proposes the following **hypothesis**: licensing experience in such a powerful country as Ukraine may be useful for solving similar problems in other countries, on the other hand, analysis of Ukrainian problems in the context of world experience will help to improve the relevant processes in Ukraine. In particular, S. Selimanova[2] (2016) recognizes the usefulness of studying licensing experience in Ukraine.

Purpose of the Paper is to find out the peculiarities of legal regulation of licensing of economic activity in Ukraine. *Object/subject of study*. Legal relations in the field of licensing of economic activity. The study examines the mechanism of legal regulation of licensing of economic activity in Ukraine in the historical context and in the context of compliance with international requirements.

Research Methods.

The research methodology is based on the historical method, the methods of documentary analysis and synthesis, comparative analysis, objective truth, which made it possible to systematically trace the genesis of the right regulation of licensing in Ukraine in the historical and international context. Classification, grouping, systematic methods are used to streamline empirical information and to classify the studied legal phenomena (licensed activities, specific activities). Documentary analysis made it possible to systematically

[1] Selimanova, 2016.
[2] *Ibid.*, p. 10.

examine the documentary sources of legal phenomena used in this work. The comparative method was used to compare the legislation of Ukraine with the legislation of other countries. The objective truth method is implemented by cross-checking the source data from multiple sources, relying on digital (statistical) material. The historical method has allowed us to trace licensing trends in Ukraine and in the world.

RESULTS AND DISCUSSION OF THE RESEARCH

THE FIRST TOPIC: HISTORY AND PRINCIPLES OF LICENSING IN THE WORLD AND UKRAINE

The licensing problem is a complex theoretical and practical problem, as evidenced by the history of licensing and current experience in legal regulation. On the one hand, the technical and legal restriction of business activity through licensing is linked to public concern about the safety of certain types of business activity, but on the other hand, such restriction is an interference with the freedom to conduct business.

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A reflection of this contradiction is the change in the ideology of licensing from 1991 to 2000-2015. Yes, in Art. 4 of the Law of the Ukrainian SSR No. 698-XII the license is defined as a special permit issued by the Council of

[1] Bekirova, 2004.

Ministers of the Ukrainian SSR or its authorized body. However, in the legislation of 2000-2015, the license is already defined as the right to certain activities. Yes, in Art. 1 of the Law of Ukraine No. 1775-III «On Licensing of Certain Types of Economic Activities» a license is defined as a document of the state model, which certifies the licensee's right to carry out the type of economic activity specified therein for a specified period in case of its establishment by the Cabinet of Ministers of Ukraine subject to fulfillment of the license conditions. In Art. 1 of the Law of Ukraine No. 222-VIII «On Licensing of Types of Economic Activities» a license is defined as the right of an economic entity to pursue a type of economic activity or part of the economic activity to be licensed. That is, the Law of 2015 suspended, in particular, the issuance of a license for a certain period, the license became indefinite.

Licensing history was considered by O. Yatsenko[1] (2013), O. Kashpersky[2] (2011), E. Bekirova[3] (2006), P. Palchuk[4] (2008) and others. For example, O. Yatsenko (2013) points out that the licensing institute has deep historical roots. In addition, it has developed and expanded in many countries around the world, although the terms «license» and «licensing» in the legal vocabulary of different historical periods either do not occur at all or have a non-economic meaning.

English law of the XIX – early XX centuries limited to the request of the founder of the industrial establishment to apply to the local magistrate. Each such establishment could then be inspected in accordance with the

[1] Yatsenko, 2013.
[2] Kashperskiy, 2011.
[3] Bekirova, 2006.
[4] Palchuk, 2008.

instructions drawn up for the inspectors. There were no special craft police in the Great Britain at that time. However, this was offset by the ability of individuals to file business complaints directly with the magistrate.

French law already in 1810 provided for special rules on the basis of which, without the knowledge of the prefect, manufactories could not be opened, which represent a danger to the health of the inhabitants. Such manufactories were divided into three categories: some were not allowed at all in populated areas, others could be allowed, but with the implementation of orders providing danger prevention; others could be admitted, but not otherwise, under constant police supervision. Similar instructions were given to the prefect in 1823 for manufactories that made powder and fire-resistant substances, then for manufactories that had high-pressure machine equipment.

Prussian law since 1810 has abandoned the prevailing previously detailed regulation, adopting the factories in their own way of conducting industrial activities «Gewerbeordnung», which is a simple enough application by the founder of an industrial establishment (par. 14-15). This provision was adopted and developed for various industrial establishments in the new manufactory charter of the North German Union (Gewerbe-Ordnung fur Norddeutschen Bund 1869). But this general rule is set among others: prior authorization was required from local authorities to set up industrial establishments that were recognized by the statute as dangerous in their technical design and which were considered to be dangerous to public morality or to achieve general police objectives.

The same principles were recognized in the Austrian law of 1859, which distinguished industrial establishments on the free, which did not require

special permission, and those which could be admitted only with the special permission of certain state bodies.

Describing the current state of affairs in Germany, S. Selimanova[1] (2016) points out that the general rule of licensing in Germany is a priority of the application, not of the permit. The only exceptions are activities for which entrepreneurs need special qualifications (medicine, insurance), or the production of equipment that requires systematic special control, that is, equipment that is dangerous for employees of the enterprise and/or for others.

American law in the early twentieth century, in much similarity to English, was much more forthright in protecting the interests of private capital. Yes, a person could use his property or do his own business with some damage to others. She could keep a factory that, with its noise and smoke, disturbed others as long as it was kept within reason. The world needs factories, smelters, oil refineries, high-profile machines and explosions, even at the cost of inconvenience to others, and a disgruntled citizen may be required to agree to some reasonable inconvenience for the common good[2]. But if the entrepreneur's behavior is unreasonable, in terms of the usefulness of production and the harm from it, it is recognized as a disturber of peace and order.

In the context of licensing issues, S. Selimanova[3] (2016) emphasizes that in jurisprudence and law enforcement for a long time comparative jurisprudence has been effectively used to study good international experience in order to improve national law. This allows us to study more deeply the status and nature of processes and phenomena occurring in public

[1] Selimanova, 2016.
[2] Prosser, 1955, p. 398.
[3] Selimanova, 2016, p. 4.

relations, to understand the scope and nature of mutual legal influence, the possibilities, breadth and methods of using the experience of foreign countries.

Summarizing the results of the analysis of legal regulation in the EU and the US, S. S. Selimanova[1] (2016) highlights the main features of licensing in countries where this area is successfully developing:

1. Licensing of commercial activity as a discretionary act of public administration, which restricts constitutional rights and freedoms, necessarily requires legislative consolidation.

2. The amount of the license fee shall be fixed by a statute or a by-law issued on the basis of the statutes.

3. The introduction of licensing in most cases is due to the need in the public interest to limit the number of persons engaged in certain activities, protection of health and safety of people, preservation of local attractions, etc. In relatively rare cases, licensing is set up to generate revenue.

4. The amount of licensing fees in the budget of executive bodies is small, and only in the budget of local authorities does the licensing fee contribute, albeit less, to taxation or government subsidies.

5. The licensing process in some countries is sometimes replaced by an equivalent patent application or local taxation.

6. The role of licensing in modern, developed countries as a regulator of the economy is much inferior to the methods of state incentives.

As O. Kashpersky (2011) notes on the genesis of Ukrainian licensing, since the emergence and development of Kievan Rus and the adoption of "Russian Truth", the licensing institute has just begun to emerge, but the

[1] *Ibid.*, p. 20.

imperfect tax and customs systems that existed at the time led to the waiver of licensing. After that, the licensing institute in Ukraine adapted to the European and Russian norms of law. Later, during the NEP period, this institute holds an important place, although it is under state control. Since 1991, licensing at the level of competence of public authorities has begun to be more actively implemented in all spheres of economy and trade and to adapt to the realities of today. At this historical stage of development of Ukrainian society, licensing is of particular importance, since the realities of modern life and the economic situation that has arisen in the world have required a more complete and meaningful consideration of this problem and the introduction of norms that would be able to regulate relations in this sphere of public administration, fixing them. at the legislative level, in the issue of a special right to engage in a special activity that has all the characteristics inherent in the concept of licensed activity. The implementation of economic reforms in Ukraine aimed at introducing market principles for regulating economic activity was the result of the introduction in the legal practice of the legal institutions inherent in a market economy, which imposed additional requirements (restrictions) on entrepreneurs in carrying out their business activities, in particular the licensing institute.

THE SECOND TOPIC: FORMATION OF LICENSING SYSTEM IN INDEPENDENT UKRAINE (1991-2000)

Since Ukraine gained independence, economic reforms in Ukraine aimed at introducing market principles for regulating the economy have resulted in the development of an administrative-legal institution for licensing economic activity (A. Bazhenova[1], 2017).

[1] Bazhenova, 2017, p. 104-108.

The development of the licensing system in Ukraine was investigated by the authors: O. Yatsenko[1] (2013), A. Shpomer[2] (2006), O. Kashpersky[3] (2011), E. Bekirova[4] (2006), P. Palchuk[5] (2008), E. Aver'yanova[6] (2018)), L. Belkin[7] (2010, 2011, 2012, 2014, 2019), I. Medvid, T. Dolishnia[8] (2019), and others. At the same time, the authors who researched the period 1991-2000 come to the unanimous conclusion that during this period the legislation in the sphere of licensing was formed chaotically and haphazardly, regulated mainly by by-laws. contained numerous contradictions between individual acts, more than 400 legal documents of various levels were operating in the field of licensing (E. Bekirova, 2006; A. Bazhenova, 2017; E. Aver'yanova, 2018). Most likely, this path was inevitable for the young Ukrainian state, but the Ukrainian licensing system at that time was an illustration of how no licensing should be organized.

As noted above, Ukrainian licensing at that time was based on the norms of Art. 4 of the Law of the Ukrainian SSR (hereinafter – Ukraine) No. 698-XII "On Entrepreneurship". In this article, a license is defined as a special permit issued by the Government or a body authorized by it. It was assumed that the following activities (11 types in total) could not be carried out without obtaining such a permit: prospecting and exploitation of mineral deposits; repair of sporting, hunting or other weapons; production and sale of medicines and chemicals; production of beer and wine; production of vodka, liquor and

[1] Yatsenko, 2013.
[2] Shpomer, 2006.
[3] Kashperskiy, 2011.
[4] Bekirova, 2006.
[5] Palchuk, 2008.
[6] Aver'yanova, 2018.
[7] Belkin, 2010, p. 10; Belkin, 2011; Belkin, 2012; Belkin, 2014; Belkin, 2019.
[8] Medvid, Dolishnia, 2019.

cognac products; production of tobacco products; medical practice; veterinary practice; legal practice; creation and maintenance of gambling establishments, organization of gambling; trade in alcoholic beverages.

The permit (license) for conducting business activities shall be issued by the Government or its authorized body within a period not exceeding 30 days from the date of receipt of the application. The denial of the permit (license) is issued at the same time and is a written act. Refusal to grant a permit (license) is considered by a court or arbitration.

The law did not provide for any more regulation. This created opportunities for the arbitrariness of the licensing authorities.

On 1992 adopted the Law of Ukraine No. 2697-XII «On Amendments to the Law of the Ukrainian SSR[1] "On Entrepreneurship"». By this Law, Article 4 of the original Law No. 698-XII was supplemented by another 23 activities which are impossible without a license, namely: domestic and international transportation of passengers and goods by air, river, sea, rail and road; the agency and chartering of the merchant marine fleet; production of securities, banknotes and postage; mediation activities with privatization papers; etc.

A total of 34 licensed activities are foreseen.

Instead, Art. 4, as amended by Law No. 698-XII, as of 1997, already contained 60 licensed activities[2]. At the same time, as of 2000 the number of such activities decreased and amounted to 46 items[3]. At the same time, as E.Averyanova (2018)[4], correctly points out, the types of activities subject to licensing constituted a significant segment of domestic entrepreneurship,

[1] Law of Ukraine, No. 2697-XII.
[2] Law of Ukraine, No. 698-XII.
[3] *Ibid.*
[4] Aver'yanova, 2018, p. 55.

since almost every name in the list included several types of works and / or services. In addition, the Entrepreneurship Act was not the only legal act that established the activities for which a license was required.

It is worth noting that by Resolution No. 1164 the Cabinet of Ministers (Government) of Ukraine approved the Concept of development of the state system of licensing of business activity by its types»[1].

The Concept, in particular, emphasizes that the main task of licensing is to protect the economic and other interests of the state, its citizens through the establishment by the state of certain conditions and rules for the implementation of certain types of business activities. Business licensing is defined as an integral part of state regulation of entrepreneurship in Ukraine.

At the same time, the Concept contains the correct provisions on democratic principles of licensing: protection of human and citizen's constitutional rights and freedoms, legitimate interests, public health and state security; equality of rights of all business entities irrespective of their organizational and ownership forms; publicity and openness of the licensing process. Only those types of entrepreneurial activity that directly affect human health, the environment, and the security of the state should be regulated.

It was stated that the right to engage in certain types of business activities that are licensed is regulated only by law.

In order to regulate the relations that arise during the licensing of certain types of entrepreneurial activity, it is recognized as necessary to develop and adopt a special Law on Business Licensing.

[1] Resolution, No. 1164.

The Concept recognizes the need to provide for regulation in the field of licensing only by law. However, the procedure for obtaining a license for a long time was regulated by the by-laws.

Thus, by the Resolution No. 99, the Cabinet of Ministers of Ukraine approved the «Regulations on the Procedure of Issuing Special Permits (Licenses) to Entities of Entrepreneurial Activities for Performing Certain Activities»[1]. The Regulation states that the license is issued at the request of the business entity. The following shall be attached to the application: entrepreneur – legal entity – copies of the founding documents; citizen entrepreneur - copies of documents certifying the level of education and qualification required to carry out the relevant type of activity (except in individual cases). The decision to issue a license or refuse to issue a license shall be made within 30 days from the date of receipt of the application and the necessary documents. The decision to refuse the license must state the reasons for the refusal.

The licensing authority determines the need to coordinate the issue of its issuance with the public authorities, whose function is to oversee compliance with the established rules when carrying out the respective activities. Licensing authorities (except in individual cases) approve, with the agreement of the business protection authority, instructions on the conditions and rules for carrying out certain activities and monitoring their compliance.

It is the very last paragraph that has created opportunities for authorities to obstruct licensing.

[1] Resolution, No. 99.

May 17, 1994, instead of Resolution No. 99 of April 15, 1991, the Cabinet of Ministers of Ukraine approved Resolution No. 316 of the same name[1]. In principle, this Regulation was not very different from the previous one, but a new body – the Licensing Chamber – was introduced into the licensing system. It was noted that the Licensing Chamber, upon the submission of the ministries and agencies issuing licenses, approves the instructions on the conditions and rules for carrying out certain activities and monitoring their compliance. However, the Licensing Chamber itself was introduced not by the Law, but by a by-law – Decree of the President of Ukraine No. 264/95 «On the Licensed Chamber of the Ministry of Economy of Ukraine»[2].

It is worth noting that Art. 4 of the Law of Ukraine (formerly the Ukrainian SSR) No. 698-XII «On Entrepreneurship» for the first time on 1998 introduces for the first time legislative regulation of repressive measures against licensees[3]. Yes, it is determined that the licensing authority has the right to suspend the license for a definite period in case of violation of the license conditions by the business entity; failure of a business entity to comply with the requirements for compliance with the licensing conditions of a body specifically authorized by the Cabinet of Ministers of Ukraine or a body that issued a license within a specified period. In case of elimination of the infringements that led to the suspension of the license, the issuing authority shall decide to renew its license.

The procedure for suspension and renewal of a license shall be determined by a body specifically authorized by the Cabinet of Ministers of Ukraine or by a body that issued the license.

[1] Resolution, No. 316.
[2] Decree of the President of Ukraine, No. 264/95.
[3] Law of Ukraine, No. 698-XII.

The license may be revoked if any false information is found in the license application or in the documents attached thereto; transfer of a business entity's license to another person; repeated or gross violation of the license conditions by the business entity.

The license shall be deemed to have been revoked from the date of the decision to revoke the license or from the date of revocation of state registration of the business entity.

The reasoned decision to suspend or revoke a license shall be communicated to the business entity within five days.

The decision to suspend or revoke a license may be challenged by a legal entity.

However, it must be acknowledged that the vagueness of the wording of the grounds for revocation of the license (for example, the ambiguity of the concept of «gross» infringement) significantly reduced the effectiveness of the appeal.

On July 3, 1998, in place of Resolution No. 316 of May 17, 1994, the Cabinet of Ministers of Ukraine, by Resolution No. 1020, approved a new Regulation on the procedure for licensing entrepreneurial activity[1]. This Regulation was mainly aimed at the implementation of the above new provisions of Law No. 698-XII, as of January 29, 1998.

Thus, it should be noted that the trend of development of Ukrainian licensing in 1991-2000 was an increase in the types of activities subject to licensing; lack of stability of the regulatory framework, which hindered business entities to plan their activities and respond in advance to possible changes; dominance of sectoral instructions and other by-laws in the field of

[1] Resolution, No. 1020.

licensing, overriding by-laws over the law; lack of a unified approach to the licensing system in various areas of business and subjectivity of licensing officials.

THE THIRD TOPIC: FORMATION OF LICENSING SYSTEM IN INDEPENDENT UKRAINE (2000-2015)

The beginning of a new stage of development of the licensing system in Ukraine is related to the adoption on 2000 of the Law of Ukraine No. 1775-III, – i.e. a special law in the field of licensing. Adoption of this Law was a certain embodiment of the Concept of 1996 on the development of the state system of licensing of business activity by its types. As noted above, this Concept envisaged the adoption of such a special law.

In Art. 2 of this Law it was declared that the effect of this Law applies to all business entities. At the same time, at the moment of adoption of the Law, it was established that the licensing of banking, foreign economic activity, licensing of broadcasting channels, licensing in the field of electricity and nuclear energy, licensing in the field of intellectual property is carried out in accordance with the laws governing relations in these areas.

That is, already at the moment of adoption of this Law there was a deviation from the declared aim of unity of approaches to licensing.

Art. 3 of this Law stated the following basic principles of state licensing policy: ensuring equality of rights, legitimate interests of all economic entities; protection of rights, legitimate interests, life and health of citizens, environmental protection and security of the state; establishment of a single procedure for licensing of economic activities in the territory of Ukraine; establishment of a unified list of economic activities subject to licensing.

However, as noted above, at the time of the adoption of this Law, the

principle of establishing a single order was not adhered to, since licensing in certain areas was allowed under separate laws.

To ensure a unified state licensing policy and create the conditions for overcoming sectoral lobbying, a Specialized Licensing Authority was introduced (Art. 5). According to the Law, this body: develops the main directions of development of licensing; develops draft regulatory acts on licensing issues and coordinates such projects that are developed and adopted by the executive authorities; approve jointly with the licensing authorities the license conditions and the procedure for monitoring their compliance; forms expert-appellate council; issues orders for elimination of breaches of license conditions, as well as orders for elimination of breaches of legislation in the field of licensing, etc. It was assumed that the functioning of such a body would provide a unified methodology for establishing the procedure for obtaining a license, monitoring the compliance of business entities with established requirements; license revocation.

Thus, in accordance with Art. 10 of the Law, an economic entity that intends to carry out a certain type of licensed economic activity, either individually or through an authorized body or person, applies to the relevant licensing authority with the application of the established model for the issuance of a license. The application must contain the minimum information about the business entity (name, location, bank details, identification code, type of business activity for which the applicant intends to obtain a license).

It should be especially emphasized that the Law also includes the documents for the licensing application, an exhaustive list of which is established by the Cabinet of Ministers of Ukraine upon submission by a specially authorized licensing body. The licensing authority is prohibited from requiring economic entities other documents not specified in this Law.

It should be noted that this approach combines the flexibility of the activities with the stability of the requirements and the avoidance of arbitrariness of the licensing authorities in this area, since the licensing authorities set the requirements for documents not in their bureaucratic discretion, but in agreement with the competent authorities.

Pursuant to Art. 11 of the Law, the licensing authority shall take a decision to grant or refuse to issue a license no later than ten working days from the date of receipt of the license application and the documents attached to the application, which, incidentally, is less than under Law No. 698-XII (30 days), but unless a special law regulating relations in certain spheres of economic activity does not provide for another term of issuing a license for certain activities.

For the objective control of the activity of licensees, the concept of "licensing conditions" is introduced - this is an exhaustive list of organizational, qualification and other special requirements, which are obligatory to be fulfilled when conducting the types of economic activities subject to licensing. The license conditions and the procedure for monitoring their observance shall be approved by joint order of the specially authorized licensing and licensing authority.

Therefore, the license terms are also approved not with the bureaucratic discretion of the licensing authority, but in agreement with the specifically licensed licensing authority.

Art. 9 of the Law provides a comprehensive list of economic activities subject to licensing. The list includes 60 titles. Formally, this is more than in Art. 4 of Law No. 698-XII as 2000. However, in practice, this was due to the fragmentation of certain types of economic activity. Thus, Law No. 698-XII provides for the type of licensed activity as domestic and international

transportation of passengers and goods by air, river, sea, rail and road, and in Law No. 1775-III this activity was broken down into 4 types, namely provision of services in transportation of passengers, cargo, separately, by air; separately, by river, by sea; separately, by car; separately, by rail.

When Law No. 1775-III was adopted, it was assumed that the Law would establish a single list of grounds for revocation of a license for all activities (Art. 21 of the Law). This provided not only a judicial but also an extra-judicial way of appealing the decision of annulment. The Law stipulates that the decision on revocation of a license enters into force ten days after its adoption. If, within that time, the licensee files a complaint with the Board of Appeal, the decision of the licensing authority shall be suspended until the relevant decision of the specially authorized licensing body has been taken.

That is, the advantage of such a method of protecting the right to retain a license is that, during the period of appeal, the license remains valid. This approach to alternative dispute resolution is consistent with international legal principles. In particular, In particular, Recommendation Rec (2001) 9 of the Committee of Ministers to Member States[1] states that, in practice, litigation is not always the most appropriate way of resolving an administrative dispute.

However, the problem is that, in contrast to the court, the Specialized Licensing Authority, even in the opinion of the panel of experts in favor of the complainant, cannot independently reverse the unlawful decision of the licensing authority. The authority can only require such cancellation from the licensing authority. However, if the latter ignores such a requirement, the issue of the validity of the license is a conflict.

At the same time, it should be borne in mind that, contrary to the original

[1] Recommendation Rec, 2001.

plan, practically from the first days of the existence of Law No. 1775-III, the only licensing system was destroyed. Yes, according to para. 4 Art. 3 of Law No. 1775-III in its original version, one of the basic principles of state policy in the sphere of licensing is the establishment of a uniform procedure for licensing of types of economic activity in the territory of Ukraine. However, this provision was later supplemented by the provision «...and the definition of its peculiarities for certain types of economic activity ... in the laws governing relations in the relevant field...». This has legalized the stretching of licensing rules by law, and sometimes by-laws. The history of the destruction of the single licensing system in the period 2000-2015 is shown in Table 1.

Table 1. *History of the destruction of the single licensing system (2000-2015) (Introduction of «special» activities licensed under «other» laws)*

Date of acceptance «other» of the Law	*An activity that is recognized as special*
01.06.2000	Banking, Broadcasting Licensing, Electricity Licensing, and Nuclear Energy Use (Immediately upon Adoption of Law No. 1775-III)
11.01.2001	production and sale of alcohol by ethyl, cognac and fruit, alcoholic beverages and tobacco
12.07.2001	financial services activities
17.01.2002	activities in the field of education
18.11.2003	activities in the field of telecommunications
06.09.2005	professional activity in the securities market
12.01.2006	licensing of television and radio broadcasting activities
16.05.2007	activity in the field of construction
19.05.2011	rendering of services in transportation of passengers, cargo by air transport
20.12.2011	trafficking of narcotic drugs, psychotropic substances and precursors, production of medicines, wholesale and retail trade in medicines
22.03.2012	import of medicines (except import of active pharmaceutical

	ingredients)
04.07.2012	security activities

Source: Authors.

However, it is impossible to logically justify licensing under the special rules of each specific activity. A. Shpomer[1] (2006) tried to formulate the general principles of such allocation: socio-economic role, a wide range of service contingents, ensuring the economic security of the state, vital role for society, maintaining at the proper level of the intellectual potential of society, ensuring social stability of the state. At the same time, medical practice (socio-economic role, broad range of services), and land trade (ensuring the economic security of the state, vital role for society) and providing cryptographic information security services (support to adequate level of intellectual potential of the society), etc. In practice, the decision to remove licensing rules from the profile law depends on the lobbying abilities of the authors of the relevant laws.

The «privatization» of the licensing rules by agencies leads to the following negative consequences: fragmentation of activities for which separate licenses must be obtained; the establishment of these activities by-laws (the record holder for the establishment of such activities - the Ministry of Regional Development and Construction of Ukraine – 150 elements, of which thousands of subspecies are composed); significant prolongation of the term of consideration of the application for a license in comparison with the basic Law No. 1775-III (record holder for terms - National Securities and Stock Market Commission - 3 months); uncontrolled complication of the package of documents that must be submitted to the licensing authority to obtain a license (for example, see Table 2 – increase in the number of

[1] Shpomer, 2006.

documents from 7 to 29); impossibility to appeal against the decision of the licensing authority to the expert-appellate board by a «special» licensee; introduction of additional grounds for refusal or revocation of a license; mass cancellation of licenses and the like. The destruction of the single licensing system leads to the arbitrariness of the licensing authorities to approve the terms of licensing, issuance and revocation of licenses, hinders the development of entrepreneurship and creates a basis for corruption. In fact, licensing problems are hidden in the so-called special laws and by-laws, so there are very few changes to Law No. 1775-III without restoring its universal nature.

Table 2. *Dynamics of increase in the number of documents to receive licenses for the right to carry out activities on the issue and circulation of securities*

Period, date	Number of documents
According to the resolution of the Cabinet of Ministers of Ukraine during the period when obtaining a license for this type of activity was regulated by General Law No. 1775-III	7
According to the Order of May 26, 2006, that is, after the withdrawal of this activity from the scope of Law No. 1775-III	17
Following order of 14.05.2013	29

Source: Authors.

For example, the Law of Ukraine No. 2800-IV «On Amendments to Certain Laws of Ukraine on Licensing of Professional Activity in the Securities Market» in the Law of Ukraine No. 448/96-VR «On State Regulation of the Securities Market in Ukraine», a special paragraph was inserted as follows: «Licensing of professional activity in the securities market is carried out by the State Commission on Securities and Stock Market in accordance with the laws of Ukraine governing the securities market,

regulatory acts adopted in accordance with these konamy and with the requirements of Articles 13 and 19 of the Law of Ukraine "On licensing certain types of activities"». At the same time, these articles only regulate the design of license forms and licensing cases. And this means that this type of activity is completely withdrawn from the licensing law. At the same time Law No. 448/96-VR itself includes 11 independent activities that are subject to licensing.

I. Medvid, T. Dolishnia[1] (2019) also emphasize that the licensing conditions in individual industries are governed by a large number of special legal acts that set out the general principles and rules for obtaining permits and licenses. Such a large number of legal acts complicates the process of obtaining licensing documents.

THE FOURTH TOPIC: BECOMING A LICENSING SYSTEM IN INDEPENDENT UKRAINE (AFTER 2015)

The next stage in the formation of the Ukrainian licensing system was the adoption of the Law No. 222-VIII. This adoption should address the shortcomings identified in the previous period. A comprehensive explanation of such deficiencies is contained in the official explanatory note to the draft law[2].

The main reason for the need for the adoption of the Law is recognized the need for systematic improvement and updating of the order, all stages and procedures of licensing of economic activities through their simplification, as well as a significant reduction of the list of certain types of economic activities.

[1] Medvid, Dolishnia, 2019, p. 60.
[2] Adoption of the Law, No. 222-VIII.

Almost fourteen years of experience in applying Law No. 1775-III has highlighted the need for further streamlining of licensing of economic activities, maximum simplification of all stages and procedures for obtaining licenses, avoiding unjustified burdens or unnecessary administrative procedures for economic entities, introduction of information technology, and legislation principles of licensing of economic activities.

The protection of the intending or licensed business entity against the actions of licensing officials must be strengthened, procedures for reviewing licensing activities reduced, the unlimited period of license validity for all types of economic activities subject to licensing, and the possibility of transfer licenses inherited.

It is also necessary to clearly, transparently and rigidly establish the exclusive and minimum list of grounds for revocation of the license, simplify the pre-trial consideration of cases of revocation of the license (improvement of the powers of the Expert-Appellate Board on licensing), introduce the need for attestation of officials of officials.

It is necessary to reduce not only the number of economic activities subject to licensing, which do not pose a threat to human health, the environment and the security of the state, the introduction of which has not yielded positive results in any sphere of public relations or has corruption signs, but also the types of works of licensed types business activity.

At the end of Law No. 1775-III, 57 types of economic activity and more than 200 types of work were subject to licensing.

This situation is hampering the development of domestic business due to direct and indirect losses of both entrepreneurs (in particular, the waste of time and money through bribery) and the state (the cost of maintaining an over-staffed government, shadow economy, low positions in international

investment ratings attractiveness.

At the same time, the original version of Law No. 1775-III practically did not resolve the issues raised.

First, the number of licensed activities was not significantly reduced. As of the time of the adoption of the Law, such activities were 30. As of 03/01/2020 - 33. Part of the reduction was achieved through formal integration of activities, such as: transportation of passengers, dangerous goods and hazardous wastes by river, sea, road, rail and air transport, the international carriage of passengers and goods by road, that is, the unification of all modes of transport into one type of activity, although as noted above, when passing Law No. 1775-III, these activities would be whether separated

Secondly, the issue of the conflicting situation regarding the validity of the license has not been resolved when the expert-appellate council decides in favor of the licensee-complainant, but the licensing authority does not comply with it.

Third, the regulation of licensing in different fields by different laws has not been overcome. On the one hand, already at the adoption of Law No. 222-VIII in Part 2 of Art. 2 of this Law stipulates that the effect of this Law does not apply to the procedure of issuing, re-issuing and revocation of licenses for the following types of economic activity: 1) banking activities (Law No. 2473-VIII expanded as «financial services activities and other activities licensed by the National Bank of Ukraine in accordance with the law»; 2) television and radio broadcasting activities, 3) production and sale of alcohol by ethyl, cognac and fruit, alcoholic beverages and tobacco (Law No. 2628-VIII of 2018 expanded as «production and trade in alcohol with ethyl, cognac and fruit and grain distillate, bioethanol, alcoholic beverages and tobacco and fuel, fuel storage»).

In addition, the Law No. 394-IX to the number of such licensed activities to which the licensing law does not apply, includes activity in the field of electricity, natural gas market, centralized water supply and centralized drainage, heat production, heat transport energy through backbone and local (distribution) thermal networks, heat supply and other activities licensed by the National Commission for State Regulation in the Energy Sectors law and utilities, as required by law, and exercising control in these areas.

Of course, these types of activities are not covered by the possibility of filing complaints with the Expert Appeal Board.

On the other hand, the concept of regulating the licensing of certain activities by separate laws is replaced by the concept of regulating «with features». The list of such activities as of March 1, 2020 is given in Table 3.

Table 3. *History of the introduction of licensing «features» in Law No. 222-VIII*

Date of acceptance «other» of the Law	An activity that is recognized as special
March 2, 2015	Professional activity in the securities market; activity in the field of electricity; activities in the field of telecommunications; construction of objects of IV and V categories of complexity; manufacture of medicines, wholesale and retail trade of medicines, import of medicines (except active pharmaceutical ingredients) (immediately upon adoption of Law No. 1775-III)
December 8, 2015	production of especially hazardous chemicals, the list of which is determined by the Cabinet of Ministers of Ukraine, hazardous waste management
September22, 2016	activities in the natural gas market
January 17, 2017 October 17, 2019	construction of objects that by the class of consequences (responsibility) belong to the objects with medium (CC2) and significant (CC3) consequences, according to the list of types of work, determined by the Cabinet of Ministers of Ukraine

Source: Authors.

As the scope of possible "features" is not specifically limited, such "features" are, in practice, the result of lobbying efforts and the departmental fantasies of licensing authorities, when, for example, in the securities market, grounds for suspending or revoking licenses were determined by-laws regulatory acts, even if they were against the law. At the same time, the hope for judicial protection remains extremely low, since, subject to the inclination of administrative courts that resolve disputes with the authorities, at the least possible decision in favor of the authorities, and in the presence of conflict of law, the court with a high degree of probability will decide in favor of the public authority. And this «tradition» is also inherent not only in Ukraine. Thus, in the case of «Janezevik v. Sweden and "Västberga Taxi Aktiebolag" and Vulic v. Sweden», the European Court of Human Rights noted that «in such cases, when dealing with the question of the proper balance of interests, the Court tends to the side of the state» (Pyvovar Y., Belkin L., Belkin M., & Iurynets J.[1]).

In such circumstances, it is necessary to emphasize the great positive importance for the protection of licensees' rights by adopting by the team of the newly elected President of Ukraine V.A. Zelensky the Law of Ukraine dated October 2, 2019 No. 139-IX «On Amendments to Some Legislative Acts of Ukraine on Improving the Procedure of Licensing of Business Activities» (hereinafter referred to as Law No. 139-IX).

First, Law No. 139-IX excluded from the so-called «features» the possibility of regulating licensing bylaws. Thus, in accordance with the newly introduced par. 2 of Art. 7 of Law No. 222-VIII, licensing of economic

[1] Pyvovar, Belkin, Belkin, Iurynets, 2019, doi: 10.15823/mts.2019.01

activities licensed in accordance with this Article in accordance with the features defined by the laws in the respective fields is carried out in compliance with the requirements of Art. 3 of this Law. And according to the newly introduced provision of Art. 3 of this Law, only the law determines the grounds for issuing a license, leaving an application for a license without consideration, refusing a license, renewing the license, expanding and narrowing a licensee's business activity, suspending, renewing the license in full or renewing the license in part, revocation of the license in whole or in part, and the terms of acceptance and entry into force of the decisions of the licensing authorities.

Secondly, clearer conditions for the adoption of Law No. 139-IX are spelled out as to the consequences of consideration of complaints by business entities to the Board of Appeal. Thus, according to par. 8 of Art. 5 (revised) of Law No. 222-VIII, in case of adoption by the Expert-Appellate Council on licensing of the decision on satisfaction of the licensee's complaint against the decision of the licensing authority to cancel or suspend the license in whole or in part… *such license remains valid* and the subject management remains a licensee in accordance with this Law. That is, the conflict of non-compliance by the licensing authority with the decision made in favor of the licensee is resolved in favor of the latter.

CONCLUSIONS

According to the results of this study, the authors conclude.

1. Licensing in developed democracies (USA, EU countries) went a long way in recognizing the priority of the freedom to do business over the expediency of restrictions, except in particular dangerous situations for

human life and health. The principle of the right to engage in entrepreneurial activity was recognized on application, unless the activity was particularly dangerous. Recognized the concept that the world needs in factories, smelting plants, oil refineries, loud cars and explosions, even at the cost of inconvenience to others, and from a disgruntled citizen may be required to agree to some reasonable inconvenience for the common good.

2. At the level of ideology, Ukrainian legal regulation recognized this approach, but on the way of its implementation, it constantly faced the desire of industry lobbyists to create maximum difficulties for obtaining licenses, which also had some corruption orientation. Therefore, Ukrainian legal regulation of economic activity has evolved controversially: on the one hand, with the desire to permanently limit the pressure of the licensing authority on economic entities, to seek means of effectively protecting the rights of the latter, and on the other, with the need to constantly overcome the ability of industry lobbyists to restore their previously restricted rights.

3. There are three stages in the history of Ukrainian licensing:

1991-2000 – the absence of a specific licensing law when there was a tendency for an increase in the activities to be licensed; lack of stability of the regulatory framework; dominance of sectoral instructions and other by-laws in the field of licensing, overriding by-laws over the law; lack of a unified approach to the licensing system in different areas of business and subjectivity of licensing officials;

2000-2015 – introduction of licensing by a special Law on licensing and laying the foundations for overcoming lobbying aspirations of sectoral officials, although this has not been fully achieved;

After 2015 – further streamlining of licensing of economic activities, maximum simplification of all stages and procedures for obtaining licenses,

avoiding unreasonable burdens or unnecessary administrative procedures for economic entities; legislative establishment of uniform state principles of licensing of economic activities; strict control over the legality of suspension or revocation of a license. At present, the highest level of protection of the rights of economic entities has been reached by the adoption of the Law of Ukraine of October 2, 2019 No. 139-IX on improving the procedure for licensing of economic activities.

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REGIONAL STATE AID IN THE EU COUNTRIES FOR DEPRESSED REGIONS AS THE BASIS FOR THE DEVELOPMENT OF THE ECONOMY OF THE DONBAS REGION IN UKRAINE

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Abstract

The objective of the article is to determine the ways of solving the problems of the depressed regions of the EU Member States, which take into account the principles of regional state aid of the EU and need implementation to ensure the development of the economy of the Donbas region of Ukraine. The expediency of finding a balance between investor incentives and adherence

to the EU principles of regional state aid has been noted. The authors have offered to take into account the positive experience in Ukraine: of Germany in combining local traditions and global development tendencies; of Poland on the mechanism of providing incentives to investors; of the Czech Republic on the system of creation and support of regional clusters; of Italy on investment incentive system; of Portugal on the application of the special tax regime.

Keywords: depressed regions, Donbas region of Ukraine, investment attractiveness, EU regional state aid, sustainable development, incentives.

INTRODUCTION

Scientific, Practical Problems.

Regions with socio-economic problems are considered to be depressed and present in different EU countries. A similar situation occurs in Ukraine, where regions differ in socio-economic terms, and therefore the investment attractiveness of a particular region of Ukraine is also different. At present, a very negative socio-economic and political situation has developed in the Donbas region of Ukraine (Donetsk and Luhansk regions), which is caused by prolonged armed conflict and changes in the industry's structure in the region. At the same time, it should be noted that sustainable socio-economic development of the region is the key to the economic growth of the country in the whole. Support of economic development at a progressive level requires adequate financial support, which is directly dependent on the comprehensive formation and effective implementation of the state investment policy[1]. In order to solve the problems of the Donbas region of

[1] Maidanevych, et al., 2018.

Ukraine, it is necessary to attract investment into its economy. This is not possible without state aid, which should become an instrument of investment attractiveness and stimulate the implementation of investment projects in the region. It is worth noting that the state aid in order to be effective must be oriented on situations, where it can lead to significant improvements that the market cannot provide on its own[1].

Purpose of the Study.

The objective of the article is to determine the measures to address the problems of the depressed regions of the EU Member States, which take into account the principles of regional state aid of the EU and require implementation to ensure the development of the economy of the Donbas region of Ukraine. To achieve this objective it is necessary to solve the following tasks: to determine the problems that hinder the development of the economy of the Donbas region of Ukraine; to evaluate the experience of the EU Member States in using regional state aid to address the problems of depressed regions; to determine the legal mechanism of taking into account the experience of the EU Member States in terms of the Donbas region of Ukraine for solving the problems of depressed regions.

The object of the research is public relations in the sphere of the application of measures to resolve the problems of depressed regions of the EU Member States, taking into account the principles of regional state aid of the EU in terms of the Donbas region of Ukraine. *The subject* matter of the research is the legal mechanism for applying the EU Member States' measures to address the problems of depressed regions, taking into account the principles of the EU regional state aid in terms of the Donbas region of Ukraine.

[1] Friederiszick, Massimo, 2015.

Research Methods.

Research methods have been selected to identify the measures in the EU Member States that are used to address the problems of depressed regions and take into account the principles of the EU regional state aid; and therefore, it is appropriate to implement them for the development of the economy of the Donbas region of Ukraine. The method of comparative analysis has facilitated to study the experience of the EU Member States in addressing the problems of depressed regions, taking into account the principles of the EU regional state aid, in order to identify the measures that can be applied to solve the problems of the Donbas region of Ukraine. The dialectical method of scientific cognition has assisted to analyze the state of scientific research on the aspects of using regional state aid to address the problems of depressed regions of the EU Member States, in particular the harmonization of the incentive system for investors and the principles of regional state aid. The analysis and synthesis method helped to define the main criteria for control over the state aid of the EU and the requirements of the guidelines on regional state aid from 2014 to 2020. The modeling method helped to gain a comprehensive understanding of the mechanisms for combining local traditions and global tendencies in the development of regions, the system of creation and support of regional clusters, the application of a special tax regime.

RESULTS AND DISCUSSION OF THE RESEARCH

Ukraine has obligations to implement the European rules on state aid set out in the EU-Ukraine Association Agreement, thus major reforms in this area will take place in the light of the European experience. Implementation of the

EU legislation will be carried out through the preparation of eligibility criteria for different types of state aid[1].

There are restrictions in the EU on the provision of direct economic assistance to businesses by the EU Member States. State aid is granted on the basis of rules laid down by the EU legal instruments, the execution of which is strictly controlled by the EU institutions. It should be noted that the main purpose of the control over the EU state aid is to limit the possible negative effects of national state aid on the European market integration[2].

THE FIRST TOPIC: LEGAL BASIS FOR CONTROL OVER THE EU STATE AID

Currently the legal basis for control over the EU state aid is the Art. 107 (ex Article 87) of the Consolidated version of the Treaty on the Functioning of the EU (hereinafter – TFEU)[3], which provides that aid granted in any form by the States or by public resources, which distorts or threatens to distort competition by creating benefits for certain enterprises or industries, is not compatible with the internal market to the extent that it affects trade between the Member States other than the exceptions provided in the Treaty.

Such exemptions concerning the regions are: aid designed to promote the economic development of regions, where the standard of living is abnormally low or where there is serious underemployment, and the regions referred to in the Article 349, taking into account their structural, economic and social situation (par. 3 (a) of the Art. 107 of the TFEU); assistance designed to promote the development of particular economic activities or particular

[1] Bulana, 2017.
[2] Ganoulis & Martin, 2001.
[3] EU, 2012.

economic regions, where it does not alter trading conditions to an extent contrary to the common interest (par. 3 (c) of the Art. 107 of the TFEU).

The analysis of the guidelines on regional state aid from 2014 to 2020[1] makes it possible to highlight several points.

First of all. The main objective of regional state aid is to reduce the development gap between the different regions of the European Union. The aid intensity is assumed to be higher for the regions covered by paragraph 3 (a) of the Art. 107 of the TFEU, i.e. regions with GDP per capita below 75% out of the EU average. Unlike the regions covered by paragraph 3 (c) of the Art. 107 of the TFEU, where GDP per capita is over 75% out of the EU average, and geographical coverage and aid intensity are more limited.

Secondly. Considerable attention is paid to the compatibility of regional state aid. In order to assess whether an approved measure can be considered incompatible with the internal market, the European Commission (hereinafter referred to as the Commission) usually analyzes whether the structured ensures the measures in providing the aid that the positive impact of the aid to achieve common interests outweighs its potential negative effects on trade and competition. The Commission shall consider the measure of aid only if it satisfies each of the following principles: (a) the measure of regional state aid must be oriented on achieving the objective of common interest; (b) the measure of state regional aid should target a situation, where the aid can lead to a significant improvement that the market cannot achieve, for example, by eliminating market failure or addressing equity or cohesion; (c) appropriateness of measures on providing the aid: the suggested measure on providing the aid should be the appropriate policy instrument to achieve the

[1] European Commission, 2013.

objective of common interest; (d) incentive effect: the aid must change the behavior of the relevant enterprise(s) concerned in such a way that it must participate in additional activities that it would not undertake without assistance or in a limited manner, or in another city; (e) aid proportionality (minimum aid): the amount of aid should be limited to the minimum necessary to stimulate additional investment or activity in the region concerned; (f) avoid unjustified adverse effects on competition and trade between the Member States: the negative effects of the aid must be sufficiently limited to make the overall balance of measures positive; (g) aid transparency: the Member States, the Commission, entities of economic activity and the public should have free access to all relevant acts and relevant information on assistance provided.

Thirdly. The Member State must ensure that assistance is provided in a form, which can lead to the least distortion of trade and competition. In this regard, if the assistance is provided in forms that provide a direct corporeal advantage (e.g. direct grants, tax exemptions or reductions, social security or other compulsory charges, or the provision of land, goods or services at favorable prices, etc.), the State Member should demonstrate why other potentially less distorted by forms of assistance, advances that are repaid, or forms of assistance based on debt or equity instruments (e.g., low interest loans or interest discounts, government guarantees, the acquisition of a shareholding or an alternative provision of capital on favorable terms) are not appropriate.

Fourth. There are two types of aid: (a) investment aid provided for investment projects and its maximum level (aid intensity) varies depending on the size of the applicant company. Regional aid to large enterprises is mostly provided for initial investments that are made in new economic

activity in the areas indicated on the regional aid map or for diversification of existing enterprises to produce new products or carry out new innovation processes. The aid intensity is increased by 10% for medium-sized enterprises and by 20% for small enterprises relative to aid for large enterprises; (b) operational aid provided in addition to investment aid aimed at reducing the running costs of small and medium-sized enterprises in particularly disadvantaged regions. Operational aid includes the following cost categories: personnel costs, materials, contracting services, communications, energy, maintenance, rent, administration, etc., but does not include depreciation and financing costs, if they were included into eligible costs while providing regional investment assistance.

Fifth. Regional investment aid is not the only policy instrument available to the Member States to support investment and job creation in disadvantaged regions. The Member States may take other measures such as infrastructure development, improving the quality of education and training or improving the business environment.

According to the Art. 267 of the Association Agreement between Ukraine and the EU[1], the whole territory of Ukraine by the end of 2020, will be considered as falling under paragraph 3 (a) of the Art. 107 of the TFEU and, therefore, the most intensive aid can be provided throughout Ukraine. It is likely that after 2020 it will be possible to provide the most intensive aid to the Donbas region of Ukraine, because the problems of this region require complex efforts for their positive solution.

The task of defining a set of incentive measures is currently urgent in order to attract investors to the Donbas region of Ukraine who will take into account

[1] VRU, 2014.

the EU principles of state regional aid. Several EU Member States have successful experience in attracting investment to address the problems of depressed territories, including using state regional aid. This experience requires further research and can be used to solve the problems of the Donbas region of Ukraine.

THE SECOND TOPIC: EXPERIENCE OF THE EU MEMBER STATES IN ADDRESSING THE PROBLEMS OF DEPRESSED REGIONS

At the end of the XX century, the problem for further economic development of a number of European countries became separate regions, which for various reasons differed in the negative value of socio-economic indicators in comparison with other regions of the state. The depressing nature of the development of certain regions in a number of European countries has been associated with problems of different nature. Birch K. et al note that the main concern is of those regions that are at the forefront of early industrialization in the European economy, focused on the exploitation of coal and other raw materials. These are the worst economic "black spots" in Western Europe during 1980s and 1990s, which include the Ruhr and Saar regions of Germany, the region of Northeast France, the Basque region of Spain and British coal deposits[1].

It is advisable to emphasize the fact that coal and other types of industry have provided prosperity to these industrial regions for decades. However, at some stage there was a reorientation of further goals and ways of developing

[1] Birch, et al., 2010.

the economy, and environmental issues became a priority. Everything of the above mentioned necessitated a change in economic policy in those regions.

The general objective of the policy for those regions was to find ways to divert them from traditional sectors in decline and to install new drivers for economic growth[1]. In order to improve the situation in those regions, it was necessary to provide the conditions for new technological development, but the regions had lack of resources. However, it should be borne in mind that not all regions have the same level of development, opportunities for attracting investment, creating the necessary infrastructure, and providing skilled labor. Therefore, it was necessary to find a special approach that would create the conditions for diversification of production, solving the issue of employment of the population and many others. In this situation, regional aid became the driving lever that provided the opportunity to create the conditions for solving regional problems in the industrial regions of Germany, France, and the United Kingdom.

It should be noted that old industrial regions such as the Ruhr, the North East of France, the North East of England and Wales typically received a significant share of regional aid in the 1970s and 1980s focused on industrial conversion, retraining, attracting new investments, upgrading the environment and regenerating cities. However, the UK in the 1980s significantly reduced regional spending, while other European countries such as Germany and France doubled it[2]. Analysis of the situation in the old industrial regions shows that each of these countries has found its own approach to solve the problems. The process of transformation and adaptation

[1] European Commission, 2004.
[2] Birch, et al., 2010.

of the regional economy, as well as the peculiarities of the new projected trajectory of development of the old industrial regions, is the result of a mutual combination of long-standing local traditions and general global tendencies in the development of territorial units. The success of the transformation process is possible if you find and apply the right combination of traditions and tendencies, which, according to the experience of particular regions (in particular, Manchester and the Ruhr region), seems to be the best[1]. The Ruhr situation shows, first of all, that regional restructuring is a long-running process that has been going on for decades. Secondly, neo-industrialization approaches based on the assets of the region will make more sense than simple, rootless re-industrialization strategies. Thirdly, economic diversification can disrupt the industrial monostructure and at the same time increase the region's absorbing capacity for new economic changes[2]. The British old industrial regions operate better in terms of GDP growth and employment of services, and their continental partners better retain employment. This reflects the contrast between the more interventionist policy adopted in France and Germany and the more market-oriented approach of the United Kingdom, combined with a focus on regional diversification and modernization in the former cases and transplantation through attracting internal investment into the latter[3].

After the enlargement of the EU, the economic downturn of large agglomerations is being observed in some parts of the new EU Member

[1] Koutský, et al., 2011.
[2] Hospers, 2004.
[3] Martin & Sunley, 2006.

States, namely: in Central European countries and their industrial regions in the Eastern part of Germany, the Czech Republic and Poland[1].

For example, low-income regions in Poland indicate about such socio-economic problems as unemployment and industrial monostructure[2]. In 1994, in order to encourage investment in the least developed regions of Poland, fourteen special economic zones (hereinafter referred to as SEZs) were created. According to the Special Economic Zones Law[3], the purpose of these SEZs was to enhance the social, economic development and competitiveness of regions that suffered from industrial restructuring at the beginning of the political and economic transformations of the 1990s. In particular, the zones have been designed to develop new technologies, create new jobs, develop exports, and utilize and improve existing infrastructure in an "uninhabited" area of a particular region. To achieve these lofty goals, potential investors were offered special state aid and income tax benefits to attract them to these new areas. By presenting a major economic policy instrument for regional development, the SEZs remain the cornerstone of regional economic policy in Poland for the past 20 years[4].

Poland officially began the process of accession to the EU in 1994, therefore the Polish legislation on SEZs for investors was provided in such a way as to take into account the EU principles of eligibility for state aid[5,6].

The intensity of regional state aid provided to entrepreneurs in SEZs had a positive effect on the social and economic development of the poorest and

[1] Skokan, 2009.
[2] Nazarczuk & Umiński, 2019.
[3] Ustawa, No. 123.
[4] Ambroziak & Hartwell, 2018.
[5] European Commission, 1998.
[6] European Commission, 2006.

sometimes less developed poviats in Poland, whereas the more developed poviats with SEZs did not have better or much better results compared to poviats without SEZ[1].

According to the new map, areas with GDP per capita below 75% of the EU average – covering 86.3% of Poland's population – will continue to be eligible for regional investment aid with a maximum aid intensity of 25% to 50% of eligible costs of investment projects. The maximum aid intensity is applied to large enterprises' investment. It can be increased by 10% for medium-sized enterprises and by 20% for small companies[2].

Significant political, economic, and social changes in the Czech Republic began after 1989. In May 2004, the Czech Republic became a member of the European Union, which accelerated economic growth and exacerbated regional differences in the country.

The main reasons behind the uneven development of regions in the Czech Republic and the emergence of regional differences are: 1) economic structure and its diversity – a significant reduction in production and employment in heavy industry and mining, located mainly in two regions – Moravian-Silesian and the North-West; 2) constantly unsatisfactory environmental situation, again in Moravian-Silesian and the North-West, as well as in major cities – Prague, Brno and other cities; 3) uneven coverage of the territory by technical and transport infrastructure; 4) quality of human resources (level of education, entrepreneurial tradition) and local self-government (insufficient administrative capacities in small municipalities); 5) low interregional labor mobility. Differences in the geographical location

[1] Ambroziak, 2016.
[2] European Commission, 2014a.

of the regions within the Czech Republic and in the EU context also play a significant role[1].

Moravian-Silesian region is located in the North-East of the Czech Republic. Moravian-Silesian was a nationwide center for coal mining, coke production, metallurgy, heavy engineering, and electricity generation and distribution. In the 1990s of the XX century, a rapid process of restructuring and de-industrialization took place in the region during the transition from a centralized planned economy to a market economy[2]. This has led to closing down of many inefficient coal mines, coke plants and industrial plants, which had significant consequences, in particular high unemployment and many brownfield sites in the region. Since 1990, the there was a significant improvement in the environment in the Moravian-Silesian region as a result of reduced production, the use of greener technologies and significant investment into environmental events[3]. Since 2001, the region has undertaken intensive restructuring efforts by attracting international investment and supporting the diversification of the regional economy into new industries, as well as promoting cluster activity[4].

From 2004 until the onset of the global economic crisis in 2008, the Moravian-Silesian region was one of the most dynamic regions outside the Czech capital – Prague, as evidenced by a decrease in unemployment and GDP growth. The investment structure is changed. Thus, the Moravian-Silesian is attracting higher-level investments that are key factors to future development and regional competitiveness. This development was a

[1] Skokan, 2009.
[2] Rumpel & Waack, 2004.
[3] The Ministry of Regional Development of Czech Republic, 2007.
[4] Skokan, 2009.

consequence of the specific regional policy of the Moravian-Silesian regional government, which aimed at creating industrial zones, attracting foreign investors and supporting cluster initiatives[1]. Experience has demonstrated that the restructuring of the old industrial region can be based on the renewal of clusters within three directions: innovative adjustment of old clusters, new clusters in developed industries and new high-tech and knowledge-consumptive clusters[2].

Moravian-Silesian is entitled to the EU structural funds, which play an important role in developing regional and innovation policies and in adopting the European approach to regional development[3]. The regional cluster thrives on the basis of traditional inter-company relations and is strengthened by new domestic investors and regional and governmental policies supported through the EU structural funds[4].

In addition to the above countries, depressed regions are characteristic for such countries as: Bulgaria, Hungary, Romania, Italy, Greece, Portugal and others.

The experience of Italy is interesting, where the depressed region is the agrarian South, where 40% of the population of the country lives, with the production of more than 25% of the total GDP[5].

In order to stimulate investment activity in the depressed regions of Italy, the Law on Economic Development of the South of Italy was adopted in 2017[6], and in February 2018, the Decree of the Head of the Council of

[1] *Ibid.*
[2] Trippl & Tödtling, 2008.
[3] Blažek & Uhlíř, 2007.
[4] Skokan, 2006.
[5] Travaglini, 2012.
[6] Decree-Law, No. 91.

Ministers No. 12 dated from January 25, 2018 on the establishment of Special Economic Zones (SEZs) was put into effect, defining the general goals of the development of SEZs; conditions of the creation of SEZs, their duration; criteria for determining and delimiting the territory of the SEZs; the criteria governing access to companies[1].

The law norms stipulate that SEZs can be created in the following forms: industrial park (IP); eco-industrial park (EIP); technology park (TP); free trade areas (FTAs); innovation district (ID).

The legislation provides three types of benefits for companies located in SEZs: 1) a tax credit for companies that start their business or invest in special areas consisting of harbors, airports and surrounding areas, logistics platforms and marinas. A tax credit equals 20% of investment (limited to a maximum of € 50 million) for small businesses, 15% for medium-sized businesses and 10% for large companies, unless different rates are applied in certain areas. A tax credit can only be offset by other tax responsibilities; 2) accelerated procedures and deadlines for issuing permits; 3) reduced administrative fees.

To obtain tax benefits and simplified procedures, you must maintain a business established in SEZ for at least seven years after the completion of the subsidized investment and no liquidation or dissolution is permitted[2].

Analysis of the European Commission documents[3] shows that the maximum level of aid that can be given to investment projects carried out by large enterprises in ancillary areas of Italy (regions of GDP per capita below 75% of the EU average) ranges from 10% to 25% of the total investment costs, depending on the region. They can be increased by 10% for medium-

[1] Council of Ministers of Italy, 2018.
[2] Dialti, 2018.
[3] European Commission, 2014b.

sized and 20% for small businesses. Under the new map of Italy, five regions (Basilicata, Calabria, Campania, Puglia and Sicilia) will be eligible for regional investment aid with a maximum aid intensity of 25% for large enterprises. Another 25 areas, covering 5.03% of the Italian population, are eligible for regional investment aid, within the category of regions with GDP per capita, over 75% of the EU average, with a maximum aid intensity of 10% for large enterprises.

Considering that simplified procedures will be applied in the SEZs of Italy and tax exemptions will be granted to businesses, this requires the fulfillment of the EU state aid requirements. Coordination between local, regional and national institutions is required to ensure the fulfillment of the EU state aid requirements. It is not simple to implement in practice, but it is necessary in order to prevent distortions of competition and ensure full compliance with the EU state aid legislation.

The experience of Portugal is of interest. Considering the particular geographical situation of Madeira and the specific characteristics of its economy, the Portuguese Government established free trade zones in the Autonomous Region of Madeira, according to the Decree-Law No. 500/80 dated from October 20, 1980.

According to the Decree-Law nr. 165/86, of the 26th of June 1986, with a view to facilitating and attracting investment in the Madeira Free Trade Area, tax and financial benefits may be granted for the following purposes: (a) to facilitate the creation of new investment projects; (b) production involvement and protection; (c) support for the start-up and stabilization of registered companies. The incentives provided to encourage and attract investment in the Madeira Free Trade Area are determined by the regional government, taking into account, inter alia, the contribution to the economic and social

development of the region and the resources available to the regional government[1].

For decades, tax incentives for investors have been extended. Currently, according to the Art. 36-A of the Statute of Tax Benefits[2], companies that are licensed to operate within the Madeira Free Trade Area from January 1, 2015 to December 31, 2020, are granted the following tax benefits until December 31, 2027: 1) the corporate income tax rate is 5%; 2) the exemption regime applicable internationally for dividends, reserves, capital gains and loss of capital; 3) exemption from income tax in the distribution of dividends between shareholders; 4) absence of tax on interest and other forms of payment of shareholder loans, capital surcharges or advance payments made by shareholders of the company; 5) exemption from the obligation to withhold royalties, services or interest paid to third parties; 6) tax credit for international double taxation, both legal and economic; 7) exemption from capital gains tax on the sale of shares of Madeira companies; 8) exemption from capital gains tax on sale of subsidiaries under conditions of exemption from participation; 9) tax exemption on dividends, interest and royalties received from associated companies from the EU, subject to the requirements of the parent and subsidiary directives or the interest and royalties directive; 10) reduction by 80% of rates of stamp duty, real estate transfer tax, municipal property tax, regional and municipal fees, notorial and registration fees; 11) reduction of special advance tax payments and autonomous taxation in proportion to the applied corporate tax rate (in this case a decrease of 76.2%).

[1] Decree-Law, No. 165/86.
[2] Law, No. 64/2015.

Entities wishing to take advantage of this special regime must commence their activity within six months, except for industrial, maritime and aeronautical activities, which must commence their activity within one year, from the date of issuing the license, and in compliance with one of the following requirements: (a) creation from one to five jobs in the first six months of operation and a minimum investment of EUR 75,000 in the acquisition of tangible or intangible fixed assets during the first two years of operation; (b) the creation of six or more jobs in the first six months of operation.

One of the following maximum annual restrictions is applied to special tax benefits: (a) 20.1% of annual gross value added, or (b) 30.1% of annual labor cost, or (c) 15.1% of annual turnover.

Entities benefiting from the preferential treatment will also be subject to restrictions on benefits through the application of thresholds for taxable income, under the following conditions: (a) EUR 2.73 million for the creation from 1 to 2 jobs; (b) EUR 3.55 million for the creation from 3 to 5 jobs; (c) EUR 21.87 million for the creation from 6 to 30 jobs; (d) EUR 35.54 million for the creation from 31 to 50 jobs; (e) EUR 54.68 million for the creation from 51 to 100 jobs; (f) EUR 205.5 million for the creation of more than 100 jobs.

If the tax base exceeds the limit, then the excess is taxed at the rate of 20% (general Madeira regime).

Consequently, the preferential treatment has a number of restrictions that are necessary to ensure that the preferential treatment complies with the EU in regard to the state aid requirements. According to a new map, regions that account for 69.01% of Portugal's population will continue to be eligible for regional investment aid with maximum aid intensity for large enterprises,

starting with 25% of projected costs of relevant investment projects in mainland Portugal and above 35% on Madeira, up to 45% in the Azores. The aid intensity inside enterprises, for investments, may be increased by 10% and by 20% for small enterprises[1].

Portugal's overall tax system is very attractive in itself, and Madeira's special free trade zone tax system is even more attractive. Madeira Free Trade Area was created in the 1980s and offered one of the most competitive tax systems in Europe, with great benefits for companies looking to start their business in a variety of areas. Madeira's Free Trade Area is not a tax haven since its tax system complies with state aid rules and has been endorsed by the EU and is characterized by transparency and compliance with international exchange of information legislation. For this reason, it has advantage over many other jurisdictions[2].

THE THIRD TOPIC: DIRECTIONS OF SOLVING PROBLEMS OF THE DONBAS REGION OF UKRAINE

The socio-economic and political situation of the Donbas region of Ukraine is caused by four blocks of problems[3]. The first block includes the problems associated with prolonged armed conflict and proximity to the collision line, resulting in the destruction of infrastructure and housing. The second block includes the problems associated with the need to provide housing and work for internally displaced persons. The minimum state social benefits provided by the legislator for internally displaced persons do not allow renting or buying housing, even in small settlements, not mentioning regional centers. Therefore, to be able to rent a home, you need to find a job.

[1] European Commission, 2014c.
[2] Santos & Reis, 2016.
[3] Zeldina, 2018.

However, finding a job in a strange city is not easy, and if the problem of housing is not solved, it is almost impossible. The third block includes the problems related to the disconnection of traditional relations of economic entities, the need to provide new markets for the purchase of raw materials, the sale of finished products, as well as the objective expediency of reconstruction of the means of production that do not meet the current economic conditions. It should be noted that the erosion of a technologically outdated economy and the disruption of traditional relations with the temporarily occupied territories require not only the formation of a fundamentally new economic complex, but also the initiation of the search for new sources of supply of raw materials and components, and requires the search for new markets for manufactured products[1]. The fourth block includes the problems associated with changing the structure of industry in the region. Thus, a large number of industrial enterprises providing employment to the local population are located in territories temporarily outside the control of Ukraine or those enterprises suspended their economic activity for a number of reasons. At the same time, it should be noted that before the military conflict, the coal, coke-chemical and machine-building industries were concentrated in the Donbas region of Ukraine, where a large number of highly skilled employees worked. Favorable geographical location, proximity of raw materials and markets, developed network of transport communications, high population density, distinguished the Donbas among other economic regions of Ukraine[2].

[1] Libanova, 2015.
[2] Yefremenko & Gavrysh, 2017.

Therefore, some of the mentioned problems took place before the escalation of the armed conflict in Ukraine, and now they have only intensified; another part of the problems is directly related to negative consequences of armed conflict. It is also worth noting that a number of problems of the Donbas region of Ukraine is identical to those of the old industrial region and other depressed regions of the EU countries. We talk about: changing the structure of industry in the region; reconstruction of production facilities that do not meet the current conditions of management; solving the problem of employment; providing the region with modern infrastructure, etc. However, all of those problems require immediate resolution, and the following tasks are required to be accomplished: to restore the infrastructure; to construct and rebuild residential buildings; to create new jobs; to reconstruct, modernize existing production complexes; to build new production facilities; to develop small and medium-size business; to create environmentally safe conditions for the development of the region; to provide security of economy management.

In order to accomplish these tasks, the involvement of human and financial potential is required. We talk about high quality specialists and billions of US dollars. Scholars and practitioners sound different numbers because it is impossible to calculate clearly the required amount of money. The budget of Ukraine does not have sufficient material resources to fulfill these tasks. In this regard, in order to solve the existing problems of the Donbas region of Ukraine, it is necessary to attract investment funds, national and foreign investors, as well as international institutions. However, investors are not in a hurry to invest in the economic recovery of the Donbas region of Ukraine. The negative factors that occur in the Donbas region of Ukraine make investors think about the feasibility of investing, so creating attractive

conditions by the state should compensate investors for the negative factors that characterize the situation in the region.

It should also be borne in mind that the overall purpose is to create conditions that will ensure the sustainable development of the Donbas region of Ukraine. Thus, the investment attractiveness of the Donbas region of Ukraine should contribute to creating the necessary conditions for the sustainable development of the region.

To create investment attractiveness of the Donbas region of Ukraine and ensure its sustainable development, various measures have been offered by the state authorities. However, the mechanisms provided by the legislation of Ukraine to attract investors in order to solve the problems of the Donbas region of Ukraine are not effective.

The conducted analysis of the EU Member States' experience in dealing with the problems of depressed territories, taking into account the principles of the EU to regional state aid, indicates the feasibility of borrowing those positive measures that can be used to solve the problems of the Donbas region of Ukraine. Examples of such measures are provided in Table 1.

Table 1. *Measures envisaged by the legislation of the EU Member States to address the problems of depressed territories that should be borrowed*

The EU countries	**Measures to solve problems of depressed territories that are worth borrowing**
Germany	1. Combining long-standing local traditions and global tendencies in territorial units' development; 2. Diversification of the economy of the depressed region to destroy the industrial monostructure and to increase the region's capacity for new economic changes.
Poland	1. Establishment of free economic zone, where to provide the mechanism to harmonize incentives for investors and the EU principles on the eligibility of state aid.
Czech Republic	1. Establishment of industrial zones taking into account local features;

	2. Creation and support of regional clusters on the basis of traditional and new inter-company relations; 3. Use of the EU structural funds for the development and implementation of regional innovation policy.
Italy	1. Creation of the incentive system for free economic zone's investment activity, which provides: tax credit for companies investing in depressed regions; expedited licensing procedures and terms for issuing permits; reduction of administrative fees.
Portugal	1. Legislative enshrinement of a special tax regime for entities that create jobs and make a minimum investment of EUR 75,000 in the acquisition of tangible or intangible fixed assets during the first two years of operation.

Source: authors' development

CONCLUSIONS

The analysis of socio-economic problems that occur in the Donbas region of Ukraine and the problems of depressed regions of the EU Member States allows us to make the following conclusions:

1. The current regional policy of Ukraine does not allow to attract investment to solve socio-economic problems and ensure the development of the economy of the Donbas region of Ukraine. The research demonstrates that we need a comprehensive approach that will offer investors attractive measures to undertake investment projects that are needed for the region.

2. The experience of the EU Member States demonstrates that finding a balance between the need to provide incentives to attract investors to depressed regions of the country and the importance of adhering to the EU principles of regional state aid helps to solve the problems of depressed regions in a positive way.

3. The European experience in solving the problems of depressed regions with the help of state regional aid has to be implemented. Therefore, it is necessary to take into account the positive measures provided by the

legislation of different EU Member States in the legislation of Ukraine, which can provide the solution of socio-economic problems of the Donbas region of Ukraine.

4. In order to form an effective regional policy of the state aimed at solving the problems of the Donbas region of Ukraine and to comply with the EU principles on state regional aid, it is advisable to borrow: from Germany – the policy of combining long-standing local traditions and global tendencies in the development of territorial units, ways to diversify the economy of the depressed region, oriented on the destruction of the industrial monostructure and the increase of the region's capacity for new economic changes; from Poland – the mechanism for the creation of free economic zone providing for harmonization of incentives for investors and the EU principles on the eligibility of state aid; from the Czech Republic – specific features of the creation of industrial zones, the system of creation and support of regional clusters on the basis of traditional and new inter-company relations, the mechanism of using the EU structural funds for the development and implementation of regional innovation policy; from Italy – the system of stimulating investment activity into free economic zone, which provides: tax credit for companies investing in depressed regions, accelerated procedures and terms of issuing permits, reducing administrative fees; from Portugal – the procedure for applying a special tax regime for the entities that create jobs and make investment.

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ETHICAL AND LEGAL ESSENCE OF ACADEMIC INTEGRITY IN UKRAINE

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Abstract

The article is focused on revealing the essence of academic integrity in Ukraine. Academic integrity is considered as an ethical and legal phenomenon without taking into account other kinds of impact on society. It

has been emphasized that academic integrity in Ukraine is the system of rules for protecting the copyright law, quality standards of education, presentation of reliable information. It has been proved that the rules of academic integrity for Ukrainian education as the systemic legal formation is a new phenomenon. Correlation of ethical and legal rules of integrity has been made. It has been established that the violation of academic integrity can be carried out by a student, a scientific supervisor of student or dissertation papers, a scholar. The authors have offered the classification of violations of academic integrity: violation of the rules of the copyright law protection's standards; violation of the rules on quality standards of education; violation of the rules of reliable information's standards.

Keywords: academic integrity, violation of the rules of academic Integrity, liability for the violation of academic integrity, literary piracy, text recycling.

INTRODUCTION

Scientific, Practical Problems.

Academic integrity is one of the main notions in the educational process of Ukraine. It was an element of moral and ethical norms up to 2017, which regulated the activities of educators, and was used as a basis for the verification of dissertations. The concept of academic integrity in Ukraine arose due to the Srtengthening Academic Integrity in Ukraine Project, implemented by the American Councils for International Education with the assistance of the Ministry of Education and Science of Ukraine and supported by the US Embassy in Ukraine[1]. Since 2017, the norm on academic integrity

[1] SAIUP, 2017.

has been enshrined in the Law of Ukraine "On Education"[1]. This provided an opportunity for the scientific community to get new standards of scientific works, to make Ukrainian science transparent and sound. These standards in Ukraine became the subject matter of theoretical comprehension. For this purpose, scientific results on this issue can be divided into two groups: 1) research in the field of copyright law, allowing to identify the degree of originality of a scientific work, the right of authorship or focused on the protection of non-property and property trademark rights (It is referred to scientific works of H.O. Androshchiuk, V.S. Drobiazko, O.D. Sviatotskyi, V.I. Serebrovskyi, E.A. Fleishyts, R.B. Shyshka et al.); 2) studying literary piracy as an independant category (doctoral dissertation G.S. Ulianova «Methodological problems of civil legal protection of intellectual property against plagiarism» (2015), doctoral dissertation O.M. Ryzhko «Plagiarism in the social and communicative dimension of the beginning of the XXI century: the nature of the phenomenon and the history of fight» (2018). The achievements of these scholars have been used to better understanding of the issues raised in this article. In particular, the authors have studied the concepts and content of academic integrity, types of violations of academic integrity, liability for committing these offenses, etc., taking into account these achievements. Analysis of international literature indicates on a small scientific interest to general theoretical problems of academic integrity. Foreign scholars mainly focus on implementing the policy of academic integrity among high school students[2] the formulation of practical guidance on academic integrity to University students[3], the understanding of various

[1] VRU, 2017.
[2] Richards, Saddiqui, White, McGuigan & Homewood, 2016.
[3] Brown & Janssen, 2017

aspects of academic injustice and clarifying the reasons of its violations by students and lecturers[1]. A great part of the works is also focused on explaining the nature of plagiarism to University students, its varieties and the liability for its use[2]. Such attention to this issue is explained by the need of forming the negative attitude to any manifestations of academic dishonesty by University students. Indeed the consequences of plagiarism for students may be devastating, because their failure to learn and apply appropriate study skills will affect both their university experience and their subsequent career[3]. Despite the nod toward a significant contribution of these and other scholars who researched this issue, it should be noted that nowadays there are no developments of many theoretical provisions in the field of violation of the rules and standards of academic integrity in Ukraine.

Purpose of the Study.

The objective of this article is to accomplish theoretical and legal research of the essence of academic integrity in Ukraine, to identify organizational and legal problems that arise within the activity of educational institutions, in the work of pedagogical, scientific and pedagogical, scientific employees of these institutions and degree-seeking students in the researched field on the basis of comprehensive analysis of theoretical works of scholars, the current national legislation and the practice of its application, as well as to formulate scientifically substantiated propositions and recommendations aimed at and overcoming them. To achieve the objective, the authors of the article consider it necessary to solve the following main tasks: to reveal the content of

[1] Kwong, Ng, Mark & Wong, 2010.
[2] Barrón-Cedeño, Vila, Martí & Rosso, 2013; Comas-Forgas, Sureda-Negre & Salva-Mut, 2010; Roig, 2010; Sarlauskiene & Stabingis, 2014
[3] Dawson & Overfield, 2006

academic integrity in Ukraine as a social and legal phenomenon, to analyze the national legislation and practice of its application in this area, to consider cases of violations of the rules of academic integrity and to suggest their classification, to characterize different types of liability that may occur for the violation of academic integrity.

The object of the research is public relations that arise in the field of academic integrity, their legal regulation and ethical content. *The subject* matter of the research is ethical and legal content of academic integrity in Ukraine.

Research Methods.

Scientific publications within this problem were the material for the article, the authors of the article considered the current regulatory basis on this issue, in particular the provisions on academic integrity of some educational institutions. Existing judicial practice on the matters of applying various types of liability for the use of literary piracy and text recycling was also the material for understanding the essence of academic integrity. Some of our deductions are based on the analysis of the materials of specific cases recently considered by the courts of various jurisdictions in Ukraine. In this regard the authors of the article used information from open access sources, in particular from the website http://reyestr.court.gov.ua/. The combination of theoretical achievements of domestic and international scholars related to academic integrity, provisions of educational legislation and judicial practice in this area made it possible to form the understanding of the academic integrity, existing types of its violation and kinds of liability for its violation.

The formulated the objective, tasks and features of the subject matter of the research led to the use of such methods of scientific cognition. The essence of academic integrity, classification of its violations, types of liability

for violations of academic integrity have been determined by applying the method of analysis and synthesis in relation to the norms of the Law of Ukraine "On Education", the provisions on the academic integrity of certain educational institutions, as well as judicial practice. The system analysis and documents' analysis have been used while studying codes of ethics of educational institutions. The statistical method has provided an opportunity to establish the state of violations of academic integrity in Ukraine.

RESULTS OF THE RESEARCH AND DISCUSSION

Results

The provisions of normative and legal acts regulating the issues of academic integrity in Ukraine just start to be applied in the practice of educational institutions, in the work of pedagogical, scientific and pedagogical, scientific employees of educational institutions, as well as degree-seeking students. Academic integrity can be defined as the system of rules for the protection of copyright law, quality standards of education, presentation of reliable information. These rules are enshrined in national educational legislation and regulations of educational institutions. The level of academic integrity, liability for its violation are determined independently by educational institutions. Taking into account the understanding of the notion of academic integrity, contained in the Art. 42 of the Law of Ukraine "On Education", it is studied as an ethical (set of ethical principles) and legal (as rules defined by the law) phenomenon. The direction of academic integrity is the formation of trust for learning outcomes and/or scientific (creative) achievements. Subjects of implementation – are participants in the educational process. Legislation of Ukraine defines the notion of academic integrity, types of academic integrity offenses, liability for the commission of these offenses. However, the content, significance and consequences of the

application of text recycling, as well as clarification of the nature and features of detailed liability for violations of academic integrity need to be additionally characterized. It is believed that the study of these issues is a perspective area for further scientific research. The authors have paid attention that the term "additional and/or detailed liability for the violation of academic integrity" is not clearly defined in the current Ukrainian legislation, and therefore the authors have suggested to distinguish two types of liability: broad liability for the violation of academic integrity, which provides the simultaneous application of several types of liability, in particular the main, additional and detailed (administrative or criminal) liability; narrow detailed liability, which involves bringing the perpetrator exclusively to civil and legal, administrative or criminal liability.

Discussion

THE FIRST TOPIC: ETHICAL AND LEGAL BASIC PRINCIPLES OF ACADEMIC INTEGRITY IN UKRAINE

Academic integrity is based on ethical and legal standards. "Honesty, trust, fairness, respect, and responsibility is the backbone and foundation of academic integrity"[1]. If we consider academic integrity as a set of ethical principles, then there is a need to identify the fundamental principles of academic integrity from the point of view of ethics both of a scholar, educator, and a degree-seeking student. The ethical principles of education are not allocated and are not characterized in the Law of Ukraine "On Education". These principles are offered both at the level of scientific reflection, in particular, the teaching staff must have the system of moral and ethical values such as honesty, humanity, responsibility for the performance of official

[1] UTC Walker Teaching Resource Center, 2006.

duties, integrity, impartiality, and political neutrality[1], and at the level of educational and scientific institutions in the form of Codes of Ethics. The National Academy of Sciences of Ukraine adopted the Code of Ethics of Ukrainian Scholars, which established requirements for a scholar as a researcher, author, tutor, teacher, consultant/expert, citizen. Thus, this Code defines: a scholar should ensure impeccable honesty and transparency at all stages of scientific research and consider the acts of fraud as unacceptable, including fabrication and falsification of data, piracy and literary piracy (clause 2.3); only a real creative contribution to the scientific work can serve as a criterion of authorship; it is inadmissible to submit authorship to a scientific work to another person, to accept authorship or co-authorship and, in particular, to demand it (clause 3.3); a scholar should not repeat own scientific publications in order to increase their number (clause 3.4)[2]. Certain higher educational institutions have also adopted ethical codes. An example is the Code of Ethics of the State Higher Educational Institution "Kyiv National Economic University named after Vadym Hetman", which characterizes the following key values of the University: academic freedom, institutional autonomy, quality and integrity of scientific and educational activities, respect for social and cultural diversity, balanced development. The basis of the mentioned Code is the following ethical principles: trust and cooperation; decency and justice; academic integrity; critical analysis and respect for sound thoughts; readiness for changes and the desire for constant improvement; legality, accountability and transparency; joint and individual responsibility for the results of activities[3]. It is possible to determine from the

[1] Nazarova, 2011.
[2] OESI, 2011.
[3] KNEU, 2017.

above that the ethical principles laid down in the content of academic integrity are the principles of the attitude of participants of educational process to their activities, developed on their own knowledge, personal values, experience and responsibility to society.

The transformation of the ethical norm of integrity into the legal one was due to the introduction of the notion of academic integrity and its tangible links into the educational legislation of Ukraine (the Laws of Ukraine "On Education", "On Higher Education", "On Scientific, Scientific and Technical Activities"). Numerous cases of the use of literary piracy in the educational environment of Ukraine have become the basis for the consolidation of the rules of academic integrity at the legislative level. For example, according to the survey conducted in 2016 by the East Ukrainian Social Research Foundation among students of higher educational institutions (a total number of people is 1,298), 90% of respondents confirmed that they resorted to any kind of literary piracy[1]. Anyone involved with science has heard about at least one major scandal related to the "wrongful appropriation of somebody else's work". But the reality we face may go far beyond this basic concept[2]. Among the latest high-profile examples of the application of literary piracy we can provide the case of the monograph "The Multiplicity of Reality in the English Post Postmodernist Novel (Philosophical Problems, Genres, Narrative Strategies)"[3] written by D. I. Drozdovskyi, which he submitted for the defense of his doctoral dissertation. On September 26, 2018 the group of literary critics published a conclusion, where they stated that there was literary piracy in the monograph of D. I. Drozdovskyi (see the comparative table on the

[1] Unplag, 2016.
[2] Soares, 2015.
[3] Kyiv: Pulsary, 2018.

literary piracy facts in the monograph of D.I. Drozdovskyi) (2018). On September 10, 2018 a special commission was created in Shevchenko Institute of Literature of the National Academy of Sciences of Ukraine in order to study the text of the monograph, which on November 13, 2018 published the conclusion on its website about the presence of 64% of literary piracy in the monograph of D.I. Drozdovskyi (2018). Apparently, one of the major focuses of academic integrity is to prevent plagiarism so as to ensure that one's work is their own, and that the work they did is also understood[1].

To combat literary piracy educational institutions began to use special software. Thus, the rector of Ternopil National Economic University A.I. Krysovatyi and the director of the company "Antiplahiat" A. I. Sidliarenko signed on September 25, 2018 the Memorandum on the free provision of access to the Unicheck online service in order to verify dissertations for the features of literary piracy, which has already being successfully used by more than 90 Ukrainian and 350 foreign educational institutions[2]. Unfortunately, not all institutions nowadays use services to verify scientific works on literary piracy. In particular, representatives from 60 out of 90 national higher educational institutions have declared that they use software to detect literary piracy, furthermore 82% of them apply disciplinary penalties for such an academic fraud[3]. "Though there are many computer tools to detect plagiarism, it is dangerous to rely solely on those computer tools because they only detect matched text that can be located elsewhere electronically[4], and they are not completely reliable especially when using in non-English speaking

[1] Kwong, Ng, Mark & Wong, 2010.
[2] TNEU, 2018.
[3] Burnyi, 2018.
[4] Mann & Frew, 2006.

countries"[1]. It is also of concern that nowadays there is no any single system and base in Ukraine at the level of central executive authorities in the field of education and science for the verification of texts for borrowings without reference to the source and the use of synonymy[2]. Regarding research, the scholars themselves complain on the manifestation of scientific ignorance, which is the distortion of scientific information, scientific impropriety and attributing authorship and the position to the provision of positive law, distorting the author's statements, etc.[3]. The above indicates on the existence of an urgent practical problem for the protection of the quality of education and science. Overcoming this situation is possible only through the definition of the content of academic integrity in the educational process of Ukraine, since it is the content that points to the essence and principles of the relevant phenomenon.

One of the factors of spreading literary piracy was the fact that academic integrity for many years had been an ethical rule, and the ethics of the profession was not based on coercion or external observation, grounded on internal concept of moral obligations related to activities[4]. In contrast, the rules of academic integrity are defined in the current legislation. In particular, the Art. 42 of the Law of Ukraine "On Education" refers to the observance of academic integrity by pedagogical, scientific and pedagogical, scientific employees of educational institutions (includes: references to sources of information in case of the use of ideas, developments, statements, information; compliance with the norms of legislation on copyright law and

[1] Kwong, Ng, Mark & Wong, 2010.
[2] Kremenovska, 2018.
[3] Shyshka, 2016.
[4] OAJ, 2018.

related rights; providing reliable information on the methodology and results of research, the sources of used information and own pedagogical (scientific and pedagogical, creative) activities; control over the observance of academic integrity; objective assessment of educational outcomes) and degree-seeking students (includes: independent performance of training tasks, tasks of the current and final control of learning outcomes (for people with special educational needs this requirement is applied taking into account their individual needs and abilities); reference to sources of information in case of the use of ideas, developments, statements, information; compliance with the norms of copyright law and related rights; providing reliable information about the results of own educational (scientific, creative) activities, used research methodologies and sources of information)"[1].

THE SECOND TOPIC: VIOLATION OF THE RULES OF ACADEMIC INTEGRITY

"Breaches in academic integrity are a pervasive and enduring international concern to the overall quality of higher education"[2]. Analyzing the above provisions of the Law of Ukraine "On Education" it should be noted that the rules of academic integrity are divided into the following groups:

1) rules for the standards of protecting copyright law (establishing the level of originality of a scientific work, references to sources of information in case of the use of ideas, developments, statements, information; compliance with the rules of copyright law and related rights);

2) rules on educational standards (control over the observance of academic integrity by degree-seeking students; objective assessment of learning

[1] VRU, 2017.
[2] Richards, Saddiqui, White, McGuigan & Homewood, 2016

outcomes; independent performance of educational tasks, tasks of the current and final control of learning outcomes);

3) rules on reliable information standards (providing reliable information on the methodology and results of the research, sources of used information and own pedagogical (scientific and pedagogical, creative) activities).

The fact of academic integrity offense may be established in case of the violation of the above rules in the form of: academic literary piracy (copyright infringement, appropriation of authorship); text recycling (reduplication of own works in order to increase their number without proper references to previously published works); fabrication (artificial creation of data within the educational process); falsifications; cribbing; fraud (academic literary piracy, text recycling, fabrication, falsification and cribbing); bribery; biased assessment. The following violations can be classified depending on the type of violations of the rules of academic integrity: 1) violations of the rules for the standards of protecting copyright law (academic literary piracy, falsification); 2) violations of the rules on quality standards of education (cribbing, fraud, bribery, biased assessment); 3) violations of the rules of reliable information standards (text recycling, fabrication).

Violations of academic integrity can be carried out by a student, a lecturer, a scientific supervisor of a student or a dissertation, a scholar. Here is an example from the court practice. Thus, on January 19, 2018, the Supreme Court, consisting of the panel of judges of the Second Court Chamber of the Cassational Civil Court, dismissed the cassation appeal of the plaintiff – the vice-rector on scientific and pedagogical work to the defendant – Kyiv National University of Technologies and Design about the cancellation of the Order dated from March 18, 2016 No. 99 on personnel about disciplinary penalty in the form of admonition. Studying the materials of the case, the

Court found out that the plaintiff being a scientific supervisor of a student's thesis, allowed it to be presented without a certificate of verification for literary piracy. The plaintiff violated clause 13.3 of the Provisions on the organization of educational process at Kyiv National University of Technologies and Design, approved by the Order dated from February 19, 2015, No. 35 (items 40-42, Vol.1), according to which the objects of verification for the availability of literary piracy features are mandatory graduation theses. At the same time, the plaintiff argued that he as a scientific supervisor was not obliged to send the thesis for the verification of literary piracy and to obtain an appropriate certificate. Besides, he as a scientific supervisor is not entitled in his election not to allow the graduate thesis to be presented according to these grounds. The decision on admitting or not admitting the thesis to be presented is taken by the graduating department and is collegial. Subsequently, on March 18, 2016, the student received a certificate about the verification of the graduation thesis for literary piracy, there were no features of literary piracy, so formal requirements were fulfilled[1].

This example of the court practice demonstrates that one of the problematic issues while detecting literary piracy in the student's scientific work is the matter of the presence of the offense both by the student and his scientific supervisor. We believe that in order to overcome this situation, it is necessary to clearly define the division of liability between degree-seeking students, pedagogical (scientific and pedagogical, scientific) employees and educational institutions in the provisions on the academic integrity of educational institutions. The problem of this example is also that the scientific

[1] USRJ, 2018.

supervisor is a hired employee of the University, who is subject to the norms of labor legislation. According to the Art. 141 of the Labor Code of Ukraine: "The owner or his authorized agency must properly organize the work of employees, create conditions for the growth of labor productivity, provide labor and production discipline, strictly observe labor laws and labor protection regulations, and carefully address the needs and demands of employees, improve their working and living conditions" (2003). Interpretation of this norm gives grounds to assert that educational institutions are obliged to provide scientific supervisors of student works with appropriate software for the verification of scientific works for literary piracy. Unfortunately, not all national educational institutions apply this rule today. Similar results based on the conducted research of the surveyed faculty members and University students of Hong Kong were achieved by Chinese scholars[1]. Therefore, we believe that a scientific supervisor of a student's work, who is not equipped with special equipment or software for detecting literary piracy, should not be brought to liability.

THE THIRD TOPIC: LIABILITY FOR THE VIOLATION OF ACADEMIC INTEGRITY

While detecting the violations of the rules of academic integrity, it is necessary to determine its form, since the liability depends on this and the degree of the committed offense. The Art. 42 of the Law of Ukraine "On Education", establishes the type of liability depending on the status of the offender: 1) pedagogical, scientific and pedagogical, scientific employees of

[1] Kwong, Ng, Mark & Wong, 2010.

educational institutions are brought to the following academic liability: refusal to award a scientific degree or a scientific rank; deprivation of the awarded scientific (educational and creative) degree or the academic title; refusal to award or deprive the awarded pedagogical degree, qualification category; deprivation of the right to participate in the work of the agencies stipulated by the law or to occupy the positions determined by the law; 2) degree-seeking students may be brought to the following academic liability: re-passing of the assessment (control work, exam, credit, etc.); repeated passing of the educational component of the curriculum document; expulsion from the educational institution (except for those, who acquire general secondary education); deprivation of academic scholarship; deprivation of privelleges on tuition fees provided by the educational institution[1]. Besides, depending on the type of violations of academic integrity, the offender may be brought to civil and legal (may be determined by the educational institution in the form of a fine, reimbursement of damage inflicted to higher educational institution, etc.), administrative or criminal liability. It is the so-called additional and/or detailed liability (paragraph 7 of the Art. 42 of the Law of Ukraine "On Education"). It follows from the foregoing that liability for violating academic integrity can be divided into main, additional and / or detailed.

The main liability is defined in the Art. 42 of the Law of Ukraine "On Education" and consists in the application of coercive measures of negative influence on the offender in the form of deprivation of scientific ranks, achievements, participation in the work of scientific, pedagogical councils, privileges, etc. This type of liability is necessarily applied to the offender.

[1] VRU, 2017.

That is, this type of liability leads to the negative consequences for the offender in the scientific and educational spheres, which deprives or partially deprives him of his possibility to work in this area, officially recognized as a scholar, lecturer, or a degree-seeking student. To bring to this type of liability, it is necessary to establish corpus delicti of the offense of academic integrity: 1) the presence of the subject of the offense (a scholar, a lecturer or a degree-seeking student); 2) the presence of guilt (intent or carelessness); 3) the presence of an action or omission of the subject, which led to the violation of academic integrity; 4) the presence of negative consequences or the threat of such consequences.

The main liability can be applied, in particular, in case of detecting text recycling both of pedagogical, scientific and pedagogical or scientific employees of educational institutions, and degree-seeking students. Text recycling does not give an opportunity to have a new result within the scientific or educational activities, and also has negative consequences for the scientific or educational process. It may arise if there are duplicate publications, in particular when the author presents the same text of conference theses, articles for two different journals[1]. This can include the publication of articles from the materials of defended dissertation or the re-use of previously published or used in any form of work for teaching another discipline or other institution[2]. "The reality is that for many working scientists, the number of published papers authored continues to be one of the primary means by which research productivity is measured"[3]. The publication of research in the form of small scientific works to increase the number of

[1] Schneider, 2018.
[2] JCU, 2018.
[3] Roig, 2010, p. 295.

own publications reduces the statistics of pedagogical, scientific and pedagogical, scientific staff of educational institutions, as well as degree-seeking students.

Insufficient attention in Ukraine is paid to the problem of text recycling, because there is no unity in understanding the essence, significance and, most importantly, the consequences of violations of academic integrity by the educational community. This state of affairs is explained, in particular, by the fact that the clause 12 of the Procedure for awarding scientific degrees, approved by the Resolution of the Cabinet of Ministers of Ukraine dated from July 24, 2013 No. 567 (hereinafter – the Resolution No. 567) determined that "the published works that reflect the main scientific results of the dissertation, in the corresponding branch of science include: monographs; manuals (for dissertations on pedagogical sciences); articles in scientific, in particular electronic, professional editions of Ukraine; articles in scientific periodicals of other countries in the area of the dissertation" (paragraph 1). In addition, "the completeness of the presentation of the dissertation materials in the published works of the applicant is determined by the Specialized Academic Council" (paragraph 4)[1]. Proceeding from the above, any dissertation is a text recycling of the articles or a monograph, if they reflect the main scientific results of the dissertation in accordance with the requirements of the Resolution No. 567. At the same time, the author of the dissertation must publish his scientific works, which reveal the main scientific results of the dissertation. We would like to note that according to paragraph 2, clause 14 of the Resolution No. 567, the dissertation is removed from consideration regardless of the stage of passage without the right to defend it again only in

[1] VRU, 2013.

case of revealing text borrowings, the use of ideas, scientific results and materials of other authors without reference to the source[1]. We believe that this situation needs to be solved by the Ministry of Education and Science of Ukraine, namely: issuing an order with the approval of the relevant Instructions or providing methodological recommendations explaining the raised issues. At the same time, the Ministry of Education and Science of Ukraine should develop and submit propositions to the consideration of the Cabinet of Ministers of Ukraine for improving the provisions of the Resolution No. 567 that regulates these issues, or to develop own draft of amendments and additions to the said Resolution, with their simultaneous submission to the Cabinet of Ministers of Ukraine.

Additional liability for violating academic integrity is a form of liability that may be additionally applied to an offender who is brought to the main liability in order to encumber the main type of liability. The content of additional liability is that the person has already suffered negative consequences for the committed offense, but additional liability, namely disciplinary one, is applied to a person. The use of additional liability is appropriate for offenses that encroaches not only on academic integrity (as the personal value of a pedagogical, scientific employee or a degree-seeking student), but significantly affects the activity of an educational institution, infringes on its scientific and business reputation, spoils the image, etc. For example, according to the letter of the Ministry of Education and Science of Ukraine dated from October 24, 2017 No. 1 / 9-565 "On the provision of academic integrity in higher educational institutions": if a dissertation (scientific report), which contains academic literary piracy, was defended in

[1] VRU, 2013.

a permanently operating Specialized Academic Council then a higher educational institution (a scientific institution) is deprived the accreditation of the corresponding permanent Specialized Academic Council and the right to create one-time specialized Scientific Councils for a term of one year[1]. It follows from the foregoing that the educational institution also has negative consequences for its own activities and image, therefore, it has an interest in preventing the violation of academic integrity, and may impose additional liability on a perpetrator. Additional liability may be in the form of a fine imposed by the educational institution, prevention, reimbursement of the damage (calculated on the basis of losses incurred as a result of non-receipt of profits, if the educational institution establishes the fee for educational services) and non-material damage in the form of violating the business reputation of the educational institution. Therefore, it is advisable to apply this type of liability in case of detecting academic literary piracy.

The Art. 42 of the Law of Ukraine "On Education" has the term "additional and / or detailed"), which makes it possible to distinguish two types of liability for violating academic integrity: 1) broad liability, which provides the opportunity of simultaneous application of several types of liability, in particular the main, additional and detailed (administrative or criminal) liability; 2) narrow detailed liability, which involves bringing the perpetrator exclusively to civil and legal, administrative or criminal liability. It should be emphasized that it would be advisable to distinguish between additional and detailed liability for violating academic integrity in the provisions of educational institutions regarding academic integrity.

Administrative liability for the violation of academic integrity is not

[1] VRU, 2017.

established in the Code of Ukraine on Administrative Offenses, but the Art. 512 provides liability for the violation of the rights to the object of intellectual property rights. It concerns the illegal use of the object of intellectual property rights, the appropriation of authorship on such an object or other intentional violation of the rights to the object of intellectual property rights, which is protected by the law[1]. Consequently, this norm can be applied to such types of academic integrity as academic literary piracy, falsification and cribbing.

Criminal liability for violating academic integrity is not also defined. However, the Criminal Code of Ukraine contains Articles that can be applied to perpetrators in the violation of academic integrity. Thus, the Art. 176 of the Criminal Code of Ukraine establishes liability for the violation of copyright and related rights, containing the following actions: illegal reproduction, distribution of works of science, literature or other intentional violation of copyright and related rights, as well as financing such actions, if it caused severe material damage[2]. This Article covers such violations as academic literary piracy, falsification and cribbing. In regard to bribery, the Art. 368 of the Criminal Code of Ukraine establishes liability for accepting a proposition, a promise or obtaining an unlawful benefit by an official[3].

CONCLUSIONS

Based on the conducted research of the essence of academic integrity in Ukraine we can offer the following conclusions. The rules of academic integrity in Ukraine just begin to be formed and implemented, then national educational institutions must take into account and apply the best practices of

[1] VRU, 1984.
[2] VRU, 2001.
[3] *Ibid.*

foreign Universities in this area. This concerns the definition of the sufficient level of originality of scientific works, the development of citation rules, the formation of skills of independent study of the scientific material for degree-seeking students, etc. The authors have offered to divide the rules of academic integrity into: the rules for the standards on protecting copyright law, the rules for the education standards, the rules for reliable information standards. Violations of academic integrity are classified depending on the type of violations of these rules: violation of the rules for the standards on protecting copyright law; violation of the rules on quality standards of education; violation of the rules for reliable information standards. Liability for violating academic integrity is divided into the following types: main, additional and / or detailed (2015, April 21).

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JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS: CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS AND EXPERIENCE FROM UKRAINE

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Abstract

Administrative courts of Member States of the Council of Europe are consistently holding to the notion that discretionary powers of administrative authorities limit the jurisdiction of administrative courts, even though this

limitation entails restriction of a right to a court. The article aims to determine due effect of discretionary powers on the jurisdiction of administrative courts for better access to justice. The article relies extensively on primary legal sources, including identification, collection and systematic analysis from ensuring 'right to a court' standpoint and comparative research of principles European Court of Human Rights laid down in its case-law and those ones reflected in national law of Ukraine. It is substantiated that it is counter to the purpose of administrative justice not to allow it to assess the exercise of discretionary powers.

Keywords: administrative litigation, discretionary powers of administrative authorities, jurisdiction of administrative court, right to a court, scope of judicial review.

INTRODUCTION

Scientific, Practical Problems

Administrative courts of member States of the Council of Europe are consistently holding to the notion that discretionary powers of administrative authorities limit the jurisdiction of administrative courts, even though this limitation entails restriction of a right to a court. The dominant view is that the administrative justice in cases concerning decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law is not to substitute its own assessment or opinion for that of the administrative authorities and not to order administrative authorities to act in specific manner, since that amounts to inappropriate interference with exercise of discretionary powers and performance of executive functions of administrative authorities. However, it

has become imperative that the right to a court is supposed to not be theoretical or illusory, but to be practical and effective instrument designed to restore violated rights, which is particularly important in context of administrative proceedings, since its purpose is to protect rights and interests of private natural and legal persons from violations of administrative authorities. Complete non-intervention of courts with the exercise of discretionary powers, withdrawal of judicial review of the exercise of discretionary powers from purview of administrative courts makes it impossible to file administrative-law appeals regarding abuse of discretionary powers and thus gross arbitrariness of administrative authorities could go unpunished, administrative justice is considerably hindered and the right to a court is not respected.

Literature Review.

The general consensus in the literature is that the issue of binding and freedom of administration, since there is a fine line between, on the one hand, inappropriate judicial interference with exercise of discretionary powers and performance of executive functions of administrative authorities and, on the other hand, granting effective and efficient legal remedies against unlawful decisions, commissions and omissions of administrative authorities through compelling them to full restoration of rights and interests of legal persons and individuals in domain of public administration.

On a basis of a profound research of judicial review of administrative discretion in the administrative state, dealing with standards of judicial review of the European Court of Justice as well as with these in Dutch administrative law and that ones used at the UK's Specialist Competition Appeal Tribunal, Poorter, Ballin & Lavrijssen (2019) concluded that one of the rationales behind administrative discretion is what we would call "discretion as policy".

This form of administrative discretion arises precisely because the legislature, in adopting the statute, cannot foresee the characteristics of every single case. Therefore, it leaves leeway to the administration to balance interests and take a decision that suits best the particular situation. Here, judicial review is traditionally hampered by the dichotomy that exists between law and policy. Traditionally, courts were supposed to limit their review to matters regarded as judicial (or, subsequently, quasi-judicial) in nature. This meant that the review of arbitrary action in areas formally defined as nonjudicial was understood to be beyond the presumed parameters of legitimate judicial action. This lack of judicial oversight meant that the administrative bodies came to enjoy, in some corners of their work, an effectively rule-free environment. From perspective of the cited authors, normatively, this raises the question whether the traditional distinction between law and policy is still adequate in the context of the administrative state. Poorter et al. have firm conviction that courts cannot take responsibility for the policy choices made by the administration, but they can assess whether the decision-making process used by the administration has been reasonable in the light of the principles of subsidiarity, proportionality, transparency, and precaution, along with human rights.[1]

Lingyun (2009, pp. 77-78), having carried out an investigation into Chinese Administrative Litigation Law, indicated that there is a serious misunderstanding that some courts even mistakenly think that the free discretion is complete self-governance by the administrative authority, and it is totally up to the administrative authority to "have the final say", and the court cannot interfere. The consequence is that, on the one hand, a great

[1] Poorter, Ballin, & Lavrijssen, 2019.

number of cases of abuse of power "slip away" right before the eyes of the judge, seriously damaging the effectiveness of the administrative judicial control and drastically reducing the number of cases of "abuse of power" objectively. Such a situation is most worrisome and depressing; the change of the status must depend on the further improvement of the judge's quality, and clearer judicial policy and legislative provisions. According to the author even if we still want to keep judicial interference means like "change of judgment", "defining time limit for new specific administrative behavior" and "requesting the defending administrative authority to take relevant remedy measures", it is still necessary and beneficial to further detail their specific application conditions.[1] For instance, Zhang (2018), endorses the use and further development of manifest unfairness and manifest unjustness as the criteria for judicial review, giving due weight as well to principles of both reasonableness and proportionality.[2]

In addition to the above-mentioned legal scholars Parchomiuk (2018) as well propounds the view that despite the declining practical significance, the concept of abuse of powers (in comparison to principle of proportionality or the concept of manifest error in assessment) remains an *ultima ratio* means to challenge administrative acts that are unacceptable from the point of view of the axiology of the legal system, the "ultimate weapon" of an administrative court judge. The value of this concept is also expressed in emphasizing the importance of the competence norms. Without denying the need for a restrictive interpretation of competence provisions, it must be recognized that each power of an administrative body has its own specific purpose. The use

[1] Lingyun, 2009.
[2] Zhang, 2018.

of powers for purposes other than that for which they were originally intended leads to an unacceptable restriction of the rights of the individual. A reference to the search for the purpose of the powers, characteristic of the concept of abuse of powers, does not blur the limits of interference, but on the contrary: allows them to be given a rational sense.[1]

Bearing in mind the foregoing considerations and recognizing them as being of a tremendous significance, however, it could be a valuable contribution to the discussion of the optimal depth and limits of judicial review of discretionary powers to determine due effect of discretionary powers on the jurisdiction of administrative courts for better access to justice, making reference to principles and guidelines on this matter European Court of Human Rights laid down in its case-law and those ones reflected in national law of Ukraine.

Purpose of the Study.

In the context of all the foregoing, in this research paper we intend to determine the scope of judicial review of the exercise of discretionary powers by administrative authorities, having regard to national law of Ukraine as an example of member State of the Council of Europe manifesting the afore-mentioned tendency as well as paying due attention to principles governing ensuring a right to a court, enshrined in European Court of Human Rights (ECHR) case-law, which constitutes the purpose of the article.

The *object* of the article is the administrative proceedings, while the *subject* matter of the article is the scope of judicial review of the exercise of discretionary powers by administrative authorities.

Research Methods.

[1] Parchomiuk, 2018, p. 478.

The article relies extensively on primary legal sources, identifying and conducting systematic analysis as well as a comparative research of principles governing determination of the scope of judicial review of the exercise of discretionary powers of administrative authorities laid down in the case-law of the ECHR and those ones reflected in Ukrainian statutory provisions and the case-law of the Supreme Court of Ukraine. As a result of conducting these operations, dialectic reflecting on purpose of administrative justice and discretionary powers as a mean for independent fulfillment of executive functions of administrative authorities and having critically evaluated the afore-mentioned and some other relevant legal materials, the authors elaborate theoretical concepts and practical solutions regarding the matter of whether or not and to which extent the jurisdiction of administrative courts must be restricted because administrative authorities are vested with margin of appreciation, which indicates acceptable degree of the effectiveness and efficiency of the methods the authors opted to use.

RESULTS AND DISCUSSION

THE FIRST TOPIC: RIGHT TO A COURT IN THE EUROPEAN CONVENTION ON HUMAN RIGHTS AND ITS APPLICABILITY IN ADMINISTRATIVE PROCEEDINGS

As stated in the Report of the Venice Commission on the rule of law one of the intrinsic elements of the rule of law is access to justice before independent and impartial courts, including judicial review of administrative acts. The document asserts that everyone should be able to challenge governmental actions and decisions adverse to their rights or interests.

Prohibitions of such challenge violate the rule of law. It is vital that the judiciary has power to determine which laws are applicable and valid in the case, to resolve issues of fact, and to apply the law to the facts, in accordance with an appropriate, that is to say, sufficiently transparent and predictable, interpretative methodology[1]. Hence, the requirement of access to justice before independent and impartial courts, including judicial review of administrative acts gives rise to obligation of a government to respect the right to a court providing proper legal and institutional framework for its exercise, including making it possible to appeal against decisions, commissions and omissions of administrative authorities through granting the courts sufficient scope of judicial review and power to provide effective remedies to protect rights and interests of private natural and legal persons from violations of administrative authorities.

The most substantial source of standards relating to fair trial for member States of the Council of Europe is art. 6 of Convention for the Protection of Human Rights and Fundamental Freedoms (Convention) in conjunction with ECHR's case-law revealing principles of its interpretation and application. Pursuant to the article in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Additionally, everyone charged with a criminal offence has the following minimum rights: 1) to be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him; 2) to have adequate time and facilities for the preparation of his defense; 3) to defend himself in person or through legal assistance of his own

[1] European Commission, 2011.

choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require; 4) to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him; 5) to have the free assistance of an interpreter if he cannot understand or speak the language used in court[1].

Even though the above-mentioned guarantees of fair trial cover determination of his civil rights and obligations and of any criminal charge, it is common knowledge stemming from long-standing case-law of ECHR that under particular circumstances administrative-law appeals come under the concept of 'determination of his civil rights and obligations and of any criminal charge' in line with Convention terminology.

The foundation of this viewpoint was laid in the case-law of ECHR dating back to the middle of the 20th century. As was explained in the Court's Ringeisen v. Austria judgment, for Article 6, paragraph (1) (art. 6-1), to be applicable to a case ("contestation") it is not necessary that both parties to the proceedings should be private persons. The character of the legislation which governs how the matter is to be determined (administrative law, etc.) and that of the authority which is invested with jurisdiction in the matter (administrative body, etc.) are therefore of little consequence[2]. For instance, issue concerning withdrawal of the licence, which has adverse effects on the goodwill and the value of the restaurant business and maintenance of which was one of the principal conditions for carrying on business activities, despite having features of public law is not excluded from the category of "civil

[1] UN, 1950.
[2] Ringeisen v. Austria, No. 2614/65, § 94.

rights" within the meaning of art. 6-1[1]. Additional examples of administrative-law cases in which Article 6 was considered applicable are the following (with reference to Guide on Article 6 of the European Convention on Human Rights. Right to a fair trial (civil limb)):

granting building permission, revocation of a firearms licence (where the applicants had been listed in a database containing information on individuals deemed to represent a potential danger to society);

social-security benefits, even on a non-contributory basis, and also proceedings concerning compulsory social-security contributions;

the right of access to administrative documents;

revoking a permit for a factory on environmental grounds;

an action for cancellation of an administrative decision harming the applicant's rights;

recruitment or appointment, career or promotion, transfers, termination of service and disciplinary proceedings relating to civil service, unless there is justification for the exclusion of civil servants from the guarantees of Article 6 on the basis of the special nature of the relationship between the particular civil servant and the state in question.[2]

What is more, it is to be noted for correct determination of the scope of application of fair trial guarantees that cases arising from administrative offences punished with punitive administrative measures of criminal nature may fall within the ambit of the criminal head of Article 6. Nevertheless,

[1] Traktörer Aktiebolag v. Sweden, No. 10873/84, § 43.
[2] ECHR, 2019, p. 12-16.

because number of such administrative-law cases is not substantial, it seems to be a reasonable step to focus on 'civil' procedural guarantees of fair trial that are to be adhered to in administrative proceedings.

THE SECOND TOPIC: CASE-LAW OF EUROPEAN COURT OF HUMAN RIGHTS CONCERNING JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS OF ADMINISTRATIVE AUTHORITIES

The case-law of ECHR concerning judicial review of the exercise of discretionary powers of administrative authorities appears to suggest that this international institution holds to a view that the Convention for the Protection of Human Rights and Fundamental Freedoms provides ample support for the assertion that it is perfectly acceptable to restrict to a certain extent the jurisdiction of administrative courts with margin of appreciation of administrative authorities.

First of all, ECHR is of the opinion that the "right to a court", of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication, in particular where the conditions of admissibility of an appeal are concerned, since by its very nature it calls for regulation by the State, which enjoys a certain margin of appreciation in this regard. However, these limitations must not restrict or reduce a person's access in such a way or to such an extent that the very essence of the right is impaired.[1]

The basic premise of the principles regarding determining the scope of judicial review of exercise of discretionary powers by administrative authorities set forth by the case-law of ECHR is that for the determination of

[1] Ivanova and Ivashova v. Russia, Nos. 797/14 and 67755/14, § 42.

civil rights and obligations by a "tribunal" to satisfy Article 6 § 1 of the Convention, the "tribunal" in question must have jurisdiction to examine all questions of fact and law relevant to the dispute before it. The Court have acknowledged in their case-law that the requirement that a court or tribunal should have "full jurisdiction" will be satisfied where it is found that the judicial body in question has exercised "sufficient jurisdiction" or provided "sufficient review" in the proceedings before it. In adopting this approach the Convention organs have had regard to the fact that it is often the case in relation to administrative-law appeals in the member States of the Council of Europe that the extent of judicial review over the facts of a case is limited, and that it is characteristic of review proceedings that the competent authorities review the previous proceedings rather than taking factual decisions. It can be derived from the relevant case-law that it is not the role of Article 6, in principle, to guarantee access to a court which can substitute its own assessment or opinion for that of the administrative authorities. In this regard, the Court has placed particular emphasis on the respect which must be accorded to decisions taken by the administrative authorities on grounds of expediency and which often involve specialised areas of law.[1]

In assessing whether, in a given case, the extent of the review carried out by the domestic courts was sufficient, the Court has held that it must have regard to the powers of the judicial body in question and to such factors as:

(a) the subject-matter of the decision appealed against, and in particular, whether or not it concerned a specialised issue requiring

[1] Ramos Nunes de Carvalho e Sá v. Portugal, Nos. 55391/13, 57728/13 and 74041/13, § 176-179.

professional knowledge or experience and whether it involved the exercise of administrative discretion and, if so, to what extent;

(b) the manner in which that decision was arrived at, in particular, the procedural guarantees available in the proceedings before the administrative body; and

(c) the content of the dispute, including the desired and actual grounds of appeal.[1]

Summarising the considerations laid down in the case-law of ECHR on due judicial review of decisions, commissions and omissions of administrative authorities, it is to be noted that a positive conclusion on this issue may be reached on condition that it was determined whether or not:

decision had been made by reference to irrelevant factors or without regard to relevant factors;

evidence relied on was not capable of supporting a finding of fact;

the decision was based on an inference from facts which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference.[2]

In considering whether the legislative scheme, taken as a whole, provided a due enquiry into the facts, the Court takes account of the nature and purpose of that scheme. In relation to administrative-law appeals, the question whether the scope of judicial review afforded was "sufficient" may depend not only on the discretionary or technical nature of the subject-matter of the decision appealed against and the particular issue that the applicant wishes to ventilate before the courts as being the central issue for him or her, but also, more

[1] *Ibid.*
[2] Bryan v. the United Kingdom, No. 19178/91, § 44.

generally, on the nature of the "civil rights and obligations" at stake and the nature of the policy objective pursued by the underlying domestic law.[1]

Furthermore, not less important for protection of human rights and fundamental freedoms in context of activities of administrative authorities is to adhere to the view that it is generally inherent in the notion of judicial review that, if a ground of challenge is upheld, the reviewing court has power to quash the impugned decision, and that either the decision will then be taken by the review court, or the case will be remitted for a fresh decision by the same or a different body.[2]

The conclusions of the preceding analysis can be summarised as follows. The opinion of the ECHR on the issue of scope of the judicial review of exercise of discretionary powers by administrative authorities is that in line with Article 6 of the Convention requirements there is no obligation to empower a court to substitute its own assessment or opinion for that of the administrative authorities and overrule them taking decisions on merits of the case or determining the specific course of action for administrative authorities. Justification for this approach includes, among other features, grounds of expediency, involvement of specialised areas of law, discretionary or technical nature of the subject matter of the decision appealed against. However, it is expected that court exercises sufficient jurisdiction or provided sufficient review in the proceedings before it, which includes determining whether or not decision had been made by reference to irrelevant factors or without regard to relevant factors, evidence relied on was not capable of supporting a finding of fact, the decision was based on an inference from facts

[1] Fazia Ali v. the United Kingdom, No. 40378/10, § 84.
[2] Kingsley v. the United Kingdom, No. 35605/97, § 32.

which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference. In addition to that, question whether the scope of judicial review afforded was "sufficient" depends on issue at stake and the subject-matter of the decision appealed against.

THE THIRD TOPIC: UKRAINIAN LAW ON THE ISSUE OF JUDICIAL REVIEW OF THE EXERCISE OF DISCRETIONARY POWERS OF ADMINISTRATIVE AUTHORITIES: STATUTORY PROVISIONS AND THE CASE LAW OF THE SUPREME COURT OF UKRAINE

Administrative justice in Ukraine, as provided by the Code of Administrative Court Proceedings of Ukraine, irrespective of whether an administrative authority has the discretionary powers, is to verify whether the decisions, commissions or omissions of public authorities are: lawful; made/committed using power for the purpose for which it was granted; justified, that is, taking into account all the circumstances that are relevant to the decision (action); undertaken independently, impartially and in good faith, respecting the principle of equality before the law, preventing all forms of discrimination; prudent; proportionate, in particular, with respect to the necessary balance between any adverse effects on the rights, freedoms and interests of the person and the goals to which this decision (action) is directed, etc.

Nevertheless, there is overwhelming evidence in the case-law of the most authoritative domestic court that administrative justice in cases concerning lawfulness of decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law court

is not to assess ways of exercise of discretionary powers of administrative authorities and cannot quash the impugned decision and make decision bypassing competent administrative authorities or bind them with directives as to what decision is expected to be for it to restore violated rights or interests of private person. Opting to act in that manner, a court, as it is currently believed, interferes with exercise of discretionary powers and performance of executive functions of administrative authorities.

In particular, it is considered to be an interference with exercise of discretionary powers of a competent administrative authority to absolutely discharge an offender in administrative offences proceedings on grounds that administrative offence committed is negligible, in disregard of which police officers imposed an administrative penalty. The rationale for this statement was that determining whether a person is guilty and whether administrative penalty is to be imposed comes within exclusive purview of National police of Ukraine, whereas an administrative court is not supposed to interfere with exclusive domain of competence (margin of appreciation) of public authorities, since the objective of administrative proceeding is not to contribute to efficiency of public administration, but to ensure respect of rights and interests and obedience of the law, or else the division of power principle is disregarded.[1] Likewise, it is argued that the court cannot interfere with the exercise of executive powers of administrative authority, in particular, of competence of High Qualifications Commission of Judges of Ukraine to appraise judge candidates in context of competition for a vacant position of judge.[2]

[1] Name v. Regional Police Subdivision in Mariupol of Department of Patrol Police, No. 266/3228/16-a.
[2] Name v. High Qualifications Commission of Judges of Ukraine, No. 800/327/17.

As a reason for restriction of judicial review of activities of administrative authorities, exclusive purview is often complemented by involvement of special knowledge in decision-making of administrative authorities. This could be perfectly exemplified in proceedings related to verification the existence of circumstances for determination of market dominance of economic entities. With respect to the latter the supreme court institution of Ukraine stated that determination of circumstances indicating dominant position of economic entity in a particular product market falls outside the competence of courts; this matter could be handled solely as a result of special investigation carried out by Antimonopoly Committee of *Ukraine*, *implementing statutory provisions on economic competition protection.*[1] *Similar argumentation* the Supreme Court of Ukraine produced in the case regarding suspension of a special subsoil permit. The court pointed out that courts are not competent anthropogenic security institution (special knowledge required, due qualifications and professional level have governmental mining supervisors) and therefore has no latitude to assess the potential environmental consequences of the suspension of a special subsoil permit. The expediency of decisions of administrative authorities is not subject to judicial review; a court cannot substitute itself for the competent administrative authority.[2]

Political autonomy in matters within a political context of governmental authorities and local self-government underlie another opinion of supreme domestic court institution as for restrictions of judicial control, including, for

[1] Private Stock Company Ukraine International Airlines v. Ministry of Infrastructure of Ukraine, No. 910/12018/17.
[2] Navigator Complect LLC v. the State Service of Geology and Subsoil of Ukraine, No. 826/14951/18.

instance, expressing no confidence in the chairman of the district state administration. In this regard the Supreme Court of Ukraine noted that a right to express no confidence in the chairman of the district state administration is of discretionary nature and for this reason a court is in no position to interfere with internal competence of local self-government bodies and evaluate rationale for decision of district council on this matter. The court is of the view that this decision could be reviewed by court only for compliance with the procedure without attempting to independently evaluate the work of the chairman of the district state administration regarding the fulfillment or non-fulfillment of his duties and without expressing opinion on strength of foundation of the position of deputies on this issue.[1]

As shown above, there is a case-law indicating that under no circumstances could the scope of judicial review encompass decisions, commissions and omissions of administrative authorities coming within their margin of appreciation stipulated by law: if they relate to a group of issues covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level. According to this viewpoint administrative justice is not supposed to directly contribute to efficiency of public administration through assessing expediency of activities of administrative authorities.

In contrast, one can observe a clear tendency that the increasing support in domestic administrative courts has the view that the requirement for access to justice and effective judicial protection of violated rights in public relations dictate the need, save for exceptional circumstances, to determine, having

[1] Name v. Shepetivka District Council of Khmelnytskyi Region, No. 688/3487/16-a.

considered an administrative-law appeal, the obligations of administrative authorities related to relevant private persons in direct and specific manner.

First of all, of paramount importance is to ascertain whether it is the case that the administrative authority enjoys a margin of appreciation in a situation at hand. In this regard it is asserted that powers of administrative authorities are not of discretionary nature if there is a sole lawful course of action. This means that on condition that there is a set of circumstances established by law and prescriptive guidelines and regulations obligating an administrative authority to act in a specific manner under these circumstances and suppose an administrative authority fails to do it, it is perfectly acceptable to force an administrative authority onto it.[1] Furthermore, it is acknowledged that discretionary powers are not to be used arbitrarily and the court must be authorized to review outcomes of exercise of discretionary powers, which is a safeguard against abuse and arbitrariness in context of substantial degree of latitude of administrative authorities. In addition to that it considerably contributes to good administration and prevention of misuse of power. At the same time, it is thought to be acceptable that the protection of the infringed rights may be confined to compelling to re-consider an application of private person and make a reasonable decision on the merits of the application.[2] What is more, the optimal way to resolve administrative dispute over value added tax refund was determined to be direct recovery of the sum of value-added tax refund from state budget, regardless of the fact that several years before delivery of the judgment reflecting and affirming this opinion, it was a consistent approach to protect the rights of taxpayers associated with value

[1] Name v. Main Department of State Service of Ukraine for Geodesy, Cartography and Cadastre in Poltava Oblast, No. 1640/2594/18.
[2] LLC Firm Cranberry *v. Antimonopoly Committee of Ukraine, No.* 910/23375/17.

added tax refund through mere placing tax authorities under obligation to: a) re-examine an application for the value-added tax refund from state budget; or b) give an opinion on the confirmation of the amount of value-added tax refund; or 3) enter the application in the register of applications for the value-added tax refund. However, in the case of *Ascop-Ukraine Ltd v. State Tax Inspectorate in Dnipro district of Head Dept. of State Fiscal Service of Ukraine in Kyiv and Head Dept. of State Treasury Service of Ukraine in Kyiv* (2019) the Supreme Court of Ukraine held that an effective remedy ensures restoration of the violated right, being adequate to the circumstances, leading to the desired outcomes, giving the greatest effect. Given that such remedies as compelling tax authorities to give an opinion on the confirmation of the amount of value-added tax refund or to enter the application in the register of applications for the value-added tax refund – do not lead to an effective restoration of rights of the taxpayer, the Supreme Court of Ukraine concluded that an effective remedy in these circumstances is direct recovery of the sum of value-added tax refund, as well as of the complementary default interest from state budget through state treasury.[1] Likewise, having determined the rejection of the State Migration Service of Ukraine to issue a passport of a citizen of Ukraine in the form of a booklet to be unlawful, the Supreme Court of Ukraine with a view to effectively protecting the violated rights of the applicant has ordered the home office, immigration and nationality bodies to issue a passport of a citizen of Ukraine in the form of a booklet.[2]

[1] Ascop-Ukraine Ltd v. State Tax Inspectorate in Dnipro district of Head Dept. of State Fiscal Service of Ukraine in Kyiv and Head Dept. of State Treasury Service of Ukraine in Kyiv, No. 826/7380/15.

[2] Name v. Korosten District Department of the State Migration Service of Ukraine, No. 806/3265/17.

Additionally, the idea about next to unlimited judicial review of exercise of discretionary powers by administrative authorities and determination of their duties in direct and specific manner following consideration of an administrative-law appeal is reinforced by some other case-law of domestic courts, represented in analytic review of Sasevych (2019). In particular, a reference was made to judgments compelling administrative authorities to:

a) accept and register a tax invoice and calculation adjustment in the unified register of tax invoices;

b) write off a bad tax debt, considering that 'the defendant's refusal to write off the tax debt is unlawful and the possibility of the defendant making an alternative decision is not established by law, and therefore the obligation of the defendant to write off the bad debt is an effective way to protect the violated rights of the plaintiff's in the manner which doesn't necessitate further appeal to the court for the protection of the same violated rights;

c) approve the decision of the specialised scientific council on awarding the scientific degree of doctor of laws

d) to institute enforcement proceedings for the execution of the executive document;

e) grant permission for the production of a land development project for the allocation of land for personal farming.[1]

CONCLUSIONS AND FUTURE STUDY

The above considerations concerning the scope of judicial review of the exercise of discretionary powers by administrative authorities in the national

[1] Sasevych, 2019.

law of Ukraine and in to principles governing ensuring a right to a court, reflected in ECHR case-law, are sufficient to conclude this research with the following statements.

1. The ECHR holds to the opinion that in line with Article 6 of the Convention requirements there is no obligation to empower a court to substitute its own assessment or opinion for that of the administrative authorities and overrule them taking decisions on merits of the case or determining the specific course of action for administrative authorities. However, it is expected that court exercises sufficient jurisdiction or provided sufficient review in the proceedings before it, which includes examination of relevance and merit of facts underlying activities of administrative authority at hand and whether the interpretation of facts which was perverse or irrational in the sense that no civil servant properly directing himself would have drawn such an inference. In addition to that, question whether the scope of judicial review afforded was "sufficient" depends on issue at stake and the subject-matter of the decision appealed against.

2. The Ukrainian statutory provisions on administrative justice prescribe that administrative courts shall examine whether decisions, commissions or omissions of public authorities are: a) lawful; b) made/committed using power for the purpose for which it was granted; c) justified, that is, taking into account all the relevant circumstances; d) undertaken independently, impartially and in good faith, respecting the principle of equality before the law, preventing all forms of discrimination; e) prudent; f) proportionate, in particular, with respect to the necessary balance between any adverse effects on the rights and interests of the person and the goals to which this decision (action) is directed, etc. These provisions have no reservation for that activities of administrative authorities, which relate to a group of issues

covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level or in other way related to exercise of discretionary powers of administrative authorities.

3. In the case-law of the highest court in the domestic judiciary of Ukraine it appears to be a consensus view that that powers of administrative authorities are not of discretionary nature if there is a sole lawful course of action. This means that on condition that there is a set of circumstances established by law and prescriptive guidelines and regulations obligating an administrative authority to act in a specific manner under these circumstances and suppose an administrative authority fails to do it, it is perfectly acceptable to force an administrative authority onto it.

4. Nevertheless, there is a difference of opinion on the matter of whether or not the jurisdiction of administrative courts must be restricted because administrative authorities are vested with margin of appreciation and to which extent. According to one of these opinions under no circumstances could the scope of judicial review encompass activities of administrative authorities if they relate to a group of issues covered by the exclusive competence of administrative authorities, are of political nature or require special knowledge, qualifications and professional level. Another opinion is based on the premise that the requirement for access to justice and effective judicial protection of violated rights in public relations dictate the need, save for exceptional circumstances, to determine, having considered an administrative-law appeal, the obligations of administrative authorities related to relevant private persons in direct and specific manner.

Having regard to the foregoing observations and considerations the optimal solution seems to be the one that is reflected in the Ukrainian statutory

provisions on administrative litigation, which requires examination of activities of administrative authorities, irrespective of whether an administrative authority is vested with discretionary powers, with reference to the set of criteria enshrined in that provisions. This approach perfectly aligns with the case-law principles regarding determining the scope of judicial review of exercise of discretionary powers by administrative authorities set forth by the case-law of ECHR. However, it is a subject matter for further research to crystallise those exceptional circumstances under which a judicial interference with exercise of discretionary powers and performance of executive functions of administrative authorities is inappropriate (matters of political expediency, equally lawful alternative courses of action corresponding with afore-mentioned assessment criteria, etc.).

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PRINCIPLES AND MODELS OF MEDIATION IN DEVELOPED COUNTRIES

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Abstract

The article explores the foreign experience of implementing the mediation procedure as one of the alternative means of resolving conflicts in the legal field, and provides a list of reasons for identifying different models of mediation. Using the method of legal modeling, a model of mediation in Ukraine was developed and the possibility of implementation into civil procedure legislation was envisaged. The Mediation models reflect their particularities through the constituent characteristics of the reconciliation process. The basic rules for mediation and the use of mediation technology are based on certain identified models. Each model is effective in resolving different categories of disputes. Also, the rules of conduct can be combined depending on the specifics of the legal process and its participants in the mediation.

Keywords: alternative dispute resolution, mediator, mediation, models of mediation, principles of mediation.

INTRODUCTION

Scientific, Practical Problems.

In today's world, the Mediation Institute is developing very dynamically. This is due to the significant advantages of this institution over the traditional court case. First of all, it is the speed of conflict resolution, the high percentage of successful mediation procedures, the reduction of the burden on the judicial system. It is through mediation that one can bypass the courts and reach a consensus of the conflicting parties on a particular issue. Principles and models of mediation have been the subject of research by many world scientists, among which are the works of: J. Thomas, L. Fuller, S. Silby, and domestic scientists, in particular, G. Eremenko, I. Yasinovsky, Y. Prytyka, T. Podkovenko, etc. For example, J. Thomas identifies four models of mediation: the model of the savior, the mediator, the organizer and the model where the mediator can use any means and methods. Lon Lewis Fuller laid down 8 principles that constitute the “internal morality of law.” Susan Silby has done research on legal culture issues. Galina Eremenko researches theoretical and applied technologies of alternative ways of dispute resolution. Y. Prytyka examined the content and classified the principles of mediation. T. Podkovenko studied the Institute of Mediation, analyzed foreign experience and Ukrainian perspectives. I. Yasinovskyy carried out a theoretical and legal analysis of the implementation of the mediation procedure in Ukrainian legislation. In foreign countries, the practice of dispute resolution using alternative methods, including mediation, has long

been established. Therefore, it should be noted that the study of models of mediation in developed countries is a very relevant area of scientific search. The legislation of Ukraine does not provide the possibility of bringing the mediator to administrative responsibility, there is no single international list of models based on the principles of mediation.

The purpose of the article.

The purpose of the article is to carry out theoretical and legal analysis of models and principles of mediation in different countries, to identify advantages and disadvantages, to be able to borrow foreign experience in order to improve the legislation of Ukraine. The following tasks have been set to achieve this: to characterize the theoretical and legal aspects of mediation; determine the principles of mediation; explore models of mediation; to analyze foreign experience regarding the characterization and structure of mediation principles and models; to propose ways of solving structural problems that arise during the formation of principles and models of mediation in Ukraine.

Object and Subject of the Research.

The object of the study is public relations in the sphere of mediation procedure formation. *The subject* of the study is the theoretical and legal foundations of the formation of principles and models of mediation in the modern world.

Research Methods.

The following methods of research are applied in the article: structural (the individual elements of models of mediation were investigated); functional (the effectiveness of using the principles of mediation was investigated); formally legal (the relationship of mediation principles was investigated); statistical (the statistical data of efficiency of application of mediation

procedure were investigated); modeling (the most effective model of mediation was formed).

RESULTS AND DISCUSSION

THE FIRST TOPIC: CHARACTERISTICS OF THE BASIC PRINCIPLES OF MEDIATION

Today, legal science is characterized by finding new effective ways of influencing social processes, human behavior, resolving disputes and conflicts in the legal field. Most scholars believe that mediation is a specific approach to conflict resolution, where a neutral third party is responsible for structuring the process in order to help all parties of a conflict reach a single, mutually acceptable solution to the issue at hand.

In jurisprudence, mediation should include the legal nature of the settlement of the conflict. However, in the case of mediation, the legal positions of the parties are not the only and sufficient basis for resolving the disputed situation. Unlike litigation, where the settlement of a dispute is based on specific legal rules.

In our opinion, the effectiveness of the mediation process depends very much on the personal potential of the parties of the conflict. The purpose of any conflict in the mediation process is not a victory, but a joint movement into the future. The parties of the mediation process agree to work on the outcome and through joint negotiations.

The main purpose of mediation is to reconcile the interests of the parties with their voluntary consent. The lack of coercion in making a decision indicates the fair foundations of this procedure.

Each of the parties of the conflict makes certain mutual concessions in

order to make a decision that will satisfy all sides of the process, will be mutually acceptable. As a result, there will be no "winner" and "loser" as a result. The validity of the decision is seen in the bilateral agreement of the parties, in which the mediator doesn't making any decisions. Unlike litigation or arbitration, in the mediation process, the parties agree.

As a general rule, mediation is generally not the final stage in the exercise of the right to a fair trial, since the parties, after the mediation process, may seek judicial settlement of the dispute.

According to most scholars, the mediation process eliminates any possibility of a corruption component, since the mediator, as a neutral party, is interested in the parties to resolve their dispute to the greatest advantage for both of them. The decision must be consistent and fair for both parties a priori.

The mediation, as an alternative way of resolving legal conflicts, is very effective. The obvious advantages of this method are: short terms of dispute resolution; effective implementation of the agreement reached through the mediator.

Much earlier from Ukraine, the above advantages have been noticed in Europe and the USA, where the Institute of Mediation today has some history and successful experience. Mediation, as an independent process of out-of-court dispute resolution, emerged in the United States in the 1960s as an alternative to lengthy litigation. Labor and family conflicts were the first and successful spheres of mediation. Later, business also began to use mediation as a way of resolving commercial disputes. The geographical boundaries of the use of mediation have expanded quite rapidly due to the effectiveness of this method. A little later, mediation also began to be used in Australia and Canada, and in the 1980s. began to be applied in the UK, and then - in other countries of continental Europe. As of today, mediation is the most common

non-judicial method of conflict resolution in the world. The success of this procedure is extremely high: on average 75-80% of all mediation disputes in the world end in effective agreement.

Some authors also refer to the benefits of mediation as a way of resolving disputes:

1) control that the parties have over both the mediation process and its outcome;

2) direct involvement of the parties in the negotiations; the speed of mediation and its voluntariness; simplicity and flexibility, efficiency and economy;

3) ensuring effective interaction between the parties, improving or restoring relations between the parties;

4) privacy;

5) mutual benefits from mediation;[1]

A very important advantage of mediation is the fact that in this process there is no need to enforce the decision, because in the process of reconciliation, the parties themselves make the decision that satisfies them, and therefore they are interested in its implementation. Attention should also be paid to a quick resolution of the conflict.

The analysis of different positions and approaches to the study of the positive and negative aspects of mediation allows us to characterize the main disadvantages:

1) In the mediation process, it is difficult to be sure of the professionalism of the mediator than the judge in the classical court process;

2) The “stronger” parties of the conflict have the opportunity to impose

[1] Kozlovsky, 2002.

their point of view, since mediation, through its informality, provides far less procedural guarantees than a court hearing;

3) The considerable uncertainty of the possibility of bringing mediators to justice for the unintentional and intentional harm caused as a result of their activity. Mediation, which focuses on conflicts between private parties, hides from the public some significant disputes that already have or may have socially significant consequences.

The study of the principles of the mediation process is important for the following reasons: First, the principles are the basis of the whole process, since they are both the foundation and the framework for building a specific rule of law or institution, branch of law or legal system; second, mediation doesn't have a clearly established procedure or step-by-step process that fits in with specific process, time, or organizational settings. That is why the principles are the main factor in regulating the mediation procedure.

Each country sets its own principles of mediation. However, at the international level, they are regulated in the European Code of Conduct for Mediators, adopted in Brussels. It enshrines the basic principles such as: equality, voluntariness, impartiality, confidentiality, independence and neutrality of the mediator, competence of the mediator, fairness of the mediation process. However, this list contains similar concepts. The main content is not focused on mediation as the process, as the legal status of the mediator. That is why there is a scientific need to define and interpret the basic principles of mediation.

Voluntary mediation means an opportunity for the parties to terminate or suspend the mediation process at any time. In the event that the parties have chosen this method of dispute settlement, the final result depends directly on their internal will, as there is no binding nature of the execution of the

agreement. In this case, the parties invest personal and/or financial resource in reaching a compromise result.

A distinctive feature of the alternative dispute resolution process is their voluntariness.

Privacy in mediation procedures can also be important for conflicting parties in resolving disputes, especially if such disputes have arisen in family or business matters. If an agreement is reached, the parties may decide on their own whether they wish to keep it confidential or not. In special and exceptional cases, the mediator may be obliged to disclose information disclosed by the parties in the mediation process: when confidential negotiations force the mediator to believe that anyone may be at risk of harm, or if it has been or will be done any criminal offense. Information about the finances provided during the mediation procedure in family disputes may also be disclosed in a subsequent lawsuit.

The Law on Mediation in Latvia stipulates that confidentiality of information does not apply in cases where its disclosure is required for the protection of state policy, in particular, protection of the rights and interests of the child, as well as for the prevention of threats to life, health, freedom, or in the case of the existence of sexual risks.[1]

The voluntary nature of mediation means that the parties of the mediation procedure have the discretion to choose whether or not the proposed conflict resolution solution meets their internal interests. If the parties cannot agree, there will be no consequences for them.

Mediation generally does not imply any restriction on the rights of the participants, which means that what is said in the course of this procedure

[1] Campbell & Fell vs. The United Kingdom, 1984.

cannot be used as evidence in subsequent litigation. This feature allows participants in the procedure to freely discuss all possible options for a future agreement. The parties have the right to propose new ways of reaching an agreement, without depriving themselves of the opportunity to apply to a judicial authority later, in case the mediation agreement is not signed. As a general rule, the mediation procedure results in the signing of an agreement, which is often drawn up in a binding document that completes the legal resolution of the dispute. In this case, the parties are no longer able to go to court to resolve this dispute, even if the other party fails to comply with the agreement.

There are numerous collections of mediation ethics principles for mediators.

Most scholars have different principles in their content, but all of them are really used in the mediation process.

There are also principles that are well established in the understanding of mediation and are generally contained in various collections and codes:

1) the principle of inadmissibility of conflict of interest. This principle means that mediators are required to avoid engaging in dispute resolution processes in which they have a direct personal, financial or professional interest in any particular outcome;

2) mediators need to know the limits of their capabilities in order not to initiate dispute resolution processes, which they don't have the ability to resolve, and to freely communicate to the parties of the conflict their knowledge and experience;

3) the principle of voluntariness. It means that the parties of the conflict must be involved in the process voluntarily and make efforts to agree on its resolution;

4) the principle of confidentiality. First, mediators must ensure that the procedure is confidential to third parties; secondly, when the mediator meets with each party individually, it must also ensure the confidentiality of what they have said in such private discussions;

5) the principle of independence. Supporting and assisting the parties of the conflict in making their own settlement decisions, rather than mediating their opinions;

6) honesty of mediators, which implies honest disclosure of their qualifications and experience.[1]

Some scholars divide the principles of mediation according to their functional purposes into organizational principles (neutrality and voluntariness) and procedural (confidentiality, equality, independence of the parties and their cooperation).

We believe that the following are the mandatory principles of mediation:

1) Impartiality - the mediator must do his work honestly and objectively. He is obliged to mediate solely those matters in which he may remain fair and impartial. In fact, the idea of impartiality is central to the mediation process. Where a mediator is appointed by either a court or other institution, that organization should also make every effort to ensure that the mediator is impartial.

2) Privacy - The mediator has no right to disclose the progress and results of the mediation process, unless all parties gave their permission, or if it's required by law.

3) Voluntariness - the mediation procedure is exclusively voluntary. No one can force the parties of the conflict to use mediation. It is a voluntary

[1] Koval, 2006, pp. 129-132.

process based on the parties' desire to reach a settlement. In addition, voluntariness means that parties of the mediation procedure by their own free will may terminate it at any time. Mediator services are accepted voluntarily throughout the procedure by both parties; consent to the results of the mediation process is also purely voluntary; the parties control the course and results of mediation themselves.

However, all of the above principles are not absolute and inviolable. The cases of their violation are not uncommon. For constructive negotiations, the mediator seeks to change the balance of power to a more balanced one. Most often this is done by giving the "weaker" side some small advantages: they are approached first, less time-limited, they are given the first word and so on. In international negotiations, mediators may apply some pressure to the non-negotiable party (threat of political, diplomatic and economic sanctions).

THE SECOND TOPIC: FEATURES OF CLASSIFICATION OF MEDIATION MODELS

Many studies cite a large number of classifications based on different criteria. Let's look at some of them. The classification of mediation models can be done depending on: integration in the litigation and the direct role of the mediator and the subject of the conflict.

In view of integration into the judicial system, countries have identified judicial and extrajudicial mediation models.

Judicial mediation (court-connected, court-related, court-annexed mediation) is a fully stand-alone model that is integrated into the country's judicial system. Depending on the judge's role, there are several approaches of understanding judicial mediation. According to the first approach, the judge must conduct the mediation procedure under certain conditions

provided by national procedural law. Judicial mediation also includes those procedures which are carried out in accordance with the rulings or recommendations of a judge after adopting a particular case, and through the prescriptions of the law as a mandatory pre-trial procedure. In other words, it is sufficient for the judge to initiate mediation, and his direct involvement in the process is optional.

Today, there are several ways in which international mediation is carried out in the world, which are conditioned by the various purposes of reconciliation procedures, in particular mediation into the national legal space. We can distinguish the following approaches:

1) involvement of specialized organizations or private practitioners in the mediation process;

2) mediation in the court facilities directly by court staff, including judges;

3) direct implementation of the mediation procedure directly by the judge hearing the case (integration of mediation technology into the trial).

Extrajudicial mediation is a model of dispute settlement between the parties, conducted by a third party, an independent party (external mediator), which helps the parties to reach a settlement in the pre-trial order.

The negotiation model of extra-judicial mediation also gives the parties a high chance of a favorable resolution of the conflict, in addition to maintaining a considerable amount of their powers. Mediators in the process of extrajudicial mediation are persons who have been trained in the basics of mediation and as a result have received an appropriate certificate of eligibility for mediation. For example, in Australia, in judicial mediation processes, conciliation procedures are conducted by private mediators, who are selected by the parties independently from specially prepared lists established in the courts. In the Netherlands, similar lists are made up by the Netherlands

Mediation Institute, in Austria by the Ministry of Justice. In the conduct of their activities, external mediators are guided only by some of the recommendations established by the Council of Europe on the implementation of the mediation procedure. External mediators are not regulated under national law. The parties of the process grant the mediator a specific set of procedural powers. It is the responsibility of the mediator to carry out the activities impartially and to avoid the least possible influence on the participants of the procedure. He has the right to collect and reproduce information, to make notes, to divide and summarize it, to define prospects and to create an appropriate atmosphere, but he has no right to influence the process itself through his own perceptions of a particular situation. An important condition is the independent agreement of the parties of the legal conflict. In such a case, the parties of the conflict retain a high degree of autonomy in the mediation process. The problem-solving process is confronted with them as a result of their own collaboration, not as an external bond. This leads to a high level of confidence in the accuracy and fairness of the results of such negotiations. If the parties have reached an agreement in a legal conflict with the help of a neutral mediator, a mediation agreement is signed. It should be noted that the mediation agreement is formal in nature and not binding, unlike mediation in a court case in which the mediator approves a settlement agreement or closes the proceedings in the case of refusal of the plaintiff's claim or recognition lawsuit. Thus, the contract establishes the legal relations of the parties within the framework of extrajudicial mediation, while in the procedural legal form there is a consolidation of legal relations in the court instance.

A quite simple and practical approach to the consideration of mediation models was proposed by L. Boulle and M. Nesic. They distinguish four

models of mediation: 1) classical mediation facilitating dispute settlement; 2) therapeutic mediation; 3) evaluation mediation; 4) regulatory mediation.[1]

The basic rules of the mediation procedure and the use of mediation technology are built. Each of the above models is effective in resolving the respective categories of disputes. The rules of mediation can also be combined depending on the characteristics of the disputed relationship and their participants.

Shamir Yona identifies the following models of mediation procedure: 1) single mediator; 2) commission of mediators;3) joint mediation.[2]

In general, mediation is a very difficult process, and joint mediation has many benefits if all mediators know how to work together as they complement each other, divide tasks together, work out a dispute resolution strategy, compare their perception of the information provided parties of the conflict. Generally, a single mediator model is much more efficient than a joint mediation model when mediators are not familiar with each other. This mediation model is the most popular. The commission model is usually used in extremely difficult cases.

Anil Xavier outlines the following three methods: 1) evaluation method; 2) method of facilitating the solution of the problem; 3) the method of converting the problem.[3]

When applying the evaluation method, the mediator is giving an assessment of the situation quicker. The mediator's opinion is the instrument of dispute settlement.

The problem solving method is a classic one. In this case, the mediator

[1] Boulle & Nesic, 2016.
[2] Shamir, 2003.
[3] Xavier, 2009, pp.363–378.

does not provide legal advice, but merely seeks to help the parties find a common and acceptable solution of the problem. The mediator creates a supportive atmosphere in which the parties of the conflict work together to achieve results together.

It is expedient to identify seven main models of mediation.

Negotiation – this model of mediation assumes that the goal is to reach a settlement. The mediator seeks to find the facts, narrow issues of conflict, and directly controls the negotiation process between the parties. This negotiated mediation procedure is structured, meetings with the parties are frequent, and direct interaction between the parties is somewhat less frequent than other models. The peculiarity of the therapeutic model is the professional assistance in reaching mutual understanding between the parties, and conflicts are seen as problems in such mutual understanding. The parties of the process openly express their thoughts and feelings. The problem-solving model is characterized by the fact that disputes are regarded as problems that arise because of the conflicting needs of the parties. The mediation procedure is aimed at reaching an agreement between the parties. The transformation model assumes that disputes and problems can be seen as opportunities for moral growth and transformation. The model of problem settlement is characterized by the fact that the mediator plays an active role, seeks to reveal the elements of conflict. The communicative model of mediation is aimed at promoting the parties' awareness and understanding of the conflict, and the settlement of the conflict is secondary to its understanding. The mediation assessment approach entails the need to persuade the parties to settle the conflict and also to predict the outcome of the court proceedings and the consequences in case the dispute cannot be resolved through the mediation procedure.

Some scientists believe that there are two main approaches:

1) An approach that facilitates conflict resolution;

2) evaluation (guiding) approach.

The approach to conflict resolution is characterized by the fact that the mediator helps the parties identify specific needs, identify and highlight the areas in which the parties agree. The mediator does not evaluate or question their position both weaknesses and strengths. In this particular model of mediation, the mediator acts solely as a mediator.

An evaluative approach is an approach that helps solve the problem of identifying the parties' own needs for their understanding and reaching a mutually acceptable solution. However, in applying the valuation approach, the mediator helps the parties of the conflict to assess the strengths and weaknesses of their positions, the likely outcomes and risks of different options for resolving the conflict.

According to Thoren Hansen, approach to mediation has copied the traditions of narrative family therapy and constitutes the therapeutic style of the mediation process. In the process of applying this method, the conflicting parties go through three non-discrete stages: interaction, deep understanding of the conflict and its history, construction of an alternative model of further interaction. Since these steps are not discrete, it is not obligatory - to pass them in a clear sequence, in addition, the parties can return to any stages over and over again.[1]

It should also be noted that Cheryl A. Picard, in the process of studying mediation approaches, also identifies an approach that involves a thorough understanding of the conflict. A key and special aspect of this approach is the

[1] Hansen, 2003.

understanding of mediation as an interpretative process through which conflict can change. By using this approach, mediators believe that conflicts are most effectively resolved when helping to master new skills becomes their primary goal in completing this procedure. The concept of conflict in a particular model is slightly different from the understanding of conflict in other models of mediation.[1]

This approach views conflict as an interaction between the parties, whereby mediators pay attention to the relationship between the parties, and in particular how the parties defend their points of view. Mediators provide the parties with different types of interaction that will allow them to extend the types of dialogues and, as a result, change the conflict for the better.

The method by which the legal problem is altered - focuses on the relationship of the parties; the mediator seeks to help move forward in resolving the conflict by deepening understanding and empathy between the parties.

Many scientific sources also provide many other approaches to the classification of models of mediation, from which we can conclude that such models, above all, should be classified by the criterion of mediator subjectivity by which we can distinguish:

1) Jurisdiction mediation carried out either directly by a judicial authority or at its request, or by a specialized administrative complaint body, a public and private notary, a specialized mediation unit or a special state body:

a) the jurisdiction of procedural mediation;

b) jurisdiction of beyond procedural mediation.

2) Non-jurisdictional mediation procedure, which should include one

[1] Cheryl A, 2016, p. 189).

performed by a private direct mediation organization or by any private mediator or other organization providing mediation services, lawyers, private arbitration, etc.:

a) procedural non-jurisdictional mediation;

b) non-procedural non-jurisdictional mediation;

Depending on the purpose of mediation - it is advisable to divide the mediation procedure into the following types:

The first is mediation aimed at the full resolution or settlement of a conflict, the complete abandonment of a judicial review of a conflict or dispute, or the termination of such consideration that has already commenced.;

Mediation aimed at editing / partially resolving the conflict, eliminating determinants and / or reducing the volume of requirements; mediation aimed at auditing a dispute / conflict and evaluating the prospects for its resolution or settlement.

As of today, the issue of identifying the possibilities and ways of introducing mediation into the national system of ensuring and protection of the rights and freedoms of the individual, as well as determining the interconnection with civil and criminal processes, has become quite crucial. There are two dominative concepts to introduce mediation into the national defense mechanism. The first is the concept of judicial mediation, according to which the latter should become a necessary part of this procedural procedure. The second one – mediation should be a completely autonomous way of resolving legal disputes and, like arbitration, have to function in parallel with the trial.

Despite the absence of specific legislation, Ukraine already has experience in applying the mediation procedure, which confirms the institution's

sufficiently high efficiency in conflict resolution processes. There are several regional mediation groups in the territory of Ukraine, which have joined the Association of Mediation Groups of Ukraine and the so-called Ukrainian Center of Understanding, which is quite active in the implementation of programs of reconciliation of victims and offenders, as well as in the educational activities in this field.

Chapter IV of the Code of Civil Procedure of Ukraine provides for a dispute settlement procedure with the participation of a judge prior to the commencement of the case. Article 49 of the Code of Civil Procedure of Ukraine provides for the possibility of concluding a settlement agreement at any stage of judicial proceedings. Pursuant to Article 197 of the Code of Civil Procedure of Ukraine, the Court, at the stage of preliminary proceedings, clarifies whether the parties wish to conclude a settlement agreement.[1]

CONCLUSIONS

Summarizing the above, it is advisable to conclude that the analyzed review of mediation models will facilitate the more effective implementation of mediation in Ukraine, as it forms a holistic concept of mediation as a social and legal phenomenon, a mechanism for settling a legal dispute. The research conducted is useful for mediators, as the characteristics of mediation models will help to shape their own approach to the mediation procedure and to form ways to further improve their professional skills. In addition, it will allow participants in this procedure to form their own views on the mediation process.

The main advantages of mediation as a way of resolving legal conflicts

[1] Code of Civil Procedure of Ukraine, Articles 49, 197.

are: fairness; direct control of the procedure by the parties; confidentiality; voluntary procedure; speed of mediation; direct involvement of the parties in the negotiations; economy; efficiency; flexibility; simplicity; effective interaction between the parties.

The main disadvantages are: inability to check the professionalism of the mediator; the ability to impose one's point of view on the "weak" party; uncertainty over whether mediators are held liable for unprofessionalism or abuse of power.

The basic principles of mediation are increased: equality, neutrality of the mediator, confidentiality, honesty of mediators, voluntary participation, direct control over the mediation procedure, inadmissibility of conflict of interests, certain limits of competence of the mediator, impartiality of mediators, damages.

After conducting a detailed analysis of the theoretical and methodological principles of the study of the experience of foreign countries on the application of the mediation procedure, it should be noted that the division of mediation into models has great practical and theoretical importance. The models of mediation described in the articles are the basis for forming prospects for the implementation of the mediation procedure in Ukraine, creating a comprehensive understanding of the mediation procedure as a social and legal phenomenon, and borrowing the potential as an effective way to resolve the conflict.

Based on the study of mediation models, it can be classified - depending on the integration into the judicial system and depending on the role of the mediator and the subject matter of the dispute.

Depending on their integration into the judiciary, most countries identify judicial and extrajudicial models of mediation. Judicial mediation (court-

connected, court-related, court-annexed mediation) is a fully stand-alone model that is integrated into the country's judicial system. While out-of-court mediation is a model of dispute settlement between the parties, conducted by a third, independent party (external mediator), which helps the parties to reach a settlement in a pre-trial.

Based on the research, the number of main models of mediation was increased: negotiation; therapeutic; model of problem solving; model of legal conflict resolution; model of transformation; communicative model; model of problem solving; evaluation model.

In our opinion, it is advisable to propose ways of solving structural problems by fixing in the Rules of Ethics of Mediators the principles of activity, the relations of the mediator and the parties, the relations between mediators and the like.

It is advisable to propose the creation of a separate structure - the National Association of Mediators of Ukraine. With exclusive competence in the certification of mediators, maintaining a unified register of mediators, reviewing complaints about the actions of mediators and passing a competent opinion to law enforcement agencies to bring mediators to administrative responsibility, etc.

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