NATIONAL ACADEMY OF LEGAL SCIENCES OF UKRAINE

YEARBOOK

OF UKRAINIAN LAW

Collection of scientific papers *Founded in 2008*

№ 9/2017

UDC 340(058)(477) ISSN 2077-4052

Recommended for publication by the Presidium
of the National Academy of Legal Sciences of Ukraine
(Resolution № 99/5 on 02.12.2016)

Yearbook of Ukrainian law : Coll. of scientific papers / responsible for the issue O. V. Petryshyn. – Kharkiv : Law, 2017. – № 9. – 330 p.

In the scientific journal «Yearbook of Ukrainian law» the best articles published by scientists of the National Academy of Legal Sciences of Ukraine, other educational and research institutions in the field of law, theory and history of state and law, state-legal sciences and international law, civil-legal sciences, environmental, economic and agricultural law and criminal-legal sciences in 2016, have been gathered.

Founder – National Academy of Legal Sciences of Ukraine
Publisher – National Academy of Legal Sciences of Ukraine

Registered by the Ministry of Ukraine for Press and Information
(Certificate of State registration of the print media.
KV Series number 15596-4068 R from July 9, 2009)

Address of the Editorial Board: 61024, Kharkiv, Pushkinska st., 70,
National Academy of Legal Sciences of Ukraine, tel. 707-79-89.

НАЦІОНАЛЬНА АКАДЕМІЯ ПРАВОВИХ НАУК УКРАЇНИ

ЩОРІЧНИК
УКРАЇНСЬКОГО ПРАВА

Збірник наукових праць *Заснований 2008 року*

№ 9/2017

УДК 340(058)(477) ISSN 2077-4052

Рекомендовано до друку президією Національної академії правових наук України
(постанова № 99/5 від 02.12.2016 р.)

ЩЗ2 **Щорічник** українського права : зб. наук. пр. / відп. за вип. О. В. Петришин. – Харків : Право, 2017. – № 9. – 330 с.

У науковому виданні «Щорічник українського права» зібрані найкращі статті, які були опубліковані у 2016 р. науковцями Національної академії правових наук України, інших навчальних і наукових закладів у галузі правознавства, з проблем теорії та історії держави і права, державно-правових наук і міжнародного права, цивільно-правових наук, екологічного, господарського та аграрного права і кримінально-правових наук.

Засновник — Національна академія правових наук України
Видавець — Національна академія правових наук України

Відповідальний за випуск *О. В. Петришин*

Зареєстрований Міністерством України у справах преси та інформації
(Свідоцтво про Державну реєстрацію друкованого засобу масової інформації. Серія КВ № 15596-4068 Р від 09.07.2009 р.)

Адреса редакційної колегії: 61024, Харків, вул. Пушкінська, 70,
Національна академія правових наук України, тел. 707-79-89.

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INTRODUCTION

Nowadays more than a hundred specialized legal journals and collections are annually issued in Ukraine, in which thousands of scientific articles from various branches of legal science are published.

In 2008 by the decision of the Presidium of the Academy the nationwide scientific periodical – Yearbook of Ukrainian law was founded, in which the most important legal articles of academicians and corresponding Members of the National Academy of Legal Sciences of Ukraine and also research associates, who work in research institutions of the National Academy of Legal Sciences of Ukraine and other leading research and higher education institutions of Kiev, Kharkiv, Donetsk, Lviv, Odessa are published.

Yearbook aims to become a kind of guide in the field of various scientific information that has already been printed in domestic and foreign journals during the previous year. «Yearbook of Ukrainian law» is a unique legal periodical dedicated to the widest range of legal science's problems that should be concentrated source of modern scientific and legal thought on current issues in the theory and history of state and law, constitutional, criminal, civil, economic, international and other branches of law, that has no analogues in Ukraine. On the pages of this journal modern legal concepts and theories of further development of Ukraine as a democratic, social, law-governed state, the most interesting and current ideas, fundamental and priority issues of jurisprudence are accumulated.

Selection of articles is carried out by the branches of the Academy (theory and history of state and law, state-legal sciences and international law, civil-legal sciences, environmental, economic and agricultural law, criminal-legal sciences), which combine leading scientists and legal scholars from all over Ukraine.

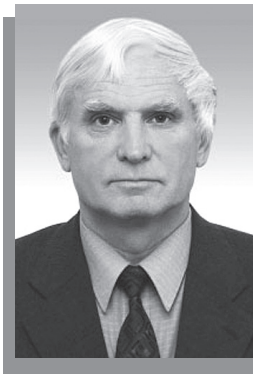
This is the seventh number of Yearbook that from now on will be published in English. The main purpose of these changes – enable scientists from other countries to get acquainted with the problems relevant to Ukrainian legal science both the general theoretical, so in different branches of law, modern Ukrainian legislation and practice, to provide opportunities for international scientific cooperation.

This periodical will be of interest to a wider audience: academic and teaching staff, graduate students, adjutants, students of higher educational institutions and to all those who are interested in the main lines of development of the Ukrainian legal science.

Honourable President of the National
Academy of Legal Sciences of Ukraine
V. Ya. Tatsii

THEORY AND HISTORY OF STATE AND LAW

V. Goncharenko, Doctor of Law, Professor,
Head of the Department of History of State
and Law of Ukraine and foreign countries
Yaroslav Mudryi National Law University



UDC 340.15:94(477)«1921/1991»

REGULATIONS LEGISLATURE UKRAINE DURING THE SOVIET ERA

In the history of Ukrainian statehood has significant experience in the organization and activities of legislative bodies at different times, especially in the second half of XIX–XX centuries. Thus, the organization and operation of the central representative of relatively advanced forms began to be implemented in the second half of the nineteenth century. in Western lands, which were part of the Austro-Hungarian Empire, which was formed in 1867. At the same time Galicia and Bukovina belonged to Austria, and Transcarpathian Ukraine – Hungary. That is, most of the Western lands were ruled by Austria.

According to the Constitution of Austria in 1867 (with some modifications lasted until 1918) the country was headed by the emperor, who had extensive powers both in management and law. At the same time, the Constitution provided for the functioning of the country's parliament (Reichsrat) – a representative legislature Austria. According to the Constitution in 1867, the Austrian Reichsrat was a bicameral legislature and consists of two chambers – the House of lords and Chamber of Deputies. The Chamber of Deputies is the lower house of the Austrian parliament and the House of lords – the upper house of parliament. The structure of the Austrian Parliament elected representatives from Galicia and Bukovina, while in which the experience gained parliamentary activities, including parliamentary procedure and mastered. In the scientific literature devoted to the research organization and operation of parliaments in different periods of their

existence and in different countries, steel is the idea that one of the most important features of Parliament is well developed parliamentary procedure enshrined in the regulations. Regulation, or as it is often called, the code of parliamentary procedure rules, which are fixed to detail all procedural rules is the key to productive Parliament. Had their regulations and House of the Austrian Parliament. Thus, the inner workings of the Chamber of Deputies regulated by the Decree (the name had regulations Chamber) of 2 March 1875, and the House of lords – Decree of 25 January 1875 These decrees were unchanged until the early twentieth century. Enough to thoroughly analyze the contents of the Decree of the Chamber of Deputies of the Austrian Reichsrat made his time in his article A. Nolde[1]. The author focused on the most significant issues of internal order of the institution.

The development of capitalism in the second half of XIX – early XX century, which included much of the Ukraine, led to some changes in its polity. This process actively took place during the revolution of 1905–1907. It is because of the revolution in Russia was a central representative body – State Legislative Council. The competence and general issues of organization and activities of the State Duma defined above such legal act as «Establishment of the State Duma», and a number of articles of the Basic State Laws Empire as amended on April 23, 1906 justified is the view that the laws of the State and legal views were the imposed monarchical constitution[2].

Widely representative body, which was the State Duma of the Russian state could not work productively without having a very clear set of rules necessary for the proper functioning of the Duma. It is no coincidence «Establishment of the State Duma» section contained seven «On internal rules in the Duma», which includes articles 62 and 63. Article 62 stated: «Details of the internal regulations of the State Duma, office items and procedures referred to in Article 12 Meeting and duties of the Office of the Duma, it consented and subordinate entities determined by the order issued by the Duma in the development of the rules of the institution. This Decree is published to the public through the Senate». In 1906 and State Duma passed the first three chapters of the Decree. II State Duma adopted sections Decree 1906 temporary management and entrusted his Decree Commission to review these sections and to process these. That was done. II State Duma adopted the fourth chapter of the Decree and four units of the fifth chapter of the Decree.

Analysis of their contents gives reason to believe that the document as a whole meets the requirements of parliamentary procedure, which provided the opportunity to the functioning of the State Duma as a legislative body of the state.

Work on preparing the Decree was held in the third Duma (1907–1912). So

[1] Нольде А. Порядок австрийского парламента // Журнал Министерства юстиции. – 1906. – № 3. – С. 233.

[2] Смыкалин А. С. Этапы конституционного строительства в дореволюционной России // Государство и право. – 2004. – № 3. – С. 80.

in 1908 the Third State Duma adopted some provisions of the new Decree, and in June 1909 approved it completely and took leadership[1]. This version of the Decree was applied during the third State Duma and the beginning of the fourth State Duma, and a total of five years (1909–1914). As noted I. Yashunskyy, III State Duma had «finally produced entirely Decree»[2]. In his view, «the technical part of the Decree adopted by the Third State Duma, in some imperfections, was skillful and successful construction of all previous Duma practice»[3].

The theme of the Decree was in sight and the fourth State Duma (1912–1917). Thus, in 1913, before the dissolution of the State Duma on summer vacation, deputies were sent voluminous report of the special committee of the Decree. As pointed out by the witness of those events L. Nemanov, «available to the Commission was sufficient material to make a good Decree. Besides regulations Western parliaments, the Commission, as the report used the draft Decree of 1st and 2nd State Dumas, Decree of 3 th State Duma»[4]. In his article, the author also pointed out that the common thread through the contents of the draft Decree is the idea of combating the debate as a «great evil of Duma's life» because, according to Commission Decree, created obstruction and verbosity[5]. L. Nemanov criticized and some other provisions of the draft Decree of the Fourth State Duma, for example, noting that «design gives the presidium of the Duma huge rights without installing at the same time no means to deal with its arbitrariness»[6].

Decreeof the Fourth State Duma had approved it in March 1914 and accepted for guidance on April 15, 1914.

However, with the establishment of the State Duma of Nicholas II made the reorganization of the State Council, making it a member of the legislative process. This reform was promulgated a number of legislative acts, namely: the manifesto «On the change of the Office of the State Council and the view of the Office of the State Council,» the decree «On reorganization of the Office of the State Council» and the new edition of «The institutions of the State Council,» issued February 20, 1906, basic state laws in the Russian Empire as amended on April 23, 1906. The above acts have transformed the state Council in the second, upper, house of parliament[7]. The rules of procedure contain State Council Order of the State Council, published May 12, 1907[8].

Thus, during the stay of Ukrainian lands in the second half of XIX – early

[1] Демин В. А. Государственная дума России: механизм функционирования. – М.: РОССПЭН, 1996. – С 87.

[2] Яшунский И. Наказ в третьей Государственной думе // Право. – 1909. – № 39. – Стлб. 2065–2070.

[3] Яшунский И. Наказ в третьей Государственной думе // Право. – 1909. – № 40. – Стлб. 2122–2126.

[4] Неманов Л. Проект Наказа четвертой Гос. думы // Право. – 1913. – № 35. – Стлб. 2001–2002.

[5] Ibid (p. 2001–2002)

[6] Ibid (p. 2012)

[7] Российское законодательство X–XX веков. – М.: Юрид. лит., 1994. – Т. 9. – С. 19.

[8] Собрание законов и распоряжений правительства. Отдел первый. – 1907. – № 86. – Ст. 802.

XX century part of the Austro-Hungarian and Russian empires representatives from these lands, working in the imperial parliament, gained experience of parliamentary procedures in the functioning of the legislature.

Significant experience of legal procedural rules to ensure the functioning of the higher representative bodies was accumulated during the Soviet era, when there were several models of these bodies.

Thus, in the 1917–1937 representative bodies of the central government were All-Ukrainian Congress of Workers, Peasants and Red Army Deputies, the All-Ukrainian Central Executive Committee of Soviets (VUTSVK), the Bureau VUTSVK.

Among these the highest power had Ukrainian Congress of Soviets. During the entire period of this constitutional body was fourteen Ukrainian Congress of Soviets. The work of each of them need appropriate regulation. How said his time M. Golodnyi, «the functioning nationwide congresses are not governed by a specific regulation of the constant action. There was not properly fixed procedure for consideration and decision-making conventions. Certain procedural rules contained in the regulations that adopted every Congress and acted only for the Congress. Most of them had no documentary form, and there in the form of traditions and customs[1]». For example, at the IX National Congress of the Soviets adopted the following rules: «Government Report – 2 hours. Speakers – 1 hour. Co-speaker – 20 minutes. The final word speaker – 20 minutes, co-rapporteur – 10 minutes. Speakers in order of discussion papers – have for the first time 10 minutes, the second time for 5 minutes. The word for proposals «for» and «against» for 5 minutes. A word to the right – with the minutes. The word of personal questions at the end of the meeting – 3 minutes. Offers are made only notes. Word beg note. The congress is open from 9 to 2 pm and from 5 pm to 8 pm»[2]. Differed little other regulations nationwide congresses of the above regulation IX Ukrainian Congress of Soviets. A small difference was only in the amount of time that stood out for speakers. As you can see, the rules nationwide congresses contained only minimum procedural rules governing the procedure for meeting the highest authority of the USSR. Unfortunately, the rules congresses SSR was not arch procedural rules that would regulate in detail the functioning of the National Congress councils. Regulations conventions did not contain answers to a number of procedural issues. for example, had to act as if the Regulations term in the courtroom All-Ukrainian Congress of Soviets lacked a certain number of delegates had to act and how these missing delegates. The regulations contained no indication of who could be the initiator of solving such important issues as cloture (comp-

[1] Голодний М. О. Всеукраїнські з'їзд Рад, їх компетенція та порядок діяльності // Проблеми правознавства. – К., 1971. – Вип. 20. – С. 49.

[2] IX Всеукраїнський з'їзд Рад робітничих, селянських та червоноармійських депутатів. Стенографічний звіт. – Х.: ВУЦВК, 1925. – С. 5.

lete or incomplete). No regulations govern in detail the process of debate. They contain detailed rules on the procedure and how to vote in decision making (easy open, roll-call, secret). As regulations were absent rules concerning requests and delegates of the members of the Government of Ukraine, heads of other central state bodies of the republic. Regulations governing the powers are not replicas. M. Golodnyi drawn attention to this part of the regulations nationwide congresses as proposals delegates. Thus, the researcher points out that all the proposals were amended in writing. «However, – said M. Golodnyi – not required that they be made thoroughly in draft form»[1]. This approach M. Golodny iconsiders it proper, «given the composition of the meetings, the lack of bulk delegates – workers, peasants and Red – Opportunities perfectly execute their proposals»[2]. Supreme position of Ukrainian Congress of Soviets in state bodies of the Republic, logically, required constant, carefully detailed regulations. But such regulations for the All-Ukrainian Congress of Soviets was not white is accepted. In this respect you can give some explanation. Thus, according to A. Tadevosyan, no permanent regulations Republican Congress of Soviets «because obviously short period of his work»[3]. Specious arguments concerning the lack of a thorough regulation of the functioning of public authority expressed expert on parliamentary procedure A. Savrasov, who said: «We know that where the law declared bogus, where decision-making is carried out by illegal methods, where decisions are taken unanimously (or alone) without sufficient discussion, there is no need to create a detailed and well thought-out parliamentary procedure»[4]. This statement is well suited to national congresses, including the All-Ukrainian Congress of Soviets. Each of them worked only within a few days. Draft decisions they took, after preparing the Bureau VUTSVK, and at the congress previously sanctioned by the Communist faction, which included most of the delegates were subject to party discipline and voted unanimously at a meeting of the faction for the decision, which then were passed at the plenary sessions of the ride. Therefore, delegate nothing to do but to vote unanimously in an open ballot for the decision of the Congress.

Second after All-Ukrainian Congress of Soviets was the central representative body of Ukrainian SSR was the Central Executive Committee (VUTSVK). The main form of VUTSVK were sessions that were convened by the Presidium VUTSVK. High status VUTSVK, the assembly form its operation required

[1] Голодний М. О. Всеукраїнські з'їзд Рад, їх компетенція та порядок діяльності // Проблеми правознавства. – К., 1971. – Вип. 20. – С. 50.

[2] Ibid (p. 50).

[3] История государства и права Советской Армении. – Ереван: Институт философии и права АН АрмССР. – 1974. – Книга первая. – С. 191.

[4] Саврасов А. Ф. Наказ Государственной думы (1906–1917 гг.): история создания и применения: автореф. дис.… канд. истор. наук. – Воронеж, Изд. Воронеж. ун-та, 2010. – С. 1.

careful regulation of VUTSVK. So many questions, so to speak, a procedural nature governed by a number of regulations.

One of the first regulations designed to resolve some issues of work VUTSVK was the Ukrainian CEC resolution of 26 May 1920 «On All-Ukrainian Central Executive Committee». This normative act was determined by the frequency of convening ordinary and extraordinary sessions VUTSVK. It established that the regular session of the Bureau VUTSVK VUTSVK convened every two months, and extraordinary session convened on the initiative of the Presidium VUTSVK on a proposal RNA SSR or at the request of one third of the members VUTSVK[1]. Another piece of legislation containing rules of procedural nature, was made the second session of the fifth convocation VUTSVK May 8, 1921 «Regulations on Ukrainian Central Executive Committee»[2]. This resolution has the following parts: 1) The rights and duties of VUTSVK; 2) VUTSVK plenum session; 3) Regulation VUTSVK plenum meetings. Resolution had many procedural innovations that ensure productive work sessions VUTSVK in general and members VUTSVK including.

A peculiar culmination in the case of legislative regulation of routine procedures VUTSVK the adoption of the third session of the eighth convocation VUTSVK 12 October 1924 «of the Ukraine Central Executive Committee of Soviets of Workers, Peasants and Red Army Deputies (VUTSVK)». Provisions had 47 articles[3]. Provisions contained a number of procedural rules designed to ensure VUTSVK work. Thus, the fundamental question for any collective body – a decision-making procedure. This question touches and the Regulation on VUTSVK. Thus, according to Art. 13 all the issues discussed at the sessions VUTSVK, resolved by open vote and a simple majority of members VUTSVK. For the same session of the quorum needed VUTSVK presence of at least one third of members VUTSVK. Equally important rule contained cent. 14 Regulation on VUTSVK. It was noted that the internal order of the session VUTSVK «is set in the Rules, produced by the Presidium of the All-Ukrainian Central Executive Committee and approved by the session». In the Central State Archives of higher authorities of Ukraine (Ukraine TSDAVO) remains «Order on order of the sessions of the All-Ukrainian Central Executive Committee», which consists of 78 articles that thoroughly regulated without exception the functioning VUTSVK sessions[4]. The Regulation first carefully defined legal status VUTSVK Chairman and Secretary VUTSVK from activity which is largely dependent on the proper functioning of the public authority SSR.

[1] СУ УССР. – 1920. – № 11. – Ст. 210.

[2] Отчет второй сессии Всеукраинского Центрального Исполнительного Комитета 5-го созыва (5–8 мая 1921 г.). – Х.: ВУЦИК, 1921. – С. 78–79.

[3] ЗУ УСРР. – 1924. – № 45. – Ст. 276.

[4] Центральний державний архів вищих органів влади України (ЦДАВО України). – Ф. 1. – Оп. 3. – Спр. 56. – Арк. 57–65.

In VUTSVK Regulations of 1924 also contained some provisions that govern the functioning of the Presidium VUTSVK. But the more closely the procedural rules of the Presidium VUTSVK first defined the «Mandate of the order of the Presidium of the All-Ukrainian Central Executive Committee» approved by the VUTSVK on July 30, 1925[1] February 6, 1929 Resolution VUTSVK approved a new «Decree of the order of the Presidium of the All-Ukrainian Central Executive the Committee». These «Decrees» were essentially expanded regulations of the Presidium VUTSVK. For example, the «Decree» in 1929 consisted of 70 items which are included in the following sections: 1. The composition of the Presidium of the All-Ukrainian Central Executive Committee. 2. The agencies, institutions and individuals have the right to submit the case to the Presidium of the All-Ukrainian Central Executive Committee. 3. The procedure for bringing a case to the Presidium of the All-Ukrainian Central Executive Committee and preparation of the agenda of meetings of the Presidium of the All-Ukrainian Central Executive Committee. 4. The procedure of convening and conducting meetings of the Presidium of the All-Ukrainian Central Executive Committee. 5. The minutes of meetings of the Presidium of the All-Ukrainian Central Executive Committee. 6. The execution of resolutions of the Presidium of the All-Ukrainian Central Executive Committee. 7. The procedure for consideration of the Presidium of the All-Ukrainian Central Executive Committee of protests and complaints submitted to it[2].

With the adoption in 1937 of the new Constitution of the USSR and the election of 30 June 1938 the Supreme Soviet legally and practically ceased activity congresses of Soviets of USSR Central Executive Committee of the USSR, the Presidium of the CEC of USSR. According to this constitution highest state authorities declared the Verkhovna Rada of the Ukrainian SSR (Art. 20)[3]. Under Article 23 of the Constitution, the Supreme Soviet of the USSR was declared the only legislative body of the USSR. It would be logical to develop and adopt such a body as the Supreme Soviet of the USSR as executive, legislative, senior government issued regulations carefully. Especially because in Ukraine and in foreign countries had accumulated vast experience in developing and adopting appropriate regulations. But the current practice of the Supreme Soviet went in a different way. For many years, the regulations adopted first session of the Verkhovna Rada of the corresponding convocation and had a very summary. For example, March 4, 1947 deputies unanimously voted regulations sessions of the Supreme Soviet of the second convocation. Here is the text of the regulations, «Parliament's session held from 11 am to 3 pm and from 6 pm to 10 pm. Speakers on the agenda of the session of the Verkhovna Rada approved the Chair-

[1] ЗУ УСРР. – 1925. – № 60–61. – Ст. 349.

[2] ЗУ УСРР. – 1929. – № 8. – С. 347–364.

[3] Історія конституційного законодавства України: Зб. док. / упоряд. В. Д. Гончаренко. – Х.: Право, 2007. – С. 105.

man of the Verkhovna Rada. Each group of deputies, which has not less than 50 people can put their co-rapporteur. Speakersof available for report 1:00 for the final word – 30 minutes; co-rapporteur for supporting reports – 30 minutes for the final word – for 15 minutes. speakers provided to first time – 20 minutes, in the second – 5 minutes. Personal statements and actual reference shall be made in writing and announced by the Chairman of the Verkhovna Rada of immediate or late meetings regardless of their content. Early questions submitted in writing and announced by the Chairman of the Verkhovna Rada immediately. For words to the agenda given 5 minutes in explanation of vote – 3 minutes»[1]. Here is a transcript of the session of the Supreme Soviet recorded the procedure a Regulation of the Supreme Soviets: «Head. Does any of MPs some other draft regulations? From seats. None.

Head. Do the deputies who take the floor on the draft regulations introduced?

From seats. None.

Head. Let me set the order of voting regulations. There is a proposal to vote rules in general. Are there any other suggestions?

From seats. None.

Head. Voting. Who for making regulations made by the deputy Shelekh, please raise a hand. Please drop. Who against? None. Who abstained? Either. Regulations approved unanimously. «As you can see, the rules adopted without discussion and open vote by raising deputies' hands. From the above regulations had practically no difference in content regulations of the Verkhovna Rada of the Ukrainian SSR these third – eighth convocation[2]. Thus, the rules of meetings sessions Parliament Soviet USSR included the minimum number of rules and left unanswered many questions regarding the organization of the highest representative legislative body of the country. This situation was not accidental because the operation did not involve the Supreme Soviet of the parliamentary regime and, in this regard, and the need to regulate in detail the activities of the Supreme Soviet. As evidenced, for example, content analysis of verbatim record of the Verkhovna Rada of the USSR, which reflect the activities of the

[1] Перша сесія Верховної Ради УРСР. Другого скликання. 4–6 березня 1947 року. Стенографічний звіт. – К. : Укр. вид-во політ. літ-ри, 1947. – С. 7.

[2] See: Заседания Верховного Совета Украинской ССР (Первая сессия). 17–20 апреля 1951 г. Стенографический отчет. – К.: Изд-во полит. лит-ры Украины, 1951. – С. 10–11; Засідання Верховної Ради Української РСР четвертого скликання. Перша сесія (29–31 березня 1955 р.). Стенографічний звіт. – К.: Вид-во пол. літ-ри України, 1955. – С. 8; ЗаседанияВерховного Совета Украинской ССР (Пятого созыва) (Первая сессия, (15–17 апреля 1959 г.). Стенографический отчет. – К.: Изд-во полит. лит-ры Украины, 1959. – С. 8; Засідання Верховної Ради Української РСР шостого скликання. Перша сесія (11–12 квітня 1963 р.). Стенографічний звіт. – К. : Вид-во політ. літ-ри України, 1963. – 8; Засідання Верховної Ради Української РСР сьомого скликання. Перша сесія (11–12 квітня 1967 року). Стенографічний звіт. – К.: Вид-во політ. літ-риУкраїни, 1967. – С. 9–10; Засідання Верховної Ради Української РСР восьмого скликання. Перша сесія. (14–15 липня 1971 року). – Стенографічний звіт. – К.: Вид-во політ. літ-ри України, 1971. – С. 9–10.

Supreme Councils for the period of the Constitution of the USSR in 1937 for among them 1970's, all, without exception, the vote taking place in Parliament, was unanimously «yes». So consider carefully regulate the procedure of voting and decision-making was not necessary. As it was not necessary to do so due to the fact that the session of the Supreme Soviet continued over the period or one day or several days, and therefore excluded any complex procedures for sessions of the Supreme Soviet. Primitivism regulations of the Supreme Soviet, which functioned until the mid-1970s, S. Sas says several reasons following lines: «absolute lack of separation of powers, the dominant role of the Communist Party, no need to resolve internal conflicts because of the nonexistence of most conflicts»[1]. Only the first session of the Supreme Soviet of the ninth convocation adopted July 4, 1975 decree «On approval of the Regulations of the Verkhovna Rada of the Ukrainian SSR», which was approved more or less detailed regulations of the Verkhovna Rada of the USSR[2]. A Regulation was preceded by a little about the reasons for drafting regulations and offer MPs to adopt this document. As always, members without debate and unanimously adopted regulations of the Verkhovna Rada of the Ukrainian SSR. The document consisted of 17 items that regulate issues such as the order convening sessions of the Supreme Soviet, the procedure for registration of MPs, the procedure for the invitation to the meeting guests term of the Parliament of agenda, election of the Verkhovna Rada procedure discussing bills and other documents, procedure for the inquiries and their form, order coverage of sessions of the Supreme Soviet[3]. S. Sas, drawing attention to the fact that for the first time to accept the Supreme Soviet regardless of specific regulations convening of this body consisted of only 17 points, rightly observes that «no one has the right to name the act primitive». According to the researcher, limited regulation was not related to the lack of competence of the then legislators, and the fact «that under the current system of governance, those rules have been laid down in the regulations, it was enough for the settlement of the Verkhovna Rada of the Ukrainian SSR»[4].

Certain innovations in the legal status of the Supreme Soviet of the Ukrainian SSR were made to the Constitution of the USSR in 1978 For almost two years the procedural rules of the Supreme Soviet governed by the regulations of 1975, although Article 114 of the Constitution of the USSR in 1978 noted that the order of the Supreme Soviet and it was determined of the Rules of the Supreme Soviet and other laws of the Ukrainian SSR, which were issued on

[1] Сас С. В. Парламентська процедура Верховної Ради Української Радянської Соціалістичної Республіки та її відмінність від класичної моделі // Наше право. – 2004. – № 2 (1 ч.). – С. 12.

[2] Засідання Верховної Ради Української РСР дев'ятого скликання. Перша сесія (4 липня 1975 року). Стенографічний звіт. – К.: Вид. політ. літ-ри України, 1975. – С. 39–42.

[3] Ibid (p. 43–46).

[4] Ibid (p. 13).

the basis of the Constitution of the USSR. Therefore, following the requirements of Article 114 of the Constitution, the Supreme Soviet of the USSR adopted March 25, 1980 the Verkhovna Rada of the Ukrainian Soviet Socialist Republic. Regulation consisted of 12 chapters, which contained 65 articles and which for the first time in the entire previous history of the functioning of the Supreme Soviet carefully defined work order of the highest organ of state power of the USSR[1]. A report on the draft regulations at a meeting of the Supreme Soviet was the Deputy Chairman of the Presidium of the Supreme Soviet deputy V. Shevchenko. The speaker focused attention on the content of the draft regulations of the Verkhovna Rada, highlighing, as she said, «on the main provisions of the draft regulations»[2]. Deputies who participated in the discussion of regulations of the Supreme Soviet, positively rated content. Regulation was unanimously voted by show of hands of deputies of the Supreme Soviet. Rules of the Supreme Soviet in 1980 was undoubtedly a significant milestone in the process of legislative support for the internal organization of the legislature Ukrainian SSR. However, it is largely inferior to the classic parliaments regulations civilized countries. A different and could not be, since the Supreme Soviet of the USSR was one of the components of the Soviet model of representative bodies of state power, far from parliamentarism. The next step in the development of the regulatory procedures of the Supreme Soviet was the adoption by the VR May 22, 1990 the Provisional Regulations of the Parliament of Ukraine twelfth convocation. For this document has been characterized by some features classic parliaments[3]. Thus, the supposed secret ballot on election of the Verkhovna Rada of Ukraine.

The above gives reason to believe that in the history of Ukrainian state has accumulated vast experience of legislative regulation of routine procedures in the operation of the high representative government bodies. This experience can be fully taken into account in the search for the optimal model regulations Ukrainian parliament.

Published: Вісник Національної академії правових наук України. – 2016. – № 1 (84). – С. 30–42.

[1] Відомості Верховної Ради УРСР. – 1980. – № 15. – Ст. 268. Докладніше про зміст нового регламенту дивись: Сас О. Верховна Рада Української РСР – безпосередня попередниця сучасного українського парламенту // Віче. – 2011. – № 12. – С. 21–22; Сас С. В. Парламентська процедура Верховної Ради Української Радянської Соціалістичної Республіки та її відмінність від класичної моделі // Наше право. – 2004. – № 2. – С. 14–16.

[2] Перша сесія Верховної Ради Української РСР (Десяте скликання). 25–26 березня 1980 року. Стенографічний звіт. – К.: Вид-во політ. літ-ри України, 1980. – С. 24.

[3] Тимчасовий регламент засідань Верховної Ради дванадцятого скликання / Постанова Верховної Ради Української РСР від 22 травня 1990 р., № 6-XII. – 1990. – 15 с.

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UDC 340.114

COURT PRACTICE AS A SOURCE OF LAW IN UKRAINE: PROBLEMS OF THEORY

The judiciary, operating under legal democratic state is increasingly taking on the characteristics of the guarantor and protector of rights while performing important tasks on elimination of possible conflict in social relations caused by a variety of factors – economic, political, cultural and others. Per se, the legal instructions in today's society of conflicting interests are not able to fulfil the aim of regulation – the rule of law and conflict resolution. Accordingly, the judicial system that functions properly, serves an important function of society and, at the same time – a prerequisite and component of a modern democratic state[1].

From the legal mechanisms standpoint the issue is in providing authoritative «transfer» of the contents of certain rules of behavior into the realm of social reality with all the specific features. This approach should be kept within the legal framework with regard to the professional legal criteria and through transparent competitive procedures. A court, an institution closest to the law, has the prerogative and the final decision on legal disputes and conflicts.

The most significant feature of courts in society, especially in the difficult times of reforms is consistent provision of human rights as the driving force of any social change. Under these conditions, the courts are primarily entitled to serve as a secure tool for human rights, to create a legal space in which interests of different social groups are to be expressed, based on the fundamental principle of democracy for the recognition of man as the highest social value.

[1] Winkelmann Justice Helen. ADR and The Civil Justice System / H. Winkelmann // AMINZ Conference. 2011. – Taking Charge of the Future (6 August 2011) [Elektronnyi resurs]. – rezhym dostupu : http://www.courtsofnz.govt.nz/speechpapers/ADR%20and%20the%20Civil%20Justice%20System.pdf

That is why judges in modern society play an increasingly important role and are often subjected to more criticism, and face much more complex issues than ever before. Today's society considers a court as an institution that is able to resolve the dispute, even in those areas of social life, which until recently were far beyond the jurisdiction[1]. These general trends are reflected in the legal basis for the organization and administration of justice in Ukraine, in particular – the thesis of the Part 2 of Article 124 setting jurisdiction of the courts to «any dispute and any criminal charges».

All this leads to a particular interest of general theoretical science to the provisions, enacted by the courts in specific cases soon to become samples of application and interpretation of the law in solving similar disputes in the future, exposing the issue of judicial practice as a source of law.

It is commonly recognized in legal doctrine that one of the most important features of law is its general nature, and therefore a legal norm usually does not take into account the diversity of specific situations that may become subject to its regulation. No legal provision requiring compliance from a particular group to recognize their legitimate behavior can be clearly formulated. A law, regulating corresponding social relations usually involves a level of abstractness, and therefore requires a legal assessment. Note also that a significant amount of legislation uses the so-called value-based concept that by definition requires a broader interpretation. In addition, a court is often forced to supplement laws, that is, figuratively speaking, to engage in «completion» of law when the application of the law features several possible options of its interpretation.

The text of the formal sources of law cannot ensure the completeness of legal regulation. There may be situations that are not covered by the effect of existing legal requirements, but are in need of regulation, thus, formalized source of law should always leave an appropriate autonomous space, an «area of freedom» in which the participants can independently determine the relationship patterns of its behavior. Yet all disputable situations are to be resolved by the court.

The value of judicial practice as a source of law is particularly noticeable in the legal regulation of relations that are not clear, incomplete or contradictory normalized on legislative level, and in the application of legal principles and norms of human rights and fundamental freedoms in courts.

Also, consider that formal law:

a) must be subjected to critical evaluation, primarily by judges, in light of the relevant objective limits of legal regulation, the principles of law and human rights;

b) may be subjected to dynamic interpretation, if the public relations require different behaviors because of their relative development;

c) the state, represented by the judicial authorities may authorize the norms established by the civil society, granting them the official legal status.

[1] Paul G. Kauper. The Supreme Court and the Rule of Law / G. Kauper Paul // Michigan Law Review. – Vol. 59.

This creates an objective basis for the recognition of judicial practice (jurisprudence) as a source of law, in other words as an official form (way) of external expression and consolidation of rules, self-reference of which verifies their existence.

The importance of jurisprudence for the legal regulation of public relations is widely acknowledged by the practitioners. Their work is based around a statement that a huge amount of adopted judicial acts contains generalized experience matched to determine the main directions of jurisprudence on a particular issue, the dynamics in the application of a particular law, and its quality characteristics in terms of «operability». Jurisprudence produces basic approaches that serve as a benchmark when considering specific cases.

To determine the main directions of the regulatory impact of judicial practice in certain aggregated form, it:

(1) affects the formation of uniform rules of decision making in similar factual situations that provide a common judicial practice, eliminates the situation where the same category of cases sometimes is considered by courts in different ways, and therefore contributes to legal certainty as one of the important requirements of the rule law;

(2) specifies the provisions of regulations where their abstraction allows several options for regulation;

(3) creates a uniform understanding of the laws that are vaguely formulated or ones which are inconsistent to the moral values of society, and therefore need a dynamic interpretation;

(4) fills a gap in the legal regulation and offers behaviors in situations where the legislator deliberately left space for independent regulation, yet the frequency of disputes determined the urge to develop well-established behaviors.

With its main objective set to perform these important tasks, jurisprudence contributes to the establishment and maintenance of public confidence in the court and ensures its credibility and effectiveness.

Generally, judicial practice (jurisprudence) is formally considered as a secondary source of law. It can provide a convincing justification for the judgment, but a reference to judicial practice only in not a solid enough statement. It must be combined with reference to a relevant legal act, legal or other formal agreement. The situation may differ if the state clearly indicates binding conclusions set out in the relevant legal acts.

In Ukraine, the judicial practice was not officially recognized as a source of law for a long time, but lower courts have always tried to follow the practice of higher courts in dealing with similar cases, because otherwise their decisions could be reversed on appeal or cassation. In Soviet times the resolutions issued by the Plenum of the Supreme Courts of the USSR and the Federal Republics served as a specific benchmark for court enforcement, later recognized on doctrinal level and implemented in a theory of «legal provisions»[1]. Consequently, the

[1] Details of the scientific debate on law-making role of jurisprudence in domestic science see: Шевчук С. В. Судова правотвор-

judicial practice of the higher courts have always acted as a guide for lower courts and other law enforcement agencies.

The legal system in Ukraine, which aspires to be based on the rule of law and respect for human rights can no longer be single-channel («mono-source»), while jurisprudence under these conditions naturally becomes binding and, ultimately, receives the status of a source of law. Only under the recognition of professional opportunities for judicial protection and justice, participation in the lawmaking, determining the direction and nature of legal regulation of social relations will it be possible to advance towards an effective system of justice, protection and human rights.

The recognition of jurisprudence as a source of law contributes to solving many of the more general theory of law issues in the direction of modernization and convergence into the «European thinking». First – its refinement towards a broader social base of law and improving the efficiency of legal regulation, implementation of the law's practical functions and tasks.

Thus, Article 17 of the Law of Ukraine «On the enforcement and application of the practice of the European Court of Human Rights» of 23 February 2006 r. 3477-IV[1] expressly states that Ukrainian courts may apply the judicial practice of the European Court of Human Rights as a source of law. As you know, the text of the Convention on Human Rights and Fundamental Freedoms, which forms the basis of common standards of human rights, which are recognized as one of the three pillars of the European system of values (along with democracy and the rule of law), is quite concise. The content and meaning of the requirements is largely disclosed in the practice of the European Court of Human Rights thus creating the term «European Conventional law» (or «the Conventional law»)[2].

Participating states should take into account not only the judicial practice of the European Court of Human Rights regarding their particular state, but the decisions, targeted at third-party countries because they can teach them how to avoid similar violations in the future and accordingly change their own legal and law enforcement system[3]. The Court's decision should be an incentive for member states to change their laws and enforcement practices to ensure that these countries will not breach human rights in the future[4].

Moreover, the Plenum of the Supreme Court of Ukraine in its resolution

чість: світовий досвід і перспективи в Україні. – К.: Реферат, 2007. – 640 с.

[1] http://zakon5.rada.gov.ua/laws/show/3477-15

[2] Harris D. J. Law of the European Convention on Human Rights / D. J. Harris, M. O'Boyle, C. Warbrick. – 3-d ed-n. – Oxford: Oxford University Press, 2014. – 1080 p.

[3] Беляневич О. А. Про застосування практики Європейського суду з прав людини // Вісник КНУ ім. Тараса Шевченка. Серія Юридичні науки. – 2009. – № 81. – С. 32–38.

[4] Юдківська Х. Ю. Еволюція ролі Європейського суду на шляху до процедуралізації фундаментальних прав // Вісник Верховного Суду України. – 2011. – № 7. – С. 19–22.

«On judgment in a civil case» clearly emphasized that «the reasoning of each decision ... if necessary, should contain a reference to the Convention and the correspondent European Court of Human Rights judicial practice which are, pursuant to the Law Of Ukraine on February 23, 2006 № 3477-IV «On the enforcement and application of the practice of the European Court of Human Rights» regarded as a source of law to be applied in this case»[1].

Analysis of judicial practice shows that Ukrainian courts sometimes refer to the decisions of the ECHR as a source of law, including the cases where it is necessary to renounce the use of legal prescription that contradicts with the international obligations of Ukraine in the field of human rights. For example, in one of the cases a man appealed to the court to recognize the actions of the State Border Service of Ukraine (USBS) unlawful. The plaintiff worked under contract with USBS as a senior officer. From 13.10.2014 to 28.09.2015, he was on leave to care for a child under the age of three. On 24 of September 2015, he asked for a leave until the child reaches six years because the child was in need of a special health conditions.

The defendant refused to grant such leave, referring to the Law of Ukraine «On Social and Legal Protection of Servicemen and Their Families», which guarantees the right to take such leave only to females (this rule is still in power). The court granted the petition, citing the decision of the ECHR in the case «C. Markin against the Russian Federation», which, among other things, stated that «gender stereotypes that dictate the perception of women as the person who mostly takes care of the children and the husband as breadwinner alone may not be sufficient justification for the difference in treatment also like other stereotypes related to race, origin, color or sexual orientation». The court also relied on the principle of gender equality enshrined in the Constitution of Ukraine. This allowed the Court to justify the conclusion that the order of the Law of Ukraine «On social and legal protection of servicemen and their families» contradicts international acts and the Constitution of Ukraine, and therefore should not be used[2].

We also note that all procedural codes of Ukraine (at that time the Criminal Procedure Code of Ukraine, Civil Procedure Code of Ukraine, the Commercial Procedure Code of Ukraine, the Code of Administrative Procedure of Ukraine) were complemented with provisions specifying the judgments of the Supreme Court of Ukraine as obligatory pursuant to the Law of Ukraine «On the Judicial System and Status of Judges» of July 7, 2010 r. Number 2453-VI.

Thus, in accordance with Art. 360-7 of the Civil Procedural Code of Ukraine of 18 March 2004 r. #1618-IV the judgment of the Supreme Court of Ukraine, adopted on the consideration of the application for revision of a judgment on

[1] Постанова Пленуму Верховного Суду України від 18.12. 2009 р. № 14 «Про судове рішення у цивільній справі» // Вісник Верховного Суду України. – 2010. – № 1. – С. 4.

[2] http://www.reyestr.court.gov.ua/Review/52810098

the grounds of unequal application of the court (courts) of cassation of the same substantive law in similar cases is mandatory for all government entities, which utilize the legal act containing the said rule of law, and all courts of Ukraine. Courts are required to bring their judicial practice into line with the Supreme Court of Ukraine. Such judgments of the Supreme Court of Ukraine shall be published on the official website of the Supreme Court of Ukraine no later than 15 days after their adoption.

Later (Act of 12.2.2015 #192-VIII) formulation of the article was changed slightly: «The conclusion of the Supreme Court of Ukraine on the application of the law, as set out in its resolution adopted on the results of the proceedings on the grounds of unequal application of the court (courts) of cassation the same rules of substantive or procedural law is mandatory for all government entities, which utilize the legal act containing the said rule of law.

Opinion on the application of the law set out in the decision of the Supreme Court of Ukraine should be considered by other courts of general jurisdiction in the application of the law. «The court has the right to retreat from the legal position set out in the conclusions of the Supreme Court of Ukraine, while providing the relevant reasons». The last sentence on the possibility to back down from the legal position of the Supreme Court of Ukraine was wrongly perceived by many as an argument in favor of such legal positions not serving as a source of law. In this case, similar to the judicial precedents, the court can actually deviate from such a legal position if he proves that the factual circumstances of the case in question, differ from the case on which the Supreme Court had made the appropriate position, or set situation is proved to be absolutely exceptional, pointing to significant changes in social values and standards of society.

For example, the Law of Ukraine «On Enforcement Proceedings» establishes a three-month window for the claim of bankruptcy proceedings. However, this does not account for a situation where after the opening of the enforcement proceedings the reorganization of the debtor takes place. The result proved to be a controversial practice: some courts have considered that the period should be calculated from the date of the enforcement proceedings, others – after replacing the debtor in the proceedings because of the reorganization. Since the legal position of the Supreme Court of Ukraine states that the term is calculated from the opening of the proceedings, all contrary judgments usually get canceled (e.g., the decision of the Supreme Economic Court of Ukraine on June 4, 2015 in case №924/159/14)[1].

The status of a source of law in Ukraine must also be recognized with a resolution of the Constitutional Court of Ukraine. We should distinguish between the CCU decisions formulated as «unconstitutional as a whole» or «in part» of certain normative act and resolution

[1] http://www.reyestr.court.gov.ua/Review/44674985

on the official interpretation. The decision to abolish the law or other legal act (separate provision) has the highest legal force in relation to the canceled act. This decision is binding and final. It does not require publication of additional legal acts of legislative and executive power; is compulsory, normative and leads to a significant change in the legal regulation of the relevant areas of public relations. The judgment on the unconstitutionality of legal acts gained a characterization of negative lawmaking in the doctrine. Such acts have the status of a source of law, but not as jurisprudence, but as a separate kind of legal act.

As for the judgments of the Constitutional Court on the official interpretation, they are covered by the notion of jurisprudence as rulings in individual cases containing samples of uniform legal and repeated application and interpretation of the law. For example, the judgement of the Constitutional Court of Ukraine on 16 April 2009 on the constitutional provision of Kharkiv city council concerning the official interpretation of the provisions of Article 19, Article 144 of the Constitution of Ukraine, Article 25 (p. 14) Article 46, Part One, ten of Article 59 of the Law of Ukraine «On Local Self-Government In Ukraine» (the right to cancel the acts of local authorities), the reasoning part indicates that non-normative acts of the local self-government are acts of a single application, so they cannot be canceled or modified by the local self-government after their implementation. The above legal position acquired the status of a source of law to which you can refer in terms of not only acts of local governments, but also acts on any subject of public authority[1].

The conclusion, made by the Constitutional Court was in fact based on a general principle of the inadmissibility of the negative impact of the abolition of administrative act on citizens' rights, implementation of which has been recognized or supported with an act which had spread to all acts of public authorities as local governments and public authorities, unless as prescribed those decisions having legal relations connected with the implementation of certain subjective rights and legal interests. The Constitutional Court of Ukraine also bases its legal position on the general constitutional provisions under which the rights and freedoms and their guarantees determine the content and direction of the state, being responsible before the people of the said state (Article 3 of the Constitution of Ukraine). In addition, the overbearing nature of the powers of local governments and public authorities in making their individual decisions on which there are legal relations connected with the implementation of certain subjective rights and legal interests are identical and based on the public nature of

[1] This conclusion is confirmed by numerous decisions of courts of Ukraine, based on the conclusions of the Constitutional Court (See., Eg, the ruling Supreme Administrative Court of Ukraine on 27 October 2015 in the case K/800/42228/15 (http://www.reyestr.court.gov.ua/Review/52952886), decision of the High Specialized Court of Ukraine for Civil and Criminal Cases of 17 February 2016 (http://www.reyestr.court.gov.ua/Review/56517555) etc.

their powers. Accordingly, any public body may not revoke or amend its previous decision, if there exist legal relations connected with the implementation of certain subjective rights and legal interests or there are legal entities opposed to its modification or termination.

Based on the above, we can conclude, that in modern Ukraine the status of a source of law (in judicial practice) is granted to the obligatory conclusions in specific cases of the European Court of Human Rights, some of the UN Committees (ones recognized the by our state), Supreme Court of Ukraine in decisions on unequal application of substantive and / or procedural law and the Constitutional Court of Ukraine in cases of official interpretation. Judgments of other courts (including high specialized courts of Ukraine) containing samples of uniform legal and repeated application and interpretation of law, may acquire the status of source of law yet not mandatory, but convincing (authoritative).

Published: Право України. – 2016. – № 10. – С. 20–27.

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UDC 340.15:94(477)«1648/179»

STATE CONCEPTION OF UKRAINIAN HETMANS (THE MIDDLE OF THE XVII–XVIII CENTURIES): SUBSTANTIAL ASPECTS

In historical and legal science a state conception of the era of Hetmanshchyna was studied in the context of the history of the Cossack state, biographies of its creators – in the works of M. Kostomarov, V. Antonovych, M. Hrushevsky, D. Doroshenko, and contemporary researchers: V. Smoliy, V. Stepankova, A. Myronenko, A. Kozachenko, etc. The monograph of the author was no exception[1]. Meanwhile, studies of state conceptions of the era of Hetmanshchyna enriches our knowledge of state experience of Hetmans, its logic and challenges, circumstances in which the state concepts were developed. This article attempts to explore briefly some meaningful aspects of state conceptions of the Hetmans of Cossack State.

After the victory of the National Revolution of 1648 Cossack ideals and norms of life spread quickly and took roots in consciousness of the Ukrainian population, which sought to defend their right to freedom, to own statehood. The main and, of course, the prevailing idea of that time was the formation of the Cossack State. The most prominent role in development of the state conception, development of formation state program undoubtedly belonged to Bohdan Khmelnytsky (1595–1657). In his «Calling Universals» he promised «our land... to make the blessed», called for a decisive battle with the Poles who marked as «the aim of thier policy to conquer our system of self-governance and choice...». As you can see, the last one was the ba-

[1] Єрмолаєв В. М. Вищі представницькі органи влади в Україні (історико-правове дослідження). – Х.: Право, 2005. – 272 с.

sis and continuation of the state formation for Hetman. «As for me, I shall spare neither life nor strength, ready for any danger, everything will be given away only for the common freedom and peace, and my soul will rejoice soon till I get your fruit that I desire put»[1]. It was a national liberation uprising that Khmelnytsky estimated as a continuation of the previous Cossack uprisings. It rose for the «pious faith and integrity of our Motherland», «for the honor of our gentry, which is being despised, destroyed, highly ridiculed and trampled». Therefore, the task of defending the «ancient rights and liberties of Zaporizhia army» from their neglect and gross violations of the Polish magnates, gentry, Catholic and Uniate clergy[2] was declared as the next goal.

The success of the National Liberation War provided the determination to Hetman's political plans, i.e. obtaining political autonomy for Ukraine as part of the Polish-Lithuanian Commonwealth, representative government and the Ukrainian Orthodox metropole in the Senate. In a letter to the Polish King Wladyslaw IV, B. Hmelnitskiy, emphasizing his allegiance to the King stresses grievances «lords chiefs and Ukrainian statesmen,» asked to allow to «order to keep us in the ancient rights and liberties and that it [warned] us his holy face, for we ... more sterpily not of bondage»[3]. Cossacks oppression and clergy were discussed in the. «Points and instructions given to Cossack ambassadors», in «The Terms sent to Warsaw», so that there were Polish troops on the Cossack territory and the Hetman was granted eldership, Cossacks were given freedom of access to the sea, so they sued right and noble, and were ruled by the king directly, «had its hetman elected Cossacks»[4]. Cossack requirements did not mention withdrawal from the Polish-Lithuanian Commonwealth, but they demanded establishment of national-territorial autonomy. This program of Hetman and Cossack was supplemented in the «Points of Cossack Requirements for King Jan Kazimierz and the Polish Government» on February 24, 1649, where, in particular, establishment of autonomous Cossack state in the Senate was discussed «at least three senators»[5].

Brilliant victories of the Cossack and peasant troops approached Zborowski contract, which made political autonomy of reclaimed Ukrainian lands constituional. However, the failure of the Polish Parliament in the ratification of the Treaty, the abolition of the conditions of the Union of Brest dispelled the hopes of the Hetman for Ukraine's representation in the Polish Sejm and Senate, changed his plans[6]. In early February 1649 he clearly stated to Commissars of the Polish King about his intentions to create an indepen-

[1] Тисяча років української суспільно-політичної думки. У 9 т. Т. 3. Кн. 1 – К.: Дніпро, 2001. – С. 176–178.

[2] Документи Богдана Хмельницького. 1648–1657. Упор. І. Крип'якевич та І. Бутич / АН УРСР. – К.: Вид-во АН УРСР, 1961. – С. 33–39.

[3] Ibid. – С. 80, 81.

[4] Ibid. – С. 80–85.

[5] Ibid. С. 126–131.

[6] Універсали Богдана Хмельницького. 1648–1657. – К., 1998. – С. 47–98.

dent Ukrainian state: «I will knock out of the Polish captivity all Russian people. ...And having stood up the Vistula river, I will say further to the Poles: «Sit down, be quiet, Poles! All of your magnates, princes I will herd there, and if they shout over the Vistula, I will find them there probably...»[1]. Therefore, B. Khmelnytsky sought the release of all the ethnic lands of Ukraine from foreign domination, its national unity, restoration of the glory and the Western borders of Kievan Rus – «as possessed by the pious and great dukes». Thus, for the first time in the history of national social and political thought, the Hetman formulated a national state idea, i.e. creation of an independent state within the ethnic boundaries of Ukraine.

The defeat at Berestechko and the Bila Tserkva Agreement of 1651 had restricted it geographically, however, did not stop the productive state formation processes in Ukraine. They used the experience of the original Cossack Republican organization of government in Zaporizhzhya Sich, tested by practice of military-administrative, regimental-hundredth control system of the Cossacks led by the Hetman, the rule of the government of Common (General), regimental, hundred boards, election of public authorities at all levels, developed by the local self-government. Despite the new threat of war with Poland, B. Khmelnytsky expressed confidence: «we are now the poles again to obey should not be»[2].

Geopolitical field of contemporary Europe was made up exclusively of monarchy, where the monarchs – kings, emperors, tsars represented the national sovereignty, entered the only actors in international relations. This circumstance was taken into account, obviously, Getman, calling themselves in the diplomatic correspondence «edinovertsami and autocrat Russian»[3]. Such a «slotiterator» – evidence of the desire of Hetman connect the ideas of the Cossack republicanism and catholicity with the traditions of old Ukrainian-Russian state, to strengthen personal power for success of the state in conditions of almost continuous war, the complex geopolitical situation of Ukraine. Khmelnitsky opposed to monarchical institutions, and not once publicly condemned them. So, in their state plans and actions of the Hetman was forced to weigh in an extremely complex geopolitical and domestic circumstances that forced him to sacrifice some democratic procedures (regular convening of the General of the Cossack councils, sometimes, violations of election of regimental and hundredth of the elders), changing diplomatic priorities, the configuration of military-political alliances.

The idea of the international orientation policy of the Cossack state was for-

[1] Грушевський М. С. Історія України з ілюстраціями і документами. – Донецьк: ТОВ «ВКФ «Бао», 2009. – С. 217; Смолій В., Степанков В. Богдан Хмельницький. – К.: Вид. дім «Альтернативи», 2003. – С. 180.

[2] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 1 – К.: Дніпро, 2001. – С. 255.

[3] Смолій В., Степанков В. Богдан Хмельницький. – К.: Вид. дім «Альтернативи», 2003. – С. 190.

mulated. Khmelnytsky considering the external threat, the creation of favorable conditions for the state. He proposes «loyalty and citizenship to the Russian Tsar, tries to log to the patronage of Turkish Ports by offering «our friendship», enters into Alliance with Semigradia, noting that the agreement between the two countries should be «not without benefit to the king's Majesty and without harm to the Swedish side»[1]. the Agreement with the same terms was signed with Moldavia and Wallachia. In a letter to the Swedish king in July 1656 Hetman formulates a foreign-policy doctrine: «we used not harm anyone, but rather to compete in goodwill with those who treat us prailno»; «no come on no one on the offensive, but with God's help I will continue to protect as we can, faith, will and our borders»[2]. Maintains an active diplomatic negotiations on the establishment of the international anti-Polish coalition. A real alternative to Hetman considered the project of creating a Confederation of three States – Poland, Lithuania and Ukraine. However, these intentions B. Khmelnytsky did not coincide with the Polish.

The Pereyaslav Treaty in 1654 and «the March article of B. Khmelnitsky» in the opinion of the Hetman had to legally sign an agreement on military-political Alliance with tsarist Russia, constituate it the sovereignty of the Ukrainian state and the independence of Poland. In «the March articles», letters to the Tsar of Muscovy Would be.'nyts'kyi defended the inviolability of public order of Ukraine, «all rights and liberties in the wells and the courts, no magistrates, no Lord or steward of the courts of the troop stood up, and from the older to the society they were judged, where three people of the Cossacks, there are two third must judge» (Art. 1), «...to Zaporozhye army, what exactly elected Hetman...» (Art. 6). «Rights granted from centuries of princes and kings, both spiritual and secular people, so nothing was violated» (Art. 13), «...to the privileges of his Imperial Majesty to us on the charters gave written, to eternal time was inviolable» (Art. 17)[3]. The «Charter» Polski sample were called «Constitutions». Khmelnytsky and had legal force for nearly a century, have been referred to by all subsequent hetmans, the Royal power. For Ukraine «Article Khmelnytskyi» was really an act of constitutional significance, which legally confirms the achievements of the state on the basis of the Republican system, rule of the General of the Cossack Hetman councils and government.

Death B. Khmelnitsky Hetman Ivan Vyhovsky (net. – 1664) in response to the flagrant violation «of Articles Khmelnytsky» by the tsarist government, reviving the idea of a Russian Grand Duchy. In September 1658 the Hetman signed with the Polish commissioners «Gady-

[1] Універсали Богдана Хмельницького. 1648–1657. – К., 1998. – С. 91–102.

[2] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 1 – К.: Дніпро, С. 71–72; 243–244; 248–249; 268–269.

[3] Універсали Богдана Хмельницького. 1648–1657. – К., 1998. – С. 64–67; Тисяча років української суспільно-політичної думки. У 9 т. – Т. 1. Кн. 1 – К.: Дніпро, С. 262–267.

ach treatise»[1]. The signing of the treatise occurs in secret, because Vyhovsky doubted the possibility of its approval both by the Sejm and Cossacks. It was about the establishment of the Ukrainian territory of the Russian Grand Duchy, which along with Poland and Grand Duchy of Lithuania will be part of the Commonwealth. «The entire Commonwealth of the people of Poland and the Grand Duchy Litovskoj and Russian, – was stated in the treatise, – let it be restored to personbut as it was before the war, that is, that these people within their and cobalah were undisturbed... and rights described in the councils, in the courts and the free choice of its sovereigns and Grand Dukes of Lithuania and the Russian...». Regarding the Supreme power in the Grand Duchy of the Russian, the Treaty provides for certain territorial and jurisdictional limitations: «And for the best of these covenants (contracts) approval and loyalty to the Hetman troops Rusko from now on should be to end the life of their Hetman Rusko and the first Senator, and after his death it should be a full election of the Hetman, that is elect four [candidates] select the state... provinces, one of which his Royal Highness will approve without alienating from rank brothers the noble Hetman Russian».

Thus, the General Cossack Council as the principal organ of popular rule were deprived of their powers at the choice of the Hetman. Treatise fixed life status of the Hetmanate.Vygovsky, the possibility of the inheritance of the Hetman's power, his brothers. The most complete political program of the Hetman were outlined in the «List of items, and submissive requests Ivan Vyhovsky Polish king and Polish-Lithuanian Commonwealth», made 1659[2]. They provided for the abolition of the Union, accession to the Duchy of the Russian provinces of the Russian, Podolsk, Volyn, sovereignty of the Hetman in these lands, his right to the appointment of members of the government, the allocation of seats in the Sejm and the Senate for ambassadors and senators from the Kiev province, meet the private interests of the Ukrainian gentry, approving all of the ancient rights of Zaporozhye», the return of property and churches of the Orthodox Church, etc. So, he wrote an extensive programme of reform of the Ukrainian public life and exaltation of the power of the Hetman to the level of a limited monarchy, which is not consistent with the law of the Cossack customs. Plans propolish gentry did not satisfy the Cossacks, Polish-Lithuanian Commonwealth and the Cossack officers on the Pro-Russian orientation. The civil war began, strife, Destruction.

Successor Ivan Vyhovsky Yuri Hmelnitski (near 1640–1685) denied such plans, the reform of the Cossack state. His political program at the beginning of the Hetmanate was quite constructive to take into account the previous experience of the state came mainly from the points of the March articles.Khmelnytskyi[3]. However, the «Articles, or

[1] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 1 – К.: Дніпро, С. 309–316.

[2] Ibid. – С. 332–344.

[3] Ibid. – С. 345–348.

Pereyaslavl of the Constitution given by the king in electing as Hetman Yuri Khmelnitsky» 1659. grossly violated the legal status of Ukraine and its powers are the Supreme authorities. «Articles» is now «the great Emperor... udarowa the behest to do in the Zaporozhian army» General Parliament for the choice of the Hetman, which was read «Articles». Khmelnytsky is sworn to the king, the newly elected Hetman and all Board members «to the eternal and faithful citizenship».

Statist thought later Hetman of Ukraine was forced to reckon with increasingly humiliating conditions limit the Moscow government, the legal status of the Cossack state, the authority of the General councils of the Cossack, Hetman, the Hetman government. Ivan Briukhovetsky (1623–1668), who was elected Hetman of left-Bank Ukraine in 1663, in the Moscow papers (1666) has stated that it is not the Hetman, and the king of the God-sent ruler in Ukraine, and its status as «full and true gosudarst citizenship», agreed all taxes and levies direct to the Royal Treasury, asked the king to send «in the little Russian town gosudarstva Governor» to make Kiev the Governor Keeper of the Hetman kleinods. The Hetman himself refused the right of the Cossack state sciatica with other States. Such zeal was rewarded by the tsarist government boyar image of the Hetman.

In turn, the right Bank Hetman Pavlo Teteria in the «universal grass-roots troops Zaporizhzhya» in November 1663. called on the Cossacks to support the king of Poland, which Polish army and the Tatar troops came to the right Bank, to serve him «as ddocname sovereign»[1]. So his actions Patriotic statesmen have created favorable conditions for the Treaty of Andrusovo (1667), and later «eternal peace» between Poland and Russia, which cemented the division of Ukraine, the destruction of the Cossack state.

Such a policy aroused the indignation of even.Bryukhovetsky: he raises the Left anti-Moscow uprising, returns the titles of «the Hetman of Zaporizhia army loyal», declaring the unification of both parts of Ukraine – «with the brethren of our party to inflict us with the desired consent»[2]. However, to the authority of the Cossack masses could not and was killed. I Miusov, opposition among the Cossack on the external priorities change or destroy state plans Hetman, creative processes.

Right Bank Hetman Petro Doroshenko (1627–1698) first tried to continue the state-line I. Vygovsky, was forced, in spite of the Polish agreement with the Tatars, promising in October 1667 «full and true allegiance to his Royal grace and Richie the Commonwealth»[3]. Hetman renounced rights on the international relations with other States, has agreed to the return of the rights of the Cossacks to the level of the bila Tserkva agreements. This necessary step does not coincide with the true intentions of Doroshenko and the following year he paid

[1] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 1 – К.: Дніпро, С. 403–404.

[2] Ibid. – С. 454–455.

[3] Ibid. – С. 442–443.

articles-requests to the Turkish Sultan: «For the Treaty and the establishment, which was at the time of Bohdan Khmelnytsky, the Hetman, the same wants and Petro Doroshenko, Hetman...»[1]. In the articles we talked about the independent existence of the Cossack state, the reunification of Ukrainian lands, the liberation of the population from paying tribute to the life of the election of Hetman the autonomy of the Church under the Patriarch of Constantinople and others. This project was approved by the expanded petty Parliament at Korsun in 1669 State program Doroshenko was proclaimed and expanded the Russian Ambassador. TEPCO, in particular, is preservation and inviolability of all Cossack liberties, the right to elect the Hetman of the entire Cossack «Cossacks of nature», «live bredolab * and unbroken pricelist... with the Moscow peoples» and the like[2] so, Hetman set ourselves the goal of creating a free Ukraine on the basis of friendly relations with all surrounding States, with the exception of its vassal status.

By the way, as an independent state, Ukraine has seen Peter sukhovey (1645-net), which «Appeal to the Ukrainian people» in October, 1668. opposed Moscow and the Polish patronage, for the connection of the people «both sides of the Dnieper», for public diplomacy. In practice, however, conceded these plans and began an internecine struggle Doroshenko, invaded by the Tatars on the right Bank. Their defeat of the Cossacks, Doroshenko win M over.Khanenko in October 1669, supported by Poland, did not stop the destructive processes and internecine competition.

In its political program, announced, in particular, in the «Order articles ambassadors to Moscow» from 1 January 1669, Demian Mnohohrishny (ad and see unknown) retreated from the idea of unity of Ukraine on both sides of the Dnieper river, placed their hopes on Moscow's patronage. Getman acknowledged allegiance «to the lower servants» of the king's, asked the king to restore and confirm the power of the «Articles». Khmelnytsky as a legal basis for the preservation of Cossack rights and liberties, pre-existing system in Ukraine[3]. Have Proposed the withdrawal of Russian Governor with military people from the Ukrainian cities through the robberies, murders and fires «and all sorts of tortures to people», asked leave of the king of Kiev, to release the prisoners in Ukraine, people. On Glukhovsky Parliament 1669. in the election of the Hetman of left-Bank Ukraine D. mnohohrishny was vasimalai Imperial will «darwati of the Hetman and the whole army this side of the Dnieper rights and liberties is still their right, and their rights and liberties in no will be broken»[4]. But article 3 provides for the continuation of the Russian bail in Kiev, Pereyaslav, Nizhyn, Chernihiv, regular levies, article 19 established the procedure of informing the Hetman, article 20 has defined a new procedure

[1] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 1 – К.: Дніпро, С. 464–468.

[2] Ibid. – С. 445–451.

[3] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 2. – К.: Дніпро. – С. 7–12.

[4] Ibid. – С. 27–52.

for change of the Hetman for his crime, contrary to the «Articles». Khmelnytskyi. Hetman at Glukhovsky the Parliament with the elders and Cossacks, gathered Voight and ricami hoped for an end to strife and civil war, and in the end, and Ruins. Unlike Poland, Moscow also recognized Cossack autonomy, certain concessions, although far from «Articles».Khmelnytskyi.

The new left Bank Hetman Ivan Samoilovich (net.-1690) should start a Board for the more difficult conditions of Konotop (1672) and Pereyaslavl (1674) articles which restricted and regulated the powers of the General councils of the Cossack, Hetman and his government[1].Samoilovich was forced to take part together with the Cossacks and Russian troops in the war against Doroshenko, with the power to turn his citizenship ten regiments of the right Bank part of the officers. So, at that time the only one who really wanted to adopt Ukrainian people most fully in his rights and liberties, preserve democratic institutions, and achievements of the Cossack state, remained Doroshenko. Their views on the state of Ukraine it is stated in the «Letter to the Cossacks» in March 1676[2]. In his opinion, «snames Samoylovich preserve the integrity of its ramenta from the Tatar Nachod complete ruin of the remnants of this side of Ukraine, our homeland...» Came to the conclusion: «Where there is a host to a raft obligasi your moggie was sure that his sheep will remain whole?» In other words, can there be a state without its own borders? The old Hetman «own Breasts, brave hearts, their blood had defended and protected her.» And through left Bank «of the rebels and ambaw» – M. Gunner, J. Somka, I. Samoilovych – «little Russia went bankrupt on both sides of the Dnieper river and a very short military people through many terrible competition». In fact Doroshenko, obviously, saw the main cause of the Devastation. Shares his thoughts: «during the current decline and lyadsky powerlessness we could liberate them, poles, Podolsky, Volyn Polesie and Lithuanian cities and our Russian land», which means «to make something that gave the commemorative intent and my predecessor, Bohdan Khmelnytsky, and return them... starovo freedom.» Thus, in the program of the Hetman of the Ukrainian state on all its land, overcoming its division «into two and three».

About the same vision of the Cossack state and the reasons for Ruins was at the Zaporozhye Cossack Ivan Sirko (to the net.-1681). In «Letter to I. Samoilovych» in September, 1678, he is also a model of the state Would be considered. Khmelnytsky, «Hetman of our good and genuinely titlepage his own country...»[3]. However, after he «began to occur frequent and irregular hetmans and roskana nezichov through the engagement of the neighboring monarchs... our poor Fatherland, a single little Russia, two parts». Nezichov to Ukraine he had the poles and Muscovites, which led to her

[1] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 2. – К.: Дніпро. – С. 94–98; 118–129.

[2] Ibid. С. 133–135.

[3] Ibid. – С. 159–162.

first two, and then three of the Hetman. This brought, according to.Sulfur, the decline of homeland and «her final desolation.» Mishka is silent is the role of Zaporizhia, which contributed to the split in their support of the rebellion, M. Pushkar, Vivienne P. I. Briukhovetsky and dry Winds. Ivan Sirko, the letter expresses, obviously, the opinion of Zaporozhye: «it Seems to us that it would be better for both of you on both sides of the Dnieper to the Hetman to live as brothers among ourselves in love and odnodumtsev, for which their enemies you would be a terrible and always smagumelis in korista for yourself and the little Russian of the Commonwealth». We are talking about the feasibility of friendly coexistence at this stage, two Autonomous entities of the Cossack state under the two protectors. Thus, the state thought I. Sulfur were superior to their patrioticly, pragmatism and variation in the political programs of the successors Khmelnytskyi.

That I. Samoylovych was not zealous muscophiles harm Ukraine wanted to be «snowlady Governor» shall certify «the Petition to the General foreman against the Hetman.Samoilovych» dated July 7, 1687[1]. In the denunciation include allegations of Hetman in the desire to be independent in foreign policy, «arbitrarily to own the Ukraine, and «people of the military orders, that he, and not the monarchs have served». Despite the biased content of the denunciation, he identifies, it seems, And aspiration. Samoilovych to liberate Ukraine from the yoke of Moscow, his acute dissatisfaction with the «Eternal peace» between Russia and Poland that divided Ukraine intend to create a «Little Principality».

Kolomaksky article 1687. accused the Hetman of treason», and the terms of the election of Ivan Mazepa Hetman of the new article even more narrowed the legal status of the Cossack state, the rights and freedoms of its people, the powers of the Hetman: to be «persistent in eternal allegiance»[2]. Hhe Cossacks got the right to choose and dismiss the Hetman, but only with the Royal decree, it was forbidden relations with other States, although the Cossacks again asked to confirm their old right. The capital was declared Baturyn, where the king was said to be under Hetman «for the protection and security of his» Moscow regiment. So, Hetman not so much citizens, how many became hostage of the regiment.

Like his predecessors, Ivan Mazepa in his domestic policy, little heed to the constraints of a signed «Articles» with the tsarist government, continued statepolicy, conducted secret diplomacy. Events of the Northern war pushed the Hetman to the secret relations with Poland and Sweden. In his «Speech to the officials civil and military Cossack Ukraine on the eve of the break with Moscow 1708» he justified his change of geopolitical priorities»[3]. We are now, brethren, between the two abysses, ready

[1] Тисяча років української суспільно-політичної думки. У 9 т. – Т. 3. Кн. 2. – К.: Дніпро. – С. 287–295.

[2] Ibid. – С. 297-316.

[3] Вивід прав України / М. Грушевський, І. Франко, М. Костомаров та ін. – Львів: МП «Слово», 1991. – С. 42–44.

to devour us when we choose the path for myself reliable to get around them». Its discretion Hetman osnovu alternative choice for Ukraine: when the victorious Swedish king will overcome the Russian king, according to the will of the winner, we «inevitably will be ranked as Poland and given into slavery to the poles... and already here and there will not be treaties about our rights and privileges...». «How to allow the Russian Tsar to withdraw the winner, then distress the hour will come to us from the king himself...» so, which of the visible evils choose the lesser, raises the question Hetman in his Speech, «to our descendants, thrown into the slavery of our necrocest, their complaints and curses we are not burdened». Assured Hetman officials and in his good intentions: he managed to convince the Polish and Swedish kings about «patronage and the mercy of our Fatherland.», and the Tsar of great Russia – «jewels neutrality, that is, must not fight we nor the Swedes nor the poles, nor velikorodny, and shall, together with the military forces of our own, to stand in their proper places and to protect their own Motherland...». After the future pacification of the warring States, Ukraine receives the status of an independent Principality, «with its natural riches and, with all the same rights and privileges as a free nation means». Hardly believe the officials on the agreement of Peter i And his boyars on Ukraine's neutrality, the guarantee of its legal status France and Germany. It is, rather, the Hetman of the project than the actual action. Referring to agreement with Sweden as a «continuation of long-standing», apparently referring to Yaroslav the Wise and.Khmelnytskyi. Thus, the political program of I. Mazepa during the height of the Northern war involved the preservation of the Cossack state, protection of its autonomy and independence under the protectorate of the Swedish king. However, two main reasons prevented its implementation: the precaution Hetman of their plans and diplomacy, which deprived him of the support of the officers and Cossacks; the defeat of the Swedish army at Poltava in 1709.

The failure of the uprising of I. Mazepa and its transition with the part of the officers and Cossacks on the Swedish forces from joining them on the territory of Ukraine had Ukraine fatal consequences, accelerating the attack of tsarism on Ukrainian autonomy. Peter rejected the candidacy of the next Hetman – Chernihiv Colonel Paul Polubotko proposed by the Cossacks, in favor of Ivan Skoropadsky. The king was instituted and established the procedure for adoption by the General Cossack Rada «Articles», the terms of which the Hetman had received authority to Peter, And only promised the preservation and confirmation of all «liberties» of the Cossack. «Reshetylivs'ke pleading articles» I. Skoropadsky asked to give legal force to the articles, the data predecessors of the king to the former Hetman of Zaporizhia army. First of all, it was about maintaining the powers of the Hetman of the Cossacks «control yourself», to personally Royal decrees, without intervention of Russian generals and officers, not to violate the rights of the Cossacks,

the return of the Zaporozhian host of the artillery, taken by the king of Baturin, the limitation of the power of the Governor and reducing the number of the Russian pledge, the oppression of the Cossacks and the like[1]. So loyal to the king Hetman is trying to preserve the remnants of the autonomy of Ukraine, state institutions, law and their powers, curses I. Mazepa and calls him a traitor. However, the king did not intend to fulfill his promise and the more recent preservation of the rights of the Hetman.

Radical revival of the Cossack Republic was celebrated reflections and projects ally Ivan Mazepa Pylyp Orlyk (1672–1742), who was elected by the Cossacks in Bender Hetman. We are talking in particular about his «Pacts and Constitution of laws and liberties Zaporizhia army» (1710) and «Conclusion rights of Ukraine» (1712) – sights of statist ideas of the eighteenth century[2]. In the «Pacts and constitutions» provided that the renewal of the powers of the General Cossack Council and Petty officers of the Council in the system of bodies of power and administration of the Zaporizhzhya army. St.6 enormobowl of convening General councils in the Cossack Hetman's residence three times a year – at Christmas, Easter and holiday Cover. On these tips, «with a pre-defined duration», on the orders of the Hetman had to meet the colonels, with their officers and captains were elected General councilors from each of the regiment «a few notable veterans, experienced and highly distinguished men, to enter the public Council», the ambassadors from the grassroots of the Zaporozhye Cossacks. In this part of the General Parliament had the status and importance of the Supreme representative body of the Cossack state, would be a kind of «Cossack Parliament». The convening of the «black» tips article of the Constitution does not provide, thereby constituional single legislature in the future restored Republic.

Analyzed the article took into account the negative effects of the second fault of the Board.Mazeppa: the restored virtue of the rules of Cossack customary law, and most importantly – the trust between the Hetman and the General foreman by calling and broad powers of the General officers ' happy. In its composition should contain selected in the General Cossack Council of the General officers, colonels, inclusive, of the General councilors. Parliament is convened by the Hetman between «sessions» Cossack Parliament, in case of need decisions or performing any urgent matters», the advice of the Hetman or, in the case of receiving emails from foreign countries and drafting responses to them, «that there was a secret correspondence» and «damage the integrity of the Motherland and the common good». Glad petty was assigned to a delegated Supervisory authority over the actions of the Hetman: if he does «the opposite of justice that

[1] Тисяча років української суспільно-політичної думки. У 9 т. Т. 4. Кн. 1. – К.: Дніпро, 2001. – С. 191–194.

[2] Вивід прав України / М. Грушевський, І. Франко, М. Костомаров та ін. – Львів: МП «Слово», 1991. – С. 45–49.

deviates from the law or harm the liberties and the threat to the homeland», the advisors are entitled to «full freedom of voice» and to Express reproach Hetman «private», or, in case of necessity – public (General) happy «requiring a report on the violation of the laws and liberties of the Motherland.»

Another limitation of the Hetman's power under article taking into account the previous negative experience was the deprivation of the right of the Hetman to Hetman's court: guilty (intentional or unintentional) crimes against the Hetman of honor from among the General councilors, or elders, other officials and ordinary Cossacks shall be subject to review by the General court (Art.7). The following articles of the Constitution contained extensive recovery program in state and public life of Republican principles, and management at all levels, the establishment of measures of administrative and criminal responsibility of officials, regulation of income and expenditure of the state Treasury, the eradication of corruption, anti-people fiscal policy, various duties, the introduction of a system of effective social protection, and the like.

Noteworthy under the constitutional mechanisms of checks and balances in the system of the Supreme bodies of state power. Thus, the convening of the General Council is to be granted only by order of the Hetman to a pre-determined time, obviously, to avoid illegitimate «black» Cossack tips with unpredictable solutions. The draft decisions of the Council invites the Hetman, after which «without exception, should be with a clear conscience, rejecting his and others' private interests, without the wicked envy and thirst for revenge, to make the right decision...». Hetman «is endowed with a certain freedom of power and influence», brings «the set oath» at the General Council, limited in his thinking and actions of the General officers and General councillors: «Without their prior decisions and consent, in its sole discretion (Hetman) should neither begin nor resolved, nor to be». A counterbalance to their power provided for the preparation of counselors «for publicly accepted form of corporal oath of allegiance to the Motherland, honest loyalty to the Hetman...». General councilors had the right to demand a report of the Hetman, «but without the profanity and without the slightest harm high Hetman's honor». They themselves must «firmly follow the procedure guided by the General regulations (General) Council, and resolutely to oppose any attempts to offend or infringe upon the weights of the common people.., are required to adhere to the relevant law, and to show every courtesy...» to the Hetman. In turn, he «belongs to their mutually respect, having for military companions, not slaves and count their assistants...».

Thus, the authors of the Constitution sought to strengthen at the constitutional level, the restoration of the Cossack state, its full sovereignty, the Republican form of government within the boundaries recognized during the Khmelnytsky with the restoration of the jurisdiction of

the Zaporozhye Cossacks on all the lands that belonged to them. The articles enshrine the principle of separation of powers into legislative, Executive and judicial, the system of «checks» and «balances». The legislature, the General Cossack Council had a representative character, was elected Hetman, Hetman government, General foreman, must come together and work according to tradition and procedure. Executive power is personified and was headed by the Hetman, the Hetman government, accountable to the General Council, on the ground regulatory and management functions was carried out by the regimental and company administration. The judiciary veverkova General court. Such constitutional provisions provided for a comprehensive system of state bodies. The form of government of the Cossack power had signs of parliamentary-Hetman of the Republic. The implementation of the «Pacts and constitutions» provided that «after the happy conclusion of the war».

In the «Manifesto» of April 4, 1712, P. Orlik «lets you know the kings, princes, republics and other Christian States» on the causes of the war against the king of Moscow, the Union with the Swedish king and his goal: to act in accordance with justice and right, allowing each to protect its own business and its own target»[1]. In the «Conclusion rights of Ukraine», the author briefly outlined the history of the Cossack state from the time when «brave Hetman Khmelnitsky was released from the Polish Cormega suppressed the Cossack nation». To the European readers can understand, he writes about the Cossack state as a Principality, where his condition and the death of Hetman chose to further their princes». «...Cossack nation and Ukraine was free», she concluded treaties of perpetual peace with the Turkish Sultan, the Crimean Khan and the Swedish king. And the strongest proof of the sovereignty of Ukraine, according to P. Orlyk, was a solemn Union Treaty with the Russian Tsar in 1654, who, it seemed, was to always find balance, freedom and order in Ukraine. To «the king as faithfully performed it, as it was believed by the Cossacks.» So now there were only «a shadow of sovereignty» – «vopya injustice» oppressors of the Cossacks. «... The Moscow violence... do not give any legal rights of Muscovites on Ukraine. On the contrary, the Cossacks have the right the right human and natural, one of the main principles of which is: people always have the right to protest against oppression and to attract the use of their ancient rights, when it is the right time».

Interesting for our contemporaries, the story about the danger to Europe from Russia in the «Conclusion rights of Ukraine»: «for Those that care about the interest of the whole of Europe and every state in particular, it is easy to understand the danger to free Europe from this aggressive state». They can judge this not only from the examples of history, but also thanks to the ac-

[1] Тисяча років української суспільно-політичної думки. У 9 т. Т. 4. Кн. 1. – К.: Дніпро, 2001. – С. 237–239.

quired experience in European diplomacy. And this was written long before Russia will become «the gendarme of Europe». The Empire remained (the last!) Empire for 300 years...

Thus, the historical sights of statist ideas of Ukrainian hetmans of the second half of XVII – beginning of XVIII century a valuable source on the history of the Russian state, which reflects their political programs, decisions, and reactions to domestic and geopolitical challenges.

Published: Вісник Національної академії правових наук України. – 2016. – № 1 (84). – С. 43–56.

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UDC 340.15:343.195

SERHII IVANOVYCH ZARUDNYI AND JUDICIAL REFORM 1864

In preparation for the judicial reform 1864 the role of Serhii Ivanovych Zarudnyi is difficult to evaluate. According to the famous researcher of the reform Dzhanshyiev H. A., S. I. Zarudnyi was «the most staunch leader, an ardent inspirator and a tireless worker, in short, a true luminary»[1].

Serhii Ivanovych Zarudnyi was born on 17th March 1821 in Kupiansk county Kharkiv province. He came from an old but impoverished Ukrainian noble family.

Since childhood S. I. Zarudnyi stood out for his exceptional abilities, especially in mathematics, diligence, accuracy, strength of character, seriousness and curiosity.

Since he was fourteen years old being all alone, living in a strange city, Kharkiv, S. I. Zarudnyi without any assistance began to prepare for admission to the University, sometimes experiencing significant financial difficulties, which did not leave him during his studies.

However, in spite of the difficulties, in 1842 Serhii Ivanovych graduated from the Kharkiv University with the degree of candidate of mathematics.

The same 1842 year, he arrived in Petersburg with the intention of taking over as astronomer at the Pulkovo Observatory, but the destiny had other plans for him, and instead of the Observatory S. I. Zarudnyi was in the Ministry of justice. And on 24th April 1843, he was appointed senior assistant to the head clerk, officially becoming a departmental officer. But alive and talented nature of Serhii Ivanovych warned him against the danger of becoming a bureaucrat, and vice versa, is closely connected with the creative reform of the judicial system.

The first S. I. Zarudnyi collision with the reform of the judicial system took place in 1843, thanks to the circular of

[1] Джаншиев Г. А. Эпоха великих реформ. Т. 2 / Г. А. Джаншиев. – М. : Территория будущего, 2008. – С. 17.

the Ministry of justice on the collection and compilation of the chiefs of courts and prosecutors' opinions about the weaknesses of the existing civil procedural laws in connection with the proposed conversion. Working with documents sent from the places, Serhii Ivanovych became interested in new views on judicial-legal life, that opened before him all its diversity and complexity, which brought him a huge advantage in further work to reform the judicial system and legal proceedings. «this was my school, – wrote in his memoirs S. I. Zarudnyi, – I was interested in the question of the imperfection of our laws: and exactly out of these disadvantages, I began the study of the laws themselves»[1].

It was very important school for S. I. Zarudnyi and incomparably more fruitful than the then University law school, which was engaged in commenting on the existing legislation, erecting into a dogma of almost every article of the Laws, not even daring to think about their critical analysis[2]. Working on the generalization of the reviews, S. I. Zarudnyi at the same time acquainted with foreign legislation, comparing it with national laws, travelled abroad, and for example, during a trip to Paris he actively studied French jurisprudence.

Already at that time the activity of S. I. Zarudnyi is characterized not merely as a legal practitioner, but as a legal author. He tried to use the historical method to understand the essence of the law, separate incidents sought to reduce to General principles of law, fragmented practices of law enforcement have made the unity, and can say that was one of the originators of the Russian school of practical jurisprudence. Soon he acquired such authority, that the chief prosecutors and senators began to consult with him.

Active creative position of Serhii Ivanovych provided him with access to active participation in the work of the forthcoming reform of the judicial system which began in 1843. Although work in this area proceeded very slowly due to conservative position of the Minister of justice, the earl V. N. Panin, who believed even the very moderate proposals by the chief manager of the II Department of his Imperial Majesty's Chancellery of the earl D. N. Bludov are overbold and even radical. After a long and fruitless confrontation between Panin and Bludov in 1852 at the II Department of the Office was formed the Committee to draft civil proceedings, and Serhii Ivanovych was appointed as its clerk. Despite the modest title, S. I. Zarudnyi significantly influenced the work of the Committee and tried to bring in the civil process are all possible, for that time, innovations and improvements.

A huge help in the quest of S. I. Zarudnyi to reform the judicial system and legal proceedings was his direct acquaintance with the situation on the ground as the clerk of the Committee, headed by the prince V. I. Vasylchykov and established to investigate the abuses commissariats during the Crimean War. The immediate awareness of the situation in the

[1] Сборник Правоведения. III. – С. 3.

[2] Джаншиев Г. А. Эпоха великих реформ. Т. 2 / Г. А. Джаншиев. – М. : Территория будущего, 2008. – С. 238.

South of Russia showed S. I. Zarudnyi the ugly picture of what the huge size reached embezzlement and bribery in the military, and what a terrible state has the court and the office during the domination of administrative arbitrariness and silence society. All this strengthened the determination of the S. I. Zarudnyi to work towards the reform of the judicial system[1].

With support of the State Secretary V. P. Butkov S. I. Zarudnyi was appointed as an assistant Secretary of the State Council in April 1857. V. P. Butkov realizing the inevitability of judicial reform sought to update the state of the office with young, new-minded staff and, therefore, invited Sergey Ivanovych as a connoisseur of civil procedure, a draft of which was made with his active participation and has already entered the discussion of the State Council. From this point S. I. Zarudnyi became even closer to the case of judicial reform, becoming its driving force and leader[2].

Despite his modest position, S. I. Zarudnyi actively participated in the work of the Committee and significantly affected its activity and tried to introduce all possible improvements, which were in line with the spirit of the time, to the civil process, but because of the opposition V. Panin he could not implement such revolutionary innovations as publicity and verbalness of the process.

However, by the end of the reign of Mykola I a project of reforms of civil procedure were prepared. Although the overall judicial policy of Mykola I, can be characterized as pre-reform[3].

Despite the coming to power of the liberal Alexander II, the mood in ruling circles of that time were vague, often walked in the footsteps of Mykola's regime and was not always progressive. As a consequence, the discussion of the mentioned draft civil proceedings commenced on 15 November 1857 from reading a Supreme decree by which the State Board was forbidden to arise questions about the jury, legal profession and publicity of the process.

In this situation the developers of the reform remained nothing but be content with palliative measures of a purely technical nature, and wait for the judicial reform in democratic and rational principles of better times that came only with the abolition of serfdom.

Being an ardent supporter of reforming the judicial system, S. I. Zarudnyi avoided extremes in its development. So, he acted as an opponent of prince D. A. Obolenskyi, who was proposed during the reform proceedings to take all French proceedings, which was in force in the Kingdom of Poland. Serhii Ivanovych strongly objected to such borrowing, and his position affected members of the State Council, making them look deeper at the problem and put the

[1] Зарудный С. И. Письмо опытного чиновника сороковых годов младшему брату, поступающему на службу / С. И. Зарудный // Русская старина. – 1899. – No 12.

[2] Джаншиев Г. А. Эпоха великих реформ. Т. 2 / Г. А. Джаншиев. – М. : Территория будущего, 2008. – С. 242.

[3] Захаров В. В. Судебная политика Николая I / В. В. Захаров // История государства и права. – 2012. – No 3. – С. 46–47.

question of judicial reform more broadly. In the result, it was decided not blindly adopt foreign models, and to first develop the basic principles of reform, taking into account national and foreign experience, and receive to them a preliminary finding of the State Council and then referred to the local judicial institutions. According to this approach in reforming the court took part the public, to what S. I. Zarudnyi attached great importance. He was the initiator that the comments received from the places have to be printed and distributed to the members of the State Council. In addition, such mailings were made to scientists-lawyers and specialists, which greatly expanded public participation in judicial reforms. This approach to the reform of the judicial system was gradually infiltrated by elements of the publicity of the trial, legal profession, separation of the judicial government from administrative government etc.

Despite all these efforts of S. I. Zarudnyi work on judicial reform during 1857–1861 was conducted slowly and hesitantly. But the achievements made at that time, was not in vain. Exactly at that time Serhii Ivanovych paid much attention to the generalization of the European experience. In these years he made several trips abroad to study the experience of the European judicial system and legal proceedings, and has prepared for publication a number of special works on the process. At that S. I. Zarudnyi continued to speak out against the blind copying of foreign experience. In his works, Serhii Ivanovych played a passionate champion of deprivation the administrative authority and police functions peculiar to the judiciary, defended the principle of adversarial process as the conditions of its implementation, the introduction of the legal profession. S. I. Zarudnyi stood for the unity of the appeal as the event, which contributed to a uniform understanding of laws and elimination of judicial arbitrariness.

The fundamental position of the S. I. Zarudnyy in reforming the judicial system in Russia was closely connected with the necessity of drastic reform of the social structure of society in general. According to S. I. Zarudnyi, without a radical solution of the peasant question could not be made rational judicial reform. In his opinion, serfdom had not need in a fair court. These judges were only landowners. Over the peasants reigned Supreme arbitrary court. The situations of the February 19, 1861 broke these rules. Then in Russia there was an urgent need in the fast and fair court. And to summarize nearly two decades of experience in the implementation of the judicial reform, in 1885 Serhii Ivanovych wrote: «if in 1861 did not place the liberation of the peasants with land, in any case would not have been issued legal statutes in the form in which they appeared on November 20, 1864»[1].

In 1861 S. I. Zarudnyi finally got a real opportunity to implement his plan for serious judicial reform in Russia, built on a rational basis. Serhii Ivanovych seeing the need in Russia's liberal transformation, in a hurry to «strike while the iron is hot» and to liberate the

[1] Русская старина. – 1885. – No 5.

judicial system from faults, which its has, and put in it innovative rational democratic principles.

In October 1861 S. I. Zarudnyi prepared for D. Bludov a report analysing the difficulties that have arisen in the consideration of his own, Earl D. Bludov and projects, compiled at different times and inconsistent among themselves. On 24th of October 1861 came in a Supreme decree of establishment at the State Office the special Committee headed by I. Zarudnyi and attached to it famous legal authors and practitioners[1] to extract from D. Bludov's drafts «major basic principles». At the end of 1861 the Committee completed this work, which made it obvious that those «basic principles» is not sufficient to carry out a comprehensive judicial reform. Prince P. Haharin, who replaced D. Bludov on a post of the Chairman of the State Council, in 1862 received the command of Alexander II, who proposed to outline the considerations of the State Office about the main principles, according to which the judicial system has to be converted taking into account studies of science and experience of European States. This act removes the prohibition on implementation in Russia of certain institutions of the European judicial law, such as trial by jury, and was able to compile a coherent and rational plan for the transformation of the court. The Committee, the soul of which was S. I. Zarudnyi, within six months had completed the work and presented «Considerations and Basic provisions on civil and criminal proceedings». Among the basic principles that were the basis for judicial reform were: complete separation of the judicial authority from the legislative and the executive, the irremovability of judges, independence of the legal profession, the decision of criminal cases, including political, jury etc. Serhii Ivanovych has specifically supported the proposals of the Committee member D. Rovinskyi to replace dumb estates jurors with jury for decision on the question of guilt, besides were given a detailed historical sketch of trial by jury in Europe with in-depth analysis of the arguments for and against this institution in relation to the Russian realities. Among the works that have been prepared by S. I. Zarudnyi of these problems, it is important to point out: «General considerations on the composition of the criminal court and a special jury for a particular kind of Affairs in England, France and Italy». Such attention S. I. Zarudnyi to the jury is not accidental. The fact that the issue of the jury was perceived ambiguously at that time in Russia. On the one hand, there were allegations that the Russian people have no living sense and consciousness of the right that they confuse the law with the orders of his superiors, often associate the offender with the poor and because of that Russian society is not yet ready for the introduction of trial by jury. On the other hand, there was a view that the jury is contrary to the autocratic system of Russia, as it is an interfering of the society in the Affairs of government.

S. I. Zarudnyi was the enemy of both these biases. He developed a theory on

[1] История российского правосудия / под ред. Н. А. Колоколова. – М. : Закон и право, 2009. – С. 238.

the basis of which there is a border between despotism where everything is dominated by the will of the ruler, and monarchy, which although is administered by the will, but on the basis of properly and permanently the existing laws. Based on this, Serhii Ivanovych and his associates argued that the jury and other key institutions of the judiciary, such as publicity, separation of court from administration, although they have a definite political character, but they limit the arbitrary of the administration and it is compatible with a monarchical form of government where the law is respected[1].

All of these efforts of S. I. Zarudnyi were not in vain, they achieved two important objectives: first, the D. Bludov's drafts change into legislative material and became the basis for the preparation of new drafts in a single comprehensive plan, and secondly, from the management job was eliminated elderly Earl D. Bludov, who began to incline to some liberal ideas, but could not lead such a large and important business. Because of this, the Committee, which was carried out by S. Zarudnyi, at the end of 1861 had completed its work. But it was obvious that not enough drafts for a comprehensive and a deep reform of the judicial system. Skillfully playing on the contradictions between the indecision of the initiator of judicial reform Earl D. Bludov and resistance from the Minister of justice Earl V. Panin, S. Zarudnyi in the shortest possible time – two or three months – managed to turn things around so that in 1862 it was put on a rational basis. From that moment the fate of the future transformation of the judicial system was solved and has opened access to all the major institutions of the European judicial law for Russia.

Considerations of State Office was notified by S. I. Zarudnyi to State Council and the royally approved on 22nd of September 1862[2], after which it was sent to academic lawyers and practitioners and published in the Collection of legalizations and orders. Their content both in Russia and abroad was perceived definitely – Russia is on the verge of the introduction of judicial institutions that will not concede to the European.

After that the problem moved to the practical level. For drafting legal regulations in accordance with the «Basic provisions» under the State Office was formed a new Committee. It was composed of three departments: civil justice, criminal justice and judicial system. Technically, its head was appointed V. Butkov, and under the headship of the S. Zarudnyi was a branch of civil proceedings, but Serhii Ivanovych worked with tireless energy in all departments and especially in General assemblies and was the life and soul of the Committee.

Serhii Ivanovych tried to get the Committee all progressive that was de-

[1] Памятники российского права : в 35 т. Т. 13: Судебная реформа 1864 года в Российской империи / под общ. ред. д-ра юрид. наук, проф. Р. Л. Хачатурова ; д-ра юрид. наук, проф. А. А. Демичева. – М. : Юрлитинформ, 2015. – С. 87–88.

[2] История российского правосудия / под ред. Н. А. Колоколова. – М. : Закон и право, 2009. – С. 238.

veloped by the legal science and practice at the time. He repeatedly subjected to processing of the drafted articles, passionately arguing and trying to explain the matter from all sides. Working with the proofs he strived to perfect each article.

Less than a year the Committtee drew up a draft legal regulations, adding to them the large scientifically motivated explanatory notes (18 000 pages). Draft legal regulations were sent to ministries and judicial institutions to give their feedback to and the comments received from them were given by S. I. Zarudnyi to State Council, which accepted them, and on 20th of November 1864 Judicial Statutes were signed by Alexander II.

The contribution of S. I. Zarudnyi in the development of the judicial reform symbolically was evaluated by the Chairman of the Committee the Earl V. Butkov, who on 22nd of November 1864 sent to S. I. Zarudnyi first printed copy of the Judicial Statutes, with a note: «the first printed copy of Judicial Statutes is awarded to Serhii Ivanovych Zarudnyi as to the person to whom the Judicial reform in Russia is most of all owes its existence»[1].

After the approval of legal regulations S. I. Zarudnyi was finally appointed by the Secretary of the State Council, took an active part in the drafting of additional laws to them and became part of the State created under the office of the new Commission for drafting the regulations on the introduction of legal regulations.

And here the role of Serhii Ivanovych was very significant. The fact that the majority of the members of the Committee inclined to the view of the Ministry of justice, which proposed to open a new judicial institution not at once and everywhere, but gradually, citing practical difficulties.

Fearing typical for Russia of rapid cooling to reform S. I. Zarudnyi supported by members of the Committee M. A. Butskovskyi and O. I. Kvist strongly insisted on the introduction of Statutes in all provinces.

Finishing work on judicial reform S. I. Zarudnyi has regulated the preparatory material, «the Case of the transformation of the judiciary in Russia», dividing it into 74 volumes. In addition, he rendered a great service to the Russian legal science and judicial practice and to the Russian social development in general, having issued the classic work «the Judicial Statutes of the 20th of November 1864 and the arguments on which they are based» in 1866[2].

Shortly after the introduction of legal regulations came as a result of the reaction, unfavorable times for both the new court and its chief reformer S. I. Zarudnyi because of the replacement of D. M. Zamiatin on a post of the Minister of justice by K. I. Palen, who was hostile to the Basis of Legal Regulations. S. I. Zarudnyi as a faithful guardian of the «basic principles» of judicial reform

[1] Джаншиев Г. А. Эпоха великих реформ. Т. 2 / Г. А. Джаншиев. – М. : Территория будущего, 2008. – С. 248.

[2] Судебные уставы 20 ноября 1864 года с изложением рассуждений, на коих они основаны : в 2 ч. – СПб. : Изд. Гос. Канцелярии, 1866.

and as state Secretary of the Department of law had a possible opposition to the reactionary intentions of the new Minister. Due to the authority that Serhii Ivanovych has by members of the State Council, the proposals were positively received, and this further increased his reputation as a «liberal», which he had along with other staunch defenders of judicial reform.

January 1, 1869. with the help of efforts of the reaction S. I. Zarudnyi was removed from the legislative work and appointed as a Senator, and not to the Cassation Department, where he more than anyone had a right to be because of his past experience and where his knowledge would be the most useful for reasonable interpretations of Legal Regulations, but in the old Department – boundary.

Sending S. I. Zarudnyi away from the State Office aroused sympathy among the many members of the State Council.

Fear of the authority of S. I. Zarudnyi was so large that he up to the end of his life never had the opportunity to participate in the activities of the Supreme regulator of the new court, the creation of which he took such a hot and fruitful participation.

However, loving a great thing of publicity of court, S. I. Zarudnyi could not resist the desire at least indirectly to penetrate into the temple of a new trial, to which the new leaders have closed access to him. He ran for honorary magistrate in Kupiansk district, Kharkiv province at the location of his family estate. Here he spent his usual summer vacation, during which carefully attended meetings Kupiansk Congress of magistracy.

Published: Вісник Національної академії правових наук України. – 2016. – №1 (84). – С. 57–65.

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UDC 340.132.8

THE MAIN OBJECTIVE OF LEGISLATION: TO GOVERN RELATIONS OR TO REGULATE GOVERNANCE OF RELATIONS? SOME REFLECTIONS

Problem statement. In the legal literature and practice, very oftenfor the determination of a nature and characteristics of legal systematization of social relations, the concept «legal governance» is used[1]. Mechanism of legal governance is considered as a logically consistent, dynamic system of unified legal means necessary and sufficient to ensure effective legal governance of social relations [2].

At the same time fairly similar concepts such as «legal effect», «legal regulation» and others are used virtually in the same sense. The difficulty with this approach is that it may allow different interpretations: these concepts may be explained as synonymous, as parallel concepts, as antonyms, and even somewhat paradoxical componentsof each other etc.[3] Such tendency can be traced on all levels: ingeneral theory, in interbranch and in branch sectors. It is worth adding that not with standing the scholarly relevance of the discussion its so-called «exaggeration» may have com-

[1] Теорія держави і права: підручю для студю юрид. вищ. навч.закл. [Текст] / О. В. Петришин, С. П. Погребняк, В. С. Смородинський та інш.; за ред. О. В. Петришина. – Х. : Право, 2014. – 134 с. – 368 с.

[2] Общетеоретическая юриспруденция: учебный курс: учебник [Текст]/ под ред. Ю. Н. Оборотова. – О. : Феникс, 2011. – С. 37. – 436 с.

[3] Наприклад, вважається, що «правовий вплив» та «правове регулювання» є сторонами так званого виразу процесу правової регламентації. Див.: Махаев Р. Е. Правовые основы Российского государства: учебник для студентов вузов, обучающихся по специальности «Государственное и муниципальное управление» [Текст]/ Р. Е. Махаев. – М.: ЮНИТИ-ДАНА, 2007. – С. 188. – 315 с.

plex implications for other important aspects of legal life, including: law-making processes, practical application of law etc.

Thepurpose of this paper isto define and systematize these concepts, toidentify their content, toshow their influence on the content of legislation, as well as to provide a description of peculiar properties of the employment of the concepts on different levels.

Analysis of previous research into the topic. Generally, to date there has been sufficient research into the issue of legal governance conducted by Ukrainian scholars. Among them are: A. V. Zaichuk, N. M. Onishchenko, Y. M. Oborotov, O. V. Petryshyn, P. M. Rabinovich, V. S. Smorodinsky and others. Howeverthere is still a need in a broader research and a greater attention to particular aspects of the topic such as characterization, differentiation and systematization of the concepts «legal governance», «legal regulation», «legal effect».

Paper main body. Overall the topic in question is complex and multifaceted; therefore this paper focuses on itssome particular points.

It should be pointed out that most frequently the concepts «legal governance» and «legal effect» are considered as having different meanings. The legal effect is commonly recognized as a complex process of the law impacton public life, consciousness and people's behavior through direct and indirect legal means. Being a traditional constituent element of the social governance and one of the pivotal parts of a state's activities the legal effect is primarily based oneconomic, political, ideological, cultural and other conditions of a society-development[1]. The latter statement needs to be noted since it will be referred to further in this paper while providing an analysis of the essence of law. Whereas, the legal governance is a process of organizational and legal systematization, development and protection of public relations.

The initial differentiation of both concepts will allow not solely to systematize them, but through comparison to identify more specifically their content. The investigation into the issue should start with the philological (linguistic) explanation of theconcepts. In a general sense, the word «effect» meansa result or consequence of an action or other cause.While the term «governance» stands for a system for arranging, organizing and setting up something. The purpose of the governance is to place something in a certain framework, relevant boundaries.In short, effect is a result, and governance is a process, a tool etc.

From law perspectives the legal effectis seen as effective organizational and legal action of rules regarding to public relations, which is carried out by legal means (law norms, acts of law application), and other legal phenomena (legal consciousness, legal culture, law-making process, etc.).In contrast, legal governance is the arrangement of public relations; their legal management, pro-

[1] Юридический научно-практический словарь-справочник (основные термины и понятия) [Текст]/О. Ф. Скакун, Д. А. Бондарева; под ред. О. Ф. Скакун. – Харьков: Эспада, 2007. – С. 267–268.

tection, development etc. that is provided by government equipped with law and a collection of legalmeans. It should be emphasized that government ensures the vital functions of societyas a system, through the use of power, and law – through the normative governance[1]. While legal governance is always associated with the establishment of specific rights and obligations of subjects, the implementation of legal norms etc., the legal effect is characterized by another attributes. For example, the legal effect, relatively speaking, unlike the legal governance, is not always associated with the establishment of rights and obligations, not always works through legal relations etc. Legal governance is to a certain extent a specific effect, which is carried out by a special normative regulator (normative governor) – law, whereas legal effect is a more general social, spiritual andideological influence of law on social processes taking place in the country.When it comes to legal governance, relations between subjects acquire legal forms within which the state indicates measures of the required behavior. In this regard, legal governance is considered specific and such as being focused on the enforcement of legal rules.

In summary, there is a number of features that allow making a distinction between the concepts «legal effect» and «legal governance».

Considering the legal effect and the legal governance, and furthermore other components of social governance, one should draw special attention to the important essential factor that characterizes law in a particular state, in a group of similar states or, in other words, helps more clearly understand the nature of a specific law (national law system).

Awareness of the fact of conformity of essence of law in a particular state (group of states) with its social system[2] allows to identify more clearly, at least on the expert level, the interests of what particular group, social class, specific class[3] the whole population law protects, or in other words, according to the modern definition – in what way the law considers the existing real social stratification[4]. Exploration of this aspectmust reveal who, figuratively speaking, «creates» law in a particular state and to whom, accordingly, it should serve. In this regard one should take into account that the dominant group of citizens virtually in any developed society always

[1] Теорія держави і права. Академічний курс: Підручник [Текст] / за ред. О. В. Зайчука, Н. М. Оніщенко. – К. : Юрінком Інтер, 2006. – С. 292–295.

[2] Лейст О. Э. Сущность права. Проблемы теории и философии права [Текст] / О. Э. Лейст. – М. : ИКД «Зеркало-М», 2002. – С. 153. – 288 с.

[3] Стрельцов Є. Л. Відповідальність за спекуляцію при капіталізмі: міф або реальність! [Текст]/ Е. Л. Стрельцов// Юридичний вісник України. – 2016, 26 серпня – 1 вересня. – №34 (1102).

[4] Наприклад, у сучасній соціології кажуть про існуючі в суспільстві певні класи як про сукупність людей, які мають схожі життєві можливості, опосередковані доходом, престижем і владою. Див.: Типы и виды стратификации [Электронный ресурс] – Режим доступа: www.grandars.ru/college/sociologiya/tipy-stratifikacii.html – Название с экрана.

seeksto maintain (acquire) the economic and political power[1]. This state of affairs allows not solely taking into account external factors, but understanding the essence and trends of legal effect in its broader sense.

Related to the analysis is the concept of «legal regulation» which requires definingin terms of the strict sense and in comparison with the term «legal governance». Moreover, the complexity of such a definition is not just «confusion» with the use of the term, which was noted earlier in the paper. Thedifficulties are added by the fact that to date there has been little research into the concept of «legal regulation», its essence and features.

Some researchers have offered solid «tips»regarding the concept of «legal regulation». For instance, it is suggested that, based on the provisions of the general theory of law, legal regulation is the so-called consolidation ofobjective law[2]. Objective law is a system of formally binding common rules of conduct that have been established or sanctioned by the state; that express the will of the dominant part of the socially inhomogeneous society; are aimed to regulate social relations in accordance with the will and general social needs, and are provided by the state[3].Such approach makes it possible to consider this issue in detail. The initial phase of the study allows consideringthat legal regulation «deserves» a broader definition, especially on interbranch and in branch levels. It is believed that legal regulation is not always the process of normative support. Understanding the legal regulation in a broader sense allows not onlyanalyzing the legislation, but also identifying the existing or credible approaches to creation, or cancellation, or amendment the legislation, revealing the correlation of existing laws and legal doctrines or existing practice. This also allows to compare legislation in force (the normative basis) to the law (the normative basis) of foreign countries. Analysis of legal regulation may provide with the evidence of interaction between provisions of national legislations (the normative basis) and international instruments. Furthermorethe study may support in identifying problems and contradictions that exist in the current legislation. Overall, this approach may contribute to formulation of more qualitative proposals for the law improvements in broad terms.

Understanding legal regulation in this way allows focusing attentionon some very important points. It is assumed that regarding the certain group of «specific» public relations it is irrelevant to employ the concept of «legal governance», for example, when addressing international and intrastate-

[1] Рабинович П. М. Социалистическое право как ценность [Текст]. Издание 2-е, стереотипное. / П. М. Рабинович. – Одеса: «Юридична література», 2006. – С. 58. – 168 с.

[2] Теорія держави і права: підручник для студ. юрид. вищ. навч. закл. [Текст] / О. В. Петришин, С. П. Погребняк, В. С. Смородинський та ін.; за ред. О. В. Петришина. – Х. : Право, 2014. – С. 135. – 368 с.

[3] Рабінович П. М. Основи загальної теорії права та держави. Навч. посібник [Текст]. Вид. 9-е, зі змінами. /П. М. Рабінович. – Львів : Край, 2007. – С. 87. – 192 с.

armed conflicts. Undoubtedly, law plays a pivotal role in such cases, however one should be careful with overestimating potentials of law in managing difficult, even tragic events. Many other instruments may address these challenges, and law creates only the necessary legal base for it. For that reason in this and other similar cases, the law should take a role of legal regulation.

A special reference to the action of law on a branchlevel, allows more precise study of other provisions that are considered traditional while recognizing the fundamental problems of legal regulation and tasks of legislation. Exploration of this topic reveals some problematicissues. Amongst them are, for instance, lack of unity in identification of tasks of thesectoral legislation, of a role of a particular area of legislation in carrying out these tasks etc. Evidently, each branch of law has its tasks, however a common methodological approach to the identification of objectives of a particular area of law, challenges of the entire system of national legislation should be uniform in essence, since it facilitates improvement of a system of the national legislation and its single elements.

In this regard, turning to the Ukrainian national legislation one should consider provisions of the Constitution of Ukraine stating, for example, that the state (government): *«ensures protection* (highlighted by E. S) of rights of all property rights holders and economic operators» (Article 13);*ensures* environmental *safety* and *maintenance* of ecological balance» (highlighted by E. S.) (Article 16) etc. At the same time, on the theoretical level the Constitution of Ukraine is viewedas the *legal base* (highlighted by E. S.) for the adoption of other laws and for*the governance of numerous social relations* (highlighted by E. S.) which are based on the system of the state power organization, including those arising between public authorities and a society,an individual and a citizen[1]. In more general terms, it is claimed that the Constitutional provisions, in contrast to norms of other branches of law, *govern* (highlighted by E. S.) a specific sphere of social relations[2], and *protect* (highlighted by E. S.) the most important and general political and legal public relations[3].

Similarly, substantive branches of laws that are subordinate to the Constitution employ the same general approachwith regard to appropriate social relations. For instance, Civil Code of Ukraine, as a «representative» of private law legislation, in provision «Relations governed by civil legislation» (art. 1) states, in paragraph 1, that the civil legislation *governs* (highlighted by E. S.) individual nonproprietary and proprie-

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[1] Конституція України та її розвиток. Поняття. Предмет і структура Конституції [Електронний ресурс] – Режим доступу: http://pidruchniki.com/1281041946859/pravo/konstitutsiya_ukrayini_rozvitok. – Назва з екрану.

[2] Конституційне право України [Текст]: Підруч. для студ. вищ. навч. закл./ за ред. В. П. Колесніка та Ю. Г. Барабаша. – Х.: Право, 2008. – С. 5.

[3] Задорожня Г. В. Конституційне право України [Текст]: підручник / Г. В. Задорожня, Ю. А. Задорожний, І. М. Сопілко. – К.: Видво Нац. авіац. ун-ту «НАУ – друк», 2010. – С. 9.

tary relations (civil relations), which are based on the legal equality, free will and property independence ofsubjects[1].

At the same time, Family Code of Ukraine in Article 1entitled «The task of the Family Code of Ukraine» states that the Code *«defines* (highlighted by E. S.) principles of marriage, individual nonproprietary and proprietary rights and obligations of spouses, grounds for the emergence and the content of individual nonproprietary and proprietary rights and responsibilities of parents and children, adoptive parents and adopted children, other family members and relatives»[2].

Analysis of the laws in the sphere ofpublic law system also shows the lack of uniformity in the declaration of challenges set forth in the laws. Article 1 of the Economic Code of Ukraine «Subject of governance» reads as follows: «Code *sets forcebasic principles* (highlighted by E. S.) of economic activity in Ukraine and *governs* (highlighted by E. S.) economic relations arising between economic entities, these entities and other participants of economic relations in the process of organization and carrying out of economic activities[3].

Article 1 «Relations governed by the Budget Code of Ukraine» of the Budget Code of Ukraine stipulates that the Code *governs* (highlighted by E. S.) relations arising in the process of drafting, review, approval, execution of budgets, reporting on their implementation and control over compliance with budget legislation and issues of *liability for infringement* (highlighted by E. S.) of budget legislation. The Code also *sets forthlegal basis* (highlighted by E. S.) for formation and payment of state and local debt[4].

Code of Ukraine on Administrative Offences in its Article 1 stipulates that one of the objectives of the Code is *protection* (highlighted by E. S.) of rights and freedoms of citizens, property, constitutional system of Ukraine, the rights and interests of enterprises, institutions and organizations, the established law order, rule of law[5].

Article 1 of the Tax Code of Ukraine, entitled *«Scope* (highlighted by E. S.) of the Tax Code of Ukraine» stipulates that the Code governs relations arising in the

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[1] Цивільний кодекс України (Відомості Верховної Ради України (ВВР), 2003, № 40–44, ст. 356), в ред.11.06. 2016 р. [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/435-15 – Назва з екрану.

[2] Сімейний кодекс України (Відомості Верховної Ради України (ВВР), 2002, № 21-22, ст.135), у ред. від 08. 06. 2016 р. [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/2947-14. – Назва з екрану.

[3] Господарський кодекс України (Відомості Верховної Ради України (ВВР), 2003, № 18, № 19–20, № 21–22, ст. 144), у ред. від 01.08.2016 [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/436-15 – Назва з екрану.

[4] Бюджетний кодекс України (Відомості Верховної Ради України (ВВР), 2010, № 50–51, ст.572), у ред. від 11.06. 2016 [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/2456-17. – Назва з екрану.

[5] Кодекс України про адміністративні правопорушення (Відомості Верховної Ради Української РСР (ВВР), 1984, додаток до № 51, ст. 1122), в ред. від 27. 07. 2016 [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/80731-10. – Назва з екрану.

collection of taxes and fees, including an exhaustive list of taxes and duties imposed in Ukraine and the procedure of their administration, taxpayers and duties, their rights and duties, competence of regulatory authorities, powers and duties of its officers in the performance of tax control and liability for violation of tax laws.This Code defines the functions and the legal framework of regulatory bodies specified in paragraph 41.1 of Article 41 of the Code»[1].

Part 1 of Article 1 of the Criminal Code of Ukraine «Objectives of the Criminal Code of Ukraine» states the Code's task asa *legal support for the protection* of the rights and freedoms of a individual and a citizen, public order and public safety, the environment, the constitutional system of Ukraine from criminal attacks; providing peace and security and prevention ofcrimes[2] [21]. It should be noted that solely this Code mentions the *legal support* as the objective of criminal laws.

The preliminary exploration of the topic has allowed making important findings. First, each of the branches of laws that have been analyzed, has its, figuratively speaking, «personal» objectives, although is an element of the general system of national legislation. Hence, laws in a given national system should posses at least common coordinated goals and objectives. Second, despite the differences in definition of objectives of legislation the term «legal governance» is set forth as a sole or one of the objectives virtually in all the laws, which, we believe, is burdensome for the laws.

Recent discussions on issues of legal governance more and more frequently have concerned about the «political will» aspect. This is explained by the fact that, notwithstanding the qualitative legislation, legal governance in many respects depends on the implementation of laws. It worth emphasizing that the laws create«solely» necessary legal base, the legal «prerequisite» for exercising the governance. In this regard, the legislation represents a legal form, or rather the legal regulation of legal governance, which operates on this basis.

Summing up, it should beunderlined that, criminal legislation seems to be more closely connected with these considerations. In particular, Part 1 of Article 1 of the Criminal Code of Ukraine identifies its objective as «legal support» or, in another words, a legal regulation. All other substantive branches of laws are viewed as not being precise enough about their objectives.

Conclusion. Concepts «legal effect», «legal governance», and «legal regulation» are constituent elements of a single «chain» of social governance. At the same time, each of them has its meaning, definition, characteristics, mission etc.

[1] Податковий кодекс України (Відомості Верховної Ради України (ВВР), 2011, № 13–14, № 15 – 16, № 17, ст. 112), в ред. від 01. 08. 2016 [Електронний ресурс] – Режим доступу: http://zakon4.rada.gov.ua/laws/show/2755-17. – Назва з екрану.

[2] Кримінальний кодекс України (Відомості Верховної Ради України (ВВР), 2001, № 25–26, ст. 131), в ред. від 01.05.2016 [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/2341-14. – Назва з екрану.

However, differences between these concepts should break neither the existing relationship between them nor the subordination. It is offered to put these types of concepts in the «chain» in the following order: «legal effect» as the most general concept which aims to «achieve» a certain result; followed by «legal governance» – the process of achieving an appropriate (precise) result;then comes «legal regulation» – creation of the necessary legal (legislative) framework for the organization of the legal process, which leads to a certain result. Based on this consideration in the process of making law and improving existing laws, it is possible to establish certain uniformity in defining objectives of Ukrainian legislation, which in its turn will facilitate its improvement.

Published: Вісник Південного регіонального центру НАПрН України. – 2016. – № 9. – С. 8–15.

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UDC 340:34.05

RELIGIOUS FREEDOM AND FREEDOM OF EXPRESSION: EUROPEAN AND ISLAMIC APPROACHES

The connection between modern European law and the Christian tradition is generally recognized. In scientific papers of many scholars is reasonably proven, that Christianity, *inter alia*, the canon law is one of the pillar, on which the Romano-Germanic law and, accordingly, the legal systems of some European countries are built. Harold J. Berman in his work «Law and revolution. The Formation of the Western Legal Tradition» noted that in the 12th century the canon law became the first modern Western legal system. For the first time the church itself was regarded as a legal system, law-governed state with a complex control system[1].

The Catholic Church formed not only a set of certain rules of conduct, but also a full-fledged legal system with all its elements – law, developed jurisprudence, judicial staff training, judicial and executive bodies and officials, who applied and stood for the law with the observance of the specified procedures. In the course of time, as pointed out H. Berman, the system of canon law and the control system were adopted by the states, which were forming in the future periods[2]. H. Patrick Glenn also stated that the canon law with the Roman law had the most impact on the formation of the European legal systems[3].

However, at the end of the twentieth century and at the beginning of the 21st century the world globalization processes changed the familiar world for us. A considerable population migration has led to a significant change in the struc-

[1] Berman H. Law and Revolution. The Formation of the Western Legal Tradition. Harvard University Press. – 1997. – C. 530.

[2] Ibid. – C. 521.

[3] Glen P. Legal Traditions of the World. Oxford University Press Inc: New York. 2004. P. 133. (401)

ture of national and religious communities in Europe. The most rapidly in all European countries is increasing the number of Muslim community. According to various estimates, the number of Muslims in Europe has exceeded 44 million people, that is 6% of the population. According to the global research data of The Pew Research Center in 2010 in France this community accounted for about 4, 7 million, in the Federal Republic of Germany – 4, 8 million, in Albania – 2, 5 million, in Kosovo – 2 million, in the United Kingdom – 3 million, in Bosnia and Herzegovina – 1, 7 million, in Bulgaria – 1 million, in Macedonia – 0,8 million.[1] Not only the number of the Muslim population in absolute figures grows, but also their part in the general population of these countries is growing, accordingly, too. For instance, in France the Muslim community makes up 6% of population, in the Federal Republic of Germany – 5%, in Albania – 80%, in Kosovo – 90%, in the United Kingdom – 2, 7%, in Bosnia and Herzegovina – 40%, in Bulgaria – 12%, in Macedonia – 33%[2].

According to sociological predictions, the tendency to increase the number of the Muslim population and their part in the society will continue in the coming decades. Thus, according to the forecast of The Pew Research Center, the Muslim community in Europe by 2030 will have increased to 58 million people, that will have already accounted for 8% of the population, and in 2050 will have accounted for 10% of the population[3].

Philip Jenkins from the University of Pennsylvania predicts that by 2100, the Muslims will have already accounted 25% of Europe's population[4]. Therefore, the problem of coexistence in the European countries of different religious communities won't only disappear by itself, but will become more difficult with time. How exactly these demographic changes will affect the various social processes in Europe it's difficult to predict, but most scientists believe, that the influence of Islam on the social relations will be more and more tangible.

Well-known futurists Alvin and Heidi Toffler suggest that centers of Christianity will gradually shifted to Latin America, and the influence of Islam in Europe will be ever more appreciable on all spheres of life – politics, economics, culture etc.[5] Philip Jenkins, the author of the paper «Christianity of the future», has also recognized, that in the second

[1] The Future of the Global Muslim Population available at (last visited Apr. 23, 2012) <http://www.globalreligiousfutures.org> (последнее посещение – 19 января 2015 г.).

[2] The Future of the Global Muslim Population available at (Last visited Apr. 23, 2012) <http://www.pewforum.org/future-of-the-global-muslim-population-preface.aspx> (последнее посещение – 19 января 2015 г.).

[3] The Future of World Religions: Population Growth Projections, 2010-2050 <http://www.pewforum.org/2015/04/02/religious-projections-2010-2050/> (последнее посещение – 19 января 2015 г.).

[4] Comment / Richard Dawkins foundation <http://richarddawkins.net/comments/905172> (последнее посещение – 19 января 2015 г.).

[5] O'Rorke C. General discussions message board (Last visited Apr. 23, 2012) <http://www.alvintoffler.net> (последнее посещение – 19 января 2015 г.).

half of the twentieth century the main centers of the Christian world shifted decisively to Africa, Latin America and Asia[1].

The last decades show the growing number and scale of social conflicts between Muslim and other communities in Europe. The Islamic community increasingly requires the observance of their traditional cultural and religious rules in Europe. So, in late 2004 to early 2005, the conflict gained considerable sharpness in France associated with the right of Muslim women to wear the hijab – a traditional scarf covering the head and neck, except for the face. In February 2005 the law that banned in government offices and educational institutions to wear any signs, which showed the religious affiliation of a person, including the hijab, was adopted. This led to mass demonstrations of Muslims who claimed the restriction on their rights. In 2009 in Switzerland was held the referendum, in which the construction of new minarets was prohibited.

Towards a new round of tensions between European and Muslim communities resulted in the so-called «cartoon scandal», when a set of editions published a series of caricatures of Islam, Muslims and the Prophet Muhammad. This conflict caused a huge resonance and gave rise to a new discussion on the correlation of freedom of speech and religious freedom in the European and Islamic culture.

One of the first in this series was the conflict that erupted after the publication of 12 caricatures of Mohammed in the Danish newspaper Jyllands-Posten on the 20th of September 2005, on which was depicted the Prophet with a bomb on his head. Many European newspapers reprinted the cartoons on their pages, leading to an even greater escalation of the conflict. As a result, the conflict has acquired an international dimension and has caused numerous casualties, the economic and political losses for many European countries.

In 2007, Swedish artist Lars Vilks drew several cartoons depicting the Prophet Muhammad with a dog's head. It has led to protests, two bombings in Stockholm and repeated attempts to kill the author, who lives under constant police protection. In February 2015 several people were killed and wounded in Copenhagen during the attack on the lecture of the artist, who in a month received a prize for courage from the Danish Free Press Society in the Danish parliament in Copenhagen.

In early 2015 there was a tragedy in a French satirical magazine Charlie Hebdo, when 12 people were killed by shots of Islamists, including leading journalists and cartoonists of the edition. The reason for the attack was repeated publication on the pages of the edition the caricatures of Islam, Muslims and the Prophet Muhammad. Tens of thousands of people all over Europe went to the rallies of solidarity with the journalists and to support the freedom of speech with the slogan – «I am Charlie». Only a few Europeans expressed doubts about

[1] Jenkins Ph. Demographics, Religion, and the Future of Europe, Orbis // A Journal of World Affairs. 2006. Vol. 50. No. 3. – P. 533.

the accuracy of journalists' position in the question of correlation between freedom of speech and the protection of religious feelings of believers.

For an objective consideration of the problem of correlation between freedom of speech and religious freedoms it is necessary to analyze the features of the Islamic conception about which the European reader hardly has known anything. The Islamic concept of freedom of thought and expression is quite different from the European concept that causes misunderstanding and confrontation between representatives of corresponding cultures. In Islam, the concept of human rights is based on the belief that only God is the author of the law and the source of all human rights[1]. Human rights, bestowed by Allah, can't by virtue of their divine origin be reduced or eliminated by the state, society or individuals. Nobody has the right to change them at their own discretion.

Freedom of thought and speech are considered as one of the fundamental rights of a Muslim. Islam considers man as a being endowed with intellect by God, which is required to find the truth. Freedom of thought and freedom of expression are essential tools in this way. From this point of view it's absolutely incorrect the consideration, that Islam is an antagonistic to the knowledge, science, discussions and art religion. The achievements of Islamic science in mathematics, astronomy, medicine and other fields have laid the foundation of a modern European and world science. Admissibility of different opinions is recognized even in matters of theology and Sharia, resulting in the division into Sunnis and Shiites, as well as numerous religious-legal schools (mazhabs)[2].

However, it is supposed that given the limited human abilities, Allah himself stated some of the verities, self-knowledge of which, from the point of view of Islam, is outside the human mind and thought. These tenets set forth in the Quran and Sunnah and are the subject of faith, but not the subject to human subjective evaluation.

Accordingly, for a law-abiding Muslim the issues defined in the Sharia as a taboo don't need a rational understanding and proof. At the same time, in the doctrine Islamic theology tries to explain existing prohibitions. In Islam is extended the requirement for a person to use the freedom of speech and thought where it brings benefits to a person itself. And where these freedoms are harmful to a person, the ban comes into force.

From the point of view of the legal consequences all actions of a Muslim can be divided into five categories: obligatory, recommended (approval), permitted (indifferent), censured (not punishable) and illegal (punishable)[3].

The picture of living beings (in the form of animated images or sculptures) refers to prohibited acts, which are one

[1] Сюкияйнен Л. Р. Ислам и права человека в диалоге культур и религий. – М., 2014. – С. 17.

[2] Бехруз Х. Исламские традиции права. – Одесса, 2006. – С. 61–70.

[3] Массэ А. Ислам: Очерки истории: Пер. с фр. – М., 2007. – С. 98.

of the 76 major sins in Islam[1]. This prohibition is not directly expressed in the Quran, but it is come from the hadiths of the Prophet. So, in the book of hadiths of al-Bukhari it is reported that once a man came to Abdullah ibn Abbas and said: «Oh, Abu Abbas really – I'm a man and I do for a living with these hands, making these pictures». Ibn Abbas said: «I will tell you what I've heard from the Messenger of Allah, and he said: a person, who creates any image of something that has a living spirit, Allah will expose to the tortures, until he will have inspired with him, but he'll never be able to do it». Hearing these words, a man deeply grieved. Then Ibn Abbas said to him: «Woe to you, if you are doing this, but if you want to continue doing so, then you should paint the trees and everything that doesn't have the spirit» (994 (2225))[2].

Islamic theology explains the origin of this rule by prohibition on likening Allah, who has created every existing thing, as well as by ban on the worship of idols and other gods, which almost always have the specific artistic external image. Later, in some countries, mainly in a Shiite environment, the prohibition of human and animal image ceased to be strict.

Ambiguous interpretation of these rules existed in respect of photographic pictures of living creatures. In recent years, Islamic theologians who have the right to issue fatwas have justified the permissibility of photos with certain restrictions. Thus, according to the fatwa of one of the most respected Islamic scholars of our time, the president of the International Union of Muslim Scholars Yusuf al-Qaradawi, photography is not an act of creation, which is forbidden in the hadiths, but only a reflection, a mirror image of reality. Thereafter, the scientist has concluded, that the photographic process doesn't fall under the category of works performed by sculptors and artists[3].

A similar situation exists with respect to the depiction of the Prophet Mohammed. For most Muslims, the ban is absolute: the picture of Muhammad and all other prophets in Islam is expressly forbidden and considered as idolatry. Prophet Muhammad and all other prophets are considered as perfect and sinlessness figures, and therefore can not be subject to any artistic interpretation, especially if it can lead to disrespect or affront to the Prophet.

An important element in understanding the angry Muslim reaction to the cartoons of the Prophet is the sense of the role and limitations in the Islamic humor. Islam welcomes the believer brings joy to other people using the humor and fun, but at the same time it is prohibited to go beyond the boundaries defined by God – a joke must be truthful; it is not allowed to make up the tales or scare another person; one shouldn't joke with older people, teachers, academics,

[1] Имам Захаби 76 Больших Греков: Пер. с турецк. – М., 2010. – С. 120–121.

[2] Аль-Бухари С. Мухтасар: Пер.с араб. В. А. Нирш. – М., 2003. – С. 378.

[3] Аль-Карадави Ю. Современные фатвы: Пер. с араб. Я. Расулов. М., 2004. С. 228.

leaders, with someone, who doesn't understand jokes, unfamiliar with each other men and women; joke must be smart, adequate for the situation, intelligible to others, not offensive, not degrade a person or his family; one can't joke about forbidden topics, tell vulgar stories, reveal intimate details, use blasphemy and slander[1].

It should be understood that the cartoon by Lars Vilks, depicting the Prophet Muhammad with a dog's head, was assessed by Muslims as particularly cynical, since the dog is considered an unclean animal in Islam, contact with which is undesirable.

Thus, we can conclude that the cartoons of the Prophet Mohammed broke a lot of taboos which exist in Islam and affected the deep and important for the believers feelings. Faith and religious shrines for Muslims are at the top of the hierarchy of values that are protected under Islam. All other values that Islam defends – life, mind, procreation, property[2], occupy a subordinate position related to the principal value. The nature and extent of the negative reaction of Muslims to this situation is also explained by Islamic provisions. From the point of view of Islam, it requires a person to defend their faith and beliefs, to use, if necessary, the force of arms.

The main causes of such conflicts are quite different ideologies and cultural traditions of the Muslim world and mainly Christian Europe. On the basis of this ideology a quite different scale of values that each society attempts to maintain and protect is formed. Thus, the situation with the cartoons is a conflict on which value takes priority – freedom of expression or religious freedom. European and Islamic traditions give different answers to this question.

An important issue is to avoid such tragedies in the future. The media, being a powerful instrument of influence on the society, should pursue responsible editorial policy, and a State must perform regulatory and control functions effectively.

In this regard, I would like to eximine Charlie Hebdo's editorial policy for several decades. Satirical weekly Charlie Hebdo edition has been published since 1970 and emerged on the basis of another magazine – «Hara-Kiri», which had been closed earlier that year after the coarse joke about the death of Charles de Gaulle. The editorial policy has always been based on the fact that there are no taboo subjects for jokes. Cartoon heroes, often very offensive and painful have become the leaders of different states, politicians, celebrities and even the Pope. The magazine has repeatedly published caricatures of Christians, Jews and Muslims. When in Europe the first cartoon conflict broke out, the periodical edition took a tough stance on the protection of freedom of speech and the impossibility of its self-restriction. On issues of interaction of European and

[1] Рамазанов К. Юмор с точки зрения Ислама <http://ansar.ru/society/yumor-s-tochki-zreniya-islama-kak-shutil-prorok-mir-emu> (последнее посещение – 19 января 2015 г.).

[2] Джассер Ауда Цели шариата (руководство для начинающих). М. 2015. С. 113; Мухаммад Садик Мухаммад Йусуф Права человека в исламе. СПб., 2008. С. 13.

Muslim culture the magazine has started to carry out the policy of incitement to Islamophobia.

So, March 1, 2006 the magazine published so-called «Manifesto of the twelve», in which urged all Europeans to fight against the Islamic threat. Islam has been put on a par with fascism, Nazism, and Stalinism, as the totalitarian threat to Europe[1].

In the second half of 2015 Europe was faced with a new problem of the mass migration of illegal refugees, most of whom left the war-ridden Syria, Afghanistan, Sudan. According to estimates by the UN Refugee Agency and the International Organization for Migration, about 1 million of regugees have moved to Europe for a year[2], most of whom belong to the atypical for Europe national, cultural and religious groups. It is predicted a significant increase in the proportion of the Muslim population.

A new migration of peoples, as it is called by journalists, is accompanied by numerous tragedies. According to the UN information, on the way to Europe several thousand refugees have died, most of whom drowned while crossing the Mediterranean Sea. The greatest resonance was the case of the death of 3-year-old child Ailana Kurds from the Syrian city of Cobán, whose body was washed up on the shore near the Turkish Bodrum city. In the words of survivors, in a failed crossing were died at least 12 people, including four children and a woman. 5-year-old brother of the boy is also presumed dead. The photograph of the deceased child shocked Europe and made us think about the fate of the forced immigrants.

A week after the event shocked the whole of Europe, Charlie Hebdo published a regular magazine in which mocked the death of Muslim children. In the published cartoon under the inscription «So close to the goal» Ailana lying on the sand is depicted. Above it hung the cafe advertisement with the inscription: «Two children's menu for the price of one». Another cartoon depicts Jesus walking on water, next to the drowned boy. The picture has the caption: «Proof that Europe is Christian. Christians walk on water – Muslim children sink». What feelings can evoke such publication for the child's parents, the Syrians and Muslims in general in relation to the Europeans? What actions must take the state in such a situation? Recall that the attack on the editor of Charlie Hebdo happened after Muslim organizations had repeatedly sued upon the publishing for the insults and incitement to religious hatred, but the courts repeatedly justified the journalists.

So, in 2006 at the beginning of the conflict, after the publication of three cartoons of the Prophet, several Muslim organizations – the Great Mosque of Paris, the Union of Islamic Organizations of France, as well as the Muslim World League accused the editorial

[1] Manifeste des douze <https//fr.wikipedia.org/wiki/Manifeste_des_douze> (последнее посещение – 19 января 2015 г.).

[2] Совместный пресс релиз Агентства ООН по делам беженцев и Международной организации по миграции <http://unhcr.ru/index.php?id=10&tx_ttnews[tt_news]=549&cHash=91c794407e3577fa2d3fa0b2c827ff72> (последнее посещение – 19 января 2015 г.).

board of inciting ethnic hatred and filed the claim with the court against it. The plaintiffs argued that the weekly had insulted the feelings of Muslims, causing an affront to a group of persons because of their religious affiliation. French law provides for this violation six months in jail and a fine of more than EUR 22 000. During the hearing of this case the magazine received the support of prominent political figures of the country – Nicolas Sarkozy, François Bayrou and François Hollande, who publicly advocated the edition. The trial ended a year later with a judgement of acquittal for the magazine.

If we extrapolate this situation to our reality, it could be concluded that such actions fall under Article 161 of the Criminal Code, which envisages punishment for deliberate actions aimed at inciting ethnic, racial or religious enmity and hatred, humiliation of national honor and dignity or insult the feelings of citizens in connection with their religious beliefs.

Scientific-practical commentary to the Criminal Code of Ukraine explains that under the incitement to national, racial or religious enmity and hatred should be understood the dissemination of any ideas and views, which undermine trust and respect of a particular nationality, race or religious denomination, as well as cause disregard or hatred against traditions, culture, lifestyle, religious practices of the citizens of a certain nationality or religion. It can also be the spread of various appeals, fabrications that form in people a sense of anger, alienation and evoke enmity. At that, the expressed ideas and views are purely of a general nature and aren't directed to a specific person. The main thrust of the committed actions – is to spread between people of different nationalities, races, religions the mutual distrust, to evolve the alienation, suspicion, transforming into persistent hostility. The humiliation of national honor and dignity or the insult of citizens' feelings in connection with their religious beliefs have the purpose – to humiliate, insult, that is, to show the inferiority, narrow-mindedness of the people of a particular nationality or religion. It can be expressed in different forms of bullying of the citizens: slander, mockery of the culture, religious rites, customs[1].

The Criminal Code of the Russian Federation contains a similar *corpus delicti*. Article 282 of the Criminal Code «Inciting hatred or hostility, as well as abasement of human dignity» establishes liability for actions aimed at the incitement of hatred or enmity, as well as abasement of dignity of a person or group of persons on the basis of sex, race, nationality, language, origin, attitude to religion, as well as affiliation to any social group, if these acts have been commited in public or with the use of mass media or telecommunication networks, including the «Internet»[2].

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[1] Кримінальний кодекс України: Науково-практичний коментар / Ю. В. Баулін, В. І. Борисов, С. Б. Гавриш та ін. за заг. ред. В. В. Сташиса, В. Я. Тація. Вид. 4-те, доп. Харків, 2008. С. 464.

[2] Уголовный кодекс Российской Федерации от 13 июня 1996 г. № 63-ФЗ // Собрание законодательства РФ. 1996. № 25. Ст. 2954.

As we can see, the legislation of Ukraine and the Russian Federation is close enough on this issue to the laws of other European countries, in particular France, and allows the government to restrict the freedom of expression when it encroaches on other societal values. The practice of the European Court of Human Rights has also affirmed this right of a state. So, in the «Otto-Preminger Institut v. Austria» case, the Court acknowledged the legality of the Austrian authorities' actions, which had seized the film screening and forfeited it, in which Jesus entered into an agreement with the devil to punish mankind with syphilis. In the case of «Wingrove v. the United Kingdom» the Court made a similar decision concerned with the ban on the movie's release, the basic plot of which – sexual fantasies on the topic of Jesus. And in the «I. A. v. Turkey» judgment, the Court qualified the story with blasphemous comments about the Prophet Muhammad «an aggressive attack on the Islamic prophet»[1].

Thus, we can conclude that the inefficient and untimely actions of public authorities contributed to the evolution of the conflict with the Muslim community in Europe. An adequate judgment on the initial stage of the conflict would have contributed to its peaceful settlement, would have saved human lives and would not have allowed a considerable alienation of the Muslim community from the European community.

Conflicts and misunderstandings of their underlying causes are the result of significant cultural differences between the European and Muslim civilization. Given that Muslims and Europeans will have to coexist in a common Europe, it is necessary to study and understand these cultural differences. And in those areas where it's possible the rise of significant religious conflicts, it is necessary to use the appropriate legal regulators, including the prohibited tools.

Published: Вестник Университета имени О. Е. Кутафина (МГЮА). – 2016. – № 3 (19). – С. 158–166.

[1] Свобода релігії і свобода слова після Charlie Hebdo: збірка есе до круглого столу Харківського юридичного товариства 25 лютого 2015 року / Упорядники Д. Вовк, О. Уварова. Харків, 2015. – С. 75.

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EUROPEAN LEGAL VALUES AND THEIR PERCEPTION BY THE LEGAL SYSTEM OF UKRAINE

The category of «European values» is not normative, it can be defined as a system of universal Humanist principles (ideas and demands for social regulation), which are shared by the majority of members of the civilized European community and recognized by them as significant and morally justified. These values include legal (rule of law, human rights), political (*prima facie* democracy), common ideological (secularism, rationality, tolerance, etc.) values. It is clear that such division is comparative (e.g, democracy should be also considered as legal and at the same time ideological value, the same in the broad sense we can say about the rule of law), and the list of values is inexhaustible.

However, in this research paper we will examine the rule of law and human rights just as legal values, i.e those that are the foundation of the legal systems of the European Societies and their law as a system of recognized by these societies mandatory rules of human and their associations' behavior, the institutionalization and effective implementation of which are provided by a public political authority, primarily, by a state.

The rule of law over a state arbitrariness is the legal foundation of national legal systems of modern civilized Europe, the cornerstone of a single European legal system that unites them. The principles which form the conceptual juridical construction of the rule of law and are derived from it, are formulated mainly in the decisions of the European national constitutional courts and the European Court of Human Rights, and the European legal doctrine of the rule of law are constituted.

According to this doctrine the concept of the rule of law means the observance of a number of basic requirements (principles) by a public authority of a modern civilization-state.

The first of these is the requirement of strict observance, accurate and uniform implementation and the correct application of legislation by all subjects of law, especially by public authorities and their officials. This requirement is well-known to the national legal doctrine as the «principle of legality» and is embodied in Art. 19 of the Constitution of Ukraine: «The legal order in Ukraine is based on the principles according to which no one shall be forced to do what is not envisaged by legislation. Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine».

The second is the requirement for public authorities to be bound by human rights, which is the sense, a kind of anthropological foundation of formation and effective functioning of the modern legal system of Europe and national legal systems of civilized countries, which are its members. Human rights are fundamental (basic) – this is the list of generally recognized key standards, which have been historically developed, are a reflection of the level of modern human civilization and have been enshrined in a number of sources of public international law («human rights catalogue»).

In philosophical and legal terms, human rights are natural, as emanating from human nature itself, but not from arbitrary discretion of a state or other public institutions (see Art. 1 of the Universal Declaration of Human Rights 1948: «All human beings are born free and equal in dignity and rights»). These rights are inalienable, that is considered as an integral part of individual, without which a person is not only deprived of rights in a legal sense, but also can not exist and develop normally in a social sense, can't be a person, because he or she doesn't have opportunities to meet his/her needs and interests. So, without these rights neither society nor a state can not evolve normally. Since a state does not give them a person, then it can't take the rights away. Herewith, human rights are inalienable – for the reasons mentioned above, a man even on his own conscious volition can not relinquish these rights, exchange them for some tangible benefits, pledge, lend or borrow, etc.

Human rights are universal, i.e. apply to all people regardless of their nationality, ethnicity, race, gender. However, this feature is denied or corrected by a number of scientists because of natural differences of people (national, cultural, sexual, and so on).

Human rights are egalitarian (equal) – belong to everyone equally and ensure the right to equal treatment of all people regardless of race, sex, age and other differences. However, this characteristics also provides for the extra power of mechanisms to ensure minority rights.

They are categorical (unconditional) – their recognition, guaranteeing and securing (ensuring) is a categorical requirement for any state as fundamental purposes of its establishment (let us remember social contract theory). Thus, a

state, which does not ensure human rights, is *a priori* illegitimate, unjust, and its citizens have a natural right to reinstall (reset) such a state by any means.

Human rights are legal – clear legal rules and at the same time effective legal mechanisms, are recognized and guaranteed by a state by their fastening in the constitution and other legislative acts, as well as by acceding a state to the relevant international agreements, which constitute the «international law of human rights». Strengthening, ensuring and protection of human rights are the primary legal obligation of a modern civilized state. However, these rights are moral, that is based on the non-judicial internal needs, views and value orientations of people; the obligation of public authorities to recognize, guarantee and protect them is moral, categorical regardless of their institutionalization and the attitude of authority to them[1].

To human rights corresponds the obligation of a state of non-interference in the sphere of individual freedom, on respect for human rights, their guaranteeing, protection and contribution to their realization (UN Charter, Art. 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 3 of the Constitution of Ukraine). This commitment is a system of three main types of state's obligations:

1) an obligation to respect human rights, that requires the representatives of a state to abstain from their infringements;

2) an obligation to protect human rights, that provides a state's duty to protect bearers of rights from unlawful interference in the process of their implementation and to punish offenders;

3) an obligation to secure the exercise of human rights, that requires a state to take active actions (measures) to promote the realization of human rights.

The European Court of Human Rights at its interpretation and application of the Convention uses the doctrine of negative and positive obligations of a state. The negative obligations require a state to refrain from interference with enjoyment of human rights. So, the violation of human rights occurs in consequence of either an existence of active state barriers to their realization, or its disproportionate interference with such realization. Positive obligations require a state to actively interfere with the exercise of human rights; violations of these rights occur in consequence of the lack of appropriate active state actions.

From the above mentioned, in turn derives the requirement for public authorities to use all adopted (reasonable) and the appropriate measures to protect human rights. Such measures may be legal (in particular legislative enshrinement of human rights, establishing certain legal procedures, requirements, etc.) or practical (e.g. taking appropriate mea-

[1] Права людини: Концепції, підходи, реалізація / За ред. Б. Зізік ; пер. з англ. – К. : вид-во «Ай Бі», 2003. – 263 с.; Філософія прав людини / За ред. Ш. Госепата, Г. Ломанна ; пер. з нім. – К. : Ніка-Центр, 2008. – 320 с.; Рабінович П. М. Основи загальної теорії права та держави. Навч. посібник. Вид. 10-е, доп. – Львів : Край, 2007. – 224 с. – С. 16–21.

sures to prevent convicted persons from causing bodily harm)[1].

Ukraine has the duty to ensure conformity of its national legislation with international legal obligations. This obligation must be fulfilled by a system of regular and effective measures, including: incorporation of international norms in the field of human rights into national legislation or their direct application within the domestic legal system of Ukraine; implementation and taking the necessary legal procedures to ensure under fair conditions effective and prompt access to justice; provision of adequate operative means of protection and restoration of rights, *inter alia*, compensation for damages; establishing effective guarantees for ensuring the same level of protection for victims of violations of international human rights norms and standards provided by international law, etc.[2]

As noted by T. Pashuk, «under public judicial protection of human rights it should be understood a jurisdictional law enforcement activity of national competent authorities directed either at the enforcement of legal obligation necessary for the realization of human rights, or the restoration of this right, or the prevention or stop its violation. Accordingly, a human right to public judicial protection of human rights ... – is the right to carry out in the course of a jurisdictional law enforcement activity the measures for direct fulfillment of an obligation required for the realization of human right, or to restore such right or for the prevention or to stop its violation»[3].

The fundamental national guarantee of human rights and at the same time the demand for the rule of law is independent, impartial and uncorrupted judiciary, including administrative justice.

The third requirement of the rule of law for a public authority is the demand for the compliance with the fundamental principles of law (freedom, justice, equality, humanism) in law-making and law enforcement activities, in particular the prohibition of negative discrimination – an unjustified human restriction of individual rights on any grounds (nationality, race, gender, property status, etc.). In general, considering the coordinate system of the rule of law and the state in this system it should be understood that the axes of the system are freedom, justice and equality as fundamental principles of law.

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[1] Теорія держави і права : посібник для підготовки до державних іспитів / Д. В. Лук'янов, С. П. Погребняк, В. С. Смородинський, Г. О. Христова ; за заг. ред. О. В. Петришина. – 5-тє вид., допов. і змінене. – Х. : Право, 2016. – 208 с. – С. 178–179.

[2] Дослідження практики Європейського суду з прав людини для визначення Національних стандартів компенсацій порушення державою прав людини : [інформаційно-аналітичний звіт] / М. Гнатовський, А. Федорова, К. Красовський, О. Власенкова]. – К. : Атіка, 2011. – 184 с. – С. 7–9.

[3] Пашук Т. І. Право людини на ефективний державний захист її прав та свобод. – Праці Львівської лабораторії прав людини і громадянина НДІ державного будівництва та місцевого самоврядування АПрНУ / Редкол. П. М. Рабінович (голов. ред.) та ін. – Серія І. Дослідження та реферати. Вип. 15. – Львів: Край, 2007. – 220 с. – С. 177.

The fourth is the requirement of legal certainty (predictability, foreseeability and «legitimate expectation»). The relevant requirements of law-making and law enforcement at one time were formulated by professor Lon L. Fuller of Harvard Law School using the example of unsuccessful law-making activity of King Rex and are constituted the so-called «internal morality of law»: laws must be general; laws should be promulgated, that citizens might know the standards to which they are being held; retroactive rule-making and application should be minimized; laws should be understandable; laws should not be contradictory; laws should not require conduct beyond the abilities of those affected; laws should remain relatively constant through time; and there should be a congruence between the laws as announced and their actual administration[1].

It is known that in many countries of Romano-Germanic legal family (to which tends and tries to join also the Ukrainian national legal system) is recognized the theory of «stable laws» that requires the courts to follow constant jurisprudence as an important factor of the unity of judicial system and a national legal system as a whole.

In addition, for Ukraine the demand for the meticulous and rapid execution of judgments as a necessary condition for legal certainty and the rule of law in general (the European Court of Human Rights repeatedly pointed out to Ukraine on this) is of current importance.

A key principle of a modern civilized state in accordance with Art. 6 of the Convention is the proper administration of justice. Given the fact that the right to a fair trial as a part of the rule of law is one of the primary places in the system of global values of a democratic society, the European Court of Human Rights has always offered a quite broad interpretation of it[2].

Thus, in the case of *«Delcourt v. Belgium»*, the Court stated that «in a democratic society within the meaning of the Convention, the right to a fair administration of justice holds such a prominent place that a restrictive interpretation of article 6 (1) would not correspond to the aim and the purpose of that provision». In the *«Bellet v. France»* judgment the Court pointed out that «Article 6 (1) contains guarantees of a fair trial, of which access to a court is one aspect. The degree of access afforded by the national legislation must be sufficient to secure the individual's right to a court, having regard to the principle of the rule of law in a democratic society. For the right of access to be effective, an individual must have a clear, practical opportunity to challenge an act that is an interference with his rights».

As illustrates the position of the Cour in many cases, the main component of the right to a court is the right of access

[1] Фуллер Л. Л. Мораль права ; пер. з англ. – К. : Сфера, 1999. – 232 с. – С. 43.

[2] Де Сальвиа М. Прецеденты Европейского суда по правам человека. Руководящие принципы судебной практики, относящейся к Европейской конвенции о защите прав человека и основных свобод. Судебная практика с 1960 по 2002 г. ; пер. с фр. – СПб. : Издательство «Юридический центр Пресс», 2004. – 1072 с. – С. 277–512.

to a court — in the sense that a person must be granted the opportunity to apply for a court to resolve a particular problem, and that a state should not legally or practically impede the realization of this right.

The Convention and its Protocols are a part of the national legislation of Ukraine, binding sources of its law, that is recognized by the national legal system of Ukraine sources containing mandatory legal rules and from which they are taken for the purpose of legal regulation of the social relations. By ratifying the Convention and the Protocols thereto, Ukraine pledged primarily to secure to everyone within its jurisdiction the rights set out in these acts. According to para. 1 (1) of the Law of Ukraine «On Ratification of the European Convention on Human Rights 1950, First Protocol and protocols № 2, 4, 7 and 11» of 17 July 1997, Ukraine generally recognized the operation of Article 46 of the European Convention on Human Rights 1950 on its territory concerning the recognition of compulsory and without special agreement jurisdiction of the European Court of Human Rights in all matters regarding the interpretation and application of the Convention. According to Art. 17 of the Law of Ukraine «On Enforcement of Judgments and Application of Practice of the European Court of Human Rights» dated 23.02.2006, the Ukrainian courts apply by considering all cases the Convention and the case-law as a source of law[1]. The adoption of these laws is reasonobly acknowledged by scholars as a «very radical step, as a result of which a certain, currently not specifically defined scope of the Court practice has been proclaimed as the source of law in Ukraine»[2].

The practice of the Court in respect of Ukraine regarding the guarantees enshrined in Art. 6 § 1 of the Convention is reflected in cases concerning the right of access to a court and to a fair trial. Thus, in the case of *«Tregubenko v. Ukraine»*, the Court concluded that by applying the supervisory review process to cancel the judgment in favor of the applicant, the Plenum of the Supreme Court of Ukraine violated the principle of legal certainty and the applicant's right of access to a court guaranteed by Art. 6 § 1 of the Convention. The Court reached a similar conclusion with respect to the revocation of the final judgment in the *«Naumenko v Ukraine»*, *«Poltorachenko v. Ukraine»*, *«Timotiyevich v. Ukraine»* cases. The Court found that in those cases, in which there was the revocation of the judgments, which became final and binding, there had been a violation of Art. 6 § 1 of the Convention. In the *«Ivanov v. Ukraine»* judgment, the Court stated that the right

[1] Фулей Т. І. Застосування практики Європейського суду з прав людини при здійсненні правосуддя: Науково-методичний посібник для суддів. – 2-ге вид., виправ., допов. – К., 2015. – 208 с. – С. 6.

[2] Рабінович П. М., Соловйов О. В. Застосування Європейської конвенції з прав людини та практики Стразбурзького суду в Україні. – Праці Львівської лабораторії прав людини і громадянина НДІ державного будівництва та місцевого самоврядування НАПрНУ / Редкол. П. М. Рабінович (голов. ред.) та ін. – Серія І. Дослідження та реферати. Вип. 28. – К., 2014. – 208 с. – С. 152.

to a court «would be illusory if a Contracting State's domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party». «A state, – stated in the decision – can't cite lack of funds as an excuse for not honouring a judgment against it or against entities or companies owned or controlled by state». This follows directly from the requirements of the Convention. The Court concluded that «the reason for delayed enforcement of final domestic decisions is the existence of variety of dysfunctions in the Ukrainian legal system», which «has failed so far actually to put into effect any measures aimed at improving the situation, despite the Court's substantial and consistent case-law on the matter».

The fifth requirement of the rule of law provides for the embedding in activities of public (*prima facie* judicial) authorities the principle of proportionality, i.e reaching for the balance of interests of a person, other individuals and society in lawmaking and law enforcement processes. Public authorities can't impose on citizens the obligations, which exceeded a social necessity. The analogue of proportionality is the American judicial doctrine of the «weighing of interests» that provides by considering cases the weighing of common (national, public) and personal interests, resulting in taking under judicial protection one of them, which has the greater weight, i.e social value.

In accordance with the principle of proportionality, legal (first of all, judicial) evaluation of actions, acts and decisions of public authorities and their officials must be carried out by using the «proportionality test» by criteria such as: 1) the feasibility – means, aimed at the attainment of the particular purpose by public authority, which must be fit for the purpose; 2) the necessity – from all appropriate means it should be selected by a public authority that, which is the least restrictive the rights of individuals; 3) the balance of interests (proportionality in the narrow sense, or the principle of balance) – damage caused to an individual by the restriction of the rights must be proportionate to the public benefit from the achieving the purposes of such restriction[1].

The sixth fundamental requirement of the rule of law for public authorities of a modern civilized state is a requirement of good faith of these authorities, that is conscious exercise by public authorities of their powers. The main obstacle to implementing the rule of law in public life is the corruption and other abuses of public power. With certain reservations we can agree with researchers who believe corruption is an informal factor of integrity and stability of some so-called «strong» states, «states of natural law» with «closed societies» (to which the authors reasonably refer also Ukraine)[2]. However, total corruption as

[1] Коэт-Элия М., Порат И. Американский метод взвешивания интересов и немецкий тест на пропорциональность: исторические корни ; пер. с англ. // Сравнительное конституционное обозрение. – 2011. – № 3. – С. 59–81.

[2] Дарден К. Целостность коррумпированных государств: взяточничество как неформальный институт управления ; пер. с англ. // Прогнозис. – 2010. – № 1. – С. 109–134; Уэй-

a stable defect of public authorities functioning in these countries, especially law enforcement agencies and courts, prevents the implementation of the rule of law, smashes it to pieces, as is clearly incompatible with most of its requirements. Herewith, a state loses a reliable guidance and coordinates of the rule of law, that weakens it, tears away from modern civilization, inevitably sooner or later leads to its political and economic decline. Consequently, the integrity and the «power» of such states are actually temporary, and economic and political prospects in the absence of significant systemic changes towards a return the coordinates of the rule of law — is clearly pessimistic. And there are enough confirmations of this on the political map of the world.

It should be noted that by a legal doctrine, including domestic, the list of requirements of the rule of law is constantly supplemented and specified. So, M. Koziubra refers to the main components of the rule of law the respect for human rights and freedoms, the supremacy of the constitution, the principle of separation of powers, legality, limitation of discretionary powers, the principle of equality of rights and equality before the law, the principle of legal certainty, the principle of protection of confidence, the principle of proportionality, the independence of judiciary (court and judges)[1].

Ukrainian society and the state must realize that the choice between the rule of law and the rule of the arbitrary state is difficult, but is obvious civilizational choice of the state, which claims the status of the European and intends to take a worthy place on the map of modern Europe. As pointed out in his book «The State in the Third Millennium» the reigning Prince of Liechtenstein Hans-Adam II, «one area, except for international relations, in which a state ... still has a competitive advantage over private companies, local communities and community unions – is the rule of law. For the majority of people the most important task of a state is to provide legal protection, law and order... The fact that the rule of law still exists in many democratic countries is worth to be called a small miracle... What is the use of a democratic law-governed state, which has built up the most complicated social system or is conducting a sophisticated cultural policy, while the main pillar of a constitutional state — is the rule of law – has collapsed and a state is not able to provide its citizens with a worthy of legal protection?»[2].

A huge responsibility for the Ukrainian choice for the European civilized way, its justification and legal security relies on scholars and judges (primarily on the judges of the Constitutional Court of Ukraine) – on all those whom society has entrusted a mission of implanting into national legal system both the principle of the rule of law, and in its modern

нгаст Б. Р. Почему развивающиеся страны так сопротивляются верховенству закона? : пер. с англ. // Прогнозис. – 2010. – № 1. – С. 135–162.

[1] Загальна теорія права : Підручник / За заг. ред. М. І. Козюбри. – К. : Вате, 2016. – 392 с. – С. 358–379.

[2] Ханс-Адам II, князь. Государство в третьем тысячелетии ; пер. с англ. – М. : Инфотропик Медиа, 2012. – 320 с. – С. 141–143.

interpretation (taking into account the legal positions set out in the judgments of the European Court of Human Rights) and the fundamental legal requirements, which are its integral part.

Published: Конституційна реформа в Україні в сфері місцевого самоврядування: уроки від країн Вишеградської четвірки : тези доп. та наук. повідомл. учасн. наук.-практ. конф. (м. Харків, 21–22 жовтня 2016 р.). – Х. : Право, 2016. – С. 184–194.

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UDC (477)340.15«16»-047.37

A. I. YAKOVLIV – NOTED SCHOLAR OF THE PEREYASLAV TREATY

The people's liberation war of Ukraine against Poland, the figure of Bohdan Khmelnytsky and the Pereyaslav Treaty in 1654 aroused the interest of many generations of domestic and foreign scientists.

Among the historical and legal researches from the first half of XX century from the problems of the Ukrainian and Moscow treaties of XVII–XVIII centuries and the Pereyaslav Treaty, in particular, the work of Andrii Yakovliv «Ukrainian-Moscow Treaties in XVII–XVIII» stands out. This monograph was published in Warsaw in 1934, but the Ukrainian reader could review it only after 60 years due to the efforts of V. A. Smoliy and V. M. Rychka, who prepared it for the Ukrainian Historical Journal». And although the Ukrainian scientists (historians, lawyers) currently have got access to the ideas and conclusions of A. I. Yakovliv, they have not reached the public because of the authorities' negative attitude, represented by the Minister Tabachnyk and other supporters of the «reunification of Ukraine with Russia».

The state of the Ukraine-Russia relations at the present stage determines the particular relevance of the main provisions of the monograph of A. I. Yakovliv and his other works, provides new arguments for refuting the Russian position regarding the Ukrainian statehood. Therefore, acquaintance of a mass audience with the author and his ideas, debunking apologetics of the «Russian World» is the purpose of this Article.

Both the work and its author were unknown in Soviet times not only to the general reading audience, but also to the specialists in the USSR, although his research on different problems in the history of the Ukrainian law was published in Germany, Czechoslovakia, Poland, and USA. The reasons for such an attitude of the Soviet authorities to the famous scientist lie largely in his biography.

A. I. Yakovliv was born on 12.11.1872 in Chyhyryn, in a large family of the

provincial official. In 1890–1894 he was studying at the Kiev Theological Seminary and graduated brilliantly, and then 4 years worked as a teacher in Cherkasy. In 1898 he entered the Dorpat University to the Law Faculty. Already in student years he started to research the history of the Ukrainian law under the guardianship of the professor M. A. Dyakonov. His thesis was so successful that he received an offer to stay at the university to prepare for a professorship. But because of the life circumstances A. I. Yakovliv refused from that offer.

Coming back to Kyiv, A. I. Yakovliv passes his state examinations and receives a diploma of St. Vladimir Kiev University. Working in the public service (in the courts, in the Treasury Chamber), in Law, A. I. Yakovliv does not leave the science. He is a member of the Ukrainian Scientific Society and a member of the council of Kyiv Enlightenment, the teacher of the bases of law and legislation in the Kyiv educational establishments.

In 1917 the active social and political activity of A. I. Yakovliv was activated. He created the Association of Ukrainian lawyers, was one of the founders of the Ukrainian Law Society, a delegate of the All-Ukrainian National Congress, where he was elected a member of the Central Council, where he fulfilled the obligations of the director of the office, was the UPR ambassador to Austria-Hungary. In the Ukrainian State Hetman P. Skoropadsky A. I. Yakovliv headed the department at the Ministry of Foreign Affairs; during the Directory times he was an extraordinary minister and the head of the diplomatic mission in Belgium and Holland with the powers to conclude a treaty between the UPR and the Bank of Amsterdam[1].

When the Soviet authority won in Ukraine, A. I. Yakovliv was abroad. Return to Ukraine was dangerous for him, he became an immigrant. In 1921 the Ukrainian immigrants with the permission of the Czechoslovakia government formed the Ukrainian Free University in Prague, where A. I. Yakovliv worked for many years. In 1923 he was admitted to the Faculty of Law and Social Sciences as an assistant professor of civil procedure, and in 1926 the scientist received the title of extraordinary professor for the scientific work «Civil Procedure». In 1930-1931 and in 1945 he was elected as a rector of the university, from 1935 he headed the department of civil law at the same time was a law professor of the Ukrainian Economic Academy in Podebrady. From 1937 till 1940 A. I. Yakovliv lived and worked in Warsaw, where he fulfilled the obligations of the director of the Ukrainian Research Institute, was secretary at the Mohyla Mazepa Ukrainian Academy of Sciences. At the same time the scientist worked in public organizations, was the chairman of the Ukrainian Academic Committee of the International Commission for Intellectual Cooperation at the League of Nations in Geneva, Chairman and Permanent Representative of the Ukrainian Society of

[1] Смолій В. А., Ричка В. М. Угоди гетьманського уряду України, з Московською державою (1654–1764 рр.) очима правознавця// Смолій В. А., Ричка В. М. //Український історичний журнал. – 1993. – №4–6. – С. 94.

the League of Nations, a founding member and later chairman of the Museum of the liberation struggle of Ukraine, member of the historical and philological Society in Prague[1].

At the time of the Second World War A. I. Yakovliv returned to Prague, after the war he lived in West Germany, Belgium, and from 1952 lived in the village, where he continued research. The scientist died in 1955 in New York, where he was buried.

The scientific heritage of the scientist is large and varied. But the scientist's most attention was paid to the problems of the history of Ukrainian law and the Ukrainian state. He explores the history of dig courts, influence of the old Check law on the Ukrainian law in XV-CXVO, the problem of the Magdeburg Law in Ukraine in XVI-XVIII centuries, customary law, and the codification of law in Ukraine in XVIII. His work «Fundamentals of the UNR Constitution (New York, 1964)» was already published after the death of the scientist. As a participant in the trial over the killer of S. Petliura he knew the investigation materials, and it gave him the opportunity to express his own opinion about the tragic death of the former chief of the UNR. Among the other historical and legal problems a special attention of A. I. Yakovliv was paid to the issue of the Pereyaslav Treaty and other Ukrainian-Moscow Treaties of XVII–XVIII, to which he devoted a number of papers.

The first article of A. I. Yakovliv «Treaty of the Hetman Bohdan Khmelnytsky with Moscow 1654» was published in 1927 in the «Jubilee Collection of the All-Ukrainian Academy of Sciences in honor of the Academician D. I. Bahaliy», and the next in 1928 in the «Jubilee Collection of the All-Ukrainian Academy of Sciences in honor of the Academician M. Hrushevsky» appeared his second work «Articles of Bohdan Khmelnytsky» as amended in 1659. Soon the scientist published another work on this problem – «Moscow drafts of the contracting paragraphs with the Hetman Ivan Vyhovsky» (1933). The main provisions and conclusions of these studies have been deepened and developed in the fundamental research of A. I. Yakovliv «Ukrainian-Moscow Treaties in XVII–XVIII»[2].

The latest work of A. I. Yakovliv – «Treaty of the Hetman Bohdan Khmelnytsky with the Moscow Tsar Oleksiy Mikhailovich 1654: Historical and Legal Studio on Award of the 300th Anniversary of the Treaty (1654–1954)»[3]. In it the author mainly remains in the same position on the legal nature and content of the Treaty in 1634, as in the aforementioned monograph. The assessment of the value of the Treaty in the history of Ukraine as an act that «has started a new era – Ukraine's coexistence with the Moscow state under certain conditions, which continued 110 years (1654–1764)

[1] Плецький С. Ф. Яковлів Андрій / Плецький С. Ф. // Українське козацтво. Мала енциклопедія. – Київ – Запоріжжя. – 2002. – С. 563.

[2] Яковлів А. Українсько-московські договори в XVII–XVIII віках / Яковлів Андрій / УІЖ. – 1993. – № 9. – С. 122–128.

[3] Переяславська Рада 1654 р. (Історіографія та дослідження). – К., 2003. – С. 91–155.

has not changed and resulted in the deprivation of Ukraine from the rights and liberties, guaranteed by the Treaty, and its full incorporation. Both Parties referred to this Treaty as to the act that authoritatively and conclusively established the rights and obligations of the Parties[1].

Based on this basic conclusion as to the meaning of the Pereyaslav Treaty, A. I. Yakovliv holds in his monograph a deep analysis of all available sources that directly or indirectly related to the Treaty, as well as the political and military situation in which Ukraine was the day before drafting the Treaty, rightly noting that this situation also had some influence on the terms and conditions of the Treaty. The results of this analysis have allowed the scientist to establish the exact list of acts by which the Pereyaslav Treaty was executed and the text of this Treaty. The work has the greater significance that many original documents, including such important as the Articles of Bohdan Khmelnytsky (actual draft Treaty), March Articles with royal decrees under Articles, etc. (Answer of Moscow to the project of Khmelnitsky) has not been preserved.

Comparing the content of the Articles of Bohdan Khmelnytsky with the March Articles of the royal decrees and letters, A. I. Yakovliv convincingly established that all the terms and conditions, proposed by B. Khmelnitsky and V. Zaporizkyi, were considered by the tsars and nobles and accepted as a whole or with some comments: offers from B. Khmelnitsky dated 17.02.1654 in the quantity of 23 articles are quite exhausted with 11 articles as amended on March 27 and by Letter Patent of decrees contained in the articles. Taken together, they represent the full text of the Treaty in 1654[2].Yakovliv refutes the view of some authors (Karpov, Kulish, Odynets), who believed that there was no Treaty, that the king as an absolute monarch just felt «pity» for the Zaporizhzhia Army, having approved some old Cossack rights and privileges. He gives quite convincing evidence that the form of the Treaty is not related to its content, that by the content the act 1654 was a bilateral Treaty between B. Zaporizkyi and Moscow king, according to the Treaty both parties considered in the official acts. The author quotes all of these acts with reference[3].

During the legal analysis of the Treaty in 1654 A. I. Yakovliv refers to the historical method. He noted that in XVII century there were quite different political ideas and legal concepts that in the political acts of XVII century «legal relations between the states were imagined as relations between the persons of monarchs, and not as the relations between the individual states». In terms of the Treaty 1654 the legal relations, which arose as a consequence of this Treaty connect Hetman B. Khmelnytsky, who personifies Ukraine, and Tsar Alexei Mykhaylovych, who personifies the

[1] Яковлів А. Українсько-московські договори / Яковлів А. //УІЖ. – 1993. – №4–6. – С. 97.

[2] Ibid. (C. 116).

[3] Яковлів А. Українсько-московські договори / Яковлів А. //УІЖ. – 1993. – №7–8. – С. 118.

Moscow state. Personification as a way to present abstract ideas about the rights of the state in any sphere of government is used everywhere in the Treaty so the analysis cannot be interpreted literally, as do some authors[1]. Thus, the formula «where three human Cossacks shall judge two the third one» only symbolically meant that the Zaporizhia Army was not completely dependent on Moscow in the court sphere[2].

According to the formal content of the Treaty the rights of the Moscow Tsar regarding Ukraine were limited to getting the tribute money and control over the relations of Ukraine with foreign states, and then only in certain cases. In all other areas Ukraine was independent, with elected Hetman, who had full powers and authority on the internal affairs.

A. I. Yakovliv considered the Treaty 1654 public-political by nature. For its legal assessment, according to the scientist's opinion, it is important to know not only its formal sense, but also to find out whether the Treaty was actually implemented and to what extent. Analyzing the main directions of the Ukrainian-Moscow relations, governed by the Treaty, the author came to important conclusions, which are crucial to ascertaining the true legal nature of the Treaty. In particular, he believed that the military conditions were generally implemented, namely the war with Poland was made by joint forces of Ukraine and Moscow. And after the Vienna Settlement Agreement, which was concluded without the participation of Ukraine and against its wishes, B. Khmelnitsky believed that Moscow had violated the terms and conditions of the Treaty 1654, and now ruled Ukraine quite independently, although formally remained in the contractual relations with Moscow[3].

Other terms and conditions of the Treaty, aimed at the restriction of the state independence of Ukraine, including the law of the international relations, have been implemented from the very beginning. B. Khmelnytsky acted as the supreme master of the independent state, making active and passive right to relations with foreign states, concluding agreements of the international nature without the consent of Moscow. Treaty 1654 was an ordinary alliance and defense protection treaty for him that had not to «knit» Zaporizhzhia Army in its relations with other states and international politics.

At first Moscow also shared the overwhelming view of that time to such «protective» treaties. Moscow considered Ukraine a separate state the relations with which after the Pereyaslav Treaty were carried out through the Ambassador's commandment in charge of diplomatic affairs of the Moscow reign. The state border and customs agencies separated Ukraine from Moscow. And already in the state list of the nobleman Buturlin there started to appear the idea of union with Moscow of «parent torn away, Kyiv», which then found its justification in the works of the Russian scientists, historians and lawyers. Disagree-

[1] Ibid. (C. 119).
[2] Ibid. (C. 123.)
[3] Ibid. (C. 124).

ing with them, A. I. Yakovliv gives sufficiently convincing arguments to refute the idea and definition of the legal nature of the Treaty («Incorporation», «Autonomy», «Personal Union», etc.), which arose on its basis[1].

«The relations between Ukraine and Moscow by the literal meaning of the Treaty 1654, – concluded by A. I. Yakovliv, are – very close to the nominal vassal relations or protectorate». And it is not the terms and conditions that affected the relations between them, but the real life and the real forces of both states. The nominal vassal dependence, which de jure agreement established de facto, did not exist. In fact, Ukraine was a state, independent from Moscow. That outside world acknowledged Ukraine as the same. Foreign states and monarchs saw Hetman Bohdan Khmelnytsky as the supreme authority of an independent state, and Treaty 1654 was deemed the agreement of alliance, peace, or «protection» in that understanding, just purely nominal protection that did not prevent from keeping diplomatic relations with Ukraine as with the fully legitimate subject of the international law.

Such a conclusion of the scientist did not coincide with the idea of «reunification» of Ukraine and Russia that was dominant in the Soviet historiography. It closed the way of his works to the Ukrainian readers for a long time. Fortunately, not for ever.

Published: Форум права. – 2016. – № 2. – С. 208–211.

[1] Ibid. (С. 126).

STATE-LEGAL SCIENCES AND INTERNATIONAL LAW

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UDC 001.92+002.6:316.324.8

HISTORICAL AND LEGAL ISSUES OF FORMATION AND DEVELOPMENT OF THE INFORMATION SPHERE AND INFORMATION LAW IN UKRAINE (end of XX – beginning of XXI century)

Articulation of issue. In the establishment and development of the information society, national and global information space all the spheres of human life, society, the state and the international community are directly related to information and conditioned by it. The current period of development of culture and civilization is characterized by a new step in the evolution of social processes and is distinctive due to pursuance of developed industrial society to improve their social structures and institutions. Today humanity has to deal with

the new factors of social and economic development – namely, the factors of information development. The key factors that shape and direct processes of the information progress involve deliberate and purposeful use of artificial intelligence and information and communication technologies in the economic and social practices. The leading and largely symbolic feature of the modern world is forming global information industry, which transforms the role of information and knowledge in the socio-economic sphere[1].

However, the important issue is understanding the nature and characteristics of the impact of information and communication technologies on the changes in the traditional activity system, social and interpersonal communication, due to the need of information law, which is the regulatory framework for a new way of life. It is impossible to find the answer to modern information and legal issues without a thorough study of the relevant historical experience. Under these conditions, research of historical and legal issues of formation and development of social relations in the sphere of information and learning history of the information law presents an actual scientific problem that requires complex processing.

Analysis of recent studies. Intersectoral nature of social relations in the information sphere is reflected in the publications of a number of domestic and foreign scientists, particularly in the following areas: Philosophy and History of Science (N. Viner, V. O. Danilyan, O. P. Dzyoban, P. Draker, Y. V. Kanygin, D. Robertson, E. Toffler), Economics (I. B. Zhylyaev, V. L. Inozemtsev, M. Kastels, P. V. Melnyk, V. I. Muntiyan, M. Y. Shvets), Political Science and Sociology (V. M. Bebik, D. V. Dubov, O. V. Lytvynenko, M. A. Ozhevan, O. V. Sosnin), State Management (M. V. Ga-man, V. I. Gurkovskiy, A. I. Semenchenko, V. O. Shamray) and many others.

Recent theoretical, legal and applied problems related to regulation of social relations, particularly in the information sector, and to the development of information law were covered by such scientists as: V. B. Averyanov, O. F. Andriyko, I. V. Aristova, O. A. Baranov, K. I. Belyakov, V. M. Bryzhko, G. V. Vynogradova, O. O. Zolotar, R. A. Kalyuzhnyi, O. L. Kopylenko, B. A. Kormych, T. A. Kostetska, O. V. Kokhanovska, I. Y. Kregul, N. V. Kushakova, G. M. Krasnostup, V. M. Lozovyi, A. I. Marushchak, N. M. Myronenko, V. Y. Nastyuk, N. B. Novytska, A. M. Novytskyi, N. R. Nyzhnyk, O. P. Orlyuk, O. V. Petryshyn, V. M. Petrenko, V. F. Sirenko, V. Y. Tatsiy, V. P. Tykhyi, I. O. Trubin, M. O. Teplyuk, O. G. Frolova, V. M. Furashev, Y. S. Shemshuchenko and others.

Constitutional and legal nature of the information sphere was studied by scientists, such as: V. F. Pogorilko, T. A. Kostetska, I. O. Kresina, A. V. Kolodyuk, A. O. Selivanov and others. Issues of the legal provision for national

[1] Пилипчук В. Г., Дзьобань О. П. Інформаційне суспільство: філософсько-правовий вимір: Монографія / Пилипчук В. Г., Дзьобань О. П. – Ужгород : ТОВ «ІВА», 2014. – С.5

and information security were studied by V. V. Belevtseva, M. V. Belanyuk, M. O. Budakov, V. D. Gavlovskyi, O. D. Dovgan, V. V. Krutov, V. V. Kostytskyi, A. I. Marushchak, V. Y. Nastyuk, D. M. Prokofieva, N. A. Sa-vinova, E. D. Skulysh, M. P. Strelbytskyi, V. I. Tymoshenko, O. M. Yurchenko and others. Actual problems of legal informatics and legal modeling were studied by D. V. Lande, V. M. Furashev, S. M. Braichevskyi, I. F. Korzh, O. V. Gladkivska, S. V. Lykhostup, M. Y. Shvets and other scientists.

At the same time, only a few publications was devoted to historical and legal aspects of the formation and development of information sphere, public information relations and information law[1].

The main material. Historical analysis and genesis of the scientific research shows that the information sphere and public information relations existed since the origin of mankind. In the context of the above, there are noteworthy conclusions made by renowned scientist in the field of history of science, Y. M. Kanygin, which, in particular, noted: *«Informatics is something new – even for us… Information has become the subject of study only recently… But now it turns out that the basic elements of informatics (including information theory and machines for its processing) existed in pre-antique times! … In Plato's dialogues «Timaeus» we can find a detailed explanation of coding issues («core» of information theory), the value of which is growing rapidly in our time. …Analysis of traditional Buddhist techniques of meditation training reveals its striking resemblance to algorithms defined by contemporary artificial intelligence researchers (5th generation computers)»*[2]. Similar estimates were expressed in writings of G. V. Vasilieva, L. Oppenheym and other researchers of ancient civilizations.

That is, the study of the history of information sphere and regulation of in-

[1] Пилипчук В. Г., Беланюк М. В. Історичні аспекти розробки і впровадження наукової спеціальності 12.00.13 – «Інформаційне право; право інтелектуальної власності» / В. Г. Пилипчук, М. В. Беланюк // Інформація і право, 2016. – № 2 (17). – С. 5–14.; Брижко В. М., Гладківська О. В., Швець М. Я. Науково-дослідний центр правової інформатики Академії правових наук України (становлення та результати) : Науково-популярне видання / В. Брижко, за ред. М. Швеця, О. Гладківської. – К.: НДЦПІ АПрН України, 2009. – 16 с.; Швець М. Я., Брижко В. М., Гладківська О. В. Наукова діяльність Науково-дослідного центру правової інформатики Національної академії правових наук України: довідник (2001–2010 рр.) / упорядники: В. М. Брижко, О. В. Гладківська, за ред. М. Я. Швеця. – К.: ТОВ «Пан-Тот», 2010. – 70 с.; Микола Якович Швець (до 75-річчя від дня народження та 45-річчя науково-дослідної, науково-педагогічної і громадської діяльності) : Біографія і бібліографія вчених Національної академії правових наук України. – НДЦПІ НАПрН України. – К. : Видавництво ТОВ «ПанТот», 2010. – 32 с.; Пилипчук В. Г., Фурашев В. М., Гладківська О. В. Історія Науково-дослідного інституту інформатики і права НАПрН України та розвитку правової науки в інформаційній сфері / Пилипчук В. Г., Фурашев В. М., Гладківська О. В. // Вісник НАПрН України. – Харків : «Право». –№ 2(73). – 2013. – С. 290–300.

[2] Каныгин Ю. М. Путь ариев: Украина в духовной истории человечества. – К. : Изд-во А. С. К., 2003. – С. 136–139.

formation relations will contribute to more effective solution of current legal issues of the ***information activities***, in particular, in the following areas: *electronic governance, e-Parliament and e-government; provision of administrative services and access to public information; telecommunications, communications and informatization; media, Internet, advertising; publishing, libraries, archives and museums; state statistics, document management, digital signature; information activities in the fields of education and science, culture and arts, in economic, financial, banking and other sectors*.

Information globalization naturally raises a number of philosophical and legal questions, understanding of which requires to apply to the nature of the information sphere, information society, information and ideas about it as a phenomenon of modern civilization.

Ukraine and the world is actually undergoing quite difficult transition from an industrial to an information society. A historical analysis conducted, and application of studies logic of E. Toffler allow to distinguish the following major ***historical periods of development of society*** *and* ***public relations*** in Ukraine[1]:

– *agrarian society* (began to form about 7,500 years ago, since the developed agrarian civilization – the so-called «culture of Tripoli» and actually existed until the second half of the twentieth century);

– *industrial society* (began to emerge in the XVIII century and was formed in the second half of the twentieth century);

– *information society* (began to emerge in the end of the twentieth century).

Each of these periods had its characteristic features of social relations in different spheres of life and their appropriate adjustment (at the level of customs, traditions, religion or law). The main difference between the modern process of information society formation is the rapid change of social relations in all spheres of human life, society and the state, which requires a radical revision of the role of modern legal science.

Systemic historical and legal problem is the lack of a common understanding of the nature of information as a key component of the information society and the global information space. Today we have somewhat simplified approach to the definition of «information» concept at the legislative level, which boils down to the synonymous terms «information» or «data».

However, as the history of science shows, we deal with information in management and communication systems, information technologies, languages and biological systems, information systems in living cells etc. Therefore, taking into account doctrines of K. Tsiolkovskyi, V. Vernadskyi, O. Chizhevskyi, N. Viner, V. Gitt and other scientists, the ***«information»*** term, along with terms *«energy» and «matter»* must be referred to the fundamental values that form the basis of the universe and are the basis for mod-

[1] Пилипчук В. Г., Дзьобань О. П. Інформаційне суспільство : філософсько-правовий вимір : Монографія / Пилипчук В. Г., Дзьобань О. П. – Ужгород : ТОВ «ІВА», 2014. – С. 247.

ern science[1]. The process of scientific understanding of the role and value of information can be divided into three periods: *pre-cybernetic, cybernetic and post-cybernetic*[2].

Pre-cybernetic period is associated with traditional (on a philosophical level) understanding of the preconditions for the existence of information exchange itself. It started in the days of the Hellenic and post-Hellenic civilization and was completed by the period of industrial revolution of the late XIX century. Information right also arose under these conditions[3]. As an example, we can mention facial right (originated from *fas* – self), which regulated access to the information within the divine will.

The beginning of the XX century was linked to fundamental discoveries of modern scientific paradigm: probability theory and quantum mechanics. They created the basic preconditions for scientific and technological progress in its modern vision. But these discoveries began to be implemented on a technical level in the mid XX century, when paths of their technological implementation became apparent.

Since the mid 50-ies of XX century began the so-called *cybernetic period* of the information understanding. 50's and 60's of last century were marked by the flowering of cybernetics and electronics. Representatives of these sciences created the first and further generations of electronic computers, including personal computers. In that period basic information theories were formed and rapidly developed. The theoretical legacy of that time still is the main basis for science in the study of information problems.

The period of cybernetic understanding of the role and value of information continued until 1990, that is before the mass informatization, when the stage of PC introducing, digital information transmission lines and creating a new class of information technology has begun. High-speed information transmission, as well as its high-tech processing, storage and use have created a new level of understanding of the nature and importance of the information in society.

So-called *post-cybernetic period* began in 1990s and exists till now – the period of mass development of high-tech information and communications systems, information technologies, resources, products and services and their implementation in all areas of human life, society, state and international community.

During the abovementioned post-cybernetic period at the end of the XX – beginning of XXI century, information revolution took place in Ukraine and worldwide, one of the key features of

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[1] Каныгин Ю. М. Путь ариев: Украина в духовной истории человечества. – К. : Изд-во А. С. К., 2003. – С. 136–139.

[2] Пилипчук В. Г., Дзьобань О. П. Феномен інформації: історико-правові та філософські аспекти / В. Г. Пилипчук, О. П. Дзьобань // Інформація і право. К., 2015. – № 1 (13). – С. 5–14.

[3] Зарипова З. Н. Правовое регулирование образовательной реформы в России второй половины XVIII века: автореф. Дис. …канд. юрид. наук : 12.00.01 «Теория государства и права. История государства и права. История политических и правовых учений» / З. Н. Зарипова. – Н. Новгород, 2000. – 21 с.

which is the rapid development of information technologies and growing importance of information that led to the formation of information society. According to the definition provided by the European Commission in 1993, an information society is a society in which human activities are carried out through the use of services provided through information and communication technologies.

Historical analysis shows that the question of building components of the information society and the legal regulation of information relations have been actively processed in the leading countries of the world only in the second half of the twentieth century. In 1970s in Ukraine famous scientists Glushkov V. M. and Amosov M. M. first in the world raised a number of fundamental problems in this area, but their further comprehensive development was mainly carried out by scientists from Western Europe, USA and Japan.

It should be noted that in Ukraine in the 70s of last century cybernetic science and computer science began to take active development, and scientific achievements were applied in complex processing of organizational and legal problems of development of automated control systems, data-processing centers and their implementation in national and departmental management systems etc. Along with the development of Cybernetics Center of the Academy of Sciences of the Ukrainian SSR and other technical research institutions, socio-legal research in this area at that time involved the Institute of State and Law named after V. M. Koretskyi, and a number of the legal professional scientists, including the directions of contemporary scientific expertise in public law and administration, administrative law.

A positive historical experience and a classic example of a combination of science and production seems to have been the fact that new areas of science and technology development in Ukraine were then maintained at the level of state policy, and academic institutions received adequate financial, logistical and other resource provision. Accordingly, based on comprehensive scientific research, research and production facilities were established and industrial production developed. Thereafter, positive national experience in shaping and implementing public policy in science and technology areas and relevant scientific and production potential were largely lost. In the course of comparison, we may note that these negative trends in scientific and technical sphere development continue today.

Processes of informatization that occurred throughout the civilized world, could not remain unnoticed by the leadership of a sovereign Ukrainian state. But in the early 1990s, this work was carried out fairly piecewise. The situation began to change dramatically with the formation of the National Agency For Informatization under the President of Ukraine, according to the Decree of the President of Ukraine dated March 13, 1995 № 206/95.

The beginning of systematic work in the field of information can be considered the adoption in February 1998 (for the first time in the post-soviet territory) of the Laws of Ukraine *«On the Concept*

of the National Informatization Program» and *«On the National Informatization Program»*, which were developed with the participation of Cybernetic Center of National Academy of Sciences of Ukraine, the National Agency for informatization under the President of Ukraine, the Cabinet of Ministers of Ukraine and the Secretariat of the Verkhovna Rada of Ukraine.

Further system work in the field of information and consolidation of interests of the public and private sectors were enhanced by the activities of the State Commission on prevention and elimination of possible negative consequences of computer crisis of 2000 and the Government Commission on the information and analytical support of executive bodies set up by Decrees of Cabinet of Ministers of Ukraine dated 16.02.1999 № 218 and № 777 dated 7.05.2000, respectively.

In the same period in the Ukraine started the active formation of information legislation, which now contains about 4 thousand laws and other legal acts regulating modern information relations and creating the legal conditions for the development of the functional areas of information activities.

In terms of the chronology of legislative activity in Ukraine in the late XX – early XXI century we may identify the following ***main stages of formation of the national information legislation***:

1) creating legal bases of formation and development of information sphere in Ukraine. The key act for the implementation of the above was the adoption of the Resolution of the Presidium of the Verkhovna Rada of Ukraine «On the Development of the package of draft laws on issues of informatization and information protection»[1], according to which the Cabinet of Ministers of Ukraine was instructed to develop and submit to the Verkhovna Rada of Ukraine package of draft laws on issues of information and data protection, information support economic and social development, protection of human rights in terms of information, state and commercial secrets, responsibility for violations in the operation of information, document management reform, information resources export control, access to information, etc. before September 1, 1992.

As a result, according to the estimates made by scientists of the Research Institute Of Informatics And Law of National Academy of Legal Sciences of Ukraine (NDIIP NAPrN of Ukraine), in the late 90ies of the last century information legislation already contained significant array of regulations (over 260 laws, 295 Resolutions of the Verkhovna Rada of Ukraine, 470 decrees and orders of President of Ukraine, 1 370 decisions and orders of the Cabinet of Ministers of Ukraine, and over 1 500 acts of ministries and agencies)[2].

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[1] Про розробку пакету проектів законів з проблем інформатизації та захисту інформації : Постанова Президії Верховної Ради України від 24.03.1992 р. № 2212-XII // Відомості Верховної Ради України (ВВР). – 1992. – № 26. – Ст. 368. [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/2212-12.

[2] Швець М. Я., Цимбалюк В. С. та ін. Інформаційне законодавство України: концеп-

A positive feature of the first stage of the formation of a national information legislation, according to our estimates, was development of a basic regulations that contributed to the development of the information sector and laid the foundation for the development of information society in Ukraine. However, a significant drawback was the permanent adoption of a large number of legislative acts, in which provisions are often not consistent with each other, which created significant problems in the law enforcement activity;

2) legal support for formation and implementation of government policy on informatization and policy on development of national information legislation. The main events at this stage in terms of history are:

– adoption of the Concept of National Informatization Program[1], according to which, in particular, as a basis for the state policy based on a combination of the principles of centralization and decentralization, self development etc. government regulation was supposed to be used, which would ensure consistency, coherence and integrated development of the country;

– Governmental Commission on Information And Analytical Support Of Executive Bodies (2000), supported by the Scientific and Technical Council the State Committee on the Communication and Informatization of Ukraine, adopted the decision to support and take as a basis the draft Concept of reforming the legislation of Ukraine in the area of public information relations with recommendation on inclusion for completion and filing as a regulatory act for the National Informatization Program of Ukraine.

Basis of the Concept, developed by scientists at the initiative of the National Academy of Legal Sciences of Ukraine, National Academy of Internal Affairs of Ukraine and the Interdepartmental Center for combating organized crime at NSDC of Ukraine, was the complex of organizational and legal measures, including those designed for the development of the Information Code of Ukraine[2]. Analysis of the Concept content also showed dynamic development of Ukrainian legal science in the information sector;

– definition by National Informatization Program for 2000–2002[3] of the goal to prepare the Concept of creation of regulatory basis in the field of informa-

туальні основи формування / М. Я. Швець, В. С. Цимбалюк, В. Д. Гавловський, Р. А. Калюжний // Право України. – 2001. – № 7. – С. 81–88.

[1] Концепція Національної програми інформатизації : Схвалено Законом України «Про Концепцію Національної програми інформатизації» від 4 лютого 1998 року № 75/98-ВР // ВВР. – 1998. – № 27–28. – Ст. 182. [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/75/98-вр.

[2] Тацій В., Лисицький В. До питання реформування законодавства України у сфері суспільних інформаційних відносин / В. Тацій, В. Лисицький // Вісник Академії правових наук України. – 2000. – № 4. – С. 298–302.

[3] Завдання Національної програми інформатизації на 2000–2002 роки : Додаток до Постанови Верховної Ради України від 06.07.2000 р. № 1851-III [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/1851-14.

tion; as well asadoption of decision of the NSDC of Ukraine dated 31.10.2001. «On measures to improve state information policy and ensure information security in Ukraine», which instructed the Cabinet of Ministers of Ukraine to develop a proposal for codification of legislation on information relations[1];

– introducing legal mechanisms to ensure interaction between science and practice of state management in the List of tasks (projects) of the National Informatization Program for 2002, their state customers and funding[2]. In particular, this List instructed the State Committee on Communication of Ukraine to organize research on reforming legislation in the field of public information relations and identified the expected results, including preparing comparative assessment of legislation of developed countries for informatization and working materials to the draft Code of Information Law in Ukraine;

– determination of the strategy of development of information society in Ukraine, for what basic principles of information society in Ukraine in 2007–2015 years were approved legally[3] and order was issued by the Cabinet of Ministers of Ukraine «On approval of a plan of measures to implement the tasks stipulated by the Law of Ukraine «On the Basic principles of information society development in Ukraine in 2007–2015»[4].

It is noteworthy that these documents determined the need to take actions on codification of information legislation, improving the efficiency of the information society development and the creation of an integrated system of legislation harmonized with international law. That plan also provided for the development in 2009 of the draft *Information Code of Ukraine*.

The feature of the second phase was the adoption of a number of decisions and legislation acts necessary for the formation and implementation of state information policy, policy of ensuring information security of Ukraine, and the introduction of complex measures to the development of the information society and information law in Ukraine. However, much of these decisions remained unimplemented.

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[1] Указ Президента України від 6 грудня 2001 року № 1193/2001 «Про рішення Ради національної безпеки і оборони України від 31 жовтня 2001 року «Про заходи щодо вдосконалення державної інформаційної політики та забезпечення інформаційної безпеки України»: [Електронний ресурс]. – Режим доступу: http://www.raga.gov.ua.

[2] Перелік завдань (проектів) Національної програми інформатизації на 2002 рік, їх державні замовники та обсяги фінансування, затверджений розпорядженням Кабінету Міністрів України від 13.06.2002 р. № 323-р. [Електронний ресурс]. – Режим доступу: http://zakon4.rada.gov.ua/laws/show/323-2002-р.

[3] Основні засади розвитку інформаційного суспільства в Україні на 2007–2015 роки, затверджені Законом України від 09 січня 2007 року № 537-V [Електронний ресурс на DVD] // Бібліотека баз даних і знань в галузі держави і права. – К. : НДЦПІ НАПрН України. – 12.02.2011.

[4] Розпорядження Кабінету Міністрів України від 15.08.2007 р. № 653-р. «Про План заходів з виконання завдань, передбачених Законом України «Про Основні засади розвитку інформаційного суспільства в Україні на 2007–2015 роки»: [Електронний ресурс]. – Режим доступу: http://zakon.rada.gov.ua/laws/show/653-2007-р.

The results obtained from studies[1] make it possible to isolate certain ***historical features, trends and systemic problems of formation of national information law*** (end of XX – beginning of XXI century), which need further complex processing, including:

– standard-setting activities in the information sphere were often carried out in the absence of national consistency, by fragmented solving existing problems in some laws and other regulatory acts. There are significant differences in the understanding of a system of information legislation and approaches to its formation;

– various laws and regulations governing public information relations for 20 years were adopted without sufficient coordination in conceptual and categorical apparatus and used a number of terms that are not correct and ambiguously perceived by participants of information activities;

– the legislative process in the information sector was often carried out without proper coordination with international information law regulations and provisions of legal acts of the European Union. A large number of legal rules governing information relations is scattered in different laws and other legal acts, which complicates their practical application;

– the legislation on protection of personal data require considerable elaboration and harmonization with EU regulations, developing and introducing legal mechanisms for implementation of the human right of ownership to their personal data;

– proper attention wasn't paid to legislative regulation of one of the main functions of the state – provision of information security of Ukraine.

It should be noted that in recent years the above-mentioned issues were supplemented with other ***negative trends, including those related to the protection of rights, freedoms and human security in the information sector, access to public information, legal regulation and protection of information of public electronic registers*** etc[2].

To address these systemic problems, we should listen to the advice of EU experts on the need for more active involvement of the experts and scientists of scientific institutions and educational institutions of Ukraine by central executive bodies and local authorities to study the existing problems. Now, as the analysis shows, these suggestions

[1] Пилипчук В. Г., Баранов О. А., Цимбалюк В. С. Концептуальні основи кодифікації інформаційного законодавства України : [підрозд. 5.2] / В. Г. Пилипчук, О. А. Баранов, В. С. Цимбалюк // Правова доктрина України : У 5 т. / Нац. акад. прав. наук України; редкол. В. Я. Тацій [та ін.]. – Х. : Право, 2013. – Т. 2: Публічно-правова доктрина України. – С. 780–805; Пилипчук В. Г., Брижко В. М. Проблеми становлення і розвитку інформаційного законодавства в контексті євроінтеграції України / Пилипчук В. Г., Брижко В. М. // Інформація і право : науковий журнал. – К. : НДЦПІ НАПрН України, 2011. – № 1 (1). – С. 11–19.

[2] Пилипчук В. Г. Актуальні питання захисту прав, свобод і безпеки людини в сучасному інформаційному суспільстві / Проблеми захисту прав людини в інформаційному суспільстві: Збірник матеріалів науково-практичної конференції / Упорядн. Фурашев В. М., Петряев С. Ю. – К. : Вид-во «Політехніка», 2016. – С. 6–8.

are usually followed by the Ukrainian parliament. Although, for the sake of historical justice, it should be noted that in the late twentieth and early years of the twenty-first century public authorities paid more attention to scientific and legal provision of the information sphere development.

Another reason that restrained the development of the information sphere, information law and information legislation, according to our estimates, were significant differences between specialists, experts and scientists on priorities and ways of their development.

As an example in the context of the above, we can mention the attempt of the Center for Political and Legal Reforms to clarify and summarize the idea of the information right in the course of the round table held in 2004 «Information right: status and prospects of development in Ukraine»[1]. As it turned out, the views of various experts with regard to information law at that time varied considerably. Those who have dealt with the media, believed that the information law is their area, this is the right of media. Similar statements, but in their favor, were made by experts in communications, telecommunications, informatization, informatics and cybernetics. The most heated debates were related to determining the place of the information law in the legal system of Ukraine.

For the sake of comparison, we should take into account the presentations of representatives of Germany and the UK during that round table. In particular, an expert on information law in Germany Matthias Rossi said that in Germany information law includes constitutional right to information, international information law, information civil law, information criminal law, and information public (state and administrative) law. The right to data protection, the right to protection of privacy, the right of access to information, telecommunication law, postal law, electronic information services law, the right of broadcasting, right of the press are considered as separate institutions. Instead, according to the expert presentations, in the UK media law examines all issues related to the collection and dissemination of information, and telecommunication right investigates and regulates the means of disseminating information.

Some solutions to this problem, given the achievements of various branches of science, including philosophical, sociological, political, psychological, educational, technical, have been proposed in the 2012–2016 years by scientists from the Research Institute Of Informatics And Law of National Academy of Legal Sciences of Ukraine, which has now become one of the leading research institutions in the field of information law and information security, particularly in developed draft *Concept of codification of information legislation of Ukraine* (2012), prepared by the Research Institute Of Informatics

[1] Т. Шевченко «Інформаційне право: для журналістів чи для програмістів?» [Електронний ресурс]. – Режим доступу: http://medialaw.org.ua/analytics/informatsijne-pravo-dlya-zhurnalistiv-chy-dlya-programistiv.

And Law of National Academy of Legal Sciences of Ukraine together with the Research Institute of Intellectual Property of National Academy of Legal Sciences of Ukraine and supported by MES of Ukraine (2014) proposals on the implementation of *scientific specialty 12.00.13. – «information law; intellectual property right»* and other works[1].

Development of information law and information sphere in Ukraine was significantly stimulated by the decision of the General Meeting of National Academy of Legal Sciences of Ukraine, which approved the priorities for the development of legal science in the information sector in 2011–2015 and 2016–2020 years developed by scientists of the Research Institute Of Informatics And Law of National Academy of Legal Sciences of Ukraine. More important in the context of the above, in our view, should be the role of a set of measures proposed during parliamentary hearings held by the Verkhovna Rada of Ukraine, in particular: *«Society, media, government: freedom of speech and censorship in Ukraine»* (2003), *«Legislative support for the development of information society in Ukraine»* (2014) etc.[2]

Another area of information law and information society, as evidenced by recent history, was the introduction of scientific achievements in scientific and educational activities. To this end, a number of scientists since the late 90s of last century began teaching disciplines on problems of regulation of social relations in the information sphere in higher educational institutions of Ukraine. Among the first, we can mention teaching in 1998–1999 years of discipline *«Information Law»* in the Kiev Institute of Economics, Management and Commercial Law[3].

A good example of integrating research and education in the field of information law was the creation of common *Educational and Scientific Center of Information Law and Legal Issues of Information Technology* in 2013 by SRI of Informatics and Law of National Academy of Legal Sciences of Ukraine and National Technical University of Ukraine «KPI». One of the main objectives of the Center was determined as the development and implementation in the learning process of necessary scientific and methodological materials for new

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[1] Концепція кодифікації інформаційного законодавства України // Інформація і право : науковий журнал. – К. : НДЦПІ НАПрН України, 2012. – № 1 (4). – С. 1–6; Наказ Міністерства освіти і науки, молоді та спорту України від 14.09.2014 р. № 1057 [Електронний ресурс]. – Режим доступу: http://zakon5.rada.gov.ua/laws/show/z1133-11.

[2] Постанова Верховної Ради України від 16.01.2003 р. № 441-IV «Про підсумки парламентських слухань «Суспільство, засоби масової інформації, влада: свобода слова і цензура в Україні». – [Електронний ресурс]. – Режим доступу: www.raga.gov.ua; Постанова Верховної Ради України «Про затвердження рекомендацій парламентських слухань на тему: «Законодавче забезпечення розвитку інформаційного суспільства в Україні» від 3 липня 2014 року № 1565-VII / Відомості Верховної Ради (ВВР), 2014, № 33, ст. 1163.

[3] Цимбалюк В. С., Гавловський В. Д. Інформаційне право. Навчально-методичний комплекс. – К. : Інститут економіки управління та господарського права. 1999. – 183 с.

courses. As a result, in 2014–2015 years scientists of the Research Institute of Informatics and Law of National Academy of Legal Sciences of Ukraine and National Technical University of Ukraine «KPI» prepared and provided with all the necessary learning and teaching materials teaching a number of courses on specialty ***«Information Law»***, in particular: *«Information Society And Law», «Fundamentals Of Information Law,» «Fundamentals Of Information Security», «International Information Law», «Information And Social and Legal Modeling», «Modern Methods Of Information And Social And Legal Modeling», «Legal Issues of Information And Communication Technologies», «Information Resources»* etc.[1]

In general, consideration of the actual historical and legal problems of formation and development of the information sector, information society and information law in Ukraine at the end of the XX–XXI century makes it possible to reach the following **main conclusions and proposals**:

1. Genesis of the scientific research shows that the information sphere existed since the origin of mankind and public relations. A historical analysis conducted makes it possible to determine periods of development of society and public relations in Ukraine *(agrarian society*, *industrial society*, *information society)*. Each of these societies has been characterized with certain information relations and features of regulation of information activities at the level of customs, religion, law, requiring comprehensive scientific study. This will facilitate the identification of historic features, patterns and trends, as well as identification of further areas of development of information sphere and information rights in the modern world.

2. Systemic historical and legal problem is the lack of a common understanding of the nature of information as a key component of the information society and the global information space. Today we have somewhat simplified approach to the definition of «information» concept, which boils down to the synonymous terms «information» or «data». However, as the history of science shows, we deal with information in management and communication systems, information technologies, languages and biological systems, information systems in living cells etc. Therefore, taking into account current scientific achievements, the *«information»* term, along with terms *«energy» and «matter»* must be referred to the fundamental values that form the basis of the universe and are the basis for modern science, including legal.

3. The actual scientific problem in the present conditions is studying modern history of formation and development of public relations in the information sphere. It seems expedient to in-

[1] Пилипчук В. Г., Фурашев В. М. Трансформація центру правової інформатики в Науково-дослідний інститут інформатики і права: становлення, здобутки, пріоритети (2011–2015 рр.): Науково-інформаційний огляд / В. Г. Пилипчук, В. М. Фурашев, за інформаційно-технічної підтримки В. М. Брижка, В. В. Поперечнюк, О. Г. Радзієвської. – К. : ТОВ «ПанТот», 2016. – С. 29.

clude the following in the priority areas of historical and legal research on this issue:

– genesis of scientific thought to protect the rights, freedoms and human security in the information sector and finding the balance between human rights and the need to protect the legitimate interests of society and the state in the information sphere;

– studying the history of socio-political and legal doctrines on the establishment and development of the information sector and the information society, public policy and public administration in the information sector, information law and information legislation;

– Analysis of historical and legal problems of informatization, development and implementation of information technology, resources, products and services in various spheres of human life, society, the state and the international community;

– studying the historical and legal issues of ensuring the information security, countering the information terrorism, cybercrime and other offenses, the development of national and international security systems in the information sphere.

In general, historical and legal problems of formation and development of social information relations in times of modern history and in different historical periods in Ukraine and abroad require further reflection and comprehensive scientific study to facilitate the establishment of a modern information society and innovative development of Ukraine.

Published: Вісник Національної академії правових наук України. – 2016. – № 4 (87). – С. 29–44.

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UDC 342.951:351.82

THE DEMOCRATIC CONTROL OVER THE SAFETY SECTOR DURING THE FIGHT AGAINST TERRORISM

There is no formally recognized international legal definition of terrorism[1]. The national strategy of safety determines terrorism by fight against terrorism of the USA (February, 2003) as: «the deliberate, politically motivated violence aimed against non-belligerent persons from marginal groups or secret agents». Magnus Norrell, the Swedish counterterrorism expert, gives the following working definition: «systematic use of the illegal violence from non-state or sub public authorities which is especially aimed on non-belligerent and/or civilians for achievement of definite purposes. These purposes can be political, social or religious depending on what group is meant. Terrorism becomes international when it is carried out beyond the borders of the country – a source of formation of group or when he is directed to foreign citizens within the country – a source of formation of group»[2].

[1] During a meeting in Bern, Switzerland, in the framework of «Partnership for Peace», 22 April 2002 Colonel Nick Pratt (retired) said that there are 109 academic definitions of the term 'terrorism'. April 2, 2002 Islamic states were unable to reach a common definition of «terrorism» at a meeting of the Organization of the Islamic Conference (OIC) in Malaysia. The different views on the nature of the Palestinian struggle against Israel – the «struggle for freedom» or «terrorism» were the obstacle (Financial Times, April 3, 2002). Prof. Dr. Kemal Beyglou, an American expert on counter-espionage, September 16, 2002 emphasized during his lecture at the Atlantic Club in Sofia, that the best concise definition of the term «terrorism» is a «politically motivated attack on unarmed civilian people.» Chris Donnelly of NATO regards terrorism as «tactics» (Donnelly / CND / 2002/090 / Spain / 26/04/2002 / – C. 5); Trofimov S. A. considers terrorism as criminal activities of a terrorist directions (Правове регулювання антитерористичної діяльності в Україні: монографія / С. А. Трофімов. – Х. : Право. – 2012. – С. 12–64.).

[2] Magnus Norrel, The Role of the Military and Intelligence in Combating Terrorism,

In addition it is possible to tell that today terrorism is the global phenomenon: terrorists are organized in network and can carry out activity from every spot on the globe. Neutralization of one segment of the organization doesn't mean the end of existence of all networks. Besides, we deal with terrorists who are guided by extremely religious motivation to action doing them even more fanatical and ready to work, without doing distinctions. Disposal of all «incorrect», not excepting uses nuclear or weapons of mass destruction, is an essential part of thinking of new terrorists. The deep satisfaction of leaders of the Islamic State with a large number of the victims as a result of fighting in Syria and other countries acts and extends terrorists worldwide. In the working purposes we mark out the following key features and prospects of the phenomenon of terrorism:

a) the terrorism causes death to the innocent and not involved in the conflicts people;

b) the terrorism is tool/tactics of warfare (hybrid) action;

c) the terrorism has the indistinct territorial and legal framework of activity;

d) the terrorism becomes more and more dangerous;

e) the terrorism shows the large-scale «force of suicide», putting into the question the traditional rational approaches to application of military and other violence;

f) the terrorism carries global scale;

g) the terrorism is motivated with fanaticism, religiousness and policy of violence;

h) the use of weapons of mass defeat is the mad, but direct purpose of terrorist or proponents threat.

Well, any state with democratic society or being in process of democratization shouldn't remain away from attempt to deprive terrorism of his ability to blackmail and degradation of society. People expect that fight against terrorism will end with a victory, and they will be able to continue a normal and free way of life which they conducted earlier, applicable Ukraine till February, 2014. However, it is only one of concepts of how democracy has to react to terrorism. Other concept which isn't deprived of common sense reflects other approach which doesn't exclude the terrorism phenomenon, but, in view of constant presence of terrorism at public life, adapts to him. An essence of this thinking is that the democratic countries with their open societies, the rights and civil liberties will be always vulnerable in the face of the terrorism. These societies will never be capable to protect all purposes, always, against all possible attacks that mean that terrorism will be always attractive to enemies of democracy and progress. Though vigilance of society and individuals always on call in the democratic state fighting against the terrorism, expectations from this fight have to remain realistic, it concerns also reduction of vulnerability of democratically dug out society.

Both concepts offer the legitimate arguments and exits caused by this dilemma of democracy fighting against the

Romanian Journal of International Affairs 8:4 (2002). – P. 42.

terrorism, consisting the next parallel behavioral ways:

Firstly, despite necessary restrictions of some rights and freedoms of the democratic society during fight against the terrorism, protection of basic principles of the democracy and preservation of all measures directed against the terrorism in the established framework of the democratic procedures, is obligatory for any democratic state. Preservation of balance between the principles and interests isn't a simple task, but it is the only way of overcoming tension or crisis in fight of the democratic society with itself and at the same time in fight against terrorism. It is known of inadmissibility of use of a campaign against the terrorism as way of suppression of lawful disagreement or as way of suppression of the people expressing the opinion to the government. If we want to prevail over terrorism, we have to carry out it, respecting human dignity and human rights. The sphere in which the democratic governments and societies risk to fail is the sphere with excessive concentration of the power in any body. There is very fair question concerning democracy: Should NATO countries to reconsider their faith in the system of checks and balances under the influence of terrorism?

Secondly, it should be applied to efforts to democratize Islam and prevent that Islamic clerical parties contributed to prolonging the process. The main issue in the debate is the fact that Muslims, as such, are not a problem, the problem is radical Muslims. On this basis, we can agree that the key to a sustainable future is a coalition of moderate Islamists and non-Islamists, who have undertaken obligation to an executive government, and there is also a need for a diplomatic process to establish a credible framework for delegitimizing terrorism.

Certainly, determination and working upon these ambitious purposes and implementation of them require the creation of civil society with proper respect for pluralism in Muslim countries of the world. Muslims learning the introduction of democracy in Muslim society emphasize the key role of Muslim intellectuals in transformation of public attitude and help to get rid of medieval model, which is supported by some Muslim clerics. It is on behalf of Islam and other religions to help Islam to upgrade internal organization of religion by creation and intensification of supranational leadership and governing structures.

However, the depolicitization of adaptation difficulties of Islamic fundamentalism to globalization requirements has to be the fundamental strategic target of Muslim and non-Muslim intellectuals. The adaptation to the needs of global international situation becomes the key content of most countries' policy over the last decade. Other countries perceived new tendencies to establishing of global world as a threat for their existence. Hiding behind the existing differences between religion and culture of Near East countries that are poorer the Western Countries, the supporters of radical Islam decided to attack. For instance, the goal of terroristic act on September 22nd, 2001 was to give political definition of collision format between radical Islam and approaching econom-

ic, political and cultural globalization. Collision form «suffering Islam» against «world Americanization» was the most successful. The idea of «the collision of civilizations», poverty in Muslim world, failed countries, especially Muslim are tendencies that are used by the terrorists. The readiness of separate Muslims all over the world to accept the globalization idea as opportunity to improve their life conditions with lots of chances for choice is the key disappointment of radical Islam. This readiness of Muslims to accept the globalization and get rid of conservative Islam fundamental habits and relations possibly overbalance those, who are interested in manipulation of consciousness of believers.

The globalization and democracy success is the result of the victory in the fight for democratic rights in non-West countries and the fact of that national boundaries and sovereignty cannot save people who go against social, political and technological progress. One more reason is the creation of more and more effective forms and institutes of global management. The attack and dissuasion of those, who support these tendencies as well as the attack on the global management centers by developing social processes considered as way to preservation of Islamic fundamentalism and its extremist and aggressive embodiment. The destruction of everything that globally remain the only way for main defenders of fundamental traditions – excessively radical embodiment of social, religious and political life.

There are three concentric and at the time strategic way for eradication of terrorism.

The first – long-term and wider: 1) to conquer hearts and minds of potential globalization victims; 2) to prove them, that terrorism is not the exit way from difficulties and negative consequences of humanitarian progress; 3) to deprive the terroristic nets of access to poor, despaired people; 4) to prove that globalization provides civilized way out of difficult situation, prevailing in the period of adaptation to new economic, technological and informational situation.

The second – medium-term: 1) the help frustrated countries in achieving prosperity. East Europe region is the most important whose success will be stimulus for positive processes in Black and Caspian Seas region; 2) the involving of Islam in civil society, the separation of religion from country and construction of democracy, impacting on religious reforms, that would demotivate fanatical terrorism; 3) the upgrading of cooperation and coordination of the main centers in their antiterrorist and counterterrorist actions.

The third – short-term: 1) the prevention of realization of terrorist actions with weapons of mass destruction application; 2) the creation of instruments, institutes and individuals training who are able to effectively realize all operative actions of antiterrorist and counterterrorist fight on the terrorist controlled territories.

The successful fight against terrorism inevitably accelerates international systems' constructive tendencies, globalization and positive social and economic ef-

fects of globalization. The progress of the fight provides the worlds' religions with possibility to cooperate more humanly.

Taking adequate measures with help of democratic procedures can narrow the field for terroristic groups' maneuver on the legal way. The adherence to the democratic way means finding of adequate standards for private life and safety at the same time. Strict definitions already tightly connected both external and internal safety must be found. International organizations' safety potential must be focused on this problem in connection with antiterrorist fight.

The institutional and legal formula of close and integrated armed forces' work with police and intelligence is important in purposes of eradication of terrorism basis inside the country. There is a need in constructive decision and antiterrorist thinking for the achievement of agreement of special services and law enforcement authorities' cooperation of anti-terrorist countries.

The special measures must be taken for the public awareness' rising of vigilance's importance by society during war against the terrorism. These measures have to be parallel to the similar steps that are undertaken for improving of transparency, accountability and maintaining of the level of effectiveness of counter-terrorism by security centers' institutions. Similar requirements should be put toward the international parliamentary forums that monitor counter-terrorism activities. The result should be to create an atmosphere of trust in both national and international levels between people and the relevant institutions of the volunteer movement that engage the fight against transnational terrorism.

Publshed: Bezpieczeństwo i zarządzanie kryzysowe – bezpieczeństwo i obronność państwa (21-22 сентября 2016 г., г. Лодзь, Республика Польша). – Społeczna Akademia Nauk, Tom XVII, Zeszyt 5, Część 3. – С. 257–264.

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UDC 347.73

PROCURING THE STABILITY OF THE FINANCIAL LAW: PROBLEMS AND PROSPECTS

Recently the problem of ensuring of stability of the financial legislation gets the particular relevance.

The fact is, that how stable will be the financial law, will largely depend on the effectiveness of financial and legal regulation, the impact of it's actions, successful implementation of tasks to perform which was created this legal act. Especially important open problem is due to the necessity for certainty tax obligation increased tendencies to attract investors for major projects and production development programs.

It is no coincidence scientists emphasized that the flow of both foreign and domestic investment that contribute to the development of infrastructure, utilities, energetics, the improving competitiveness of the private sector of the economy and improvement of information and communication technologies, etc., to the country with a market economy is only possible in the presence of favorable investment climate, one of the essential components of which is precisely the stable financial legislation [1].

Stability of the Financial Law provides the operation of rules for a long time period, the absence of significant changes in its content. «This contributes to improve the management efficiency, because the appropriate body has enough of time to examine in depth the actual targets and specialize in their practical implementation» [2].

It is significant that on the existence of issues related to ensuring the stability of the law, scientists focused in pre-

[1] Козырин А. Н. Публичные финансы: взаимодействие государства и общества / А. Н. Козырин. – М. : Статут, 2002. – С. 7.

[2] Законность, правопорядок и правовая культура : материалы 3-ей межвузовской научно-практической конференции адъюнктов и аспирантов, (Москва, 20–22 мая 1974 г.). – М. : Академия МВД СССР, 1974. – С. 39.

revolutionary'1917 times, as it was believed that frequent changes in laws undermines respect for them[1]. Thus, scientists insisted that means ensuring stability can be: the passage of the law defined the procedure for adoption; establishment of special, complicated rules for adoption and making changes of the most important laws (such as the Basic Laws); development of the theory of «free jurisprudence», the essence of which is the full development of judicial discretion and case law[2].

The scientific literature indicates that the stability of the law – is a characteristic of normative legal act adopted by the supreme authority of the State or by the nation in a special legislative procedure, which has supreme legal force and regulates the most important public relations. According to this, the legal act is characterized by social conditioning; stable efficiency of the regulation of relations, manifested in sufficient or satisfactory resolution of the challenges facing the development of the legal act; absence of conflicts that could lead to the cancellation or partial change of the legal act; set of essential features that reflect sufficient qualities of the legal act and which determine its ability to meet the needs of society, due to the high quality, level of the development technique and the language of the legal act[3].

Based on these links, with a certain conventionality can be characterized by stability decisions and conclusions of the Constitutional Court of Ukraine as a source of financial law, and that's because the current legislation does not provide for a procedure of changing previously adopted such acts. Analysis of the current regulatory and legal acts, which are ordering the public financial activities, including financial laws, indicates about the presence of multiple, unsystematic changes made to their content. For example, to the Tax Code of Ukraine, (which was adopted December 2, 2010 and entered into force on January, 1, 2011, so – in violation of the principle of stability), from December 2010 till December 2016 were amended by more than 100 laws. And at the same time, in twenty-one days after its adoption, i.e. before the introduction of the Code, its provisions have been modified. During the year 2011, amendments were made by sixteen laws, during the year 2012 – by thirteen laws, during the year 2013 – by nine, during the year 2014 – by twenty-six, during the year 2015 – by twenty-six, during the year 2016 – by five. To the contents of the Budget Code of Ukraine, which was adopted in the new edition

[1] Капустин М. Н. Теория права. Общая догматика / Капустин М. Н. – М. : Типография Московского ун-та, 1868. – Т. 1. – С. 155.

[2] Энциклопедичекий словарь русского библиографического института Гранат: в 58 т. / [ред. Ю. С. Гамбаров и др.]. – М., 1907. – Т. 30. – С. 467; Гредескул Н. А. Общая теория права / Н. А. Гредескул. – Санкт-Петербург: Типолитография И. Трофимова, 1909. – С. 223.

[3] Концепция стабильности закона (серия «Конфликт закона и общества») / отв. ред. В. П. Казимирчук. – М. : Проспект, 2000. – С. 59, 60.

in 2010, on the end of 2016 was amended by more than sixty laws[1].

Historical excursus proves quite the same sad statistics. As follows, during ten years of its existence the Law of Ukraine «On the order of repayment obligations of taxpayers to budgets and state trust funds», which was adopted on 21 December 2000, was changed almost by thirty laws. On the period of the beginning of 2010 the Law of Ukraine «On income tax», which was adopted May 22, 2003, was amended by more than thirty laws. The Law of Ukraine «On taxation of corporate profits» as of the year 2010, was changed by more than one hundred ten laws, and the Law of Ukraine «On Value Added Tax» – almost by one hundred fifty laws[2]. These facts indicate that the financial, and particularly tax legislation does not systematically developing in our country, but rather spontaneously: arise the necessity in the settlement of certain relationships – and then, often quickly, with a lot of shortcomings, appears appropriate financial legal act. Because of this rulemaking in the financial sector can hardly be called effective: because neither proper training nor monitoring of system communication as in the content of such acts, as with other financial and legal acts and acts of other branches of law does not occurs.

In our opinion, this situation is highly undesirable not only from the legal, but especially from the economic point of view. It is well known that the sustainable development of economic relations in the country can be achieved that time, when taxpayers could clearly identify the tax burden, enterprises can actually get some transfers from the budgets to ensure the development of production and so on. In other circumstances there is impossible to calculate the amount of tax revenues and fees clearly, even making scientifically substantiated planning; enterprises that need support from the state, will not function properly. Therefore, lack of stable financial law becomes an obstacle not only to the economic development of the country. To this we add that the opposite trend is available very often: the content of regulations that include financial and legal norms, does not meet the nature and the development of financial relations regulated by them. This means that changes are not made to the financial laws where necessary. However it is clear that to some extent the performance of the revenue and expenditure parts of public funds depends on how the content of regulations will meet the nature of regulated relations.

Of course, this practice has a negative impact. This ultimately prevents the objectives and the tasks of public financial activities, and violates the rights of

[1] Податковий кодекс України ; Бюджетний кодекс України (Tax Code of Ukraine ; Budget Code of Ukraine) // [Електрон. ресурс] [Electron. resource]. – Верхов. Рада України (офіц. сайт). Verkhovna Rada of Ukraine (official web portal) – Режим доступу (Access mode): http://zakon.rada.gov.ua/

[2] [Електрон. ресурс] [Electron. resource]. – Верхов. Рада України (офіц. сайт). Verkhovna Rada of Ukraine (official web portal) – Режим доступу (Access mode): http://zakon.rada.gov.ua

subjects of financial relations. Certainly, in current situation is possible to appeal to the fact that the laws governing financial relations, cannot exist for long in the economic crisis of the country's de facto under martial law. The idea of L. K. Voronova is fair about this. She states that, as a rule, the law indicated by stable nature and prolonged time of existence, but the laws governing financial relations cannot exist for long. Financial laws, which express the economic and social interests in concentrated form, change very often[1]. A. P. Orlyuk also speaks about the constant dynamic development of financial legislation that allows the state to respond to rapid economic changes. [2]. Indeed, the financial legislation must change due to the difficult economic situation, and sometimes changed rules can stimulate the economic development.

These provisions indicate that the content of financial law should be flexible, able to adapt to the specific financial needs of the state and respond to the changing of the situation by adjusting the respective financial and legal norms that will let to balance the public and private interests. And now it is necessary to talk about the combination of such financial law qualities as stability, flexibility and dynamism.

Of course, stability must not be the end in itself. While changing economic conditions in the country the financial law must be changed because of the necessity to adapt it to new economic conditions. In other words, the financial law is inextricably linked with the social relations that it regulates. But it's change must not take place after the slightest changes in the financial (economic) relations. If this happening, it is first of all testifies about the shortcomings of the law, and then about the dynamics of public relations. In our opinion, the legislator has a number of measures, including legislative technique, for during the adoption of any law, including financial one, the development of public relations would be taken into account.

In view of described above, constructive is the consideration of D. A. Monastyrsky, stating that there are two areas in the comprehension of stability of law: first, as the immutability of the law (unchangeable law – stable law) and, secondly, as a sustainability approach to the regulation of public relations with the possibility of systemic, evolutionary changes in legislation (Act may change, while remaining stable). With this, the scientist rightly points out that the second version of the understanding of the stability of law is more reasonable[3]. Significantly, that the legist then rightly poses the question: what

[1] Воронова Л. К. Фінансове право: підруч. / Л. К. Воронова/ – К. : Прецедент; Моя книга, 2006. – С. 52.

[2] Орлюк О. П. Фінансове право: академічний курс: [підруч.] / О. П. Орлюк. – К. : Юрінком Інтер, 2010. – С. 113.

[3] Монастирський Д. А. Стабільність закону: поняття, сутність та фактори забезпечення: автореф. дис. … канд. юрид. наук: спец. 12.00.01 / Д. А. Монастирський. – К., 2009. – С. 5.

changes the law will strengthen the stability to go «in the fairway» of stability and what changes will harm stability? To determine this, obviously, it is necessary to define criteria by which the separation will take place. Scilicet there is necessary to define concerning what one change of the law will promote stability and others – to break it.

To our opinion, the answer to this question is contained right in the financial legislation. The analysis of the financial legislation suggests two quite formed approaches to determining the content of stability of the financial law. Firstly, the Art. 4 of the Tax Code of Ukraine provides for that tax legislation is based including, the principle of stability. It means that changes of any elements of taxes and fees cannot be made later than six months before the beginning of the fiscal period in which there will be new rules and rates. Taxes and fees, their rates, as well as tax relief cannot be changed during the budget year[1].

Secondly, in the Art. 27 of the Budget Code of Ukraine stipulates that the laws of Ukraine or their individual provisions that affect the performance of the budget (reduce income budget and / or increase the cost of the budget) and will be adopted not later than 15th of July of the year preceding the planned, must be enacted until the beginning of the plan budget period; after 15th of July of the year preceding the planned, must be enacted until the beginning of the budget period following the planned[2]. Therefore, despite the objective need to adopt the State Budget Law annually and, in certain circumstances, reviewing the legal mechanism of taxes that let to respond to changes better in the implementation of socio-economic and financial policies, the foundations of legal regulation of public finance must be stable, but not invariable. Understanding of the financial law stability as it's invariability, is contradicts to the gist of financial relations, which are intended to regulate such a law, because indicated public relations are in constant development. The dynamism of the financial law can be considered as «it's ability to be adequate to public relations. Adequacy is expressed by the ability to respond quickly to changing of social conditions and the presence of a genuine need for change»[3]. However, the financial law may be changed with the mandatory compliance of provisions of Art. 4 of the Tax Code of Ukraine and Art. 27 of the Budget Code of Ukraine.

It should be noted that in many countries, like Ukraine, amendments to tax laws and other acts of financial legislation tied to the adoption of the bud-

[1] Податковий кодекс України від 2 груд. 2010 р. // Голос України. – 2010. – № 229–230. Tax Code of Ukraine of December 2, 2010 // Golos Ukrainy. – 2010. – № 229–230.

[2] Бюджетний кодекс України від 8 лип. 2010 р. // Голос України. – 2010. – № 143. Budget Code of Ukraine of July 8, 2010 // Golos Ukrainy. – 2010. – № 143.

[3] Баскова И. В. Стабильность и динамизм советского уголовного закона : автореф. дис. … канд. юрид. наук : спец. 12.00.08 / И. В. Баскова. – М., 1989. – С. 8.

get for the current year. For example, the issue of servicing the public debt can not be considered separately from the budget process, because the amounts provided for servicing and repayment of public debt, affecting on the performance of the state budget of the current year, and they must be taken into account in the implementation of the budgets of future years. This approach allows to evaluate all planned in the current year changes of financial law rules in terms of balancing public revenues and expenditures. As an example, in France the set tax each year must be confirmed by the current financial laws (budget). A similar provision is contained in the legislative Acts of Denmark, Luxembourg and other countries. In Norway, in addition to annual confirmation of each tax collection provided mandatory procedure for revising tax laws after the expiry of the parliament[1].

Not by chance in the Ukrainian legislation is reflected provisions under which any law affecting the reduction of income and / or increasing budget expenditures this year, can not be accepted in whole by Verkhovna Rada (The Supreme Council) if simultaneously with its adoption will not be made relevant amendments to the law on the State Budget of Ukraine for the same year (Art. 160 of the Rules of Procedure of Verkhovna Rada of Ukraine)[2]. Thus, the content of financial law should be flexible, able to adapt to the specific financial needs of the state and respond to the changing of the situation by correcting the respective financial and legal norms that will let to balance the public interest with private ones. As the example, referring to the tax system is unequivocal seen that a stable, permanent tax will lead to imbalances.

As it is supposed, to ensure the stability of the financial law in our country present real opportunities that are «not the invention of something new in the theory of law». It primarily for ensuring of high quality in the law-making professional activities of the relevant legislative body. It is clear that we are talking about improving the working quality of both parliament and other bodies empowered to issue of the relevant regulations governing the implementation of public financial activities. However, to achieve this – it is not an easy task. This is especially concerns the Ukrainian parliament, which is formed on democratic principles.

Moreover, as rightly indicates D. A. Monastyrskiy, among illegal factors influencing the legislative process in Ukraine greatest role plays political factor, which is expressed in the form of uncivil («shadow») lobbying, a manifestation of which, in particular are: failure to comply the procedure for submitting the bill; unjustified accelerating the procedure of consideration of the bill; ignoring the findings of the Main Scientific Expert and the Legal departments of the Verkhovna Rada of

[1] Козырин А. Н. Публичные финансы: взаимодействие государства и общества / А. Н. Козырин. – М. : Статут, 2002. – 37 с.

[2] Див.: Про Регламент Верховної Ради України: Закон України від 10 лют. 2010 р. // Відом. Верхов. Ради України – 2010. – № 14–15, № 16–17. – Ст. 133.

Ukraine, the Institute of Legislation of the Verkhovna Rada of Ukraine; reduced procedure of consideration of the bill – which leads the emergence of unstable laws[1].

Significantly, that some countries to overcome this problem, chooses a path to maximally attract professionals to legislative activities. We mean the practice, when all of parliamentarians select for a specific drafting an individual who has deep knowledge and largest experience in the area, which aims to regulate specific regulatory legal act. For example, in the United Kingdom specially creating committees, which carefully consider separate projects. Herewith, these committees are created each time for a particular bill and after its task are dissolved.

The same problem can be resolved and by other means, such as increasing the professionalism of staff working in Ukrainian parliament. So, when preparing a given project analyzed not only legal, but also economic, social and political factors that influence the need for its adoption and implementation consequences of normative legal act. Herewith in the case of necessity specialized experts and scholars are involved. It is very true that the conclusions of such experts should always be discussed in the legislature[2]. Unfortunately, in Ukraine recommendations, suggestions and observations of scientists, almost overlooked by the legislative authority in the development of financial laws[3]. However, it is clear that any legislation should be based on strong scientific base, and then we can talk about the actual implementation of the slogan: «the law must be adopted not when it can be adopted, but when it can't be not adopted».

Once again we emphasize that any changes to financial legislation should be carefully and properly grounded. Therefore, such characteristic as stability complies to flexibility and dynamism of financial legislation. Summing up the above considerations, the financial stability of the law can be defined as its ability over long time regulate effectively and efficiently a wide range of financial relationships without requiring significant changes in the rules that it contains[4]. Herewith one of the main principles on which the stability of the financial law is based, there is a system of interests, which is not only

[1] Монастирський Д. А. Стабільність закону: поняття, сутність та фактори забезпечення: автореф. дис. … канд.. юрид. наук: спец. 12.00.01 / Д. А. Монастирський. – К., 2009. – С. 7.

[2] Сравнительное конституционное право / под ред. В. Е. Чиркина. – М.: Манускрипт, 1996. – С. 547.

[3] Див.: Воротина Н. В. Проблемы использования результатов научных исследований в процессе усовершенствования бюджетного законодательства Украины / Н. В. Воротина // Системообразующие категории в финансовом праве: состояние и перспективы трансформации: материалы междунар. науч.-практ. конф., г. Харьков, 15–16 апреля 2010 г. / редкол.: В. Я. Таций, Ю. П. Битяк, Л. К. Воронова и др. – Х.: НИИ гос. стр-ва и местн. самоуправления, 2010. – С. 34–35.

[4] Див.: Монастирський Д. А. Поняття та природа стабільності закону / Д. А. Монастирський // Університет. наук. записки. – 2005. – № 1–2 (13–14). – С. 65.

consistent at such a statute, but makes its position as an act of higher legal force, in which the validity of the law should be determined primarily by as it is perceived by financial law, as it reflects their requirements and needs. The credibility of financial law is measured primarily by how accurately it reflects the vital problems of every citizen and society as a whole, how effectively protects their interests[1]. We believe that is designated in this article is very topical issue and requires further scientific debate about its understanding and theoretical and practical reasoning. We agree that the problem of ensuring of stability of the financial law is quite complicated to solve, but definitely, it must be solved because it affects the efficiency and rationality of legal regulation of relations in the sphere of public financial activities in general.

Published: Вісник Академії правових наук України. – 2012. – № 4 (71). – С. 253–262.

[1] Концепция стабильности закона (серия «Конфликт закона и общества»)/ отв. ред. В. П. Казимирчук. – М.: Проспект, 2000. – С. 62.

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UDC 342.9

LEGAL NATURE OF THE ADMINISTRATIVE TORT LAW OF UKRAINE

A understanding branch of law gives the knowledge of the characteristics of social relations, that the industry is regulated. The action legal norm transforms the social relations in the legal relationship. The totality of these relations constitutes the subject branch of law.

Present-day Ukrainian administrative law fundamentally requires definition of its subject-matter. Bringing it to correspondence with up-to-date realties will be-come an important step towards reformation of administrative-legal institutions and bringing white light to their role in evolution of the processes of formation of law-bound state and development of civil society.

For the modern Ukrainian administrative law correctness of the subject branch of law is of fundamental importance. Its establishment in line with modern realities is an important step towards the reconstruction of the administrative and legal institutions and objective coverage of their role in the evolution of the formation of the rule of law and civil society.

In the Soviet period the of the subject branch of administrative law officially recognized relationship in the field of public administration. The evolution of administrative law in Ukraine under the influence of the standards of the European administrative space formed the subject of a new concept of administrative law[1].

Subject-matter of administrative law includes four types of relations. First, it is relations of public administration that involves the whole aggregate of administerial relations. Second, it is relations occurring in the process of delivery of justice in the form of

[1] Колпаков В. К. Роль конвергенції у формуванні стандартів європейського адміністративного простору / В. К. Колпаков // Сучасна адміністративно-правова доктрина захисту прав людини : тези доп. та наук. повідомл. наук.-практ. конф. м. Харьків 17–18 квіт. 2015 року – Х. : Право, 2015. – С. 13–17.

administrative legal proceedings. These are relations of authority carriers' responsibility for wrong acts. Third, it is relations of responsibility for violation of rules in effect, or relations of administrative responsibility (administrative-delict relations). Fourth, it is relations occurring in the result of individual addresses to public administration bodies for the purpose of realization of individuals' rights (relations of administrative service). Fifth, it is relations of indirect authority (occurring in the result of mutual observance of administrative rules by subjects who are not bound by powers and authority)[1].

This article examines the legal nature of the third kind of relationship: the relationship of administrative responsibility (administrative and tort relations).

The doctrine of administrative offense is a major component in the concept of an administrative tort law.Principal importance for determining the role of an administrative offense in aggregate of all the actions prohibited by law, determines the fact of fixation in the Constitution of Ukraine legal liability for such acts[2].Accordingly, the study of administrative offenses is an important task of science of administrative law.Fundamental theoretical research has differentiated attributes of administrative tort on a posteriori and a priori.

Posteriori signs are fixed by law. These features – the truth of facts. They are the same for any behavioral act. A priori characterize the individual behavioral act. They are the result of the analysis of a particular behavioral act. These features – the truth of logic. They allow to characterize behavioral act as an administrative tort.

The doctrine of the attributes of an administrative tort has important theoretical and practical significance.Firstly, it facilitates identification and classification of the most significant features of antisocial acts, helps in establishment of fair sanctions; secondly, it assists law enforcement authorities to properly qualify offenses, thus setting adequate influence measures; thirdly, makes possible to understand the law, support training of lawyers, and promotes legal erudition of citizens[3].

Generally, the combination of elements is the description of act in the law. Description of an action not yet committed, but only possible or supposed. In practice, only legally significant features characterizing act as an offense, goes down for such a description. They have been named the structural features. The main source of this description is the Code of Ukraine on

[1] Kolpakov V. Subject matter of Ukrainian administrative law: the concept evolution / Valerii Kolpakov // Scientific Letters of Academic Society of Michal Baludansky. – Slovakia, Košice : Academic Society of Michal Baludansky, 2014. – No 2. – P. 66–68.

[2] Адміністративно-правове регулювання публічного адміністрування в Україні : навч. посіб. / [О. Г. Бондар, Т. О. Коломоєць, В. К. Колпаков та ін.] – За-поріжжя : ЗНУ, 2014. – 204 с.

[3] Коломоєць Т. О.,Колпаков В. К. Вступ до навчального курсу «Адміністративне право України»: навч. лекція / Т. О. Коломоєць, В. К. Колпаков. – К. : Ін Юре, 2014. – 240 с.

Administrative Offences (hereinafter the CAO)[1]. Elements features may be permanent and variable.

Permanent features received general recognition in legislation, legal theory, and social practice. For example, «age of administrative responsibility», «witness», «vehicle», «pedestrian», «firearm», «afforestation», «intellectual property», «building», «official» and so on.

Variable features can change their meaning quite often. By rule, these features are contained in regulations.

For example, the law established the responsibility for violation of infringement of sanitary rules (Art. 42)[2]. Infringement of rules of trade by alcoholic drinks (Art. 156), public welfare (article. 152), holding dogs and cats (Art. 154), health facilities and lines of communication (Art. 147) and so on. These rules can be set, changed, canceled by the relevant authority, what results in changes of the respective compositions.

Assessment features are widely used in description of essential elements. The content of such features in statute is not clearly defined, thus the question of their presence or absence is under law enforcement officials consideration.

Therefore, theoretical studies play an important role in revealing of their content. Such features, as «gross violation» (Articles 85, 108), «Arbitrariness» (Article 186), «emergency situation» (Articles 127, 140), «provision of necessary conditions ащк living, training and education» (Article 184), «prodigal expenditure» (Articles 60, 98), «mismanagement maintenance» (Article 150), «mismanagement» (Art. 164[2]), «devices similar to markings», «objects that contribute crowded birds hazardous to aircraft flight «(Art. 111),»insulting molestation to citizens», «similar actions» (Article 173) states that «offends human dignity and public morality «(Article 178), «persistent disobedience» (Article 185), «willful evasion» (Articles 185[3], 185[4]), «reasonable excuses» (Article 210) and so on.

Features could be distinguished by the degree of generalization. In this case, it is referred to the following features: a) general; b) generic or specific; d) specific or individual.

Common characteristics for all essential elements (illegality, sanity, fault etc.).

Generic (specific) are typical for the group of elements. For example, essential elements, that describes violations in the field of standardization, product quality, metrology and certification. Social relationships that develop in this area are the specific object of encroachments in this case.

Specific (individual) describes separate specific elements «expansion of in-

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[1] Кодекс України про адміністративні правопорушення : Введений в дію Постановою Верховної Ради Української РСР від 07.12.1984 // Відомості Верховної Ради Української РСР – 1984. – додаток до № 51. – Ст. 1122.

[2] Колпаков В. К. Адміністративна деліктація поняття і критерії / В. К. Колпаков // Людина, суспільство, держава : правовий вимір в сучасному світі : Матеріали IV Міжнародної науково-практичної конференції, м. Київ, Національній авіаційний університет, 27 лютого 2014 р. – С. 184–186.

veracious hearings» (Art. 173), «stowaway travel» (Art. 135), «prostitution» (Art. 181[1]), «silence in public places» (Art. 182), «narcotic substances in small sizes» (Art. 44),» organization of street procession «(Art. 185[1]),» contempt of court» (Art. 185[3]).

The Code of Ukraine on Administrative Offences: Official Bulletin of the Verkhovna Rada of Ukrainian SSR, 1984, annex to No. 51, Article 1122 (Brought into force by Resolution of the Verkhovna Rada of Ukrainian RSR, 1984, annex to No. 51, Article 1122.

The source of these articles is the Code of Ukraine on Administrative Offences, unless otherwise is noted.

Essential elements of administrative offenses classifies depending on: 1) the degree of public danger – on basic and qualified; 2) the nature of damage – on material and formal; 3) the subject of an offense – on private and official (service); 4) the structure – on alternative and definite; 5) the design features – on descriptive and blanket (referential)[1].

Let's examine characteristics of each type of essential elements of administrative offenses[2].

1. Basic and qualifying elements

Recognizing this, or that act as an administrative offense and imposing sanctions for violation, the legislator considers that the degree of public danger of similar offences may be different.

Thus, infringement by drivers of vehicles of railway crossings rules characterized by greater public danger while providing services for passengers or dangerous cargo transportation (Art. 123).

Due to this fact in some cases legislator, considers several essential elements of administrative offenses, belong the same type of actions. These elements vary the degree of public danger. Any additional features called qualifying are indicating a higher degree of danger.

Thus, features may be basic, such as occur in every case of commitment of offence and qualifying, such as supplements the basic features.

Basic features in their turn form the so-called general essential element of an offence. If necessary, legislator complements essential elements with qualifying features, thus an act can be qualified under another article that imposes stricter punishment. Essential elements, with such features are named qualifying.

In the Code it often appear such a qualifying feature as replication (Articles 44[2], 95, 104), an emergency situation (Articles 122, 127, 140), the presence or possibility of harmful material consequences (Articles 128[1], 140), state of drunkenness (Art. 127), leaving of a place of road traffic accident (Art. 122[4]), a gross violation of rules (Art. 85), act committed by official (Articles 93, 95[1], 107[1]).

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[1] Колпаков В. К. Теорія адміністративного проступку : Монографія / В. К. Колпаков, В. В. Гордєєв. – Х.: Харків юридичний, 2016. – 344 с.

[2] Kolpakov V. Essential elements of an administrative offense: concept and types [electronic resource] / Valery Kolpakov // Journal of High Qualifications Commission of Judges of Ukraine, 2014. – Access mode: http://www.vkksu.gov.ua/ua/about/visnik-vishoi-kvalifikatsiynoi-komisii-suddiv-ukraini/essential-elements-of-an-administrative-offense-concept-and-types/.

2. Material and formal elements

Material essential elements contain such features, as A) occurrence of harmful material consequences caused by committed act. For example, forest damage by sewage, caused its shrinkage (Art. 72), infringement of requirements of fire safety in woods (Art. 77), abduction of other's property (Art. 51); B) describes action that necessarily leads to harmful effects, despite they are not identified by the law: breach of law of a state ownership on bowels (Art. 47); excess of limits and specifications of use of natural resources (Art. 91^2); prodigal expenditure of fuel and energy resources (Art. 98); sale of products in violation of the requirements for health warnings on tobacco products (Article 168^2).

To the formal (conditional term) belongs such elements that have no features of harmful material consequences. For example, residing without registration of location (Art. 197), infringement of a frontier regime (Art. 202), illegal withdrawal of passports in mortgage (Art. 201).

Completing the description of material and formal essential elements of administrative offenses is important to note, that the criminal law concludes slightly different meaning in their concepts. Under the material elements herein understands those in which the end of crime is associated with the occurrence of socially dangerous consequences (a person can be attracted for murder only if in result of his actions someone's death occurred); formal elements are those, where the occurrence of socially dangerous consequences is not a feature, i.e. recognition of crime with such essential elements requires only the establishment that the committed act is prohibited by the law. These crimes include, for example, illegal possession of firearms.

3. Service and private elements

Essential elements of administrative offenses are divided into private and service (civil), depending on the subject of the offense, whether is he/she a civilian citizen or an official (Articles 93, 96, 99). The main characteristic of service offence is that the unlawful act should be committed through the service action[1]. According to the Article 14 of the CAO, officials are subject to administrative responsibility for noncompliance with established rules, resulting from the performance of his/her official duties. Thus, according to the Article 185^2 (Creation of conditions for the organization and conduct with infringement of the established order of assembly, meetings, street campaigns or demonstrations) establishes administrative liability for officials if they provide premises, transport, facilities for conduct with infringement of the established order of assembly, meetings, street campaigns or demonstrations.

4. Definite and alternative elements

Division of essential elements on definite and alternative has a great practical value. Definite elements describe features of one act within the frame-

[1] Kolpakov V. K. A priori determinants of administrative tort / V. K. Kolpakov // Вісник Запорізького національного університету: Збірник наукових статей. Юридичні науки. – Запоріжжя: Запорізький національний університет, 2014. – № 3. – С. 130–136.

works of one article of a regulation. For example, finishing of a minor to a state of intoxication (Art. 180), minor hooliganism (Art. 173), prostitution (Art. 181^1), and trade from hands in unstated places (Art.160).

Alternative elements describe several actions within the frameworks of one Article of regulation. Herewith, an act considered as an offence if one, several (or even all) actions have been committed. For example, Art. 189^1 of the CAO stipulates that a breach of earlier approved: – norms of extraction, – an established accounting procedure, as well as failure of proper storage conditions of extracted precious metals and precious stones, precious stones of organogenic origin and semi-precious stones, established account procedure as well as violation of all specified above by the extraction subject should be considered as an offence.

As a separate offence it should be considered separately a breach of the established account procedure, violation of the established order of registration, failure to provide proper storage conditions for extracted precious metals, and violation of all the specified procedures together. Additionally, in this article we find an alternative offence items: it refers to rules concerning precious metals, precious stones, stones of organogenic origin, semi-precious stones.

Alternative elements are contained in Articles 171 «Infringement of rules of manufacture, repair, sale and hire of means of technical equipment», 173^2 «violence over family default of the protective instruction» 177^2 «Manufacturing, purchase, storage or realization of the falsified alcoholic drinks or tobacco products», 186-3» Infringement of the order of representation or use of the given State statistical supervision» 189^2 «'Infringement of rules of manufacturing and the order of the account and storage of seals and stamps, and as manufacturing, import, realization and uses of self-type-setting press» and others.

Thus, in such cases essential elements are the commitment of various actions, named in the law. At the same time, for performance of essential elements it doesn't matter if one, two, or all actions together have been committed. It is important to note, that a person is not committing a new offense if he/she consistently performs all actions named in the law, for example, initially illegal purchase, than storage and transfer of narcotic substances (Art. 44 of the CAO). If a citizen drinks alcohol beverages in public place and after appears in public place in a state of intoxication, that offends human dignity and public morality, in this case he/she commits one, but not two offenses (Art. 178 of the CAO). Separate actions of the same person, both manufacturing and selling of the forbidden instruments of getting objects of animal or flora, compose essential elements of one offence (Art. 85^1 of the CAO).

Thus, if the definite essential elements name those common features they consist of, then instead the alternative elements have several features variants. Frequently this characteristic of features description is caused by the desire of legislator to avoid general formulation, as well as to reveal the content of these features and specify it. And in some

cases, the design of the alternative features is linked to the desire of authorities to save normative material and, instead of several articles creation, to create a single, but broader in its scope.

5. Descriptive and blanket (referential) elements

Descriptive essential elements that reveal the content and nature of an act in the full scope are recognized as an administrative offense. For example, minor hooliganism (Art. 173), drinking beer, alcohol, alcoholic beverages on manufacturing (Art. 179), an inveracious call of special services (Art. 183), intentional damage of passport (Art. 198). Article with the descriptive essential elements contains all of the three elements of legal norms (hypothesis, disposition and sanction). In this case, the logical structure of standards of law coincides with structure of an article of a legal act. The main purpose of such a development of normative materials is to promote individuals that apply for a provision with the possibility to find in appropriate article all necessary structural elements.

Blanket (or referential) elements contain a reference to related regulatory act that is necessary for establishment, if there is a lack of corpus delicti in actions or not. There are three types of such references known.

First, it refers to a specific article of the same regulation, containing missing data of legal norms. For example, considering nature of committed offense and offender's personality to specified persons (except persons who committed an offense under Article 185 measures of influence defined by Article 13 of CAO can be applied; penalties for an offense covered by Article 164^{14}, could be imposed within three months, from the day it was first detected Art. 38; small-sized vessels in the first, third, fourth and fifth paragraphs of an Article 116, second paragraph of an Article 116^{1}, third paragraph of Article 116-2, first paragraph of an Article 117, third paragraph of Article 118, paragraph three of Article 129, paragraph five of Article 130 of this Code should be understood as a self-propelled vessels with the main engines power less than 75 hp (Art.116); Sate inspectors of Agriculture sphere have the right to constitute reports on administrative violations, within the jurisdiction of the authorities referred to in Articles $222–244^{19}$ (Art. 255); things and documents which are tools or direct object of an offense and items that were found during detention, personal inspection or required inspection, subject to withdrawal by officials specified in articles 234^{1}, 234^{2}, 244^{4}, 262 and 264 (Art. 265); in the circumstances referred to in paragraphs 5, 6 i 9 Art. 247, agency (official) that ordered the imposition of administrative penalties, terminates its execution (Art. 302).

Second, it refers to another regulation. For example, infringement of rules of protection of electric networks (Art. 99); excess by drivers of vehicles of speed of movement, default of signals of regulation of traffic, infringement of rules of transportation of people and other traffic rules (Art. 122); infringement of Rules of protection of the main pipelines (Art. 138); failure of chief and other officials of State authorities, institutions and organizations, including the branches of the National Bank of

Ukraine, commercial banks and other financial and credit institutions, the legal requirements of officials of the income and charges referred to in sub-paragraphs 20.1.3, 20.1.24, 20.130, 1/20/31 of paragraph 20.1 of Art. 20 of the Tax Code of Ukraine (Art. 163-3); violation by individual of statutory restrictions on business or other paid activities (Art. 172^4); violation of the rules of administrative supervision (Art. 187).

Third, it refers to several different regulations. For instance, infringement of conditions and rules of realization of the international automobile transportation of passengers and cargo (Art. 133^2); infringement of rules, norms and standards at the maintenance of highways and roads (Art. 140); infringement of rules of an accomplishment of territories of cities and other settlements (Art. 152); infringement of the legislation of budgetary system of Ukraine, purchase in advance of the goods, works and services for public funds (Art. 164^{12}); release and realization of production which does not meet the requirements of standards, non-standard production, certificates of compliance, regulations and samples (standards) for safety, quality, completeness and packaging (Art. 167).

In such cases, essential elements are «collected» from several different independent offences. This is the violation of various acts, regulations and requirements. Using formal approach in this case it is not difficult to indicate several offenses. For example, the infringement of the established rules and mode of operation of installations and manufactures from processing and recycling of waste (Art. 82). Moreover, legislator considers all these acts, as one offense. The basis of this approach is the likeness of these acts, so they are identical and have one and the same legal features of an essential element.

It should be also noted, that in one blanket construction of an essential element of an offence, a number of different references types could be combined. As an example Article 125 «Other infringements of traffic rules», establishes violations of traffic rules, except foreseen by Articles 121–128, part first and part second of Art. 129, Articles 139, 140 of the CAO. Article 212^{10}, establishes restrictions on campaigning: campaigning person, whose participation in the election campaign is prohibited by law, campaigning beyond the terms established by law, or in places prohibited by law, campaigning in ways and means that are contrary to the Constitution and Laws of Ukraine, or other breach of statutory restrictions on campaigning, except foreseen by Articles 212^9, 212^{13} and 212^{14} of the Code.

In addition to these, the classification base of essential elements of administrative offences could be amended with other criteria. According to this feature of the subjective side, as a form of fault, offenses can be divided into intentional and reckless, and on the basis of motives into acquisitive and altruistic etc.

The foregoing gives rise to the conclusion that the legal nature of administrative delicts (administrative tort, administrative offenses) in the administrative law of Ukraine is the criminal law.

Published: Адміністративне право і процес. – 2016. – № 1(15). – С. 74–82.

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UDC 342.92

AN APPEAL MECHANISM IN ADMINISTRATIVE-LEGAL RELATIONS: AN ASPECT FROM THE PERSPECTIVE OF THE STRASBOURG COURT PRECEDENTS

European Court of Human Rights practice is essential for understanding European standards of administrative-legal appeal. We recall that according to Art. 17 of the Law of Ukraine «On Enforcement and Application of the European Court of Human Rights Decisions»[1] courts, while examining the case in a trial, apply the Convention for the Protection of Human Rights and Fundamental Freedoms and the case-law as a source of law. Also, Article 8 of the Code of Administrative Procedure of Ukraine requires to consider understanding of the rule of law in the practice of the European Court. This means that an analysis of court decisions does not have only doctrinal significance and serves as a basis for improving the legal regulation (Zh. Marku indicates that the practice of the European Court significantly influenced the French law on administrative procedure, including the settlement of differences, which is the sphere of administrative appeal)[2], but subject to immediate use by judges in the handling of cases and therefore influences the practice of bodies carrying out public administration.

Administrative and legal problems are encountered in the practice of the court, which is connected with many articles of the Convention on Human Rights and Fundamental Freedoms[3]. We focus mainly on the analysis of cases of violations of

[1] Закон України «Про виконання рішень та застосування практики Європейського суду з прав людини» 23.02.06 3477-IV [текст] // Відомості Верховної Ради України. – 2006. – № 30. – Ст. 260 (з наст. змін. і доп.).

[2] Административные процедуры и контроль в свете европейского опыта : кол. монография [текст] / под. ред. Т. Я. Хабриевой. – М. : Статут, 2011. – 320 с. – С. 60.

[3] Конвенція про захист прав людини і основних свобод // Офіційний вісник України. – 2006. – № 32 (23.08.2006). – Ст. 2371.

Articles 6, 13 of the Convention, and Art. 1 of Protocol[1]. According to Art. 6 of the Convention, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, which settles dispute as for the determination of his civil rights and obligations or of any criminal charges brought against him. According to Art. 13 of the Convention, everyone, whose rights and freedoms set forth in this Convention were violated, shall have an effective remedy before a national authority notwithstanding that the violation has been committed by persons acting in an official capacity. So, the practice of the European Court of Human Rights for these Articles is directly related to issues of judicial and extrajudicial protection of rights and legal interests of individuals.

Article 1 of Protocol provides that any natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided by law and by the general principles of international law. The Court examined many cases concerning deprivation of property or restrictions on the possession of property that was caused by adoption of an administrative act or recovery of damages caused by decisions in public administration (for example, the case «Hrymkovska v. Ukraine», which was concerned with administrative decisions regarding damage caused by the operation of the trunk road M04)[2] and at this point this practice is important for purposes of our research.

Extension of requirements of Art. 6 of the Convention in cases of administrative jurisdiction demands additional explanation. During the development and adoption of the Convention, as it follows from the literal understanding of provisions of this Article, it was provided that it extends namely to cases heard in the course of criminal and civil proceedings, while administrative proceedings were not discussed[3]. However, later the court gradually started to expand its understanding of Art. 6. In the case of «Zimmermann and Steiner v. Switzerland,» which dealt with a judicial review of a decision of an administrative agency (evaluation commission) to determine the size of state compensation to the applicants, the Court pointed out that in this case the applicants' rights are covered by Art. 6 because these rights are essentially private[4]. Other similar cases

[1] Перший Протокол к Конвенції про захист прав людини і основних свобод від 20.03.52 р. // Офіційний вісник України. – 2006. – №32. – Ст. 2372.

[2] Європейський суд з прав людини : Рішення у справі «Гримковська проти України» від 21.07.11 // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[3] Адміністративна юстиція України: проблеми теорії і практики : настіл. кн. судді / за заг. ред. О. М. Пасенюка. – К. : Істина, 2007. – 608 с. – С. 421.

[4] Європейський суд з прав людини : Рішення у справі «Цимерман і Штайнер проти Швейцарії» від 20.06.83 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

can be mentioned: «OVR v. the Russian Federation»[1] on matters of legal entities of public law – professional associations based on mandatory membership; case «Feldebryuhhe v. the Netherlands» – to stop providing social benefits in medicine; right» Havrylenko v. the Russian Federation» – regarding the calculation and indexation of social benefits[2].

In matters relating to administrative responsibility (and, therefore, appealing decisions on imposing administrative penalties), the Court pointed out that in some cases these matters may be covered by Art. 6, if the offenses defined in national legislation as administrative, are criminal by nature or the character of the encumbrances imposed on the person is so serious, that one can say that he is actually prosecuted. Thus, in the case of «Engel and Others v. the Netherlands» ECHR pointed out that sanctions, which include imprisonment of persons are criminal[3]. One can also recall a case «Malihe v. France». The Court found the criminal sanction of disqualification of driving in it, since this right is very useful in daily life[4].

Confiscation of property is criminal by nature in vision of the Court (e.g. in the case of economic activities without a license, violation of customs regulations), used as an additional penalty, especially when the cost of such property stands in stark contrast to a fine as the main penalty (for example, the case «Nadtochii v. Ukraine»[5] the case «Iarmola v. Ukraine»[6], «Plakhtieiev and Plakhtieieva v. Ukraine»[7]).

In this case, the Court considers that according to the general rule, tax disputes (including those related to the use of tax penalties) as stated in Art. 6 of

[1] Європейський суд з прав людини : Рішення у справі «OVR проти Російської Федерації» від 20.06.2000 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[2] Європейський суд з прав людини : Рішення у справі «Гавриленко проти Російської Федерації» [електронний ресурс]. – Режим доступу: http://www1.umn.edu/humanrts/ru-ssian/euro/Rgavrilenkocase.html.

[3] Європейський суд з прав людини : Рішення у справі «Енгель та інші проти Нідерландів» від 08.06.76 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[4] Європейський суд з прав людини : Рішення у справі «Маліге проти Франції» від 23.09.98 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[5] Європейський суд з прав людини : Рішення у справі «Надточій проти України» від 15.05.2008 р. // Ліга від 15.05.08 // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[6] Європейський суд з прав людини : Рішення у справі «Ярмола проти України» від 16.04.2009 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[7] Європейський суд з прав людини : Рішення у справі «Плахтєєв та Плахтєєва проти України» від 21.03.2009 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

the Convention are not protected (for example, the case «Ferradzini v. Italy»[1]). However, if tax penalties are very burdensome and intended to punish the person who actually converts them into a criminal sanction, in this case a reference to violation of Art. 6 is possible. In the case of «Vestbjerg Taxi Company v. Sweden», the Court pointed out that the current tax penalties are not a means of financial compensation of expenses, which could be caused by behavior of a taxpayer. After all, the main purpose of the relevant provisions of the legislation is to encourage the taxpayer to carry out his legal duties and punish for evading them. Therefore, such penalties are punitive and preventive in nature. The latter is usually a sign of criminal punishment. Proceeding from this the Court concluded that the general nature of the legal rules governing tax penalties and objective of a penalty, which is both preventive and punitive in nature, clearly indicate that, for the purposes of Article 6, the applicants were accused of a criminal offense[2].

Due to the fact that administrative penalties in some cases may be regarded as criminal ones, Art. 2 of Protocol 7 of the Convention is applied in such cases, according to which everyone who is convicted of a criminal offense has the right to revision of a conviction or sentence given to him by a higher tribunal. In such cases the individual's right to appeal should always be guaranteed. In the case of «Luchaninova v. Ukraine», the Court pointed out that the review of the case by the Chairman of the Supreme Court cannot be considered as an independent guarantee of the right to appeal[3] because that person is not involved in reviewing either formally or virtually. In other words, this right should have immediate nature, its implementation should not be limited by discretion authority or official as for solution to a question of whether a particular revision of a judgment (as it is in a case in supervisory review). This includes cases in which a decision on the application of administrative sanctions is taken by the competent administrative authority. In the case of «Štefánek against the Czech Republic» the court said that «although the reliance on administrative authorities function to investigate and punish offenses ... is not contrary to the provisions of the Convention, the person who puts forward such allegations must, due to the decision adopted in his favor, be able to apply to the

[1] Європейський суд з прав людини : Рішення у справі «Феррадзіні проти Італії» // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[2] Європейський суд з прав людини : Рішення у справі «Компанія Вестберга таксі проти Швеції» від 27.07.2002 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[3] Європейський суд з прав людини : Рішення у справі «Лучанінова проти України» від 09.06.2011 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

authority that can verify the legitimacy of the decision in compliance with the procedural guarantees of Article 6 (Convention)»[1].

In the case «Luchaninova v. Ukraine», the Court also noted that the right to appeal is not absolute. Since there may be some exceptions, particularly for minor offenses. Accordingly, absence of a mechanism for appeal in the case of the imposition of minor administrative sanctions (e.g., warning or petty fine) is not considered by the Court as such that violates the spirit and letter of the Convention and the law on administrative offenses, which provides similar institutions, is not the one that automatically contradicts European standards. It should be considered when deciding an issue of reasonability of, for example, the right to appeal on rulings on administrative offenses that are not related to the imposition of administrative penalties. In the event when a negative result, which is a result of a ruling in the case on an administrative offense, is insignificant, absence of opportunity to challenge the resolution could be justified. When this result is relevant, but the state did not provide a proper appeal mechanism of such order either to the Court (if the resolution adopted by an administrative authority), or to a higher court (if a subject of an imposition of a penalty is the local court), it is a violation of Art . 2 Protocol 7 of the Convention (cases « Hurepka v. Ukraine»[2], «Dmytrii Plakhov v. Ukraine»[3], «Khrystov v. Ukraine»[4], Peretiaka and Sheremetiev v. Ukraine»[5]). It should also be noted that in the Guidelines opinion on expert evaluation of normative acts (of projects) to the European Convention on Human Rights, approved by the Government Agent for the European Court of Human Rights of 15.08.2006[6], it is indicated that the pres-

[1] Європейський суд з прав людини : Рішення у справі «Штефанек проти Чеської Республіки» від 18.07.2006 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[2] Європейський суд з прав людини : Рішення у справі «Гурепка проти України» від 09.06.2011 р. [електронний ресурс]. – Режим доступу: http://www.khpg.org-/ru/index.php?id=1157025974

[3] Європейський суд з прав людини : Рішення у справі «Дмитрій Анатолійович Плахов проти України» від 27.03.2012 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[4] Європейський суд з прав людини : Рішення у справі «Христов проти України» від 19.02.2009 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[5] Європейський суд з прав людини : Рішення у справі «Перетяка і Шереметьєв проти України» від 21.12.2010 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[6] Урядовий уповноважений у справах Європейського суду з прав людини : Методичні рекомендації щодо здійснення експертизи нормативно-правових актів (їх проектів) на відповідність Конвенції про захист прав людини і основоположних свобод від 15.08.2006 р.

ence of the right to appeal is a part of the analysis of regulations for compliance with Art. 13.

Another important point, which the European Court of Human Rights insists on, is a requirement of efficiency of appeal, which applies to judicial and administrative proceedings, since Art. 13 of the Convention does not focus solely on issues of appeal in court. In the case of «Kadykis v. Latvia», the Court found a violation of Art. 13 in the absence of an effective mechanism to appeal on an administrative detention[1]. In the case of «Soldatenko v. Ukraine» the Court, in the context of an appeal on a court decision to extradite, pointed out that the mere securing of the right to appeal to court decisions, acts or omissions of a subject of authority (Art. 55 of the Constitution of Ukraine, Art. 2 of the Code of Administrative Procedure of Ukraine) does not mean having an effective mechanism for the protection of rights. In the Court's view, these provisions are potentially capable of providing an effective remedy in respect of complaints, that the decision on extradition would constitute a violation of Article 3 of the Convention, but on condition that they provide sufficient guarantees. Such guarantees could be found, for example, in the courts jurisdiction to consider the extradition in accordance with Article 3, and further pause extradition in a given case. This logic (as shown in the judgment «Baisakov v. Ukraine»[2]) returns us to the Recommendation (2003) 16, which contains similar provisions on the need to allow the suspension of an administrative act due to its being appealed. Moreover, non-use of domestic remedies by an individual (including an appeal to the administrative court) cannot be regarded as a breach of appeal to the Court if these tools are clearly ineffective and inefficient (case «Prince of Liechtenstein Hans-Adam II v. Germany»[3]).

The right to a fair trial guaranteed by Art. 6 of the Convention also provides for a clear definition of the powers of the courts that review decisions of the courts of the first instance, and, most importantly, a clear and consistent implementation of these powers in practice. At the time, the European Court of Human Rights rendered a range of rulings versus Ukraine on appeals of persons, who were not properly guaranteed a right to a cassation by contradictory laws and law enforcement practices that took place immediately after the Code of Administra-

[1] Європейський суд з прав людини : Рішення у справі «Кадикіс проти Латвії» від 04.05.2006 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[2] Європейський суд з прав людини : Рішення у справі «Байсаков проти України» від 18.02.2010 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[3] Європейський суд з прав людини : Рішення у справі «Принц Лихтенштейну Ганс-Адам II проти Німеччини» від 12.07.2001 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

tive Procedure of Ukraine entry into force. In the case of «Bulanov and Kupchik v. Ukraine» it was noted that the Court does not consider it necessary to investigate under the existing circumstances, whether the Supreme Court or the Supreme Administrative Court had the jurisdiction to decide on the merits of the applicants. It is important that applicants did not solve their complaints because the Supreme Administrative Court refused to follow the rulings of the Supreme Court, which determined the jurisdiction of these cases. Such denial did not only deprived the applicants of access to the courts, but also questioned the authority of the judiciary. After receiving the final decision of the Supreme Court, which is the highest judicial authority according to a constitutional status and provides clarification on the application of the law, the applicants had legitimate expectations that these decisions could not be challenged[1]. A similar motivation was given for «Andriievska v. Ukraine»[2], «Vasyliv v. Ukraine»[3] and others.

In the case of «Hornsby v. Greece» the Court drew attention to the issue of implementation of decisions taken against the administrative authorities. The Court noted that the decision made by the court should be seen as part of the «trial» under Article 6; the importance of this principle in the context of administrative proceedings is the duty of administrative authorities to implement the decision of the highest administrative court of the state. Accordingly, the appeal must be effective only when satisfaction of the complainant ends with a quick and full implementation of the adopted decision in its favor[4].

In summary, we note that consideration of the legal positions of the Strasbourg Court is not only a matter of rulemaking, direction of legal regulation of redress mechanisms used by members of administrative and legal relations in order to protect their rights and interests. Precedents of the Court are acting law that should find expression in law enforcement activities, primarily the practice of administrative courts, which consider complaints against decisions, actions or omission to act by government agencies.

Published: Державне будівництво та місцеве самоврядування: зб. наук. пр. / редкол.: Ю.Г. Барабаш та ін. – Х. : Право, 2014. – Вип. 28. – С. 116–128.

[1] Європейський суд з прав людини : Рішення у справі «Буланов і Купчик проти України» від 09.12.2010 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[2] Європейський суд з прав людини : Рішення у справі «Андрієвська проти України» від 01.12.2011 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[3] Європейський суд з прав людини : Рішення у справі «Василів проти України» від 20.01.2011 р. // Ліга : Закон: комп'ютер.-прав. система / Всеукр. мережа розповсюдження прав. инф. – [Електр. прогр.]. – Версія 8.2.3. – К. , 2012. – Заг. з вказів. для користувачів. – Щоден. оновлення.

[4] Європейський суд з прав людини : Рішення у справі «Горнсбі проти Греції» від 19.03.97 р. [електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/980_079.

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UDC 342.95.341.231.14

IMPACT OF THE RESOLUTION OF THE EUROPEAN COURT OF HUMAN RIGHTS ON FORMATION OF THE POSITION REGARDING THE APPLICATION OF THE SEPARATE PROVISIONS OF THE LEGISLATION ON ADMINISTRATIVE OFFENCES

Lately the European Court of Human Rights (hereinafter – the Court) has approved a lot of resolutions in the cases against Ukraine which state the violation of the Convention for the Protection of Human Rights and Fundamental Freedoms 1950 (hereinafter – the Convention). The content of some of them stipulated that these violations have been committed due to the fact that the Ukrainian courts applying some norms of administrative law (in particular, the regulations of the Code of Ukraine on administrative offence (hereinafter – CUAO)) do not consider the obligatory character of the convention provisions which determine the principles, which resolve the issues on legal responsibility of the physical persons.

We would like to emphasize that the majority of the resolutions of the Court in the proceedings against Ukraine have received the status of the final ones. It has given a possibility to the applicants of the proceeding to raise a question concerning the review by the Supreme Court if Ukraine of the resolutions of national courts taken with the violation by Ukraine of the international obligations.

The analysis of the Court resolutions as well as the provisions of the Supreme Court of Ukraine in the proceedings where the legitimacy of bringing of the persons to the administrative responsibility is evaluated, gives the possibility to formulate a number of the conclusions. In our opinion the court practice should be formed as well as the norms

of CUAO should be improved considering these conclusions.

1. Proceeding in the cases on administrative offences, in the result of which a resolution on application of the most strict penalty – administrative arrest can be taken and it is considered criminal according to its content that is such that demands the provision of all the guarantees of the article 6 of the Convention.

The resolutions in the proceedings *«Gurepka against Ukraine»* and *«Kornev and Karpenko against Ukraine»* can serve as the samples of the resolutions in which the Court demonstrates the specified positions. The last one determines that the applicant Karpenko due to committing the administrative offence specified in the part 1 of the article 185^3 CUAO has been punished by means of imposition of fine. However, the sanction of the specified article at the moment when the applicant had been brought to the responsibility, defined the possibility of application of the administrative arrest. Thus, the offence specified is not significant and the proceeding on consideration of the cases on bringing to the responsibility for its commitments should take place on the basis similar to those which are used for the consideration of the criminal case[1].

Moreover, the questions regarding the criteria, according to which the offences can be considered an insignificant one, was specified in the explanatory note to the Protocol No. 7 of the Convention. The explanatory note specified that the main criteria is whether the offence is castigated with imprisonment. Specifying this explanation, the Court in the resolution in the case *«Gurepka against Ukraine»* demonstrates a point of view which totally coincides with the one stated in the case *«Kornev and Karpenko against Ukraine»*: the applicant Gurepka was brought to responsibility under the part 1 of the article 185^3 of CUAO which stipulated the possibility of application of the administrative arrest to 15 days; presence in the sanction of the main penalty in the form of imprisonments makes it impossible to consider the offence as an insignificant one[2].

2. *Bringing of a person to administrative responsibility for the order violation which is not duly established by the national legislation is incompatible with the provisions of the Convention, in particular art. 7 of the international law act.*

This conclusion was formulated in the Court resolution in the case *«Verenzov against Ukraine»*. In the application to the Court, Verenzov complained about the fact that he was declared to be guilty in the violation of the order of manifestation realization despite such order is not duly determined in the legislation.

Having investigated the international acts, the Ukrainian legislation, having analyzed the court practice regarding realization of the right for peaceful meet-

[1] Рішення Європейського суду з прав людини у справі «Корнєв і Карпенко проти України» від 21 жовт. 2010 р. // Практика Європейського суду з прав людини. Рішення. Коментарі. – 2011. – №4. – С. 87–106.

[2] Рішення Європейського суду з прав людини у справі «Гурепка проти України» від 8 квіт. 2010 р. // Практика Європейського суду з прав людини. Рішення. Коментарі. – 2011. – №3. – С. 191–201.

ings, the Court specified that the applicant was brought to responsibility for disobedience to legal orders of the police representatives and for violation of the order of the demonstrations holding. The last one of the specified violations is stated in the article 185[1] of the CUAO. Nevertheless, its ground, in other words the order of the demonstration holding, is not duly specified in the legislation. Due to this reason, the Court has summed up that due to absence of the rules of holding a peaceful demonstration, the applicant's penalty for the violation of the non-existing order is a violation of the convention norms[1].

3. *Fixing in CUAO of too short time period for the examination of the case regarding administrative offence leads to the violation of the person's right for time and possibility for preparation of his defense as well as the right for legal assistance at his own option.*

The above specified laws are guaranteed by the paragraphs 1 and 3, article 6 of the Convection. Their violation is determined in the resolutions of the Court in the cases *«Kornev and Karpenko against Ukraine»* and *«Verenzov against Ukraine»*.

We would specify that in the first case the Court investigated the issue of responsibility to convention provisions of the procedures of bringing the applicant Karpenko to responsibility under the part 1 article 185[3] of CUAO and in the other one – the applicant Verenzov under the article 185 and part 1 article 185[1] of the CUAO.

The article 277 of CUAO determines that the cases regarding administrative offences stipulated by article 185 and part 1 article 185[3] are considered by the court within one day and article 185[1] – within three days.

In both specified resolutions the Court reminded that the subparagraph b part 3 article 6 of the Convection guarantees for the accused one «adequate time and possibilities necessary for the preparation of his defense». The accused one should have a possibility to organize his defense in a due way, to present without any obstacles to the court, which investigates the case, all necessary defense arguments and in such way influence on the proceeding result. In addition, the means which are accessible to all, who is accused of offence commitment, should include the possibility to get acquainted with the results of the investigation which took place during the whole proceeding in order to prepare his defense. The issue of the time period adequacy and the means given to the accused one should be evaluated taking into account the circumstances of each certain case.

In the case of Karpenko and in the case of Verenzov, the Court specified that despite the absence of a certain stating a certain time period between drawing up of the acts on administrative offences and examination of the cases regarding the applicants, it's obvious that it did not exceed several hours. Even if to presume that these cases were not

[1] Рішення Європейського суду з прав людини у справі «Вєрєнцов проти України» від 11 квіт. 2013 р. // Практика Європейського суду з прав людини. Рішення. Коментарі. – 2013. – №3. – С. 73–104.

complicated, the Court expresses it doubt that the circumstances under which they have been considered, had been such that gave the applicants a possibility to get duly acquainted with the accusation and proves against them, to evaluate them and elaborate an effective legal strategy of their defense. The further appellation claim which took place in the case of Verenzov, in opinion of the Court, could not change the situation taking into account the fact that at the moment when the appellation court investigated the applicant's claim, he has already completed the time of the administrative arrest. Thus, in the specified cases the Court has come to a conclusion that the applicant had not had adequate time and means for the preparation of their defense.

Regarding the right for the legal assistance on his own choice, the Court has also defined that it was violated in both considered cases. Whereas in the resolutions for both cases, it it described a different demonstration of such violation. So in the case of Verenzov, the national court refused the applicant to satisfy his claim regarding the presentation of his interests by the attorney at his own choice under the reason that the claimant was a human rights activist.

Expressing critics to such argumentation, the Court indicated that not each human right activist is an attorney and if even when such person is an attorney, it does not mean that he was not vulnerable or did not needed the assistance in his procedural status of a suspect one. If a person considers that he need legal assistance and the national legislations guarantees his right for the defender notwithstanding his own legal knowledge. Refusal of the national bodies to satisfy such petition on legal representation is illegal and self-willed.

In the other case the claimant Karpenko affirmed that still she didn't apply for the provision of the legal representation of her interest, she should not be blamed for that because as it was said earlier, she didn't have any time to evaluate the situation and understand the necessity and importance of such petition for the examination of her case. Thus, the Court has come to a conclusion that the inactivity of the claimant does not release the country from the responsibility for the violation of her procedural rights.

4. *Review by the appellation court of the resolution regarding administrative arrest after full completion of the penalty is a violation of the appellation right specified in the article 2 of the Act No. 7 to the Convention.*

Such resolution was taken by the Court after having examined the case *«Shvidka against Ukraine»*. The claimant in this case was brought to the responsibility under the court resolution dd 30 August 2011 under the article 173 of CUAO with the imposition of the penalty in the form of the administrative arrest of 10 days. The defender of Shvidka presented an appeal on her behalf in the day of the resolution approval which was considered by the appellation court in 21 September 2011. At that time Shvidka has already completed her full penalty and for this reason in her claim to the Court, she specified that at the

moment of the appeal consideration, it was not important to her whether the appellation court cancels the resolution of the court of first instance or leaves it without any changes.

Having certified in this case the violation of the appellation right, the Court specified that under the CUAO, the appellation claim does not terminate the execution of the court resolution on imposing the administrative arrest. Thus, the review by the appellation court of the resolution on imposing the arrest shall be executed afterwards when the person brought to responsibility, has completed her penalty. Due to this reason the Court mentioned that such review cannot effectively correct the deficiencies of the resolution of the court of lower instance as it (reviw) «serves to no aim anymore».

The Court has also mentioned the fact that if the appellation court has cancelled the resolution of the court of first instance, than the claimant would be able to demand on this basis the payment of material and moral damages. Nevertheless, in the Court's opinion, such retrospective and exclusively compensation method of legal defense cannot be considered as a replacement of law for revision as the Contention is aimed to guarantee not the illusion rights but the rights, which are effective in practice[1].

5. *The powers of the Supreme Court of Ukraine specified in the article 297[10] CUAO completely guarantee the adequate possibilities to reach the juridical state, which has a person before violation of the Convention, in respect to which the question of brining to administrative responsibility was solved.*

According to this article if the Supreme Court of Ukraine has come to a conclusion about complete or partial revision of the resolution in the case on administrative offence due to the definition of the violation by Ukraine of the international obligations, it has the right a) to cancel the resolution and terminate the proceeding, b) cancel the resolution and send the case to a new examination to the court, which has delivered the judgment subject to appellation.

We would like to underline that Verenzov and Shvydka in their claims to the Court specified that their bringing to administrative responsibility formed the violation of the rights which are protected by the Convention. So, Verenzov complained about the intervention in his right of peaceful meetings (article 11 of the Convention) and Shvydka – about violation of the rights of free expression of opinion (article 10 of the Convention). In other words, both claimants affirmed that their actions were not illegal and for this reason, the enforcement measures cannot be applied to them. The Court in its resolutions supported the positions of Verenzov and Shvydka stating the violation of the specified articles of the Convention.

The Supreme Court of Ukraine, having investigated the relevant claims of Verenzov and Shvydka, cancelled the resolutions of national court on bringing of these persons to responsibility, and terminated the proceeding in these cases

[1] Рішення Європейського суду з прав людини у справі «Швидка проти України» від 30 жовт. 2014 р. // Офіц. вісн. України. – 2015. – № 22. – Ст. 625.

due to the lack of content of administrative offences[1].

Karpenko in the claim to the Court indicated the violation of the part 3 of the article 6 of the Convention, e.g. the non-provision of the time and possibilities required for preparation of her defense. So, the claimant has not complained about bringing her to responsibility due to the absence in her actions of the offense content, she mentioned that she had not has fair judicial examination due to violation of the procedural guarantees stipulated by the Convention. For this reason the Supreme Court of Ukraine has partly satisfied the Karpenko claim on review of the resolution of her bringing to responsibility, cancelled the resolution of the court of first instance and the case was directed to new review[2].

The proceeding in the case regarding Karpenko was terminated by the resolution of the judge of Chervonozavodskiy district court in Kharkiv city. By the moment of its new review, the term of administrative penalty has finished. In this resolution Karpenko was proclaimed guilty in committing an offence stipulated by the part 1 of the article 185 – 3 of CUAO[3]. We consider that the desirable for the claimant reason for the proceeding termination which would completely rehabilitate her, would have been the determination by the court at new consideration of the case, of the absence in her action of the offence content due to not proving the guilt in committing the offense.

The decision of the appellation court regarding bringing of Karpenko to responsibility is not included into the Unified register of court decisions. We suppose that the claimant has not used her right to appeal the court resolution according to which she was declared guilty. Whereas under the article 294 of the CUAO she could have appealed the resolution of the court of first instance declared in the result of new consideration of the case and ask the appellation court to terminate the proceeding under the rehabilitation reason.

Published: Адміністративне право і процес. – 2016. – № 2 (12). – С. 16–22.

[1] Постанова Верховного Суду України від 3 берез. 2014 р., № 37908429 [Електрон. ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/37908429 та постанова Верховного Суду України від 27 квіт. 2015 р., № 44293205 [Електрон. ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/44293205.

[2] Постанова Верховного Суду України від 9 лип. 2012 р., № 25300167 [Електрон. ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/25300167.

[3] Постанова Червонозаводського районного суду м. Харкова від 29 груд.2012 р., № 28420109 [Електрон. ресурс]. – Режим доступу: http://www.reyestr.court.gov.ua/Review/28420109.

CIVIL-LEGAL SCIENCES

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UDC 347.441.83(094.5)(477)

INVALID TRANSACTIONS AND THEIR LEGAL CONSEQUENCES ACCORDING TO THE LEGISLATION OF UKRAINE

Transactions are one of the most important legal phenomena that are supposed to be an efficient instrument to regulate public relations. It is enough to say that the vast majority of civil relations appear exactly from the transactions.

Considering this role of transactions as legal facts of civil law, Article 203 of the Civil Code of Ukraine stipulates general provisions that are necessary to follow in order to make the transaction valid, in other words, to make the respective actions of natural persons or legal entities as to become grounds for civil rights and responsibilities to appear, to change or to terminate. These requirements are reducedas follows: the essence of the transaction shall not violate the provisions of the Civil Code of Ukraine, other acts of civil legislation as well as moral principles of the society; the person who performs transaction shall have the required amount of relevance, the willingness of which shall be free and correspond with the inner intent; the transaction shall be performed in the way stipulated by the law, the transaction shall be aimed at achieving real legal consequences stipulated by it.

Exactly following these requirements determines transaction as «sound» legal fact. It makes the mechanism of civil regulation functioning, namely it transfersthe civil rights and responsibilities from regulatory field in the field of real civil relations, the essence of which are civil rights and responsibilities that natural persons and legal entities enjoy.

If any requirements stipulated by Article 203 of the Civil Code of Ukraine are violated, the actions of natural per-

sons and legal entities only relatively can be considered as transaction and, respectively, shall not perform the function of legal fact.

According to part 1 of Article 216 of the Civil Code of Ukraine, invalid transaction does not create any other legal consequences, except ones, appeared at the result of its invalidity. In legal literature the issue related to the invalidity of transaction as well as related to their legal consequences is still a subject of lively discussions.In practice this issue is a ground for a number of questions to arise.

The literature stipulates fairly that although institute of invalid transactions in legislation was used quite a long time ago, even now the legal science does not have a common point of view related to the definition of invalid transaction. In addition to this, the important issue related to the essence of invalid transaction and how this notion corresponds with the notion of transaction invalidity has not been uncovered fully yet.[1]

There are no doubts that transaction (or if to be more precise – actions that includes features of transactions) that do not comply with the requirements stipulated by Article 203 of the Civil Code of Ukraine is impossible to be considered as appropriate (efficient, acting) legal fact and thus to create, to change or to terminate legal rights and responsibilities.

As it was stipulated, the consequences of performing such actions may be entirely the ones related to stating (recognizing) transaction asnull and void.

Considering these conditions, there is an absolutely reasonable question, whether it is appropriate (including and first of all from the terminological point of view) to name actions that violate the requirements of Article 203 of the Civil Code of Ukraine if not invalid but still transactions.

In due time this fact attracted attention of M. M. Agarkov. He emphasized that the term «transaction» should be used to name only actions that led to the intended legal effect. Those actions that did not lead to the intended legal effect or led to the wrong legal effect should be named «willingness» and here we should talk about invalid willingness but not about invalid transaction.

As M. M. Agarkov noticed, the transaction is always valid and it includes willingness that is considered to be always valid. Thus, valid or invalid can be only willingness.[2]

But, as we can see, during the latest codification in Ukraine as well as in other CIS countries, the law maker did not amend the terminological approach to define actions that do not correspond with the stipulated requirements of Article 203 of the Civil Code of Ukraine. He keeps naming them as invalid transactions.

At the same time, in our opinion, defining nature of legal transactions, there is lack of grounds to consider them as

[1] Гутников О. В. К вопросу о понятии недействительных сделок. В кн.: Недействительность сделок в гражданском праве: проблемы, тенденции, практика. – М. : Статут, 2006. – С. 58.

[2] Агарков М. М. Понятие сделки по советскому гражданскому праву // Советское государство и право. – 1946. – № 3–4. – С. 47–48.

legal facts that independently belong to legal phenomenon and that are valid, but they do not create those legal consequences that were intended.

In addition to this, this point of view provokes certain objections. Thus, in Russian literature O. V. Gutnikov expressed opinion that invalid transaction itself is also a legal fact. He divides two notions: transaction-fact and transaction-legal relations and considers that there are neither theoretical, no regulatory grounds to connect transaction with legal consequences occurrence on which the willingness of the parties was aimed at.[1]

The author believes that legal consequences are out of the transaction concept as legal phenomenon and belong to transaction-legal relations concept, but not to the concept of transaction-fact.

Due to the fact that invalidity itself belongs to the legal consequences (in other words to transaction-legal relations concept, but not to transaction-fact concept), the author supposes incorrectly to say that invalid transaction is not a legal fact[2].

Invalid transaction as legal fact is «action of natural persons or legal entities aimed at creating, changing or terminating legal rights and responsibilities according to which the law does not recognize legal consequences on which the willingness of the parties was aimed at on the grounds stipulated by the Civil Code and that took place at the moment of performing such an action. Invalid transaction as a legal fact is possible to be legal as well as illegal action».[3]

O. V. Gutnikovconsiders that while estimating transaction on the subject of its legitimacy, it is necessary to conduct a review in order to find out whether the transaction violates the mandatory regulations of the law, or not. If such violation is uncovered, the transaction is considered to be invalid. If the transaction violates the prohibition, it is considered to be illegal, in other words it is considered to be a violation of law.

In Ukrainian civil law this point of view is supported by I. V. Spasibo-Fateeva. She also believes that invalid transaction is impossible to be legally indifferent fact because having performed the transaction the parties appear to have certain circumstances according to the law (although not those on which they were aimed at)[4].

Such point of view on the essence of the invalid transaction is hardly can be supported. The exact scheme of legal facts that determines the dynamics of civil legal relations (their appearance, changing, termination) and, thus, civil transactions in general stipulates the place in such transaction system, first of all relying on their «constitutional» characteristics: legitimacy, character of a strong will, focus to achieve certain result.

Exactly these characteristics have influence on general characteristic of

[1] Гутников О. В. Недействительность сделки в гражданском праве (теория и практика оспаривания). М.: Статут, 2007. – С. 30.

[2] Гутников О. В. К вопросу о понятии недействительных сделок. – С. 69.

[3] Гутников О. В. Вказ. Робота, С. 93–94.

[4] Спасибо-Фатеева И. В. Недействительные сделки и проблемы применения реституции // Ежегодник украинского права. – 2009. – № 1. – С. 150.

transactions as legal facts and define their relations with other legal facts including legal acts, legal actions, civil violations of law (delicts).

Lack of even one of such characteristics confirms the «defectiveness» of such action as legal fact. Such circumstance was rather categorically emphasized by M. M. Agarkov. He stated that such action in general is impossible to be considered as transaction and needs another term.

On the basis thereof, he offered «to hold back» from using the term «invalid transaction», replacing it with another one, namely «invalid declaration of will» taking into account lack of required features of transaction as legal fact.

Modern scientists who study invalid transactions, their legal consequences share traditional views on defining invalid transactions as legal phenomenon that does not belong to the system of legal facts. This point of view was demonstrated in the works of M. M. Agarkov and O. A. Krasavchikov, F. S. Heyfets and other civil law scholars of soviet times.

Rejecting the possibility and reasonability to qualify invalid transactions as legal facts sui generis, A. A. Kot specifies that there are all grounds to say that the existing system of legal facts has no place for invalid transactions. Such conclusion mostly on the lack of legal consequences that invalid transactions have and only indirectly is proved by the failure «to add» invalid transaction in this or that group (type) of legal facts[1].

D. O. Tuzovtakes more categorical position: «Invalid transaction does not refer to the regulatory scheme provided for it and in this respect **it does not exist for the law** because it does not give a legal effect that refers to its type. Due to the fact that the notion of legal fact is immanently connected with the legal effect, it is necessary to recognize that invalid transaction as such (exactly like transaction) is not a legal fact. This is an action that is indifferent to the law. It is not prohibited but it is not allowed by the subjective right, it does not take it under its protection»[2].

As it is possible to see, the old discussion on legal nature of invalid transactions appeared in Russian civil law before the revolution. It continued during the soviet times and even nowadays it provokes lively interest in legal science. To a certain extent it is caused by the lack of fundamental civil and theoretical studies devoted to the institute of legal facts not only in Ukraine but in other post-soviet countries as well.

The last decade offers the works of M. A. Rozhkova[3] and A. V. Kostruba[4] that uncover certain problems of legal facts system in the civil law.

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[1] Кот А. А. Природа недействительных сделок // Недействительность в гражданском праве: проблемы, тенденции, практика. М.: Статут, 2006. С. 114–115.

[2] Тузов Д. О. Теория недействительности сделок. Опыт российского права в контексте европейской правовой традиции. М.: Статут, 2007. – С. 134–135.

[3] Рожкова М. А. Юридические факты гражданского и процессуального права. М.: Статут, 2009. 332 с.

[4] Коструба А. В. Юридичні факти в механізмі право припинення цивільних відносин. Київ: Видавничий дім «Ін Юре», 2014. 370 с.

At the same time, it is possible to say without any exaggerations that the institute of invalid transactions has similarly important and similarly controversial both theoretical and practical sides.

As it was emphasized before, the legal consequences of the invalid transaction itself provoke interests of scientists and experts.

The look-back study of the civil law proves that the Civil Code of the Ukrainian SSR as well as codified acts of civil law of other republics of the former USSR, the main legal consequence of legal transaction in most cases was mutual restitution application.

Thus, Article 48 of the Civil Code of the Ukrainian SSR stipulated that the invalid transaction made each party responsible to give back to another party everything that was received at the result of such transaction, and if it is impossible to give the received back in kind – to compensate the damage with the help of money if other consequences were not stipulated by the law.

In certain cases, except mutual restitution, as an exception, it was allowed to compensate damages incurred by the «offended» party (if the transaction was performed by the infant or incompetent person and another party knew or had to know about that).

Special legal consequences the law maker stipulated for such called «antisocial» transactions that were performed with the aim that intentionally contradicted the interests of the socialist state and society. If two parties had certain intent and the transaction was performed by them, everything gained by them at the result of such transaction was incurred from them as income of the state and if the transaction was performed by one of the parties, another party had to give everything received back as well as everything owned to transfer to the first party instead of the received.

If only one of the parties had intent, everything that was received by it according to the transaction was given back to another party, and everything that was received by another party or everything that belonged to it instead of performed ones was incurred in favor of the state.

Taking into account the character of such circumstances, they were named civil confiscation and in educational materials they also were named as «prevention of restitution»[1].

It should be noted that application of the consequences stipulated in Article 49 of the Civil Code of the Ukrainian SSR (civil confiscation) even in soviet times was performed quite seldom. It is even possible to say that it was performed only in exceptional cases. One of them was provided by the Plenum of the Supreme Court of the USSR as of October 6, 1970 «On application of the legislation by the courts while resolving disputes where one of the parties is kolkhoz». The courts were recommended to recognize the agreements as null and void in which the ownership right of the state on the land (purchase and sell, pledge, lease etc.) was violated directly

[1] Советское гражданское право. Том 1. Под ред. В. А. Рясенцева. М.: Юридическая литература, 1975. С. 212–215.

or in a hidden way and to apply exactly those circumstances stipulated in Article 49 of the Civil Code of the Ukrainian SSR (the similar regulation were included into other civil codes including the Civil Code of the RSFSR).

Such position was based on the understanding that according to Article 90 of the Civil Code of the Ukrainian SSR the land, its subsoil, waters and forests were owned exclusively by the state and were given to other subjects just into usage. Therefore, hidden transactions of land plots from the position of the civil legislation were considered as «antisocial» and those that discredited constitutional principles of the socialistic way of life.

As the practice proves, when the state tax service system was established, Article 49 of the Civil Code of the Ukrainian SSR received «a new life». In order to provide state budget replenishment and to make unfair tax payer to pay penalties, the tax authorities started to initiate actively claims to recognize transaction performed by the natural persons or legal entities as null and void on the grounds stipulated by Article 49 of the Civil Code of the Ukrainian SSR (later – the Civil Code of Ukraine of 1963).

The study of the resolving disputes practice related to recognition of transactions as null and void by the economic courts showed the «demand» for the Article 49 of the Civil Code of Ukraine of 1963 exactly on fiscal purposes. The tax authorities used a very easy scheme. Discovering during the audit of the enterprise's activity so called «fake» enterprises (as a rule, established by the founders that did not exist by having their lost or stolen documents that did not do business in reality), through court proceedings procedure they recognized their foundational documents as null and void and respectively annulled their state registration as a legal entity. Later, having studied economic and financial operations performed by the participation of such «fake» legal entity, the tax authorities applied to the court with a claim to recognize all transactions performed with their participation as null and void on the grounds stipulated in Article of the Civil Code of Ukraine of 1963.

Furthermore, all negative circumstances fell on the shoulders of the fair opposite party of the contract because at the moment of settling the case the fake enterprise, as a rule, terminated its activity a long time ago leaving no chances to the creditors.

Such situation caused controversial reaction within the business society. It destabilized the court practice because considering the case a lot of state authorities, such as general courts, economic courts, bodies that enforce the court decisions and others were engaged.

The state of things essentially changed when in 2003 the new Civil Code of Ukraine was adopted. It excluded the regulation that was identical to the one that Article 49 of the Civil Code of Ukraine of 1963 included. As possible consequences to recognize the transaction as null and void it did not stipulate civil confiscation (prevention of restitution) application.

The key innovation of the Civil Code of Ukraine of 2003 involved that the law

maker, defining the legal consequences of invalid transactions, refused from confiscation consequences at all. Pursuant to the paragraph 2 of part 1 of Article 216 of the Civil Code of Ukraine, in case of invalid transaction, each of the parties is obliged to give back in kind to another party everything it gained to perform such a transaction. If it is impossible to give everything back, in particular, when those that was received is the use of property, or performed work, or provided service, another party is obliged to compensate all damages at the prices that exist at the moment of such compensation.

The Civil Code of Ukraine of 2003 has another approach to solve the issue related to compensation of the damages caused by the invalid transaction. As a general rule, the provision according to which if another party or the third party suffered damages or nonmaterial damage by the invalid transaction, such damages should be recovered by the party that was guilty in such invalid transaction (part 2 of Article 216 of the Civil Code of Ukraine of 2003) was fixed.

Analyzing the stated innovation of the current Civil Code of Ukraine, it is possible to say that they are logically fit into the concept of private method to regulate property and personal non-property relations based on legal equality of the parties and their autonomy of will.

As it was stipulated before, the violation of the terms of the validity of transaction does not make this action being a violation of the law itself. It deprives such an action («declaration of will» as it was stated by M. M. Agarkov) of legal fact status. That is why returning the parties to their primary proprietary status (mutual restitution) in such a case it is possible to be considered as the most significant sound consequence.

Speaking about the possibility to recover the damages and/or nonmaterial damage caused by the transaction, pursuant to the general regulations of Article 22 of the Civil Code of Ukraine of 2003 the person who suffers the damages at the result of its civil right violation enjoys the right to recover them.

Similarly, Article 23 of the Civil Code of Ukraine stipulates the right of any person to recover all nonmaterial damages that he suffered at the result of violation of its civil right.

Therefore, stipulated by Article 216 of the Civil Code of Ukraine legal consequences to recognize transactions as null and void are possible to be considered as absolutely balanced measures provided by the law maker if the terms of validity of transactions stipulated in Article 203 of the Civil Code of Ukraine are violated.

At the same time this logic according to which the depth of the conceptual approach was determined before defining the consequences of invalid transactions was ruined completely by Articles 207, 208 of the Civil Code of Ukraine. They stipulated the possibility to recognize invalid the **economic responsibilities** that did not follow the requirements of the law or that was performed with the aim that intentionally violated the interests of the society and the state or was executed by the participant of economic

relations with violation at least one of economic competence (social legal capacity) on the request of one of the parties or the respective state authority.

At the result of recognition of economic responsibilities as null and void the Civil Code allows to apply confiscation procedures (mutual or one-sided restitution avoidance).

So, the study of the content of Articles 207 and 208 of the Civil Code of Ukraine (if to not take into account all «inappropriate» wordings that were criticized heavily in legal literature)[1], gives a ground to reach a conclusion that in fact the mechanism of Article 49 of the Civil Code of Ukraine of 1963 remains the same, although the authors of the current Civil Code of Ukraine refused from it as a matter of principle.

Taking into account the stated above, it is interesting to analyze the experience of the Russian legislation related to this issue. It is necessary to note that the Civil Code of the Russian Federation includes «antisocial transactions» although this notion was modified in a certain way.

Thus, pursuant to Article 169 of the Civil Code of the Russian Federation, the transaction is considered as null and void if it was performed with the aim that intentionally violates the interests of public order or morality.

The consequences of such transaction performance are application of one-sided restitution or mutual civil confiscation.

The comments to the stated article describes that due to the different reasons, such as difficulties to prove circumstances required to apply this article, uncertainties of the notion «public order and morality», carefulness of the judges to apply such a norm, taking into account the cruelty of consequences provided by it, social and economic changes that take place in the country that cause the rethinking of many values, it is applicable in court practice as well as Article 49 of the Civil Code of the RSFSR very seldom.

The Russian court practice developed general list of antisocial transactions. Having certain precautions and additional conditions it is possible to name them as follows: a) the majority of transactions that includes the components of the criminal offense or harsh administrative violation of law; b) the transactions aimed at tax avoidance; c) the transactions that violate significantly the currency legislation; d) the transactions the performance of which creates life and health hazard of citizens as well as cause harm to environment; e) the transactions aimed at derogation of national security and safety; f) the transactions deal with drug industry, pornography spreading, radioactive materials etc.[2]

As it is possible to see, the ground to recognize the antisocial transaction as null and void, the Russian law maker defines as violation of public order and morality by the actions of the participants of the transaction.

[1] Цивільне право України. Загальна частина. К.: Юрінком Інтер, 2010. С. 541 (автор відповідної глави О. В. Дзера).

[2] Комментарий к Гражданскому кодексу Российской Федерации. Часть первая / под ред. А. П. Сергеева. М.: Проспект, 2010. С. 450–451.

There is a great number of transactions that directly or indirectly relate to the public field if to take into account this classification.

It should be reminded that the previous civil codes of the union republics in this group of invalid transactions defined as follows: the ones that really violated the law (the law was considered in its broad sense: acts of the current legislation), the ones that were performed with the aim that intentionally violated the interests of the society and the state, in other words, the ones that included subjective element (the aim and the intent).

In our opinion, defining the grounds to violate the public order and morality (preserving the subject element – the aim and the intent), Article 169 of the Civil Code of the Russian Federation significantly broads the possibility of legal discretion to qualify the transaction according to hereof.

Turning back to the Ukrainian legislation, it should be noted that Article 228 of the Civil Code of Ukraine in its previous wording (the Civil Code of Ukraine of 2003) in general was aimed at replacing Articles 48 and 49 of the Civil Code of the Ukrainian SSR. At the same time it significantly innovated the general approaches to regulate illegal transactions.

Pursuant to Article 228 of the Civil Code of Ukraine the invalid transaction was considered as one that violated the public order, the essence of which was described in part 1 of Article 228 of the Civil Code of Ukraine, namely, the transaction was considered as such that violated the public order, if it was aimed at violation of constitutional rights and freedoms of the person and the citizen, destruction, damaging of the property of the natural person, state, the Autonomous Republic of Crimea, territorial communities, its acquisition.

The study of this definition gives grounds to make a few conclusions and thoughts to appear. It should be mentioned, that the category «public order» is not typical for civil law. Traditionally, it is applied in international private law and includes a specific content. It defines by its main function, namely, to restrict foreign law application.

Using the notion public order Article 228 of the Civil Code of Ukraine, the law maker determined its extent within the invalid transaction institute. The notion of public order was reduced on its maximum by specifying the following characteristics, namely:

a) violations of constitutional rights and freedoms of a person and a citizen;

b) destruction, damaging of the property of the natural person and state formations (the state, the Autonomous Republic of Crimea, territorial communities).

The list of these characteristics, being defined as complete, lead to the situation in which a lot of transactions were left behind Article 228 of the Civil Code of Ukraine although previously they were covered by Articles 48 and 49 of the Civil Code of Ukrainian SSR.

If to compare the content of Article 169 of the Civil Code of the Russian Federation and Article 228 of the Civil Code of Ukraine it is very easy to uncover that the circle of the invalid transactions the characteristics of which are

regulated by Article 228 of the Civil Code of Ukraine is considerably narrower than the one provided by Article 169 of the Civil Code of the Russian Federation.

Obviously, even employing more extensive interpretation, it is practically impossible to apply the category of public order (in the context of Article 228 of the Civil Code of Ukraine) in tax practice to implement fiscal aims by the tax authorities.

At the same time applying the Articles 207 and 208 of the Economic Code of Ukraine that we mentioned above, the tax authorities used the «repressive mechanism» that these articles included successfully.

As it was said, the civil law scholars criticized the contradictions between the Economic Code of Ukraine and the Civil Code of Ukraine in this part many times. The scientists who studied the economic law found specific grounds. The degree of discussion has never been decreased.

In such situation the amendment as of December, 2010 to Article 228 of the Civil Code of Ukraine wasin a certain sense unexpected. It said: «If the transaction violates the requirements related to the correspondence of this transaction to the interests of the state and the society, its moral values, such a transaction is possible to be recognized as null and void. If the recognized transaction is performed with the aim that intentionally contradicts the interests of the state and the society and two parties have such intent – in case if two parties performed the transaction – everything that was gained by them according to the transaction is charged in favor of the state; if the transaction was performed by one party, according to the decision of the court another party is obliged to recover everything that was received and that belonged to it from the first party to recover the received. If only one of the parties has an intent everything obtained by it according to the transaction shall be returned to another party, and everything that was received by another party or that was owned by it, has to be recovered from it according to the decision of the court in the favor of the state».

Therefore, the new version of Article 228 of the Civil Code of Ukraine removed the contradictions with Articles 207 and 208 of the Economic Code of Ukraine in the favor of the position of the Economic Code of Ukraine.

Such amendment of Article 228 of the Civil Code of Ukraine gives grounds to consider the new version of the article as critics to Article 49 of the Civil Code of the Ukrainian SSR.

A. V. Dzera specified many times that Article 49 of the Civil Code of the Ukrainian SSR is impossible to consider as successful due to the lack of certain criteria to treat transaction as null and void and to apply legal consequences provided by it. The court practice also did not give a certain interpretation that is why the courts even in soviet times recognized transaction as null and void very rarely according to the regulations of Article 49 of the Civil Code of Ukrainian SSR. They applied sanctions pro-

vided by it only when the actions of the participant of the transaction included the features of crime[1].

At the same time, as it was stipulated, the tax authorities using actively the Articles 207 and 208 of the Economic Court of Ukraine resolves fiscal disputes ignoring largely all those circumstances that on scientists' point of view generate challenges to apply Article 49 of the Civil Code of the Ukrainian SSR or Articles 208, 209 of the Economic Code of Ukraine.

Turning back to amendments of Article 228 of the Civil Code of Ukraine it is impossible to not mention that making amendments by the third part, its content startedto suffer certain contradiction. That happened due to the mechanical blending of two regulations: the previous version of Article 228 of the Civil Code of Ukraine that consisted of two parts, the analysis of which was described earlier in this article and «reanimated» Article 49 of the Civil Code of Ukrainian SSR with the part three.

The contradiction appeared due to the fact that the transactions that violate public order (part 1 of Article 228 of the Civil Code of Ukraine) according to the part 2 of this article **are void**, in other words they are invalid and in such case the law maker calls to recognize them invalid separately through the court proceedings procedure.

Speaking about transactions that violate the interests of the state and the society stipulated by part 3 of Article 228 of the Civil Code of Ukraine, **they are possible to be recognized by the courts asinvalid** as it follows from the wording of the stated regulation.

In such context it is possible to make a conclusion that except those transactions the invalidity of which is stipulated by the law and fact of their performance and the court only defines the consequences of such invalidity, a new type of invalid transactions appeared, namely when **such transactions are possible to be recognized as null and void by the court** in case if they contradict the interests of the state and society. It should be noted that these transactions are impossible to be referred to the category of challenged ones because the resolving of issue related to their invalidity does not depend on the declaration of intent of certain group of interested persons.

Thus, amendments to Article 228 of the Civil Code of Ukraine introduce certain corrections into invalid transaction classification. It is possible to define three groups of transactions that are impossible to be considered as fully legal facts:

1) **void transactions**, the invalidity of which is determined by the law;

2) **invalid transactions**, the invalidity of which **isdetermined by the court** in cases stipulated by the law;

3) **challenged transactions**, the invalidity of which is not determined directly by the law but one of the parties or another interested party challenges its validity on the grounds stipulated by the law.

At the same time, in our opinion, any thoughtful theoretical ground to detach a separate group of transactions that contradict the interests of the state and the

[1] Цивільне право України. Загальна частина. С. 541.

society is more likely impossible. If the law maker considers such list of transactions to be reasonably added into the system of invalid transactions,it surely can be «joined» to the void transactions.

But such conclusion should correspond the wording of part 3 of Article 228 of the Civil Code of Ukraine.

The presented facts prove that amendments to Article 228 of the Civil Code of Ukraine caused serious objections not only for its concept but from the position of legal drafting.

Published: Спогади про Людину, Вченого Вчителя (до 60-річчя від Дня народження професора Ірини Миколаївни Кучеренко) / за заг. ред. Р. О. Стефанчука. – К.: АртЕк, 2016. – С. 135–151.

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UDC 347.22(477)

RELATIONS OF PROPERTY FOUNDATIONS OF ENGAGING IN COMMERCIAL ACTIVITY IN UKRAINIAN LAW

1. Basic elements of commercial legal order of Ukraine

Formation of traditions of economic analysis of law in the area of commercial relations representing methodology of economic theories of state legal regulation of a capitalist economy in various market conditions – both during recession and growth is observed in present jurisprudence of Ukraine.

In this regard, questions of systemic understanding and criteria of efficiency of legal regulation of relations of engaging in commercial activity, ensuring feedback between rule-making and law enforcement, reliability of subjective rights, easiness of fixation and transfer of rights to property objects, role of the state, law, and civil society in the relations of engaging in relations of engaging in commercialactivity, market principles of the system of property rights, preparation of political scientists and ordinary citizens for the legal thinking of a civil society which guarantees equal opportunities and respect for human dignity in relations of engaging in commercial activity are becoming more topical.

Due to his egoistic nature, both man and collective formations created by him in many respects on an intuitive basis study and measure the state and society in general on «mine or another's» principle as an intrinsic and determining motive for most ideas and actions of society. It is egoistic nature of ownership that predetermines the origin and content of basic legal and other social constructions in the state and society that form commercial legal order. Any substantial deviation from this rule sooner or later causes instability of relations of engaging in commercial activity and necessity of restoring the balance in one of three directions – mainly in public interest, in private interest or through their balanced joining.

Temporary or even relatively long-term stability, which can be reached by the first two ways, leads to social explosions, application of «pointed sanctions» that reduce but not eliminate substantial disproportions of the private or public interest, respectively, that brings in disrespect for human dignity, violation of other basic rights of propertyless members of society and their resulting sustainable development inability.

However, the stability of commercial legal order on the principles of self-rebirth, sustainable development is possible on the principles of equal access to property, respect for human dignity, legal safety, proportionality between the private law and its limitations, presumption of legal equality of all participants of property relations of commercial activity.

The basic elements of commercial legal order of any state and society that guarantee equal opportunities in society and respect for human dignity are the right of ownership, property relations, and commercial turnover, functioning among themselves in a balanced manner.

Only under the conditions of inviolability of property relations, balance (proportionality) of limitations of ownership right by public interest, stable existence of property and non-property relations, on the principles of the rule of law and justice is possible.

2. Ownership right as a basic element of civil society and commercial legal order

The right of ownership, which is one of the most important human rights, ensures legal authority over property and non-property values as an integral part of a civil society.

Economic relations that involve relations of ownership, commercial turnover, etc. constitute an objective basis of a civil society. The performance of this function is not facilitated by the dualism in understanding relations arising in economics that has emerged in the modern doctrine of law and economics.

In jurisprudence property relations are mostly regarded as volitional relations, legal relations that emerge in the economy but not as economic relations.

In economic theory, on the contrary, economic or production relations are viewed as objective material relations arising independently of the will and consciousness of people and, therefore, they are, sort of, not directly influenced by the law.

Indeed, relations of ownership and of economic turnover are objectively material in their nature, since people are forced to enter into these relations in order for them and for the society to exist.

Property relations are determined not by the will of their participants, but by objective regularities, conditions of vital activity of society that actually influence the formation of rules of law and legal system at large.

However, in modern society, property relations other than legal, materialized through volitional subjective activity of people, cannot exist.

Accordingly, any mechanisms of regulation of economic relations must be

protected legally or otherwise (with the help of morale, religion, etc.), which, in general, excludes the possibility of «… creation of only economic or only legal mechanisms of regulation[1] which, in fact, are interconnected as two sides of a single social phenomenon.

3. Concepts relating the role of the state on in regulating property relations of engaging in commercial activity

Unity of the economic and legal aspect of property relations determines various approaches to the question of the role and influence of the state on an entrepreneur, correlation of the state and law in regulating property relations of engaging in commercial activity.

Economic science distinguishes mainly two basic approaches to the role of the state in regulating property relations of engaging in commercial activity – liberal-monetarist and national-state.

Liberal-monetarist approach provides for the transition to the modern western economic system and for the formation of a modern market economy (so called the Washington Consensus doctrine)[2].

The methodology of this approach is predetermined by the neoclassic political economy of self-regulated and generating progress and wellbeing markets that became the godmother of programs of structural reforms for which the state was something dubious and the law was important only as a neutral instrument[3].

The ideology of Washington Consensus is notable for simplification of tasks of economic politics and for its reduction to four postulates: 1) liberalization (of trade, financial markets, international payment and financial operations); 2) deregulation of activity of commercial enterprises while protecting private property; 3) privatization of enterprises and 4) stabilization through tough formal planning of money supply (monetary policy of «neutrality» of money) and fiscal «discipline» achieved by concentrating on few priority functions of the state and made possible owing to reduction of state revenues and expenditures[4].

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[1] *Пушкин А. А.* Правове поле і економіка громадянського суспільства в Україні // Кодифікація приватного (цивільного) права України / За ред. проф. А. Довгерта. – К.: Український центр правничих студій, 2000. – (336 с.). – С. 54–55.) [*Pushkin A. A.* Legal framework and the economy of civil society in Ukraine // Codification of private (civil) law Ukraine / Ed. prof. A. Dovhert. – K.: Ukrainian Centre for Legal Studies, 2000. – (336 pp.). – P.54–55.]

[2] См.:Ясин Е. Г. Российская экономика. Истоки и панорама рыночных реформ. – Курс лекций. – М., 2003; Гайдар Е. Т. Гибель империи. Уроки для современной России. – М, 2007. [See: YasinE.G. Russianeconomy. The origins and the panorama of market reforms. – Course of lectures . – M., 2003; Gaidar E. T. Fall of the Empire. LessonsformodernRussia. – M., 2007.]

[3] *Книппер, Рольф* Основные проблем правового сотрудничества // Актуальные проблемы частного права. Liberamicorum в честь академика М. К. Сулейменова / Сост. Е. Б. Жусупов, А. Е. Дуйсенова. – Алматы: Юридическая фирма «Зангер», НИИ частного права, 2011. – (544 с.). – (С. 3–29). – С. 6. [*Knipper, Rolf* Basic problems of legal cooperation // Topical problems of private law. Liber amicorum in honor of academician M. K. Suleimenov / Comp. E. B. Zhusupov, A. E. Duysenova. – Almaty: Law firm «Zanger» Scientific Research Institute of Private Law, 2011. – (544 pp.). – (P. 3–29). – P. 6.]

[4] О Вашингтонском консенсусе, прежде всего: J. Williamson.What Washington means

In general, this policy is aimed at limiting the role of the state as an active subject of economic influence and at limiting its functions through control of dynamics of indices of money supply[1].

The implementation of structural reforms based on this doctrine and financed mainly by The IMF, the World Bank and the US Treasury basically brought in a «shock therapy» which was expected to push the dissolved Soviet Union on the path of market economy and growth in a short time by means of massive privatization and liquidation of state structures[2].

The programs of reformation of former Soviet republics in general failed.

Rapid implementation of the market economy through macroeconomic stabilization, liberalization and privatization of enterprises was predominantly socially, economically and politically extremely ruinous for the former Soviet republics.

The Bretton Woods Institutions abandoned «minimalist approach to the State» and assured that «stateless development» failed and that without an efficient and effective state there is no sustainable development and that, therefore, it is necessary to improve the ability of states to maintain reliable and predictable public institutions. Thus, statute, law and justice inevitably attracted general interest[3].

During the implementation of neoclassical economics in the post-Soviet space the fundamental belief, which was considered axiomatic, that individuals are more than the state focused on the organization of production chains, because such chains promise profitability, was refuted.

Lack of restrictions and incentives to organise production of consumer goods after dissolution of the Soviet Union resulted in that the predominant aim of private individuals was not making value, but maximizing profits. For this purpose they organize reliable production chains only if other, more lucrative, easier, and associated with a lower risk

by Policy Reform. Latin Adjustment, Washigton D. C., 1990; V. Hooper. The Wasington Consensus and Emerging Economies. WorkingPaper, 2002. – Sidney; Книппер, Рольф Указ. соч. – С. 3–29. [About the Washington Consensus, foremost: J. Williamson.What Washington means by Policy Reform. Latin Adjustment, Washigton D. C., 1990; V. Hooper. The Wasington Consensus and Emerging Economies. Working Paper, 2002. – Sidney; Knipper Rolf Mentioned work. – P. 3–29.]

[1] *Дойников В.* Кризис гражданско-правовой доктрины и современный этап кодификации российского законодательства / В. Дойников / Юридичний вісник України. – 2009. – 16–22 травня. – №20 (724). – С. 5. [*Doynikov V.* The crisis of civil doctrine and the current stage of codification of Russian law / V. Doynikov / Law Journal of Ukraine. 2009. – 16–22 May. – №20 (724). – P. 5.]

[2] See: *J. Sachs, D. Lipton.* Prospects for Russian Economic Reforms. – B.: Brooking Papers on Economic Activity. – Washington D. C., 1992. – P. 213; *Книпер, Рольф*Указ. соч. – С. 7. [See: *J. Sachs, D. Lipton.* Prospects for Russian Economic Reforms. – B.: Brooking Papers on Economic Activity. – Washington D. C., 1992. – P. 213; *Knipper Rolf* Mentioned work. – P. 7.]

[3] See:*The World* Bank, The State in a Changing World, Washington D. C., 1997; *Книпер, Рольф*Указ. соч. – С. 9. [See: *The World* Bank, The State in a Changing World, Washington D. C., 1997; *Knipper Rolf* Mentioned work. – P. 9.]

ways are closed to them by institutions and law. In practice, as an alternative way other methods of maximizing profits, for example, asset-striping of production units were rationally considered and used. In this situation it is easier for a private individual to get profit by «skimming the cream» rather than by making value. Since institutions and law were not created, the former Soviet republics did not see an expected rise of entrepreneurial activity in the first 10 years of reforms, but rather went through «amassivestrippingofassets»[1].

In this regard, common in post-Soviet economic science thesis that «when it comes to the transition to the market, from the scientific point of view this means the replacement of a planned management of economy with its spontaneous regulation….

This emphasizes the distinction between spontaneous economies in the West and planned ones in the USSR».

In fact, the point of view consisting in replacement of the planned management of the economy with a balanced self-regulation and imperative state influence on the economy proved to be more scientific.

Nevertheless, it should not be considered as a basis for the return to a planned economy within the meaning of the conception of commercial law grounded in the science of commercial law in the post-Soviet space.

Supporters of the conservative-state conception in the regulation of relations of engaging in commercial activity proceed from the fact that the legislation of 90th, built on liberal philosophy of economy, did not lead to and could not lead to economic public order. In this case economic order is understood as a predominant in society way of material production based on provisions of constitution, rules of law, moral principles, business rules and customs approved by the supreme legislative authorities in strategic economic decisions ensuring harmonization of private and public interests, creating partnership and good faith relations in commercial activity[2].

Some authors consider that threats to national security of a state cannot be removed based on liberal-civil views in legal science that hinder the development of productive forces of society[3].

Supporters of this approach consider that ensuring national strategy of economic security of a state corresponds to a modern conception of commercial (entrepreneurial) law (V. V. Laptev, V. K. Mamutov) which constitutes a basis for …Commercial Code…[4].

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[1] *Haff, Stiglitz.* The Transition from Communism. The World Bank, May 2004. – P. 2.

[2] *Хозяйственное* право Украины: Учебник / В. К. Мамутов, Г. Л. Знаменский, В. В. Хахулин и др. / Под ред. В. К. Мамутова. – К.: Юринком Интер, 2002. – 618 с. [CommercialLawofUkraine: Textbook / V. K. Mamutov, G. L. Znamenskii, V. V. Khakhulin, etal. / Ed. V. K. Mamutov. –K.: YurinkomInter, 2002. – 618 p.

[3] *Бизнес.* Менеджмент. Право. Тема номера «Систематизация предпринимательского законодательства». – 2006. – № № 3, 4. [*Business.* Management. Law. IssueTopic «Systematisation ofbusinesslaw.» – 2006. – № № 3, 4.]

[4] *Правовое* регулирование предпринимательской деятельности в рыночной экономике. Сб. статей под ред. Губина Е. П. – М., 2008. [*Legal*regulationofentrepreneurialactivityinmarketeconomy. Collection of articles ed. Gubin E. P. – M., 2008.]

Aforesaid approaches regarding methodology of commercial legal order and economic analysis of law are generally based on a somewhat simplified understanding of modern economy in various market conditions – both in the conditions of growth and recession determined by peculiarities of markets with asymmetric information.

One of the most recognized in the modern world theories of the capitalist economy in the conditions of dynamics and growth is a Neo-Keynesian macroeconomic theory.

Neo-Keynesianism is a theory of a state-legal regulation of the capitalist economy suggesting rather imperative external influence on economic processes in a given state.

The fundamental postulate of this theory is a statement that in modern conditions capitalism has lost spontaneous restoration of economic balance and that, therefore, state regulation of the economy is necessary.

Special feature of Neo-Keynesianism consists in that it, in fact, reflects a more mature degree of development of state-monopolist capital, supports systematic and indirect, but not sporadic and indirect as in Keynes' theory, effect of a bourgeois state on the capitalist economy.

Neo-Keynesian theory reasons forms of economic regulation of the economy in different market conditions – both in the conditions of recession and growth, – explains, on the one hand, steady pace of economic growth and, on the other hand – economic crises and inflationary booms. This is how Neo-Keynesian theory of economic dynamics and growth emerges[1].

Manifestation of this trend in Neo-Keynesianism is developed by its representative «theory of markets with asymmetric information» (J. Stinlitz, G. Akerlof, M. Spence) for which its authors received Nobel Prize in Economics in 2001.

The basis of this theory is a mathematical model of a market in which a situation can be seen where one representative has incomplete information about the agent of interaction (representative of the other party) which can become apparent in hidden features of such relations that can, for example, result in unfavourable selection.

An example of such selection is a rather conventional situation: concealing by an owner of information about bad quality of his car when purchasing insurance policy or an attempt by a new employee to hide his incompetence from the employer.

All this, in its turn, on a more general level, allows us to analyse how it can affect the level of prices and quality[2].

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[1] *Стрельцов Є.* Грецька криза: її уроки для України // Юридичний вісник України. – 18–24 липня 2015. – № 28 (1045). – (С. 6–7). – С. 6. [*Streltsov Y.* Greek crisis: its lessons for Ukraine // Law Journal of Ukraine – 18 – 24 July 2015. – № 28 (1045). – (P. 6–7). – P. 6.]

[2] *Стрельцов Є.* Грецька криза: її уроки для України // Юридичний вісник України. – 18–24 липня 2015. – № 28 (1045). – (С. 6–7). – С. 6. [*Streltsov Y.* Greek crisis: its lessons for Ukraine // Law Journal of Ukraine – 18 – 24 July 2015. – № 28 (1045). – (P. 6–7). – P. 6.]

4. Property relations in the area of engaging in commercial activity and legal property titles

TheaboveconceptualideasofNeo-Keynesianismineviтably «balance» on the border between economics and law, as state regulation of the economy is impossible without law, which brings it closer to the jurisprudence and to lawyers' ideas of the economy of civil society, commercial legal order and legal forms of property appropriation.

Economic or property relations that must be built on the principles of equality of the participants, regardless of who they are – a natural or legal person, a state or local community, constitute the essence of economic foundations of civil society.

In this sense, it is legally unacceptable to divide the economy in civil society into individual sectors – private, public, cooperative, collective, and so on – and to establish a special legal regime for each of them.

An inviolable rule of civil society is the principle of legal equality of subjects of property relations that provides for such a system of property relations and such volitional form of their manifestation and consolidation in the law that is based on equal legal basis for the participants of these relations – both natural (citizens) and legal persons as well as other participants.

The application of the principle of legal equality of the regime of property relations to all participants of these relations also concerns public formations having legal personality – the state and local communities that have certain property basis in the capacity of the subject of property relations on the principles established for legal entities.

This rule is reflected in the introduced to the Commercial Code of Ukraine Chapter «Legal forms of participation of the State, the Autonomous Republic of Crimea, local communities in civil relations» (Art. 167) which states: «1. The state acts in civil relations on an equal footing with other participants of these relations. 2. The State may establish legal entities of public law (state-owned enterprises, educational institutions, etc.) in the cases and in the manner prescribed by the Constitution of Ukraine and law.3. The State may establish legal entities of private law (companies and so on. etc.), take part in their activities on a common basis, unless otherwise provided by law».

At the same time, Art. 170 of the Commercial Code of Ukraine stipulates that the state acquires and exercises civil rights and obligations through public authorities within their competence established by the law.

Thus, the law ranks the state and legal entities created by the state with natural and legal persons endowing them with features of the subject of property relations governed by civil law.

Property and personal non-property relations arising between mentioned subjects are free from the forms of administrative-command influence on them that existed in the past and still exist to some extent nowadays due to the institutes of commercial management and of operational administration provided by the Commercial Code of Ukraine.

In this regard, rules provided by the Commercial Code of Ukraine in Chapter III «Property foundations of engaging in commercial activity» regarding vesting unitary state and communal enterprises with real title of «commercial law» and «operational administration» (articles 136, 137 of the Commercial Code of Ukraine) are incompatible with the principle of legal equality since this makes it impossible for legal persons of public law to have title of ownership held by any natural or legal person of private law.

Said institutes (right of commercial management and right of operational administration) deprive legal persons of public law of the right to be the owner of the property assigned to them or acquired by them. Thereby such legal persons turn into a kind of legal fiction substantially limited in performing the functions of a full-fledged subject of property relations and not able to be liable under its obligations due to lack of its own property, which is owned under the law by another person (subject) – the state.

The application of real legal institutes with features of administrative-command influence in the Ukrainian law reflects common in the national doctrine and state law distorted idea of correlation of the state, law and society excluding the formation and functioning of civil society in the conditions of legal and actual inequality between the state, legal persons created thereby on the one hand and other subjects of property relations (subjects of private law) on the other.

These institutes reflect the old idea of commercial law which consists in the uniting of horizontal and vertical regulation of economy where administrative influence on the sphere of economy prevails.

This is a disguised form of administrative-command system based on the determination of the state influence on an entrepreneur from a position of a totalitarian state rather than from legal position.

Such inequality of legal regimes is a feature of societies of non-civil type (totalitarian, transition economies, etc.) whose law is made by the will of states rather than in the process of carrying out property, other social relations.

The formation and functioning of civil society implies equal for all its participants and independent of each other state. State exercising its public-legal functions in no case means precedence (priority) of the state over law; law is not a direct result of activity of the state; it is embedded in civil society.

True origins of law lie in the system of actually existing social relations with ownership relations in the core of them. The role of a lawmaker, other persons engaged in the area of law is not to invent rules of law, but to derive them from actually existing relations providing for their possible development.

In this regard, A. Pushkin correctly noted: «The fact that the establishment of rules of law is mediated by the will of the legislator or of someone else does not mean that this will itself is law. It is only the means of objectification of law which in real life grows out of material

and other needs of people in the process of their communication»[1].

Thus, the law that satisfies the demands of civil society may be derived only from the developed system of market economic, in other words property relations. And over time, rules of this law must be officially fixed in laws, other regulatory acts.

At the same time, the state is meant only to ensure law, that is, the normal functioning of civil society relations through the law-making and law-enforcement.

In turn, laws must be based on principles of law, and not only on the principle of legality, and they must reflect real life that is developing under objective economic laws.

Property relations in civil society are interconnected with economic and legal relations, dualism of law and principles of private law.

Market economy must constitute the economic basis of civil society. In a society having market economy the law is divided into private and public.

Public law in property relations is designed to ensure state establishment of rules of the game which must be observed by members of this relations. Public function, in fact, consists in limiting subjective rights of private persons, in particular by applying enforcement measures necessary for legal protection of members of property relations.

In this regard literature rightly pays attention to the fact that most of commercial relations are regulated by special laws based on public rather than private principles (registration, licensing, certification, regulations, bans, guidelines)[2].

Private law based on recognition not only of equality of all subjects, but also of diversity and equality of all forms of ownership must constitute the legal basis of a civil society. Accordingly, there must be diverse forms of entrepreneurial activity; principles of freedom and safety of ownership, personal freedom, freedom of contract must be secured.

Private law is designed to regulate social relations between members of society. A crucial role is assigned to property and personal non-property relations between members of society irrespective of the area of life in which they emerge. Relations between members of society serve as a legal foundation; they define the limits of possible and necessary behaviour of state bodies towards members of society.

Literature draws attention to the fact that civil law governs mainly relations in the sphere of exchange, whereas entrepreneurial (commercial) law – in the sphere of production, distribution and exchange. Mainly macroeconomic relations (investment, pricing, monopolistic

[1] *Пушкин А. А.* Указ. соч. – С. 55. [*Pushkin A. A.* Mentioned work. – P.55.]

[2] *Яковлев В. Ф.* Гражданский кодекс. Заметки из истории подготовки проекта. Замечания о содержании кодекса, его значение и судьбе // в книге Гражданский кодекс России. Проблемы. Теория. Практика: Сборник / Отв. ред. А. Л. Маковский. – С. 58–66. [*Yakovlev V. F.* Civil Code. Notes from the history of project preparation. Remarks on the content of the Code, its meaning and fate // in the book The Civil Code of Russia. Problems. Theory. Practice: Digest / Ed. A. L. Makovsky. – P. 58–66.]

activities, etc.) constitute the subject of commercial law.

It should be noted that all the rules of legislative acts, including in the area of commercial activity, may also be considered as two major subsystems: rules of private law and rules of public law. The former govern the relations in which human rights are exercised irrespective of whether a person is a member of a state, the later govern human rights of a person as a citizen, i.e. they are connected with person being a member of a state[1].

Formation of civil society implies formation of ownership relations and commercial turnover through application of title to property, which is not a disguised form of an administrative-command system, based on the determination of state influence on an entrepreneur not from the position of a totalitarian state, but from the legal position.

In addition, property relations in civil society constitute a basic element of society of equal opportunities, respect for human dignity and legal security.

Civil society must have at its disposal the union of public persons – political scientists thinking not in old terms of the state as an all-embracing and omnipotent force, but in terms of the state designed not to stand above society but to serve it, the state which has as its foundation public agreement in the form of constitution reflecting and fixing possible and necessary behaviour of all state bodies dictated by the objective role and place of the state in the structure of society.

[1] *Пушкин А. А.* Указ. соч. – С. 57. [*Pushkin A. A.* Mentioned work. – P.57.]

5. Concept and system of property relations in civil law

All system of property relations, including in the area of engaging in commercial activity, predetermines ownership right, which constitutes the root of subjective rights.

Property relations constitute social relations expressed in a legal form that have as their object property values.

In turn, property is the whole available bundle of rights and duties which belong to a particular person.

According to part 1 of Art.190 of the Commercial Code of Ukraine property means individual thing, aggregate of things, as well as property rights and obligations.

Legal science of civil law countries regards property as a special legal form of material values belonging to an individual person in the form of a bundle of property rights and obligations belonging to particular natural and legal persons (that can be measured in terms of money), viewed as a sum of active and passive valuables that are closely interlinked[2].

[2] See:Цивільне право України. Загальна частина : підручник / підручник / за ред. О. В. Дзери, Н. С. Кузнєцової, Р. А. Майданика. – 3-тє вид., перероб. і доп. – К. : Юрінком Інтер, 2010. – (976 с.). – С. 228–229; Халабуденко, О. А. Имущественные права. Книга 1. Вещное право / О. А. Халабуденко; Междунар. независимый ун-т Молдовы. – К.: Междунар. независимый ун-т Молдовы, 2011. – (306 с.). – С. 34;Суханов Е. А. Понятие имущества // Российское гражданское право: Учебник: В 2 т. Т. I: Общая часть. Вещное право. Наследственное право. Интеллектуальные права. Личные неимущественные права / Отв. ред. Е. А. Суханов. – М.: Статут,

Property is a polysemantic concept that can be viewed as (a) a collective concept (set of things, as well as property rights and obligations belonging to a person) or (b) available property (that is an asset in the form of things and property rights) or (c) only things belonging to a particular person (when recovering property from unlawful possession). Therefore, it is necessary to always clarify the meaning of this term through interpretation in each particular legal rule.

It is characteristic that there is no uniform approach to the issue of the legal regime of property in civil law countries. In particular, civil law of Ukraine regards property as a special object (Part 1 of Art. 190 of the Commercial Code of Ukraine).

However, under Russian civil law property is not recognized as an independent object of civil rights but is regarded as a set of different in terms of their legal regime objects of civil rights (things and separate property rights – obligatory, corporate, exclusive)[1].

Conducted analysis provides a basis for concluding that property relations constitute a property component of civil legal relations which have as their object particular things (real rights) and separate property rights (obligatory, corporate, exclusive intellectual property rights).

6. Concept and peculiarities of legal regulation of property relations in the area of engaging in commercial activity

The concept and system of property relations in the area of engaging in commercial activity are doctrinally substantiated in the science of commercial law and legislatively reflected in chapters III «Property foundations of engaging in commercial activity» and IV «Commercial obligations» of the Commercial Code of Ukraine (the CoC of Ukraine).

Conceptually the CoC of Ukraine proceeds from the division of property relations in the area of engaging in commercial activity into two groups: (a) property relations that constitute property foundation of engaging in commercial activity; (b) commercial obligations.

Provided by the CoC of Ukraine system of property relations that represent property foundation of engaging in commercial activity is made of real legal relations (of ownership, of commercial management and of operational administration) of use of natural resources, of intellectual property in commercial activity, corporate relations.

2010. – (958 c.). – C. 301–303. [See: Civil law of Ukraine. General part: textbook/ textbook/ ed. O. V. Dzera, N. S. Kuznietsova, R. A. Maidanyk. – 3rd ed., revised and supplemented. – K. Yurinkom Inter, 2010. – (976 p.). – P. 228–229; Halabudenko, O. A. Property rights. Book 1. Real Law / O. A. Halabudenko; International Independent University of Moldova. – K.: Internat. International Independent University of Moldova 2011. – (306 p.). – P. 34;Sukhanov E. A. The concept of property // Russian civil law: textbook: in 2 v. V. I:. Generalities. Real Law. Inheritance Law. Intellectual property rights. Moral rights / Ed. E. A. Sukhanov. – M.:Statut, 2010. – (958 p.). – P. 301–303.]

[1] См.: Суханов Е. А. Указ. соч. – С. 303; Хвостов В. М. Система римского права. Учебник. – М., 1996. – С. 124. [See: Sukhanov E. A. Mentioned work. – P.303; Khvostov V. M. System of Roman law. Textbook. – M., 1996. – P.124.]

According to the CoC of Ukraine commercial obligations involve: property-commercial, organizational- commercial, social-communal obligations of subjects of engaging in commercial activity (undertakings), public obligations of undertakings, organizational- commercial contracts.

7. Real rights as property foundation of engaging in commercial activity

Subjective civil rights held by undertakings constitute the content of property relations in the area of engaging in commercial activity.

The system of property legal relations in the area of engaging in commercial activity is predetermined by a conventional in civil law and statutorily fixed classification of civil rights that provides for separation of, first of all, real and relative rights.

Real rights imply fixing the right of a person in a thing (ownership right and limited real rights). Relative property rights provide their holder with the right of claim against another person – obligatory (contractual and non-contractual), corporate, etc. property rights.

Real right constitutes a legally protected possibility of direct influence over a thing which is an object of a respective right.

The holder of a real right gets exclusive dominance over a thing. Dominance over a thing means authority to exercise influence over a thing or to exclude others from exercising such influence. Dominance provided by this authority is either complete (i.e. absolute right, for example right of ownership) or limited with regards to disposal of a thing (rights in another's things).

In the first case, dominance applies to every act of use or disposal unless it is limited by the law or rights of others in a thing (property). In the second case, dominance may be complete or almost complete with respect to use; whereas disposal is excluded or limited to a certain type of use (in particular servitudes) or to a certain type of disposal[1] (security rights, right of operational administration, right ofcommercial management).

The CoC of Ukraine governs the most important and widespread real right in the area of engaging in commercial activity.

The right of ownership and other real rights, in particular the right of commercial management and the right of operational administration constitute the basis of a legal regime of property of undertakings. Commercial activity may also be conducted on the basis of other real rights (right of possession, right of use, etc.) provided by the CoC of Ukraine (Art. 133 of the CoC).

CoC of Ukraine provides for the possibility of fixing the property of undertakings under another right in accordance with the terms of a contract with an owner of property (Part 2 of Art. 133 of the CoC of Ukraine).

Said rule of the CoC of Ukraine gives us certain grounds to consider that an undertaking may own property under another real right provided by

[1] *Основные* институты гражданского права зарубежных стран / отв. ред. В. В. Залесский. – М. : Норма, 2009. – (1184 с.). – С. 157, 165. [*Main* institutes of civil law of foreign countries / Ed. V. Zalesskii. – M. : Norma, 2009. – (1184 p.). – P. 157, 165.]

the terms of a contract with an owner of property.

In this context, said article of the CoC of Ukraine is contrary to the generally accepted rule that the list of real rights is exhaustive and that such list may be established by the law and not by the contact. This implies the impossibility of fixing property of undertakings under another real legal title based on a contract with an owner of property, except for those specified in Part 1 of Art.133 of the CoC of Ukraine.

The CoC of Ukraine regards the right of ownership as a main real right in the area of engaging in commercial activity. According to Part 1 of Art.134 of the CoC of Ukraine an undertaking engaging in commercial activity on the basis of the right of ownership, …has the right to provide property to other undertakings for the use of such property under the right of ownership, the right of commercial management, the right of operational administration… .

The analysis of said rule in a systemic connection with Art.55 of the CoC of Ukraine («Concept of an undertaking») makes it possible for us to conclude that it is possible for an undertaking engaging in commercial activity on the basis of the right of ownership (i.e. for undertakings that are neither unitary states nor communal enterprises) to provide property to other subjects (including unitary states, legal persons of private law and natural persons-entrepreneurs) under the right of commercial management or the right of operational administration.

Consequently, there are two grounds on which an undertaking may acquire the right of commercial management and the right of operational administration:

(1) As a result of authorised state bodies/ bodies of local self-government conferring property on unitary states/ communal enterprises (part 2 of Art. 74, Part 4 of Art.76 of the CoC of Ukraine), or

(2) As a result of provision by an undertaking which is not a legal person of public law.

In addition, it follows from Part 1 of Art.134 of the CoC of Ukraine that it is possible for the undertakings that are not legal persons of public law (i.e. for natural persons-entrepreneurs, legal persons of private law) to provide property to other undertakings (apparently to any natural or legal person without limitation) under the right of commercial management and the right of operational administration.

It therefore means that, for example a joint-stock company has the right to transfer (to sell, to give) property owned under the right of ownership to a natural person-entrepreneur or to another legal person of private law for use under the right of commercial management or under the right of operational administration.

Such prospect seems at least strange and, in fact, this rule is aimed at destabilizing civil turnover as a result of introducing unknown and harmful to private legal relations quasi-real legal titles which were initially and exclusively

designed for legal persons of public law, not for subjects of private law.

Provided by the CoC of Ukraine the right of commercial management (Art. 136 of the CoC) and the right of operational administration (Art. 137 of the CoC) are defined as real rights of an authorised undertaking which possesses, uses and disposes of property conferred on this undertaking by the owner with limitations prescribed by the CoC and other laws.

The main difference between these two institutes consists in different possibilities of exercising powers (mainly the possibility of disposal), grounds for establishment, social purpose and area of application.

It is observed in literature that mentioned rights in their content are maximally close to the content of the right of ownership. However, the state or local community does not act, as a rule, as an ordinary owner and does not directly exercise known «triad» – possession, use, and disposal. They carry out general management of property. It is, however, a legal person of public law (in particular, unitary state enterprise), which is not the real owner, that actually exercises powers of possession, use, and disposal[1].

In this regard, a group of authors offered to apply to such property «structurally complex model of the right of ownership» where there are two owners of the same property: the state (municipality) and the enterprise itself,[2] or to recognize state enterprises as owners of all or of part of property they were entrusted with,[3] which, in fact, made possible the existence of bisected ownership where the state acts as a «supreme manager» deprived of actual powers of an owner[4].

However, such offers, which were substantiated in the period of the Soviet Union, were not accepted by legislator, since it would entail legal confirmation of a structure of «dual» («split») ownership of the same property. Such approach is inherent in Anglo-American law that regards ownership right as a set of powers minimally necessary for legal control over a thing. Therefore, different in their substance and scope titles may be established with regard to the same property. A classic example of a split ownership is an Anglo-American institute of trust where both the trustee and beneficiary are owners of property comprised in a trust fund but with different powers (the trustee exercises «triad» of powers in the interests of another person, while the

[1] *Калмыков Ю. Х.* Общенародная собственность и трудовой коллектив // Хозяйство и право. – 1988. – № 12. – С. 56–60. [*Kalmykov Yu. Kh.* Public property and work collective // Khoziaistvo i parvo. – 1988. – № 12. – P. 56–60.]

[2] *Мозолин В. П.* Право собственности в Российской Федерации в период перехода к рыночной экономике. – М.: Изд-во ИГиП РАН, 1992. – С. 153. [*Mozolin V. P.* The right of ownership in the Russian Federation in the period of transition to the market economy. –M.: Publishing House of ISL of RAS, 1992. – P. 153.]

[3] *Мозолин В. П.* Указ. соч. – С. 153. [*Mozolin V. P.* Mentiond work. – P. 153.]

[4] *Калмыков Ю. Х.* Указ. соч. – С. 57–58. [*Kalmykov Yu. Kh.* Mentioned work. – P.57–58.]

beneficiary has the right to profit and control)[1].

The conception of «split» ownership is inadmissible for legal orders of continental (i.e. civil) law. Continental tradition of ownership right proceeds from the rule that: one thing may not be owned by two owners; holders of real rights – non-owners of property are not recognized as direct owners of property provided to them or conferred on them[2].

As a whole, this approach should be agreed with since the right of ownership in continental legal orders is based on a time-tested conception of a single owner and so far there are no sufficient grounds to change it.

However, the question as to the possibility of legal persons of public law being declared as single owners of property, as it is prescribed by provisions of Art. 329 of the CC of Ukraine, remains topical.

According to Part 1 of said article of the CC of Ukraine, a legal person of public law acquires ownership right in property transferred into its ownership and in property acquired into its ownership on grounds nor prohibited by law.

At present provisions of Art. 329 of the CC of Ukraine are not applied and their content is mainly of a prospective importance since other laws of Ukraine do not provide for conferring property under the right of ownership on legal persons of public law prescribed by Art.81 of the CC of Ukraine. According to this Article a legal person of public law is set up by an executive act of the President of Ukraine, of thestate authority of the Autonomous Republic of Crimea or of the local self-government body. The order of setting up and the status of legal persons of public law are established by the Constitution of Ukraine and other laws. These legal persons first of all involve ministries, committees, other central executive bodies, budgetary institutions which according to the effective law, as a rule, own property conferred on them under the right of operational administration.

As it has been previously stated, the CoC of Ukraine provides for property being conferred on state unitary enterprises under the right of commercial management or under the right of operational administration (Articles 73–76 of the CoC of Ukraine), on communal commercial enterprises – under the right of commercial management, on communal non-commercial enterprises – under the right of operational administration (Art.78 of the CoC).

Since mentioned rules of the CoC of Ukraine establishing legal forms of property of state unitary enterprises are special in comparison to the rule of Art. 323 of the CC of Ukraine, legal persons of public law may acquire property which belongs to them under the right of commercial management or under the right of operational administration and

[1] *Ласк Г.* Гражданское право США (право гражданского оборота). – М.: Иностранная литература, 1961. – С. 512–515. [*Lask H.* Civil law of the USA (civil turnover law). – M.: Innostrannaia literature, 1961. – P. 512–515.]

[2] *Ахметьянова З. А.* Вещное право: Учебник. – М. : Статут, 2011. – (360 с.). – С. 24. [*Ahmetianova Z. A.* Real law: Textbook. – M. : Statut, 2011. – (360 p.). – P. 24.]

which simultaneously becomes state or communal property subjects of which are the state, the ARC, and the territorial community respectively[1].

In our opinion, a promising direction of resolving the issue of recognizing legal persons of public law as owners of property is recognizing them as trustees on the basis of Art.316 of the CC of Ukraine.

According to Part 2 of said Article of the CC of Ukraine, the right of trust ownership that arises out of law or property management contract is a special type of ownership right.

Provisions of Chapter 70 «Administration of property» of the CC of Ukraine (Articles 1028–1045) apply to trust relations.

Provided by the CC of Ukraine structure of the right of trust has two important advantages whichin combination make it possible to regard this real legal title as an effective substitute for the institutes of the right of commercial management and of operational administration.

Firstly, «Ukrainian» right of trust does not have an effect of «split» ownership – the only owner is the trustee; the settlor and the beneficiary are the subjects of obligatory rights; neither the settlor nor the beneficiary has ownership rights in property transferred into the trust.

Secondly, the trustee is under the duty to act only in the interests of the settlor or of the beneficiary. All property in trust ownership (transferred and subsequently acquired) enters the trust, is recorded in a separate (independent) balance of the trustee separately from such manager's own property.

Under the general rule, creditors of the trustee may not foreclose on property comprised in a trust fund. Moreover, the trustee has the right to receive remuneration for his administration services in the order and on the terms specified by the property management contract.

In fact, such model of trust can be viewed as an advantageous for the state and for territorial communities alternative to unitary state and communal enterprises (at least for commercial). There is no need in altering Charters of state enterprises to reflect the amount of income to be contributed to the state budget, resolving the issues of removal of surpluses of unused property or finding formal (plausible) pretexts for liquidation of a state enterprise with «valuable» assets that are under the threat of being commercialized.

And most importantly, the use of trusts for the purposes of administration of state property will make it possible to entirely or partly stop applying unknown to modern civilized legal orders quasi-

[1] *Науково-практичний* коментар Цивільного кодексу України: У 2 т. – 3-тє вид., перероб. і доп. / За ред. О. В. Дзери (кер. авт. кол.), Н. С. Кузнєцової, В. В. Луця. – К.: Юрінком Інтер, 2008. – Т. І. – (832 с.). – С.549–550. [*Scientific and Practical* Comment of the Civil Code of Ukraine. In 2 v. – 3rd ed. revised and supplemented / Ed. O. V. Dzera (head of collective of authors), N. S. Kuznetsova, V. V. Luts. – K.: Yurinkom Inter, 2008. – V. I. – (832p.). – P. 549–550.]

real rights of commercial management and of operational administration, and, as a matter of fact, such legal forms of legal persons as unitary state and communal enterprises.

8. Principle of proportionality in property relations of engaging in commercial activity

One of the determinative principles of property relations is the principle of proportionality between objectives and limitations of rights. This principle determines the criterion of permissible interference (influence) of the state with the exercise of subjective rights by private individuals.

In this context, note should be taken of a rule formulated by the European Court of Human Rights according to which observance of the principle of proportionality requires a fair balance between general interests of society and requirements of the protection of the individual's fundamental rights. If as a result of application of measures «an individual and excessive burden» is placed, it is considered that the fair balance of interests has not been kept. Therefore, measures taken must be effective from the standpoint of resolving problems of society and, at the same time, proportional with regard to the rights of private individuals[1].

Thus, the principle of proportionality allows the possibility of the imposition by the state of a burden on a subjective right of a person provided, however, that such burden does not have as its effect an individual and excessive burden since such influence turns title of an owner or another subjective right into a good which is disadvantageous to its holder.

The principle of proportionality is implemented through fair application of civil legal structures of real legal and obligatory legal nature.

In reallaw this principle is manifested in the fair balance test applied by the European Court of Human Rights as a criterion of assessing proportionality when considering ownership right disputes. This criterion is applied by the court whenever the dispute is connected with conflict of public and private interests, providing for the search of a fair balance between public interests and protection of fundamental rights of individuals[2].

In fact, this methodologic approach was applied in the decision of the Constitutional Court of Ukraine in a case regarding conformity to the Constitution of Ukraine (constitutionality) of the provisions of the Law of Ukraine «On transfer of collection of visual arts of Joint-

[1] Федорчук Д., Брєдова Г. Особливості захисту прав інвесторів у практиці Європейського Суду з прав людини // Правничий часопис донецького університету. – 2005. – № 2 (14). – С. 41.[Fedorchuk D., Briedova H. Peculiarities of protection of investor rights in the practice of the European Court of Human Rights // Legal journal of Donetsk university. – 2005. – №2 (14). – P. 41.]

[2] Манукян В. И. Европейский суд по правам человека: право, прецеденты, комментарии: Научно-практическое пособие. – К.: Истина. – 2006. – С. 254–256.[Manukian V. I. European Court of Human Rights: law, case law, comments: Scientific and practical guide. – K.: Istyna. – 2006. – P. 254–256]

stock company «Gradobank» into ownership of the state» 1881-IV of 24 June 2004 and of the Resolution of the Verkhovna Rada of Ukraine «On declaring collection of visual arts national heritage of Ukraine» No.2434- III of 24 May 2001 (case concerning collection of visual arts of JSCB «Gradobank»).

The decision of the CC of Ukraine of 23 October 2008 held that the provisions of regulatory acts providing for the transfer of the collection into the ownership of the state and for its placement in the Museum of the city of Kyiv were unconstitutional. The Court also considered general interest when resolving the case. The Court declared the collection to be the object of national cultural heritage for people to have access to it. This is a legal status of the collection that does not deprive its owner of ownership right. The owner has the right to use, dispose of the collection to the extent permitted by law. It may not be exported from Ukraine except for the case when its owner leaves[1].

Obligatory law implements the principle of fair balance through the rule of adequacy of consideration which concerns substantive fairness of a contract, but has no connection with and, therefore, does not contravene the requirements of procedural fairness. A contract may be considered invalid only in the latter case and does not entail invalidity only due to unfairness of the substance or non-equivalence (imbalance) of consideration. Such contract will be binding even if the consideration provided by one party is a peppercorn in comparison to the consideration provided by the other party[2].

In the doctrine of European countries adequacy of consideration is viewed as a general requirement of mutual fairness (justicia commutativa) non-compliance with which results in invalidity of a contract not due to «excessive damage being caused to the suffered party («laesio enormis»)»[3], but only provided that there is a substantial imbalance, obvious imbalance of considerations under the contract as a result of use of «lack of experience, great distress, other cases of foisting a contract in a situation where a suffered party is deprived of possibility to make a considered decision»[4].

Such imbalance usually arises as a result of volitional defect experienced by the suffered party to the contract which is principle in nature in the form of misrepresentation, duress, etc. Substantial imbalance of considerations may be caused by unlawful actions which in essence are not connected with volitional defect (i. e. according to procedural fairness).

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[1] *Мистецтво* знову без народу // Україна молода. – 2008. – 24 жовтня. – С. 3. [*Art*againwithoutpeople // Ukrainamoloda. – 2008. – 24 October. – P. 3.]

[2] Цвайгерт К., Кетц Х. Введение в сравнительное правоведение в сфере частного права: В 2-х т. – Т. 2. – Пер. с нем. – М.: Междунар. отношения, 2000. – С. 12.[Tsvaygert K., Ketts Kh. Introduction to comparative law in the field of private law: In 2 v. – V.2. – Trans. from German. – M.: Mezhdunar. Otnosheniia, 2000. – P. 12.]

[3] Цвайгерт К., Кетц Х. Указ. соч. – С. 13. [Tsvaygert K., Ketts Kh. Mentioned work. – P.13.]

[4] Цвайгерт К., Кетц Х. Указ. соч. – С. 13. [Tsvaygert K., Ketts Kh. Mentioned work. – P. 13.]

However, such actions «are regarded as unfair due to imbalance of considerations in conjunction with other facts relevant to the case»[1] provided that they are qualified as violation of public order or of good morals (in particular, it concerns the right of a consumer to renounce within a specified time limit without any specific reason a contract concluded in a situation where a consumer was deprived of possibility to make a considered decision)[2].

In this context, imbalance of considerations under gambling and betting contracts does not negate their validity. Such deals may be held invalid only if they contravene a direct provision of law or if they are held to be contrary to public order and good morals.

9. International standards of legal regulation of property relations of engaging in commercial activity in the practice of the European Court of Human Rights

The practice of the European Court of Human Rights (hereinafter – ECHR, the Court) with regard to Art.1 of Protocol No.1 to the Convention which guarantees every person property right (right of ownership) is of great importance for the understanding of international standards in the area of property relations of engaging in commercial activity. As a matter of fact the text of this rule does not directly state this right; however, the practice of the ECHR has established that by recognizing the right of every person to the peaceful enjoyment of his possessions, Art. 1 of Protocol No.1 to the Convention, in fact, guarantees the right of ownership.

According to the practice of the Court, Art.1 of Protocol No.1 to the Convention encompasses three rules. First, general rule asserts the principle of respect for the right of ownership. It is manifested in the first sentence of the first paragraph of Art. 1. The second rule concerns deprivation of property and makes such deprivation conditional on certain circumstances. It is contained in the second sentence of the same paragraph. The third rule recognizes that the states-signatories to the Convention have the right to control the use of property in accordance with the interests of society by passing such laws as they deem necessary for that purpose. It is contained in the second paragraph. Before considering whether the first rule has been complied with, the Court has to decide whether the first two rules have been applied. That means that the second and the third rules that regard certain cases of interference with the right to respect for property must be construed in the light of the general first rule[3].

The right to dispose of one's property is a common and fundamental aspect of the right of ownership.

The concept of the right of ownership is of autonomous significance in the practice of the ECHR that does not depend on

[1] *Цвайгерт К., Кетц Х.* Указ. соч. – С. 13. [*Tsvaygert K., Ketts Kh.* Mentioned work. – P. 13.]

[2] *Цвайгерт К., Кетц Х.* Указ. соч. – С. 11–12. [*Tsvaygert K., Ketts Kh.* Mentioned work. – P. 11–12.]

[3] *Дудаш Т. І.* Практика Європейського суду з прав людини: навч-практ. посіб. / Т. І. Дудаш. – К.: Алерта, 2013. – (368 с.) – С. 308. [*Dudash T. I.* Practice of the European Court of Human Rights: scientific and practical guide. / T. I. Dudash. – K.: Alerta, 2013. – (368 p.) – P.308.]

formal qualifications from internal law. Under the general rule, it applies only to existing possessions. Accordingly, Art.1 of Protocol No.1 to the Convention does not guarantee the right to acquire property, in particular through inheritance or gift. The concept of ownership concerns, in the first place, material things (plots of land and immovable), as well as non-material property (shares and bonds).

Claims, both specific and those that can be fulfilled, just as well as permit for engaging in certain types of commercial activity are also considered to be property in the meaning of Art.1 of Protocol No.1 to the Convention. Thus, the right of ownership is not limited to the right of ownership of physical things: some other rights and benefits creating property may be viewed as «ownership rights» and, therefore, as property for the purposes of Art.1 of Protocol No.1 to the Convention. The latter extends to property values comprising the right of claim under which an applicant can seek at least a legitimate expectation to get an effective exercise of his ownership right. However, the hope for preservation of a prior ownership right that cannot be effectively exercised for a long time may not be viewed as «possessions» within the meaning of Art.1 of Protocol No.1 to the Convention. This also applies to conditional right of claim which has not been cleared off due to non-occurrence of a condition. Claims for recovery of property damages are also covered by Art.1 of Protocol No.1 to the Convention.

The question as to whether a licence for engaging in certain types of commercial activity grants its holder the right, guaranteed by Art.1 of Protocol No.1 to the Convention, depends on whether a licence can be viewed as one giving rise to reasonable expectations of its holder with regard to the term of the licence and the possibility of generating income from activity specified in the licence. However, the holder may not have reasonable and legitimate hopes for continuation of his activity if conditions connected with the licence are no longer met or if the licence was withdrawn in accordance with the law effective at the time of issuance of the licence. Future income may be regarded as possessions only if it can be received or if it constitutes the subject of certain claim.

Property value in commercial business which for an entrepreneur consists in clientele formed as a result of his activity is regarded as possessions.

Possessions also involve monies awarded to an interested person by a final and binding decision of the court which have been proved to be collectable. In particular, such monies involve long-term non-payment of debt granted by a final court decision which entered into force. Deficit of money is not an excuse for the state in the event of failure by the state to fulfil the court decision or in the event of considerable delay in fulfilment of a decision since it breaks a fair balance between general interest and the right of an applicant to resect for his possessions[1].

[1] См., например: решения Европейского суда по защите прав человека в делах «Bezuglyiv. Ukraine»от 22.12.2005 г., «Abramovv. Ukraine»от 10.07.2008 г. // Ду-

Interference with the right to dispose of property by the state authorities must be carried out within certain limits. To determine whether in a particular case interference with the right of ownership by limiting or depriving of such right complied with the Convention, the ECHR applies the criteria of proportionality and effectiveness.

The principle of proportionality of interference requires a fair balance between the demands of the general interest of the community and the rules adopted for the protection of fundamental rights.

Thus, there must be a reasonable connection between measures taken and their aim. This requirement will not be met if an interested person is made to bear «an individual and excessive burden». The proportionality test used by the ECHR to establish existence or lack of violation of the Convention consists of traditional questions: was there an interference with the conventional right, was it provided by the law, was its aim legitimate, was it necessary in a democratic society, were the measures taken proportionally to the aim set. For example, in its judgement in case *SeryavinandOthersv. Ukraine* of 10 February 2011 the ECHR noted that for the purposes of Article 1 of Protocol No.1 the fairness analysis becomes appropriate only when the interference in question complies with applicable rules established by law. It does not appear either from the case-file materials or from the Government's observations that the municipality was in any way precluded from obtaining the consent for the reconstruction either directly from the attic co-owners or by way of a court order before entering into the investment contract. Further, it does not follow from the available materials that any provision of domestic law authorized the municipality to enter into the contract without such a consent or, in the event of a dispute, without its judicial resolution. The conclusion of the investment contract constituted therefore interference, which was not in accordance with the law. Article 1 of Protocol No. 1 was accordingly breached in this regard.

The principle of effectiveness of ownership right consists in that it must be ascertained whether the encumbered property could be subject to expropriation. The practice of the ECHR clarifies that it is necessary to take into account consequences and to assess the situations with due account taken of all its components.

In the area of property use the state has broad discretionary powers regarding the choice of order of realizing limitations and regarding the assessment of justifiability of their consequences with regard to public interests, aim sought to be achieved by the law. Therefore, the states-signatories to the Convention must assess the necessity of such interference. We are talking about limitations of ownership right that are less severe than expropriation which entails ownership right passing to another subject.

даш Т. І. Практика Європейського суду з прав людини: навч-практ. посіб. / Т. І. Дудаш. – К.: Алерта, 2013. – (368 с.) – С. 308. [See, e.g.: judgement of the European Court of Human Rights in cases «Bezuglyiv. Ukraine» of 22.12.2005, «Abramovv. Ukraine» of10.07.2008 // Dudash T. I. Practice of the European Court of Human Rights: scientific and practical guide. / T. I. Dudash. – K.: Alerta, 2013. – (368 p.) – P. 308.]

The Convention defines the control over the use of property as measures that may in some way partly affect the content of ownership right. This control must be exercised with the aim to guarantee public interest or to secure the payment of fines or other payments. Such interference must be made in compliance with a fair balance between the requirements of interests of society and necessity to protect fundamental human rights. Thus, there must be proportionality between the aim and measures. The states-signatories to the Convention have discretionary powers as to the imposition of control over the use of property, in particular to confiscate with the objective to subsequently destroy things the use of which has been declared illegal or dangerous for the interests of society. In this case preventive measures may be taken regarding property such as seizure and confiscation of property discovered as a result of illegal activity to the prejudice of society.

The states have the right to enact laws necessary for securing payment of income. Discretionary powers of the states apply to the granting of a right to financial institutions to determine sums of money subject to tax as specified by the taxpayer. The possibility of imposing taxes on property which is, in fact, in the possession of a debtor, but is nominally property of a third person is applied in order to strengthen the position of creditor in the course of its implementation is in compliance with Protocol No.1 to the Convention[1].

Attention should be paid to the autonomous approach to the interpretation of civil right and obligations in the context of practice of the ECHR, which makes broad interpretation of sphere of private law in the area of engaging in commercial activity possible.

In the practice of application of Art.6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, the ECHR noted that the concept of «civil right and obligations» is an autonomous conception and it may not be construed solely by reference to the domestic law of the respondent State. Thus, in the case *Ringeisen v Austria*, the ECHR held that in analogous situations it is not important whether an official body acted as a holder of civil rights or as a public authority. When determining whether the outcome of a court proceeding is of conclusive importance for civil rights and obligations.

Article 6 of the Convention extends to the right to engage in commercial activity. In this area, the cases heard by the Court concerned such issues as: withdrawal of a licence to sell alcoholic beverages, withdrawal of permit for private medical practice or ban on setting up a private school.

Thus, the right to engage in private practice, in particular medical or legal, also falls within the scope of Article 6 of the Convention[2].

Published: Розвиток приватного права України: монографія. – К.: Алерта, 2016. – С. 167–186.

[1] *Дудаш Т. І.* Указ. соч. – С. 310. [*Dudash T. I.* Mentioned work. – P.310].

[2] *Льошенко А.* Цивільні права і обов'язки в контексті практики Європейського суду з прав людини / А. Льошенко / Юридичний журнал. – 2007. – № 11 (65). – С. 117–118. [*Loshenko A.* Civil rights and obligations in the context of practice of the European Court of Human Rights / A. Loshenko / Legal journal. – 2007. – № 11 (65). – P. 117–118.]

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UDC 347.77/.78(73)(477)

VALUE OF PRECEDENTS IN THE SPHERE OF THE RIGHT OF INTELLECTUAL PROPERTY IN THE USA AND PRACTICIANS OF COURT IN UKRAINE: CERTAIN ASPECTS

Circulation to substantial filling of protection and protection of intellectual property rights in the USA and Ukraine gives the chance to reveal a number of common features and the features inherent in each country in this sphere, and also to find out separate aspects of value of precedents in intellectual property right sphere in the United States and court practice in Ukraine.

Not a secret that disputes in intellectual property sphere are considered as one of the most difficult both in Ukraine, and in others, including such developed countries, as the USA. The decisions, accepted are quite often cancelled by courts of the highest authorities as their consideration is performed not always qualitatively and in time. It is influenced also by specificity of disputes in the specified area, court practice in which relation is characterized by a considerable variety. Difficulties appear also at application of rates as substantive right, and procedural law positions. Exclusive specificity accompanies also all process of carrying out of necessary judicial examinations. Considering dispute in intellectual property right sphere, the judge, along with the decision especially to legal questions about availability or absence of the right, the fact of an offence, the size of the caused harm, should research also a number of the technical aspects concerning a subject of proof, namely: Application of set of essential signs of the industrial sample, question of similarity of disputed designations and so forth. For the decision of similar questions it is necessary to appoint judicial examination of objects of intellectual property. However, conclusions of such examination are not always unequivocal. We will add to it that possibil-

ity of application of analogy in consideration of the disputes following from other civil relations extremely for disputes in sphere of intellectual property is limited, or is impossible.

All aforesaid testifies **to an urgency of a theme of the given publication** about finding-out of questions value of precedents in intellectual property right sphere in the USA and court practice in Ukraine.

The purpose of the given publication thus, are mainly civil – legal analysis of the maintenance of precedents in intellectual property right sphere in the USA and court practice in Ukraine by circulation to dispute resolution problems in sphere of intellectual property, characteristic for such countries, as Ukraine and the USA, with accounting in some cases a cardinal difference between objects of intellectual property right, adjustment of author's, patent and other relations, methods of protection and protection of the rights.

First of all, we will remember that origin of two various concepts – Copyright and droit d'auteur, for example, in author's right, speaks an accessory of the states of the world to various systems of law. In the countries with English – the American legal traditions («common law») author's right name «copyright» that is literally translated as «the right to copies» and understood as possibility to perform author's right by reproduction of the created products. Thus it is necessary to notice that the maintenance copyright in the American law is understood more widely than its simplified name and includes the right of public execution, public display and general data. In a general view it is possible to assert that the author's right in the United States is considered in the set as specific pattern of ownership which the author can create and use in commercial objectives, as well as any other property. Thus, the basic emphasis here becomes traditionally in property the rights of the author, which ultimate goal of activity – improvement of public welfare and increase in economic values, motivation of creative activity of authors and inventors.

As to Ukraine it is the country of continental legal tradition which is called also as based on the Roman right, or Roman-German in which the key role is played by the concept droit d'auteur that is literally translated from French as author's rights. According to this concept author's right it is considered from two positions: as having lines of the property are protected also property by the maintenance of this property, and also protects the personal non-property rights of the author, considering the natural right concept according to which product is considered actually by continuation of the person of the author. Last from the mentioned concepts (droit d'auteur) was taken for a basis by preparation of the Bern convention. It explains that fact that the USA, having joined this convention further has been forced not only to soften the position in understanding of author's rights, but also to approach the legislation with the legislation of the countries of continental Europe. However, it is necessary to notice thus that the Law on an entering order in conven-

tion action prohibits to courts of the United States to refer to its rates directly. Therefore actually unique source of the American right connected with the Bern convention, the Law on entering in action of its positions is. In 1989 the United States have made concessions, recognizing the personal non-property right of authors of art visual products to authorship and inviolability of product.

In turn, the basis of the legislation of Ukraine about intellectual property is constituted by positions of the Constitution of Ukraine[1] which item 41 fixes the right of everyone to own, use and dispose of results of the intellectual creative activity. Ukraine is the participant of almost all major international conventions in intellectual property sphere. Besides, important rules of law of intellectual property have found the fastening in a number of codes of Ukraine. Thus the basic system act of the legislation since 2003 considers the Civil code of Ukraine (further Cc Ukraine)[2], the Book the fourth which unites the rates, concerning protection of the rights to various results of creative intellectual activity.

The various understanding of essence of author's right in system of common law and the continental right has caused occurrence monistic and dualistic doctrine concerning the author's right maintenance. So, representatives of monistic doctrines prove that all competences of the author – as personal and property character – are displays of the unitary right which in aggregate provide observance of intellectual and economic interests of the author. Supporters of dualistic interpretation talk about two categories of the rights, whose legal destiny different: to laws of estate the principle of estrangement is applied, they are limited in time, and the personal non-property (moral) rights, on the contrary, submit to principles not alienability, impossibility of application of prescriptive limit and to eternity.[3]

As it is known, any state of the world does not give today such value to intellectual property protection as the USA. Considering also achievements in ИТ – technologies which have confidently led this country to the advanced positions in world economy, becomes clear that it could occur only thanks to assistance of all state policy and support of creativity and creative activity by all society. In the Constitution of the USA 1787 (p. 1) necessity to protect interests of authors of inventions, scientists at once has been provided and art,[4] is thus indicative that Thomas Jefferson became the first chairman of Patent authority. Thus, hierarchy of the federal legislation the Constitution of the USA which is the basic law of the country and determines laws which con-

[1] Конституція України: Закон від 28.06.1996 №254к/96 – ВР. – Відомості Верховної Ради України ВВР), 1996, № 30, ст.141.

[2] Цивільний кодекс України. – Закон від 16.01.2003р. № 435 – IУ// Відомості Верховної Ради України (ВВР), 2003, №№ 40–44, ст. 356.

[3] Липцик Д. Авторское право и смежные права / Пер. с фр.; предисловие М. Федотова. М.: Ладомир; Издательство ЮНЕСКО, 2002. – С. 131–134.

[4] Конституция Соединенных Штатов Америки в переводе О. А. Жидкова. – ст.1, розд.1, параграф 8.// Електронный ресурс. Режим доступу: http://www.hist.msu.ru/ER/Etext/cnstUS.htm.

tain conflict positions of the Constitution can be declared court void. However, it is not necessary to forget that legal acts are a general basis of the federal legislation and are published in Meeting of laws, codified in USC – the Code of laws of the USA. The international contracts ratified by the senate, are considered as a hierarchical equivalent of legal acts and consequently courts try to interpret the internal right of the country so that it corresponded to the international obligations, considering simultaneously and a role of judges according to common law. In case of the rigid contradiction of treaty stipulations with legal acts, that was accepted later, is considered the law, is applied by courts of the USA.

The described system as we see, has affected positively all further development of system of protection of intellectual property rights in sphere author's, a patent right, the rights to trademarks and a diligent competition.

In the literature the attention that the great value has in the United States is paid, as before, compromise search between the rights of the author and interest of a society, covers a wide range of questions, including the rights of the First amendment (the right to a freedom of speech) and the Fourteenth amendment (the right to a privacy) Constitutions of the USA.[1] So, authors affirms that today the greatest profits of the USA receive from sale of author's rights and the goods protected by them, products of high technologies, licenses for production of the goods and services under known trademarks and so forth.

From here there is clear a hard line of this country in relation to so-called «piracy» and the countries in which it is extended, including Ukraine.

It is important to underline communication of fundamental science of the USA with production and the market as positive feature. Venture projects as the states, and the private capital are extended. As venture activity is directed on search of technological innovations inventors and authors – founders receive thanks to such projects the world's largest possibilities for creativity, and quantity wishing to enclose means in perspective technologies constantly grows. To it testify indirectly and the sums of claims which generate modern «patent wars». For example, company Apple submitted claims to Samsung twice and their initial sum in 2011 has constituted 4,5 billion dollars. In 2012 the court has come to a conclusion that Samsung has broken six patents Apple, including what concerned design elements. In patent war which proceeded until recently a number of the high technologies of the companies most known in sphere supported Samsung. Among them – Google, Facebook, eBay.[2] The companies have sent the so-called letter «a companion of court» – the independent party, gives consulta-

[1] Hughes J. Recording Intellectual Property and Overlooked Audience Interests // Texas Law Review. – 1999. – Vol. 77, No. 4. – P. 929.

[2] Google, Facebook, e-Bay поддержали Samsung в патентной войне против Apple. Информационное агентство УНІАН, 22.07.2015 //Електронний ресурс. Режим доступу: http://www.unian.net/science/1103393-google-facebook-ebay-podderjali-samsung-v-patentnoy-voyne-protiv-apple.html

tions on case in point. In particular, they asked the judge to review the decision which obliged Samsung to list incomes of sale of devices which have broken patents. « The decision will lead to absurd results and will provoke negative effect to the companies which spend billion dollars annually for researches and development of difficult technologies and other components »- have noted the companies[1]. They consider that such the decision will lead to a flow of claims in patent sphere among IT – developers. Recognizing a number of patents Apple void, the court named technologies, by them are protected «obvious» that confirms availability of one more problem in a patent right of the USA which is connected with such active patenting of results of technical creativity that inventors complain of complexities of check of the achievements, impossibility to orient in enormous quantity of the patented objects and fears to break the right of other founders, in the course of fastening of the rights.

Without stopping on the known data about the form of government in the USA which should be considered at research of features of system of law of this country, it is necessary to notice that the federal government as well as all states, except Louisiana, use legal common law tradition, therefore within a relevant jurisdiction judgments are valid the law. Thus, references to judicial legislation are an integral part of the American legal practice. Thus value of the law communicates as with precedent, and the doctrine stare decisis («to stand on solved»). According to the resulted principles, courts of the lowest level should consider decisions of the courts of the highest level and, at absence is immutable arguments against it, to act the same as and in the previous decisions.

As to separate states on consideration of laws in important spheres, such as contracts and trademarks, it is possible to see considerable freedom of judges here again. It speaks observance of common law traditions and this level. The federal usual common law similar such, which is accepted states, no. In – the first because the federal Constitution limits law-making of the federal government only to the spheres set forth above and, in – the second, law-making powers are delegated only the Congress[2]. Such spheres in which it is standard – the legal base of a situation irrespective of legislative decisions, for example, antitrust acts[3]. Simultaneously take place.

As the legislation in the USA is subordinated the federal Constitution, in case of origin of any conflict, we will apply the federal act will be considered priority before the state statute. However, for states the decision of the Supreme Court is obligatory only, and decisions of federal intermediate courts of

[1] Google, Facebook, e-Bay поддержали Samsung в патентной войне против Apple. Информационное агентство УНІАН, 22.07.2015 //Електронний ресурс. Режим доступу: http://www.unian.net/science/1103393-google-facebook-ebay-podderjali-samsung-v-patentnoy-voyne-protiv-apple.html

[2] Erie Railroad Co. v. Tompkins, 304 U. S. 64 (1938)

[3] Leegin Creative Leather Prod., Inc., v. PSKS, Inc., 551 U. S. 877, 888 (2007)

appeal are obligatory only for federal circuit courts within corresponding region, but (items 3 [4]) are not obligatory for courts of states. In turn, courts of states have the right to listen to the claims shown on the basis of the federal legislation, and federal courts – claims on the basis of the legislation of states, taking into account a number of general terms. It is a question of cases, when the parties in legal procedure – from different states.

All normative acts which are accepted by federal departments according to the Law on administrative production have legal force. A condition is that they should correspond to the Constitution and the authorized right. Attracts attention and that fact that judicial bodies accept reasonable interpretation by the governmental department of any legal act which is in its competence, answers so-called to «the doctrine of Shevron»[1]. Normative acts are published in the Federal register and codified in Meeting of federal normative acts-CFR. In turn, the judicial legislation has legal force which changes depending on court which makes decisions, and is published in national, regional «meetings of judgments» or in «meetings» of states, representing volumes of the judgments collected together. It is not necessary to forget, whether those courts of the lowest level publish all decisions, hence, value of precedent is received only by those from them which are published.

Considering the aforesaid, it is possible to draw certain intermediate conclusions that system of intellectual property of the USA in whole and corresponding laws in particular:

1. The constitution of the USA allows to solve intellectual property questions Federal to the legislation of the USA directly in spheres of author's right and patents;

2. On trademarks and other kinds of intellectual property, the federal government has the right to publish laws only thanking its competence to regulate sphere of trade and only on purpose «to promote their development»;

3. Proceeding from the previous position, it is possible to assert that the American right in intellectual property sphere is based on idea of assistance to distribution of the economic blessings and increase in volume of innovations and results of creativity of people;

4. Despite active actions of the federal government in sphere of intellectual property and to assistance of creative process as it is provided by the Constitution, value of laws of states are not less important for intellectual property right, therefore researching the rights and obligations in sphere of intellectual creative activity in the United States, it is not necessary to forget both about the federal legislation, and about the legislation of states.

In Ukraine the system of judicial protection of intellectual property rights has started to be formed in the early nineties of the last century. Disputes in intellectual property sphere on jurisdiction were considered in courts of law and economic courts. The last within the jurisdiction considered cases about existence of in-

[1] Chevron U. S. A., Inc. v. Natural Resources Defense Council, Inc., 467 U. S. 837 (1984)

tellectual property rights, about infringement of the rights. In turn, general courts, according to civil legal proceedings affairs under the claim of physical persons concerning authorship or acknowledgement void law-enforcement documents, as a rule, solve.

A number of positive processes in our country among which – development of market relations, attraction of foreign investments, export increase – promoted increase in quantity of the given out patents and certificates in Ukraine. In parallel with it number of judicial disputes has increased in intellectual property sphere also. Gradually there was clear a necessity of allocation from among judges of specialists who could specialize on consideration of difficult and demanding profound knowledge, affairs in intellectual property sphere. In result, as a part of the Higher economic court of Ukraine the Appellate court on disposal of legal proceeding in the economic disputes connected with protection of the right to objects of intellectual property has been created, and in system of economic courts – boards of judges of corresponding specialization have been generated.

Today the domestic system of law is based on unity and specialization principles at which separate categories of disputes consider specialized courts – economic, administrative. The courts of law, authorized to consider all civil and criminal cases, except what are carried by the legislation to jurisdiction of specialized courts function also. The judicial system is headed by the Supreme Court of Ukraine with which coordination, streamlining of judicial system, and also unity and generalization of practice of application of the current legislation is provided. In general, the judicial system is characterized by relative simplicity of construction, a step of links, unity of main principles of forming and activity. It is necessary to notice thus that the basic criterion of differentiation of a competence of the courts of the general jurisdiction and economic courts, first of all, a subject railroad train of participants of this or that dispute: If such participants are subjects of managing (the juridical person or the physical person – the businessman) dispute subordinated to economic courts and is considered according to rates of the Economic procedural code of Ukraine. In case either participants of dispute are physical persons, or, as one of the process parties the physical person dispute is subject to the permission general court according to rules of the Code of civil procedure of Ukraine acts.

In the resolution of 17 October 2012 № 12 «About some questions of practice of the dispute resolution, the intellectual property rights connected with protection» Plenum of the Higher economic court of Ukraine notices that in a circle subordinated the economic court of disputes should carry and the disputes connected with acknowledgement void documents, certificating the right to objects of intellectual property (the certificate, patents), concern property points of law on corresponding objects and in character are civil-law or economic-legal, are not among public disputes.[1] The

[1] Постанова Пленуму Вищого господарського суду України № 12 від 17.10.2012 р. «Про деякі питання практики вирішення спорів, пов'язаних із захистом прав інтелек-

system of administrative legal proceedings from the moment of its origin has generated a question of jurisdiction of disputes on intellectual property protection. In it and for today there are active discussions both in circles of theorists, and among experts.

All as is discussed also a question on creation of specialized judicial body on consideration of disputes in intellectual property sphere. It causes of the further detailed research of legal grounds and features of creation of court under the decision of disputes in intellectual property sphere (patent court) with determination in domestic judicial system, finding-out of specificity of consideration competent to it of disputes.

Considering the leading part of judgments in the American system of the legal justification, for accurate understanding of American federal legislation and the legislation of states it is necessary to analyze court practice. It will allow understanding, why and how judges explained the law relevant provision. Among the disputes most known and influencing decisions in intellectual property sphere in the USA, and also are analyzed in Ukraine, it is necessary to name Cases: Feist Publications. Inc v. Rural Telephone Service Company, Inc.[1]; Bridgeman Art Library. Ltd V. Corel Corporation[2]; Basic v. Kinko's Graphics Corp[3]; Princeton University v. Michigan Document Services, Inc[4]; American Geophysical v. Texaco Inc.[5]; New Era Publications v. Henry Holt and Co.[6]; v. Random House[7]; v. Acuff-Rose Music[8] and many other things. Not the superfluous will notice that on the statistician, the majority of private disputes between owners of intellectual property rights and persons who break their rights, attracting compulsory actions in intellectual property questions.

CONCLUSIONS:

For today it is possible to assert that the global system of the protection of intellectual property right in the world is already created. Ukraine as well as the USA, develops in this direction, adapting for world community requirements. Economy of the countries, does not follow world tendencies of intellectual, information, social and economic and technological development, are not capable to provide stable development of the states. The USA have considerable experience of protection and protection, first of all, laws of estate of intellectual property, and last year make consider-

туальної власності» // Електронний ресурс. Режим доступу – vgsu.arbitr.gov.ua/files/pages/22102012_12.pdf.

[1] Feist Publications. Inc. v. Rural Telephone Service Company, Inc. 499 U. S. 340 (1991)

[2] Bridgeman Art Library. Ltd. V. Corel Corporation, 36 F. Supp. 2d 191 (S. D. N. Y. 1998)

[3] Basic Books v. Kinko's Graphics Corp., 758 F. Supp. 1522 (S. D. N. Y. 1991)

[4] Princeton University Press v. Michigan Document Services, Inc., 99 F.3d 1381 (6th Cir. 1996)

[5] American Geophysical Union v. Texaco Inc., 60 F.3d 913 (2d Cir. 1994)

[6] New Era Publications International v. Henry Holt and Co., 873 F.2d 576 (2d Cir. 1989)

[7] Salinger v. Random House, 811 F.2d 90 (2d Cir. 1987)

[8] Campbell v. Acuff-Rose Music, Inc., 510 U. S. 569 (1994)

able efforts for integration of all countries into uniform effective system of protection of intellectual property rights. For years of independence of Ukraine also considerably made active occurrence process in the world structures regulating the relations in sphere of intellectual property, leaning mainly against the European experience and aspiring to divide values of the European Union.

The difference in a greater degree attention which is given to those or other questions of intellectual property rights in the different countries of the world speaks origin during far times of various legal concepts which have been taken as a principle protection of intellectual creative activity. For example, concepts copyright and droit d'auteur in author's right. From here the author's right in the United States is considered traditionally and mainly as specific pattern of ownership which the author can create and which can be used in commercial objectives, as well as any other property. The basic emphasis here becomes on laws of estate of the author. It answers also to an ultimate goal – to improvement of public welfare and increase in economic values from the point of view of the American right,. Ukraine which concerns the countries of the continental legal tradition, which else name Latin or based on the Roman right, or Romano-German, has in a greater degree apprehended the concept droit d'auteur which is literally translated from French as author's rights. According to this concept author's right it is considered in two planes: such that protects the property maintenance of this property; and, embodying the natural right concept (product is continuation of the person of the author), protects the personal non-property rights of the author. As the concept droit d'auteur has been embodied in Bern conventions, the USA as the country, has joined, has been forced to soften the position and to approach the current legislation with the legislation of the countries of continental Europe.

The intellectual property right is a sphere, in which practice of court the important role which from right systems the country did not concern initially belongs. However, in the USA the federal government as well as states, use legal common law tradition, in communication, with what within the limits of a relevant jurisdiction judgments are valid the law. The reference to judicial legislation – an obligatory part of the American legal practice, and value of the law contacts precedent and the doctrine stare decisis that mean «to stand on solved». According to the resulted principles, courts of the lowest level should consider decisions of the courts of the highest level and act the same as and in the previous decisions, at absence is immutable arguments against it. For Ukraine last years process of strengthening of a role and value of judicial lawmaking is more and more accurately traced. In the conditions of harmonization of the legislation of our country with EU right in Ukraine has grown and the role of the Supreme Court which analyzes has amplified and makes use of experience of the decision of many affairs, including, in intellectual prop-

erty sphere, focusing judicial bodies on true application of the current legislation in this important sphere. Resolutions and determinations of judicial boards on civil and to criminal cases of the Supreme Court on concrete affairs also serve today as reference points for court practice in which find reflation important, basic questions for the practice, arising at application of precepts of law. Such resolutions and decisions on concrete affairs have already obtained in practice acknowledgement as original precedents of interpretation of the precept of law, matters not only for strengthening of protection of the rights of participants of relations in intellectual property sphere, but also for more understanding between Ukraine and the USA in these questions.

Considering that in one clause it is impossible to pay attention to all institutes of intellectual property right in a cut of the declared theme, the further analysis of a role of precedents in the right of the USA and court practice in Ukraine is reasonable for conducting on separate institutes that will allow to use more actively materials of practice of both states and to draw more detailed conclusions.

Published: Право України. – 2016. – № 7. – С. 104–113.

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UDC 347.72.01

REGARDING THE LEGAL ENTITIES OF PUBLIC AND PRIVATE LAW

Dividing legal entities into the ones that belong to public or private law respectively has been foreseen by the provisions of Art. 81 of the Civil Code of Ukraine, which also should have provided the relevant criteria for this dichotomy. Part 1 of the above mentionedArt.indicates as such *the procedure,* and Part 2 – *the grounds for establishment* of legal entities.

Furthermore, the Civil Code does not contain any legal consequences for this division, e. g., defining the special features of public law legal entities, compared to private law legal entities. This could be partially explained by the purpose of the Civil Code framework for private law, subsequently the legal entities of public law have dropped out of its coverage, except for the clause that their participation in civil relations is also subject to the Civil Code coverage, unless otherwise noted (Art. 82 of the Civil Code). There is no similar code in the scope of public law.

In the meantime, while the Commercial Code of Ukraine has overwhelmed in complex business legal framework, anyhow, it did not percept nor developed the position of the Civil Code on dividing the legal entities. This is not the only drawback of the mentioned Code, but it has brought adverse consequences for administering the formal status of legal entities in the scope of public law. For instance, the Commercial Code uses the notion of «*the commercial entities of the public sector industries*», thus indicating entities which are based only on public property, along with the entities, where the state equity interest equals 50% or more, or otherwise constitutes a number which guarantees the crucial impact of the state on its business decision-making (Art. 22 Part 2 of the Commercial Code). Public and private enterprises are also missing on the list of legal entities analogues (Art. 63 of the Commercial Code), although the framework

for the private enterprise has been foreseen in Art. 113 of the Commercial Code.

There is no denying that even a superficial overview of the current legal framework of legal entities classification in the two codes demonstrates the misconceptions, determined by applying the indicated terms in the Civil Code. Besides, confusion is being also caused due to introducing the term «*public joint-stock company*» (Art. 152 Part 2 of the Civil Code): the fact that it does not belong to the legal entities of public law is not perceived well. Even more problems have derived from the activities of national joint-stock companies (NJSC), foreseen by the Law «On joint-stock companies» (Art. 1 part 2), considering the special features, provided for by specific laws. It appears therefore, firstly, that the legal status of NSC parallels the status of any SC as a legal entity of private law; secondly, this Law does not refer NSC to the legal entities of public law; thirdly, NSC is special compared to common SC.

According to the Law «On state registration of legal entities, individual businessmen and public organizations» (Art. 9 part 2 para 6), legal entity of public law is the one which is under effective control of central or local government. If such state or local authority «executes corporate governance in a *relevant legal entity*», such entity is not defined as a legal entity of public law. Law «On preventing corruption» also states about the legal persons of public law (Art. 49).

The legislator, anyhow, is using various terms with regard to these entities in particular laws. For instances, these definitions can be as follows: «enterprises, establishments, organizations and their unions, which are intended to meet state or community needs», «the managers, beneficiaries of public funds», «the public equity interest constitutes 50% or more of the authorized capital stock» (Law «On public procurement», Art. 1 Part 1 para. 1).

Therefore, the legislator means that the criteria of dividing legal entities in the public sector industries (not naming them the legal entities of public law) are: state property; public funds; state equity interest in the authorized capital stock.

It is also possible to find a notice that the indicated enterprises are the legal entities of public law in the provisions, set for the status, organization, competence and operations mode of particular public authorities (e. g., Regulation on the Ministry of Finance of Ukraine, para. 13, Regulation on the Ministry of Interior Affairs, para. 15). Nevertheless, theindicated legal entities, being the public authorities, have no connection to the commercial sphere.

The above-mentioned ambiguity of the criterion for dividing the legal entities of private and public law, as provided by the Art. 81 of the Civil Code of Ukraine, whether it is the *procedure*(Part 1) or *the grounds for establishment* (Part 2), boosts a range of misunderstandings. The constituent instrument is the grounds for creating legal entities. That said, a legal entity of private law is created based on constituent documents, according to Art. 87 of the Civil Code. A legal entity of public law is established ac-

cording to anadministrative act of the President of Ukraine, a public authority, public authority of Autonomous Republic of Crimea or a local government.

This rule contains internal contradictions, as, firstly, the availability of constituent documents or anadministrative act *is not the procedure of establishment*: the procedure for legal entities establishment implies for a certain procedure; secondly, the constituent documents areof little importance in this procedure – only their confirmation and submission; thirdly, legal entities both of private and public law fulfill their activities based on constituent documents.

If it is believed that the *specific type of a constituent act* is the criterion for dividing legal entities, then this act is the decision of founders, incorporated in a constitutive agreement, (Art. 153 part 2 of the Civil Code, Art. 9 part 3 of the Law «On joint-stock companies»), which embodies the will of the founders – for legal entities of private law, or anadministrative act of the state, represented by relevant authorities, issued as a regulatory act – for legal entities of public law, rather than a constituent document.

Thus, the legal entities can be created based on a proper constituent document (Art. 17 part 1 para. 5 of the Law «On state registration of legal entities, individual businessmen and public organizations»), model charter, or without the indicated documents.

Thereby, the presence or absence of a constituent documentcannot be considered a criterion for dividing legal entities into private and public. Commonly, constituent documents are present in both cases, when submitted for the state registration of a legal entity, and only few legal entities of public law do not possess such (Art. 17 part 2 of the above mentioned Law). As usual, these are public authorities. All the *commercial* legal entities obtain constituent documents, submitted for the relevant state registration.

If getting into «*establishing*» as a criterion for dividing legal entities (with regard to commercial entities instead of the types, provided by Art. 81 of the Civil Code), it has been mentioned in the Commercial Code (Art. 55 part 2), according to which commercial entities could be divided into (a) legal entities, established according to the Civil Code; (b) state, community and other enterprises, established according to the Commercial Code; (c) and other legal entities, which make business and have been registered in a proper way. Considering the last case, it's necessary to believe that these are the ones, the establishment of which is foreseen neither by the Civil Code, nor by the Commercial Code (e. g., other than enterprises legal entities – political parties, community organizations, associated with legal entity status).

Anyhow, Art. 56-58 of the Commercial Code, which state about the *establishment* of commercial entities, do not contain any specific features, compared to the Civil Code. Perhaps, the *types* of enterprises were meant (Art. 63 of the Commercial Code), along with the specific features of the *methods for theestablishment (foundation) and developing*

their stock capital, based on which the enterprises are divided into unitary and corporate (Art. 63 part 3 of the Commercial Code). Inanycase, thiswhatsoever has nothing in common with dividing the legal entities into the fields of private and public law.

Meanwhile, the Commercial Code brings additional complexities into solving the problems of legal entities classification. For instance, Art. 67 part 4 of the Code states about «state enterprises, including commercial companies (except for the banks), where the state equity interest equals 50% or more». Hence, *in this case the legislator makes an equation between the state enterprises and commercial companies*, though Chapter 9 of the Commercial Code does not already contain this terminology, using instead «a commercial company, where the state equity interest in the stock capital is over 50%» phrasing.

The legislator is similarly contradictive in the scope of administering the activities of state commercial enterprises (Art. 74 of the Commercial Code), the unitary ones ore those which can be turned into joint-stock companies, where state equity interest constitutes 100%. The ruling itself is made up in a way that prevents equalizing «state enterprise» and «joint-stock company», due to the fact that the latter is a corporate enterprise (according to the terminology of Art. 63 part 5 of the Commercial Code). At the same time, the first six parts of Art. 74, on the contrary, stated about the state commercial enterprise and only part 7 mentions about a unitary one (to be understood as state unitary commercial enterprise). Meanwhile part 7 of this Art.contains the term «conversion», it appears therefore that thereby the change of legal entity's organizational form has taken place (Art. 108 part 1 of the Civil Code).

That is to say, a joint-stock company will not already be considered as a state enterprise, because these are different organizational forms of legal entities. Besides, if a state enterprise has converted into a joint-stock company, the provisions of Art. 74, parts 1-2 of the Commercial Code become inapplicable, as joint-stock company has to be the proprietor, and the state – the shareholder. A state enterprise cannot obtain private property rights, given the right of commercial management instead.

The fact that according to Art. 167 of the Civil Code the state is empowered to establish legal entities both of public (state enterprises, educational organizations) and private law (enterprising companies) increases imbalances in the scope of understanding the types of legal entities (private or public law). At the same time, firstly, all the enterprising companies, consequently, including the joint-stock companies, irrespectively of state equity interest presence – are named legal entities of private law without any exceptions; secondly, both types of these legal entities possess constituent documents, therefore their establishment takes place based on the relevant constituent documents.

Meanwhile anadministrative act may also take place, by means of which the state establishes not only the legal enti-

ties of public law, but the legal entities of private law as well. Hence, if a joint-stock company is being established, a regulation of a relevant public authority is issued. Examples are the establishment of National joint-stock company «NaftogazUkrainy», with the corresponding Procedure of the President of Ukraine of February, 25th, 1998, № 151 «On the reform of oil and gas complex of Ukraine» and the Regulation of the Cabinet of Ministers of May, 25th, 1998, № 747; the establishment of open joint-stock company «State joint-stock company «Automobile roads of Ukraine» – the Procedure of the President of Ukraine of November, 8th, 2001 «On improving the efficiency of road economy of Ukraine management» and the Regulation of the Cabinet of Ministers of February, 28th, 2002 № 221; State joint-stock company «KhlibUkrainy» – the Regulation of Cabinet of Ministers of Ukraine of August, 22nd, 1996 № 1000 etc.

Art. 73 part 1 of the Commercial Code states that a state unitary enterprise is established by an authorized authority in an *administrative procedure*. Art. 74 does not contain a similar provision for a state commercial enterprise. Therefore there is no clarity for establishing the later in an administrative or other way. Anyhow, Art. 74 part 7 of the Commercial Code refers to an *procedure,* for conversion of a state unitary commercial enterprise into a state joint-stock company with a 100% state equity interest. This procedure has been approved by the Regulation of the Cabinet of Ministers of August, 29th, 2012 № 802 and is indeed an administrative one.

Thus, Ukrainian legislation provides for various procedures of establishing the legal entities of private and public law. Nevertheless, all the cases are governed by the rule: a legal entity (according to the Civil Code) / commercial entity – commercial organization (according to the Commercial Code) can be established based on the decision of the proprietor (proprietors) or an entitled authority. Considering the fact that if the state is the owner of property, the decisions are made by the authorities, based on public legislation. If private persons act as proprietors, the decisions are made according to the Civil Code.

I. e., public legislation is applied only considering the procedure of developing these decisions, which cannot affect the status of a legal entity, obtained after all the relevant public legal relations. That is why the procedure of legal entities establishment as a whole or an-administrative act or constituent documents (their presence or absence) in particular cannot be considered as a criterion for dividing legal entities into public and private law.Notall the legal entities, established by the state, are the ones of public law, though all of them have been founded through administrative procedure.

It is also worth being mentioned that the status of legal entities, established by the state, can be consequently converted without amending their organizational form. E. G, if a state has established a joint-stock company and owned it completely, and subsequently the privatization took place through selling a part of stock capital to private persons; this does

not make any impact on the organizational form of such a legal entity (it continues being a joint-stock company).

Anyhow, it does not provide an answer to the question on whether the type of legal entity has changed. If, supposedly, before the privatization, a joint-stock company used to be a legal entity of public law, and eventually became a legal entity of private, thus we shall conclude that, firstly, in order to change the status of these legal entities the amendment of their constituent documents is not necessary; secondly, the joint-stock companies can belong either to of private or public law. Perhaps, these conclusions make the status of a joint-stock company blurred and deprives the above mentioned division of any sense.

In comparison: any changes of a legal entity's status result into inevitable amendments to the State Registrar, except for conversion (Art. 108 of the Civil Code), though even the change of joint-stock company type from private into public is not considered a conversion (Art. 5 part 2 of the Law «On joint-stock companies»). The indication of legal entities' *organizational form* is required in their constituent documents (Art. 90, part 1; Art. 152 part 3 of the Civil Code), instead there is no obligation to include the *type* of a legal entity (of private or public law).

The outlaid analysis of legislation determines a question on what is the sens of dividing legal entities into types. It is complicated to give an unequivocal answer, because, usually, Ukrainian legislation (except for the Civil Code of Ukraine) does not operate with the notions of these legal entities and does not imply for any relevant legal consequences at all[1]. Anyhow, public participation in these legal entities is sometimes crucial for particular legal frameworks. E. g., (a) only particular legal entities are entitled to fulfill certain types of activities; (b) only particular types of legal entities are required to meet some criteria in order to maintain their activities, e.g., making agreements, fulfilling certain tasks on demand of the state, embodied in certain authorities; (c) state enterprises are required to be under specific control while making loans, issuing guarantees orbailment (Art. 67 part 3 of the Commercial Code), making other agreements (Art. 79 part 5 of the Commercial Code).

Based on the preceding assumptions, it can be concluded that the literal interpretation of Art. 81 and 167 of the Civil Code, the provisions of the Commercial Code and other legal Acts of Ukraine proves internal contradictions of approaches towards dividing the legal entities into the ones which belong to public or private law, the lack of clear criteria for this purpose.

Doctrinal interpretation of Art. 81 and 167 of the Civil Code of Ukraine for developing the grounds of dividing legal entities into types should be based on the criteria of *dividing the law into private and public spheres* (or the conception of latter as composed of these two spheres).

[1] The only exception is the Law of Ukraine «On preventing corruption», where Article 3 part 1 para. 2 contains a list of certain consequences, though their nature is not civil and does not refer to the legal entity itself.

This approach, basically, cannot determine any objections.

There has already been expressed a wide range of opinions on that issue since the times of Ancient Rome, anyhow, we will highlight the principal undoubtable approaches. These are (a) the *interest*, put as a corner stone of legal framework, i.e., in whose interest does the person join the legal relations; (b) the *method* (imperative or dispositive) applied to the problem under consideration; (c) the relations of *power and subjection*, if speaking of legal entities, it's also necessary to state about (d) *property rights* and (e) *liability.*

The ***interest***. It is well known and widely accepted, that public law administers the relations between the public authorities, between them and private persons, aimed to protect the interests of the society. Private law builds legal framework for the relations between private persons (individuals and legal entities) and ensures their private interests.

Given the above mentioned issues, if a legal entity has been established for undertaking activities in the scope of its founders' interests, the participants (company) or beneficiaries (e. g., a private charity), it is a legal entity of private law. If a legal entity has been established for the sake of public interests, as it takes place while carrying out the authorities in the scope of state management (the state authorities and local self-government, National Bank of Ukraine etc.), it is a legal entity of public law.

Anyhow, there is quite a lot of legal entities, which act in public interests, but meanwhile are considered to be legal entities of private law – universities and other educational organizations (irrespective of property rights), research, healthcare and cultural institutions, political parties, religious communities etc.

This is already enough to be sure of the fact that the ***criterion of interest is itself not sufficient to serve as a basis for division of legal entities into types.*** Furthermore it is true, when these legal entities are commercial organizations, as all the commercial companies are aimed to receive profit. At the same time, there is no reason to state that if the equity of a joint-stock company belongs to state (partially or completely), it's activities are carried out for public interest.

The method (imperative or dispositive). With regard to legal entities this approach is reflected, primarily, in the legal framework for relations between the legal entity and/or its founder/-s (participants). If the principal legislative provisions have clearly defined the circle of legal entity's authorities, which is attributive for the public sphere, it is a legal entity of public law, and vice versa.

The legislation is quite strictly defining the legal status, competence and administration of public law legal entities, for which purposes they do not even need a constituent document. Considering the legal entities of private law, the legislator admits different legal frameworks for through constituent and internal documentation. If all the legal entities of private law had constituent documents, while the legal entities of public law did not, this criterion would be efficient. Anyhow, when many legal enti-

ties of public law possess constituent documents, this criterion itself also does not allow divide the legal entities into public and private.

Speaking of the joint-stock companies, whose equity belongs to the state (irrespective of its proportions), it is entitled to define the list of opportunities, available for its structural branches – it could be more longer or shorter, but still these norms are not imperative. Sometimes legal acts even state directly the inadmissibility of interference and obstruction of national joint-stock companies business activities on behalf of public authorities, their executive officers and representatives (para. 3 of the Regulation of the Cabinet of Ministers of 2015, № 1002 «Particular issues of improving corporate management of public joint-stock company «National joint-stock company «NaftogazUkrainy»).

Power and subjection relations. This determines the principal differences of public and private legal spheres: the first one contains vertical framework for power and subjection; the access of the relevant subjects to power. On the contrary, the private sphere is associated more with horizontal relations between equal subjects,provided separately with property rights.

Above all, the legal entities of public law are typically entitled with authorities, executing the particular public functions. Commonly, the legal entities of private law are usually deprived of these opportunities, though they can be empowered with special functions in particular occasions, for instance, in the field of legal framework with a limited number of persons (stock market, etc.[1]).

It's also necessary to take into consideration that, firstly, if public law subjects participate in civil legal relations, they act as legal entities of private law (Art. 1, 2, 82 of the Civil Code), maintaining the legal status in the public scope. Secondly, there are legal entities with specific types of corporate administration, intrinsically linked to power and subjection relations (e. g., holdings, concerns etc.).

Thus, power and subjection relations constitute a circumstance, which also opposes to the division of legal entities into public and private.

Property rights. The legal entities of private law, according to the principal approach of the Civil Code, *own* their property. It is commonly believed that the legal entities of public law do not possess their assets. This point of view was barely influenced by the provisions of Art. 329 of the Civil Code, which remains unexplored almost all the time of the Civil Code enforcement, due to the fact that the priority in the legal framework for public law legal entities has been given to the Commercial Code, which did not share similar approach. According to the provisions, developed in Soviet times and adopted by modern Ukrainian law, the proprietors of public law legal entities assets is the state (Art. 73 part 3 of the Commercial Code) or the

[1] *Філатова Н. Ю.* Саморегулівні організації як суб'єкти цивільного права [Текст] : монографія / Н. Ю. Філатова ; Нац. юрид. ун-т ім. Ярослава Мудрого. – Харків : Право, 2016. – 240 с.

local community. The legal entity itself owns the indicated property on the basis of commercial administration or operational management.

With regard to national joint-stock companies, according to the Art. 85 of the Commercial Code it is the owner of property as a commercial enterprise. Otherwise it cannot be stated for all the joint-stock companies without any exceptions, irrespective of the owner and the size of public equity interest. Anyhow, there also hybrid joint-stock companies in Ukraine, where a part of assets belongs them as private property, another – as an object of commercial management (para. 25, 26 of National joint-stock company «NaftogazUkrainy» Charter). From the other hand, the state as a stakeholder is not entitled to manage the property (para. 11, 12 of the indicated Charter). The mentioned proprietal regime is paradoxical, results in an extraordinary mess and does not contribute to the clarity of referring to these joint-stock companies as to public or private law legal entities.

Therefore, given the legal regime of legal entity's property (private property, commercial management) it is also impossible to define its type (public or private).

Liability. The feature of liability in the civil doctrine originates from property separation (the belonging of an object to a specific person, based on a particular right). According to the common rule (Art. 96 of the Civil Code), a legal entity (private law) is responsible with all the available assets (owned as private property). A similar provision is contained in Art. 73 part 1 of the Commercial Code, which provides the liability of a state commercial enterprise with all the property, acquired on the rights of commercial management, for the results of its activities.

It appears therefore, that even if a joint-stock company owns a property, which does not belong to the latter as an object of private property, but is still kept in public property instead – a joint-stock company is liable with all its assets, irrespective of property legal regime. Anyhow, there are some exceptions. National joint-stock company «Naftogaz» is not liable with property, which does not belong to the latter as a private property object and cannot be declared bankrupt (para. 12, 13 of the Charter).

Among the legal entities of private law there are some, the liability of which has special features, but with regard to complete reimbursement for the persons which interact with them – these are full companies, limited partnershipsor additional liability companies. The law provides additional liability for the participants of these companies.

The situation with the responsibility of some subjects, which are traditionally considered to be the legal entities of public law is quite opposite, as some of the (e. g., state institutions) are not liable with all their assets. As for commercial subjects (state enterprises), the law does not imply any limits.

The highlighted issues of civil law doctrine, the same as the analysis of legislation, prove the absence of properly developed mechanisms for dividing the legal entities into types and to prove the

appropriateness of this division at all. When any dispute around the status of a legal entity arises, the court is pushed at settling it, based solely on the principles of reasonableness and justice. It is our profound conviction, that the indicated situation is not only unjustified, but also places the judges in jeopardy of being convicted of abuse, especially given the current complexities. It is moreover real, when considering the legal assessment of state economy. Thus, there are reasons not only to review the division of legal entities into the fields of private and public law through implementing another criterion (if there is any sense in maintaining this approach), but also to harmonize the vast body of relevant legislation, along with developing clear and unambiguous legal framework for the status of these legal entities and the legal regime of their property.

Published: Спогади про Людину, Вченого Вчителя (до 60-річчя від Дня народження професора Ірини Миколаївни Кучеренко) / за заг. ред. Р. О. Стефанчука. – К.: АртЕк, 2016. – С. 176–190.

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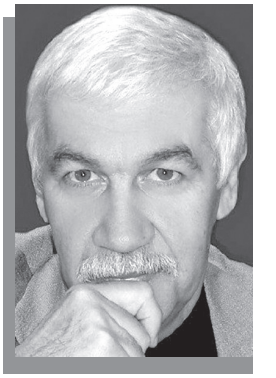

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UDC 347.1/7(477):341.174(4).001.8

ADAPTATION OF LAW OF UKRAINE TO THE EU LAW IN THE CONTEXT OF EUROPEAN TRADITIONS OF PRIVATE LAW

With the ratification of the Agreement between Ukraine and the EU on 16th of September 2014, the issue of adaptation of the Ukrainian law to the European law (EU Law) has become far more topical. This fact stipulates future research in the field of the Law of Europe as a phenomenon of the European civilization with the purpose to inquire into the methodological grounds of correlation of legal systems in the sphere.

To begin with, it is necessary to elicit the essence of the concept «European Law».

The viewpoint according to which the European Law is regarded as a system of legal tenets, created in the course of formation and functioning of European Communities and the European Union, which were applied within their competence on the basis and in accordance with their founding agreements and general principles of law seems to be appropriate.[1] Let us pay attention to the final part of this definition, where they consider general principles of law according to

[1] European law. Course book / Under the editorship of L. M. Entin. – M., 2000. – P. 43.

which (along with founding agreements) the provisions of the European Law function are applied, article F of Agreement of 1992 envisages that «the Union respects the main individual rights as they are ensured by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they appear from general constitutional traditions of member-states to be fundamental principles of law of the Community». Therefore, it should be taken into consideration that the backbone of the fundamental principles of the EU is based on the priority of individual rights recognized in the European Convention as well as on constitutional traditions of the European states. The same traditions determine further development of the national law of the states, which are members of European communities.

On this basis, we can characterize the European Law as a system of principles, legal tenets that are created due to the formation and functioning of European Communities and the European Union basing on and in accordance with the founding agreements and fundamental principles of law.

We should add that the basis of the definition of the European Law should be consideration of the essence of law as the only European concept, which is grounded on the idea of the European unity itself. Foremost it concerns the concept of private law, which is based on European civilization values and acts as their embodiment in European legal consciousness.

However, the conclusion about the uniformity of the European law cannot leave out the issue of existence of traditions of law, and traditions of private law in particular, within its boundaries. Their existence is induced by the presence of relatively independent (though related) sub-civilizations within the European civilization. Based on the statement that law is an element of civilization, it is assumed that certain peculiarities of sub-civilizations influence the features of legal traditions that exist in Europe.

Herewith, it is reasonable to take into consideration the division of all European civilization into «Eastern» and «Western» sub-civilizations, which is based on regarding characteristics of two types of historical, social and cultural development. In this context, it is necessary to specify that, while speaking about «East» and «West», the division is not made by geographical criteria but according to differences in set of mind, outlook, material existence, culture etc.

Many scholars consider religion to be the main factor of assigning the society to a particular civilization. With such an approach the division of Christian Church into Eastern and Western Churches which was caused by the borderline which appeared between parts of the Roman Empire and within the course of time transformed into the differentiation of Eastern and Western civilizations, corresponds to the European system «East – West». Regarding this head-note, some researchers draw the main «differentiation line» in Europe in a way that divides Ukraine and Belarus into two parts separating Orthodox Ukrainians and Belarusians from Catholics.[1] Other

[1] Huntington S. The Clash of Civilizations // Polis. – 1994. – № 1. – P. 38–48.

authors judge the mentioned above criterion with a critical mind and instead of «religious» classification factor they suggest other criterion («universal, fundamental, inherent to all civilizations») – recognized by each individual who is a member of a civilization, which is dichotomy «we» and «they», «we are different from them», «insiders» and «outsiders».[1]

In our view, in modern conditions, the civilization-religion criterion does not work, as it became the topic of political speculations due to its penetration into the general canvas of geopolitical interests and global ambitions. Besides, we cannot but mention such factors as the absence of one-hundred percent belief of the countries' populations in God, presence of several religious confessions in the majority of European countries, contradiction of such criterion with rather popular ideas of ecumenism, etc.

Without dwelling on the issue in details, we should admit that we consider it reasonable to differentiate not by one criterion but according to a total of the main features characteristic for the type of civilization (sub-civilization). Among them, the crucial factors are attitude to people, determining their place in the Universe, environment and society. Herewith, we take into consideration that mainstream Western and Eastern types of civilization development do not coincide with geographical division and can be present to some extent in different civilizations in different parts of the world.

[1] Orlova I. B. Euro-Asian Civilization. – M., 1998. – P. 25

The features of the Western type of civilization development are:

1) sovereignty of a private person (recognition of the central place of a person in the system of social relations);

2) developed institution of private and corporate property that plays a key role in the economic life of society;

3) liberalism as the philosophical ground for social life;

4) social-political pluralism, which is reflected in the division of functions of different branches of power and giving power to self-government etc;

5) beliefs (religion etc.) which have the features of absolute inherent value or strive at such understanding.

Formed on such grounds the Western legal tradition has such characteristics:

1) distinct differentiation between legal and other institutions. Although politics and morality can determine law but they are not understood as the law itself;

2) administration of legal institutions is delegated to a special circle of people who gain legal education with this purpose;

3) legal thought has an impact on legal institutions: it analyzes and systemizes law acting as a factor which helps to create other legal categories;

4) law is conceived in society as a consensual unit, a unified formed system;

5) law is conceived as an integral system, «organism» which develops through generations;

6) feasibility of law system is based on the society's conviction in long lasting character of law;

7) development of law proves that it does not only last but has its history;

8) historicity of law is connected with the understanding of its supremacy over political power;

9) confidence in historicity of law is associated with the faith in its supremacy over political power. It is believed that law to some degree is superior to politics and places an obligation on the state. Formally, it looks like the conviction in the opportunity for the existence of civil society and law-bound state;

10) different jurisdictions exist and compete inside the society which makes the supremacy of law necessary and possible.[1]

Characteristic features of the Eastern type of civilization development are:

1) predominance of collective, public and state interests over individual ones;

2) significant governmentalization of economic life, weakness and imperfection of private property institutions («Asian mode of manufacture»);

3) tendency to authoritarian (tyrannical) type of power;

4) equalizing social ethics;

5) ethical-normative function of religion, resulting in the situation when religious principles practically acquire the features of authority of law.

Formed on such ground the Eastern tradition of European Law has such characteristic features:

1) limitation of paradigm of law by Christian teaching in its Orthodox interpretation;

2) tendency to understanding law as a total of legal acts which were inspired by the needs of society that are better known to the state;

3) arranging and conducting law making, codification, research and other kinds of activity in the sphere of law by the «initiative from above»;

4) weakness of creative research which results in the loss of authority and significance of law;

5) tendency to limitation of private-legal type of regulation, desire to ensure maximum control and interference into the relations of private persons. As a result, private law appears to be «mixed» with public-legal tenets;

6) vague distinction between legal institutions on the one side and state (administrative, managerial) institutions on the other side;

7) absence of theoretically grounded and recognized concept of succession of law. As a result, such phenomena as reception, transplantation, adaptation of law often take place in latent forms, have limited and inconsequent character;

8) emphasis mainly not only on the rights but on duties of participants of civil-legal relations[2].

Therefore, in reference to Europe, the «Western Legal Tradition» is those values, concepts, categories and institutions, which are characteristic for the Western European sub-civilizations and based on the worldview, culture and mindset of the Western world, which originates from Greek and Roman ancient world.

[1] Berman H. J. Western Legal Tradition: the Formation / Transl. from Engl. – M., 1998. – P. 41–42.

[2] Kharytonov Ye. O. History of Private Law of Europe: the Eastern Tradition. – Odessa, 2000. – P. 8–9.

The tradition of private law as a concept inseparably connected with the Western European civilization is formed and functions on the basis of the Western tradition.

Herewith, as every long-term process the formation of the Western tradition (concept) of private law can be reasonably divided into gradations that characterize the main stages of development.

The easiest way to conduct such division would be orientation on the established division of history of Europe into periods: Ancient World, Middle Ages, Modern Period. Nevertheless, such division only roughly reflects changes that took place in the history of the Western European World. Besides, it is insufficient for identifying the stages of development of certain elements of civilization, each of which has its own rhythm.

Imbalance of the rhythms of the state and law (political history and elements of culture) is especially noticeable in the field of private law. While the change of political regime soon causes the change of public-legal tenets, which are closely connected with public authority, and is its continuation, their impact on private law is less obvious and more distant in time.

Drastic solutions are certainly possible in this sphere. Such an example is cancelling the right of private property by the Soviet power. However, non-recognition or introduction of this or that institution, especially in a certain country, is not the change of legal framework yet. It is more political than legal decision and requires many years of work on elimination and transformation of legal framework that existed in the country. Still, more time is needed before ideas in the field of private law can spread on the group of legal systems etc.

To consider differences in the rates of development of political history, that is public and private law, it is reasonable to distinguish periods (changes in time) and stages (qualitative changes of legal systems). In this case, preserving the division of history of Europe into Ancient World, Middle Ages and Modern Period we have grounds for distinguishing several stages in the development of law in the West, which are connected with the consideration of crucial moments in the development of law in general, and private law in particular.

H. Berman explains the presence of such «destructions» by the characteristic for the Western legal tradition discrepancy between its ideals and reality, which from time to time led to forced elimination of legal frameworks by revolutions,[1] of which he counted six. In his view, they are: 1) the Papal revolution of 1075–1122, 2) Lutheran reform in Germany in the XVI century, 3) the English revolution of the XVII century, 4) the American revolution of 1776, 5) the French revolution of 1789, 6) the Russian revolution of 1917. Each of them created a new legal framework, which embodied some of the main tasks of the revolution and changed the legal

[1] Herewith, revolutions are understood as powerful explosions that took place when the legal system froze and could not adapt to new conditions and therefore it was accepted as that which does not correspond its ultimate goal and task.

tradition but finally remained within this tradition. Therefore, as a whole, the legal tradition preserved and in fact renewed in the course of the revolutions.[1]

Agreeing with the conclusion regarding the necessity of considering the importance of revolutions for the formation and reforming of law, attention should be paid to significant drawbacks of such approach that place in question resiliency of the suggested concept as a whole.

The first one lies in the excessive spreading of the concept «West» and therefore erosion of criteria of category the «Western Legal Tradition» and loss of certainty of factors that influenced its development. For example, it is possible to agree that the American Revolution influenced the development of certain institutions of Western law.[2] However, it was not crucial for the development of the Western legal tradition.[3] That is why distinguishing the American Revolution as a factor of its formation is hardly viable.

The second drawback of the concept is the erroneous thesis that Russia, Greece, Spain first were out of the influence of the Western legal tradition but later they became part of the West (as well as North and South America).[4] Designation of Russia to the West has always been controversial and now is denied by its leaders who insist on the distinctiveness of «Euro-Asian civilization». Therefore, this statement can be regarded as worthy only for those parts of the Russian Empire, and then – the USSR, that chose the course for Euro integration (Baltic countries, Georgia, Moldova, Ukraine).

We should not mix phenomena of different forms such as the Pope Revolution and subsequent religious, bourgeois and other revolutions. The Pope Revolution determines the boundary between European chronological civilizations of early and late Middle Ages. It is a line between the period of constitutionalization of the Western legal tradition which began in 1054 with the official recognition of the Christian Church division and completed with recognizing the independence of temporal and religious power which further became a significant feature of exactly the Western legal tradition and had an impact on the development of traditions of private law. As regards other mentioned above revolutions, they all had particular, clearly expressed

[1] Berman H. J. Western Legal Tradition: the Formation. – M., 1998. – P. 43.

[2] Alexis de Tocqueville. Democracy in America / Transl. from French. – K., 1999. – P. 341.

[3] It is surprising that the main supporters of the American ideas in the field of law were so-called «economic lawyers» of the post-Soviet territory. (e.g. MamutovV.I. Again About General Civil Law Approach // Law of Ukraine. – 2000. – №4. – P. 93. For counter arguments refer to: Kharytonov Ye. O. Anti-Civil Law or Seven Misstatements of So-Called Economic Approach // Law of Ukraine. – 2000. – №9.-P.90.). It may be connected with the similarity of the situations: attempts of the state to overcome the chaos that arose with the change of economic relations in the conditions of impropriety of the law concept which existed before and not understanding of their belonging to a particular civilization.

[4] Berman H. J. Western Legal Tradition: the Formation / Transl. from Engl. – M., 1998. – P. 20.

national character. They were national not in their orientation at achieving a national goal but in their reflecting contradictions of national character, peculiarities of historical development of a certain ethnic group, nation, group of nations as well as specific features of national (ethnic) approach to solving problems which generated in the society. Therefore, we cannot agree with the idea that the loss of unity and solidarity of the aim by the Western civilization and transformation of relations of the race, religion, family, class, neighbourhood, cooperation into «superficial nationalism» happened in the XX century and therefore caused disintegration of the Western legal tradition.[1]

There are reasons to state that the national influence on the integrated Western legal tradition started much earlier – with reference to the formation of the European worldview of the Modern Period and related to the consequent process of transformations of cultures.[2] It resulted in the cluster of the mentioned above revolutions that caused the transition to a new stage of development of the Western legal tradition. Its characteristic feature is the formation within the Western legal tradition of relatively independent legal systems which reflected both the features which were common for the Western legal tradition as a whole and peculiarities of its development in particular conditions of place and time.

In our view, the significance of this stage in the development of the Western tradition of private law and completion of the formation of the private law concept should be especially emphasized. While since the beginning of the formation of Western law till that time, the tradition of private law either had been only arising (law of early Middle Ages) or had stayed on the stage of thorough understanding and creating concepts, the formation of certain institutions etc., after the cluster of revolutions a «breakthrough» in this field took place and primacy of rights of a private person became a distinguishing factor in establishing the main vector of the development of law. One can say that laying the foundation of modern (and perspective) vision of the private law concept, as it is, took place.

Taking into account the mentioned factors, the following stages in the development of the Western tradition of private law should be differentiated:

I) Stage of «personal» (pre-private) law. The formation of the Western legal tradition as such goes on. This is the period from the decline of Western Rome to the Pope revolution of 1075–1122;

2) Stage of «personal jurisdiction» (proto-private law). The beginning of the formation of the Western tradition of private law. It covers the period from the Pope revolution until the Reformation of the middle of the XVI century.

3) Stage of «egalitarian person-centralism of courts of justice». Establish-

[1] Berman H. J. Western Legal Tradition: the Formation / Transl. from Engl. – M., 1998. – P.16.

[2] Ferguson believes that these factors already functioned in Ancient World. Adam Ferguson, An Essay on the History of Civil Society /Transl. from Engl. – M. : 2000. – P. 205–207, 307–327.

ment of the Western tradition of private law. The period from bourgeois revolutions of the XVI – XVIII centuries till World War I. It marks the completion of the formation of private law concept and transition of the development of the Western tradition of private law into a new quality.

On the first of these stages, the transition from the Ancient law to the idea of the formation of the Western European law takes place. Such feature of the Western tradition as relative independence of law is formed. The chaotic borrowing of the Roman law tenets goes on and their implementation into the collection of Barbarian laws takes place. Therewith, the Barbarian law is closely connected with the political and religious life, customs and moral values. Church does not have its own systematized law-creative instruments and developed law until XI century. Canon law is inseparably connected with theology and even the expression jus canonicum is used not very often. The main principle that functions in the sphere of regulations of private relations is subjection to «personal law» which is, first of all, determined by the feature of allegiance (citizenship).

On the second stage the formation of specific features of the Western legal tradition begins, the interest to private law appears and formation of its characteristic features starts. These changes take place during the Pope revolution (Gregorian reforms) of 1075–1122 which laid the foundation for the discovery of Justinian's Roman texts exempting the clergy from the emperor's, king's or baron's rule and establishing a strong pope monarchy in Western Church. The first European university was founded in Bologna to train lawyers and create legal science as well as separate canon and temporal law, church and secular legal institutions.

On this stage a concept of law as an integrated and coordinated system is formed, confidence in eternal nature of law, its ability to grow from generation to generation is stated; «growth» of law in the West acquires certain inner logic: the changes are not just adaptation of the old to the new but they become a part of a particular model of changes,[1] confidence in supremacy of law over political power is formed; different jurisdictions and different legal systems compete in the same society. Private law begins its formation as a concept, in particular, due to the ideas of High Renaissance, development of crafts and trade, canon law etc. The study of principles of the Roman law and the reception of its tenets take place.

The main principle of regulation of relationships in the private sphere is «personal jurisdiction» – legal tenets are applied to a particular group of subjects: the decisive factor is not citizenship, race, gender etc. but their social background.

On the third stage, the formation of the fundamentals of the Western tradition of private law takes place under the influence of ideas of «natural law»: establishing the independent status of

[1] Berman H. J. Faith and Order: the Reconciliation of Law and Religion. – M., 1999. – P. 42.

a private person, recognition of a complex of his or her personal or property rights, introduction of principle of contractual freedom etc. A characteristic feature is the reception of the Roman private law as a universal tool of ensuring the rights of a private person.

On the other hand, the enrichment of the Western tradition of private law takes place due to national bourgeois revolutions aimed at overcoming the contradictions of internal state and social-cultural development. In particular, the Lutheran concept of Christian conscience to some extent facilitates the development and creation of the system of protecting the private contracts and property rights in many Western countries. The English Puritanism promotes the development of independent court procedure, jury trial and strengthens human rights not only in England but also in other countries of Western Europe. Codification of civil law in France induces new codifications in the whole Europe and on other continents. The formation of «legal systems» takes place and within their framework the formation of civil-legal systems as well, which effects the development of the Western tradition of private law. The latter loses «personal jurisdiction» and becomes a clearer complex. However, along with this, it differentiates according to mindset, mental outlook and national traditions, and now develops simultaneously not only in chronological but in geographical positions.

As for the «Eastern European Legal Tradition», it is understood as legal values, concepts, categories and institutions which are characteristic for the Eastern European sub-civilization founded on the outlook, culture and mindset of nations, ethnic groups that were part of so called «Byzantine Commonwealth of Nations» or now are successors of «Byzantine Spirit» expressed in the principles of Orthodox Christian religion.

In the Eastern European legal tradition the Eastern European concept of private law is formed under the Western influence but it does not lead to the rise of an independent tradition of private law. It is explained by the absence of independent philosophic basis, specific character of relationships «person – state» and other similar factors.

Due to the fact that Ukraine was formed and continuously developed in line with the Eastern European legal tradition, a theoretically and practically significant question arises as to determining the grounds for its correlation with the law of the EU, in particular, the opportunities and the level of consideration of Ukrainian mindset, peculiarities of legal consciousness etc.

In our view, the issue of choice does not exist any longer as Ukraine, like any other state that strives to be a member of the European Community, has already made its choice. And this choice is the European one. That is why the methodological ground for correlation of Ukraine's law with the law of the EU in the field of private law is the consideration of the fact that the concept of private law developed and formed in the context of development of the Western tradition of Euro-

pean law. Therefore, the adaptation of Ukraine's law to the EU law depends, first of all, on the readiness and ability of the Ukrainian society to conceive the Western European basic civilization values (liberalism, human rights, private property right, contractual freedom, respect of other person's rights etc.) without these factors the real movement towards this aim is impossible.

Published: Studia Prawnicze: Rozprawy i Materiały. – 2016. – Nr 1 (18). – S. 39–50.

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UDC 347.44:368(477)

REALITIES AND PROSPECTS OF TITLE INSURANCE IMPLEMENTATION IN THE DOMESTIC INSURANCE SERVICES MARKET

Further development of civil circulation, considering the introduction of new legal mechanisms of creation, transfer and termination of the subjective rights of individuals and legal entities, determines the need for the development of reliable protection tools for its members. One of such protective instruments in the domestic legal system may be the insurance of the legal title (title insurance), which gained considerable popularity in the USA and the EU countries, but is not widely used in our country nowadays. The above mentioned actualizes the consideration of the problem of implementation of the title insurance practice in the insurance services market of Ukraine.

The insurance legal relations and the features of a civil contract that serves as the basis of their origin were investigated by many domestic and foreign lawyers, such as D. G. Amanzhaev, A. S. Amelina, V. I. Borysova, I. V. Venediktova, O. V. Hryschenko, O. V. Kohanovska, T. D. Kryvoshlyk, N. S. Kusnetsova, V. V. Kushchenko, R. A. Maidanyk, S. O. Slipchenko, I. V. Spasybo-Fateeva, D. V. Terehov, V. V. Us, T. V. Tsvigun, Y. M. Shevchenko, V. P. Yanyshen etc.

In a modern world, there is an active development of new legal constructions in the insurance field, which is a direct consequence of the evolution of existing legal mechanisms of minimization or even complete avoidance of the risks that accompany the creation, transfer and termination of subjective civil rights. In this connection, the category of «insurance protection»[1] is prompted to enter the legal usage in cases where it comes to insurance of various kinds of property turnover objects (things, liability, financial risks, investments, etc.). Insurance allows to minimize the negative effect of various events and even prevent or completely eliminate their adverse

[1] Цвігун Т. Теоретичні аспекти визначення сутності страхового захисту [Текст] / Т. Цвігун // Ринок цінних паперів України. – 2012. – №3–4. – С. 91.

effects[1], and therefore is aimed at complete or partial restoration of property status of the victim (insured) when the insured event happens. The specified purpose of insurance institution generally corresponds to the purpose of protection of the subjective civil rights justifying the appropriateness of the use of the category «insurance protection». All available, in domestic property turnover, constructions serve as the legal means of providing the insurance protection. One of these legal means is the construction of title insurance.

Historically, title insurance firstly found its spread in the turnover of the real property. In this regard, the experts of the insurance field have repeatedly stated that title insurance has a very narrow scope, which is the secondary real estate market. They justified this conclusion by stating that title insurance, when implementing the primary mechanisms of the estate of freehold creation, is inefficient, because in this sphere of property turnover the rights to real estate are often acquired through investment. The absence of previous transactions on the real estate unit in this case, virtually eliminates the risk of the title illegitimacy. However, this conclusion is valid only for countries with a high level of legal protection of the real estate market participants. The domestic real estate market, unfortunately, is characterized by insufficient level of the development of mechanism for protecting the rights and legal interests of its members as well as by the presence of the negative experience of the investment component functioning. For example, it is worth mentioning a well-known resonance scam involving a violation of legitimate rights and interests of investors from the heads of the company «Elita-Center» in Kyiv, there exist cases when the property developer issued to different persons two or more documents that are the legal title to one and the same apartment in the multi-unit apartment building, or the sale of real estate units to different people by unauthorized persons under the forged documents etc. Unfortunately, such property losses have not been excluded at the real estate market of Ukraine yet. The presence of these and other possible property risks determines the need for widespread introduction of title insurance not only at the secondary but also at the primary real estate market. Disappointing are also the results of the analysis of existing insurance risks level in other segments of the domestic civil circulation, particularly in the vehicles market. The literature states that the title insurance of movable things (like cars) has found its spread due to the fact that such transactions are associated with minimum risks[2]. It is difficult to agree with this conclusion, considering the realities that have

[1] Грищенко О. В. Правове регулювання договору майнового страхування у новому цивільному законодавстві України [Текст] / О. В. Грищенко // Вісн. Хмельницьк. ін-ту регіон. управління та права. – 2002. – №2. – С. 160.

[2] Секрети і «підводні камені» страховки прав власності на нерухомість [Електронний ресурс]. – Режим доступу: http://www.bankchart.com.ua/finansoviy_gid/strahuvannya/statti/sekreti_i_pidvodni_kameni_strahovki_prav_vlasnosti_na_neruhomist. – (Веб-сайт «Bankchart» рейтинги банківських послуг).

been formed in the domestic vehicle market, because the scope of their turnover and documentary registration can hardly be considered as the minimum risky.

The appearance and implementation of the title insurance construction in the world is associated with the spread of the practice of invalidation the contracts regarding the transfer of real estate property right in the nineteenth century. The validity of many transactions was disputed on the basis of illegality of acquiring the property rights to real estate, in connection with which the procedure of transfer of rights required new means of protecting its members. In that period the practice of research of the «title history» became quite common, that was checking of real estate title documents as for the law «purity» and thus the legitimacy of the previously committed transactions. This service was provided by notaries, archivists and other people, who having access to archival records and documents, expressed their opinion about the «purity of the title»[1].

At the present time the practice of implementation of mechanisms of the creation, transfer and termination of real rights to real estate in the USA has provided the definition of legal purity of the title and its insurance with the meaning of their integral part[2],[3].No less attention to this issue is paid in Europe, as in most of the EU countries checking of real estate unit before committing each subsequent transaction can take up to two months, despite the fact that this market is quite «old» and legally established [4].

The current civil legislation of Ukraine does not explicitly enshrine the title insurance construction, and does not limit the ability of real estate market participants to use this tool of insurance protection. Taking into account the inexhaustibility of the list of voluntary insurance, enshrined in the provisions of the Article 6 of the Law of Ukraine «On insurance», and, designated by the law, ability of the insurer to choose the types of voluntary insurance, the studied kind of insurance activity can be easily implemented in domestic practice [5].

Keeping the traditional specifics of insurance relations, title insurance stands out by its subject and, as stated earlier, by its scope.

In legal literature, a common view is that title insurance is carried out in case of property loss as a result of termination of property right to it[6], that means that it is directly related to the risks of

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[1] Терехов Д. В. Понятие титульного страхования[Текст] / Д. В. Терехов // Омск. науч. вестник. – 2009. – №2 (76). – С. 103.

[2] Ibid. – С. 104

[3] Аманжаєв Д. Г. Страхування іпотеки як спосіб мінімізації фінансових ризиків [Текст] / Д. Г. Аманжаєв // Економіка та держава. – 2011. – №4. – С. 62.

[4] Ус В. В. Титульное страхование – действенный механізм защиты прав участников рынка недвижимости [Текст] / В. В. Ус // Имущественные отношения в Российской Федерации. – 2010. – №3 (102). – С. 57.

[5] Про страхування : Закон України від 07 березня 1996 р. №85/96-ВР // Відом. Верхов. Ради України. – 1996. – №18. – Ст. 78 (зі змінами).

[6] Ус В. В. Титульное страхование – действенный механізм защиты прав участников рынка недвижимости [Текст] / В. В. Ус // Имущественные отношения в Российской Федерации. – 2010. – №4 (103). – С. 27.

loss of property rights [1],[2],[3].Some lawyers expressed the view that the object of insurance in this case is the property right, based on the identification of such right with the legal title [4], and taking into account the peculiarities of the insurance object. Particularly, V. V. Kushchenko in the analysis of the title insurance specifically notes that the insurance of property rights is carried out to protect the rights of the acquirer against the illegal encroachments of third persons to real estate object[5]. However, this position has vulnerabilities, and it is explained by analyzing the consequences of the invalidity of the transaction. The insurance «against the illegal encroachments» does not include all possible risks of the studied legal relations. The wrongfulness in this case is not a determining factor. It is supposed that title insurance mainly covers the cases of wrong acts of third persons that arise, in particular, when committing invalid transactions. The lawyer himself, by the way, agrees with this [6].No less interesting is his position on the object of insurance. The recognition of the transaction invalidity leads to bilateral restitution, and invalid transactions, as we know, do not create legal consequences, which the parties tried to achieve, creating just the consequences associated with their invalidity. This should mean that no real rights of the acquirer as for the transaction occur, and therefore at the moment of entering the insurance contract the subject of insurance cannot exist as well. It is also obvious that that the insurance contract itself may not cause any legal consequences in this situation, and therefore the insurer does not have to fulfill its obligations to the insured in the part of making payments when the insured event happens. One gets the false impression that the lack of legitimacy of acquiring the subjective right, determined by the recognition of the transaction invalid, leads to the absence of the insurance subject, and the title insurance contract itself is unreasonable. The difficulty of defining the insurance subject in case of committing null transaction is associated with the consequences of its nullity, and, at the same time, the presence of the insurance subject in respect to disputed transactions is explained by the presumption of legality of the property right acquisition

[1] Терехов Д. В. Понятие титульного страхования[Текст] / Д. В. Терехов // Омск. науч. вестник. – 2009. – №2 (76). – С. 104.

[2] Аманжаєв Д. Г. Страхування іпотеки як спосіб мінімізації фінансових ризиків [Текст] / Д. Г. Аманжаєв // Економіка та держава. – 2011. – №4. – С. 62.

[3] Кривошлик Т. Д. Види страхування в іпотечному кредитуванні в Україні [Текст] / Т. Д. Кривошлик // Фінансово-кредитний механізм активізації інвестиційного процесу : зб. тез II Міжнар. наук.-практ. конф. до 15-ї річниці створення каф. банк. інвестицій, (Київ. 3 лист. 2011 р.) / М-во освіти і науки України, ДВНЗ «Київ. нац. екон. ун-т. ім. Вадима Гетьмана». – К. : КНЕУ, 2011. – С. 268.

[4] Мельниченко А. Проблеми розвитку титульного страхування в Україні [Текст] / А. Мельниченко // Вісник Київ. нац. торг.-екон. ун-ту. – 2009. – №5 (67). – С. 92.

[5] Кущенко В. В. Страхование сделок с недвижимостью[Текст] / В. В. Кущенко // Имущественные отношения в Российской Федерации. – 2005. – №6 (45). – С. 55.

[6] Ibid. – С. 57

(chapter 2, Article 328 of the Civil Code of Ukraine)[1].

The subject of the title insurance contract is determined by the specifics of the insurance risk, which is one of the key categories of insurance. It refers to a certain event, in case of which the insurance is carried out and which has features of probability and chance of occurrence[2].

Given that invalid transactions do not give rise to legal consequences, which their participants tried to achieve, the false impression might be given that title insurance is carried out against financial risks [3], like potential losses, damages, loss of profits [4]. If we consider the insurance risks with title insurance in this sense, they cannot be equated with direct property losses incurred by, for example, the buyer under the contract, who remains with nothing in case of vindication of its property. This should mean that there are no financial risks in case when the transaction is free of charge, such as under the contract of gift or when inheriting. Furthermore, given that the consequence of transaction invalidity is a bilateral restitution, in some cases, it eliminates the possibility of any direct financial losses, and therefore the risks associated with them. Exactly this aspect is not taken into account by the lawyers, who attribute the risks under the title insurance to financial ones[5].

In addition, the indicated conclusions are not confirmed by practice in the field of insurance services provision. For example, the National Joint Stock Insurance Company «Oranta» considers, as an insurance risk under the title insurance contract, the possibility of terminating the property right, based on the court decision that has entered into force on the invalidity of the transaction regarding the acquisition of property right as a result of circumstances (events) which arose (occurred) before entering into or during the term of the contract and were unknown to the insured at the time of making the insurance contract[6]. Taking this into consideration, it would be reasonable to distinguish such title risks as

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[1] Цивільний кодекс України : за станом на 8 лист. 2016 р. // Відом. Верхов. Ради України – 2003. – №№ 40–44. – Ст. 356 (зі змінами).

[2] Цивільне право : підруч. у 2 т. [Текст] / [Борисова В. І. (кер. авт. кол.), Баранова Л. М., Бєгова Т. І. та ін.] ; за ред. В. І. Борисової, І. В. Спасибо-Фатєєвої, В. Л. Яроцького. – Х. : Право, 2011 – . – Т.2. – 2011. – С. 518.

[3] Тлуста Г. Ю. Титульне страхування в Україні: механізм функціонування та перспективи розвитку [Електронний ресурс] / Г. Ю. Тлуста // Наук. записки Нац. ун-ту «Острозька академія». Серія Економіка. – 2011. – Вип. 16. – С. 563–568. – Режим доступу до журн.: http://nbuv.gov.ua/UJRN/Nznuoa_2011_16_76.

[4] Фурман В. М. Ризики в інвестиційній та фінансовій діяльності страховика [Текст] / В. М. Фурман // Фінанси України. – 2008. – № 2. – С. 107.

[5] Тлуста Г. Ю. Титульне страхування в Україні: механізм функціонування та перспективи розвитку [Електронний ресурс] / Г. Ю. Тлуста // Наук. записки Нац. ун-ту «Острозька академія». Серія Економіка. – 2011. – Вип. 16. – С. 563–568. – Режим доступу до журн.: http://nbuv.gov.ua/UJRN/Nznuoa_2011_16_76.

[6] Титульне страхування [Електронний ресурс]. – Режим доступу: http://oranta.ua/ukr/title_insurance.php. – (Веб-сайт Національної акціонерної страхової компанії «ОРАНТА»).

vindicatory and restitutionary[1], which should be considered as the most common in judicial practice and practice of law enforcement in general.

Obviously, title insurance is carried out to protect the property interests of the insured in case of illegitimate grounds of property rights to arise. Such ground is the title, which means the corresponding transaction, the commission of which should lead to creation of subjective civil rights, and which, due to objective reasons, can acquire features of invalidity. Eventually, the Roman lawyers understood exactly the creation of rights as a title[2]. This may explain the efficacy of the title insurance construction in case of its nullity or contestability as a transaction.

Title insurance is carried out in case of possible losses associated with the lack of desirable for the parties (sides) legal consequences of the committed transaction that could potentially be invalidated. The subject of insurance is not the property right, but the ground (transaction) that should cause its creation, that is why the invalidity of ground of subjective property right acquisition (change, termination) serves as the insurance risk. This explanation of specifics of the title insurance subject is based on determination of the transaction as the action of a person, aimed at the acquisition, change or termination of civil rights and obligations (Article 202 of the Civil Code of Ukraine)[3].

The analysis of the specifics of title insurance construction gave the lawyers the reason for the classification of property insurance into two separate types: 1) own property; 2) title[4]. Property insurance is carried out in case of damage or destruction of a thing. As a compulsory one, the property insurance in this sense is provided by, for example, Article 24 of the Law of Ukraine «On lease of state and municipal property», in the context of the facility lease insurance against risk of accidental loss or damage [5]; and Article 8 of the Law of Ukraine «On mortgage», as the insurance against the risks of accidental destruction, accidental damage or damage to the subject of the contract[6].

Meanwhile, title insurance is carried out against the legal risks of loss of a thing, of property right to it[7] or of an

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[1] Мельниченко А. Проблеми розвитку титульного страхування в Україні [Текст] / А. Мельниченко // Вісник Київ. нац. торг.-екон. ун-ту. – 2009. – №5 (67). – С. 92.

[2] Дождев Д. В. Римское частное право: учебник для вузов [Текст] / подобщ. ред. акад. РАН, д.ю.н., проф. В. С. Нерсесянца. – [2-е изд., изм. и доп.] / Дождев Д. В. – М.: Норма, 2006. – С. 405.

[3] Цивільний кодекс України : за станом на 8 лист. 2016 р. // Відом. Верхов. Ради України – 2003. – №№ 40–44. – Ст. 356 (зі змінами).

[4] Кущенко В. В. Страхование сделок с недвижимостью [Текст] / В. В. Кущенко // Имущественные отношения в Российской Федерации. – 2005. – №6 (45). – С. 55.

[5] Про оренду державного та комунального майна : Закон України від 10 квіт. 1992 р. №2269-XII // Відом. Верхов. Ради України. – 1992. – №30. – Ст. 416 (зі змінами)

[6] Про іпотеку : Закон України від 5 черв. 2003 р. №898- IV // Відом. Верхов. Ради України. – 2003. – №38. – Ст. 313 (зі змінами).

[7] Ус В. В. Титульное страхование – действенный механізм защиты прав участников рынка недвижимости [Текст] / В. В. Ус // Имущественные отношения в Российской Федерации. – 2010. – №4 (103). – С. 27.

actual possession of a thing when it comes to the consequences of invalid transaction. Besides, in the context of analysis of the title insurance contract, it appears that not only the ground of property right creation, but also the ground of derivative real rights can serve as the subject of insurance. Recognition of invalidity of the transaction regarding the transfer of property right to the thing causes the invalidity of derivative transactions, including loan agreements, leases etc. In this regard, each potential carrier of property rights can alone insure the ground of its creation under the title insurance contract.

The peculiarity of the title insurance is the ratio of the circumstance that gives rise to the insured event and the case itself. The relevant circumstance takes place before the conclusion of the contract, meaning that it exists in the history of property right transfers, and due to various circumstances, may not always be detected or evaluated properly. However, the insured event itself occurs already after making the corresponding transaction[1].

The scope of the title insurance structure cannot only involve the contractual relations that arise as a result of the conclusion of contracts, aimed at the transfer of property right: sales, exchange, gift, life maintenance etc. It is possible to insure the title in case when the property right arises in way of inheritance or even as a result of the enforcement of legal mechanisms, such as withdrawal of real estate from the entity or individual, based on a court decision or under foreclosure on it during the enforcement proceedings. There are no grounds for limiting the scope of such an effective instrument of insurance protection. Moreover, in these and similar cases, there may be more risks due to the confusion of the situation that in turn determines the need in applying for insurance at all.

The insured, under the title insurance contract, shall be entitled to payment of insurance compensation subject to establishing the fact of invalidity of the transaction (exactly the establishment, because the entry into legal force is important only in the context of analyzing the content of the title insurance contract), which is the ground for creation (transfer, acquisition) of rights for the relevant thing by insured. Moreover, the commission of such transaction has the nature of a legal fact, characterized by only a probability of its occurrence. In view of this, the most effective are the following two models of making the title insurance contract: 1) making the insurance contract using the construction of the preliminary contract; 2) making the insurance contract after committing a transaction that is the ground for creation of property right to a certain thing by insured. As a possible model, the conclusion of the title insurance contract, with a condition of its entry into legal force simultaneously with the moment of occurrence of the ground for acquiring the property right for a certain thing by insurer, can be also considered.

[1] Кущенко В. В. Страхование сделок с недвижимостью[Текст] / В. В. Кущенко // Имущественные отношения в Российской Федерации. – 2005. – №6 (45). – С. 57.

The risks associated with unfair actions of property turn over participants play an important role in the investigated legal relations. It is necessary to keep in mind that the acquirer's awareness about the circumstances, laid in the foundation of the insured event, is recognized in the insurance contract conditions as a ground that relieves the insurer from the obligation to carry out the insurance payments. At the same time, this condition is applied in practice and is not enshrined at the level of the regulatory provisions of applicable civil legislation of Ukraine. Nevertheless, a prerequisite for signing the title insurance contract is the research, carried out by the specialists, of legally significant circumstances that determine the insurance risks, despite the chosen by the parties' legal scheme of signing the contract. Such condition is the result of the construction development of the title insurance relations.

Conclusion. Despite the perspective of application of the title insurance construction and its appeal to the members of civil relations, who are mainly the acquirers of property rights to real estate, this means of insurance protection of their legitimate rights and interests still remains rare in the domestic property turnover. The main reason we should recognize here, is the lack of legislative consolidation of the title insurance construction in the domestic legislation. The situation is for the benefit of the insurer, who, taking care of its own interests, has the ability to model the title insurance contract under the scheme of the contract of adhesion, creating favorable conditions only for itself. The provisions of acts of applicable civil legislation of Ukraine, which could somehow balance the legitimate rights and interests of both parties of the contract, are currently not available. Therefore, the consumers of insurance services, in the part of the title insurance contract formation, can rely only on the good faith of the insurers. In connection with this, it is suggested to enshrine the title insurance contract construction at the level of the provisions of the Law of Ukraine «On insurance» with determination of its essential conditions.

The domestic real estate market, unfortunately, is characterized by «confusing stories» concerning the facts of state fixation of creation, transfer and termination of rights to certain real estate units and commission of transactions on real estate. Since the beginning of the development of Ukraine as an independent state, of course, using tried and tested in Soviet period mechanisms of fixation of real estate rights and transactions on them, a new, modern electronic system of state registration of rights transfer in this, without exaggeration, important area of property turnover has been gradually forming. Despite the fact that now the rights to all types of real estate are registered in the State Register of real rights to real estate, there is a «layer» of objects, which history includes «dark spots» and information of which is only on paper, and their authenticity can be put under doubt. The mentioned risks should not negatively affect further development

of the real estate market in Ukraine and should, at least partly, be compensated by the national insurance system of the relevant risks.

During the implementation of the title insurance contract construction in practice, the level of a legal culture of the participants of the domestic property turnover, should be taken into account, which, combined with the economic crisis situation in our country, creates some problems. Non-regulation of the investigated relations leads to the use of illegal schemes on the primary and secondary real estate markets, which would have intensified the use of insurance protection instruments. At the same time, this does not happen, because of the caused by the crisis decrease in the growth of revenues of the civil relations participants, forcing them to save on insurance protection of their rights and legitimate interests.

Considering the abovementioned, the title insurance contract construction is very promising in terms of the possibilities of its application in the property turnover of Ukraine. As the main priority of its quick and wide implementation in the domestic insurance services market, an immediate consolidation of the legislative provisions, defining the basic principles of legal regulation of this important sphere of insurance relations, should be considered.

Published: Право і суспільство. – 2016. – № 6. – С. 55–61.

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UDC 347.122

DERIVATIVE SUIT AS AN INSTRUMENT TO PROTECT CORPORATE RIGHTS

Starting from May 2016, a new instrument to protect owners of corporate rights from illegal actions and/or lack of actions of company's authorities has appeared in Ukrainian law. The essence of such instrument is to authorize participants (shareholders) that own small stock of interests (shares) in the charter capital of the company (minority shareholders) to bring a suit on behalf of the company against its management that is usually controlled by majority shareholders and acts in their interests. The problem when management and the company's majority shareholders abuse their rights caused the necessity to develop respective legal mechanisms to provide respect for minority shareholders' rights as well as respective instruments of procedural influence on company, the willpower of which, as a rule, is identified with the willpower of management appointed by the majority shareholders.

As it is stated in juridical literature, it is necessary to authorize minority shareholders to represent legal entity in legal proceedings in order to give them an opportunity to sue on its behalf, despite the company's authorities and its majority shareholders unwillingness or their resistance. Minority shareholders are able to cope with this role better than others are. If authorities of legal entity commit violations with the consent of majority shareholders or even on their initiative, minority shareholders are interested in and have «interest» to terminate such violations and to overcome their negative consequences[1].

The «place» of origin of the so-called «derivative suit» is traditionally considered by the scientists as countries with common law. The establishment of such institute is connected with the process of dividing shares among a huge number of shareholders when a single owner of the

[1] Попов Ю. Похідні (непрямі) позови: іноземний досвід та українські перспективи. – Українське комерційне право. – 2012. – № 12. – С.55–65.

company disappears and the management is concentrated in the hands of managers who from time to time act in their own interests, but not in the interests of shareholders who appointed them.[1]

Thus, in 1855 the United States Supreme Court in its decision related to the case Dodge V. Woolsey[2] stipulated that *«it is now no longer doubted, either in England or the United States, that courts of equity, in both, have a jurisdiction over corporations, at the instance of one or more of their members; ... if acts (actions of authorities – A. K.), intended to be done, create what the law denominate as a breach of trust».* As stated by the decision, the notion «shareholder's derivative action» or «derivative suit» was not mentioned. This notion appeared much later.

According to the very fitting phrase of one of the leading American lawyers in the field of corporate law Magnuson R. J., addressing the derivative suit – *«abused minority received the mantle of the company in order to fix violation caused by those who temporary control the fortune of the company»*.[3] At the same time, the case Cohen v. Beneficial Indus. Loan Corp.[4] gave another very fitting phrase according to which the participant who brings a derivative suit, «steps into corporation's shoes».

From the time when the institute of derivative suit first appeared and until today, it serves as an effective mechanism to fight against management and majority shareholders who violate interests of legal entity in countries such as the USA, Great Britain and in most countries of the European Union. In order to support such conclusion, it is necessary to analyze the latest court cases according to which the companies were forced to pay shareholders significant amounts of money in order to settle cases initiated by the minority shareholders against the company's management.

In October 2011, the shareholders of Southern Peru Copper Corporation recieved 1,263 billion dollars from the company due to the fact that in 2005 it acquired mining company Minerva México on terms that the court considered as unfair.[5]

In another particular suit brought by shareholders to the Head of New Corp. in 2013, the court approved a settlement agreement according to which the company agreed to pay compensation for 139 million US dollars to the plaintiffs.[6]

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[1] Follow the link http://lawmix.ru/commlaw/380/ // Журбин Б. А. Групповые и производные иски в судебно-арбитражной практике.

[2] Dodge v. Woolsey, 59 U. S. 331 (1855) http://caselaw.lp.findlaw.com/scripts/getcase.pl?navby=case&court=us&vol=59&invol=331

[3] Magnuson R. J. Shareholder Litigation. – 1992. § 8.01. Цитується за: Swanson C. Juggling Shareholder Rights and Strike Suits in Derivative Litigation: The ALI Drops the Ball. // MINN. L. REV. – 1993. – v. 77. – P.1339–1392 (At P.1344) http://law.hamline.edu/workarea/downloadasset.aspx?id=1533&libID=1537

[4] Cohen v. Beneficial Indus. Loan Corp., 337 U. S. 541, 548 (1949).

[5] Follow the linkhttps://www.lexisnexis.com/legalnewsroom/corporate/b/blog/archive/2011/10/17/delaware-chancery-court-enters-1–263-billion-shareholders-derivative-suit-award.aspx?Redirected=true

[6] Follow the link http://www.dandodiary.com/2013/04/articles/shareholders-derivative-litigation/do-insurance-to-fund-entire-largest-ever-139-million-news-corp-derivative-suit-settlement/

In 2015, the Federal Judge of California (the USA) approved a settlement agreement for a case initiated by the derivative suit brought by the shareholders of Hewlett Packard against management of the company. It was based on the unsuccessful acquisition of British computer company Autonomy Corp. As the result, Hewlett Packard agreed to pay compensation for 100 million US dollars to the plaintiffs.[1]

Speaking about Ukraine, the grounds and trends to introduce legal mechanism for derivative suit have existed a long time before the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Related to Investors' Rights Protection» as of April, 7, 2015 No. 289-VIII (hereinafter – **The Law On Investors' Rights Protection**) was drafted. It came into force on May 1, 2016, allowing the use of derivative suit. The Decision of the Constitutional Court of Ukraine No.18-рп/2004 as of December 1, 2004 (case on the interest protected by law) can be illustrative in this regard. The findings state that the *shareholder may protect his right and legally protected interests through application to the court in case if they have been infringed, challenged, unrecognized by the company he is a member of, authorities or other shareholders of this company.*[2] The same decision stated that the procedure of legal protection initiated by anyone, including third persons, of rights and legally protected interests of the company that cannot be considered as identical to the complex of individual legally protected interests of its shareholders is stipulated by the law. In the view of this, there was no definite answer related to the right to apply to the court with a derivative suit.

Later, court practice demonstrated different positions on this topic and the abovementioned decision of the Constitutional Court of Ukraine did not have definite interpretation. For instance, p. 11 of the Resolution of the Plenary Assembly of the Supreme Court of Ukraine «On Court Practice of Corporate Disputes Consideration» as of October 24, 2008, No. 13 states that *the law does not provide the right of the shareholder to apply to the court to protect rights of the company, the court should define whether the applicant enjoy the subjective substantive right or legally protected interest for protection of which the application was made, as well as to discover the existence or absence of the fact of their infringement or challenging.*[3]

Lack of legal regulation and unique legal position on the issue made it impossible for Ukraine to develop such an effective mechanism to protect rights of minority shareholders as derivative suit. Thus, introduction of such institute in terms of legislation is considered by the business society as a positive step in the field of corporate relations protection.

[1] Follow the link http://www.law360.com/articles/665398/hp-reaches-100 m-securities-settlement-over-autonomy-buy

[2] Follow the link http://zakon2.rada.gov.ua/laws/show/v018p710–04 /Decision of the Constitutional Court of Ukraine No.18-рп/2004 as of December 1, 2004

[3] Follow the link http://zakon3.rada.gov.ua/laws/show/v0013700–08 / Resolution of the Plenary Assembly of the Supreme Court of Ukraine «On Court Practice of Corporate Disputes Consideration» as of October 24, 2008, No. 13

At the same time, there are many conditions still not fully regulated or regulated partially. This can potentially restrain the development of such progressive mechanism to protect rights of participants in corporate relations and in some cases even create conditions for abuse.

For instance, nowadays issues related to the status of parties of the legal proceedings initiated by the derivative suit strives for better regulation. According to the Law on Investors' Rights Protection, the participant (shareholder) on behalf of the company that according to its procedural status is a plaintiff applies the derivative suit. The law stipulates certain restrictions related to the range of participants (shareholders) that enjoy the right to apply to the economic court on behalf of the company with derivative suit to compensate damage caused by illegal actions or lack of actions of the authorities of such company. The law grants such a right only to a *participant (shareholder) of the company who owns 10 and more percent of its charter capital (ordinary shares).*

In addition to this, the Law on Investors' Rights Protection and the Economic Procedure Code of Ukraine (hereinafter – the **«EPC of Ukraine»**) do not reference the fact whether the group of participants (shareholders) of the company who only jointly own 10 and more percent of its charter capital (shares), enjoy the right to apply a derivative suit.

Other questions remain unclear as well, namely, how a group of such participants (shareholders) of the company should appoint their representative, how his powers should be proved, whether participants (shareholders), who formed such a group, have a possibility to change their decision to be its member after the derivative suit has been initiated or when the decision to choose/appoint the representative has been made etc.

Unfortunately, Article 28 of the EPC of Ukraine remains silent on this. It only provides certain rules for cases, when one company in legal proceedings has a few representatives, determining *consensus omnium* principle as an obligatory condition to exercise the right of the economic proceedings' participant, namely, to withdraw from the suit, to reduce the amount of demands under the suit, to amend the subject or the ground of the case, to enter into settlement agreement, to refuse from appeal claim or cassation. Herewith, such joint agreement between the participants should be put in black and white.

It is necessary to mention that establishing certain criteria and requirements to the owners of corporate rights that enjoy the right to apply a derivative suit against authorities of the company is relatively widespread practice in other countries as well. For instance, in Austria, Bulgaria, Hungary, Sweden like in Ukraine, the participant (shareholder) of the company who owns 10% of the charter capital enjoys the right to apply to the court with derivative suit. In Czech Republic, Italy and Spain this census is equal to 5%, in Germany the owner of the corporate rights who owns at least 1% of the charter capital or part, the nominal value of which is equal to 100 000 euro enjoys the right to apply to the court with derivative suit against the management of the company. In Japan,

it is necessary to own one share in order to do this. However, there is a minimum term for its ownership that is equal to six months. At the same time, Great Britain does not provide any requirements to minimum amount of interests (shares) that the participant (shareholder) should own, thus, any participant (shareholder) of the company may initiate such a suit.

Establishing certain criteria and requirements to the participants (shareholders) who enjoy the right to apply with a derivative suit against the authorities of the company is aimed at providing management and majority owners (shareholders) of the company with certain guarantees to be protected from abuse by unfair minority owners (shareholders) of the company who initiate derivative suit in order to achieve unlawful enrichment. Such practice of legal blackmail is quite widespread in the world. It is commonly referred to as «strike suits». The main aim pursued by the participants (shareholders) of the company, applying with the derivative suit against its management, is not the restoration of rights and/or compensation of damages to the company, but receiving bailout from the legal entity to terminate legal proceedings. There are even categories of such «moneymakers» deliberately purchasing shares of the company in order blackmail it if they see the ground for such an unlawful action.

Different legal systems provide different mechanisms to prevent such abuses. For instance, in Japan, the shareholder who applies derivative suit should own shares of the company during the term that is not less than six months. In Germany, the interests (shares) should be purchased before the participant found out about infringement of his rights. Unfortunately, in Ukraine the lawmaker did not provide protection mechanisms, except minimal amount of shares in the charter capital of the company to own. Therefore, there is a chance that institute of the derivative suit may be used with unfair purposes.

Another not less interesting peculiarity of Ukrainian legislation that needs better regulation by the Law on Investors' Rights Protection and EPC of Ukraine is the issue related to the defendant in cases initiated based on derivative suits.

According to the Law, the defendant in this category of cases is the authority (including the terminated ones) the suit on compensation of damages caused to the company by its actions or lack of actions was brought up against. In addition to this, such an authority is unable to represent the company and to appoint the representative to take part in the case on behalf of the company (p.10 of Article 28 of the EPC of Ukraine).

At the same time, for the reasons unkwown the lawmaker left without attention a range of key issues that have influence on financial and procedural essence of claim against the authority. In particular, the law does not provide against which authorities of collegiate authority of the company exactly (supervisory board, board of directors, head office etc.) the suit to compensate damages caused by the certain decision of such collegiate authority should be brought.

There is particularly topical and difficult issue in cases when the decision was taken by the collegiate authority and the voting occurred without unanimous consent.

From the practical point of view, there is another important peculiarity, namely providing legal evaluation of the situation when the suit was addressed to the authority that acted to perform decision of another body of the company (for instance, when suit to compensate damages was brought to the Chairman of the Board of the company who signed agreement to execute the respective decision for the Supervisory Board of the company etc.).

Another issue that is worth paying attention to is one related to the subject of the derivative suit. According to the legislation, it can be a claim to compensate damages caused by the illegal actions or lack of actions of the authorities. Taking into account all the above mentioned, it is obvious that in cases initiated at the result of the derivative suit all four components of the civil violation are subject to be proved: illegal actions, guilt, negative consequence (damages) and casual relations between illegality and damages.

Moreover, the law does not regulate definitely the court competency of cases initiated at the result of the derivative suits. Thus, according to the provisions of Article 12 of the EPC of Ukraine, the disputes between the company and its authorities are under jurisdiction of economic courts. Moreover, according to Article 16 of the EPC of Ukraine such category of disputes determines exclusive jurisdiction – according to the location of the legal entity.

It is fully understandable that the lawmaker kept in mind the location of respective company on behalf of which the suit is applied. But, the version of the legal norm itself (p.7 of Article 16 of the EPC of Ukraine) does not stipulate the possibility of certain conflict to appear while defining jurisdiction in case when a participant (shareholder) who was authorized to do this and who is intent to apply with a suit on behalf of the company is also a legal entity.

It is necessary to mention that neither Law on Investors' Rights Protection nor the EPC of Ukraine stipulates the procedural status of other participants (shareholders) of the company who do not support the suit of the participant (shareholder) of the company who applied it against its authority.

Therefore, taking all the aforesaid into consideration, it is safe to say that Ukraine made only its first real legal steps to recognize mechanism of right on derivative suit making restrictions to the circle of participants (shareholders) who enjoy the right to bring a derivative suit against the company's authority that caused damages to it. Nevertheless, the stated facts do not prove that eventually such range and the subject of the suit cannot be amended significantly widening it. If this issue will get regulated legislatively this will emphasize the practical importance and value of similar way to protect interests of the participants of corporate relations.

Published: Вісник Вищого господарського суду України. – № 5. – 2016.

ENVIRONMENTAL, ECONOMIC AND AGRICULTURAL LAW

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FORMATION OF ECOLOGICAL AND LEGAL SCIENCE: RESOURCE ASPECT AND ITS INTEGRATION PROBLEMS

A general problem statement. The current stage of environmental law elaboration is characterized by two opposite, although interrelated, trends: the science of environmental law perceives the need, on the one hand, to stop expansive development and provide internal structuring and differentiation, while on the other hand – to respond adequately to the changing social and economic factors, emergence of new legal regulation objects and their impacting factors, fulfillment of environmental policy objectives of different levels (international, state,

public, industrial) and orientation (internal or external). Nonetheless, being inclined to consistency, the environmental law science cannot but be sensitive to present challenges and is evolving in accordance with the needs of the society and the call of the times, involving an increasing number of new phenomena in its sphere of influence.

As researchers emphasize, from time to time any science reaches the level where it has to rethink its own essence in order to continue its evolution. This rethinking should be based, primarily, on a critical evaluation of a science's fundamental principles and validation of its methodological efficiency. Where this is the case, relevant changes of its content may be expected[1].

The European democratic community presents Ukraine with a necessity to fulfill a broad range of political, socio-economic, cultural and educational, and other kinds of «home tasks»; bringing the national legislation requirements in line with international standards; and conducting scientific, in particular legal, research in various social spheres. The research in question includes considerable scientific efforts made in environmental law with account of domestic approaches to rulemaking and foreign practices of regulating relations in the sphere of natural resource utilization and reproduction, environment protection, promoting environmental safety. In this sense, environmental legal science as a component of judicial science is of great importance to the public life.

Recent research and publications analysis regarding formation of environmental and natural resources laws, their place in the system of environmental legal science and systemic structural links is a matter for perpetual scientific inquiry. The prospects and areas of further development of environmental legal science are constantly in the focus of the leading research and educational judicial centers of our state and individual researchers, in particular A. Getman[2],

[1] Миколенко О. І. Суб'єктивні фактори, які негативно впливають на розвиток науки адміністративного права / О. І. Миколенко // Актуальні проблеми держави і права. – 2012. – № 68. – С. 453–458. – С. 455.

[2] Гетьман А. П. Витоки науки екологічного права України / А. П. Гетьман // Проблеми законності. – 2009. – Вип. 100. – С. 165–175; Ґенеза науки екологічного права: історичний аспект // Збірник наукових праць за результатами Міжнародної науково-практичної конференції «Актуальні проблеми реформування земельних, екологічних, аграрних та господарських правовідносин в Україні». – Хмельницький : Вид-во Хмельниц. ун-ту упр. та права, 2010. – С. 196–198; Гетьман А. П. Ретроспектива розвитку екологічної правової науки / А. П. Гетьман // Держава і право у світлі сучасної юридичної думки : зб. наук. праць на пошану акад. Ю. С. Шемшученка. – К. : Юрид. думка, 2010. – С. 342–347; Гетьман А. П. Витоки екологічного законодавства в наукових працях учених-юристів / А. П. Гетьман // Бюлетень Міністерства юстиції України. – 2012. – № 11 (133). – С. 38–43; Гетьман А. П. Доктрина науки екологічного права: ґенеза теоретичних досліджень еколого-правових проблем у XX ст. / А. П. Гетьман // Право України. – 2014. – № 12. – С. 143–154; Getman A. Environmental and legal science: current state and prospects of development / A. Getman // Yearbook of Ukrainian law : coll. of scientific papers / responsible for the issue O. V. Petryshyn. – 2016. – № 8. – P. 259–267.

E. Orendarets[1] and other scientists. In the aspect of forming an empiric foundation for the problem range study, it is necessary to mention systemic works by such scholars as V. Andreitsev, V. Yermolenko, M. Krasnova, N. Malysheva, M. Shulha and others. However, despite numerous research works, the said problem issues largely remain debatable.

In light of the foregoing, **the main paper objective** is a theoretical analysis of the current state of environmental law development, formation of the next stage of natural resource relations, their expansion and transformation into environmental resource management with the aim to respond adequately to differentiation and complication of structural and systemic links.

The discussion of the material. The evolution and dynamics of environmental legislation, natural resource laws is largely determined by the global and European processes and requires a continuous revision and upgrading in order to cover gaps, respond timely and adequately to modern challenges and value paradigms change etc. One of the problems is development of traditional branches of law and lines of scientific research, which in turn raises an issue of the content and structural-systemic links of these legal branches. It should be noted that some research works are marked by a scientific dissonance, when researchers, unable to withdraw from the conventional rules and standards while justifying new legal phenomena, are squeezing them into the ready-made parameters of legal ideas and approaches without a cardinal transformation of their methodological and worldview component. This situation results in legal thought stagnation, immobilization, conservative-regressive opinions and conclusions, the so-called «rope-pulling» between the branches of law. It makes sense that a famous British researcher of legal philosophy Dennis Lloyd emphasized the changeability, dynamic nature of legal thought, concluding that it is difficult to quarrel with the statement that the idea of law made an invaluable contribution into the human culture. The author believed that political instability of the contemporary world made it clear that the humanity civilization's survival would depend largely on its ability to respond adequately to new growing demands made on the essential concepts. He was sure that the agenda of the day should include the idea of a more creative approach to law than ever before[2].

On the other hand, one has to agree that the changing worldview approaches require certain revision of traditional areas of research, in particular natural resources law. It is no coincidence that the passport of the scientific discipline 12.00.06, among the research areas in the field of natural resources law, lays an emphasis on objective and subjective prerequisites for forming, developing,

[1] Орендарець О. О. Розвиток науки екологічного права : автореф. дис. … канд. юрид. наук : 12.00.06 / Орендарець Олена Олександрівна. – К., 2015. – 16 с.

[2] Ллойд Д. Идея права / Деннис Ллойд ; пер. с англ. М. А. Юмашева ; науч. ред. Ю. М. Юмашев. – Изд. 5-е. – М. : Книгодел, 2009. – 376 с. – С. 349.

and functioning of natural resources law as an independent branch of the national legal system of Ukraine and such subbranches as: energy law, land resource law, forestry law, water resource law, mineral resources utilization law[1]. Although referring energy law to the block of natural-resource branches is still debatable, it demonstrates a trend of expanding the scientific cognition subject of natural resources law, which is to not only regulate a rational use of certain natural objects, but also provide incentives for their preservation, restoration, replacement etc.

In this case, an energy law example will be most illustrative for demonstration of contradictions occurring in the course of the Ukrainian science evolution. Thus, first of all, it is worthwhile to agree with the opinion of a Russian researcher O. Gorodov who stresses that determining the domain of any branch of law, especially a complex one, is always a product of long discussion in judicial science and never produces an absolute unity of opinion as to understanding of hierarchical links between the subjects of various branches of law within the legal system as a whole. The unity of opinion is baffled by numerous factors, including existence of priority branches of law such as civil and administrative law. They are built according to a model of well-defined domains and a finite set of methods of legal impact on social relations, incorporated in these branches. According to the author, difficulty of defining the subject of energy law lies exactly in the fact that the Russian system of law already contains primary and specialized branches of law, formed as its elements, which comprise the most significant and well- structured spheres of the social reality[2]. However, as opposed to the approach established in the Ukrainian legal science, O. Gorodov maintains a position, according to which the subject matter of energy law pertains to the topics of scientific discipline 12.00.07, and this point of view is quite common for the Russian legal system.

One might jump to a conclusion that including the area of energy law into the passport of discipline 12.00.06 in Ukraine became a clear-cut solution, which would improve the standard and orientation of scientific research works, their implementation, methods of teaching academic disciplines and so on; however, in practice this does not reflect the actual situation. Thus, at the faculty of law of Taras Shevchenko National University of Kyiv, the Master training program includes the course of «Enegry Law», which is structurally divided among three departments of: environmental law, administrative law, and economic law, with the department of environmental law delivering a module of «Environmental legal problems in power engineering»[3]. The situation is some-

[1] Паспорти спеціальностей : затв. постановою президії ВАК України від 8 жовт. 2008 р. № 45–06/7 / Атестаційний процес: нормативна база // Бюлетень ВАК України. – 2009. – № 1. – С. 6–19.

[2] Городов О. А. Введение в энергетическое право : [учеб. пособие] / О. А. Городов. – М. : Проспект, 2015. – 224 с. – С. 7.

[3] Балюк Г. І. Енергетичне право України. Модуль 1: Енергетичне право України. Еколого-правові проблеми в енергетиці : робоча

what different in the National Mining University, where the said discipline is taught at the department of civil and economic law. In particular, the developed educational and methodological materials for the discipline of «Energy Law»[1] specify that the course involves a study of the following subjects: a system of the energy law of Ukraine; energy law principles; organizational-legal framework of power engineering activity; public administration, supervision, and legal regulation of fuel-power complex functioning; general provisions of alternative fuels legislation; while its basic courses include the theory of state and law; constitutional law of Ukraine; administrative law; civil law; and economic law. Moreover, it is explicitly stated that, depending on the dominating legal relations, energy law can be regarded as a sub-branch of business law. Yet the topic of «System of sources» does not even mention any regulatory acts of the environmental legal field.

Therefore, the cited example testifies to the fact that a delay in creation of theoretical-methodological and scientific-legal foundation for the new legal phenomena within the framework of the science of environmental law paves the way for scientific expansion with regard to studying not only these phenomena, but also the established system of law and its division into branches.

It is noteworthy that despite a high standard of research carried out in a variety of scientific domains, and a tribute to scientists who have formed scientific and methodological basis for their scientific disciplines, the activity of experts in various sciences leaves its stamp on their approaches to solving scientific problems, sometimes provoking one-sidedness. Nevertheless, attempts to include environmental legal relations into a system of administrative, civil, or economic law are forlorn.

As an illustration of the above mentioned, one can cite, for instance, a thesis from a doctoral dissertation defended in 2010 by R. Melnyk who, in the course of his research, concluded that relations developing in the sphere of environmental protection are mostly of public-legal nature. That is why their security and protection is performed by a special group of public administration entities, the activity of which in the sphere is regulated by the norms of general administrative law and legal standards of the sub-branch of special administrative law i.e. environmental law. The content of this law, considering a principal difference between the objects of environmental relations, can be divided into sub-branches of law of the second level: land law, water law, forestry law, faunal law, atmospheric law, waste management law, landscape law, environmental safety law[2].

навч. програма / Г. І. Балюк, Т. Г. Ковальчук, О. В. Сушик. – К. : Київ. нац. ун-т ім. Тараса Шевченка, 2012. – 47 с.

[1] Кострюков С. В. Навчально-методичне забезпечення дисципліни «Енергетичне право» / С. В. Кострюков. – Д. : НГУ, 2015. – 213 с. – С. 6.

[2] Мельник Р. С. Система адміністративного права України : дис. … д-ра юрид. наук : 12.00.07 / Роман Сергійович Мельник. – Х. : Харк. нац. ун-т внутр. справ, 2010. – 417 с. – С. 348.

In fact, the author negates almost a hundred-year history of separating from the relations of both private- and public-law nature of special relations, which were determined by their legal regulation subject – first, natural resources relations, and then environment management ones – with their internal transformation and complication, and further development on their basis of environmental law in its diversity of kinds and internal differentiation.

Similar trends are observed in economic law. Thus, G. Dzhumageldiieva in her monograph «Legal regulation of natural resources economical use» points out: «Narrow» codes (legislation), including natural-resource ones, were formed in the absence of an economic code and economic law of Ukraine. Impossibility of their inclusion into the then formulated branch-related codes rendered natural-resources legislation an air of independence and self-sufficiency, which was reflected in study programs for training lawyers. With adoption of the Economic Code of Ukraine the situation changed: there appeared an opportunity to incorporate into economic law, which includes the Code, a considerable array of natural-resource legal standards, in the first instance those regulating natural resource utilization in economic activity»[1].

Although in summation, the author is more reserved in her statements, remarking that «one of the major trends in revision of the existing paradigm of legal legislation development is ecologization of laws on ecological use of natural resources»[2]. At the same time, she is reasoning that «ecologization of laws on economical use of natural resources should be carried out not within the present resource-oriented approach, which is based on disintegration of legal standards by including them into specialized codes (Water, Land, Forest etc.), nor by arranging them in separate codified acts, oriented mostly to provide environmental protection, but rather by «coming out in a unified front», basing on the unified principles and approaches, included in the Economic Code of Ukraine»[3]. In fact, provisions of the Economic Code of Ukraine are virtually ignored, specifically its paragraph 3, Part 1, Article 4, which states clearly that relations pertaining to land, mining, forestry, and water laws, relations concerning the use and protection of plant and animal world, territories and objects of nature conservation reserve, and atmospheric air, do not pertain to the subject of the said Code regulation. That is to say, another attempt is made to extend artificially, idiomatically speaking, by hook or by crook, the subject of regulation, and to intervene into the related branches of law. Still less convincing an «educational effort» is a training guide titled «Administrative land law of Ukraine»[4].

[1] Джумагельдієва Г. Д. Правове регулювання господарського використання природних ресурсів : [монографія] / Г. Д. Джумагельдієва. – К. : Юрид. думка, 2014. – 202 с. – С. 58.

[2] Ibid. – С. 178.

[3] Ibid. – С. 178–179.

[4] Бевзенко В. М. Адміністративно-земельне право України : навч. посіб. / В. М. Бевзенко. – К. : Алерта, 2015. – 180 с.

The said guide attempts to introduce into the study process and the language of science such terms as 'administrative-land law'; 'relationship at administrative-land law'; object of administrative-land legal relations'; 'administrative discretion in administrative-land legal relations' and the like. Thus, the author of the training guide, in particular points out that in fact administrative law as if «penetrates» other branches of law, «putting in action» such legal branches as civil law, economic law, environmental law, land law, financial law, criminal law, criminal procedure law etc.[1]. To our mind, after this kind of «penetration», the legal science space may be deprived of the very mentioning of most of its law and legislation branches, except the administrative one.

In fairness, it must be said that researchers of environmental legal domain also provide grounds for that kind of interference by disputing incessantly about interrelation of environmental, land, and natural resource law, instead of forming a well-built system for regulating environmental legal relations, their hierarchical structure and grouping. On the one hand, this is an objective process, a response to new legal phenomena and challenges, which over the recent decades has come into the focus of attention of the entire humanity and our state in particular. Consequently, expansion of the sphere of environmental law regulation becomes an imperative of the time and the result of evolution and complication of environmental relations, the structure of society-nature interaction, and permanent differentiation of a legal regulation object. On the other hand, despite the fact that environmental law is a relatively new legal branch, connected largely with economic, social, and technological changes and being very sensitive to them, its drawing new relations into its orbit sometimes induces criticism in legal science, which in turn results in attempts to squeeze the emerging relations into the Procrustean bed of «traditional» categories of administrative, civil, or economic science instead of giving them independence, thus providing an impetus to their acquiring a new qualitative coloring.

An example illustrative enough is a proposal to impose an atmospheric precipitation tax, which was put forward by V. Yureskul, who believes that introduction of a tax on rain precipitation would provide for a more effective planning of rainwater treatment and utilization. The author in particular remarks that skeptics refer this tax to a category of «taxation marasmus» mockingly suggesting that alongside with the rain tax, taxes on clean air, wind, and also dumplings, pork fat and other taxes should be imposed. However, such an economic tool of rain water management already exists and is increasingly applied, for example, in Great Britain, Canada, Lithuania, Germany, Poland, the USA, Sweden and other countries. Its application stimulates introduction of elements of the so-called 'green infrastructure', which imitates natural hydrological processes,

[1] Бевзенко В. М. Адміністративно-земельне право України. – С. 5.

including rain gardens, green roofs, parks, bio-marshlands, porous sidewalks, and rain water collection for future use[1].

Without going into further debate on feasibility, purposefulness and timeliness of the above-mentioned proposal, one cannot but mention that it can serve as an explicit trend towards expansion of the subject of regulation of environmental relations and their transformation. Another, even more convincing, proof of the said trend relevancy and urgency was obtained during the roundtable discussion «Natural resources law within the legal system of Ukraine: history, modernity, prospects», held on October 30–31, 2015 at the National Academy of Legal Sciences of Ukraine. As V. Andreitsev, for instance, pointed out, to speak about the independent nature of natural resources law means, as a matter of fact, to distort the objects of that law which is likely to result in breaking their dialectic unity with landscapes and ecosystems, violation of safe conditions for conservation and protection, including prevention of negative impact on the human vital environment. The scholar further argues that the strongest social, economic, and environmental effects can be achieved in case of harmonious combination of natural resources with other components of the life sphere (biosphere), provided all problems of sustainable development are solved[2]. However, he was critical about an approach when the literature on natural resources law is focused solely on analyzing resource codes and laws, as well as processes of elaborating natural resources legislation based on traditional natural objects, while ignoring the new ones, which are increasingly involved into the sphere of environmental legal regulation, taking biological and genetic natural resources as an example.

The need for expanding environmental legal regulation was emphasized by N. Malysheva who in her report «Natural resource law must finally grow wings» stated that in the long run the natural-resource potential of the planet of Earth will be depleted and the humanity will have to look for new sources of energy, drinking water, food and the like. It means that we should look ahead, predicting future challenges proactively. New opportunities, although understudied yet, are opened by outer space and its resources, which tentatively speaking can be called potential natural resources as distinct from actual natural resources that are well explored by man and lay the foundation for the human vital activity[3].

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[1] Юрескул В. О. Щодо податку на атмосферні опади / В. О. Юрескул // Правове життя сучасної України : матеріали Міжнар. наук.-практ. конф., присвяченої ювілею акад. С. В. Ківалова (16–17 трав. 2014 р., м. Одеса) : у 2 т. Т. 2 / відп. ред. В. М. Дрьомін. – О. : Юрид. л-ра, 2014. – С. 511–513. – С. 511.

[2] Андрейцев В. І. Перспективи розвитку природноресурсового права в системі екологічного права України / В. І. Андрейцев // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 8–12. – С. 9.

[3] Малишева Н. Р. У природоресурсного права мають нарешті з'явитись крила /

In conclusion the researcher makes a point that environmental issues of space activity, specifically those related to environmental aspects of exploration of other celestial bodies' resources, should be placed in the focus of legislators' attention in the course of the initiate systematizing of an appropriate branch of law.

In this context, one should keep in mind the fact that the present situation is complicated by an ardent scientific debate on the independence and place of natural resources law both in the legal science as a whole and its environmental legal part. For example, V. Yermolenko considers that complication of the modern system of natural-resource relations, each individual resource sphere of which is based on a separate codified act, causes methodological difficulties of combining land, water, mining and other independent branches of law even within natural resource law, to say nothing of environmental law[1]. Similar positions are also maintained by I. Karakash, under whose editorship virtually a single manual of the country's independence period, titled «Natural resources law»[2], was published in 2005. The scholar believes that modern natural resources law is characterized by a number of specific and unique principles of legal regulation that testify to its independence[3].

At the same time, P. Kulynych stresses that the fact of natural resources law formation has not been proved, as long as there is no proof of forming the subject of natural resources law as a separate branch of the Ukrainian legislation. He also emphasizes that in practice land, water, forestry, mining and other individual-resource relations are established, their legal regulation being provided in full by the relevant individual-resource branches of law. Whreas in case of relations arising in connection with ecosystem structures their legal regulation is provided by the environmental law branch[4].

M. Krasnova also expresses her standpoint in relation to natural resources law objects, stating that sometimes researchers, for no good reasons, refer to the sphere of natural resources law such natural objects as forests, flora and fauna, atmospheric air,

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Н. Р. Малишева // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 132–134. – С. 132.

[1] Єрмоленко В. М. Природноресурсне право в системі права України / В. М. Єрмоленко // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 65–67. – С. 65.

[2] Природноресурсове право України : [навч. посіб. для вищ. навч. закл.] / Е. А. Бавбекова, Л. О. Бондар, Н. С. Гавриш та ін. ; за ред. І. І. Каракаш. – К. : Істина, 2005. – 374 с.

[3] Каракаш І. І. Щодо принципів сучасного природноресурсового права України / І. І. Каракаш // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 79–82.

[4] Кулинич П. Ф. Природноресурсне право як юридичний феномен: полемічні аспекти / П. Ф. Кулинич // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 111–113. – С. 113.

natural conservation reserve, recreational, health and leisure areas, as well as the ecological network, biological diversity, ozone layer, climate, which in fact are natural complexes, ecological free goods, which in accordance with regulatory requirements are to be protected and reproduced in the first place. This approach is acceptable only on condition that natural resources law is integrated into environmental law, despite the fact that the system of legal standards, meant to protect and reproduce natural resources and ecosystems, forms environmental law[1].

A direct evolutionary connection, interrelation and continuity of natural-resource and environmental relations were also noted by M. Shulga and L. Leiba, who indicate that the formation of natural resources law dates back to the 1980s, when the standards of that law used to regulate the then emerging environmental relations as well. The completeness of that branch of law was not doubted by anyone, being regarded as an independent sphere. Later on (in the 1990s), an advantage was given to environmental law, which became a priority, encompassing natural resource relations too[2].

It seems likely that one of the main reasons for the scientific discussion was provided by a paper, written by N. Kazantsev, under the title of «Natural resources law and its bounds of an integrated branch of law», in which the scientist substantiates the ideas of separation of natural resources law as a complex legal branch having a composite structure that incorporates such independent branches of law as land, water, mining, forestry and other individual-resource laws[3]. This viewpoint was met with considerable degree of approval in the legal circles of the time because it facilitated unification of approaches to utilization of various resources, standardizing them, and bringing individual branches of natural resource legislation to a different level – that of an integrated branch of law – which opened up new scientific horizons.

However, emphasizing the methodological significance of the paper in question, it is hard to recognize the fact that for about 50 years the situation has remained unchanged, and that the formation of environmental legal science should be based on the same principles as those at the time of the publication. The said standpoint was characteristic of a certain methodological stage of legal thought evolution. It has played an important part; however today it does not comply with the modern worldview concepts and legal reality, having lost its strategic role in development of science.

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[1] Краснова М. В. Сучасні реалії природноресурсного права України / М. В. Краснова // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 105–106.

[2] Шульга М. В. До питання про природноресурсове право / М. В. Шульга, Л. В. Лейба // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовт. 2015 р. / за заг. ред. М. В. Шульги. – Х. : Оберіг, 2015. – С. 208–211. – С. 209.

[3] Казанцев Н. Д. Природноресурсовое право и его пределы как интегрированной отрасли права / Н. Д. Казанцев // Вестник Московского университета. Серия 10 «Право». – 1967. – № 6. – С. 3–9.

The same concepts have been maintained by both N. Malysheva and V. Nepyivoda who held that in fact there is every reason to regard the natural-resource approach as an attempt to consider legal regulation of social relations by taking to pieces the object of these relations i.e. the environment. The approach fitted the level of knowledge of those days, providing a certain standard for legal regulation of relations concerning separate parts of the whole (individual natural resources). Yet, the efficacy of the natural-resource approach, which overemphasizes the difference between the integral parts of the environment, cannot go beyond the limits set by a globalized anthropogenic impact, or environmental changes. In other words, it is unable to offer adequate means of affecting certain properties of the whole (in this context – global environmental problems), since it is impossible to attribute them to mere qualities of component parts of the whole or their interrelation[1].

It makes sense that A. Getman, while analyzing the concept of environmental law and legislation development, indicated that: «Considering the environmental policy contents from a perspective of specific results of the declared actions implementation, it is sad to recognize that nature-consuming, energy- and raw-material-intensive type of the country's current economy determines its ranking low in development strategy. On the contrary, environmental factors should affect the economy's structuring and modernization»[2].

It is these factors, which justify, for instance, entrenchment of the environmental legal nature of the abovementioned energy law. Obviously, a further transformation of natural resources law into resource one is promising, its task being regulation of relations pertaining to natural objects, products of their utilization, and natural phenomena; setting requirements for resource economy; introduction of per unit cost of resources and other measures. Presently, a similar situation is observed in subsoil legislation that regulates the use of technogenic deposits of mineral resources, which, in effect, have lost their status of natural objects, but still possess a value to be preserved. The same is true for the waste treatment sphere, where wastes are increasingly frequently seen exactly as a potential source of resource and nature preservation.

Using the term of 'resource consumption' as a synonym of 'environmental management' is gaining currency in legal literature. Thus, for instance, a Russian lawyer I. Kalinin in his work «Legal regulation of resource consumption» makes it clear that the two notions correlate, specifying that the book is

[1] Малышева Н. Соотношение природоресурсного права и права окружающей среды: новый взгляд на старую проблему / Н. Малышева, В. Непыйвода // Государство и право. – 2007. – № 9. – С. 31–40. – С. 38.

[2] Гетьман А. П. Концепція розвитку екологічного права та законодавства як передумова забезпечення національної екологічної політики / А. П. Гетьман // Вісник Південного регіонального центру Національної академії правових наук України. – 2014. – № 1. – С. 107–114. – С. 111.

a continuation of his work on a study of the characteristic features of legal regulation of relations pertaining to resource consumption. An attempt is made to determine both systemic nature and specificity of legal mediation of social relations that make the subject of natural resources law and standards. While his first book (Natural resources law. Conceptual issues. – Tomsk, 2000) was devoted to general issues – the subject, method, principles and other basic notions and legal phenomena of the natural resources law domain, the cited paper highlights the specific features of regulatory controls over relations pertaining to exploitation of individual natural resources[1].

Therefore, with regard to the aforesaid, one may state that at the current stage, environmental legal thought needs new models and approaches to determining the system of environmental law, its subject matter and system-forming principles. In that respect, it is worthwhile to cite the work «New Approach to Environmental Law» by a Chinese researcher Lu Zhongmei who suggests quite an interesting idea, arguing that natural resources, from the ecological perspective, are an indispensable condition for the human existence and development. Due to energy, material, and information exchange, they form an ecological system of co-existence and co-wellbeing with the humanity. Considering this, natural resources are environmental resources, and we put environmental meaning into their understanding – that the natural environment as an environmental resource possesses its integrality and self-regulation[2].

Consequently, the researcher in fact makes the point that environmental relations should include not only issues of determining the natural resource status, procedure and conditions of their exploitation, but also a number of related processes, in the first place, energy and material, associated with the processes of consumption and economic management.

In the Ukrainian environmental legal science, the abovementioned viewpoint was supported by professor M. Krasnova in the context of defining natural resources law and argumentation of interrelated and interdependent character on nature-protection, nature-resource, and anthropo-protection relations within the framework of the unified system of environmental law[3].

It should be noted that the idea of extending the 'resource' category is not new in itself. Thus, a fairly well known fundamental work by N. Reimers «Ecology (theory, laws, rules, principles and hypotheses)» contains a special chapter titled «Resourcolo-

[1] Калинин И. Б. Правовое регулирование ресурсопользования : [учеб. пособие] / И. Б. Калинин. – Томск : Изд-во науч.-тех. лит., 2001. – 314 с. – С. 8.

[2] Цит. по: Хунянь Л. Концепт и взгляды на природу в экологическом праве / Лю Хунянь // Государство и право. – 2010. – №3. – С. 90–99.

[3] Краснова М.вВ. Методологічні засади сучасного екологічного права / М. В. Краснова // Вісник Київського національного університету імені Тараса Шевченка. Юридичні науки. – 2012. – №92. – С. 5–8. – С. 7.

gy», which analyzes the matters of balancing the nature, economy, natural resources, and the restrictions on their use[1].

Economic literature substantiates the existence of resource economy as a science that forms a functional mechanism in the system of social sciences, functions and interacts with economics, ecology, resourcology etc., providing research, organization, and control of exploitation of all kinds of resources. It has been observed that the current stage of Ukraine's transformation, which also shows elements of crisis recovery, requires an active development and implementation of resource utilization directly at production units. As for scientific research on resource economy, for the time being there are some unsolved problems, and namely: an ill-defined system of economic categories in the field of resource economy; lack of works that explore an economic mechanism of resource saving in a transition economy and its place in the structure of the economic mechanism; underdeveloped strategy of economic mechanism formation; and the institutional-legal basis for resource utilization needs further improvement too[2].

Economic categories are reflected in legal regulation, although in a somewhat distorted form in terms of its objectives and tasks. Thus, implementation of the said provisions has led to the situation when the Law of Ukraine «On Environmental Protection» in its Part IX «Regulation of the Utilization of Natural Resources» contains only three articles (38-40), namely: «General and Special Utilization of Natural Resources», «Natural Resources of National and Local Significance», and «Compliance with Environmental Requirements in Utilization of Natural Resources». Most researchers regard this Law as a central, systemically important act of the environmental legislation, around which its source framework is built, the provisions thereof being critical for the potential codification of environmental law.

At the same time, the Economic Code of Ukraine devotes six articles (148–153) of its Chapter 15 «The Use of Natural Resources in the Sphere of Economic Activity» to regulation of natural resource management by economic entities, specifically: «Peculiarities of Legal Treatment of the Use of Natural Resources in the Sphere of Economic Activity», «Use of Natural Resources by Business Entities», «Use of Natural Resources on the Ownership Right», «Use of Natural Resources on the Right of User», «Rights of Business Entities as to the Use of Land Resources», «Obligations of Business Entities Pertinent to the Use of Natural Resources».

It should be emphasized that with an approach, when it is the business entity and its activity that is taken as a basis for legal regulation, without considering the regulation objective, its value and worldview component is lost, affecting nega-

[1] Реймерс Н. Ф. Экология (теории, законы, правила, принципы и гипотезы) / Н. Ф. Реймерс. – М. : Журнал «Россия Молодая», 1994– 367 с. – С. 196.

[2] Ресурсономіка: теоретичні та прикладні аспекти / Б. М. Андрушків, Ю. Я. Вовк, І. П. Вовк та ін. – Тернопіль : Терно-граф, 2012. – 456 с. – С. 9.

tively the legal regulation quality. It should also be noticed that in many cases limitations of that kind are caused by artificial internal constraints to the innovativeness within the environmental legal science, stipulated by application of such traditional notions as 'natural resource management', 'natural resources', 'natural objects'. This necessitates an urgent revision of the terms, and broadening of the notions, which they denote. One of the ways should be a more active application of the terms of 'resource management', ecomanagement', 'resources', 'ecological resources', 'ecological objects' etc.

The need for going beyond the scope of the conventional terminology, embracing new phenomena and including them into an environmental economic system, has already been reflected in the related sciences and research, especially economic and natural: the notion of 'ecological resources' is penetrating gradually the working documents of international organizations; for example, in 2004, a reference book «Greenhouse Gases as Global Environmental Resource» was published[1]. The regulation prepared by the UN Food and Agriculture Organization in 1995 on the implementation of Chapter 10 of Agenda 21 «Planning for Sustainable Use of Land Resources Towards a New Approach» applied the term of 'ecological resources' and introduced an interesting separation of ecological resources from the natural ones in the land use context. It was noted that in terms of land use, natural resources are commonly regarded to be plots of land or surface climatic conditions used by local residents for economic purposes; soil and landscape elements condition; freshwater settings; as well as the state of flora and fauna, since they supply production.

To a large extent, these resources can be assessed in economic terms. It can be done regardless of their location (internal value) or according to a degree of their vicinity to populated areas (situational value).

It is commonly accepted that by ecological resources we mean those components of land, which possess their own internal value or are valued for their long-term use by man on a local, regional, or global scale. They include: biodiversity of plant and animal populations; scenic, educational, or scientific and research significance of landscapes; importance of vegetation for protection of soil and water resources in a local or a wider context; vegetation functions of a local or regional regulator of climate as a state of the atmosphere; water and soil conditions as regulators of nutrient turnover (C, N, P, K, S), as factors affecting human health, and as long-term storages countering extreme weather events; factors of human and animal disease vectors (mosquitos, tsetse flies, gnats etc.).

Ecological resources are mostly «nonmaterial» from the purely economic perspective. Within the framework of a comprehensive, holistic approach to land use planning, the division under

[1] Парниковые газы – глобальный экологический ресурс : справочник / под ред. А. О. Кокорина. – М. : WWF Россия, 2004. – 136 с.

discussion seems somewhat artificial, since ecological resources form a part of the natural resource complex. Nevertheless, it still serves the purpose of delineation of material components from non-material ones, and of dividing the components of a human vital activity system into those yielding immediate benefit at the local level and indirect-effect ones. In the context of Chapter 10, equal attention should be paid to both the groups[1].

The 'ecological resources' concept is also used in the report made by the Executive Director of the Board of Directors of UNEP «State of Environment and Contribution of the United Nations Environment Programme to Solution of Main Environmental Problems», which was prepared for the Global Forum on Environment held on the ministerial level (February 21–25, 2005, Nairobi). In particular, it is emphasized that in order to render information and data network structures active, the Intergovernmental consultative meeting called for strengthening of the national potentials to allow a more rational use of national ecological resources and productive participation in international environmental assessments[2]. In addition, it was stressed that the key problem, specifically in developing countries, lies in upgrading the collection, handling, analysis and exchange of reliable environmental data within the framework of the countries' innovative cost-effective approaches to efficient environmental resource management and participation in international environmental assessments. Therefore, it is clear that partnership programs should not be limited to assessments, but are to cover a wider scope of actions, related to monitoring of environmental situation[3]. The document uses the concepts of 'water resources', 'natural resources', 'energy resources' etc. Consequently, the point at issue is not about synonymy, but rather about broadening of traditional terms meaning, even without interpretation, and their gradual introduction into business conduct.

Conclusions of the research and prospects for further surveys. Thus, in summation, a conclusion can be made that the stage of relatively independent existence of natural resources law with its autonomy beyond the complex environmental science is over. Presently, it becomes destructive for development of both the entire field and its components, hindering their methodological progress and paving the way for expansion of

[1] Planning for sustainable use of land resources: towards a new approach // Land and water bulletin of the Food and Agriculture Organization of the United Nations. – 1995. – №2. – 60 p. – P. 6.

[2] Состояние окружающей среды и вклад Программы Организации Объединенных Наций по окружающей среде в решение основных экологических проблем : доклад Директора-исполнителя Совета управляющих Программы Организации Объединенных Наций по окружающей среде : документ UNEP/GC.23/3 [Электронный ресурс] / Организация Объединенных Наций. – Режим доступа : http://www.unep.org/GC/GC23/documents/GC23-3-Russian.pdf. – 21 с. (дата обращения 15.02.2016). – С. 19.

[3] Состояние окружающей среды и вклад Программы Организации Объединенных Наций по окружающей среде. – С. 11.

researchers from other branches of law who use the internal environmental-legal debates and contradictions to prove their own conclusions about fictitious, synthesized nature of environmental law, contrivedness of its scientific problems etc. One of the ways to integrate and coordinate the natural resource component within the environmental law framework consists in switching its orientation from exclusively traditional natural objects to a more progressive and promising theory of resource or ecological-resource law that is able to combine harmoniously both traditional (established) and innovative approaches to the essence of environmental law relations, their extension and diffusion within a unified methodological approach and legal doctrine, with underlying environmental legal science goals i.e. environmental protection, use of ecological resources, and ensuring environmental safety of the humanity. The areas in question have already been reflected in works by scientists of more or less related subject matter, specifically, wastes management[1].

Published: Проблеми законності. – 2016. – Вип. 132. – С. 104–123.

[1] Зуєв В. А. Правовое регулирование обращения с отходами // Управление устойчивым развитием в условиях переходной экономики : [монография] / ред. М. Шмидт, Б. Хансманн, Д. А. Палехов, Г. Г. Пивняк, Ю. С. Шемшученко, А. Ф. Павленко, А. Г. Шапарь, В. Я. Швец, Л. Л. Палехова. – Днепропетровск-Коттбус : НГУ – БТУ, 2015. – С. 118–128; Зуев В. А. Правовые проблемы формирования права обращения с отходами и направления систематизации законодательства в данной сфере в национальном законодательстве / В. А. Зуев // Legea si Viata. – 2014. – Septembrie. – С. 50–53; Зуєв В. А. Від природоресурсного до ресурсного права: оцінка перспектив та потенціалу // Природноресурсне право в системі права України: історія, сьогодення, перспективи : зб. матеріалів круглого столу, 30–31 жовтня 2015 р. / за заг. ред. М. В. Шульги. – Х. : Вид-во ТОВ «Оберіг», 2015.

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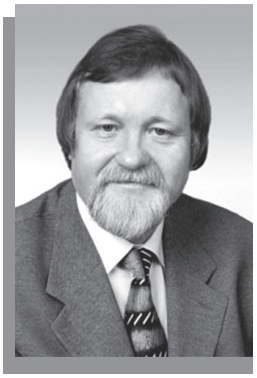

UDC 349.6

CURRENT CHALLENGES OF ADAPTING ENVIRONMENTAL LEGISLATION OF UKRAINE TO LAWS OF THE EU

A general problem statement. A course set by Ukraine for adaptation of the Ukrainian legislation to the laws of the European Union, and the actual practice of implementing environmental legal standards of international legal documents in the environmental legislation of Ukraine have created an unprecedented legal phenomenon in regulation of environmental legal relations by means of conventions and other forms of international agreements implemented in Ukraine as direct effect norms, which make up a relatively independent unit of implemented environmental legislation and sources of modern environmental law of the sovereign Ukraine.

Currently and in the long view, the science of environmental law should describe objectively the specific features of this variety of environmental law sources, the specificity of their application in the actual practice of the jurisdictional bodies of Ukraine, in particular as regards realization and protection of subjective environmental human and civil rights in the territory of the state. It is the science of environmental law that is to aim the vector of its attention onto the said aspect of the mechanism for legal regulation of the implemented in Ukraine environmental law prescripts, characterize their specific features from the educational, training, scientific, methodological, and law-enforcement perspectives, and to determine the degree of its efficiency under the actual conditions of meeting environmental challenges and their impact on forming the national environmental policy and other related policies of Ukraine.

At the same time, it should be mentioned that the said aspects of the mechanism for environmental legal regulation of environmental relations have not yet been elucidated in full in the textbooks,

manuals, training and specialized courses that are delivered at law schools which does not contribute to improvement of legal education quality, specifically that of Master programs for training of highly qualified specialists.

The academic methodological documentation in the domain is at a low level, in the first place, lacking adequate study programs and experts able to competently produce and evaluate the knowledge of the Ukrainian HEI graduates.

The relevant research sphere of environmental legal science is not abound in monographs, collective research works, trained PhDs, or doctoral theses in the scientific specialization of «Environmental Law».

It may be said without exaggeration that in the meantime a constitutional requirement to the force of Ukraine's international agreements that are part of its national legislation recognized by the Verkhovna Rada as binding (Article 9 of the Constitution of Ukraine) is not satisfied effectively, particularly with regard to the implemented Ukrainian environmental legislation.

Without doubt, the processes, which have stipulated the formation of a harmonized and implemented environmental legislation, are closely connected with adaptation of the Ukrainian law to the legislation of the European Union in the context of the country's initiative of entering the EU as an associated member.

Recent research and publications analysis. The environmental legal problem range in question is explored in a limited number of research works by environmental law scholars[1], which is obviously not enough to raise the awareness of the urgency of this field of law, its understanding and practical solution of environmental problems in the sovereign Ukraine of today.

In this aspect, the National Programme for Adaptation of Ukraine's Legislation to the EU Law, adopted by the Law of Ukraine dating March 18, 2004[2], is of fundamental significance. According to the said Law, the adaptation of legislation is regarded as a process of bringing the Ukrainian laws and other regulatory acts in line with acquis communautaire i.e. the legal system of the European Union, which includes the EU legal acts adopted within the European Community framework, in compliance with its common foreign policy, security policy and cooperation in justice and internal affairs.

The sources of the acquis communautaire system are considered to be its primary and subsidiary legislation,

[1] Малышева Н. Р. Гармонизация экологического законодательства в Европе / Н. Р. Малышева. – К.: Фірма «КІТ», 1996. – 233С.; Андрейцев В. І. Гармонізація як форма оптимізації українського законодавства: проблеми методології (еколого-правовий контекст) / В. І. Андрейцев // Вісник. Юридичні науки. Вип. 38. – К.: Держав. ун-т ім. Т. Г. Шевченка, 2000. – С. 4–14; Малышева Н. Р. Проблемы правового и организационного обеспечения развития системы экологического законодательства Украины / Н. Р. Малышева // Право Украины, 2012, № 7–8. – С. 268–290 та ін.

[2] Відомості Верховної Ради України. – 2004. – № 29. – Ст. 367; 2009. – № 23. – Ст. 280; 2011. – № 29. – Ст. 272; 2012. – № 12–13. – С. 82.

decisions made, actions and standpoints, provisions, and official publications of the European Union, which acquire a binding force in the course of adaptation of environmental laws in particular.

The category of the primary legislation among other things includes the following constituent instruments:

a) Treaty on establishing the European Economic Community of 1957; Treaty establishing the European Union of 1993; Treaty establishing the European Atomic Energy Community of 1987 with amendments introduced by the Treaty of Maastricht (on the European Union) of 1992, the Amsterdam Treaty of 1997 and the Treaty of Nice of 2001; other association acts;

b) Treaty on European Union of 1992 with amendments introduced by the Amsterdam Treaty of 1997 and the Treaty of Nice of 2001 «On Association»;

c) The Merger Treaty of 1965;

d) acts on accession of new member states.

In accordance with the above-mentioned National Programme for Adaptation of Ukraine's Legislation to the EU Law, the subsidiary legislation incorporates:

a) directives;

b) regulations;

c) decisions;

d) recommendations or conclusions;

e) legal sources in the form of international agreements;

f) the general legal principle of the European Community – the rule of law;

g) judgments of the European Court of Justice;

as well as the following sources:

a) common strategy in the sphere of foreign policy and security policy according to Article 13 of the Treaty on the European Union;

b) joint actions within the framework of common foreign policy and security policy;

c) a unified position as to common foreign policy and security policy;

d) a framework decision on harmonization of legislation in the context of the provisions of the Treaty on the European Union as regards cooperation of law-enforcement and judicial bodies on criminal cases (Article 34);

e) a unified position in the context of the provisions of the Treaty on the European Union as regards cooperation of law-enforcement and judicial bodies on criminal cases (Article 34);

f) decisions in the context of the provisions of the Treaty on the European Union as regards cooperation of law-enforcement and judicial bodies on criminal cases (Article 34);

g) a general provision or principle in the sphere of foreign policy or security policy.

The following publications also fall into the category of the subsidiary legislation of the European Union:

a) Official Journal of the European Communities;

b) European Court Reports.

The fore quoted outlines clearly Ukraine's position that is stated officially in the Fundamental Principles (Strategy) of State Environmental Policy for the Period up to 2020, approved by the Law of Ukraine of December 21, 2010

No 2818[1] «On Harmonization of Ukraine's Environmental Legislation with Some Provisions of Acquis Communautaire», that is legal requirements (primary and subsidiary) of the European Union, lest the said legislation run counter to the EU standards but rather harmonized dialectically with them both at the stage of the EU creation and that of law enforcement in all spheres, especially in activities, which are environmentally detrimental and hazardous for environmental conditions, people's health and life.

Therefore, in keeping with the above mentioned National Programme, a particular importance is attached to the process of bringing the system of environmental laws in compliance with the requirements of the EU legal system in its domain of environmental legal relations regulation.

The discussion of the material and prospects for further surveys. To certain extent, priority adaptation measures in the field of legislative regulation under the current conditions are determined by the Fundamental Principles (Strategy) of State Environmental Policy for the Period up to 2020, the analysis of which allows ranging them into several priority groups:

In the sphere of ensuring a continuous state environmental policy, its coordination with the policy of the state, branch (sector), regional, and local development. To our mind, it means a further improvement of the legislative basis for making and implementing the national environmental policy in terms of its realization i.e. state, regional, local, and object (with regard to danger sources and zones) regulation; and mechanism for tectologic, structural, instrumental, economic, and information support in normal situations and emergencies.

The point is that Ukraine has not adopted any specialized framework law as to development and implementation of its state environmental policy; therefore in this respect only some provisions of the Law of Ukraine «On Environmental Protection» of June 25, 1991[2], notably, its Preamble, paragraph «a» of Article 13; paragraph «c» of Article 14; paragraph «a» of Article 15 , paragraph «a» of Article 17 etc., and other regulatory acts of Ukraine[3], which differ essentially in their form, structure, and content and have different effect within the hierarchy of the environmental legislation of Ukraine.

However, the Ukrainian environmental policy results from internal and external environmental functions of the state and is binding for any corporate entity in the territory of Ukraine. Elaboration of basic and priority guidelines, particularly in ensuring environmental safety and maintaining ecological bal-

[1] Офіційний вісник України. – 2011. – №3. – Ст. 150.

[2] Відомості Верховної Ради України. – 1991. – №41. – Ст. 546

[3] Див. Основні напрями державної політики України у галузі охорони довкілля, використання природних ресурсів та забезпечення екологічної безпеки // Відомості Верховної Ради України. – 1998. – №38–39. – Ст. 248; Основні засади (Стратегія) державної екологічної політики України на період до 2020 року // Офіційний вісник України. – 2011. – №3. – Ст. 150.

ance, coping with the Chornobyl catastrophe aftermath, genetic preservation of the Ukrainian nation is a constitutional duty of the state (Article 16 of the Constitution of Ukraine).

Setting the guidelines of the state environmental policy is a prerogative of the Verkhovna Rada of Ukraine (Article 13 of the Law of Ukraine «On Environmental Protection» of June 25, 1991), while the authority in implementing the environmental policy of Ukraine is vested with the Verkhovna Rada of the Autonomous Republic of the Crimea, local councils of Ukraine of different levels, the Cabinet of Ministers of Ukraine.

Under these conditions, it is expedient to regulate legislatively the legal relations, which emerge in the course of forming the state environmental policy; to define the basic requirements to the policy directions, their nature, mechanisms for regulating legalization and implementation, in particular with regard to enforcement of environmental rights of citizens; to realize other components of environmental policy, specifically those pertaining to institutional, information, financial, scientific, technological, and supervisory support; achievement of basic quality and safety parameters of the environmental conditions per period of implementation; to create a system of incentive and motivating measures and legal liability of public officials and other subjects for failure to comply with the requirements of the environmental policy of Ukraine at different levels of implementation. These and other legal support mechanisms should have been formulated in the Law of Ukraine «On Environmental Protection» – in that case it would have had the title «On the Fundamental Principles of the Environmental Policy of Ukraine». Or else there should be a special Law of Ukraine titled «On the Fundamentals of the Environmental Policy of Ukraine», or the appropriate regulations could be collected in the Environmental Code of Ukraine, the norms (articles) of which should make a separate section «Environmental Policy of Ukraine».

However, considering the facts of today's life as to impossibility to pass a relevant consolidated or codified law, it is necessary to proceed from the provisions of the above mentioned Strategy that enacted environmental policy into law up to 2020, providing adaptation of the Ukrainian environmental legislation to the EU acquis communautaire standards. The more so, because the Strategy, approved by the Law of Ukraine dating December 21, 2010, has the force of a law that furthers the provisions of the Law of Ukraine «On Environmental Protection» for the specified period – at least it does not run counter to the Law as concerns legal relations regulation in the sphere of state environmental policy implementation.

To some extent, this complies with the requirements of Article 2 of the Law of Ukraine «On Environmental Protection» stating that the environmental legal relations in Ukraine are regulated by the said Law and «other special legal acts». Which prompts suggestions that the Fundamental Principles (Strategy) of State Environmental Policy for the Period up to 2020, approved by the Law of Ukraine

of December 21, 2010, No 2818, that can be referred to other special acts in the system of environmental legal relations regulation with regard to the expediency of Ukraine's integration into the European Union, specifically the country's fulfillment of its obligations as to adaptation of the environmental laws to the system of the legislative acts of the EU acquis communautaire.

Provision of a consistent environmental policy of Ukraine equally presupposes compliance with all the requirements and principles of the international convention Rio-92, so that the policy should become a factor of the country's socio-economic development, meeting the urgent needs of the Ukrainian society and individual citizens and helping create adequate living standards and well-being of the society in a stable high-quality ecologically-safe natural and social environment of people, their life-sustaining activity.

The next direction of the environmental law adaptation is considered to be monitoring and evaluation of the atmospheric air quality, particularly in terms of widespread contaminants, zoning of the Ukrainian territory, plans for improving the quality of the atmospheric air in zones and agglomerations, control of sulfur content in fuels etc.

The legislative framework for monitoring of the country's natural environment is determined by the Law of Ukraine «On Environmental Protection» of June 25, 1991 (Article 29)[1]. In particular, it envisages creation of a system for state monitoring of the environment, forecasting its changes and elaboration of scientifically substantiated recommendations for making effective administrative decisions. Monitoring of the environmental conditions was laid by the Law upon a specialized central body of executive power authorized to deal with environmental and natural-resource issues, other authorized agencies, as well as enterprises, establishments and organizations, the activity of which causes or may cause deterioration in the condition of the environment. These legal entities are obligated to submit to the competent authorities free of charge the analytical materials on their monitoring results.

The authorized public agencies together with the appropriate research institutions provide short- and long-term forecasting of the environmental condition, which should be taken into account when preparing and implementing programs and actions on environmental protection, utilization and restoration of natural resources, and ensuring environmental safety. Monitoring in the sphere of atmospheric air protection is envisaged by a special Law of Ukraine «On Atmospheric Air Protection» of October 16, 1992, with amendments[2].

The said monitoring is carried out with the aim of collection, storing, and analysis of data on pollutants release and air pollution level, evaluation and forecasting its change and hazard rate in order to develop scientifically substanti-

[1] Відомості Верховної Ради України. – 1991. – №41. – Ст. 546.

[2] Відомості Верховної Ради України. – 1992. – №50. – Ст. 678; 1995. – №19. – Ст. 85; 2001. – №48. – Ст. 252; 2004. – №36. – Ст. 434 та ін.

ated recommendations as to making decisions on air protection.

This kind of monitoring is part of the state system for monitoring the environment. The procedure of its organization and carrying out is established by the Resolution of the Cabinet of Ministers of March 9, 1999, No 343 with amendments[1].

According to this procedure, the objects of atmospheric air monitoring are as follows:

a) atmospheric air, including atmospheric precipitation;

b) emissions of pollutants into the atmosphere.

The subjects of atmospheric air monitoring are assigned to be the Ministry for Environmental Protection and Nuclear Safety of Ukraine, Hydro-meteorological Committee, State Sanitary and Epidemiological Service, their local bodies and companies, institutions, organizations, the activity of which causes or may cause deterioration of the atmospheric air condition. This monitoring is carried out by the Ministry for Environmental Protection and Nuclear Safety of Ukraine jointly with other subjects in accordance with the Program of monitoring the atmospheric air in Ukraine and the relevant regional (local) programs.

Subsequent to the results of monitoring the atmospheric air, the above mentioned subjects receive initial emission research data and observations over pollution, and also summarized data on pollution rate in a certain territory over a specified period of time, summarized data on composition and volume of pollutants release. Evaluation of contamination level and degree of danger for the environment and life-sustaining activity of people, composition and amount of released pollutants is carried out. During the monitoring, it is compulsory to detect the presence of widespread contaminants in the atmospheric air. Values and ingredients of atmospheric precipitation are determined, based on the index of substances provided in the Appendix to the above mentioned Regulation of the Cabinet of Ministers of Ukraine, and namely: dust, sulfur dioxide, carbon monoxide, nitrogen dioxide, lead and its inorganic compounds, benzopyrene, formaldehyde, a list of radioactive substances etc.

In the present context, a special emphasis is laid on reduction of anthropogenic impact on the climate and ozone layer protection. The point at issue is adaptation of the environmental laws, in accordance with Directive 2003/87/EC, on adoption of a scheme to reduce greenhouse gas emissions while doing business within the European Community, and on introduction of amendments into Council Directive 96/61/EC, supplemented by Directive 2004/104/EC[2].

[1] Див.: Екологічне законодавство України. В 4-х книгах. Кн.: 2. За загальною редакцією та вступною статтею акад. В. І. Андрейцева. – К., Слово. – 2007. – С. 543–546.

[2] Див.: Пропозиції до Базового плану адаптації екологічного законодавства до законодавства Європейського Союзу (Юридичні аспекти), підготовлені групою експертів України та ЄС за підтримки Шведського агентства з охорони навколишнього середовища відповідно до Угоди про асоціацію між Україною та ЄС, згідно з Прогресивним планом адаптації законодавства України до за-

In this domain, it is proposed to prepare a draft Law of Ukraine on the fundamentals of the state policy to control the negative anthropogenic impact on the climate. It is suggested to obligate the applicants to carry out monitoring and report on greenhouse gas emissions; vest an authorized body with full powers to revise, no less frequently than once every five years, the appropriate permits and established procedures for introducing changes to such permits; procedures for an auction sale of quotas for industrial gas emissions within the borders of Ukraine for stationary emission sources (sources of enhanced environmental hazard); adoption of a partial auction procedure for sale of industrial gas emissions quotas for aircraft operators, and granting other free quotas; formalizing in legislation the procedure for allocating funds from auctioning quotas; regulation of the procedure for making amendments in emission permits by entities that terminated the use of polluting facilities; working out regulations for domestic trade in greenhouse gas emission quotas, pursuant to Directive 2003/97/EC on adoption of a scheme for reducing greenhouse gas emissions[1].

The Ministry of Natural Environment Protection of Ukraine was suggested to be the principal law drafter.

Additionally, it was proposed to elaborate and adopt the relevant resolutions of the Cabinet of Ministers of Ukraine on establishing the procedure for the use of emission reduction indices by aircraft operators and their certification; and setting the allowable emissions of greenhouse gases for the functioning and potential objects (sources of danger).

In compliance with Regulation (EU) No 842/2006 on fluoride greenhouse gases, it is supposed to adopt regulatory acts that would help create a procedure of making incentives for prevention of fluoride greenhouse gas emissions, which are not controlled by the Montreal Protocol on substances depleting the ozone layer, and requirements to quick (immediate) elimination of any detected emission of those gases; to establish a procedure for disposal of fluoride greenhouse gases, which are not controlled by the Montreal Protocol, and their recovery; to fix a procedure for the operation of a system of marking hazardous substances and preparations, products and equipment that contain fluoride greenhouse gases, which are not controlled by the said Protocol, and a procedure for control of the use of fluoride greenhouse gases, which are not controlled by the Montreal Protocol on substances depleting the ozone layer[2].

In this regard, it is deemed necessary to establish a procedure for placement of products and equipment, which contain fluoride greenhouse gases, or the functioning of which is dependent on the gases that are not controlled by the Montreal Protocol on substances depleting the ozone layer, listed in the Appendix II to Regulation (EU) No 842/2006;

конодавства Європейського Союзу, схваленого на засіданні Координаційної Ради з адаптації законодавства України до законодавства ЄС 9 березня 2010 р. – 41 с.

[1] Вказ. документ. – С. 31.

[2] Вказ. документ. – С. 32–33.

a procedure for reduction of emissions and use of fluoride greenhouse gases, which are not controlled by the said Protocol; a procedure for marking and disposal of wastes from the equipment that contains fluoride greenhouse gases, which are not controlled by the Montreal Protocol, and marking that equipment and products; a procedure for recycling of fluoride greenhouse gases, which are not controlled by the Montreal Protocol, and a procedure for arrangement of a reporting system to obtain data on fluoride greenhouse gases emissions, which are not controlled by the said Protocol.

It is necessary to provide education and certification of personnel whose work is connected with the use of fluoride greenhouse gases, which are not controlled by the Montreal Protocol.

There is a need to adapt regulatory acts of Ukraine in furtherance of Regulation (EU) 2017/2000 on substances depleting the ozone layer with amendments and additions of Regulations (EU) 2038/2000; 2039/2000; 1804/2003; 2077/2004; 29/2006; 1366/2006; 1784/2006; 1791/2006; 899/2007; 473/2008 and others[1].

As regards establishing a procedure for arrangement of the record of ozone-depleting substances level of output, a procedure for gradual replacement of those substances, a procedure for functioning of a monitoring system for management of ozone-depleting substances regulating bans on production, supply, and complete usage of halogen-containing substances, carbon-tetrachlorides, trichlorethanes, hydro-bromofluorocarbons, control over the use of chlorofluorocarbons in aerosols and as solvents, cooling liquids, chemicals for manufacture of various foams, carrier gases for sterilizing agents in closed systems, and for other purposes, and also determining their possible uses.

Regulatory acts of that kind should establish return procedures for reprocessing, recuperation of the controlled substances during repair and operation, disassembly and removal of equipment; providing monitoring and checking of running out and emission of the controlled substances; outlining measures to prevent the controlled substances release; annual reporting of enterprises on the controlled substances production, use, export and import.

Certain adaptation of the environmental laws of Ukraine is expedient with regard to regulating the use of genetically modified organisms in order to bring the legislation in line with Directive 2001/18/EC on deliberate release of GMO into the environment, which repeals Council Directive 904/220/EU with amendments and additions, introduced by Commission Decision 2002/623/EU, Regulation (EU) No 1829/2033 and 1830/2003[2], specifically, by way of making changes in the Law of Ukraine «On the State System of Biosafety in Creation, Testing, Transporting, and Use of GMO» of May 31, 2007 No 1103[3].

[1] Вказ. документ. – С. 34.

[2] Вказ. документ. – С. 35.

[3] Відомості Верховної Ради України. – 2007. – №35. – Ст. 484.

This concerns, first and foremost, the terminology of the said Directive requirements, notably, a univocal interpretation of the term of 'placement in the market' [underlined by the author], harmonizing the procedure of state sanitary and epidemiological expert survey and entering GMO and products produced with their use on the survey list for evaluation of their hazard for the environment, human health and life.

It is also intended to harmonize the procedure of placing GMO in the commodity market; to adapt a list of information items and documents that have to be submitted together with a request during the registration procedure provisioned by the said Directive; to fix a clear-cut procedure for post-registration monitoring of GMO release; to specify provisions that relate to confidential information as per Article 25 of the Directive, and provide an effective mechanism of access to that information and public participation in making decisions on genetically modified organisms release into the environment and their placement in the market according to Articles 9, 15, 23, 24 of the Directive with specification of authorized government bodies.

It is proposed to introduce the relevant changes to subordinate legislation with the aim of the Directive transposition, and to revise and clarify the Ukrainian translation of the Directive in view of adoption of new laws.

The next point relates to adapting the provisions of Regulations 1829/2003 and 1830/2003 on tracking and marking GMO, foods and feeding stuffs containing GMO, which introduce changes to Directive 2001/18/EC[1].

In particular, it is suggested to amend the Law of Ukraine «On the State System of Biosafety in Creation, Testing, Transporting, and Use of GMO» of May 31, 2007 No 1103 as to tracking and possibility of using the requirements of the said Regulation.

Secondly, it is proposed to redraft the Resolution of the Cabinet of Ministers «On the procedures of labeling (marking) foods that contain genetically modified organisms or produced with their use and put in circulation» of May 19, 2009 No 468, so that its provisions mediated placement in the market of all products produced with the use of GMO.

In order to introduce an effective labeling mechanism, a possibility is considered to use the unique ID-numbers, applied in the EU, in the Ukrainian goods marking and labeling system.

There is also a task of harmonization of the practice of checking (inspection) and control in the said sphere with the requirements of Article 9 of Regulation 1830/2003, in particular, as to adopting the current mechanism of liability for violation of laws on consumer rights protection, and analyzing application of other provisions of the Regulation for the purpose of making changes in subordinate legislation of Ukraine.

In this aspect, a special importance is attached to adaptation of the Ukrainian legislation as regards its approximation to the legal framework of Regulation 1946/2003 «On Transboundary

[1] Вказ. документ. – С. 36.

Movements of GMOs» by way of making amendments in the Law of Ukraine «On the State System of Biosafety in Creation, Testing, Transporting, and Use of GMO» of May 31, 2007 No 1103[1] as to establishing a subsystem for notification and information about GMOs transportation, movement, procedures of their export from the customs territory of Ukraine, and measures to prevent uncontrolled transborder movement of GMO[2].

Another proposal is to make and implement a separate subordinate legal act determining the procedure of GMO export from the customs territory of Ukraine in compliance with the said Regulation.

Based on the above considerations, the Ministry of Ecology and Natural Resources of Ukraine is proposed to develop and adopt a departmental regulatory act concerning Ukraine's participation in the international procedure for providing information according to the provisions of the Cartagena Protocol on Biosafety and the Convention on Biological Diversity, signed by Ukraine on June 11, 1992 and ratified by the Law of Ukraine of November 29, 1994[3].

However, to our opinion, such supplements to the environmental legislation should not appear in the form of a subordinate law, but rather as an addition to the law of Ukraine «On Environmental Protection» of June 25, 1991.

Directive 2009/41/EC «On the Contained Use of Genetically Modified Organisms» stipulates introduction of the appropriate changes into the Law of Ukraine «On the State System of Biosafety in Creation, Testing, Transporting, and Use of GMO» of May 31, 2007 No 1103 as to regulation of the use of GMO in a closed system from the perspective of protection of human health and the environment, classification of genetically modified organisms, measures for their maintenance, modification methods, principles of an adequate microbiological practice, occupational safety and health[4].

With these considerations in mind, pursuant to the Directive requirements, it is planned to develop and adopt the Procedure for licensing genetic-engineering activity and handling of GMO (GMM) in a closed system, or alternatively, to introduce amendments and additions into the Law of Ukraine «On Licensing of Certain Types of Economic Activity» of June 1, 2000 No 1775-III, and accordingly, to supplement the resolution of the Cabinet of Ministers «On Approval of the List of Documents to be Attached to the Application on Issuance of License for Certain Types of Economic Activity» of July 7, 2001 No 756 with a clearly defined range of entities whose activity is subject to licensing.

When making the above changes and additions, it is advisable to take into account the provisions of Directive 2009/41/EC[5] as to evaluation (Article 4 Appendix III) and enactment of procedures for informing competent bodies (Articles 6–9 and the relevant Appen-

[1] Вказ. документ. – С. 37.
[2] Вказ. документ. – С. 38.
[3] Відомості Верховної Ради України. – 1994. – №49. – Ст. 433.
[4] Вказ. документ. – С. 39.
[5] Вказ. документ. – С. 39–40.

dices to the Directive), an emergency plan (Article 18), information and response in emergencies (Articles 14–15), and confidentiality of information (Article 18).

At present, it is expedient to amend and clarify the Resolution of the Cabinet of Ministers «On Approval of Provisional Safety Criteria for Handling Genetically Modified Organisms and Realization of Genetic-engineering Activity in Closed Systems» of October 16, 2008 No 922, and to consider the need for revision of the branch-specific legislation of Ukraine in the context of the Directive regulatory requirements.

Also, it is deemed expedient to introduce amendments related to the above regulatory acts, taking into account the Directive provisions (Appendix I), and to make a stricter translation of the Directive into Ukrainian.

Adaptation of the environmental legislation of Ukraine presupposes improvement of legal regulation and management of waste in accordance with Directive 2008/98/EC[1], specifically, by means of drafting a law on waste or amending the Law of Ukraine «On Waste» of March 5, 1998 No 187[2] with changes and additions, aiming to agree on terminology and recognize it legislatively, to classify wastes, operations with wastes, application of a five-step waste management hierarchy, especially when dealing with wastes that are highly dangerous for human health and life, and the environment.

In addition, there are other issues requiring enactment, namely: management of byproducts with criteria for their classification; legal regime indices or groups of indices, and legal regime termination, in particular, passing of byproducts into the category of recyclable material (resource) etc.; measures to prevent waste generation, and introduction of strict liability of producers for unreasonable generation of waste; product design considerations reducing a negative impact on the environment during manufacture and use.

Under the current conditions, a special practical importance is attached to approximation of the environmental laws, especially those on waste, to the requirements of Directive 2008/98/EC by making a new codified legal act, or amending the effective Law of Ukraine «On Waste» of March 5, 1998 No 187.

Certain terminological corrections are proposed in line with the requirements of the said Directive, among other things, in regard to types of wastes, waste management operations, a list of management subjects, introduction of «waste dealer» and «waste broker» categories etc.

Another point at issue is formalizing in the Ukrainian environmental legislation of the principal approaches to introduction of the five-step waste management hierarchy for addressing waste management issues; standards of management, which would regulate byproducts specification and their differentiation criteria; setting indices for the waste regime; measures to prevent waste formation and introduction of strict liabil-

[1] Вказ. документ. – С. 9.

[2] Відомості Верховної Ради України. – 1998. – №36–37. – Ст. 242.

ity of producers for unreasonable generation of waste; drawing plans of waste management and programs for prevention of waste formation; product design considerations reducing a negative impact on the environment during manufacture and use; measures to stimulate development, production, and marketing of reusable, technically durable products qualified for adequate and safe reclamation after they enter into the state of waste, disposal of which does not harm the environment and human health.

Classification of wastes, criteria and list of dangerous wastes, elaboration of new regulatory acts or additions to the effective laws on utilization of certain types of wastes (biowaste, waste oils, used car tires etc.) also need legal clarification.

Other matters subject to revision are legal regulation of a system of permits and registration of waste management subjects, and amendments in the legal acts of Ukraine that regulate the said procedures.

Drafting and adoption of a regulatory act on keeping public registers of all business entities managing waste (shippers, waste recovery operators, producers, their dealers and brokers in waste management) is topical too.

Appendices to the Directive require a special revision and analysis in order to make alterations and additions in relation to inclusion of innovations into the effective environmental legislation, and correction of the Directive translation into the Ukrainian language.

The time has come to adapt the environmental legislation of Ukraine to the Council Directive 1999/31/EC of April 26, 1999 «On Waste Burial», notably with regard to financial guarantees of an applicant in obtaining a burial permit, ban on burial of certain types of waste, regulation of the procedure of taking wastes for burial, planning measures aimed at control and monitoring during operation, burial costs, procedure of sealing wastes and implementing a series of measures as to sealed waste burial sites, bringing such sites in compliance with the requirements of the Directive, or their inactivation[1].

It is important to make provisions in the Ukrainian legislation – both the effective Law and new draft laws – for classification of disposal burial grounds; to adapt the existing terminology describing this type of managing waste, in particular highly dangerous, and to make the relevant changes in the subordinate legislation of Ukraine, standards, norms, and rules (sanitary).

A draft law on management of extraction industry wastes is of special significance necessitating harmonization with the requirements of Directive 2006/21/EC of March 15, 2006 on managing wastes of extracting enterprises, which introduced changes to Directive 2004/35/EC[2].

In the first place, it concerns the revision of an authorization procedure for waste treatment facilities' location and functioning with account of possible transborder impact, an information system and forms of public participation in the sphere, with a special emphasis laid

[1] Вказ. документ. – С. 12.
[2] Вказ. документ. – С. 12–13.

on classification of waste treatment facilities (as per Appendix III to the Directive) and professional scrutinizing of the said act.

Currently important issues are amendments to the Code of Ukraine «On Mineral Resources» of July 27, 1994[1], Mining Law of Ukraine of October 6, 1999 No 1127-XIV[2], the Law of Ukraine «On Waste» of March 5, 1998 No 187[3] proper, and related to it subordinate legal acts on managing extraction industry waste, aiming to transpose the Directive and harmonize with it terminologically.

It is supposed that there will be an essential approximation of other laws and subordinate legal acts of natural-resource block of the environmental legislation, in particular, adaptation of the Water Code of Ukraine[4] to Directive 2000/601/EC in the water policy sphere with amendments and additions, introduced by Decision 2455/2001/EC.

The pivotal issues of implementing the water policy of Ukraine still remain watershed management and authorization in this view of a competent body to manage watersheds, bringing «Surface Waters» and «Ground Waters» sections of the State Water Cadastre in compliance with the Directive requirements.

It is also suggested to draft and adopt a relevant regulatory act in the form of the Regulation on watershed management of water resources with authorization of nominated managing bodies to perform the functions set by the Directive.

For the purpose of adequate introduction of the watershed management, it is advisable to recognize legislatively the zoning of the Ukrainian territory on the above principle; to identify the units of the hydro-geographic zoning of Ukraine based on location of rivers; to provide a relevant institutional structure of water resource management with account of the existing water bodies; to develop and fix legislatively criteria for evaluation of river basins condition; to introduce a regulation on river basin management spheres and methods of their preparation, as well as programs and measures set by Article 11 of the Directive.

In an effort to work out in detail the approximation of legal regulation, it is intended to draw plans of river basin management, focusing on raising public awareness, as required by Article 14 of the Directive.

Yet, a further expert study and evaluation are needed to class waters into categories with the aim of implementing this Directive; and likewise the provisions of Appendices II-V, VIII and X to the Directive need further consideration by subject matter experts. The requirements set in Article 10.2 and the Directive Appendices VI and IX should also be studied more profoundly in order to consider them for use in the effective water legislation of Ukraine.

A focus in adapting Ukraine's laws is placed on the provisions of Directive

[1] Відомості Верховної Ради України. – 1994. – №36. – Ст. 340.

[2] Відомості Верховної Ради України. – 1999. – №50. – Ст. 433.

[3] Відомості Верховної Ради України. – 1998. – №36–37. – Ст. 242.

[4] Вказ. документ. – С. 14.

2007/60/EC concerning evaluation and management of flooding risks, aiming to make changes and supplements to the Decree of the President of Ukraine «On measures for effective forecasting of floods and post-disaster relief», dating March 15, 2002 No 243, and the Resolution of the Cabinet of Ministers «On the procedure for land use in potential flood zones» of January 31, 2001 No 87[1].

It is meant to develop and formalize in legislation a system for evaluating risks of emergency situations occurrence on water bodies, which should be based on the analysis of climate change impact as a result of flood formation. That is why documentation on flood risk evaluation must contain analysis (description) of floods, which took place in the past and affected negatively people's health, the environment, cultural and natural heritage, economic activity, especially if there is a probability of repeated calamities.

Therefore, it is planned to develop maps of flood risks with listing of all sorts of data about flood hazards and risks in accordance with the above mentioned Directive, and draw long-term integrated plans for flood risk management, which should be approved with due regard to the Directive requirements.

It is meant to elaborate principal provisions for regulation of inter-agency coordination and cooperation on the issues of managing flood risks, and lay down detailed procedures for stakeholders' participation. Also, it is necessary to establish procedures for information exchange at the regional (watershed) level, and those of working with the central executive authorities.

An issue is raised as to preparation and approval of the methodology of drawing long-term integrated plans for risk management, specifically, as regards their correlation with river basin management plans.

It is deemed important to create a mechanism and establish at the international level a procedure for exchange of data on flood forecasting and relief of consequences between the involved competent bodies of Ukraine and the relevant structures of the neighboring states, the activity of which is extended to transboundary river basins (with an adequate level of detail), which is important for the national mechanisms and procedures, stipulating amendments and additions to subordinate legislation, aiming to transpose the said Directive and laws adopted on its basis.

Logically, the issue of adaptation of natural resource laws is brought up to date, with an emphasis on its component – the water legislation of Ukraine in accordance with Directive 2008/56/EC on activity of the European Community in the sphere of marine environment policy (Marine Strategy Framework Directive)[2].

In this sphere, it is necessary to harmonize the regulatory requirements to legal acts terminological equivalence, and to fix strategic directions, objective and tasks of the state policy of protection and restoration of the Azov and Black

[1] Вказ. документ. – С. 16.

[2] Вказ. документ. – С. 28.

Seas natural environment, with due regard to the EU Lyon strategy provisions and achievement of greater efficiency of program documents fulfillment.

A normative-legal demarcation of the sea basins as objects of state-legal regulation and management, criteria for quality assessment of the marine environment in compliance with the European approaches and actual practice, development of complex measures aimed at a gradual pollution abatement in the Azov and Black Seas, and a dramatic improvement of their environmental condition are on a pressing agenda of today.

This would be facilitated by approximation of the legal regulation of environmental laws to the European Union legislation relating to carrying the requirements of Directive 91/271/CEE concerning urban waste water treatment, supplemented by Directive 98/15/EC, and Regulations (EC) No 1882/2003 and No 1137/2008[1], which stipulates the introduction of changes to the Regulations on collection of industrial waste water in public and departmental sewage systems of populated localities of Ukraine, approved by the Order of the State Committee of Ukraine for Construction, Architecture and Housing dating February19, 2002 No 37 that would consolidate the state commitment of providing all cities and urban-type settlements with sewage systems; fixing a list of environmentally sensitive areas according to the criteria of Appendix II to the Directive; promoting the idea of afterpurification of sewage before discharge in the prescribed zones; setting a ban on discharge of sludge to surface waters from ships, pipelines, or otherwise; establishing a procedure for treatment of food processing waste waters.

Appreciable innovations are aimed at revision of the Guidelines for urban water supply and sewage systems in Ukraine of July 5, 1995 No 30, particularly those pertaining to prescripts on their application in mountain settlements.

Introduction of particular provisions of the said Directive presupposes approval of technical and investment programs, commitment of water and sewage companies to give and make public their regular reports on discharge of waste water and sludge in the regions under their responsibility.

Next in turn is harmonization of the prescriptions of the state water monitoring system and its environmental monitoring components as to the requirements of Part D of Appendix I of the Regulation, Appendix I (Tables 1 and 2) and the relevant correction of other legal acts.

The matters of adapting the water legislation in terms of Directive 98/83 EC[2] on the quality of water intended for human consumption (with amendments and additions introduced by Regulation (EC) 1882/2003, and in compliance with Directive 91/76 EC concerning protection of waters against pollution caused by nitrates from agricultural sources (with amendments and additions introduced by Regulations (EC) 1882/2003

[1] Вказ. документ. – С. 18.

[2] Вказ. документ. – С. 20.

and 1137/2008[1]) are gaining topicality.

An integral part of adapting the environmental legislation to the EU laws is deemed to be coordination of legislative and normative-legal regulation of other environmental elements, notably regulatory acts on protection and conservation of wildlife and flora objects as per Council Directive 92/43 EEC of May 21, 1992 on the conservation of natural habitats and of wild fauna and flora[2].

Particularly topical becomes the environmental legislation adaptation in the sphere of technogenic (industrial) safety in the context of Directive 2008/1 EC concerning integrated pollution prevention and control, aimed to upgrade the effective permitting system in the economic sphere, specifically as regards the submission procedure and list of information items to be supplied together with an application for an integrated environmental permit, regulation of the permit terms (authorizing competent public bodies to supervise the applicants' fulfillment of all the mandatory actions in accordance with Articles 3–10 of the Directive, guaranteeing compliance of permit terms with the requirements as to greenhouse gases emission values[3].

Application of an integrated approach to issuing environmental permits for conducting the most dangerous kinds of activity, and improvement of the system of monitoring compliance with the permits terms is to ensure an adequate legality standard in the sphere.

The observance of a procedure for environment impact assessment and other permitting procedures is to ensure taking into account of data obtained from the assessment, when making decisions on issuing or denial of environmental permit for conducting an environmentally dangerous activity.

Formation of permit conditions should follow a certain order, notably in relation to monitoring of pollutants discharge into water bodies, measures to be taken in case of violation of regular functioning of an object of dangerous discharge, emergence of increased environmental risk i.e. extreme conditions.

The permit is to contain information on a competent body's awareness of available advanced technologies, and should obligate that body to monitor the process of adopting such technologies.

A compulsory condition for issuing environmental permits is an operator's duty to notify the competent body of any scheduled changes in functioning of increased danger sources or a change of economic activity, which requires obtaining an integrated environmental permit, and also regulation of the procedure for introducing changes, issuing or denial of environmental permit in case of an essential change in equipment operation (danger sources), on which the applicant is to report and which should be reflected in a competent body's decision on issuing an environmental permit, regulation of the procedure and change of conditions of the integrated permit, carrying out inspections of sources (facilities) that create danger.

[1] Вказ. праця. – С. 21.
[2] Вказ. документ. – С. 22.
[3] Вказ. документ. – С. 23.

An important direction in regulation of the procedure for issuing environmental permits is account of the outcome of consultations with the public; setting requirements to competent bodies as to public access to results of discharge and emission monitoring, in compliance with the permit conditions; establishing the procedure for raising public awareness of specific features of operation of environmentally dangerous installations (heightened environmental danger sources); legislative formalizing of guides for competent bodies as to public access to decisions on issuing permits, and the grounds, on which particular decisions are made, including the results of public participation.

In this respect, the environmental legislation needs harmonization with Directive 2001/80/EC «On limitation of emissions of certain pollutants into the air from large combustion plants»[1] in the form of drafting and adoption of legislative and subordinate normative-legal acts regulating the operations procedure of combustion installations as sources of increased danger; implementation of a legal procedure for issuing permits for combustion plants operation, which includes the requirement to conduct research of environmental and technical capacity, combined heat and energy generation; establishing a procedure for restriction of operation of the above installations in case of malfunctioning or breakdown of their units or assemblies; setting emission rates for multi-fuel units, the limit values of sulfur dioxin emissions, and standards for alternative use of two or more types of fuel.

These legal acts should fix a permitting procedure for operation of combustion plants located in areas of underground storage of dioxide carbon; set the emission rates for cases of increased capacity of such plants; implement a system for monitoring emissions form the said installations; make rules for combustion plant operators' reporting to competent government bodies on the results of continuous testing, inspections of testing equipment, individual tests, necessary to fulfill the requirements to pollutant emissions from the said plants.

Pertinent to legal requirements, the normative-legal acts should envisage a procedure for calculation of allowable limiting values of pollutant emissions from combustion plants, and, taking into account the research data on application of allowed emission rates for waste-burning plants, develop a plan of reducing hazardous emissions into the atmosphere for the existing sources of pollution; determine total annual emissions of pollutants as per Part C of Appendix VIII of the said Directive and the practice of applying technological standards of allowable pollutant emissions from the heat-power plants, the rated heating capacity of which exceeds 50 MW, and ensure their compliance with the requirements of Part B of Appendices III – VIII of the Directive «On sulfur dioxin, nitrogen oxide and dust».

A special significance for the adaptation of the Ukrainian environmental

[1] Вказ. документ. – С. 26.

legislation is attached to Directive 96/82/EC of January 9, 1996 On the control of major-accident hazards involving dangerous substances[1], a characteristic of which is given in the second part of the present work concerning instruments and mechanisms of securing safety for human health and life, the natural environment and other material, spiritual, and cultural values and expediency of further regulation of issues of public participation in making decisions on planning urban locations of increased danger sources; legal fixing of a procedure for provision of the appropriate information in the event of accidents at increased danger sources, the order of information exchange between state executive bodies and an operator, and between operators; making more precise the safety declaration so that it include the requirements of Article 9.2 and Appendix II of the said Directive; establishing a strict procedure for revision and renewal of safety declaration, specifying the grounds for that renewal and the need for updating technical information on safety.

In the context of the said Directive, it is reasonable to establish procedures for correction of the system for managing increased danger sources in case there appear changes that can cause an accident; revision of an inner plan of an increased danger enterprise; elaboration and legalizing plans for emergency management, in particular those developed with staff participation, and external emergency management plans devised or renewed with participation of the public.

Another pressing issue is establishment of procedures for the above mentioned plans update and implementation, interaction of emergency management organizations; a system of information about emergencies; exercising and improving state control of informing the public; making inspections of the status of the population and territory protection against emergencies as applicable by law; and a regular opening to public of a list of produced chemicals, according to Article 9 (2) Directive 96/82/EC.

The process of adaptation of the environmental laws of Ukraine to the EU legislation presupposes introduction of amendments to the Law of Ukraine «On Environmental Protection» of June 25, 1991 as to the procedure for assessment of impact on the environment, its coordination with the rules for issuing environmental permits, specifically those concerning environmentally dangerous activities, a list of sources and objects of increased danger, and conducting their state and public environmental expertise.

Against this background, it is imperative to implement the relevant reformation and create a strict system of integrated environmental management in the sphere of natural and biological resource use, landscape conservation, high environmental quality and ecological safety, to enhance the anthropoprotective function of the state as to environmental rights, in particular, the

[1] Вказ. документ. – С. 28.

human and civil right to the environment that is safe for life and health, to make allowance for additional legal guarantees of those rights by the cited Law of Ukraine, which, to our mind, would better be titled «On the Fundamentals of the Environmental Legislation» after filling it with innovative prescripts, arising from adaptation of the environmental laws to the requirements of the environmental legislation of the EU.

Published: Actual Problems of Convergence of Environmental Legislation of Ukraine with EU Laws : Materials of All-Ukrainian scientific and practical round-table conference, Oct.28, 2016, the city of Dripro / Editorial Board: V. I. Andreitsev [et al.]; Ministry of Education and Science of Ukraine, The National Mining University; Eurasian Association of Law Schools and Lawyers. – Dnipro : NMU, 2016. – P. 40–59.

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UDC 349.6:342.7(477)

PROBLEMS OF EXERCISE OF THE CONSTITUTIONAL RIGHT TO A SAFE AND HEALTHY ENVIRONMENT IN UKRAINE

In accordance with Part 1 Art. 3 of the Constitution of Ukraine an individual, his life and health, honour and dignity, inviolability and security shall be recognised in Ukraine as the highest social value. Biological and social substance of a human being as the highest social value expressed in the above mentioned rule of the Fundamental Law of the State is substantially a methodological framework for development, implementation and entrenchment in Ukrainian society of the effective scientifically based legal model of state and legal protection of the right of every person and citizen to life, health, safe environment pursuant to the Universal Declaration of Human Rights of 1948, the European Convention on Human Rights of 1950, other international legal enactments on human rights and environment. For this reason Part 2 Art. 3 of the Constitution of Ukraine provides for that human rights and freedoms, and guarantees thereof shall determine the essence and course of activities of the State being responsible to the individual for its activities, whereby affirming and ensuring human rights and freedoms shall be the main duty of the State.

Therefore, the State of Ukraine represented by legislative, executive and judicial authorities, as well as local government authorities within the scope of regulatory and protective functions and powers provided by law shall ensure for every person the exercise and jurisdictional protection of human and citizen rights, freedoms and duties affirmed in the rules of Title II of the Constitution of Ukraine, including the right of everyone to an environment that is safe for life and health, affirmed in the rule of Art. 50 of the Constitution of Ukraine.

Provided that such right of an individual to an environment that is safe for life and health is violated and is not reinstated and is not fairly compensated by

national legal remedies available in the State, then the State shall be responsible to the individual for violation of such right for the purposes of imperative provisions of Part 2 Art. 3, Part 1 Art. 50, as well as Art. 16 of the Constitution of Ukraine, pursuant to which ensuring environmental safety and maintaining ecological balance in the territory of Ukraine, overcoming the aftermath of the Chornobyl catastrophe – the catastrophe of a global scale – and preserving the gene pool of the Ukrainian people, shall be the duty of the State. Responsibility of the State to the citizens of Ukraine for violation of requirements of the legislation on environmental safety and the exercise by everyone of his/her right to an environment that is safe for life and health, as well as protection of such right is confirmed by decisions of the European Court of Human Rights in few cases of the citizens of Ukraine against Ukraine, other citizens against their states regarding protection of the right to an environment that is safe for life and health in conjunction with protection of ecological, property and non-property rights from the perspective of judicial defence of rights to life, respect for private and family life etc.

In this connection, the exercise by citizens of the constitutional right to an environment that is safe for life and health, as well as ensuring by the State of jurisdictional protection of such right becomes possible subject to correct understanding, as well as an explanation and application of the rule of Part 1 Art. 50 of the Constitution of Ukraine, according to which everyone shall have the right to an environment that is safe for life and health, and to compensation for damages caused by violation of this right.

In its substance and functional purpose the rule of Part 1 Art. 50 of the Fundamental Law of the State contains imperative provisions which shall be binding and shall be observed, complied with and applied by all subjects of legal relations in view of recognition and effect in Ukraine of the principle of the rule of law, as well as the principle of direct effect of norms of the Constitution of Ukraine affirmed in the norm of Part 2 Art. 8 of the Constitution of Ukraine, according to which recourse to the court for protection of constitutional rights and freedoms of an individual and citizen directly on basis of the Constitution of Ukraine shall be guaranteed.

It means that the State shall ensure for everyone equal opportunities for the exercise and legal protection of the right to an environment that is safe for life and health solely based on the norms of Art. 8, 16, 50 and other norms of the Constitution of Ukraine as the law of superior legal effect and international treaties ratified by the Verkhovna Rada of Ukraine, affirming human and citizen rights and freedoms for assurance and protection of life and health, honour, dignity, inviolability and security, whereby taking into account also decisions of the European Court of Human Rights in cases on complaints concerning violation and protection of legal rights connected with environment as sources of law. However, for the purpose of ensuring implementation of the principle of

legality in enforcement and judicial protection of the constitutional right to an environment that is safe for life and health, adoption of laws and other regulatory legal acts based on the Constitution of Ukraine, which laws and acts shall conform to it, is not excluded.

Therefore, application of such regulation of Art. 50 of the Fundamental Law of the State in judicial practice requires, firstly, explanation of legal nature of the right of everyone to an environment that is safe for life and health; secondly, determination of the substance and nature of legal relations arising in connection with the exercise of such right; thirdly, choice of legislative and regulatory framework necessary for regulating legal relations; fourthly, determination of notion and type of damage inflicted, as well as legal grounds, conditions, methods of compensation for damage caused by violation of such right.

The right to an environment that is safe for life and health affirmed in Art. 50 of the Constitution of Ukraine may not be considered as abstract or illusory, as it is real and has particular legal content, is characterized by such essential features which enable considering it as an independent legal category and explain its substance in objective and subjective meaning, is enforceable and therefore is subject to jurisdictional protection in case of violation of such right.

In objective meaning, the right to everyone to an environment that is safe for life and health is determined by the natural human right to life and full-value health since birth until death of an individual. For this reason, constitutional affirmation of the right to an environment that is safe for life and health is aimed, firstly, to ensuring for every person the right to life and protection of health, secondly, to ensuring rational use and protection of environmental facilities, thirdly, to creation of social conditions which are safe and favourable to life and health of society.

Pursuant to Art. 27 of the Constitution of Ukraine «every person shall have the inalienable right to life. Protection of human life shall be the duty of the State». Where by the notion «life» in the general theory of law and branch legal sciences is considered as physical, spiritual and social existence of a human being as a complex biological and social organism.

In accordance with Art. 49 of the Constitution of Ukraine everyone shall have the right to health protection, medical care and medical insurance. According to the Constitution of the WHO dated July 22, 1946, the notion of «health» is defined as a state of complete physical, mental and social well-being. Pursuant to Art. 6 of the Law of Ukraine «On Fundamentals of the Legislation of Ukraine on Health Care» the right to health protection shall comprise not only the living standard necessary for maintenance of human health, but also environment that is safe for life and health, sanitary and epidemiological welfare of the territory and the population centers in which the person resides, safe and healthy working, learning, living and recreational conditionsetc.

In accordance with Clause 1. Art. 9 of the Law of Ukraine «On Environmen-

tal Protection» dated June 25, 1991 (as amended from time to time), the right to an environment that is safe for life and health in one of varieties of ecological rights of the citizens of Ukraine, which shall be exercised and protected according to the above mentioned and other laws of Ukraine.

In accordance with Art. 270 of the Civil Code of Ukraine the constitutional right to an environment that is safe for life and health is affirmed as personal non-property right among other non-property rights ensuring natural existence of an individual, in particular: right to life, right to health protection, right to freedom and personal inviolability, right to inviolability of personal and family life, right to respect for honour and dignity etc.

Therefore, in structured system terms, the right to an environment that is safe for life and health as social value may be considered, firstly, as one of essential features or one of elements of content of the human absolute right to life guaranteed by the Constitution; secondly, as an essential feature or one of elements of the right of an individual to health protection; thirdly, as a variety of ecological rights of citizens affirmed in Art. 13, 16 of the Constitution of Ukraine and in Art.9 of the Law of Ukraine «On Environmental Protection» (hereinafter referred to as the Law «On EP»); fourthly, as a separate type of personal non-property rights ensuring natural existence of an individual, affirmed in Art. 293 of the Civil Code of Ukraine.

However, based on the meaning of the norm of Art. 50 of the Constitution of Ukraine it is provided for that the right of everyone to an environment that is safe for life and health shall be considered in the theory of law and in administration of law as an independent complex social, state and legal phenomenon which objectively exists in society, is guaranteed by the Fundamental Law of the State, has its own structure, content and functional purpose.

The foregoing is confirmed by the following arguments. Firstly, according to the Constitution of Ukraine solely individuals shall be subjects of the exercise of such right. Secondly, environment as a complex natural, man-made and social formation shall serve as an object of the exercise of such right. Thirdly, the content of such right comprises opportunities provided legislatively for everyone not to create for oneself and other people environmental conditions dangerous to life and health, to demand from others to avoid actions or omission creating environmental conditions dangerous to human life and health. At the same time, the content of such right comprises also the duties of the State, individuals and legal entities not to create environmental conditions dangerous to life and health, to prevent occurrence of them or minimize risks of their adverse effect on a human being.

The right to an environment that is safe for life and health objectified in the Constitution of Ukraine shall be considered from the perspective of the degree of freedom, equality and justice determined legislatively, which shall be ensured by the State in social relations arising, changing and discontinuing in con-

nection with the exercise by individuals of the right to natural, man-made and social environment which shall be safe for human life and health.

In subjective meaning, the right to an environment that is safe for life and health shall be considered as an opportunity provided for legislatively for everyone to live or stay permanently or temporarily in such natural, man-made and social environment which does no harm to health, allows using natural and other resources, excludes, prevents or minimizes occurrence of negative risks of biological, ecological, economic, demographic and other nature.

Whereas the right to an environment that is safe for life and health affirmed in Part 1 Art. 50 of the Constitution of Ukraine is objectively determined by the inalienable natural human right to life and health, in the theory of civil law such law is assigned to the absolute personal non-property right ensuring natural existence of an individual. General legal features of the personal non-property right are affirmed in Art. 269 of the Civil Code of Ukraine.

However, the content of the personal non-property right to an environment that is safe for life and health is explained in Art. 293 of the Civil Code of Ukraine in the following constituents: firstly, an individual shall have the right to an environment that is safe for life and health, the right to receive valid information about the environmental situation, the quality of foodstuffs and consumer goods, as well as the right to disseminate such information; secondly, activity of an individual and a legal entity causing destruction, deterioration, pollution of environment shall be illegal; thirdly, everyone shall be entitled to demand cessation of such activity; fourthly, activity of an individual and a legal entity causing environmental damage may be ceased by court decision; fifthly, an individual shall have the right to safe commodities (foodstuffs and consumer goods); sixthly, an individual shall have the right to proper, safe and healthy working, living, learning conditions etc.

As compared to the rules of the Civil Code of Ukraine set out above, the applicable ecological legislation does not explain ecological and legal content of the right to an environment that is safe for life and health. For this reason ecological and legal substance of such right is rather fully clarified in Ukrainian and foreign science of the ecological law from the perspective of implementation of constitutional and legislative guarantees of the exercise of such right in the area of rational use, preservation,recovery, protection of natural resources, legal responsibility for violation of ecological legislation, compensation for damage according to the ecological legislation etc.

The Fundamentals of the legislation of Ukraine on health protection, the exercise of the constitutional right to an environment that is safe for life and health provides for ensuring sanitary and epidemiological welfare of territories and population centers (Art. 27), creation of safe and healthy working, learning, living and recreational conditions (ст.28), preservation of the gene pool of the Ukrainian people (Art. 29), preven-

tion of infectious diseases dangerous for population (Art. 30).

The Constitutional right to an environment that is safe for life and health is affirmed and represented in other acts of the national legislation of Ukraine. However, the notion of «safe environment» as a legal category is explained neither in constitutional, nor in civil, nor in ecological legislation.

Explanatory dictionaries of modern Ukrainian language interpret the term «environment» in several meanings, in particular as follows: a) «surrounding environment with regard to an individual or a group of individuals being in it»; b) natural environment, the aggregate of all living and non-living objects being present in a particular region without human influence; c) people surrounding an individual; d) surrounding area; e) outlying districts.

As we can see, the etymology of the word «environment» is explained through the notion «surrounding» and relates to human life in space and time in surrounding natural environment, that is in the biosphere as the external shell of the Earth embracing the part of the atmosphere, hydrosphere and the upper part of the lithosphere, as well as in environment formed as a result of anthropogenic effect on the biosphere, that is in the technosphere, as well as being in social environment in which a human being lives and acts. Human life cycle in environment goes on in continuous «man-environment» interrelation in which man's environment may from time to time in the presence of particular factors have direct or indirect, immediate or remote positive or negative effect on a man, his health and life. In the same way, a man by his actions may influence the environment. For this reason, it is important for researching legal nature of the right to an environment that is safe for life and health to take into consideration the continuous system of such relations as «man-environment», «man-life-environment» and «man-health-environment».

The above-mentioned etymological meanings of the term «environment» are explained in the applicable ecological legislation, in particular, Art. 9 of the Law «On EP» refers to natural environment the substance of which is determined in Art. 5 of the above mentioned Law as the aggregate of natural and natural and social conditions and processes, natural resources involved in economic turnover as well as not used in economics at present (land, resources, waters, atmosphere air, forest and other vegetation, animal world), landscapes and other natural complexes. Furthermore, the law assigns to natural environment territories and objects of nature reserve fund of Ukraine and other territories and objects determined according to the legislation of Ukraine.

The applicable land, urban planning, civil, sanitary and epidemiological, labour, medical and other legislation of Ukraine explains the notion «surroundings» in the meaning of territories, population centers, urban planning objects, places of employment, residence, recreation which may be assigned to the notion «man-made environment» or «technospere».

Based on analysis of regulations of the applicable constitutional, administrative legislation the etymological meaning of the term of environment from a legal perspective may be interpreted as a certain social community comprising separate or joined territorial communities, administrative-territorial entities, territories with special legal status etc.

Therefore, within the legal meaning the notion «environment» is a complex legal category comprising natural environment (biosphere), man-made environment (technosphere), and social environment (social life sphere) which under the Constitution of Ukraine shall be safe for human life and health.

The applicable legislation of Ukraine does not explain the notion «safe» environment in the context of Art. 50 of the Constitution of Ukraine. Furthermore, the applicable legislation does not determine criteria of environment that is safe for life and health. For this reason, it is understood that the main criterion for determination of the notion «safe» shall mean absence of danger for a man that may be created by certain dangerous environmental factors, or minimization of occurrence of risks dangerous to life and health from dangerous natural, man-made or social environmental factors.

Pursuant to Art. 50 of the Law of Ukraine «On EP» the condition of natural environment shall be recognized as ecologically dangerous, where prevention of environmental deterioration and occurrence of danger to human health is ensured. Pursuant to such Law, ecological standards and regulations (Art. 31–33 of the Law «On EP») shall be considered the main criteria of quality or safety of natural environment.

Ecological normative standards establish maximum allowable emissions and discharges into environment of polluting chemical agents, levels of permissible harmful impact of physical and biological factors on it. The legislation of Ukraine may establish normative standards of use of natural resources and other ecological normative standards. Ecological normative standards shall be established taking into account the requirements of sanitary and hygienic, sanitary and anti-epidemic rules and standards, hygienic regulations. Normative standards of maximum allowable concentrations of polluting agents in natural environment and levels of harmful physical and biological impact on it shall be uniform for the whole territory of Ukraine.

In accordance with Art. 1 of the Law of Ukraine «On Ensuring Sanitary and Epidemiologic Welfare of Population» state sanitary normative standards and rules, sanitary and hygienic, sanitary and anti-epidemic rules and standards, sanitary and epidemiological rules and standards, anti-epidemic rules and standards, hygienic and anti-epidemic rules and standards, state sanitary and epidemiological standards, sanitary regulations (hereinafter referred to as the «sanitary standards») shall be binding.

In accordance with Art. 2 of the Law of Ukraine «On Fundamentals of Urban Planning» one of the main directions of urban planning is protection of inhabitable and natural environment against harmful impact of man-made and social

factors, hazardous natural phenomena, preservation of cultural heritage.

The above mentioned Law shall in the course of carrying out urban planning activities provide for development of urban planning documentation, designs of particular facilities according to initial data for designing, in compliance with state standards, regulations and rules, layout and construction of facilities pursuant to urban planning documentation and designs of such facilities approved according to the established procedure, rational use of lands and territories according to land legislation etc. (Art. 5 of the Law).

Whereby construction regulations, state standards, regulations and rules establish a complex of qualitative and quantitative indicators and requirements regulating development and implementation of urban planning documentation, designs of particular facilities taking into account social, natural and climatic, hydrogeological, ecological and other conditions and are aimed at ensuring formation of full-value inhabitable environment and the best conditions of human activities (Art.16).

Pursuant to Art. 19 of the above mentioned Law, in the course of development and implementation of urban planning documentation, the subjects of urban planning activities shall comply with basic tasks and measures for ensuring stable development of population centers and environmental safety of territories, that is compliance with requirements for protection of natural environment, preservation and rational use of natural resources, sanitary and hygienic requirements for human health protection, implementation of measures for neutralization, disposal, destruction or recycling of all hazardous substances and waste, established by environmental legislation.

Criteria of environmental safety affirmed in the applicable legislation may be considered by their legal nature as qualifying features, according to which the facts of violation of everyone's right to an environment that is safe for life and health shall be established according to the procedure established by law, and according to which the grounds, forms, methods, the procedure of protection of such right shall be determined, including compensation for damage caused by such violation of right, as provided by Part 1 Art. 50 of the Constitution of Ukraine.

Scientific and theoretical analysis of content of the rule of Art. 50 of the Constitution of Ukraine shows that everyone's right to an environment that is safe for life and health and to compensation for damage caused by violation of such right affirmed therein shall be considered as social value of a man and as a state legal phenomenon which shall be recognized in society and shall be enforced by the State by means of legislative affirmation of guaranties of the exercise by individuals of such right and justiciability in case of violation of it with compensation for moral and financial damage.

Subjects of the exercise of such right shall comprise all individuals to whom the Constitution of Ukraine guarantees equal opportunities for everyone to be in to an environment that is safe for life and

health, to demand first of all from the State, as well as from other individuals and legal entities not to cause harm directly to human life and health, to facilities of natural environment, other environmental facilities, by their actions or omission not to create a threat to human life and health, to demand compensation for property, ecological damage inflicted, as well as compensation for moral damage caused by violation of the right of everyone to an environment that is safe for life and health.

Objects of the exercise of such right shall comprise environment, that is constituent elements of natural environment (biosphere – atmosphere, hydrosphere, lithosphere), technosphere (regions of cities, industrial areas, production and living environment) and social environment the impact of which on a man shall conform to natural, as well as technical, ecological and other terms of safety of man's being in environment established by law.

In its content the subjective right to an environment that is safe for life and health provides for implementation of such opportunities stipulated by law: firstly, permanent or temporary stay or residence in favourable environment safe for human life and health; secondly, to demand from the State, individuals and legal entities removal of any obstacles in exercising such right according to law; thirdly, to demand from individuals and legal entities cessation of activities causing destruction, deterioration, pollution of environment; fourthly, access to information about the environmental situation, the quality of foodstuffs and consumer goods; fifthly, jurisdictional protection of the violated right for the purpose of its renewal (reinstatement); sixthly, defence of the violated right by means of compensation for property and ecological damage, as well as compensation for non-property (moral) damage.

Published: Соціологя права. – 2016. – № 1–2 (16–17). – С. 84–90.

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UDC 349.42

LEGAL FRAMEWORK OF STATE SUPPORT OF AGRICULTURE AS A MEANS OF ENSURING FOOD SECURITY

After joining the World Trade Organization (hereinafter – the WTO) Ukraine has taken a number of commitments, such as – to bring the domestic government support for agricultural producers in accordance with the requirements of the Agreement on Agriculture, which provided for a gradual restriction measures that have a direct impact on trade and production (actions of the so-called «amber box»). The analysis of national legislation on state support of agricultural producers plays a key role in the process of establishment of an efficient agricultural production and food security, making it possible to identify ways of improvement in order to bring it in line with international standards.

One of the main priorities of the state agrarian policy is government support of agricultural producers, made possible by focusing public resources on priority areas of development, facilitation of the financial, credit, insurance, tax and budget policy, sustainable intra- and inter-economic relations.

Domestic legislation does not define the state support of agricultural producers, which is crucial for its realization. Analysis of current agricultural legislation, the current state of agriculture and other factors gives I. P. Safonov the ability to determine state support of agriculture as a variety of purposeful activity of the state: firstly, the establishment and functioning of agricultural producers; secondly, the adoption of relevant laws and regulations; thirdly, the creation of a system and the determination of the tasks, functions, jurisdiction of state authorities obliged to provide support to the agriculture[1].

However, in modern terms the nature of state support for domestic agricul-

[1] Сафонов І. Правові проблеми державної підтримки сільськогосподарських виробників // Право України. – 2005. – № 6. – С. 56.

tural producers resides in the need to create conditions for effective stimulation of the functioning of agricultural producers, the production of high-quality agricultural products and raw materials, satisfy the needs of the population and processing industry in its products, the high motivation of agricultural workers establishment of farm structure, pricing, financial and credit relations, formation of material-technical base of agriculture, market relations in agriculture, rural social problems etc. [1]

Legal regulation of state support for domestic agricultural producers is aimed at implementing two major functions. The first is to ensure food security. This is understood as providing people with food from their own resources. Second, is to create guarantees for employment in agriculture considering its specifics related to seasonality, dependence on weather and climate, the high cost of the necessary industrial infrastructure and processes supporting land (as a means of production) compared to the cost of final product.

State support for agricultural producers is based on a set of predefined principles. Among the others, they include: a) the recognition, observance and protection of agricultural producers and rural population; b) professionalism in the exercise of state support for agricultural producers; c) the sustainable development of agricultural production; d) scientifically grounded combination of economic and environmental interests; e) the relationship of state agencies, local governments, NGOs and individuals; f) legitimacy, etc.

The possible measures of the state support for the domestic agricultural producers are the subject of a separate study. Here it is appropriate to focus only on the certain types of such support in the aspect of the completeness and efficiency of its legal regulation. It is necessary to assume that forms of state support of the agricultural producers can and should be filled with the different content depending on the needs of the particular type of such support.[2] State support is provided by both the state and local budgets.

An important form of government support is proper pricing of agricultural products. In relation to the method of formation in the economic theory, prices are divided into competitive, monopolistic and regulated. Regulated prices constitute a system of state regulation of prices, which has economic and administrative means. Economic instruments include the introduction of price support, they are widely used in the economy overall. A prolonged time period is required for a price to react to the introduction of indicative (regulated prices formed on the basis of the agreement of the parties, may not exceed or be below a certain level specified by the competent public authority) and imperative (fixed prices are final version of the price and not the seller nor the buyer is not

[1] Сафонов І. Правові проблеми державної підтримки сільськогосподарських виробників // Право України. – 2005. – №6. – С. 54–55.

[2] Козырь М. И. Аграрное право России: состояние, проблемы и тенденции развития (М. И. Козырь. – 2-е изд., перераб и доп. – М.: Норма, 2008. – С. 140.

entitled to deviate from them) price regulation, their use is limited, the application of these affect the prices immediately.

The economic means of the state regulation of prices for the agricultural products include interventional operations, compensation, application of the mechanism of subsidies and concessional lending. Administrative tools, provided for in article 191 of the Civil code of Ukraine,[1] include the establishment of state and utility fixed prices, the boundary levels of prices, limits of trade allowances, limit norms of profitability or by introducing the mandatory declaration of price changes.

In the legislation of Ukraine, the state regulation of pricing for agricultural products is economic and administrative ways is provided in a mixed form, because there is no clear distinction between them and independent order of application.

According to article 3 of the Law of Ukraine «On state support of agriculture of Ukraine» the main provisions of the state price regulation are as follows: 1. The state regulation shall be subject only to wholesale prices, it is performed in the sphere of retail trade; 2. The mechanisms of the regulation is to establish minimum and maximum intervention prices, the application of other measures envisaged by legislation; 3. The condition of realization is compliance with the Antimonopoly legislation; 4. The boundaries of the implementation of state price regulation is an organized market of agricultural products, the market exchange trading; 5. Objects of state regulation are clearly defined in legislation types of agricultural products – hard wheat, soft wheat, grain mixture of wheat and rye (meslin), corn, barley, winter rye, spring rye, peas, buckwheat, millet, oats, soybeans, sunflower seeds, rapeseeds, flax seeds, hop cones, sugar (beet), flour of wheat, rye flour, meat and offal of slaughter animals and poultry, milk powder, butter and sunflower oil.

The Law of Ukraine «On state support of agriculture of Ukraine» defines a complex mechanism of the state regulation of prices for the agricultural products through consistent implementation of such regulations: setting minimum and maximum intervention prices; to use of the commodity and financial interventions; to establishment of a temporary administrative regulation of prices; to use of the budgetary subsidies. The minimum and maximum purchase prices isn't an independent means of regulation, it is a tool application intervention operations, a temporary administrative regulation, the temporary budget subsidies. These elements constitute a single mechanism and must be used only in the sequence specified in the Law.

The substantial state support of the agricultural producers is a subsidy. The grant (from lat. – a gift, a donation) is non-repayable cash assistance that is provided from the state budget organizations, enterprises, local authorities, private entities to cover losses, compensa-

[1] Господарський кодекс України: від 16 січня 2003 року // [Електронний ресурс]. – Режим доступу : http://zakon4.rada.gov.ua/laws/show/436–15.

tion of losses, balancing local budget and others targets.[1]

In Ukraine are subsidized, generally inefficient productions, which are important for the national economy. The concept of «subsidies for agricultural production» there is in the legislation. Laws regulate subsidies to agricultural producers in Ukraine «On state budget of Ukraine» and «On state support of agriculture of Ukraine». The law on State budget determines only the amount of funds that will be allocated to finance the industry, and the Cabinet of Ministers establishes the utilization of budgetary funds.

In article 15 of the Law of Ukraine «On state support of agriculture of Ukraine»[2] states the following: the Cabinet of Ministers of Ukraine, when planning the expenditures of the state budget for the next year, provides for expenditure on the provision of subsidies to livestock producers (hereinafter referred to as – budgetary subsidies). Budgetary subsidies are given in order to support the level of effective demand of the Ukrainian consumers of animal products and preventing loss of the Ukrainian manufacturers such products.

The objects of the budget grants according to this article there are cattle; pigs; sheep; horses; poultry; rabbits; whole milk extra, premium, the first and second grades (aren't subjected to any handling, processing or packaging for the requirements of further sale); shorn wool; the cocoons of the silkworm; honey natural. The objects of the special budget grants there are cattle large horned dairy, the large horned cattle of meat, the young cattle of different ages; the horses; the sheep; the pigs.

The objects of the special budget grants are also bee family defined as such in accordance with the Law of Ukraine «On beekeeping» of February 22, 2000 and the products of sericulture. A direct manufacturer of the object of such grant is either the subject (recipient) budget grants or special budget grants.

Special budgetary subsidy is available only upon animals that have passed registration and identification in accordance with the Law, subject to full implementation of the system of subsequent control over target use of budgetary funds provided for these needs. The Cabinet of Ministers of Ukraine annually adopts the resolution on regulations for the provision of budget grants and special budget grants, based on the standards of this article; upon submission of the central executive body on agrarian policy sets minimum acceptable level of prices for livestock products, which is used as the basis for calculation of subsidies, as well as for pricing, when purchasing animal products directly from the manufacturer.

That is, agricultural producers in Ukraine can receive budgetary livestock subsidies (hereinafter referred to as –

[1] Райзбер Б. А., Лозовський Л. Ш., Стародубцева Е. Б. Современный экономический словарь. – 2-е изд., исправ. – М.: ИНФА – М. – 1999. – 495с.

[2] Про державну підтримку сільського господарства України: Закон України від 24 червня 2004 р. № 1877-IV [Електронний ресурс]. – Режим доступу : http://zakon4.rada.gov.ua/laws/show/1877–15.

subsidy budget). It is at the expense of the State budget of Ukraine only for domestic livestock producers and aims are:[1] keeping the level of solvent demand of Ukrainian consumers of animal products; preventing an average loss of Ukrainian producers of livestock products.

The Law contains provisions regarding the objects and subjects of the budgetary cattle-breeding subsidy. The objects like grants are distributed for two types. The Law also defined the objects of budgetary livestock subsidies and special budgetary livestock subsidies. The subject (recipient of budgetary subsidies (including special) is a direct manufacturer of animal products, which is related to such grants. The entity, what providing the subsidy budget, there is the Agrarian Fund. Like the subsidy is provided to the last in order defined by the Cabinet of Ministry of Ukraine.

The same for the budget and specifically the budget subsidies is that, their size is set at fixed amounts per head of object subsidies (farm animal), which were in the ownership of the subject grants at the beginning of the next fiscal year. Additionally, the size of budgetary subsidies established by the Cabinet of Ministers of Ukraine in fixed amounts based on: a metric unit of live weight sold (realized) object subsidies or metric unit of weight the sale of milk and wool; one family breeding a bee, that was in the ownership of the subject of subsidies at the beginning of the next fiscal year; based on the increase in the number of heads purebred (thoroughbred) breeding animals and breeding of bee colonies, which were owned by the subject of budgetary subsidies at the end of the next fiscal year. The increase is relative to their number at the beginning of the respective fiscal year.

The budgetary livestock subsidies and special budgetary livestock subsidies differ (in animal products). The special budgetary subsidies in article 15, paragraph 15.9 of the Act stipulates, that it is only available on animals that have passed registration and identification in accordance with the law. The legal regime of the special budgetary grant is also characterized by the presence of a system of subsequent control over target use of budgetary funds, are provided as subsidies.

The Cabinet of Ministers of Ukraine determines the mode of use of budget grant and special budget grant for the relevant fiscal year. The calculation of the amount of subsidy for the relevant year must be provided as an addition to the draft Law of Ukraine on State budget of Ukraine for the next year.

In Ukraine there is also plant granting alongside with cattle-breeding granting. According to the legislation there are the following characteristics subsidies in agricultural production: the grant is non-repayable cash assistance; the grant is from the state budget; the amount of subsidy is set in fixed amounts; the grant is in the order determined by the

[1] Науково-практичний коментар до Закону України «Про державну підтримку сільського господарства України / За заг. ред. А. М. Статівки // Бюлетень законодавства і юридичної практики України. – 2005. – № 10. – С. 115–121.

Cabinet of Ministers of Ukraine; subject (recipient) budgetary subsidies (including special) is a direct manufacturer of animal products, which refers to objects such grants, namely, it is provided in accordance with the legislation of processing enterprises of all ownership forms, which have their own or rented processing facilities, agricultural producers, regardless of the form of ownership and management, including maintaining a personal country economy; the entity, that providing the subsidy budget, there is Agrarian Fund; the purpose of providing subsidies is to maintain the level of solvent demand of Ukrainian consumers of animal products and prevent the average unprofitability of Ukrainian producers of agricultural products.

Based on the characteristic, subsidies in agricultural production is a non refundable cash assistance from the state budget, in the order determined by the Cabinet of Ministers of Ukraine, the processing enterprises of all forms of ownership and management, including maintaining the personal peasant economy, in the cases provided by law, to support the level of effective demand of Ukrainian consumers of animal products and prevent the average unprofitability of Ukrainian producers of agricultural products.

The problems of food security in different countries have both common features and significant differences that relate to the mentality of the inhabitants, national traditions, level of development of productive forces and production relations, the place occupied by the country in world politics. The reliable food supply of population at the expense of own production is of strategic importance and is the main function of the state, because it affects not only food, but also the national security of the country[1].

We can agree with the reasoning of P. F. Kulinich, that the regulation of the economy, the policy of resource provision of agriculture has certain disadvantages. First, it is related to the problems subsidiaries industries.[2] Therefore, there are two alternatives: either to subsidize the production of resources for agriculture or to raise prices for agricultural products.

From the perspective of society, subsidizing of production resources for agriculture is more appropriate than the maintenance of prices for agricultural products. This subsidy makes it possible to reduce production costs of agricultural enterprises and not to raise the prices of agricultural commodities in terms of increasing its production. This would benefit all society, not only manufacturers and industry resources for agriculture. The subsidies for the production of resources for agriculture have several disadvantages, like any effect in the economy regarding the regulation of market mechanism.

First, the difference between low domestic prices of resources due to subsidies and high world prices for such resources is not efficient from the point

[1] Верзун А. А. Основні напрями державної фінансової підтримки сільського господарства // Науковий вісник Національного аграрного університету. – №44. – С. 237.

[2] Кулинич П. Ф. Організаційно-правове засади розвитку аграрного і земельного ринків в Україні. – К.: Юрид. думка, 2006. – С. 215.

of view of the whole economy. Consequently, there is inefficient allocation of resources between different sectors within the country, as producers use distorted price information, resulting in financial and material resources flow into less efficient industries, which loses all society.

Secondly, it is a problem of control over the use of subsidies and rising production costs. This refers to the trend of growth of production costs in the conditions of the grant. This applies to any sector of the economy. In terms of subsidy, the manufacturer disappear stimuli to rational use of resources and, consequently, to the reduction of production costs.

Thirdly, there is the problem of compensation of expenses on subsidies from the state budget.

And, fourthly, it is a problem of inefficient use of cheap resources in agriculture.

Thus, directions of state regulation of agro-industrial market in many countries of the world, despite the level of their development, are aimed at supporting farmers' incomes. Developed states use various instruments of state support of the industry (government assistance program for agricultural producers, export subsidies, quotas, tariffs etc.). All of them are members of the WTO. Therefore, membership in this organization puts Ukraine in front of the problem of development and realization of such directions of an agrarian policy, which would not only provide the necessary level of food security, but also conform to the requirements of the trade, carry out in the framework of the WTO.

Published: Актуальні проблеми правового забезпечення продовольчої безпеки України: монографія / О. М. Батигіна, В. М. Корнієнко та ін. за ред. В. Ю. Уркевича та М. В. Шульги. – Х.: «ОП Шевченко С. О.», 2013. – С. 85–120.

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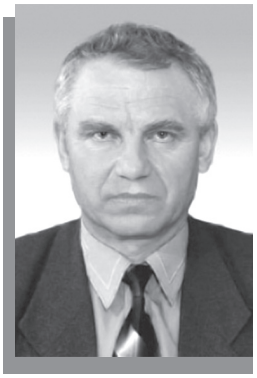

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UDC 349.41

THE LEGAL BASIS OF EXPANDING THE POWER OF LOCAL COUNCILS IN THE SPHERE OF LAND RELATIONS

All the innovations that occur at the legislative level require study and analysis to ensure the correct implementation of the relevant provisions in practice, especially given the ambiguity of the legal practice that has developed in the land legislation. Now, there are many frequent cases when the same legal rules are applied differently in consideration of similar issues. This, in turn, encourages specialists to search for optimal solutions for solving contentious issues with the further distribution of proved options. The most problematic issue under present conditions is the realization of powers of local government in land management.

The theoretical basis of this research consists of works of legal scholars: V. I. Andreytsev, V. P. Balezin, Y. O. Vovk, B. V. Erofeev, I. I. Karakash, N. V. Krasnov, P. F. Kulinich, A. M. Miroshnychenko, V. V. Nosik, Y. S. Shemshuchenko and others.

The purpose of the article is a comprehensive analysis of the legislation on the expansion of the powers of local government in land relations.

It is known that the 90-ies were marked with the launch of the land reform, which is associated with the adoption of the Resolution of Supreme Soviet of USSR «On land reform» on 18.12.1990. The exclusive state ownership of land has played the role of foundation of the land order in the state for more than half a century. Then, the differentiation of public land ownership has been proposed. Municipal and private property were declared along with state ownership of land. Moreover, all these forms of land ownership were declared equal by the law. In the future, land (land plots) was pronounced as real estate and was included in the civil circulation according to the Civil Code of Ukraine. However, the Constitution of Ukraine (Art. 13) declared the land as an object of the right of property of the Ukrainian people. Bodies of state power and bodies of local self-government within the limits determined by this Constitution exercise ownership rights on behalf of the Ukrainian people.

In Ukraine, the land reform in settlements has not been completed yet. The implementation of land-reform measures should transform the land within cities and villages into the basic resource of the sustainable social and economic development of local communities.

It should be noted that it is necessary to clarify some fundamental provisions of legislation of Ukraine, which define the powers of local authorities in the sphere of land relations. Such a need is caused by the adoption of the Land Code of Ukraine on 25.10.2001, so as adoption of a number of regulations on its development.

According to art. 5; 10 of the Law of Ukraine «On local government in Ukraine» village, town and city councils are recognized as local authorities representing the respective municipalities and carrying out on their behalf and in their interest functions and powers of local government according to the Constitution of Ukraine and laws of Ukraine.

The competence of local governments is not any question of public life, but only questions of local importance. The list of such issues is defined in the Constitution of Ukraine and the Law of Ukraine «On local government in Ukraine». In particular, according to the law local issues include regulation of land relations by village, city councils.

Land issues are solved exclusively by the relevant local council at its plenary sessions. According to Article 46 of the Law of Ukraine «On local government in Ukraine» village, town, city, city district (if established), district, regional council carries out its work sessions. Paragraph 34 of Article 26 of abovementioned law establishes that the decisions on the regulation of land relations are appointed exclusively in plenary sessions of village, town or city council.

According to Article 59 of the Law of Ukraine «On local government in Ukraine» a Council within its authority adopts regulations and other acts in the form of solutions. It is known that there are normative acts that establish, modify

or suspend legal norms, which are local in nature, related to a wide range of people and used repeatedly. Non-normative acts also include specific regulations addressed to a single subject or a legal person characterized as one of a single use. This conclusion is consistent with the legal positions of the Constitutional Court of Ukraine, summarized in the judgment on December 27, 2001 № 20-rp / 2001 (the first paragraph, i. 6 of the reasoning part) and of 23 June 1997 № 2 (Paragraph four of p. 1 of the reasoning part)[1].

The local council has no right to make a decision on the transfer to any other local authority (or the executive authority, municipal enterprise, organization) of their powers to regulate land relations. This requirement is enshrined in Article 19 of the Constitution of Ukraine – Bodies of state power and bodies of local self-government and their officials are obliged to act only on the grounds, within the limits of authority, and in the manner envisaged by the Constitution and the laws of Ukraine. In addition, one should keep in mind that no law provides the right of local councils to transfer their exclusive powers to another body.

Thus, according to Art. 26 of the Law of Ukraine «On Local Government in Ukraine» the right to resolve issues on the regulation of land relations belongs to the exclusive competence of village, town and city councils. Article 33 of this Law defines in more detail the powers of village, town and city councils of both their own and delegated by executive bodies. They include the preparation and submission to the Council of proposals for withdrawal (redemption) and providing for building on or other uses for lands owned by local communities; for the establishment of land tax rates; monitoring the observance of land legislation, land use and protection; registration of land use and lease agreements for land.

Article 12 of the Land Code of Ukraine defines the powers of village, town and city councils in the sphere of land relations more clearly, namely: a) disposal of lands of local communities; b) transfer of municipal land to property of citizens and legal entities in accordance with this Code; c) provision of land in the land use of municipal property; d) withdrawal of land plots municipal property; e) purchase of land for public needs of the local communities of villages, towns and cities; f) land management organization; g) coordination of activities of local land resources; h) monitoring the use and protection of lands of municipal property, land and compliance with environmental legislation; i) preparation of conclusions on withdrawal (redemption) and the provision of land; j) establishing and changing the boundaries of districts in cities with district division; k) informing the public about withdrawal (redemption) of land plots; l) submitting proposals to the district council on establishing and changing boundaries of villages, towns and

[1] Рішення Конституційного Суду України від 16.04.2009 р. № 7-рп/2009 // База даних «Законодавство України»/ВР України. URL: http://zakon2.rada.gov.ua/laws/show/v007p710-09/conv.

cities; m) resolving land disputes; n) other issues in the sphere of land relations according to the law. The following powers gain wider detalization in other norms of the Land Code of Ukraine and some other laws of Ukraine.

The Constitutional Court of Ukraine on this issue underlines that powers specified in paragraphs «a», «b», «c», «d» of the article (Art. 12 LC Ukraine) are referred to the term «other issues of local importance» (Art. 143 of the Constitution of Ukraine) and therefore the village, town and city councils act as agents of authorities that implement regulatory and other functions[1].

A systematic analysis of the Law of Ukraine «On local government in Ukraine» (namely Article 10, Articles 16, 17, 18, 25, 26, etc.) shows that local governments in matters of local importance assigned by the Constitution of Ukraine and laws of Ukraine, act as public authorities that perform power management functions, including normative, coordinating, licensing, registration, prescribing. As subjects of power, local governments have the final say within the law issues in land relations.

Modern Ukraine is in the process of the administrative reform of decentralization. Establishment of such a rule was caused by a number of economic and political conditions for the establishment of stable and effective system of public administration in Ukraine as a whole and at all levels of administrative and territorial structure of the state.

The essence of the decentralization is the transfer of significant powers and budgets of state agencies to local governments. The process of decentralization of power has not gone round the regulation of division of powers on land issues, in particular relations of possession, use and disposition of land.

According to the Concept of reforming the local government and territorial organization of power in Ukraine[2] administrative reform of decentralization of power, including in the sphere of land relations, is provided by: 1) determining of reasonable territorial basis for the activities of local authorities and executive bodies that can provide availability and quality of public services provided by such authorities and necessary for this resource base; 2) the creation of appropriate material, financial and organizational conditions for providing by local authorities their own and delegated powers; 3) separation of powers in the system of local authorities and executive bodies at various levels of administrative and territorial structure on the principle of subsidiarity; 4) separation of powers between the executive bodies and local authorities on the basis of decentralization of power; 5) implementation of the mechanism of state control over the

[1] Рішення Конституційного Суду України від 1.04.2010 р. № 10-рп/2010 // База даних «Законодавство України»/ВР України. URL: http://zakon3.rada.gov.ua/laws/show/v010p710–10.

[2] Про схвалення Концепції реформування місцевого самоврядування та територіальної організації влади в Україні : Розпорядження Кабінету Міністрів України від 01.04.2014 р. № 333-р. // База даних «Законодавство України» / ВР України. URL: http://zakon2.rada.gov.ua/laws/show/333–2014-р.

compliance of the Constitution and laws of Ukraine, decisions of local governments and provision of quality public services; 6) maximum involvement of people in decision-making, promoting forms of direct democracy; 7) improvement of the mechanism of coordination of local authorities.

In the process of local government reform for regulation of land relations in Ukraine public authorities and local governments are given a number of powers and they must provide services that ensure the appropriate regulation of land relations in the following areas: land ownership; relations regarding legal land rights derived from ownership; legal relations arising in connection with the rights of public land; relations in the sphere of use and protection of lands; legal security of land etc.

A process of changing the government, redistribution of functions of state and local governments by granting the local governments' greater importance and more powers comparing to previous years is based on this reform.

The process of transfer of power to the local level and implementation of the wide structure of executive power at the local level are provided. Several draft laws are registered in the parliament today. According to them powers of local government can be significantly expanded in the future including the sphere of land relations.

For example, today the local councils cannot manage lands outside the settlements. This creates barriers for the development of rural and urban areas. Regulations on limitation of jurisdiction of local governments regarding disposal of lands only within settlements reduces the financial basis of local government, which was a precondition for decentralization reform and legislative consolidation.

Thus, paragraph 213 of the Action Plan for the implementation of Program of the Cabinet of Ministers of Ukraine and the Strategy of Sustainable Development «Ukraine – 2020» in 2015[1], extends the list of land relations that are managed by the local authorities. It provides the legal regulation of issues relating to the transfer to municipal property of state-owned land located outside settlements except those on which objects of state property were built.

Today there is a draft of the Law of attributing state owned lands outside the settlements to municipal property of combined local communities[2]. It offers to transfer all state-owned lands which located outside settlements to municipal property of local communities of villages, towns, cities, united under the Law of Ukraine «On voluntary amalga-

[1] Про затвердження плану заходів з виконання Програми діяльності Кабінету Міністрів України та Стратегії сталого розвитку «Україна – 2020» в 2015 році: Розпорядження Кабінету Міністрів України від 04.03.2015 р. №213-р. // База даних «Законодавство України»/ВР України. URL: http://zakon5.rada.gov.ua/laws/show/213–2015-p#n9.

[2] Про віднесення земель державної власності за межами населених пунктів до комунальної власності об'єднаних територіальних громад: Проект Закону від 24.11.2015 р. №3510 // База даних «Законодавство України» / ВР України. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57179.

mation of local communities», except: 1) lands of defense; 2) lands of exclusion and unconditional (obligatory) resettlement, contaminated by the Chernobyl catastrophe; 3) land plots related to the buildings, structures and other immovable property of the state; 4) land plots which are in permanent use of state authorities, public enterprises, institutions and organizations of the National Academy of Sciences of Ukraine, state specialized academies etc. It is assumed that limits of the united territorial community should be determined by the approved projects of areas of village, town and city councils. If the territorial boundaries of the community not established by these projects, they are determined according to the boundaries adjoining communities.

If it is impossible to find out the real limit of the united territorial community, they are determined by the decisions of adjoining village, town and city councils based on the project land planning to clarify the boundaries of their territories or by court order. In the same way, the problem is solved if there is a dispute between several local authorities on the limits of the united territorial community.

In order to continue implementation of the principles of the reform based on the Action Plan and the Concept of reforming of the State Service of Ukraine on geodesy, cartography and cadastre the draft Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine about delegation of authority to local governments in the order state-owned lands and the strengthening of state control of use and protection of lands»[1] has been developed. The adoption of this law will allow to consolidate regulatory provisions on decentralization of powers in the sphere of land relations.

It proposes to amend Art. 12 of Land Code of Ukraine. If it is adopted, village, town and city councils will receive the following powers: disposal of lands of state and municipal property in the area of village, town or city council according to the laws; transfer of land plots of state and municipal property to the ownership of citizens and legal entities in accordance with the of Land Code of Ukraine; provision of land for the use from state and municipal property once again according to the of Land Code of Ukraine; withdrawal of land plots from state and municipal property and so on.

It should be noted that from the 01.03.2016 Article 12 of Land Code Ukraine began to operate in the new edition. Amendments to it were made by the Law of Ukraine «On Amendments to some Legislative Acts of Ukraine about expanding the powers of local governments and optimization of administrative services»[2]. The mentioned a legislative

[1] Про внесення змін до деяких законодавчих актів України щодо делегування повноважень органам місцевого самоврядування з розпорядження землями державної власності і посилення державного контролю за використанням та охороною земель: проект Закону України URL: http://land.gov.ua/info/doopratsovanyi-proekt-zakonu-ukrainy-provnesennia-zmin-do-deiakykh-zakonodavchykh-aktiv-ukrainy-shchodo-delehuvannia-povnovazhen-orhanam-mistsevoho-samovriaduvannia-z-rozporiadzhennia-zemlia/.

[2] Про внесення змін до деяких законодавчих актів України щодо розширення повно-

act has supplemented Art. 12 of Land Code Ukraine by Part 2 in which consolidation of powers of village, town and city councils in land relations in villages, towns and cities was provided. The provision of information from the state land cadastre and other issues in the sphere of land relations were assigned to them.

A number of laws on amendments to some legislative acts of Ukraine related to the expanding the powers of local government in the sphere of land relations were adopted on the basis of the Concept of reforming and plans.

Currently, the Law of Ukraine «On State Land Cadastre» was amended by expanding of powers of local governments. Such amendments provide that the provision of information from the State Land Cadastre can also be made by administrators of the centers of administrative services by the procedure established by the Law of Ukraine «On Administrative Services», or by authorized officials of executive bodies of local governments that have successfully completed training in the sphere of land relations and correspond to appropriate qualifying requirements. Training of the person in the sphere of land relations is provided free of charge by the state cadastral registrar in the term not more than one month. The state cadastral registrar gives to the person an appropriate certificate on the results of a successful training.

The local state administration, village, town, city council determine the possibility of realization of their powers in the sphere of information from the State Land Cadastre. However, they take into account the possibility of organizational and technical support of its implementation.

Consequently, the laws on amendments to some legislative acts of Ukraine on implementation of the Concept of reformation and plans on expanding of the powers of local governments in the sphere of land relations initiated decentralization of power in the sphere of land relations.

At present the powers of local governments in land relations has been greatly expanded on the legislative level. Nevertheless, these changes only initiate the implementation of the Concept of reform. They need to be continued and implemented by consolidating and amending the current legislation. According to the concept reformation of management in the sphere of land relations the main authorities of management and provision of services in the sphere of land relations should become local governments, and by the state authorities will remain functions on generalization, monitoring of compliance with the law in the exercise of their powers by local authorities.

важень органів місцевого самоврядування та оптимізації надання адміністративних послуг: Закон України від 10.12.2015 р. № 888-VIII // База даних «Законодавство України» / ВР України. URL: http://zakon3.rada.gov.ua/laws/show/888–19.

Published: Теорія і практика правознавства: електрон. наук. фах. вид. / Нац. юрид. ун-т ім. Ярослава Мудрого. – Електрон. текст. дані. – 2016. – № 2. – Режим доступу: http://tlaw.nlu.edu.ua/article/view/83986/82252.

CRIMINAL-LEGAL SCIENCES

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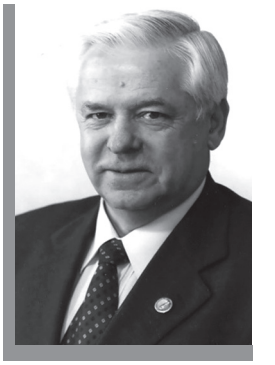

UDC 343.3/7

CONCEPT AND TYPES OF CRIMES AGAINST OCCUPATIONAL SAFETY

Occupational safety protection has fundamental importance in modern conditions. Deviations from legal prescriptions and established safety requirements, present at enterprises, mines, buildings, in agriculture, can cause or do cause serious harm to the life and health of production workers, unauthorized persons, property and environment. The protection of these goods is ensured by occupational safety. According to the Criminal Code of Ukraine 2001, occupational safety protection is provided by standards, – section X of the Special Section «Crimes against occupational safety»[1]. Under the *occupation,* we understand not only an activity, related directly to the creation of products, but also any activity of an enterprise, institution, organization or a citizen – a business entity, where human labour is the basis of operation, aimed at obtaining of a socially useful result. During the manufacturing process, a person mediates, regulates and controls the interaction between him and nature by means of his labour activity. With the help of tools, he affects the object of labour under the existing conditions of occupational environment. According to the laws of physics, any action results in opposition from both an object of labour (for example, at its modification) and tools ap-

[1] Note. Clarification regarding the application of the law on criminal responsibility for crimes against the occupation safety is submitted in the decision of the Plenum of Supreme Court of Ukraine «On the practice of courts of Ukraine legislation in cases of crimes against occupational safety» dated 12 June 2009, No 7 (see. Про практику застосування судами України законодавства у справах про злочини проти безпеки виробництва : постанова Пленуму Верховного Суду України від 12 червня 2009 р. № 7 // Вісн. Верхов. Суду України. – 2009. – № 8. – С. 15–19).

plied, – real factors of production. Such kind of technical labour property (influence – opposition) is immanent to material production. This property can take place in a non-material production (for example, at using devices, instruments, apparatus for scientific research, medical care, technical training, etc.).

Occupation is a complex interaction between a person and real factors of production. A person, through the above circumstances during or resulting from such an interaction is exposed or may be exposed to production factors[1] of different nature and extent – mechanical, chemical, thermal, electrical, electromagnetic, etc. «Everything around the employee affects the functional state of the organism»[2]. A human body tends to perceive those or other external influences only as long as they do not exceed certain levels or duration. Extension of acceptable exposure becomes hazardous or harmful[3] to a person. A production factor, the impact of which on a worker under certain circumstances shall result in injury or other sudden health deterioration, is referred to as hazardous, and probably leading (putting) to an occupational disease or reduction of worker efficiency – that is harmful. Depending on the level and duration of exposure, harmful production factor can become hazardous[4]. Not only direct labour performers, but also other participants of the production can experience hazardous or harmful effect. Under certain conditions, this influence can affect outsiders, plant property or other people's property, the environment.

Any production component can be a direct source of this adverse impact. For example, a worker that handles a detail on machine may be injured by metal shavings, which are the subject of labour. Injury can be caused by a rotating machine element – instruments of labour.

Thus, the possibility of hazardous or harmful effect is an objective property of interaction of a person and material production factors. This kind of impact of production factors cannot be ignored in the production and development of technical requirements to ensure its safety and conditions of harmlessness.

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[1] Note. «Production factor» – a term used in technical literature and standards of occupational safety in the characteristics of external influences on the production worker.

[2] Балинт И. Психология безопасности труда / И. Балинт, М. Мурани. – М. : Профиздат, 1968. – С. 85.

[3] Note. «Dangerous» and «harmful» – the main classification types of production factors affecting safety. These terms are used in technical, medical and legal literature in describing the impressive effects or adverse production factors on man, the means of production, the environment (see. ДСТУ 2293: 2014. Охорона праці. Терміни та визначення основних понять: затв. Наказом Мін економ розвитку від 2 грудня 2014 р. № 1429 // Охорона праці : наук.-виробн. журн. – 2015. – № 10. – Дод. : На допомогу спеціалісту з охорони праці. – С. 42–49 (п. 4.14, 4.15); Про охорону праці : Закон України від 14 жовтня 1992 р. № 2694-XII в ред. Закону № 2294-IV від 21 листопада 2002 р.) // Відом. Верхов. Ради України. – 1992. – № 49. – Ст. 668; Відом. Верхов. Ради України. – 2003. – № 2. – Ст. 10 (ч. 2 ст. 5)).

[4] Краснов Л. М. Организация работы по охране труда на предприятии / Л. М. Краснов. – Днепропетровск : Проминь, 1990. – С. 14.

With the present level of technology and organization of production, some possibilities of hazardous or harmful influence of production factors can be eliminated or minimized, for example, isolating by different ways, transportation of materials in closed systems, remote control of production processes. In these cases, technical and technological measures allow localization of hazard or harm of production. Similar warning of possible impressive or adverse effect of these factors is the most advanced form of occupational safety. However, most factors «can be eliminated or reduced only through mandatory compliance with the rules of conduct»[1], that is due to the human factor of production. «Any element of workplace can be a potential source of hazard under certain conditions, and it depends entirely on negligence, carelessness or fatigue of a worker»[2]. A more detailed study of causes of hazardous or harmful influence of production factors may show defects in work organization at a higher level of distribution: ignorance of worker, abnormal working conditions, lack of protective equipment and more.

Depending on the intensity (degree) of possible impact of hazardous and harmful production factors on workers at the production ground, one distinguishes ordinary (with low risk), increased risk and extreme risk. This division is carried out with a view to successful operation of techniques and conventional normal conditions and work organization. Based on this division, standards for the protection of occupational safety were established in the Criminal Code of Ukraine (Clauses 271–275).

Conventional works are characterized by low risk[3], which is generally associated with the nature of the injuries – they are insignificant; the number of victims – usually one person; no property damage. However, we cannot underestimate the hazard of such works. According to experts, "… accidents often occur at work under low risk»[4].

Unlike conventional, works with increased risk have higher degree of probability of injury of engaged persons. They are also characterized with violation (error) in the proceedings: the damage, the outcome of such a violation can be significant – death of one or more employees, injury, severe injury, group accidents etc. The causes of accidents (as well as other consequences) while performing works with increased risk are not only the specific (guilty or guiltless) human behaviour, but also outside.

[1] Балинт И. Психология безопасности труда / И. Балинт, М. Мурани. – М. : Профиздат, 1968. – С. 145.

[2] Ibid. – С. 146.

[3] Note. As V. A. Krasavchykov pointed, hazard is an objective possibility of circumstances, but not more. Possibility and reality is not the same, although the latter implies the existence of the first. Under the case in question, the possibility was realized in reality certain potentially hazardous facts must take place (see: Красавчиков В. А. Возмещение вреда, причиненного источником повышенной опасности / В. А. Красавчиков. – М. : Юрид. лит., 1966. – С. 21).

[4] Котик М. А. Психология и безопасность / М. А. Котик. – Таллин : Валгус, 1989. – С. 53.

They can also be caused by certain properties of the instruments and means of production.

A number of theorists recognize the material substrate of works with increased risk, as well as other kinds of increased hazardous human activity, as *the source of increased risk*[1]. In the science of criminal law, M. S. Greenberg gave the concept of source of increased risk. In his view, «sufficiently powerful technical system creates certain probability of injury because of their incomplete accountability»[2]. Subjects of the material world as a source of increased risk must have the following characteristics: «1) large capacity; 2) complexity; 3) relative reliability; 4) incomplete accountability and 5) the ability to cause significant harm»[3]. Investigation of accidents under the increased risk works (for example, mining, construction) however, indicate that it is often dealt with objects that do not have all these symptoms of source of increased risk, but endowed with certain properties, that create increased risk when using it (for example, rock which collapses in mines, presence of trenches, pits in construction, building materials when loading or unloading manually)[4]. Therefore, it must be assumed that the material substrate (common basis) of increased risk works is not the only source of increased risk, but also the materials (subjects) that have only individual hazardous properties (for example, increased spontaneous combustion of individual subjects, the ability to process of chemicals self-destruction, the height of buildings etc.).

Increased risk works safety demands the establishment of specific organizational and technical modes – safety levels. Therefore, only the personnel, who received a special training in occupational safety[5], can perform these tasks. They become a subject to an advanced occupational safety[6]. The list of increased risk works is defined: it is contained in the legal and technical regulations, norms of other branches of law (including labour)[7]. These include, for

[1] Красавчиков В. А. Возмещение вреда, причиненного источником повышенной опасности / В. А. Красавчиков. – М. : Юрид. лит., 1966. – С. 27.

[2] Гринберг М. С. Преступления в области техники: (сущность и обьект) / М. С. Гринберг // Правоведение. – 1962. – №2. – С. 91.

[3] Ibid. – С. 92.

[4] Борисов В. И. Уголовная ответственность за нарушение правил при производстве строительных работ / В. И. Борисов. – Харьков : Харьков. юрид. ин-т, 1974. – С. 13.

[5] Note. In ch. 2, Art. 18 Law of Ukraine «On occupational safety» dated October 14, 1992 is stated: «Workers employed in jobs with high risk … should be held annually specific training by means of the employer and knowledge checks of relevant regulations about occupational safety» (see: Про охорону праці : Закон України від 14 жовтня 1992 р. №2694-XII в ред. Закону №2294-IV від 21 листопада 2002 р.) // Відом. Верхов. Ради України. – 1992. – №49. – Ст. 668; Відом. Верхов. Ради України. – 2003. – №2. – Ст. 10).

[6] Борисов В. И. Квалификация преступных нарушений правил безопасности социалистического производства / В. И. Борисов. – К. : УМК ВО, 1988. – С. 9.

[7] Note. According to ch. 3. Art. 18 of the Law of Ukraine «On occupational safety» the list of work with high-risk is established by the

example, all works associated with cranes (regardless of the industry where they are used), high-pressure tanks, high voltage networks etc.

The presence of hazardous and harmful factors in production leads to the need for protection of life, health, property preservation, environment and other benefits. People need safety. Special security status relieves stress, anxiety, fear of possible hazard, security makes person more confident in its actions, hopes for the future, making it possible for one to do the work according to the requirements of production tasks.

The safety in the broad sense means a state of no threat. Occupational safety is a technical condition, where the possibility of the harmful effects on people, property and the environment of hazardous and harmful factors is eliminated or minimized. This status is set and controlled by a person through the system of social relations. The term «occupational safety» also covers harmlessness – the system of working conditions, which protect workers (for some industries, as well as all outsiders) against adverse effects of harmful production factors. This effect has a relatively low intensity in its immediate manifestation, it is unobtrusive (and therefore tolerant), but depends on quantitative characteristics, and acts for a long time, it causes (can cause) considerable hazardous consequences: occupational diseases of large number of employees, premature death of people, environmental pollution, in other words, acquires (can get) properties of hazardous production factor.

Occupational safety is a part of any production's safety, aimed at maintaining of internal safety, required for worker in the process of production. In its turn, the occupational safety includes technical and sanitary (the latter protects workers from exposure of harmful production factors), and as of the levels of protection – the safety of the ordinary (with little risk) and increased risk works.

Some productions also include threat of harm (which can cause it) to non-production interests. The threat is formed either in production field, or around (near) it, or because of such activities. They are, as follows: interests of the outsiders (their life, health), property (preservation of the damage or destruction of property belonging to other enterprises, institutions, organizations or individual citizens), environment (natural environment cleanliness), and others. The need to protect them from the hazards predetermines creation of a special type of safety out of production (external), yet still caused by it – the *public safety in production field*. I. P. Lanovenko noted the specific of this group of crimes as «… a violation of safety rules during such works and such production threatening a wide range of people, with this risk gaining a widespread nature. Therefore, we are talking about the criminal and law pro-

specially authorized central executive body of executive government for supervision of occupational safety» (see: Про охорону праці : Закон України від 14 жовтня 1992 р. № 2694-XII в ред. Закону № 2294-IV від 21 листопада 2002 р.) // Відом. Верхов. Ради України. – 1992. – № 49. – Ст. 668; Відом. Верхов. Ради України. – 2003. – № 2. – Ст. 10).

tection of public occupational safety»[1]. They are terms for production operation, execution of certain works, usage of obtained products, which have no impressive or devastating effects on the public interest of hazardous or harmful factors.

The highest level of negative impact of hazardous and harmful factors applies to extremely hazardous works, performing of which threaten not only the workers, directly involved in the production process, but also other persons within the field of such production. In addition, property and environmental damage is also present. This gives a reason to believe that not certain works are extremely hazardous, but the production is as a whole. Therefore, such production is extremely hazardous. The conclusion about a particular production being extremely hazardous derives from practice, considering the fact, that a certain kind of production activity involves considerable probability of significant socially hazardous consequences for a wide range of public interests. The reasons for these effects are not only within human behaviour, but they are also contained in the nature of production activities. This type of activity takes place at extremely hazardous productions. Specific literature sources state, that special provisions of criminal law do not protect the safety at all extremely hazardous productions. Out of all such productions, the Criminal Code recognizes only explosive and radiation hazardous productions. At the same time, we believe that chemically and biologically hazardous productions are extremely hazardous as well. Accidents at chemically hazardous production can cause massive harm to people and the environment with highly toxic substances (HTS). Large stocks of the most hazardous HTS – chlorine and phosgene – are concentrated at enterprises of Ivano-Frankivsk, Dnipropetrovsk and Donetsk regions. In case of an emergency at a chemically hazardous production, the total area of the hazardous zone in Ukraine can exceed 1/6 part of the territory, where over 30% of the population resides[2]. Safety specialists are aware of many accidents at chemical plants in Minamata (Japan), Love-Channel (USA), Seveso (Italy), Bhopal (India) and on the factory of «Sandoz» company in Bern (Switzerland)[3]. Thus, 1976, an accident at chemical plant of «Ikmeza» company (city of Seveso, Italy), resulted in a large number of highly toxic dioxin being discharged into atmosphere. The population of this area was evacuated. However, women from the affected area were deprived of the ability to give birth to healthy children. Everything was affected in this area: animals, birds, and flora. Dioxin turned Seveso surroundings into a desert. The researchers suggest a very slow recovery

[1] Уголовное право Украинской ССР на современном этапе. Особенная часть. – Киев : Наук. думка, 1985. – С. 191–192.

[2] Бортнічук П. М. Стійкість роботи об'єктів у надзвичайних ситуаціях / П. М. Бортнічук // Безпека життєдіяльності. – 2004. – № 10. – С. 35.

[3] Тимошенко А. С. Глобальная экологическая безопасность – международно-правовой аспект / А. С. Тимошенко // Сов. государство и право. – 1989. – № 1. – С. 90.

of life in this region[1]. A faulty valve in a 43 tons tank caused leakage of toxic methyl-isocyanate gas, which lasted 40 minutes in Indian city of Bhopal, at chemical plant of the American multinational company «Union Carbide», in December 1984. The scale of the tragedy was enormous: official numbers show 3150 people killed. 20000 people received a disability; over 200000 suffered from the effects of highly toxic gas poisoning. Unofficial numbers are even higher. For example, according to estimates of the Indian Council of Medical Research, the deadly gas cloud «burned» ten thousand citizens of Bhopal[2]. There were also cases of large uncontrolled spread of viruses and strains of microorganisms due to violation of biological safety. According to the Ministry of Emergency Situations of the Russian Federation, only in 1997 factories in this country had 3 accidents with release of biologically hazardous substances. Moreover, there was a tragedy in Sverdlovsk in 1979, where the so-called anthrax killed dozens of people in Chkalovskyi district, the residence of the 19th military town[3]. Chemical and biological weapons as well as nuclear are considered one of the most hazardous. Yet the qualification of violations in the production of chemical or biological safety rules under Clauses 271, 272 of Chapter X of Special part of the Criminal Code of Ukraine does not reflect the entire gravity of these violations and other possible negative consequences. In addition, it should be noted that draft Criminal Code of Ukraine 2001 proposed a norm to protect the safety rate of such productions[4], but while the draft was being prepared for the third reading, this norm was excluded. In our opinion, *it would still be appropriate to supplement the Criminal Code with a clause, establishing criminal liability for violation of safety rules at chemical and biological production.*

It should also be noted that a high degree of risk in production is not the greatest damage resulting from an increased hazard activity; or such productive activities cannot be recognized as legitimate[5]. However, even the presence of potential hazard brings up the need for safety conditions in production, to ensure the normal operation of enterprises, institutions and organizations, peace and prosperity both for workers and for non-workers, protection of property and the environment.

The criminal law protects occupational safety from the most hazardous infringements, responsibility for which is set in Chapter X of Special part of the Criminal Code. A *Generic object* of crimes, which is stipulated in this section, are *public relations bound to the*

[1] Зербіно Д. Д. Екологічні катастрофи у світі та в Україні / Д. Д. Зербіно, М. Р. Гжегоцький. – Львів : БаК, 2005. – С. 112, 113.

[2] Ibid. – С. 32, 33.

[3] Ibid. – С. 196.

[4] Проект Кримінального кодексу України, наданий Головним юридичним управлінням апарату Верховної Ради України за станом на 20.03.2001 р. // Матеріали проекту Кримінального кодексу України 2001 року : у 28 кн. – Кн. 28 (1999-2001рр.). – 366 с.

[5] Борисов В. И. Уголовная ответственность за нарушение правил при производстве строительных работ / В. И. Борисов. – Харьков : Харьков. юрид. ин-т, 1974. – С. 12.

occupational safety. Its elements (types, spheres, level) along with combining traits have qualitative autonomy that should be considered during the development of regulations, including the criminal law.

Direct objects of certain crimes against the occupational safety are included in the system of social relations, being a generic object with a set of peculiarities. They depend primarily on the type of occupational safety, safety levels, nature of possible damage and scope of distribution.

Victims of these crimes can be either only production workers (Clause 271 of CC) or production workers and third parties (Clauses 272–274 of the Criminal Code), or only third parties (Clause 275 of CC).

From the *objective point of view,* crimes against the occupational safety are designed the same way. All of them are described in the law as crimes with so-called material composition, and therefore require establishment of an act, consequences and causal relationship.

A socially hazardous act is found in violation through acts or omissions (or in combination) of safety requirements contained in the rules of occupational safety and production. This violation is usually not a single action (inaction), but a set of actions, where not one but a variety of safety requirements is violated. Infringement is understood as non-compliance or inadequate compliance with the safety requirements provided by the rules, or implementation of actions, expressly prohibited by the rules.

Crimes against the occupational safety are a violation of only written safety requirements. Dispositions of considered norms are blanket, and therefore their application will use legislative and other normative legal acts (regulations, rules, directions, standards, etc.), regulating occupational safety, with further determination of the violated ones. Neglecting the blanket nature of dispositions of norms of section X of Special part of the Criminal Code can result in improper qualification of violations of safety requirements in production[1].

Responsibility for violation of legislation on the peoples safety during other activities depending on the specific circumstances of the case is accrued under clauses of the Criminal Code on crimes against a person life and health, in official activities, against the environment and so on.

A mandatory feature of these crimes is *socially hazardous consequences*, divided into two types. The first type of consequences binds with the establishment of threat of death or other serious consequences (the first parts of Clauses 272–275 of the Criminal Code). The second type consists of those consequences, the onset of which is associated with causing real harm. These are «harm to health of a victim» (first parts of Clauses 271–275 of the Criminal Code); «loss of life» (second parts of Clauses 271–275 of the Criminal Code) and «other serious consequences» (second parts of Clauses 271–275 of the Criminal Code).

[1] Практика розгляду судами кримінальних справ про злочини, пов'язані з порушенням вимог законодавства про охорону праці // Вісн. Верховн. Суду України. – 2006. – №6. – С. 25–26.

In cases where crimes depicted in Clauses 271–275 of the Criminal Code had consequences under different parts of these clauses, all of these consequences should be specified in the relevant statement of case (decision, judgment) and the actions of the person must be qualified only for the same part of the clause of the Criminal Code, providing for liability for more severe consequences.

A mandatory feature of the objective side of the considered crimes is *causal relation* between the admitted violations of safety requirements and the actual harm or its possibility. The causal relation of these crimes has a number of features. In particular, in most cases, this relation comes as indirect, rather than direct. In addition, the onset of the consequence may be due to a violation of a number of safety requirements. Such violations may be committed by one or more subjects. Therefore, in many cases an additional expertise is held if the establishment of such a causal relation is necessary.

Their objective aspect determines the subjective aspect of crimes. Violation of safety requirements may include intent or negligence, the consequences – only negligence (in other words, a mixed form of guilt or negligence). The relation of subject to consequences is determinative, so in general crimes against the occupational safety are careless.

In cases of this category, each case must establish *motives* of committed violations of safety requirements, attitude of subject to compliance with these requirements, it is important for qualification, determination of public hazard degree of the offense, and the selection of a criminal sanction.

The subject of crimes against the occupational safety is special. They are persons, which must fulfil the safety requirements of production. According to their legal status, they can be divided into three groups: officials and citizens – business entities, expressly stated in Cl. 271 of the Criminal Code, in other cases, provided by law (Clauses 272–275 of the Criminal Code); workers and employees (Clauses 272–275 of the Criminal Code); outsiders for the production (Clauses 273 and 274 of the Criminal Code).

Thus, *the crimes against the security of the production are understood as socially hazardous guilty acts against the established laws and other normative legal acts on occupational safety, resulting in socially hazardous consequences under criminal law, committed by the subject of crime.*

According to similarity of the direct objects, crimes against the occupational safety can be classified as follows:

– Crimes in occupational safety (Clauses 271 and 272 of the Criminal Code);

– Crimes in public occupational safety (Clauses 273–275 of the Criminal Code).

Published: Питання боротьби зі злочинністю : зб. наук. пр. / редкол.: В. І. Борисов та ін. – Х. : Право, 2015. – Вип. 30. – С. 3–16.

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UDC 343.98

NEUTRALIZATION OF COUNTERACTION TO INVESTIGATION OF CRIMES (JUDICIAL PROCEEDINGS IN CRIMINAL CASES)

Definition, Types and Forms of Counteraction to Investigation of Crimes

The contemporary state of the fight against crime is characterized by the presence of counteracting forces, which create obstacles (barriers) in the investigation of crimes. The mechanisms of such counteraction can be different and can be simple or, on the contrary, sophisticated. Such actions are thought over before the commission of a crime, at the moment of its commission and in the post-criminal period.

The problems of counteraction to the investigation were to some extent studied in the theory of criminalistics; the notion of counteraction, its types and forms were analyzed. Counteraction to the investigation is not a new problem. A certain action implies «counteraction». H. Gross notes that «criminals use different methods»: the change of appearance, false testimony about the posi-

tion and name, feigned diseases, secret signs among criminals (Gross H. Handbook for Examining Magistrates as a System of Criminalistics – New edition, reprinted from the edition of 1908 – Moscow: LeksEst, 2002).

At present, there are different approaches to the understanding of counteraction to the investigation in criminalistics:

– illegal activities of persons who are interested in the outcome of the case (R. Belkin);

– deliberate actions (or a system of actions) directed at impeding the fulfillment of the tasks of the preliminary investigation and the establishment of undeniable truth with respect to a criminal case (V. Karagodin);

– a system of illegal activities determined by objective and subjective factors directed at disorganizing the work connected with solving a crime, impeding the establishment of undeniable truth with respect to a criminal case and administration of justice by different persons interested in dodging the responsibility by the guilty person (A. Kustov).

Despite the variety of definitions of the notion «counteraction to the investigation», its essence consists in deliberate activities of interested persons directed at impeding the solution and investigation of crimes with the help of different means. *Counteraction to the investigation* is an activity of interested persons directed at impeding the solution and investigation of crimes by means of creating obstacles on the way to the establishment of truth with respect to a criminal case. External and internal counteraction to the investigation, depending on the relation of certain persons to the criminal event, is distinguished in criminalistics.

Traditionally, counteraction is considered as an action directly aimed at the concealment of a crime (the destruction of evidence or the change of the traces of a crime or a criminal, different simulations of crimes, etc.), at dodging the responsibility (failure to appear according to the summons of an investigator or the court, a departure to another area, transfer to illegal status), at creating additional obstacles in the solution and investigation of crimes (illegal influence on the part of the mass media, the work of mala fide lawyers, falsification of evidence on the part of corrupt investigators).

Counteraction to the investigation is demonstrated in different forms: it is drawn attention to the concealment of crimes and criminal influence on evidentiary information. However, these categories represent quite broad notions, which are demonstrated in different ways. In our opinion, it is more preferable to consider counteraction to the investigation as certain influence on evidentiary information. Counteraction to the investigation is modified and becomes aggressive, dynamic and disguised.

The study of new forms of counteraction to the investigation is becoming more and more urgent:

– the use of the mass media and other communications with the purpose of impeding an investigation;

– the use of corrupt mechanisms for counteraction;

– falsification of evidence by law enforcement officers;

– the use of psychic and physical effect on participants in a criminal case on the part of interested persons (including killing of certain persons).

Under current conditions, there is a tendency to the extension of the number of «interested persons» in the counteraction to the investigation. Besides the persons who committed a crime, such persons also include mala fide witnesses, injured persons, defenders and even law enforcement officers.

There is a tendency of an increase in the number of corrupt law enforcement officers. One of the widespread ways of criminal influence on evidentiary information is the deprivation of the information that was received by subjects of the investigation of evidentiary value. Most often this is realized by means of discrediting:

1) the objective content of evidentiaiy information;

2) the procedural order of the receipt of evidentiary information;

3) the legislative order of the regulation of the receipt of evidence;

4) carriers and sources of evidentiaiy information.

Under current conditions, counteraction to the investigation is widely used in the activities of organized criminal groups. There are some peculiarities of certain forms of counteraction on the part of organized criminal groups.

The concealment of crimes. Under current conditions, one can distinguish certain peculiarities in the activities of criminals connected with the concealment of crimes. The concealment of criminal activities which is used by organized criminal groups has a specific character. In particular, this refers to a sharp increase in the specific weight of actions connected with the concealment of crimes in the system of criminal activities; concealment gets to a new quality level; concealment is becoming more and more professional.

Corrupt mechanisms of counteraction to the investigation. Corruption is a sign of organized crime. Corrupt relations are a feature of the contemporary organized crime. The problem of corruption on the whole and bribery in particular is becoming especially acute in connection with the growth of organized crime. It is necessary to note that at present the situation with corruption in Ukraine is quite difficult. According to the data (2015) of the International Non-Governmental Public Organization Transparency International (TI), Lithuania occupies the 32nd spot, Ukraine – the 130th spot out of 178 (the last spots are occupied by Angola, South Sudan and Sudan).

Corrupt relations in government and administrative bodies and especially in law enforcement bodies ensure a certain level of security and timely information about the directions of the activities of these bodies for an organized criminal group.

The use of the mass media with a criminal purpose. The mass media or mass communications are regular dissemination of information by means of the press, the radio, the television, the cinema, an audio recording, a video recording with the purpose of strengthening spiritual values and producing influ-

ence. Mass communications are an important social and political institution. Communication media have three different types of techniques:

1) printed (written);
2) verbal;
3) audio and video image.

At present time, the Internet, Internet editions and Internet technologies are used quite often.

The mass media can also fulfil tasks of the leaders of organized criminal groups, serve their needs and receive financial support from them. Now organized crime can control or have their own TV channels and certain printed media.

False testimony. There are a few problems here:

1) giving false testimony by the leaders and members of organized criminal groups and the possibilities of its identification and disclosure;

2) giving false testimony by witnesses, injured persons due to the influence on them by representatives of organized criminal groups and the possibilities of its prevention and removal.

Falsification of evidence. This refers to misrepresentation of evidentiary information by a special subject, in most cases by persons who must investigate and establish the truth. Falsification of evidence is connected with corruption in law enforcement bodies on the part of organized crime. .

The use of threats and violence. In the process of counteraction to the investigation organized criminal groups use extreme measures – from threats to physical influence (the use of violence) and physical liquidation (killing) of persons. The above-mentioned actions can be directed at both the persons who carry out proceedings (interrogating officers, investigators, prosecutors, judges) and witnesses, injured persons or members of an organized criminal group.

Criminal Behavior. Essence of Defensive Dominant

The commission of any crime assumes the presence of a subject of the activity (the subject of its commission). Different terms are used in the legal sources to define this notion: «the identity of a criminal», «the subject of the crime», «the personality of a criminal», «the guilty person», and «person, who committed a crime». Despite certain aspects, these terms are used as identical ones. There is also an opinion that denies the notion of the personality of a criminal, which allegedly does not contain any specific peculiarities.

The personality of a criminal not only exists, but it needs to be studied. It is necessary to agree with the opinion of A. Zelinskiy that the personality of a criminal is alpha and omega of criminal psychology and its cornerstone. The person who violated the law is the author of the crime and his/her actions turn the citizen into a criminal who is denied by public conscience[1]. When carrying out criminal activities criminals acquire certain knowledge and skills, habits and inclinations, i.e. a «criminal» style. Adherence to the commission of crimes in a certain way is a precondition of criminal professionalization. The knowledge

[1] Зелинский А. Ф. Криминальная психология: научно-практ. изд. Киев: Юрин- ком Интер, 1999. – С. 9.

of specific ways of professional criminal activities is the key to finding the guilty persons.

The term «the personality of a criminal» is used in the criminal law sciences. This term is also used in criminalistics. At the same time, the personality of a criminal is a social and psychological category the content of which includes the aggregate of typical psychological and moral qualities of an individual, which are formed as a result of the commission of crimes. The personality of a criminal covers the whole system of psychological qualities: inducement, attitudes, beliefs, emotional and volitional peculiarities, etc. The study of the personality of a criminal assumes the study of psychological mechanisms of the illegal behavior, motivations of different types of crimes, individual psychological and social factors, situational reactions of a person. In the context of the contemporary state oft he science, L. Ivanov suggests «a polysystemic study of the personality of a criminal in criminal proceedings» or a new «criminalistic approach to the person as an independent system[1]".

In criminalistics, the personality of a criminal is studied, first of all, in order to find the person who committed a crime. Recently, there has been attempts to develop a psychological portrait (profile) of a criminal – his/her perfect mental model. The psychological profile is a system of criminalistically significant signs, which are developed by specialists with respect to a certain criminal case (psychologists, psychiatrists, sexologists, criminalists, etc.) with the purpose of recreating the personality of the possible criminal and searching for him/her. In special sources, there are opinions that it is reasonable to form other profiles for the establishment of the personality of the unknown criminal (stereotyped, raster, criminalistical, informational ones).

When the personality of a criminal acquires the procedural status of a suspect or an accused, in cases when we are already speaking about a concrete person, the personality of a criminal is studied in another respect. Naturally, the guilt in this case has not been proved fully yet, but there is a necessity to study this personality, its motives, purposes, attitudes to what was done. The position of the accused (suspect) can be different. His/her behavior, which in some cases is conditioned by the prevalence of the defensive (protective) dominant also, differs. The study of the accused (suspect) is carried out within the framework of the criminal proceedings. The purpose of the study of the personality of the accused (suspect) consists in the establishment of a psychological contact with him/her, the determination of the level of psychological influence and the choice of the corresponding tactical means, the receipt of objective information from this person. That's why the use of the information about the personality of the suspect (accused) is considered to be rather important when carrying out certain investigative actions (interroga-

[1] Иванов Л. Н. Полисистемные исследования личности в уголовном судопроизводстве. Саратов: Изд-воСарат. ун-та, 2006. – С. 39–47.

tions, investigative experiments, searches, etc:).

Certain consistent patterns are inherent in the behavior of persons who committed a crime. Typical forms of behavior of such a person can include the following: 1) repentance for the committed crime (surrender, actions connected with damage compensation, etc.); 2) counteraction to the investigation (the concealment of the traces of the crime, incitement to false testimony, the receipt of information about the course of the investigation, the provision of false information); 3) continuation of the criminal activities, the commission of new crimes.

The defensive dominant prevails in the psychology of the person who committed a crime. The dominant is a temporarily prevailing reflex system, which conditions the work of nerve centers at this moment and gives a certain direction to the behavior. It is the defensive dominant that summarizes and accumulates impulses, causes disordered activities, incites the guilty person to carrying out actions, which, in the opinion of the criminal, must prevent him from being exposed. For this purpose, the criminal creates simulations, manufactures false evidence of his/her innocence, makes false statements and spreads rumors.

The actuation of protection mechanisms with respect to a single criminal and persons who committed a crime, acting as a group (including an organized group), has a significant difference. The single criminal's protection mechanism is determined by his/her psychology and fear of exposure. Moreover, as regards persons who commit a crime, acting as an organized group, a psychological mechanism of the functioning of the group as a whole is actuated. The presence of certain protection of the organized group from being exposed is a regular occurrence in the organized criminal activities.

It is with the protection function of organized criminal groups that the duration of their existence is connected. Such a protection mechanism is created already during the formation of the group. The structure of the organized criminal group assumes the presence of special persons (blocks, brigades) who fulfil the function of the protection from exposure (persons who ensure discipline, pursue persons who intend to cease the criminal activities, maintain ties with corrupt officials and law enforcement officers).

There is a certain correlation between the protection mechanism of organized criminal activities and counteraction to the investigation. The protection mechanism represents a potential possibility of reacting to actions on the part of law enforcement bodies. This reaction can be different, depending on the efficiency of operational search or investigative bodies. Counteraction to the investigation is the real actuation of protection mechanisms.

The personality of a criminal is the most important element of the criminalistic characteristics of crimes. This is a certain typical model of a person, who committed a criminal act (a system of data about criminalistically significant signs). The value of criminalistic characteristics consists in the fact that their elements are interconnected and have

correlated dependence. Each element of criminalistic characteristics of crimes has a different level of dependence on other elements. In particular, the element of the characteristics «the personality of a criminal» can have the following natural relations: «injured person – criminal», «traces of the crime – the way of its commission – criminal», «scene and circumstances of the crime – criminal», «time of the commission of the crime – criminal», etc.

In the contemporary literary sources, there are attempts to study and distinguish typical signs of the personality, which is inclined to the commission of a certain type of crimes, and to form a typical model of the personality of a criminal. In criminalistics researchers study the personality of a juvenile criminal, a criminal with psychic anomalies, the personality of a murderer, the personality of a maniac, etc. The development of their social and psychological characteristics, typical models of certain categories of criminals (a criminal of the violent type and his/her different subtypes, a criminal of the acquisitive type, etc.) is of certain interest. Recently they have been analyzing the behavior of the personality in a group, in an organized group (or a criminal group), the influence of the leader on other members of the group. The category of «the personality of a criminal» in criminalistics has a conventional meaning as in some cases it allows studying the so-called «collective» subject. This refers to collective crimes, the commission of a crime as part of a group.

The statement of the problem about the criminalistical understanding of the personality of a criminal is reasonable. The criminalistical understanding is conditioned not by the study of this phenomenon overall, but by certain role functions and tasks. It is natural that the category of «the personality of a criminal» in criminalistics is acquiring specific connotation and is quite conventional with respect to its internal content. This refers only to the extraction of criminalistically significant (typical) signs in a person who committed a criminal act and the possibility of manipulating them for the establishment of undeniable truth regarding the case. In this respect, it is possible to determine a few specific directions: 1) the searching one (the use of the possibilities of making different types of profiles: psychological, stereotyped, criminalistical, informational, raster ones, etc. with the purpose of modeling the personality of a possible criminal); 2) cognitive one (the development of criminalistical characteristics connected with different categories of crimes and the saturation of such its element as «the personality of a criminal» and also their use in the practical activities with the purpose of effective solution and investigation of crimes); 3) information andtactical one (the use of the information about the personality of a criminal with respect to parties to proceedings – the suspect or the accused in the course of carrying out certain investigative (court) actions).

Behavior of Aggrieved Person (Victim)

The personality of the victim – is quite a complicated character in the context of criminaistics. An aggrieved per-

son is a person who suffered moral, physical or property damage because of the crime. The crime mechanism implies interrelation between the criminal and the victim (the aggrieved person). The psychology of the conflict «offender – victim» can take many forms. In some cases, victims oppose crime investigation or proceeding in a criminal case.

Depending on the role of the aggrieved person (victim) in the implementation of the criminal intent, several types of behaviors on the part of the victim have been defined: positive, neutral and provocative. Positive behavior is behavior that is aimed at the prevention of the conflict, its suppression and arrest the offender (socially positive behavior). Neutral behavior does not conduce to the commission of the crime, but does not prevent it either (indifferent behavior). Provocative behavior of the victim creates a real opportunity, contributes to the implementation of criminal intent (by its nature, duration and intensity). Provocative behavior is the cause of committing a criminal act or produces a positive effect on the formation of criminal intent. Provocative behavioris sometimes referred to as negative.

Provocative behavior of the victim induces negative emotional states of the criminal (aggressiveness, anger, bitterness, etc.) which causes murders, injury, etc. For example, systematic humiliation and insults can cause the emotions of anger, as a result of which physical damage will be inflicted on the aggressor. Frivolous or immoral actions of the victim (depravity of relations, demonstration of sexual availability, etc.) can be provocative in cases of rape.

A specific study of victims is reffered to as victimology. This broad interdisciplinary field studies victims, relationship between the victim and the offender[1]. There have been attempts to create a «criminalistic doctrine of the aggrieved person», «criminal victimology» or «criminalistic victimology» (V. Vandyshev, B. Holyst, Ye. Tsentrov).

The doctrine of the victim of a crime in criminalistics as a criminalistic subtheory is based on the possibilities of victimologic analysis, aimed at collecting and applying data on the injured person for the successful detection, investigation and prosecution of offenses in criminal cases.

In terms of criminalistics, it is important to differentiate between the types of victimity – an enhanced human capacity due to a number of mental and physical characteristics as well as the social role and status, under certain circumstances, to become a victim of a crime.

The following types of victimity have been defined: 1) a set of social and psychological characteristics associated with specific characteristics of socialization (victimogenic deformation of personality); 2) professional victimity (conditioned by the performance of certain social functions, such as a debt collector, taxi driver, police officer, etc.); 3) age victimity (as biological property); 4) victimity – «pathology» (as a result of a pathological condition of the person – a serious physical disorder, physical illness or mental illness).

[1] Потерпілий від злочину (міжправове дослідження): монографія / за ред. Ю. В. Баулiна, В. І. Борисова. Харків: Кроссроуд, 2008. – 364 с.

The personality of the victim is an important element of a criminalistic crime characteristic. The system of features related to the victim's personality is complex and includes, as follows: general demographic characteristics (sex, age, place of residence, work or educational institution, occupation, profession, education, etc.), information on the life style, character traits or type of temperament, habits and inclinations, links and relationships. The victim data also includes information on his/her victimity. The contacts, relationships between the victim and the criminal, their nature affect the purpose, motive, place, time, methods of committing and secreting the crime.

In criminalistics details about the victim are also important for certain investigative and judicial proceedings, for determining operating practices and their tactics (the victim interrogation, investigative experiment involving the victim, inspection of an individual, preparation of samples for comparative examination, etc.). In the course of investigation (the trial), it is necessary to eliminate the negative influence of interested persons on the victim (threats, blackmail, bribery, physical violence).

The most general program of the victim personality research should include: 1) personal details; 2) socio-psychological data; 3) behavior patterns (before the criminal conduct, at the time of the crime, after the crime); 4) independent references (from employers, educational institutions, place of residence, relatives, circle of acquaintances, etc.); 5) social networks (social circle, closest friends, conflict relations, the nature of acute conflict relations and their time period, particular patterns of spending leisure time, the fact of (not) doing joint business, undertaking commercial activities, the specificity of group behavior, propensity for micro-groups, orientation of a microgroup, etc.); 6) information on the activities (specifics of work, skills, profits, right to dispose of material assets, range of competences, the presence of conflict relations in the course of doing activities, etc.); 7) financial situation (availability of assets and property, cash deposits, sources of wealth accumulation, presence (or absence) of debt, obtaining loans and the possibility of redemption, etc.); 8) criminal experience (presence (or absence) of convictions, connections with criminal gangs, friendly relations with the persons who were prosecuted); 9) the reasons for victim behavior (performance of certain social functions (a collector, taxi driver, a police officer, etc), social deformation of the personality, consequence of a pathological condition (a serious physical disorder, physical disability or mental illness), a biological property, etc.).

The aggrieved persons can be differentiated depending on the mechanism and category of crime. There are categories of the aggrieved persons as a result of certain types of homicide (domestic homicide, contract murders, murders incident to gang confrontations, murders involving rape, etc.), injury, robbery, hooliganism, people trafficking, various sexual offenses etc.

Typical Methods of Counteraction to Investigation of Crimes (Judicial Proceedings in Criminal Cases)

Counteraction to investigation involves identifying opportunities to pre-

vent and neutralize it. Overcoming factual counteraction to the investigation calls for appropriate reaction by law enforcement officials.

For the current stage of development of criminalistics it is common to turn from the study of «counteraction to investigation» as a phenomena (definition, position in criminalistic science, types), from the development of criminalistic sub-theories and doctrines associated with the counteraction, to the development of the system of procedures, techniques and methods to overcome and neutralize counteraction to investigation in the framework of criminalistic tactics.

It is believed that the study of different methods and forms of counteraction to investigation of interested persons should be conducted in the sphere of tactics of criminal activities (criminal tactics) as a subdiscipline of criminalistic tactics. As for the study of methods of eliminating (neutralizing) of counteraction of interested persons, with good reason it holds an important position in the investigative tactics (tactics of investigative activities) as a subdiscipline of criminalistic tactics (V. Shepitko, B. Shchur, etc.).

The tactics of overcoming counteraction to investigation has been insufficiently developed so far. In our view, this direction of criminalistic tactics can be represented in several blocks:

1) tactical means to overcome perjured evidence and expose false testimony;

2) tactical means aimed at securing the secrecy of investigation;

3) tactical means aimed at protection of evidentiary information from its destruction and distortion;

4) tactical means to ensure the security of parties to criminal proceedings;

5) tactical means aimed at the prevention of investigation mistakes (tactical, organizational, methodical).

Maintaining secrecy of investigation (preliminary investigation or pre-trial investigation) may be considered as a means of overcoming counteraction to investigation. The concept of secrecy of investigation is becoming increasingly important because of modernization of counteraction of interested persons.

Secrecy of investigation is information concerning the circumstances, subject to proof in a criminal case. This is information, which is not disclosed in the interests of investigation.

Secrecy of investigation is a kind of business, official secrecy; it is conditioned by the specificity of professional work of the investigator.

The criminal legislation establishes liability for the disclosure of data of pretrial investigation by a person cautioned according to the procedure provided by the legislation against the inadmissibility of their disclosure, if it is committed without the consent of the investigator (e.g., Art. 387 of the Criminal Code of Ukraine).

The democratization of various spheres of public life does not mean a straightforward rejection of the secrecy of investigation. Since this secrecy acts as a guarantee to protect the rights and legitimate interests of individual citizens, protection of their safety, objective investigation of crimes.

Tactical rules of maintaining secrecy of investigation:

1) compilation of the list of information constituting the secrecy of investigation (preliminary investigation secrets) in a particular criminal case;

2) establishment of the scope of persons involved in the orbit of the criminal proceedings, who should be cautioned against disclosing of the secrecy of investigation (a witness, an aggrieved person, expert, specialist, interpreter, etc.);

3) warning of persons against the disclosure of the secrecy of investigation (establishment and confirmation of duty);

4) restriction of the scope of persons present during the course of the investigation;

5) restriction of access of certain individuals to the evidentiary information;

6) determination of the specifics of work with evidential information as part of investigatory-operative group (investigatory and intelligence group) or the investigation team;

7) prohibition on unmotivated transfer of the criminal case from one investigator to another;

8) establishment of the order of interaction of the investigator with inteligency staff (B. Shchur).

The problem of *falsifying evidence* as a form of counteraction to investigation has been understudied in criminalistics. The essence of falsification of evidence is the distortion of evidence, which is proof in a criminal case. Falsification of evidence is «the eternal curse» of judicial proceedings. Moreover, a special subject – the inquirer, investigator, prosecutor and defender (in a civil case – a person involved in the case, or his representative) acts as a falsificator.

In Ukraine, no specific rule governing liability for falsification of evidence has been provided yet. However, Articles 372, 383 and 384 of the Criminal Code of Ukraine (Criminal prosecution of an innocent person; False statement on a crime commission; False testimony) provide for liability for acts (part 2) «related to the fabrication of evidence».

Democratization of society is associated with increased opportunities for the mass media (the media) to cover events and conduct journalist investigations. The media are the main source of information about the activities of law enforcement agencies for the majority of the population. In an effort to react quickly to the situation, the media can report false or unverified information about high profile or serious crimes. Their negative role shows in publicizing information on the «order» of organized criminal groups. With this in mind, the media activity should have certain limits.

The system of tactical means aimed at overcoming the counteraction to investigation, may also include the *prevention of investigative mistakes*. The tactical mistakes of an investigator deserve special attention. These mistakes are made in the course of conducting investigative actions, their complexes (tactical operations), applying tactical options or their systems.

Tactical mistakes of an investigator constitute a negative result of the actions

conditioned by certain shortcomings in his/her work.

There are various reasons of tactical mistakes. Mistakes in many cases are directly related to the investigator's personality, his skills, abilities, and volitional powers and character feature.

In particular, implementation of similar actions, application of typical methods leads to a professional deformation – development of psychological changes that affect the quality of work. When at the initial stage of the investigation «everything is obvious» to the investigator, it indicates a deformation of professional consciousness.

Thus, at the present stage of development of criminalistic tactics its paradigm is changing, there are new trends and theories. The content of criminalistic tactics is characterized by the formation of a new direction – the tactics of overcoming counteraction to investigation. This trend requires scientific understanding, defining of its structure, development of the most efficient system of tactics.

Published: Textbook of criminalistics. Volume l : General Theory Edited by H. Malevski, V. Shepitko. – Kharkiv : Apostille Publishing House LLC, 2016. – P. 235–252.

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UDC 343.98

DEFINITION AND SCIENTIFIC PRINCIPLES OF CRIMINALISTIC DIAGNOSTICS AND CRIMINALISTIC FORECASTING

Criminalistic diagnostics (V. Snetkov, 1972) is a criminalistic theory, where the cognition of changes, that have taken place in the result of a crime, causes and conditions of such changes on the basis of selective examination of the properties and conditions of the interacting objects in order to determine the mechanism of the criminal event as a whole or its individual fragments, is studied (Yu.Korukhov, 1998).

The etymological meaning of the term «diagnostics» has three notions: recognition, distinction and determination. Criminalistic diagnostics accumulates all the above mentioned three notions and can be defined as a goal (task), process and method of cognizing the properties and state of the object (situation) in order to establish the changes taken places therein, identifying the causes of such changes and their connection with the committed crime.

The objects of criminalistic diagnostics are the material bodies, phenomena, situations that existed at the moment of crime. They are classified into the diagnosing and diagnostic. The former includes the objects, situations, phenomena, properties, qualities, conditions, relations, the links between which require recognition. Diagnosing objects are the material media of attributes that display the properties and impact of the events and their conditions on them.

The diagnosing objects include the traces-reflections (handwritten text, casts, photos, etc.), parts of objects, substances (solids, liquids, gas-like), reflective images. One uses samples, primarily the reference materials (tables, atlases) containing the characteristics of the objects under examination, their images, as well as collections of natural objects.

Diagnostics as well as identification is based on the examination of the object's attributes. The diagnostic attribute is the one, using which one may judge about the properties of the item reflected in the object's trace, their change in time, conditions, where the objects have interacted. However, in contrast to the identification, while making the diagnostics, one is focused on the mechanism and conditions for the formation and manifestation of traces. A distinguishing feature of diagnostics against identification is the fact that when performing identification there is always a material object, and in the course of the object can be missing (for example, a man is missing, but according to the traces on the way as available to the investigator, the approximate height of the man who has left the said traces can be determined).

Criminalistic diagnostics solves a set of problems that are aimed at studying the internal properties and state of the object, its external characteristics (time, location, operation), mechanism of the origin and development of processes (the nature of interaction between an object and the like). Among these problems there are:

a) ascertainment of the spatial structure of the criminal event situation (where, what situation was around at the crime scene, the exact location of the vehicle's collision, which of the available tracks are attributable to the committed crime, etc.);

b) ascertainment of the mechanism of individual phases (stages) of the event (the area or nature of the barriers' breaking, inter-position of the vehicles at the time of the collision, the method of producing counterfeit money, etc.);

c) specification of the tangible structure of the crime scene's situation (compliance of the objects (traces, evidence) found at the scene with the mechanism of crime, possibility of leaving traces of the crime instrument on the offender and his clothing, etc.);

d) determination of the temporal features of the criminal event (when it occurred, how long it might have been necessary to commit the crime, in which sequence the actions have took place, which traces had been made earlier, which of them later, etc.);

e) ascertainment of properties of the acting objects (how many people participated in the crime commission, the role of each of them in realizing the offensive intent, the person's criminal skills, etc.);

f) specification of cause-effect relationships (what caused the fire, possibility of spontaneous firing without pulling the trigger, etc.).

There are several areas (types) of diagnostic examinations:

1. Diagnostic examination of the properties and state of the object upon direct examination thereof:

1.1. Examination of the object's properties, including its compliance with particular (set standards) features (e.g., whether the object belongs to firearms).

1.2. Determination of the actual state of the object, presence or absence of any deviations from its normal parameters (e.g., whether the given firearm is faultless, whether it is suitable for shooting).

1.3. Specification of the object's initial state (e.g., which changes have been

made to the original text of the document under examination).

1.4. Determination of the causes and conditions for changing of properties (state) of the object (e.g., which fact has caused the rupture of the shotgun's barrel).

2. Diagnostic examinations of the properties and state of the object by its image.

2.1. Determination the trace's informativeness degree (e.g., if there are fingerprints on the bottle, and if any, whether they are suitable for the identification).

2.2. Ascertainment of the properties and state of the object at the time of manifestation (e.g., what conditions the writer was in at the time of writing the manuscript).

2.3. Ascertainment of the properties of acting objects by traces-reflections (e.g., how many people have participated in the crime commission, the role of each of them in realizing the offensive intent, the person's criminal skills, etc.).

2.4. Specification of the cause of changes in the properties or state of the object (e.g., whether a particular text has been washed out, corrected, etched).

3. Examination of the mechanisms, processes and actions upon the results (objects, maps).

3. Determination of the mechanism's structure.

3.1.1. Determination of the option to re-create the mechanism and circumstances of the event subject to the available maps (e.g., which mode (maneuver, braking) the vehicle's driving was in before hitting a pedestrian).

3.1.2. Specification of individual phases (stages, fragments) of the event. (e.g., which direction the vehicle has been on as it appears from the traces on the road surface).

3.1.3. Determination of the mechanism of the events in its dynamics (e.g., which parts of the vehicles have been in contact at the collision).

3.1.4. Ascertainment of the possibility (impossibility) to commit some actions under certain conditions (e.g., whether it is possible to shot from the given shotgun when it has fallen onto the floor from a meter height).

3.1.5. Determination of the consistency (inconsistency) of the actions with special rules (e.g., which deviations from special rules have been committed when making the forms of such document).

3.2. Determination of the conditions (situation).

3.2.2. Determination of the time (period) or chronological sequence of actions (events) (e.g., which sequence has taken place judging by traces at the scene, which actions the criminal has made).

3.2.3. Determination of the place of the action (its location, boundaries), positions of the participants (e.g., the interposition between the gunman and the affected at the moment of shooting).

3.3. Determination of the causality.

3.3.2. Determination of the cause for the observed outcome (e.g., the cause of the lock's fault is, the cause of fire).

3.3.3. Ascertainment of the causal relation between the actions and consequences (e.g., the extent to which the actions of the vehicle's driver have

caused the occurrence of the traffic accident).

4. Ascertainment of criminogenic factors.

4.1. Ascertainment of the causes and conditions of the criminal event (e.g., which factors have contributed to the commission of the crime, which imperfections of the documents have contributed to the falsification thereof) (Yu. Korukhov, 1999).

Criminalistic diagnostics is implemented in the expert and investigative practice. The essence of expert diagnostic study is to reveal, in the object under examination, the deviation from the norm, to set the cause of such changes and to determine the extent where such cause is connected with the event (mechanisms) of the crime. For these purposes, one performs a comparison of the results obtained with a similar one.

The methods of the expert diagnostics examination include the following stages (phases):

1. Preparatory stage:

1.1. Clarification of the task. Awareness of the object (situation).

1.2. Specification of the possibility to make the examination.

2. Major examination:

2.1. Analysis of diagnostic attributes.

2.2. Comparative examination through the use of analogues.

2.3. Synthesis of findings.

3. Final stage:

3.1. Assessment of the examination results.

3.2. Setting forth of conclusions.

3.3. Drawing of the opinion.

In his/her turn, the investigator carries out the diagnostics of:

(1) criminal situation on the basis of examination into the mechanism of crime (method of preparation, commission and concealment, actions by participants of the event) according to its manifestation;

(2) investigation situation on the basis of analysis of the available evidence, characteristics of personalities of the participants to the criminal process in order to predict the prospects of its development;

(3) involvement of the individual into the crime based on him showing the elements of the clue-like behavior;

(4) position of the questioned and searched according to the nature of his/her conduct, voluntary and involuntary responses.

Criminalistic Forecasting

Criminalistic forecasting is a type of predictions in the fight against crime area, focused on building and verification of forecasts that reflects the prospects and directions of the criminalistics development and development of its cognition objects in future. The objects of criminalistic forecasting include the functional side of criminal activities and of the actions to identify and investigate crimes. Such objects are treated as systemic formations, the elements of which include: mechanism, way *(modus operandi)*, situation of the crime, motive of the criminal activity, ideal and tangible traces left from the offender's interaction with the environment, techniques and methods to cognize the factors constituting a crime; behaviour of professional

and non-professional participants to the investigative process, etc.

Criminalistic forecasting performs a number of functions, which are important for theoretical researching and practical activities. Among those, it is worth mentioning the heuristic, search, regulatory, integrative, orienting, proactive and pragmatic functions.

Theoretical and methodological basis for performing the criminalistic forecasting includes:

1) philosophic concepts, beliefs, in particular the recognition of validity as the objective reality, historicity of the phenomenon and processes (events) and their continuity, interaction of the past, present and future, and so on;

2) provisions, rules and guidelines as developed in the general prognostics and being the algorithmic instructions for forming of criminalistic forecasts (dependence of the forecast reliability on its information base and number of probable forecasting alternatives; submission of forecasting methods to the laws of epistemology and logic, etc.);

3) concepts initiated in certain areas of knowledge: theory of law, criminal law and criminal procedure law, criminology, psychology, psychiatry and those as have been rendered as applicable in composition of criminalistic forecasts;

4) laws and principles as set forth in criminalistics as the basic ones for the formation of forecasting theory (the law of active and creative adaptation for the purpose of proceedings as achieved by various sciences; the law of conditionality of criminalistic guidelines upon the needs of practice to combat the crime and upon the improvement of that practice on basis of the criminalistics' achievements, etc.);

5) provisions as developed in criminalistic forecasting are subject to the specificity of the scope and object of cognition and which serve as the methodological basis for theoretical studies and practice of the criminalistic forecast formation.

The result of criminalistic forecasting involves both the information media on potential directions and tendencies that the cognition objects will develop to. Forecasts can be divided into the search and regulatory ones, constructive and destructive ones, current (operating), short-term and long-term ones, group and individual forecasts.

The accuracy and validity of criminalistic forecasts depend primarily on the collection and analysis of information as required for making of such type of the activity: both formal and informal, internal and external, quantitative and qualitative.

The sources of reference for forecasting information may include the following:

1. Scientific evidence:

a) provisions of the general theory and particular criminalistic theories: data as regards the frequency of ways (modus operandi) to commit and conceal the crimes, trace-making mechanisms, skills of criminal activity upon maintaining the stability of the determining factors;

b) results of scientometric surveys in criminalistics, in particular, the conclusions as for directions, intensity and content of the dissertation theses on specific issues of criminalistics;

c) information featuring the current level of development of the natural and technical sciences, data of which are used in criminalistics, as well as tendencies and prospects for development of scientific and technical progress;

d) results of sociological, legal and criminological forecasts;

e) survey data being the results of surveying, interviewing the researchers and practitioners, as well as the conclusions (opinions) of the experts as for object and situation of the forecast.

2. Statistical data:

a) statistical criminalistic data, being the information about the persons who have committed crimes, criminal methods and relevant traces, objects of criminal offense;

b) quantitative features of the crime, its individual types and dynamics.

3. Summarized data of practices (including the foreign experience):

a) information on the new ways to commit crimes, new varieties of criminal offenses, transformation of the environment, where these or those offenses are committed;

b) information about the efficiency of various tools, techniques and methods of criminalistics for investigation process into a particular type of crimes;

c) information on the new tools and techniques of judicial investigations, etc. as emerged in the practice.

Criminalistic forecasting is carried out through use of various methods, and it is necessary to point out the following among them: 1) the methods for obtaining source information for forecasting (questionnaires, interviews, monitoring); 2) methods of processing the source information (preparation of analytical explanatory notes, forecast scenario writing); 3) methods to obtain prognostic information (expert opinions, extrapolation, modeling); 4) methods of checking and evaluation (verification) of prognostic findings (indirect quantitative estimates, additional survey of experts, construction of auxiliary models).

Criminalistic forecasting can be of scientific, scientifically applied and practical orientations.

Forecasting of researches and results thereof is associated with the development of criminalistics in general, with specification of the ways and the potential consequences of its development; alongside forecasting is regarded as an internal, integral function of the science. Criminalistic forecasting is conductive for enhancement of the cognitive area, being a kind of reference for finding the most optimal ways and directions for scientific searching.

Scientifically applied forecasting is aimed at anticipating the prospects of changes in the nature, methods, mechanism and other structural elements of certain types of criminal activity, in peculiarities of their attributes' manifestations, and respectively, in potential changes in the activity for exposing, investigating and preventing such crimes. Its essence lies in the fact that on basis of the theoretical system of knowledge regarding regularities of the forecast objects development (knowledge about the past and present, their relationships with other objects, forecast background, etc.), the assumption is formulated about the

most probable changes in the qualitative state of such objects in future (modification of existing or appearance of new ways (modus operandi) for the crimes commitment and cover-ups, items of the criminal offense, etc.). The resulting projections determine the orientation of developments on guidelines for improvement of methods of investigation of such criminal acts being changed. Thus, the identification of tendencies of the burglars' adaptability to the changing conditions of the facilities' security against criminal offenses has made it necessary to take into account this fact in order to develop appropriate guidelines for improving the methods of investigation and performance of preventive works.

Practical forecasting reflects the specificity of anticipations in the investigative and judicial enquiry and special search activity. Basis for the projections includes the generalized views on typical development of the objects, phenomena and processes of certain kinds. The forecasts are made online on basis of such general concepts in respect to the specific real investigation situations, subjects, their behaviour and actions, etc. The source information for making of such forecasts is, in the first place, the theoretical knowledge in the sphere of criminology, psychology, theory of reflection, etc., for example, information about the typical criminalistic features of the type of crime, to which the events under investigation relate, about typical tendencies of investigative situations, psychological aspects of the suspects' behaviour and the one of other persons who are fallen into the scope of court proceedings. Empirical data as for features of the particular subject, his behaviour indicate to the forecast background, the conditions, where a particular forecasted act would take place, aimed at extraction of typical representations out of those that are the most appropriate for this particular case. For example, it is the examination and analysis of the spatial arrangement of typical places where serial murders with rapes are committed, and thereby a development of the models for forecasting of likely areas of potential recurrent offenses of that category that allows for locating the boundaries of the alleged criminal under the real conditions, since the criminal's choice of the place to commit the criminal offense is to a large extent connected with the place of his residence or the location of the original «base» where he usually works at crimes, and so on.

By the scale of coverage of the facts and circumstances as reflected in the forecast assumptions, in terms of problems to be solved in the judicial and investigative practice, forecasting is differentiated into the strategic, tactical and individual ones. The first type relates to the forecasting of the investigation and court proceedings prospects in the case as a whole; its findings precede the setting out of leads, provision of planning, identification of the most appropriate forms of interaction, characterize the possible alternatives for development of the investigative and judicial situations; consequences of their procedural decisions and arrangements as made to neutralize or minimize the negative results from their implementation, etc. The sec-

ond one is related to forecasting of productivity of the scheduled tactical operations, investigative actions and tactical techniques in order to solve tactical problems in specific situations within the investigation and court proceedings; the effects of using the gained results for proving; tactical risk and the tools to minimize it. Individual forecasting is aimed at drawing up a predictive model of the potential behaviour of participants in the pre-trial investigation and in the court proceedings, for example, the behaviour of a suspect at interrogation: responses, counteractions, etc.

The most common and effective form for realization of the criminalistic forecasts is a set of guidelines for individuals (body) making a decision on the basis of prognostic findings and that is organically included in future planning documents. This includes both the planning of the scientific examinations and their results, i.e. an implementation of scientific achievements in the areas that are assessed as the most promising, as well as upon planning of the investigation as a whole or of individual investigations. That being said, the content of guidelines as shown in the final document varies depending on the nature and specificity of the forecast object, forecast development goals and areas of examinations. Thus, the results of scientific criminalistic forecasting can be manifested through their accumulation in the program document, which determines the strategic area for making of examinations by a specific scientific team.

Scientifically-applied criminalistic forecasting is somewhat narrower due to its goals, tasks and scope than the scientific one, and therefore a brief explanatory note, which reflects the results of the development and diverse guidelines being of a constructive (promoting to realization of forecasts) or destructive (preventing the implementation of situations, events, and circumstances as described in criminalistic forecasts) nature, is the form for realization of forecasts. The results of individual forecasting are reflected in the plans of investigation or in the plans for performance of individual investigative actions and tactical operations.

Talking about the prospects for development of criminalistic methods, techniques and tools, the guidances should be of a constructive, creative nature and must contribute to the improvement or creation of new technical criminalistic tools and techniques, such as the proposals to create the most favourable conditions for development thereof and the like. In this case, the proposed guidelines can be based on the past experience (including the foreign one) of such tasks' solutions and are operating on the already approved methods, and may be of a purely exploratory nature, i.e. can include the proposals for finding the new ways and means to ensure the achievement of prognostic conclusions in respect to the development of the examination objects.

Implementation of criminalistic forecasts in the judicial investigative and special search activities is focused on optimizing the planning and organization of investigation, court proceedings, and on increase of the investigation and

search operations arrangements' efficiency (setting out and verification of leads, evaluation of the investigative, judicial and operating search situations, making of tactical decisions, specification of the optimal system on tactical techniques as the major means influencing the situation and its individual components, as well as those providing the optimal conduct of any investigative action and those facilitating the solution of the problem to reduce the level of tactical risk).

Published: Textbook of criminalistics. Volume l : General Theory Edited by H. Malevski, V. Shepitko (підручник). – Kharkiv : Apostille Publishing House LLC, 2016. – P. 211–216, 290–296.

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UDC 342.56:347.97/99(477)

SEPARATE MATTERS CONCERNING ORGANIZATION OF THE JUDICIAL SYSTEM OF UKRAINE ACCORDING TO PRINCIPLES OF TERRITORIALITY AND SPECIALIZATION IN THE CONTEXT OF THE MODERN CONSTITUTIONAL REFORM

The up-to-date problems concerning transformation of the Judicial System of Ukraine have a multifaceted nature. During the regular stage of the court reform in Ukraine which was marked by adoption of the Law of Ukraine «On Amending the Constitution of Ukraine (in the sphere of justice)»[1] a number of urgent tasks concerning optimization of the judicial system was solved. The key task consisted in rationalization of the judicial system and organization of this System on principles of territoriality and specialization. (p.1, Art.125 of the Constitution of Ukraine).

The problem of implementation of the mentioned constitutional principles has been a topic for a scientific discussion in Ukraine during a prolonged period of time. Some aspects of this matter were viewed in works by V. Brintsev, V. Dolezhan, M. Koziubra, R. Kuybida, I. Marochkin, L. Moskvitch, I. Nazarov, O. Ovcharenko, M. Onishchuk, S. Prylutskiy, D. Prytyka, A. Selivanov, N. Selizniova, V. Serduk, N. Sybiliova, V. Stefaniuk, D. Fiolevskiy, V. Shyshkin and others. The abovementioned authors maintain various positions concerning implementation of principles of territoriality and specialization. In general, this means that the matter of choosing organizational structure of the judicial system is very important and quite difficult.

The necessity of carrying out a com-

[1] Закон України «Про внесення змін до конституції України (щодо правосуддя) № 1401-VIII від 02.06.2016 [Електрон. ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/1401–19. – Заголовок з екрана.

plex research namely in terms of court specialization and territorial structure of the judicial system should help to develop an optimal way for solving problems related with determining the structure of specialized courts and with organization according to the principle of territoriality of juridical bodies of Ukraine.

Therefore, the goal of our research consists in determining the essence and importance of principles of territoriality and specialization; as well as in implementation of these principles in the process of organizing activities of juridical bodies; showing their influence on the system of courts of general jurisdiction; and finally analyzing the new court legislation.

Chapter VIII of the Constitution of Ukraine defines the main organizational principles of the judicial system. Territoriality is defined as one of fundamental principles. Territoriality in the sphere of constructing a new judicial system consists in conformity of courts of general jurisdiction with administrative and territorial structure defined in article 133 of the Constitution. This principle is stipulated by the necessity to implement justice on the entire territory of Ukraine and to bring it closer to citizens[1].

It is namely definition of the principle of territoriality that appears to be especially interesting for practicians and representatives of the legal science. So, I. Marochkin points out that the meaning of the principle of territoriality lies in the following: a) absence of territories which would be out of a court jurisdiction, b) territorially convenient location of courts, c) existence of a sufficient number of courts and judges on the territory of the state[2].

R. Kuybida views territoriality as a decentralization of lower sections of the system of courts of general jurisdiction (local courts and appeal courts). Therefore, each local court and each appeal court has its own territorial jurisdiction and competence of a court is based on jural relationships arising or existing on the definite territory. According to the author, the task of organizing courts on the basis of territoriality principle consists in bringing local courts and appeal courts closer to people[3].

V. Stefaniuk thinks that the main principle of territoriality principle consists in the fact that territorial courts should be closer to people and that each citizen should know how a court where he/she should protect his/her rights is chosen in the complex judicial system[4].

N. V. Stibiliova made an apt remark that the right for an «own» i.e. «legal» judge is one of meaningful components of territoriality. On one hand this requirement consists in the fact that each person should know in advance the jurisdiction

[1] Конституція України: наук.-практ. Коментар / В. Б. Авер'янов, О. В. Батанов, Ю. В. Баулін та ін. – Х.: Право; К.: Вид. дім «Ін Юре», 2003. – 808 с.

[2] Організація судової влади в Україні : навч. посіб. / І. Є. Марочкіна, Н. В. Сібільової. – Х. : Одіссей, 2007. – 328 с.

[3] Куйбіда Р. О. Реформування правосуддя в Україні: стан і перспективи : монографія / Р. О. Куйбіда. – К. Атіка, 2004. – 288 с.

[4] Стефанюк В. С. Судова система України та судова реформа /В. С. Стефанюк. – К. : Юрінком Інтер, 2001. – 176 с.

his/her affair belongs to and each person must be sure that nobody and nothing will deprive this person from his/her right to appeal to this court. On the other hand, it guarantees organizational independence of the court power because each judge must be sure that the territorial jurisdiction of the court (the court district) can be changed or liquidated only in accordance with the law and only in cases determined by the law[1].

Let us look through organizational aspects of court territorial accessibility (proximity). Territoriality is represented as brunches of lower sections of the system of general jurisdiction courts (local courts and appeal courts); and it ensures territorial bordering of competence of homogeneous courts (and so is it defines borders of court districts). That is why each of these courts has its own territorial jurisdiction. And this means that competence of a separate court is based on jural relationships arising or existing on the definite territory. That is an important guarantee for resolution of legal disputes within adequate periods in conditions of complicating legal relations and an increasing number of legal disputes. If in case of such a big country as Ukraine the entire legal system were centralized in a single place justice would appear to be objectively inaccessible for the majority of population of this country[2].

The principle of territoriality appears to be the most important when defining the network (location) of local courts. It is so because this network should be branched in order to provide each personality with a real opportunity to get to a judicial institution for essential settling his/her affair. Within the system of general jurisdiction courts territoriality has its quite peculiar manifestations. In addition to that, principles should be presented as the most stable legal standards. However, during the recent decades the essence of principles used by the domestic judicial system has been continuously changing. When analyzing evolution of legislation about the judicial system we can see that the composition of standards mainly depend on the will of the legislator.

On the ground of this, the Law of Ukraine «On the Judicial System and Status of Judges» has defined that local general courts are presented as district courts created in one or several districts in cities, or in a city, or in a district (districts) and a city (cities). (p. 1, Art.21).

A court is created and liquidated in accordance with the law the project of which is brought to the Verkhovna Rada of Ukraine by the President of Ukraine after consultations with the High (Supreme) Council of Justice (p.p. 1, 2, Art.19). Reasons for creating or liquidation of a court include changes of the judicial system defined by this Law, the necessity to ensure accessibility of justice, optimizing spendings of the state budget or changes in the administrative and territorial structure.

[1] Сібільова Н. В. Теоретичні основи побудови судової системи України / Н. В. Сібільова // Право України. – 2009. – С. 38–45.

[2] Куйбіда Р. О. Реформування правосуддя в Україні: стан і перспективи: монографія / Р. О. Куйбіда – К.: Атіка, 2004. – 288 с.

The mentioned theses show deviation from the strict peg of organization of judicial bodies to the administrative and territorial structure; and the mentioned approach has become a consequence of legislator's understanding specifics of their activity related with implementation of a subjective criterion, activity that is not based on administrative and territorial devision.

We should agree with V. V. Serduk who pointed out that the notion «court district» is not identical to the notion «administrative-territorial unit» because the essence of the first notion consists in organization of a court (courts) on a certain territory, territorial jurisdiction of which does not coincide with the administrative and territorial devision accepted in the state. Moreover, in case with the second notion priority belongs to the constitutionally defined administrative and territorial structure which results in creation of administrative and territorial units. In addition to that, administrative and territorial subdivision presupposes creation of general administrating authorities; and a special creation called «court district» outlines territorial competence of courts having a right to conduct court proceedings on this territory[1].

In terms of applying the principle of territoriality in accordance with the Law of Ukraine «On the Judicial System and Status of Judges», territorial organization of local courts became based on up-to-date international experience of constructing the system of courts of general jurisdiction and organization of these courts outside administrative and territorial units.

Nevertheless, scientific sources propose quite foundational arguments against practical implementation of the abovementioned approach. In particular, O. M. Ovcharenko proves that in this case, we deal with competition of principles of accessibility of justice and judges' independence; and taking into account the priority of convenient and comprehensible location of courts for the population accessibility must be given preference[2]. In our opinion, the problem of independence of courts from the executive authorities appears to be the most acute in the system of administrative proceedings. Probably a more logical solution would be to create district administrative courts in specially defined judicial districts, which would coincide with administrative and territorial units. And that was the initial idea of administrative justice creators. However, as it may often occur it was not completely implemented and during the process of creating the system of administrative courts, district courts were created in regional centers, in Kyiv and Sevastopol. In addition to that, parts of affairs of administrative jurisdiction are now viewed by local general courts. It becomes quite evident that such an approach to the matter of organizing the

[1] Сердюк В. В. Територіальність як принцип побудови системи судів загальної юрисдикції: нові підходи до реалізації / В. В. Сердюк // Вісник Академії адвокатури України. – 2015. – Т. 12, №2. – С. 161–169. – Режим доступу: http://nbuv.gov.ua/UJRN/vaau_2015_12_2_22

[2] Овчаренко О. М. Доступність правосуддя та гарантії його реалізації: монографія / О. М. Овчаренко. – Х.: Право, 2008. – 304 с.

work of administrative courts has significantly narrowed the initial idea laid in the process of their creation.

Some scientists also express an opinion that despite the instructions of the judicial law concerning creation of new districts for local administrative courts (that presupposes separation of certain special territories being under jurisdiction of the respective courts; and these territories should not be identified with administrative and territorial units) the idea of congruity of these units with court districts was consistently implemented.

Creating districts of appeal courts with borders coinciding with borders of administrative and territorial divisions also requires detailed comprehension from the point of expediency and rationality. So, creation of several appeal districts within one or several administrative and territorial units (regions) was partially used while constructing appeal courts, commercial courts and administrative courts with several administrative and territorial units combined under their jurisdiction; and that gives an opportunity to avoid influence of local authorities' interests on results of retrials in case with certain affairs.

In addition, at the same time, in view of the fact that the previous edition of Art. 26 of the Law of Ukraine «On the Judicial System and Status of Judges» defined appeal courts for viewing civil cases, criminal cases and cases concerning administrative offenses as appeal courts created in accordance with respective decrees of the President of Ukraine in separate appeal districts, we think that the abovementioned approach should not be used for organizing appeal courts for viewing civil cases, criminal cases and cases concerning administrative offenses. Our point of view can be substantiated by the fact that in view of specifics of court cases viewed by these courts there are no preconditions for their dependence on local state authorities and public authorities.

Summing up the mentioned information, we should point out the following. In accordance with the Constitution of Ukraine and the Law of Ukraine «On the Judicial System and Status of Judges» territoriality is one of the principles of building courts of general jurisdiction. General practice defines two approaches to defining the essence of this principle. According to the first approach, territorial jurisdiction of a court is defined through the borders of the court district, which do not coincide with borders of the respective administrative and territorial unit. Most judicial systems in Western European countries are built in this way. The main advantage of such a construction consists in court independence from administration of the respective territory. According to the second approach, territorial jurisdiction of a court is limited through one or several administrative and territorial units. This scheme is widespread in countries of Eastern and Central Europe as well as in CIS countries. Advantages of this scheme include: (a) convenience for population and legal entities, (b) physical accessibility of courts for citizens, (c) compliance of the judicial system with the territorial structure of state authorities (in particular criminal justice authorities).

Territoriality in the basis of building the judicial system of Ukraine means the following: (a) compliance of the system of general jurisdiction courts to the system of administrative and territorial devision; (b) absence of territories in the country, which would be out of court jurisdiction. Taking into account the occupied territory of Ukraine (the Autonomous Republic of Crimea and the city of Sevastopol), a peculiar attention in case with amendments to the Constitution of Ukraine was paid to the principle of territoriality which was clearly defined in p.6 Art. 136, and namely: «Justice in the Autonomous Republic of Crimea is performed by courts of Ukraine» (c) viewing a case by a judge of a court whose territorial jurisdiction includes this case (in accordance with the legally defined procedure of distribution of court cases).

As it has already been mentioned, the principle of specialization is one of principles used for organization of the judicial system of Ukraine. Application of this principle is a necessary condition and an important precondition for realization of theses of Art.55 of the Constitution of Ukraine securing protection of each personality's rights and freedoms in court. We may be sure that just and competent protection of rights and legal interests of citizens and legal entities can be reached only in case of performing a high-quality justice. And this high-quality justice includes many circumstances: respective preparation and selection of high-skilled and righteous personnel, proper financial and logistic support of judicial activities etc. In addition, at the same time judicial specialization should be recognized one of key factors influencing the level of court competence and quality of taken court decisions.

According to Article 18 of the Law of Ukraine «On the Judicial System and Status of Judges», (effective at the moment of preparing this report) Ukrainian courts of general jurisdiction are specialized in civil, criminal, economic, administrative cases as well as in cases on administrative offenses.

In its turn, the reform of the Constitution of Ukraine has preserved the constitutional principle of specialization and consolidated theses about actions in the judicial system of administrative courts (the first and the fifth part of the Article 125 of the Constitution of Ukraine); and to a certain extent that may be perceived as inconsistency between the principle of specialization (according to part 1 Art. 125 of the Constitution of Ukraine it concerned the judicial system in general), and definition of only administrative courts as specialized courts. And moreover, in its resolution concerning legislative draft «On Amending the Constitution of Ukraine (in the sphere of justice)» the Plenum of the Supreme Court of Ukraine points out that consolidation of autonomous administrative courts on the constitutional level is unwarranted[1]. So,

[1] Висновок Пленуму Верховного Суду України стосовно законопроекту «Про внесення змін до Конституції України (щодо правосуддя)» (реєстр. №3524 від 25 листопада 2015 року) [Електрон. ресурс]. – Режим доступу: http://www.scourt.gov.ua/clients/vsu/vsu.nsf/7864c99c46598282c2257b4c0037c014/c803389466f6921ec2257f2b002b34da/$FILE/%D0%92%D0%98%D0%A1%D0%9D%D0%9E%D0%92%D0%9E%D0%9A.pdf – Заголовок з екрана

referring to the Conclusion No 15 of the Consultative Council of European Judges (hereinafter referred to as the CCJE) where the CCJE analyzed judicial specialization in European countries and marked out that specialization of judges (judicial devisions or departments) and not specialization of courts is the most widespread. The Plenum warns, that the main risk of specialization consists in separation of specialized judges from the main judiciary; specialization may lead to fragmentation of the law and the process by means of separating specialized judges from legal realities in other spheres and potentially isolating them from general principles and fundamental rights and that may undermine the principle of legal unity.

However, the legislator went further and in the Law of Ukraine «On the Judicial System and Status of Judges», the external specialization is broadened by means of creating the Supreme Anti-corruption Court and the Supreme Court on Matters of Intellectual Property.

According to the presented information, on the level of the first instance and appeal instance the process of specialization will be performed in form of organizational devision into local courts (and appeal courts), general courts, commercial courts and administrative courts; and at the same time the Supreme Anti-corruption and the Supreme Court on Matters of Intellectual Property must be created, they should act as courts of the first instance in case with certain categories of affairs (p.1 Art. 31). In other words, organizational specialization of courts differs on levels of the first instance and appeal instance. So, for example, there is a proposal that the Supreme Anti-corruption Court should view cases concerning corruption offenses which are in the jurisdiction of the National Anti-corruption Bureau of Ukraine (i.e. cases concerning corruption accusations of judges, public prosecutors, people's deputies, senior officials and executive authorities). Taking into account the absence of a clearly defined competence of the mentioned court, scope of authorities, procedure of implementation, procedure of formation and resignation of the judiciary there is a question whether such a court can be considered extraordinary or peculiar. At the same time, taking into account norms of the legislative draft, the Supreme Anti-corruption Court formed with a purpose to hear a certain category of cases is not an ordinary one and may significantly differ from the general procedure of hearing court cases.

It is worth noting that application of the specialization principle to the judicial system is performed by means of organizational and legal measures used on the level of the state judicial system for separating specialized courts within the judicial system. Creation of specialized courts is a more complicated form of the judicial specialization, which is implemented on the level of the judicial system of the state. As far as this form concerns to the entire judicial system it touches a broad circle of organizational and legal matters (including financial matters).

Therefore, V. Stefaniuk notes that specialized courts are created depending on the needs of the society and opportu-

nities of state financing on various stages of judicial system construction and development[1].

According to I. Bondarenko, specialization in the sphere of courts of general jurisdiction presupposes creation of judicial hierarchical sections with a specialized competence in separate spheres of legislation, which are the most significant in the society[2].

We can agree to a certain extent with the fact that the specialization of courts formed up to date in the judicial system does not already meet the needs of the society and requirements to a law-bound state and that it requires improvement. But is creation of such new judicial institutions really justified from the financial, judicial and procedural point of view? The proposed reforming of the judicial system (the proposed legislative draft) will require significant financial, human and moral resources. Introduction of new courts in Ukraine has never taken place without complications. Taking into account the fact that in conditions of proper financing and after certain corrective measures in the sphere of procedural legislation the current judicial system will have an opportunity to operate effectively, we think that before introduction of any reformatory ideas (in particular ideas about creation of new judicial institutions inside the judicial system) one should clearly define goals which are going to be reached thanks to these reforms. Based on the Law of Ukraine «On the Judicial System and Status of Judges» dated June 2, 2016 the result will be further complexity of the judicial system.

In addition to this, we should point out that creation of separate judicial branches of various jurisdictions causes various legal assessments. Traditionally, supporters of the idea to create specialized courts give three main arguments: specifics of the subject of legal regulation, availability of procedural peculiarities of a separate case and the need in specially prepared specialists in a definite sphere. V. V. Serduk pointed out that specialized courts might be created in cases when this is stipulated by the specifics of court cases depending on the nature of jural relationships and peculiarities of the legal status of subjects of legal proceedings. So, in Ukraine during various periods proposals were made concerning creation of financial (tax), labor courts and other specialized courts[3].

On the basis of analyzing foreign experience of functioning of specialized courts, P. Serkov points out main characteristics of specialized courts: first of all, the purpose of creating specialized courts consists in creating necessary organizational and procedural conditions for the most efficient hearing categories of cases which are really widespread and/or which have a peculiar social im-

[1] Стефанюк В. С. Судова система України та судова реформа /В. С. Стефанюк. – К. :Юрінком Інтер, 2001. – 176с.

[2] Бондаренко І. Судова система України та її реформування у сучасних умовах / І. Бондаренко // Право України. – 202. – №8 – С. 37–41

[3] Городовенко В. В. Принципи судової влади: монографія / В. В. Городовенко. – Х.: право, 2012. – 448 с.

portance; the second point is that such courts are created within existing systems of general jurisdiction courts with general competence; the third point is that the subject competence of such courts is defined exhaustively; the fourth point is that these are courts which usually hear cases only in the first instance and higher instances for them are courts with a more general competence[1]. From the presented information, it can be seen that specialization is based on organizational and procedural conditions.

And in addition to that, we think that when solving the matter concerning further development of the specialization principle by means of creating other specialized courts one should take into account the existing legal regulations and judicial practice. At the same time, creation of specialized courts should be based on organizational and legal preconditions. In particular, the first important legal precondition consists in availability of a body of normative data, which should be profoundly studied and properly used (in accordance with its specifics). Another important legal precondition consists in available peculiarities of regulating the respective group of jural relationships and these peculiarities stipulate the specifics of the judicial procedure and give an opportunity to define legal proceedings in these cases as special proceedings.

In this context, we should mention the lasting scholarly discussion concerning specialization of judicial bodies in accordance with the subjective criterion and concerning creation of judicial institutions of juvenile justice. Specialized literature includes various positions concerning the necessity to create specialized courts hearing cases of juvenile persons and jurisdiction of such courts should be defined through the concrete subject of legislation (i.e. juveniles and underaged persons) with the simultaneous simplification of the procedure of hearing such cases. The necessity to simplify the procedure of cases concerning underage (juvenile) persons was viewed by scientists during the soviet period. In particular, M. Gernet proved the necessity to simplify the procedure by decrease of negative influence on children and teenagers that can be reached by means of substituting court proceedings with a conversation of judge with the underaged person with participation of a guardian as well as with closed court proceedings. In addition to that, the author paid his attention to possibility of hearing cases concerning juvenile persons solely by the judge; availability of requirements concerning the level of professional training of judges in the sphere of juvenile psychology; restrictions in publicity of judicial proceedings and restrictions of formal accusation of a crime; appeal of the court decission in accordance with peculiar rules of judicial proceedings[2].

According to M. Vilgushynskiy, the introduced principle of judicial system specialization in Ukraine means that

[1] Правосудие в современном мире: монографія / под. ред. В. М. Лебедева, Т. Я. Хабриевой. – М. : Норма : ИНФРА-М, 2102. – 704

[2] Гернет М. Н. Изучение преступности в СССР: Избр. произвед. – М.: Юрид. лит., 1974. – С. 603–604

certain subsystems of judicial bodies act in the system of courts of general jurisdiction and these subsystems are authorized to hear cases of only a certain category and to exercise justice according to the norms of special procedural codes; so these subsystems are unified and maximally adapted for hearing categories of cases belonging to their competence. Such system of courts of general jurisdiction completely meets international standards in the sphere of organizing the judicial system which foresee the necessity to create a respective procedural order of hearing cases of a definite subject. In addition to that, the author points out that specialization of courts and judges is an obligatory condition for improving the quality of judicial activities[1].

Opponents of judicial specialization give other arguments. G. I. Nickerov argues that it contributes to weakening of the judiciary[2]. In addition to that, creating a separate judicial branch is related with significant financial expenses of the state, which can be taken by advanced economies. It also requires significant organizational expenses related with giving premises, providing courts with necessary technical facilities, equipment, hardware, software, skilled personnel. The experience of creating the system of administrative courts in Ukraine has also confirmed this. In general, few authors in the scientific juridical literature dispute the fact that rational specialization of judges (with introduction of the respective procedural form) gives an opportunity to effectively solve the task of specialization in the judicial system. An important point is that this form of work performed by judges requires additional expenses of the state for creating and maintaining a separate judicial infrastructure.

Therefore, specialization as a principle of constructing the judicial system means that definite courts being elements of this system are authorized to hear and to solve court cases arising from definite kinds of jural relationships («external» specialization). Specialization as a principle used for organizing activities of a certain judicial institution means that definite judges are defined in it or definite judicial assemblies (panels) are created in it (these judicial assemblies (panels) are authorized to hear court cases arising from definite kinds of jural relationships – «internal» specialization). In worldwide practice specialization of courts is presented in three main models: (a) all-embracing specialization with creation of separate judicial subsystems having their own mechanisms of appealing court decisions; (b) partial specialization when separate judicial institutions on the level of the first instance are created and in higher judicial instances specialization of judges is presupposed; (c) specialization of judges at judicial institutions. The Ukrai-

[1] Вільгушинський М. Й. До питання реалізації принципу спеціалізації в системі судів загальної юрисдикції / М. Й. Вільгушинський // Адвокат (укр.). – 2012. – № 6. – С. 9–13

[2] Никеров Г. И. Судебная власть в правовом государстве (опыт сравнительного исследования) / Г. И. Никеров // Гос-во и право. – 2001. – № 3. – С. 20.

nian Judicial System combines elements of the first and the third models of specialization.

We think that, first of all, specialization of judges should be developed in Ukraine (especially in courts of the first instance). This method requires significant financial and organizational expenses yet it has proved its efficiency. However, the creation of separate branches of specialized courts in Ukraine may be performed only after reaching social and political consensus on this matter.

Published: Право України. – 2016. – № 7. – С. 34–43.

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UDC 343.131

THE PRINCIPLE OF THE SCIENTIFIC VALIDITY IN THE FORMATION OF THE MODERN CRIMINAL PROCEDURE OF UKRAINE

The problem. The formation process of the criminal procedure is continuous. It consists of elements which are significant more (a preparation of system law projects like the criminal procedural code of Ukraine (hereinafter is CPC) or less (submission of point resolution changes). The experience of lawmaking in Ukraine shows, that the positions stated are not always scientificly relevant. Consequently, some of criminal procedural law institutes do not correspond to modern requirements of the society for the functioning of procedure system, causing a problematic situation. The essence of the latter is that the issues of modern social life related to anticrime are being solved using outdated procedural mechanisms. Modern criminal procedure can be built only when based on advanced, modern research results. That is why scientific substantiation should be considered as the main principle of building a modern criminal procedure.

The analysis of the recent researches and publications. The following scientists previously covered the problems of the scientific validity of construction of the criminal procedure: V. G. Goncharenko, J. M. Groshevskii, V. S. Zelenetskii, O. V. Kaplina, V. T. Malyarenko, V. T. Nor, M. A. Pogoretskii, V. M. Tertyshnyk, O. G. Shylo, M. E. Shumylo and others. However, their publications mostly cover some aspects of the scientific method to the reformation of some institutes and regulations of the criminal procedure of law. The question about the scientific validity as a principle of formation of the modern criminal procedure was never brought up before in the science of the criminal process, and this fact, in

turn, gave birth to this particular research.

A general problem statement. A set of tasks must be performed for the disclosure of the principle of the validity of the modern criminal procedure formation. Firstly, one must define a problem of usage of the scientific position in building of the modern criminal procedure in Ukraine. Then one must clarify the person responsible for the identification of conceptual methods for the reformation of the criminal procedure legislation in conditions, when it is impossible to achieve a unity in scientists' positions on the main questions of the reformation.

Statement of the main research material. The criminal procedure as an activity, regulated by law, can be considered modern[1] only when its main provisions correspond to the modern society submission about its political, social, economic, scientific and other essentials. In a globalizing world, the modern criminal procedure has to meet not only national, but also foreign leading progressive concepts of development of the society, State and law (legislation), including a criminal procedural code. However, it is worthwhile to consider the fact that the number of procedural systems is equal to the number of States. There are just as many different procedural systems as there are states in general.

The formation of the modern criminal procedure has begun with the independence of Ukraine and it consisted mostly in the reformation of the domestic criminal procedural legislation aimed at achieveing international, partucilary, European, standards of the procedure.

The reformation of any legislation branch is a procedure. Thus, like any other process, it cannot function properly without the main provisions or rules, which are referred to as principles. The reformation of the criminal procedural legislation should be held based on a set of principles as well. Otherwise, it will be impossible to achieve the goal of the reform – the formation of the modern criminal procedure.

The result of a reform, carried out without the mentioned principles, may come in a form of unexpected results. In this case, the reform will result in a creation of a law, which does not correspond to the society anticipation. Consequences of this reformation could be hardly foreseen, but one can unambiguously claim that a new law cannot in any way be accepted as effective and modern in the way of its accordance to requirements of our time.

The process of the formation of the domestic criminal procedure continues with the adoption of the new CPC and its entering into force on November 20, 2012. After coming into force, the CPC was amended a total of thirty six times, in other words, one amendment per month. The two so-called «dictatorial laws» of January 16, 2014 were abolished on January 28, 2016. After the adoption of new CPC, the question about the theoretical basis of the reformation of the criminal procedural legislation

[1] Note: A word «modern» in this conext means time-bound, the one that corresponds with current needs.

remains relevant. For instance, in Russian Federation, the fundamental work of I. L. Petruhin, which is dedicated to the theoretical basis of the reformation of the criminal process,[12;2] was issued three years after the entering into force of the new Russian CPC. Nevertheless, it remains relevant nowadays.

Every successful amendment can be aimed at the formation of both up-to-date and «out-of-date» criminal procedure. Different scientists can percieve the same legislative provision amending the CPC in both modern and archaic manner. The most reliable reference point of the criminal procedure, as shows, is its scientific validity, because, as they say – science is the domain where all modern knowledge is produced.

The theoretical contradictions about its basis, ways, results and so on are the main reasons of the delay of the construction of the criminal procedure in a way of the reformation of the correspondent legislation branch in Ukraine. In these conditions, the question about the substance of the principle of the scientific validity of the formation of the modern criminal procedure becomes a special relevance and sense for the solving of the question about the adjustment of the theoretical conceptual positions of scientists.

V. G. Goncharenko notes that optimal content and techniques of criminal procedural law is possible only with the clear theoretical concepts ensured.[3] An attempt to develop a theoretical conception of new CPC, which should reflect modern presentations about the state and law, already occurred in Ukraine.[4] Yet the author did not define foundations of the formation of the modern procedural system, while he was keen on the extension of the rights and liberties of subjects of the criminal procedure (predominately, of victim and crime investigator), who received a purely declarative characteristic in his work. He narrowed down the competition in the process to the equalization of the rights of the victim and the accused, whereas the trends of criminal procedural law lead to the construction of adversarial model of criminal justice with the presence of the prosecution and defense. Moreover, prosecutor plays a key role among the members of the criminal proceedings on the prosecution side.

The lack of doctrinal development in the field of criminal procedure is a major, if not the main reason that the Soviet CPC (1960) was functional in Ukraine much longer than in any other post-Soviet country. While the new criminal law at the time of entry into

[1] Петрухин И. Л. Теоретические основы реформы уголовного процесса в России :в 2-х ч. / И. Л. Петрухин. – М. : Проспект, 2004. – Ч. 1. – 221 с.

[2] Петрухин И. Л. Теоретические основы реформы уголовного процесса в России :в 2-х ч. / И. Л. Петрухин. – М. : Проспект, 2004. – Ч. 2. – 192 с.

[3] Гончаренко В. Деякі зауваження у зв'язку з прийняттям нового Кримінально-процесуального кодексу України / В. Гончаренко // Вісн. Акад. прав. наук України. – 2003. – № 2–3. – С. 704–705.

[4] Тертишник В. М. Концепція Кримінально-процесуального кодексу України / В. М. Тертишник. – Дніпропетровськ : Юрид. акад. МВС України, 2003. – 40 с.

force of the CPC in 2012 acted for the past eleven years. M. V. Onishuk commented on this, «Today we find ourselves in a situation of a peasant, who is unable to harness a horse named Judiciary to the cart named Procedural Code … And this «peasant helplessness» is due to doctrinal uncertainty [1].

Scientific research should focus on determining the principle of building a criminal process. And since the majority of the practice and experience of domestic criminal procedural activities shows that the mankind did not come up with a better way of this than the competitive one, it is advisable to guide the theoretical developments to determine optimal ways of introducing competition in the domestic process. Competitiveness for modern domestic criminal process has to become the universal principle that, in psychological studies, is referred to as the «conceptual core», which resembles a hand that can wear different gloves[2].

There is no sense to prove the need of the scientific validity of the various activity processes, because it became an axiom. Here I would like to draw attention to such an important sign of scientific approach to law reform, as the variety of scientific views on trends of the modern criminal proceedings. There is a lot of views, as well as models of criminal procedure, yet only one should be chosen. Alternatively, a variety of procedural models can be used to gradually compose a single one – adequate to the social relations that prevail in the country at some point of its existence.

There exists a large variety of opinions about the «design» of the modern criminal procedure of Ukraine in a science of the criminal procedure[3].

But, as noted above, since independence, a science-based concept of integrated, comprehensive reform of the criminal procedure law that would define structural benchmarks of a modern criminal procedure has not been prepared. Even the urge to reform the criminal procedure law, which was narrowed down to an adoption of the new CPC, was only discussed in a form of scientific articles.

Part of the scientific validity of the principle of building a modern criminal process is wide, the maximum possible involvement of scientists in the discussion and study of certain legal provisions, especially those that define the conceptual bases of the process. Adherence to this approach is important in the transition from the old to the new model

[1] Оніщук М. Судово-правова реформа: чи буде дано відповіді на виклик часу / М. Оніщук // Право України. – 2003. – № 5. – С. 15–19.

[2] Козлов Н. И. Формула успеха, или Философия жизни эффективного человека / Н. И. Козлов. – М. : АСТ-ПРЕСС КНИГА, 2004. – 264 с.

[3] Бойко В. Щодо деяких положень нового кримінально-процесуального законодавства країни [Електронний ресурс] / Н. Бобечко, В. Бойко //Право України. – 2003. – № 1 // Режим доступу : http://www.lawbook.by.ru/magaz/pravoukr/0301/24.shtml. – Заголовок з екрана; Маляренко В. Окремі проблеми реформування кримінальної юстиції в Україні [Електронний ресурс] / В. Маляренко / Академічні читання / Київс. регіонал. центр Акад. прав. наук України (Київ, 22.10.2008) // Режим доступу : http://www.bod.kiev.ua/jurnal/20_13.htm. – Заголовок з екрана.

(«structure») of the criminal process, such as during the preparation of the new draft CPC. There is an option of basicly gathering all scientists engaged in research on the criminal procedure, and try to work out some sort of a coordinated position for its science-based model. However, this way goes nowhere.

Firstly, it is hardly possible to gather all scientists, and even so it would be very difficult to work together.

Secondly, even in a much smaller workgroup, the decisions on controversial issues would be adopted by voting, and thus, a minority of the involved scientists would still be dissatisfied with the decisions.

Thirdly, not all scientists are competent in all matters of criminal procedure. Typically, scientists are engaged in certain research topics, areas in the field of procedural legal theory that, in our view, is also positive because in this way you can achieve depth and quality of research. Therefore, a similar divisional approach should be reflected in the workgroups. Scientists or groups of scientists develop drafts of individual articles or chapters and then use the meetings of the entire group to initiate a discussion on the draft specific articles or chapters composed into a draft law. Project of the CPC, so to speak, becomes a product of the research of narrow specialists on particular topics (chapters, sections).

Fourthly, the preparation of future legislation, which must define the conceptual fundamentals of modern criminal procedure, should be provided by an active part of the legal community – scientists, experts and officials. Therefore, the involvement of people, who, while being well trained specialists, refuse to be involved in an active legislative work, is unfavourable. It should be noted that sometimes a high level of activity comes from people who, to put it mildly, are not prepared for legislative work. Participation of such persons has little to no good use, and in some cases, they can also cause damage to the quality of legislation.

At the stage of discussion of the bill, which defines the conceptual framework of modern formation of criminal procedure, leading scientific publication grounds should be used as means of discussion for the most debatable provisions – general or specific procedural institutions. Unfortunately, the preparation period of the project of the CPC did not held such discussions. Therefore, the highest state authorities had to intervene into the process of reforming the criminal procedure law.

Verkhovna Rada was such an authority in 1992. It adopted the Concept of judicial reform in Ukraine[1] (hereinafter – the Concept 1992). Among the factors that influenced the need for judicial reform at the time, the key role was played by the fact that «the courts of the Republic, the entire justice system and existing legislation regulating the activities of law enforcement agencies are going through a deep crisis caused by many factors and is experiencing a negative impact on its

[1] Концепція судово-правової реформи в Україні, затверджена постановою Верховної Ради України від 28 квітня 1992 р. // Відом. Верхов. Ради України. – 1992. – №30. – Ст. 426.

activities. The courts did not always reliably protect the rights and freedoms, and at times have been a tool in the command-administrative system projecting the will of the highest authority (the state). The court had no authority, and the authority enjoyed unlimited power over it. Judicial and legal reform should lead the judicial system as well as all areas of law in line with the socio-economic and political changes that occurred in the community» (Section 1 of the Concept 1992). As we can see, in the Concept 1992, Verkhovna Rada of Ukraine demonstrated an intent to bring criminal procedure in accordance with the temporal notions of rights and freedoms and modernize the system altogether.

The president of Ukraine took further responsibility for the reformation of judgment and the system of the criminal law in general. He approved two ground documents for the reformation of the criminal procedural legislation: the Concept for improving the justice system to ensure fair trial in Ukraine in line with European standards[1] and the Concept of Criminal Justice Reform in Ukraine[2].

Since the abovementioned Concepts were approved by the President of Ukraine, they received a mandatory characteristic in the development of the CPC. Defining the concept for reform of the criminal procedural law, the President left the right to seek and implement into the CPC the most effective, science-based way of procedural activities to the scientists.

Certainly, the concept for reforming the criminal procedural law determined by the President of Ukraine did not exclude the scientific achievements of domestic and foreign legal science. The model of criminal proceedings, as defined in the Concept and implemented in the current CPC, was based largely on the results of a comparative legal analysis of domestic criminal procedural law and the laws of the European Union and the practice of the European Court of Human Rights. Such fundamental approach justifies itself at the present stage of creation of national law in a state that aspires European integration.

It would seem that the scientists working on the construction of modern criminal procedure (members of working groups and experts) could only introduce draft legislation to scientific results, taking into account the contents of the above Concepts. However, there are several problems related to the use of achievements of the science of criminal procedure while working on these projects.

Firstly, the scientific results and the position is expressed on the basis of different methodological approaches. For example, the methodological basis of the

[1] Концепція вдосконалення судівництва для утвердження справедливого суду в Україні відповідно до європейських стандартів, схвалена Указом Президента України від 10 травня 2006 р. № 361/2006 // Офіц. вісн. України. – 2006. – № 19. – Ст. 23.

[2] Концепція реформування кримінальної юстиції України, затверджена Указом Президента України від 8 квітня 2008 року № 311/2008 «Про рішення Ради національної безпеки і оборони України від 15 лютого 2008 року «Про хід реформування системи кримінальної юстиції та правоохоронних органів» // Офіц. вісн. Президента України. – 2008. – № 12. – Ст. 486.

CPC draft in 2012 was the Concept of Criminal Justice Reform in Ukraine. That is why some scientists denied a list of novelties, which did not correlate with the theoretical dogmas that existed in our country for decades. Basic theoretical contradiction between traditional (conservative) and modern scientific views on the current CPC, which defines the parameters of modern criminal procedure is purely related to its functional purpose.

Secondly, the criminal procedure is commonly regarded to be a way of the struggle with the crime.[1] The new domestic doctrine, however, one that is traditional for modern Europe, a criminal procedure is understood as a means of solving of legal conflict. The essence of the first approach is the implementation of criminal proceedings for the identification of a guilty person and further punishment. The second approach involves the need to regulate by means of criminal procedure the criminal legal conflict, which has a minor impact. As for the grave crimes, all the «ability» of the criminal and criminal procedural law should be used.

Thirdly, the science of criminal procedure often shows not one but two or more points of view on the same issue. Moreover, they all can be scientifically justified within the research boundaries, in which these positions are formulated. The selection of the position formulated based on scientific research is carried out by the members of the relevant working groups based on their ability to «fit» into a concept of a draft. Therefore, certain scientific statements will inevitably be left behind. This is sometimes perceived negatively by the author and may cause rejection and criticism of both of the draft, and the subsequent law, adopted on its basis.

Fourthly, some scientific positions, claiming to play a key role in the formulation of certain norms that amend law, are expressed in different time periods. The loss of relevance by certain provisions make it impossible to use them in the preparation of the bill, since the scope of it is to contribute to the development of modern criminal proceedings. Discussion on certain provisions boils down to whether national traditions prevailing in science, law and practice implementation should be taken into account in the process of formation of modern criminal procedure. It seems that only the ones that «fit» into the current understanding of law in general and criminal procedural law in particular and the concept of the particular draft should be taken into account.

Summarizing the talk over the scientific validity of the principle of building a modern criminal procedure, we have come to the following conclusions: the problem of the usage of provisions of scientific works on legislative changes aimed at building a modern criminal procedure resides in their quantitative and qualitative diversity; in a situation, when it is impossible to achieve single position on the application of a theoretical model of the modern criminal procedure, the

[1] Подольный Н. А. Может ли борьба с преступностью быть задачей уголовного судопроизводства / Н. А. Подольный // Современное право. – 2004. – № 9. – С. 38–41.

responsibility for defining conceptual approaches to this issue should be taken by one or more of higher state authority (Parliament and / or the President).

Further research possibilities. The topic explored in this article is quite capacious. In order to complete this study, further research should be held in the following areas: clarification on the issues of practical implementation of scientific interpretation of criminal procedure activities; exploration of the possibility of providing scientific and methodological recommendations on specific criminal proceedings on different stages of its existence.

Published: Питання боротьби зі злочинністю: зб. наук. пр. / редкол.: В. І. Борисов та ін. – Х. : Право, 2016. – Вип. 31. – С. 30–40.

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UDC 343.13(477):061.1ЄС-044.332

THE PROBLEMS OF THE ADAPTATION OF THE CRIMINAL PROCEDURAL LEGISLATION TO THE EUROPEAN UNION LAW

A general problem statement. The Law of Ukraine dated September the 16th, 2014 ratified the Association Agreement between Ukraine, on one hand, and the European Atomic Energy Community and its Member States[1] (hereinafter, the Association Agreement with the EU), on the other hand. It is hard to overemphasize the importance of this event for Ukraine, because it finally created a strategic framework of further reforming processes in all spheres of social life, all of which will ensure the establishment and recognition by the state of the European values of respect for human rights and fundamental freedoms, democracy, the rule of law.

One of Ukraine's obligations enshrined in the Preamble to the Association Agreement with the EU is the gradual adaptation of Ukraine's legislation to the EU acquis in accordance with the directions set out in this Agreement and its effective implementation.

A prominent place among these areas is taken by the fight against crime and corruption; cooperation in the fight against terrorism; combating money laundering and terrorist financing; international cooperation in combating illicit drug trafficking, psychotropic substances and precursors; legal assistance.

It is necessary to separately note the competence of the EU in the field of criminal process, the development of which began with the entry into force of the Maastricht Treaty in 1992, which

[1] Угода про асоціацію між Україною, з однієї сторони, та європейським союзом, Європейським співтовариством з атомної енергії і їхніми державами-членами, з іншої сторони: ратифіковано із заявою Законом України № 1678-VII від 16.09.2014 р. // Верховна Рада України : офіц. веб-портал. – Режим доступу: http://zakon5.rada.gov.ua/laws/show/984_011?te (дата звернення: 03.06.2016). – Заголовок з екрана.

gave the EU institutions the right to issue acts in the form of «general position» – crime-combating conventions. With the entry into force in 1999, the Amsterdam Treaty gave EU institutions the competences to make framework decisions in the field of criminal proceedings, the first of which was the framework decision on the rights of victims.

The purpose of the study. The above necessitates the study on adaptation of the Ukrainian law to the EU law, including criminal procedure law, clarifying lines of its adaptation and development prospects of the science of criminal procedure, which will create a proper theoretical background of future legislative innovations.

The analysis of recent research. The issue of adaptation of the criminal procedural legislation of Ukraine to the EU legislation is relatively new to the science of criminal procedure, which explains its insufficient level of scientific development. This issue is commonly addressed in papers of scientists in the field of international law, although there are some scientific resources available from other areas of law, in particular, the following authors should be noted: O. D. Krupchan, V. I. Muraviova, K. B. Pusan, T. M. Sereda, O. M. Siniuk, O. I. Trahniuk, I. V. Iakoviuk and others.

The main part. Getting into the stated problems, it should be noted, that the first EU founding treaties did not contain provisions on cooperation in the field of criminal law, since the purpose of its creation was the development of integration in the social and economic sphere. However, in current globalization conditions, these areas of international cooperation have gained strategic importance as they are aimed at creating a common European area of freedom, security and justice, the protection of the member-states against threats that can prevent their further development and are a danger to the world as a whole. Therefore, a significant part of the Association Agreement with the EU is devoted to cooperation in the field of justice and security.

According to Article 22 of the Association Agreement with the EU cooperation of the parties is targeted, inter alia, at the following issues: a) smuggling of, and trafficking in, human beings as well as firearms and illicit drugs; b) smuggling in goods; c) economic crimes in the field of taxation; d) corruption, both in the private and public sector; e) forgery of documents; f) cybercrimes. The Parties enhance bilateral, regional and international cooperation in this field, including cooperation that involves Europol. The Parties shall further develop their cooperation in the fields of, inter alia: (a) the exchange of best practices, including the experience on investigation techniques and crime research; (b) the exchange of information in line with applicable rules; (c) capacity-building, including training and, where appropriate, the exchange of staff; (d) issues relating to the protection of witnesses and victims. The Parties are committed to implementing effectively the UN Convention against Transnational Organised Crime[1] and its three Proto-

[1] Конвенція Організації Об'єднаних Націй проти транснаціональної організованої злочинності, прийнята резолюцією 55/25

cols, the UN Convention against Corruption[1] and other relevant international instruments.

Combating money laundering and terrorist financing within the meaning of Article 20 of the Association Agreement with the EU provides for enhancement of bilateral and international cooperation in this field also at operational level. The Parties ensure implementation of relevant international standards, in particular those of the Financial Action Task Force (FATF) and standards equivalent to those adopted by the Union.

In the fight against terrorism, Article 23 of the Association Agreement with the EU provides for cooperation in the prevention and suppression of acts of terrorism in accordance with international law, international human rights law, refugee law and humanitarian law, and the respective laws and regulations of the Parties. In particular, the Parties agree to cooperate based on the full implementation of Resolution No. 1373 of the UN Security Council of 2001[2], the United Nations Global Counter-Terrorism Strategy of 2006[3] and other relevant UN instruments, and applicable international conventions and instruments. The Parties shall do so in particular by exchanging: (a) information on terrorist groups and their support networks; (b) experience and information on terrorism trends and on the means and methods of combating terrorism, including in technical areas, and training, and (c) experience in respect of terrorism prevention.

Cooperation in the fight against illicit drugs, and on precursors and psychotropic substances aims to combat illicit drugs, reduce the supply of, trafficking in, and the demand for illicit drugs, and cope with the health and social consequences of drug abuse. It shall also aim at a more effective prevention of diversion of chemical precursors used for the illicit manufacture of narcotic drugs and psychotropic substances.

Following its European aspirations and the European choice, Ukraine should ensure the gradual adaptation of domestic legislation regulating legal relations in these fields to the European Union law. In line with the provisions of the

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Генеральної Асамблеї від 15 листопада 2000 року: ратифіковано із застереженнями і заявами Законом України № 1433-IV від 04.02.2004 // Верховна Рада України: офіц. веб-портал. – Режим доступу: http://zakon5.rada.gov.ua/laws/show/995_789 (дата звернення: 03.06.2016). – Заголовок з екрана

[1] Конвенція Організації Об'єднаних Націй проти корупції: ратифіковано із заявами Законом України №251-V від 18.10.2006 р.// Верховна Рада України: офіц. веб-портал. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/995_c16 (дата звернення: 03.06.2016). – Заголовок з екрана.

[2] Резолюція 1373 (2001), схвалена Радою безпеки на 4385-му засіданні, 28 вересня 2001 року // Верховна Рада України: офіц. веб-портал. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/995_854 c16 (дата звернення: 03.06.2016). – Заголовок з екрана.

[3] Глобальна Контртерористична Стратегія ООН: Резолюція та план дій (A/RES/60/288), ухвал. Генеральною Асамблеєю ООН у 2006 році// Ел. ресурс: режим доступу http://unrcca.unmissions.org/Portals/unrcca/Counter-Terrorism/phase_1/3d_expert_meeting/Concept_Note_ru.pdf (дата звернення: 06.06.2016). – Заголовок з екрана.

National Program of Adaptation of the Ukrainian law to the European Union approved by the Law of Ukraine on March 18, 2004[1], the adaptation is to bring Ukraine laws and other legal acts in compliance with the acquis communautare. This requires the adoption of Ukraine's legislation, the creation of institutional mechanisms and appropriate actions both at the international level in relations between Ukraine and the EU and in the rule of law in Ukraine[2].

In this context it should be noted, that the regulation of the fight against crime and corruption in Ukraine in recent years has undergone a conceptual change. Since 2012, Ukraine has begun to adopt the legislation in this area not only introducing significant new legal institutions, most of which still have not been known to the national legislation and are implementing European standards, but also representing a new ideology of criminal justice, the essence of which is the recognition of the supreme value of human rights and freedoms, and their security and protection – the duty of the state to be carried out by its authorities in compliance with the European standards of human rights and the administration of justice.

Such legislative acts, first of all, include the Criminal Procedure Code of Ukraine, adopted on April 12, 2012[3], which laid down the foundation for further legislative innovations in the field of criminal justice. Adversarial criminal proceedings; separation of criminal procedural functions; substantial expansion of judicial review during the preliminary investigation and procedural capabilities of the defense in relation to the collection of information about facts that may be forensic evidence; implementation of the principle of immutability of the prosecutor in criminal proceedings; radical change in the model of the initial phase of criminal proceedings; normalization of tacit activities of the prosecution to verify statements about the crime and collect information about the facts that may be relevant forensic evidence, known as undisclosed investigative (search) actions; discretionary expansion and implementation of consensual procedures in this regard (primarily, the institute of deals in criminal proceedings) that provide opportunities to effectively protect the private interests of participants in criminal proceedings and also to resolve criminal legal conflict; widespread use of recording means in the implementation of criminal proceedings – these are only a small fraction of the conceptual changes that have occurred in criminal procedural legislation of Ukraine with the adoption of the new CPC and are aimed at introducing the European values and standards of human rights and freedoms into the field of

[1] Про Загальнодержавну програму адаптації законодавства України до законодавства Європейського Союзу: Закон України № 1629-IV від 18 березня 2004 року // Відом. Верхов.Ради України. – 2004. – № 29. – Ст.367.

[2] Муравйов В. Зближення законодавства України з правом Європейського Союзу: сучасний стан та перспективи // Вісник Київського національного університету імені Тараса Шевченка. – 2007. – № 35–36. – С. 46–51.

[3] Кримінальний процесуальний кодекс України: Закон України № 4651-VI від 13 квітня 2012 року// Відом.Верхов.Ради України. – 2013. – № 9–10. № 11–12, № 13. – Ст.88.

criminal justice. In the same context, the changes to the CPC of Ukraine should also be noted which are made by the Law of Ukraine «On amendments to the Criminal Code and the Criminal Procedural Code of Ukraine in view of recommendations of the sixth report by the European Commission on the implementation by Ukraine of the EU visa liberalization action plan, which are aimed to improve the procedures of asset seizure and special confiscation» dated February 18, 2016, which significantly changed the procedure for seizure of property, in particular, in order to ensure special confiscation; they provided for the possibility of seizure of third party property if there are sufficient grounds to believe that it will be subject to special confiscation, etc.

Adaptive processes towards the European integration of Ukraine are reflected in the latest legislation, which is also a source of the criminal procedural law of Ukraine – namely, the Laws of Ukraine «On free legal assistance» dated June 2, 2011[1]; «On the right to a fair trial» dated February 12, 2015[2]' «On Prosecution» dated October 14, 2014[3], «On National Anti-Corruption Bureau of Ukraine» dated October 14, 2014[4], «On the State Bureau of Investigation» dated November 12, 2015[5], «On the National Police», dated February 7, 2015[6] «On probation», dated February 5, 2015[7] and others.

These legislative acts significantly altered the regulation of some existing institutions in the criminal justice system (including the prosecutor's office in terms of optimization of its powers and limitations of the scope of powers in accordance with the recommendations of the Council of Europe) and created new institutions, the functionality of which is to ensure the effective functioning of the field of criminal justice at a level that corresponds to the European values and standards of human rights, public expectations regarding the fight against crime and corruption, increased confidence in the police and courts (in particular, the National Police, the National Anti-Corruption Bureau of Ukraine, the free legal assistance system, probation authorities, etc.).

However, as stated in the Strategy of Reforming the Judiciary System, Judi-

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[1] Про безоплатну правову допомогу: Закон України № 3460-VI 02 червня 2011 року// Відом.Верхов. Ради України. – 2011. – № 51. – ст.577.

[2] Про забезпечення права на справедливий суд: Закон України № 192-VIII від 12 лютого 2015 року№ //Відом.Верхов. Ради України. – 2015. -№ 18, № 19–20. – Ст.132.

[3] Про прокуратуру: Закон України № 1697-VII від 14 жовтня 2014 року //Відом. Верхов. Ради України. – 2015. – № 2–3. – Ст.12.

[4] Про Національне антикорупційне бюро України: Закон України№ 1698-VII від 14 жовтня 2014 року // Відом. Верхов. Ради України. – 2014. – № 47ю – Ст.2051.

[5] Про Державне бюро розслідувань: Закон України № 794-VIII від 12 листопада 2015 року // Відом. Верхов.Ради України. – 2016. – № 6. – Ст.55.

[6] Про Національну поліцію: Закон України № 580-VIII від 02 липня 2015 року // Відом. Верхов. Ради України. – 2015. – № 40–41. – Ст.379.

[7] Про пробацію: Закон України № 160-VIII від 5 лютого 2015 року // Відом. Верхов. Ради. – 2015. – № 13. – Ст. 93.

cial Proceedings and Related Legal Institutions for 2015–2020, approved by the Decree of the President of Ukraine on May 20, 2015[1], there exist systemic problems in the strategic planning and in the legislative process; the functioning of prosecutor's offices and criminal justice as related legal institutions has its shortcomings; the existing legal assistance system proved the lack of functional ability and the justice system today does not properly perform its task.

These factors determine the need for an integrated approach to the criminal justice sector reform, the implementation of measures envisaged by the Strategy and Action Plan to implement the Strategy of Reforming the Judiciary System, Judicial Proceedings and Related Legal Institutions for 2015–2020, adopted by the Council on Judicial Reform.

As a result of the implementation of the provisions, the judicial system of Ukraine and related legal institutions will be guided, as stated in the Strategy, in its work by the rule of law in an effective, efficient and coordinated manner; they will be accountable to the citizens of Ukraine, be free from any political influence and will meet the standards and best practices of the European Union.

Analysis of the strategic directions of further reforming of the criminal procedural legislation of Ukraine in order to adapt it to EU acquis in the criminal justice sector, current regulation of the conduct of criminal proceedings, law enforcement practices of preliminary investigation bodies and the court allows to identify priorities in this area, which should include the following provisions:

– Introduction of the mode of implementation of the European standards of criminal justice that in addition to the quality of the criminal procedural law, which, as noted above, implemented these standards into national judicial proceedings, also implies the need to change professional legal awareness of law enforcement officers and judges, forming of law enforcement practices in line with the requirements of the Constitution of Ukraine, as focused on the European values and standards, as well as the practices of the European Court of Human Rights;

– Creation of the appropriate legal framework to combat cybercrime. Understanding of the extreme importance to solve this problem led to Decree of the President of Ukraine dated March 15, 2016 No. 96/2016 approving the Ukrainian Cybersecurity Strategy, which aims to create conditions for the safe functioning of cyberspace, its use for the benefit of individuals, the society and the state. The next expected step is the adoption of the relevant law of Ukraine.

One of the ways to ensure cybersecurity of Ukraine according to paragraph 4.5 stated in the Strategy is the fight against cybercrime, which provides for the implementation, inter alia, of the following measures in an established man-

[1] Про Стратегію реформування судоустрою, судочинства та суміжних правових інститутів на 2015–2020 роки: Указ Президента України № 276/2015 від 20 травня 2015 року // Верховна Рада України: офіц. вебпортал. – Режим доступу: http://zakon5.rada.gov.ua/laws/show/276/2015 (дата звернення: 03.06.2016). – Заголовок з екрана.

ner: – creation of an effective and easy contact center to report cases of cybercrime and fraud in cyberspace, improved speed of response to cybercrime by law enforcement bodies, including their regional units; – improved procedural mechanisms for the collection of evidence in electronic form relating to crime, improved classification methods, tools and techniques to identify and record cybercrime, expert research; – introduction of court-ordered blocking of determined (identified) information resources (information services) by telecommunications operators and providers; – normalization of procedures for making writs on emergency recording and subsequent storage of computer data, traffic storage binding on telecommunications operators and providers; – resolution of issues of the possibility of urgent implementation of procedural actions in real time with the use of electronic documents and digital signatures; – implementation of the scheme (protocol) of coordination of law enforcement agencies to combat cybercrime; – training of judges (investigating judges), investigators and prosecutors to work with the evidence relating to the crime received electronically, with due regard to the specifics of cybercrime; – introduction of a special procedure for interception from telecommunications channels in case of cybercrime investigations; – training of law enforcement officers.

It should be noted that the components of a specified area of the fight against cybercrime, as follows from the above, include a number of measures of criminal procedural nature, aimed at optimizing the pre-trial investigation of cybercrime and implementation of evidence in court. Some of them have not been yet covered by the current criminal procedural legislation of Ukraine and are, therefore, promising directions of its development. This is quite logical, since the Strategy formalizes a policy of the state in cyber security and therefore determines strategic objectives, the detailed determination of which should be reflected in sectoral legislation.

Normalization of these measures is essential because, as practice shows, the investigation of such crimes raises a number of problems, particularly relating to: – the inability to conduct covert investigative (detective) actions in many criminal proceedings (despite the fact that the crime for which the criminal proceedings have been initiated is not serious); – difficulty to prove the involvement of a particular person in the commitment of a crime in the case where computer equipment is used by several persons; – inability to extract traces of the crime from the virtual space; – the need to attract specialists to participate in the conduct of investigation (search) operations (search, review) and to involve experts to conduct examinations aimed at gathering evidence; – complexity of identifying and recording traces of the crime in telecommunication networks, given the ease of change and destruction of computer information; – short-term preservation of information by providers (including IP address, allowing to identify the location of the person allegedly involved in the crime), etc.;

– Creation of an effective witness and victim protection from threats related to participation in criminal proceedings in respect of grave and especially grave crimes. The value of this task as guarantees of rights and legitimate interests of a person in criminal proceedings and guarantees of justice led to its consolidation in Article 22 of the Association Agreement with the EU, which include the provision that the parties will continue to develop cooperation, inter alia, on matters relating to the protection of witnesses and victims.

The European approach to the protection of witness and victim is that such protection is percieved as a duty of the state, the most important value of which is a person, his/her rights and freedoms. Therefore, in the most of the Member States there is a witness protection program present (national, federal, regional). The protection of witnesses and victims in criminal proceedings in almost all the EU member states is a resource-intensive program that provides a number of security measures for these individuals used at various stages of activities of law enforcement agencies that implement this program. The risk management approach is used, which consists of certain stages of work. The first stage assesses threats to the witness. The results of assessment of these threats are important to address the issues of inclusion of the witness in the protection programs and selection of specific protective measures. The second stage deals with risk classification by levels of risk (high, medium, low) allowing finding out what protections should apply. The third stage analyzes risk factors and estimates their value in order to establish the likelihood of adverse consequences for the witness, which may also affect the achievement of the goal of the criminal justice system. Risk analysis includes risk assessment and risk reduction methods or reduction of related adverse effects that can be prevented by law enforcement agencies. The fourth stage includes control over security measures applied to witnesses[1].

In Ukraine, the Law of Ukraine «On the safety of persons involved in criminal proceedings» dated December 23, 1993 and the Criminal Procedural Code of Ukraine regulate the issue of security of the witness and the victim. Unlike the Criminal Procedural Code of Ukraine of 1960, the current Criminal Procedural Code of Ukraine does not contain a chapter on the grounds and procedure for application of security measures and provides specific provisions relating to the consolidation of the right to security as part of the legal status of individual stakeholders; the possibility of a closed court session; features of the procedure: presentation of a person for identification, disclosure of material to another party, appealing of decisions, actions or omissions by the investigator or prosecutor in the application of security measures; legal proceedings in the mode of a video conference in court sessions. The new component as compared to the previously applicable law is the duty of the

[1] Краснова К. А. Защита свидетелей в государствах-членах ЕС // [Електронний ресурс] – Режим доступу: http://sbsnews.eu/ru (Дата звернення 06.06.2016 р.)

investigating judge to take necessary measures to ensure the safety of the person logically following from the general duties of investigating judges regarding the human rights.

However, as evidenced by the law enforcement practice, the security of participants of criminal proceedings has yet remained the segment of law enforcement which requires significant improvement and intensification of cooperation, introduction of new mechanisms to protect witnesses and victims, development of appropriate programs based on the experience in addressing this issue in the Member States;

– Strengthening of the cooperation of the preliminary investigation bodies and courts of Ukraine with the competent authorities of the EU Member States on cooperation in the form of mutual legal assistance in criminal matters and extradition. This particularly applies to inter-agency cooperation at the national level in the form of joint investigative teams created to investigate crimes committed in the territories of several states or if the interests of these states are violated; improvement of the procedure for extradition of the person, mutual recognition of examination conducted in the territory of another state, etc.;

– Use of all possible mechanisms to combat terrorism and prevent the existing threat of international terrorism. This area requires improvement of the existing regulatory framework for law enforcement agencies, and intensification of cooperation of the competent authorities to exchange information on terrorist groups, experience in preventing terrorist attacks, etc. In this context, it should be noted that the Criminal Procedural Code of Ukraine contains separate chapter IX –1 «Special pre-trial investigation under martial law, in an emergency or in an anti-terrorist operation area», which includes only one article. It is clear that legal regulation of this highly relevant issue cannot be considered sufficient. Because the exercise of criminal proceedings in these conditions has significant characteristics which with due regard to Article 92 of the Constitution of Ukraine shall be governed solely by the law, but not by subordinate regulatory acts, as it is currently the case;

– Elimination of corruption risks of the criminal procedural legislation of Ukraine that create conditions for corruption practices of persons engaged in criminal proceedings. Such risks are related to the imperfection of the legislation regulating criminal proceedings. In particular, the issue is the inaccuracy of wordings used in law that, in turn, creates the preconditions for a variety of approaches to their systematic interpretation, the use of biased notions, the lack of uniform standards of the legal technology to ensure the quality of criminal procedural decisions, the admissibility of discretionary powers, the opacity of certain decision-making mechanisms and procedural commission proceedings, inadequate mechanisms of prosecutorial oversight and judicial control, etc. Given the above, there is no doubt the fact that under today's conditions the anti-corruption nature of the legislation is one of the high-quality content

criteria for the positive law. In this regard, the anti-corruption examination introduced by the Law of Ukraine «On Prevention of Corruption» dated October 14, 2014 seems justified, which is defined by the legislator as an activity of discovery in legal acts, draft legal acts, provisions, which alone or in combination with other rules can contribute to the commission of corruption offenses or corruption-related offenses (Article 1 of the Law). Moreover, this mandatory anti-corruption examination in accordance with Article 55 of the said Law involves bills of Ukraine (except for anti-corruption examination of the draft legal acts submitted to the Verkhovna Rada of Ukraine by the deputies of Ukraine, which is implemented by the Committee of the Verkhovna Rada of Ukraine the competence of which includes the fight against corruption), acts of the President of Ukraine, other regulations developed by the Cabinet of Ministers of Ukraine. Being one of the most important preventive measures in combating corruption, as evidenced by the international practice, the introduction of anti-corruption examination of legislation in Ukraine is extremely important because the corruptogenic risks (factors) that contribute to corruption offenses or facilitate their commission are often laid it at the level of legislation.

Therefore, the problem of assessment of the criminal procedural legislation of Ukraine seems very relevant in terms of its corrupt implications in order to identify the priority improvement areas aimed at preventing corruption in this area.

These provisions are certainly not an exhaustive list thereof, as the European integration processes in Ukraine provide for the need for a system of legislative, institutional, organizational measures aimed at harmonizing the legislation of Ukraine in criminal justice and security with the European Union law.

Conclusions and prospects. In conclusion, it should be noted that the adaptation of the criminal procedural law of Ukraine with the EU acquis requires appropriate scientific support, conduction of fundamental research on the issues that represent the essence of the above and other provisions. This, in my opinion, defines the priority development areas of the science of criminal proceedings, the essence of which are:

– Creation of theoretical concepts of adaptation of the criminal procedural law of Ukraine to the EU acquis;

– Continuous monitoring of law enforcement practice in order to determine its compliance with the European standards on human rights and the administration of justice, on the basis of which it is possible to create a theoretical foundation for future changes and amendments to the current legislation (this monitoring should be carried out by experts in criminal proceedings, with which it would be expedient to create a team);

– Theoretical development of anti-corruption standards of criminal procedural legislation of Ukraine;

– Research of challenges of globalization of legal regulation in the field of

criminal justice and convergence of procedural forms;

– Scientific substantiation of proposals aimed at harmonizing the national legislation of Ukraine with the European standards on the rights of victims of crime (in particular, it is the case with Directive 2012/29/EU dated October 25, 2012 establishing minimum standards on the rights, support and protection of victims of crime);

– Study on the introduction of alternatives to the criminal prosecution, etc.

Published: Вісник Національної академії правових наук України. – 2016. – № 2(85). – С. 109–122.

Збірник наукових праць

Щорічник українського права

№ 9/2017

(англійською мовою)

Відповідальний за випуск *О. В. Петришин*

Статті публікуються в авторському перекладі і редакції

Технічний редактор *О. А. Федосєєва*

Підписано до друку з оригінал-макета 14.03.2017.
Формат 70x100 $^{1}/_{16}$. Папір офсетний. Гарнітура Times.
Ум. друк. арк. 26,66. Обл.-вид. арк. 30,24. Вид. № 1635.
Тираж 100 прим.

Видавництво «Право» Національної академії правових наук України
та Національного юридичного університету
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Свідоцтво про внесення суб'єкта видавничої справи
до Державного реєстру видавців, виготівників і розповсюджувачів
видавничої продукції — серія ДК № 4219 від 01.12.2011 р.

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