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THE BASIC LAW OF THE STATE: LEGAL CONTENT

Bielov D. M.

INTRODUCTION

Constitutionalism as a politico-legal category and doctrinal learning appears after the emergence and establishment of the constitution of the state in the modern sense of this term. It is inseparable and directly derived from the constitution of the state. Although not always the fact of the existence of a constitution automatically means the emergence of a particular model of constitutionalism. However, without the appearance (availability) of the constitution itself (in the broad sense of this notion), there is no need to talk about constitutionalism. The substantive basis, the very essence of constitutionalism, according to V. Shapoval, is expressed by the formula: "constitutional-legal norm + practice of its implementation"[1]. Therefore, a bit strange, in our opinion, when in certain writings, including monographs, there are such statements as "ancient", "medieval", "totalitarian" or "Soviet constitutionalism", since at that time the constitution as such (in the modern understanding of this concept) simply did not exist. However, it was precisely in previous times that, in fact, the foundations of the future phenomenon – constitutionalism were laid[2].

The Constitution of Ukraine is a part of the national legal system, its core, acts as "coordinator of the system of legislation"[3]. But, as Yu. Tykhomyrov notes, despite the fact that the Constitution, as if is in the middle of the legal array, its influence is not limited to the link "act-act". All elements of the legal system, in turn, also affect the constitution[4].

On the one hand, the Constitution is a kind of construction, on which practically all legislation is being built[5]. It is the Constitution that defines the nature of the current legislation, the process of law-making – determines, which basic acts are adopted by various bodies, their names, legal force, the process and procedure for the adoption of laws[6]. The development

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[1] В.М. Шаповал. Конституційне право зарубіжних країн: підручник. Київ: АртЕк, Вища шк., 1997. P. 135.

[2] П.Б. Стецюк. Основи теорії конституції та конституціоналізму. Частина перша: Посібник для студентів. Львів: Астролябія, 2004. P. 98.

[3] И.М. Степанов. Конституция и политика. Москва: Изд-во Наука, 1984. P. 40.

[4] Ю.А.Тихомиров, И.В. Котелевская. Правовые акты: Учебно-практическое и справочное пособие. Москва: Юринформцентр, 1999. P. 15.

[5] О.В. Оніщенко. Конституція України як основне джерело конституційного права України. Київ: Консум, 2005. P. 211.

[6] Е.И. Козлова, О.Е. Кутафин. Конституционное право России. Москва: Юристъ, 2003. P. 87.

of legislation is possible only within the parameters enshrined in the Constitution, which serves as an important condition for ensuring its unity, internal coherence[7]. As S. Shevchuk notes, the constitutional norms are formulated in the form of an open text, and, consequently, constitute “empty vessels”, which must be filled with a specific content[8]. Therefore, the adoption of a new constitution in the state, as a rule, causes significant changes and updates to current legislation. Ukraine is no exception. Although, as V. Opryshko notes, “the current legislation does not yet fit into the legal framework defined by the Constitution of Ukraine”[9].

However, the notion of a constitution cannot be disclosed to the full extent without clarifying the question about not only its legal but also socio-political nature.

1. The constitution of the state in the context of its functions

According to M. Savchyn, the supremacy of the constitution must be supported by certain institutional and procedural guarantees. Only in their totality, they determine the nature of the constitution. Institutional and procedural guarantees define certain criteria for the quality of legislation, administrative and judicial practice. Thus, the nature of the constitution and constitutional order are conditioned by the problem of statics and the dynamics of constitutional matter. The definition of the nature of the constitution is also influenced by the social environment since real constitutional relationships are determined by a certain type of society, civilization in general. The nature of the constitution is influenced by the legal tradition, which is based on the paradigm of constitutionalism, constitutional consciousness and culture, national traditions of government, the system of social values. A diversity of approaches to defining the nature of the constitution determines how these components are combined in the process of drafting the constitution and building a constitutional order[10].

The Constitution fulfils the function of legitimizing public order. Therefore, in the form of constitutional principles, democratic access to positions is determined through democratic elections and the fundamental principles of separation of powers, as well as the limitation of power, which are carried out mainly through legal guarantees of human rights and freedoms[11]. From the institutional point of view, the constitution is embodied

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[7] В.О. Лучин. Конституция Российской Федерации. Проблемы реализации. Москва: Юнити-Дана, 2002. P. 79.

[8] С. Шевчук. Основи конституційної юриспруденції: навчальний посібник. Харків: Консум, 2002. P. 7.

[9] В.Ф. Опришко. Конституція України – основа системи національного законодавства. Київ: Видавничий Дім «Юридична книга», 2000. P. 118.

[10] М.В. Савчин. Конституціоналізм і природа конституції: монографія. Ужгород: Поліграфцентр «Ліра», 2009. P. 256.

[11] Р. Циппеліус. Філософія права. Київ: Тандем, 2000. P. 204–205.

in ensuring the consolidation of democracy, representation of the people through free and periodic elections, parliamentary regime, and judicial constitutional control.

In the normative sense, the constitution includes both the provisions that contain specific regulations, as well as the provisions that determine the general legal principles of intervention in private life. Accordingly, the constitution has both a vertical and a horizontal structure. The vertical structure of the constitution relates to its own requirements, horizontal one defines a set of principles of law (provisions-principles), which operates both in the sphere of public and private law. Thus, the constitution in the normative sense extends to the sphere of public and private law[12].

In its content, the constitution expresses: a) a public consensus on social values provided by legal protection; b) ways of implementing democratic procedures and control of the people over the public authority; c) legitimation of public authority; d) limits of interference of public authority in the private autonomy of a person; e) legal mechanism of international cooperation of the state. Thus, the constitution in its content is a certain type of social order that is based on the definition of the legitimate framework of government in order to ensure the public good (balance of public and private interests).

In the formally-legal sense, the constitution is understood as the Basic Law, which has a constitutive character and has the rule of law. One should agree with M. Savchyn that, as a normative legal act, the Constitution of Ukraine has the following properties[13]:

a) constitutive nature – the constitution is an act of the constituent power; hence the constitution cannot be considered as a result of the legislative process of the parliament, which is actually established by the constitution and bound by its requirements. The Constitution, therefore, sets the foundations for the organization of society and the state, defines the foundations of the legal status of a person, the content and directions of activities of state authorities and local self-government, foundations of activities of institutes of the political system, and principles of the democratic system in the country.

Since people in a democratic state are recognized as the bearer of sovereignty and the only source of power, only they possess its highest manifestation – the constituent power. The content of the latter is the right to adopt a constitution and, with the help of it, to create the foundations of a social and state system that chooses one or another people for themselves. Only the constituent government can change, in the most radical way, foundations of the structure of society and the state. The whole history of the

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[12] М.В. Савчин. Конституціоналізм. P. 256.
[13] Ibid, p. 259.

constitutional development of both our country and foreign countries serves as a confirmation. Using constitutions, fundamental changes in the entire social system obtained the legitimacy.

It is the recognition of the constitutive nature of the constitution that the special order of its adoption, its supremacy, its role in the entire legal system of the state, the non-contradiction of the constitution for all the powers established by it, including for the legislative, are based.

In the foreign science of constitutional law, the concept, according to which the difference between the constituent power and the authority is established, is quite broadly presented. And in Germany, it received a direct expression in the constitution itself. In its preamble, it is said: "[…] the German people, by virtue of their constituent power, have created the Basic Law".

The constitutive nature of the constitution is manifested also in the fact that its prescriptions act as the first principles are primary. This means that there are no legal restrictions to establish the provisions of the constitution. There can be no such legal provision that could not be included in the constitution on the grounds that it does not correspond to any legal act of the given state. Yes, laws in Ukraine cannot contradict the Constitution. Of course, from this does not follow the conclusion that the content of the constitutional provisions is arbitrarily determined that any provision may be included in the constitution;

b) the main law – the constitution is the core of the legal system, laws and regulations are developed and adopted on its basis, it lays the program, the general direction of law-making work in the state, consolidates the system of sources of national law;

c) the highest legal force – any other normative act can distort the content of the constitution, it creates such an order when justice and law should not diverge. The Constitution of Ukraine has the highest position among rules and regulations, which should not contradict it, but conform to its basic principles and spirit.

In its Decision № 2-в/99 on 02.06.1999, the Constitutional Court interpreted the principle of the supreme legal force of the constitution in the following way: "One of the most important conditions for the definiteness of relations between a citizen and a state, the guarantee of the principle of inviolability of human rights and freedoms enshrined in Article 21 of the Constitution of Ukraine is the stability of the Constitution, which, in addition to other factors, is largely determined by the legal content of the Basic Law. The presence in the Constitution of Ukraine of too detailed provisions, which place is in the current legislation, will give rise to the need for frequent changes to it, which will negatively affect the stability of the Basic Law";

d) the horizontal effect – the constitution equally is the basis for the rules of public and private law; such a normative influence of the constitution on

the legal system of the country is realized through the specification of constitutional principles and human rights and freedoms at the level of current legislation and constitutional jurisprudence;

e) the supremacy of the Constitution regarding international treaties submitted to the parliament for the ratification procedure; this provision also applies to international treaties, duly ratified by the Parliament;

f) direct action of constitutional norms means the duty of state authorities and local self-government bodies, their officials to apply directly provisions of the Constitution in the presence of gaps in law or in the event of a conflict between constitutional provisions and provisions of law; if it is impossible to eliminate such a contradiction during the course of law enforcement, then such a conflict is finally resolved by the Constitutional Court of Ukraine;

g) special procedure for adoption – the constitution in the modern sense of this concept is an act that is usually adopted by the people or on behalf of the people. Characteristically, the emergence in the XVII century of the very idea of the need for such an act as a constitution was associated precisely with this feature.

The demand imposed by the bourgeoisie to restrict the rights of the king and feudal lords to protect their liberties could only be secured through the adoption of an act of supreme authority that embodies the will of the entire nation, of all the people. Thus in an unrealizable in practice "People's Agreement" project of Cromwell in 1653, the condition for signing it by all the people was provided. The same requirement was put forward later by J. Russo. He believed that the constitution requires the consent of all citizens. It should be the result of a unanimous decision, signed by all citizens, and opponents of the constitution should be considered foreigners among citizens.

This essential feature of the constitution is still recognized as dominant in constitutional theory and practice. It is no coincidence that the constitutions of most democratic states of the world begin with the words: "We, the people […] accept (proclaim, establish, etc.) this constitution".

In Soviet constitutions, this formula was first restored in the Constitution of the USSR in 1977, the Constitution of the RSFSR in 1978. Thus, in the preamble to the Constitution of 1978, it was written: "The people of the Russian Soviet Federative Socialist Republic ... accept and proclaim this Constitution"[14].

The idea of the people's involvement in the adoption of the constitution could not be ignored even under a totalitarian regime. Then it was expressed in a nationwide discussion of the draft Constitution of the USSR in 1936, which was held for six months with the widest scope and designed to

[14] Конституция (Основной Закон) РРФСР 1978 года, Известия ЦИК Союза ССР и ВЦИК 1978, № 121, 8 июня.

"sanctify" the Basic Law by the will of the people. The Soviet Union Constitution of 1977 was also subject to a nationwide discussion[15].

2. The latest constitutions in the history of World Constitutionalism

V. Shapoval argues that it is possible to identify common features by the content of the newest constitutions. Firstly, they reflect the relatively large role of the state in the economic sphere; consolidate economic function of the state. Secondly, according to the content of the relevant basic laws, the person has been recognized as a priority in its relations with the state. The latest constitutions, of course, contain meaningful provisions on rights and freedoms and fix a number of socio-economic rights. At the same time, quite wide guarantees of the enforcement of rights and freedoms are established and new mechanisms for their protection (ombudsman, constitutional complaint, etc.) are created. Thirdly, the newest major laws represent to a greater extent provisions of social orientation, although their meaning and purpose are different. Fourthly, relations that arise within the political system of society outside the state organization became the subject of constitutional regulation. This primarily concerns activities of political parties in their interactions with the state mechanism. Finally, fifthly, the sign of the newest constitutions is the presence in their texts of the provisions on foreign political activities of the state and the relation of national and international law[16].

Characteristic features of the newest constitutions in one way or another characterize also the basic laws adopted in the post-socialist and post-Soviet countries in the 90 years of the last century. It is they that are sometimes distinguished as the constitutions of the fourth "wave" since they were introduced and operate in other socio-political conditions than the constitutions of the third "wave". The current Basic Law of Ukraine also belongs to the constitutions of the fourth "wave"[17].

In the main laws of the fourth wave, the importance of human rights and their guarantees for the society and the state is often emphasized to a greater extent. Almost all of them define the state as legal and social, state political, economic, and ideological pluralism, fix certain provisions of the natural-legal content. Concerning the construction of the state mechanism for the authors of the main laws adopted in the post-socialist and post-Soviet countries, in most cases, the French Constitution of 1958, which began the practice of a mixed republican form of government, served as a model[18].

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[15] Ю.П. Еременко. Советская Конституция и законность. Саратов: Изд-во СГУ, 1982. P. 112.

[16] В. Шаповал. Феномен конституции в контексте отечественной политико-правовой «мифологии», «Зеркало недели», 29 (2008), 9 August. P. 4.

[17] Ю.Н. Тодыка. Конституция Украины: проблемы теории и практики. Харків: Факт, 2000. P. 78.

[18] В. Шаповал. Феномен конституции. P. 4.

The history of world constitutionalism involves the classification of constitutions as instrumental and social. Instrumental constitutions are defined as those whose content is primarily focused on establishing the status of key parts of the state machinery. Provisions on the status of the individual play a minor role in these constitutions and the question of social being is generally outside the scope of their regulation. In contrast to the instrumental constitutions, some provisions of social basic laws are addressed to society; in particular, they confirm social and economic rights[19].

To the greatest extent, provisions of the actual social direction are presented in the latest basic laws, although, as noted, the meaning, content, and purpose of these provisions are different. In some cases, the constitution proclaimed the social and economic guidelines (tasks) of the state or even declared the need for reforms in the relevant spheres, established mechanisms for the interaction of state institutions with "non-state" components of the political system of society. It is these basic laws, which are defined as social. In other cases, everything comes to nothing more than the attributive use of certain terms and providing social sound to texts of laws[20].

According to V. Shapoval, the socialization of the newest constitutions should be distinguished from "sociologization" of the Soviet constitutions, which were considered the basic laws of society. The texts of these constitutions were filled with non-legal abstractions, filled with terminology, which today relates primarily to political science. Recognition of Soviet constitutions by the basic laws of society and their "sociologization" were not accidental. In the period of existence of the Soviet organization of power, there was a desire for the mythologization of social life. In such circumstances, the constitution was considered primarily as one of the tools of ideological influence on the internal and foreign policy environment. Moreover, the ideological function attributed to it, which, as a rule, was set at a level or even above the legal function.

It is known that any constitution plays a significant socio-regulatory function, and it is in this sense that it can be perceived as the basic law of society. However, even the most socialized constitutions are primarily the main laws of the state. Those positions that are outwardly addressed to the public are formulated in a general form, have a fragmentary appearance and, in the end, usually reflect the interaction between society and the state. Determination of the constitution as the basic law of the state does not mean the substitution of society by the state, the nationalization of social life. Such a definition testifies to the nature of civil society as such, where society and each individual are protected from the full interference of the state, and the

[19] О.В. Прієшкіна. Конституційний лад України та його роль у становленні та розвитку місцевого самоврядування. Інститут законодавства Верховної Ради України. Київ, 2009. P. 122.

[20] В. Шаповал. Феномен конституции. P. 4.

latter is an integral part of the political system of society and does not absorb all its essential manifestations[21].

The constitution as the basic law of the state does not create the state but only establishes the foundations of its organization. In this regard, it plays a creative role in the state mechanism, first of all, its most important links – the supreme bodies of the state. The political task of the constitution is to establish the sovereignty of the state, to consolidate the establishment or change of the state system, to ascertain the degree of continuity in the development of the state. No less important is that the constitution as the basic law of the state determines the principles in the field of relations between the state and the person. According to the historically formulated definition based on ideas of natural law, the constitution is a certain system of restrictions of state power in the form of appropriately established rights and freedoms, as well as legal guarantees for their implementation[22].

The constitution in modern conditions of democratic development (that is, when we deal not with declarative constitutions of authoritarian states but with actual legal acts) becomes one of the decisive factors of social and state-legal development. In this sense, there can be no objection to the interpretation of the constitution as a source of state policy. Moreover, the constitution appears not only as one of the possible factors of influence on state policy, namely, as its fundamental basis and decisive factor, without which the democratic foundations disappear. And without a focus on democracy, it already begins to serve not the interests of society as a whole but exclusively the interests of certain clans, political groups or individual politicians[23].

3. Constitution and state policy

Today, one of the reasons for the constant tension in relations between the supreme bodies of state power in Ukraine is the imperfection of the Basic Law, the different interpretation of its norms, as well as the fundamental change of the state policy, especially after the 2004–2005 presidential elections.

The constitution has a mixed political and legal nature, as well as to a large extent all constitutional law. Constitutional relations that arise on the basis of its provisions can also be characterized as having a dual nature: political and legal at the same time. Powerful relations subject to constitutional regulation create prerequisites for the appearance of political issues in constitutional law and politicize it to a certain extent. The political

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[21] І. Коліушко, Ю. Кириченко. Проблеми дієвості Конституції України та удосконалення її змісту. «Парламент» 3 (2001). P. 14.

[22] В. Шаповал. Феномен конституции. P. 4.

[23] І. Гладуняк. Конституція як основа формування та реалізації державної політики. «Віче» 21–22 (2007). P. 11–12.

and legal in the constitution are closely intertwined, as well as the implementation of constitutional provisions can have a legal and political dimension.

As A. Heywood has rightly pointed out, for the vast majority of democratic states, constitutions were traditionally perceived as "precise descriptions of the current system of government"[24]. Consequently, any constitution always carries a certain prognostic-axiological element, which allows foreseeing a further direction of the state development and, accordingly, state policy. It is important to note that the prognostic function of the Constitution is directly written by well-known domestic researcher Yu. Todyka[25]. However, we now mean not only one of the possible functions of the constitution but also the fact that at its level the values are laid down that the state is called to provide.

The authors of the monograph "Politics, Law and Power in the Context of Transformation Processes in Ukraine" characterize state policy as a "system of purposeful measures aimed at solving certain social problems, meeting public interests, ensuring the stability of the constitutional, economic, legal system of the country […] the specificity of which is that it is realized through the power structures that have the authority of the monopoly right of the state to lawful coercion"[26]. Indeed, the link between the state policy and the constitution is shown by not only the reference to such a concept as "constitutional system". From the outset, the authors of the above-mentioned study establish a clear correlation between the direction of state policy and the process of ensuring social stability and satisfaction of the public interest. It should be borne in mind: the main social interests are always connected with the system of rights and freedoms of citizens of the state, which are not only formally fixed in the Constitution but must also be secured by it as a legal act of the highest legal force, which has a sign of direct imperative action (Article 8 of the Constitution of Ukraine)[27].

The same can be said for a widely used in the modern Ukrainian science definition of the state policy by V. Tertychka. This author proposes to interpret the state policy in the following way: "relatively stable, organized, and purposeful activity/inactivity of state institutions, carried out by them directly or indirectly on a particular problem or a set of problems that affects the life of society"[28]. Moreover, justifying the appropriateness of this way of understanding the phenomenon of state policy, he notes that the definition of state policy implicitly implies that it is based on the law and must be

[24] Э. Хейвуд. Политология. Москва: Юнити-Дана, 2005. P. 359.

[25] Ю.Н. Тодыка. Конституция Украины. P. 70–80.

[26] Політика, право і влада в контексті трансформаційних процесів в Україні, ed. І.О. Кресіної. Інститут держави і права ім. В.М. Корецького НАН України. Київ, 2006. P. 35.

[27] І. Гладуняк. Конституці. P. 11–12.

[28] Політика, право і влада в контексті трансформаційних процесів в Україні. P. 82–83.

legitimate. That is, state policy does not appear, so to speak, solely on its own accord and on their own will of those who are currently endowed with state power. On the contrary, in order that this direction of the state's activity should be systematic and coherent, it is necessary from the very beginning to have a certain set of rules and principles that would indicate: a) the type of political regime; b) the way of organizing state power; c) the main political institutions, the presence of which ensures the normal development of the state mechanism; d) the basic values and tasks that must be implemented during state and social development.

These rules should be fixed at the legislative level so that there are no ambiguous political interpretations of the way, in which policy should be implemented and on what grounds[29]. The universal method of fixing these rules and regulations is the method of constitutional determination. By giving these rules and principles an imperative value, the state acts as the guarantor of the fact that all participants in social and political relations will adhere to them. At the same time, it itself, as a mechanism of institutionalized coercion, will act in accordance with certain standards. Therefore, it is quite natural that in all democratically-operated countries, programs for the realization of state policy are always developed and implemented in accordance with the constitution.

However, it is necessary to distinguish between the constitution as a legal act and the functions specific to it in the legal field and the constitution as a political document having a certain socio-political content that directly or indirectly affects the entire political system of the country[30].

Consequently, the relationship between the constitution and politics manifests itself in two main areas. First, in a broad sense, political relations are one of the most important constituent parts of constitutional regulation. Constitutional norms set legal boundaries for the political process. They consolidate the foundations of the political system of society, and not only. In modern constitutions, the foundations of the social and spiritual systems of society, which affects the expansion of the object of constitutional regulation at the turn of XX – XXI centuries, are increasingly reflected. As rightly V. Chyrkin notes, "constitutional law went beyond a largely formalized approach of the XVIII – XIX centuries and spread to the settlement of issues of the social system, the situation of one or another stratum, groups of the population (social, national, age, etc.), socio-economic rights"[31].

Secondly, the constitution itself embodies a certain policy of the state, the desire of the project developers to consolidate certain principles and political

[29] І. Гладуняк. Конституція. P. 11–12.

[30] Ibid.

[31] Б.Е. Чиркин. Об объекте конституционно-правового регулирования. Российский конституционализм: проблемы и решения: материалы международной конференции. Москва: Академия, 1999. P. 126.

values. Even K. Marx argued that "all legal has in its essence a political nature"[32]. This thesis on the Basic Law, according to V. Luchyn, becomes of a special significance. The political orientation of the constitution is one of the most important qualities that determine its special role in the legal system, a special social role in society. However, the idea that a constitution is created by the state to achieve a certain political goal requires some adjustments[33].

From the standpoint of democratic constitutionalism and the theory of social contract, both the institutions of public authority and the electoral body participate in the act of constitution creation in one way or another. Therefore, official representatives of the state – only one of the subjects of the constitution creation. The constitution should integrate not only state goals of development but also the idea of society about the goals of social progress, to be an indicator of the needs of different social groups, the expression of their expectations and hopes[34].

In the history of Ukrainian constitutionalism, the Constitution has repeatedly acted as a tool of state policy, ruling circles or political forces that came to power. Thus, the First Soviet Constitution – the Constitution of the RSFSR of 1918 – consolidated the victory of the proletariat and the poorest peasantry after the October Revolution, and was actively used by the Bolsheviks as a means of political struggle against social strata and classes that did not share the ideals of socialist construction.

Interesting is the characteristic of the Constitution of the RSFSR of 1918, given by the well-known Soviet legal ideologist of the 20's P. Stuchka to the twelfth anniversary of the revolution of the state and law. He called it "the civil war constitution", which is largely justified since it openly supported class positions on the issue of the acquisition and implementation of basic civil and political rights and freedoms[35]. Later in the process of constitutional development of the Soviet state, constitutional right gradually cleared itself from the ability to act as a tool of class domination, acquiring the nature of a universal legal regulator[36].

In the mid-80's, political scientist I. Stepanov, reflecting on the relationship between the constitution and politics, expressed the view that politics and law should be represented in the constitution in an organically integral form, "balanced in a coherent unity"[37]. Of course, during the Soviet

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[32] К. Маркс, Ф. Энгельс. Сочинения, 2-е изд. Vol. I. Москва: Политиздат, 1991. P. 635.

[33] В.О. Лучин. Конституционные нормы и правоотношения: учебное пособие [для вузов]. Москва: Эксмо, 1997. P. 33–34.

[34] І. Гладуняк. Конституція. P. 11–12.

[35] П.И. Стучка. Двенадцать лет революции государства и права, «Революция права» 6 (1929). P. 10.

[36] І. Гладуняк. Конституція. P. 11–12.

[37] И.М. Степанов. Конституция и политика. P. 24.

period, the study of the constitutional policy was limited by many party-ideological barriers. However, the search for an optimal combination of politics and law in the constitution, constitutional policy, and political law is an important and constantly restored process of democratic development.

On the one hand, the tradition of observing constitutional limitations by subjects of political activity and political relations should be developed. On the other hand, the constitutional law should not be disconnected from political issues, and constitutionalists should seek to see political aspects in the implementation of constitutional norms. The study of political issues in constitutional law can shed light on the motives for adopting the constitution as a whole or individual constitutional changes, it can serve as an explanation or justification for the constitutionally regulated actions of state bodies and officials. In general, political issues highlight the controversial and problem areas of constitutional and legal development, contribute to the formation of a constitutional paradigm within the legally established normative framework of relations of person, society, and state[38].

In the concept of a political constitution, a special vision of a political community is laid down, in which a coordinated interaction between citizens and authorities is ensured and a political agreement on rules of conduct in the political sphere is taking place. History gives a lot of examples of violent imposing of the constitution by the ruling party, the authoritarian head of state, the oligarchic or military regime. However, in the spirit of the democratic policy, a constitution as a political document cannot be a political pact, which reflects the search for public consent and compromise in resolving various political and social conflicts[39].

In the political sphere, functions of the constitution are inextricably linked with its nature. In many respects, its effectiveness in the field of politics depends on the nature of the constitution. After all, the nature of the constitution is its socio-political content. In the national political science, in the Soviet era, the class nature of the constitution and its content were distinguished. Under class nature, they understood the basic socio-political characteristics of the constitution. It finds its manifestation in its content, principles, properties, and functions, has a decisive influence on its form, defining its fundamental features. The content of the constitution is the specification of its class nature. Moreover, the content may vary within a specific nature under the influence of a number of objective and subjective factors. The constitution had a dual meaning – social and legal[40]. The point is

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[38] И.А. Кравец. Сущность конституций и конституционный процесс (динамика социально-политического содержания российских конституций). Весник Московского гос. ун-та. 4 (2003). P. 35.

[39] І. Гладуняк. Конституція. P. 11–12.

[40] Ю.Л. Юдин. Конституции, in: Конституционное право развивающихся стран: предмет, наука, источники, ed. В.Е. Чиркин. Москва: Юридическая литература, 1987. P. 39.

that this approach was based on a formative theory, according to which the specifics of the nature of the constitution in different countries were tied to a certain socio-economic formation. Throughout the period of the development of Soviet constitutions, even in the late period, known as "developed socialism", dominated the class concept of the nature of the constitution, which was determined by the class (classes) it serves and which type of property it establishes[41].

In our opinion, the nature of the constitution derives from its socio-political content, so to speak, in a concentrated form. The legal content of the constitution is determined by the objects of constitutional regulation, in other words, what legal institutes, principles, and provisions are reflected in the text of the constitution and in this regard acquire the constitutional status. Given the differences in the legal and socio-political content of the constitution, it is necessary to identify the key elements of its nature, which have a political influence on the functioning of constitutional provisions.

These elements can be formulated in the form of theoretical postulates, the answers to which give a general idea of the nature of a specific constitution. These include:

1) the will of which political forces found a consolidation in constitutional provisions (whose political will was enshrined in the constitution?);

2) the interests of which social strata are reflected in the constitutional provisions and supported by them (whose interests are reflected and supported by the constitution?);

3) what is the degree of legitimacy of the constitution, which is largely determined by the terms of its project development and the procedure for its adoption (how the chosen procedure for the development and adoption of the constitution influenced the degree of its legitimacy?).

In specific historical conditions and the legal culture of an individual country, the answers to these questions may vary. In the constitutional history of one and the same country, different constitutions may have a different essence. Moreover, the essence of one and the same constitution can eventually be transformed and move away from the original idea of its creators. This is primarily related to the fact that the socio-political conditions of the constitution, the implementation of its provisions can change.

[41] Н.П. Фарберов. Новая Конституция СССР – манифест эпохи строительства коммунизма, in: Н.П. Фарберов. Конституция развитого социализма. Москва: Восход-А, 1979. P. 68.

CONCLUSIONS

Consequently, the main and still unresolved issue is the ambiguity of what is proposed to adopt: a new Constitution, a new version of the current Constitution, amendments and additions to the current Constitution. Although paradoxical, but in Presidential speeches, these terms are used repeatedly as synonyms. However, legally they are completely different concepts. This terminological confusion carries a great danger of loss of landmarks and prevents a clear statement of the problem in a purely legal area.

Thus, we believe that the constitutional process is too politicized today. In our opinion, the acutest political struggle is underway for adopting a form of constitution that is convenient for one of the parties. But in fact – for power – everyone wants a maximum of power. Including through their Constitution enforced in some way. However, the Basic Law should be adopted not from the conjuncture considerations of political expediency, but be a complete legal document, taking into account the achievements of the world jurisprudence, with the strict observance of all the prescribed legal procedures. After all, the constitution should be the main document of the state, at least for a decade.

SUMMARY

The scientific publication is devoted to highlighting the peculiarities of the legal nature of the constitution. The authors consider the structure and content of the constitution of the state in the context of its functions. The specificity of the content of the newest constitutions in the history of world constitutionalism is considered. The correlation between the constitution and the state policy is established. Modern approaches to understanding the nature of the constitution are considered. The legal nature of the Constitution of Ukraine is determined.

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Information about the author:
Bielov D. M.,
Doctor of Laws, Professor,
Professor at the Department of Constitutional and Comparative Law,
Uzhgorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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FEATURES OF EUTHANASY IN EASTERN ASIA COUNTRIES

Buletsa S. B.

"Killing both pain and patient may be good morals, but is far from certain it is good law."
Lord Edmund Davies

INTRODUCTION

Human life is a special gift, and in various decisions to continue or discontinue treatment, or to maintain life artificially, special care must be taken. If the patient has no chance of recovery and medical treatment is limited to maintaining his or her condition, it may be a matter of assisting in accelerating death by removing the life support system from the deceased patient at the request of relatives or the patient himself. It should be noted that compassionate death is a euphemism[1] for euthanasia.

The issue of euthanasia is being raised around the world, including in Asia. More attention is given to patient autonomy to address life and death. The urgency is that there is a need to consider protecting the right of a mentally competent patient to refuse medical treatment or to receive assistance, if he or she needs it, in ending his or her unbearable suffering by introducing a deadly substance to the patient. The legal status of the competent patient as well as the patient in clinical death should also be specified. Issues relating to the treatment of terminally ill people are currently being dealt with on very specific terms, and there is a degree of uncertainty in the minds of the general public and medical staff about the legal position on this issue. Doctors and families want to act in the best interests of the patient but are unsure of the scope and content of their care responsibilities. In addition, doctors are afraid of being sued, prosecuted and convicted if they shut down life support systems or prescribe drugs that inadvertently or otherwise shorten a patient's life, even if they only act as the patient wishes.

1. Legal regulation of euthanasia in Japan

The current Japanese legal system is based on a civil law system modeled on European legal systems of the XIX century, especially the legal codes of Germany and France. The Meiji Constitution was an organic law of the

[1] Dictionary of the Ukrainian language: in 11 volumes. Volume 2. 1971. Page. 453. URL: http://sum.in.ua/s/evfemizm (accessed: September 26, 2019). Euphemism – a word or expression that is replaced in the language by a rude, obscene, with an unpleasant emotional color word.

Japanese Empire, which operated from 1890 to 1945. After World War II, great legal reform took place, and the 1947 Constitution was drawn up under the occupation of the Allies, with considerable American influence. The current Japanese legal system is a hybrid of continental and American law. Both the concepts of civil law and the later effects of common law influence traditional Japanese values.

Yes, Shinto and Buddhism are two major religions of Japan. Shintoism is as old as Japanese culture, and Buddhism was imported from the mainland in the 6th century. Since then, both religions are relatively harmonious and even complement each other to some extent. Some scholars highlight the religious features of euthanasia, including:

1) Buddhism and Christianity are united in their opposition to euthanasia.

2) Buddhist and Christian opposition to euthanasia comes from the common rejection of the consequentialist reasoning in favor of an approach that respects a person's life as a fundamental rather than an instrumental good.

3) both Buddhism and Christianity teach that life is not absolute value and must be preserved at all costs and emphasize the transience of life.

4) the consensus of Buddhism and Christianity on euthanasia challenges pessimism about the possibility of moral consensus and support for the belief that the world's religions have a common core of values. Given that there is no predicted general consensus on euthanasia, the optimism expressed in these statements remains valid[2]. In most Asian countries, euthanasia is forbidden because of religious motives, which makes it impossible to legislate, but that does not mean that it is not applicable. The definitions and classifications of euthanasia in Japan are somewhat different from those adopted in the West. The Japanese term for euthanasia, "arak-shi", literally means peaceful ("arak") death ("shi"), much attention was paid to its role in the mitigation of "terminal illness", but less attention was paid to the patient, his own decision than in Western countries. The term "euthanasia" in Japan does not mean mercy, "murder", but is defined as a peaceful death and therefore covers a range of actions that are not considered euthanasia in Western countries.

Most Japanese researchers (Kai, 1995; Kanda, 1996; Kanazawa, 1961; Machino, 1993, 1995; Naito, 1984) have identified euthanasia as an act to ease the pain of patients and allow them to die peacefully in the final stages of a terminal illness in a situation of serious physical suffering without the prospect of recovery. Ending unbearable physical pain is the reason that entitles them to die. In Japan, monitoring the suffering of people around the

[2] Roy W Perrett. Buddhism, euthanasia and the sanctity of life. *Journal of Medical Ethics*. 1996. № 22. P. 311–312. URL: http://buddhism.lib.ntu.edu.tw/FULLTEXT/JR-ADM/perrett.htm (accessed: 26.09.2019 p.)

patient is also important, meaning not only the will or request of the patient. This provision was reflected in the decision of the Nagoya High Court, where the criteria were laid down in 1972[3]. Unfortunately, Western countries do not pay attention to the pain of loved ones, which in my opinion is incorrect, since suffering, the experiences of loved ones are important factors for the patient to decide on the possibility of euthanasia.

In Japan, euthanasia is conditionally classified into four types: 1) active euthanasia; 2) indirect euthanasia; 3) passive or negative euthanasia; 4) pure euthanasia. Active euthanasia is the deliberate acceleration, without therapeutic purpose, of the end of life of a patient who is in the final stages of a terminal illness or endures serious physical suffering without the prospect of recovery.

This definition of "euthanasia" is usually found in Europe. Indirect euthanasia is a treatment to relieve the symptoms of agony, but with side effects that reduce the life of a terminally ill patient, it is generally not considered problematic in the West. "Passive euthanasia" is defined as a refusal to treat terminally ill patients, and although it does not fall within the definition of euthanasia in the West, nevertheless, this type of euthanasia is a matter of moral concern. "Passive euthanasia" is defined as a refusal to treat terminally ill patients, and although it does not fall within the definition of euthanasia in the West, nevertheless, this type of euthanasia is a matter of moral concern. Pure euthanasia is a treatment to alleviate the symptoms of severe pain in a terminally ill patient, with no significant consequences of reducing life but facilitating peaceful death (an approach called palliative care in the West). Although it is classified as euthanasia in Japan, the "pure euthanasia" procedure is not against the law, since the patient's life is not interrupted by another person's intervention. Active, indirect, passive euthanasia is legally controversial in Japan as it is related to the termination of the patient's life. However, the goal of pure euthanasia is to eliminate intolerable physical pain, which is the primary goal of all types of euthanasia in Japan[4].

It should be emphasized that Japan is a country of tradition of civil law. Courts have to make decisions in accordance with laws and regulations, but they are not related to the decisions of other courts. Consequently, although the above decisions provided for euthanasia criteria, this does not mean that other courts are required to comply with these requirements. Doctors,

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[3] Miki Hayashi, Toshinori Kitamura. Euthanasia trials in Japan: Implications for legal and medical practice. *International Journal of Law and Psychiatry*. № 25. 2002. P. 560. URL: https://www.sciencedirect.com/journal/international-journal-of-law-and-psychiatry/vol/25/issue/6 (accessed: 26.09.2019 p.)

[4] Miki Hayashi, Toshinori Kitamura. Euthanasia trials in Japan: Implications for legal and medical practice. *International Journal of Law and Psychiatry*. № 25. 2002. P. 561–570. URL: https://www.sciencedirect.com/journal/international-journal-of-law-and-psychiatry/vol/25/issue/6 (accessed: 26.09.2019 p.)

patients, and patients' relatives cannot fully predict the results of their behavior in accordance with these decisions. In summary, Japan does not allow doctors to assist in suicide and is cautious about making surrogate decisions. If patients do not make informed decisions before losing consciousness, doctors are required to treat them if family members cannot clearly identify patients' wishes. However, since there is no law governing informed consent, and patients rarely sign out to refuse treatment, it is not known how to handle cases involving unconscious patients who do not have a Living Will[5].

The Japanese government itself has not issued any formal laws on the legalization of euthanasia, and the Japanese Supreme Court has never resolved the issue. Instead, to date, euthanasia policy in Japan has been resolved by two local court cases, one in Nagoya in 1962 and the other following an incident at Tokai University in 1995. The first case took place in Nagoya in 1962 and concerned "passive euthanasia" (that is, allowing a patient to die by disabling life support), the other – and in the latter case, "active euthanasia" (for example, by injection).

The court decisions in these cases set the legal framework and set of conditions in which both passive and active euthanasia can be legal. However, in both cases, doctors were found guilty of violating these conditions when they deprived their patients of their lives. Moreover, since the findings of these courts are not yet substantiated at the national level, these precedents are not binding. However, there is currently an indicative legal framework for euthanasia in Japan[6].

Thus, as we can see, Japan is very slow in considering euthanasia legislation. However, this does not mean that in Japan, reducing the life of terminally ill patients is rare. Rather, this means that such a state of affairs is justified by the unwillingness to discuss euthanasia openly. The frequency of euthanasia is unknown, as no direct applications have been reported.

There is still no law in Japan that recognizes passive or active euthanasia. However, several euthanasia-related court cases have been conducted in Japan over the past decade (although the Supreme Court's decision is still pending). Since the Kochi case in 1990, euthanasia in Japan has been discussed more openly in Japan. The social foundation of this new openness has been the development of an aging society that has emerged in recent years. In this regard, the public is more interested in the problems of long life and terminal treatment and care.

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[5] Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan's Patient Right to Autonomy. Act 42 *HastingsInt'l & Comp. L. Rev*. 2019. 485. URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 26.09.2019 p.)

[6] Euthanasia. Basic knowledge of modern terminology. Jiyukisma. 2007. P. 951, 953. (安 楽 死 ". 現代 用語 の 基礎 知識. 自由 国民 社. 2007).

Let us return to the decision made after the incident at the University of Tokai. Thus, on March 28, 1995, the Chief Justice of the Yokohama District Court in the mercy killing case at Tokai University issued a judgment, part of which contained a legal text allowing active euthanasia. Active euthanasia requires the following four conditions: 1) patient death is inevitable and unchanged; 2) the patient suffers from unbearable physical pain; 3) the doctor has already done everything possible to eliminate physical pain, that is, palliative care and there are no other alternatives, and finally, 4) the patient's wish to die is open, clear and understandable[7].

Even in the abstract, these four conditions are problematic. For example, the rapid improvement of painkillers made intolerable physical pain very rare, as it was possible to introduce the patient into a medicated sleep (sedation). If we focus on the willingness of doctors to strictly adhere to these conditions for active euthanasia, the situation is more troubling. One of the main factors is paternalism, because the doctor, as the father who cares for his child, sympathizes with the patient, helps him, takes responsibility for his decision making about his treatment.

The use of a small amount of euthanasia does not mean that the latter is exceptional in Japan, on the contrary, it is carried out discreetly. The details of these cases indicate the following:

1) palliative care for terminal patients is short in time in terms of pain control and psychological care;

2) there is a lack of informed consent and respect for the patient's autonomous decision-making;

3) lack of a clear statement of the patient's wishes;

4) euthanasia is performed by family members suffering from the burden of care;

5) a strong paternalistic tradition impedes the growth of patient autonomy in Japanese medical care[8].

Japanese scientists believe, first, that euthanasia should be accessible only to adults who can understand that it signifies a permanent end to their lives, as confirmed in the Nagoya and Yokohama Court decisions.

Second, the Yokohama District Court found that all possible palliative care should be provided, that is, palliative care should be provided to patients and include both pain control and psychiatric care. When palliative care cannot resolve intolerable physical pain, then euthanasia can be considered.

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[7] Kenzo Hamano. Should Euthanasia be Legalized in Japan? *The Importance of the Attitude Towards Life*. URL: https://www.eubios.info/ABC4/abc4110.htm (accessed: 26.09.2019 p.)

[8] Miki Hayashi, Toshinori Kitamura. Euthanasia trials in Japan: Implications for legal and medical practice. *International Journal of Law and Psychiatry*. 2002. № 25. P. 557–571. URL: https://www.sciencedirect.com/journal/international-journal-of-law-and-psychiatry/vol/25/issue/6 (accessed: 26.09.2019 p.)

Third, inevitable death was included in the court's decisions as an incurable disease (Nagoya High Court) and as an inevitable death (Yokohama District Court). Courts have stated that they believe that a necessary criterion should be the inevitable death without the prospect of relief from the suffering of the terminally ill.

However, if death must be inevitable, then euthanasia ceases to be an accessible option in all cases of incredible suffering. It is believed that relief from unjustified pain of death as a basic principle of euthanasia means that euthanasia should also be accessible to those who suffer from severe, refractory and long-term physical pain when death is an inevitable result, even if it is not.

Fourth, the Nagoya High Court criteria required euthanasia to be performed by a physician using an ethically acceptable method. Lawyer Kai (1995)[9] argued that the Yokohama District Court found it quite clear that euthanasia would be performed by a doctor. Others believe that the person who physically administers the euthanasia facility does not necessarily need to be a doctor while the latter is present.

Fifth, by the criteria of the Nagoya court, the pain observed by the patient's loved ones is the primary criterion. However, since pain is a subjective experience, we can say that the main criterion is the request of the patient, determined on the basis of pain.

Finally, none of these criteria requires a second opinion to confirm that the conditions for euthanasia are satisfactory, and that it is best to suggest that a family doctor or general practitioner who has probably known the patient for some time should suggest euthanasia[10].

Thus, in Japan for the application of passive euthanasia must meet three conditions:

1. The patient must suffer from an incurable disease and be in the final stages of a disease that he / she is unlikely to recover from;

2. The patient must give his expressed consent to discontinuation of treatment, and this consent must be obtained and maintained until the latter's death. If the patient is unable to give clear consent, their consent can be determined using a previous written document, such as a living will or family testimony;

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[9] Kai K. (1995, March 28). Chiryoukouityuushi oyobi anrakushi no kyoyouyouken–Toukai-daigaku byouin ‘‘anrakushi’’ – jiken hanketsu (Heisei 7.3.28, Yokohama Chisai hanketsu) (Permissible euthanasia – Tokai University ‘‘euthanasia’’ case (Judgement of Yokohama District Court)). Hougakukyoushitsu, 178. P. 37–45; Kai I., Ohi, G., Yano, E., Kobayashi, Y., Miyama, T., Niino, N., & Naka, K. (1993). Communication between patients and physicians about terminal care: a survey in Japan. *Social Science and Medicine*. 1993. Vol. 36. P. 1151–1158.

[10] Miki Hayashi, Toshinori Kitamura. Euthanasia trials in Japan: Implications for legal and medical practice. *International Journal of Law and Psychiatry*. 2002. № 25. P. 557–571. URL: https://www.sciencedirect.com/journal/international-journal-of-law-and-psychiatry/vol/25/issue/6 (accessed: 26.09.2019 p.)

3. The patient may be subjected to passive euthanasia by discontinuation of medication, chemotherapy, dialysis, artificial respiration, blood transfusion, IV drip and the like[11].

Four conditions are required for active euthanasia:

1. The patient should suffer from intolerable physical pain;

2. Death must be inevitable and approaching;

3. The patient must give consent (as opposed to passive euthanasia, where there is not enough living will and consent of the family);

4. The doctor has exhausted all other anesthetic measures or they have proved ineffective.

The resulting issues, in addition to the problem faced by many other families in the country, have led to the creation of "bioethics teams". These groups will be available to families of terminally ill patients to help them, together with their doctors, come to a decision based on personal case studies[12].

2. Some aspects of euthanasia in South Korea

The legal system of South Korea is a system of civil law, which has its basis in the Constitution of the Republic of Korea.

Korea itself is a country where all major world religions, such as Christianity, Buddhism, Confucianism, and Islam, coexist peacefully with shamanism. Thus, according to 2015 statistics, 44% of the Korean population professes one or another religion. First of all, the question of euthanasia legalization is influenced by religion. The question of legalization is primarily influenced by religion.

Like Japan in South Korea, "family" is a core value and emphasizes the concepts of harmony and filial piety. Just like in Japan, jurisprudence has been deeply influenced by euthanasia in South Korea. In particular, the debate on euthanasia began as early as December 4, 1997, when the doctor was sent to prison for a long term, for voluntary termination of life support for a patient with brain death. This incident is well known in Korea as the "Boramae Hospital Incident", (보라매 병원 사건). In this case, a patient who underwent craniotomy were admitted to the ICU of the hospital through subarachnoid bleeding. The patient's wife went to the hospital with a request to discharge patients, due to the impossibility of payment for treatment. The doctor dismissed a patient who died after 36 hours. And his wife was accused of murder. The Supreme court decision in 2004 in this case led to

[11] "Euthanasia". Basic knowledge of modern terminology. Jiyukisma. 2007. P. 951, 953. ("安 楽 死". 現代 用語 の 基礎 知識. 自由 国民 社. 2007).

[12] McDougall Jennifer Fecio. Gorman Martha. *Euthanasia: A Reference Handbook*. Santa Barbara: ABC-CLIO. 2008. 270p. [12] "Евтаназія". Основні знання сучасної термінології. Jiyukisma. 2007. С. 951, 953. ("安楽死". 現代用語の基礎知識. 自由国民社. 2007.)

the indictment of two doctors for help and incitement to murder. The court believed that this case is governed by the law of the voluntary dismissal, not euthanasia or worthy of death. At the time, the South Korean public was little debate about euthanasia or death with dignity, terminal dismissal from the hospital was not yet legal. After the proceedings, many doctors believed that the discharge terminal patients and discontinuation of treatment of patients where this is possible, even if there is a reasonable justification for relatives for the refusal of it is illegal[13].

Another incident that sparked further debate was the imprisonment of a father who had disconnected a respirator for his son with brain death[14]. The reports indicate that South Korea had previously legalized passive euthanasia but maintained the illegality of active suicide as of December 2015, a bill called "Death with Dignity[15]."

In the future, the legal situation changed in the case of grandmother Kim in 2008. Grandmother Kim was a 76-year-old patient with a permanent vegetative condition who had no previous instructions. The family asked the doctor to withdraw treatment. The request was rejected by the hospital and the family filed a lawsuit.

The district court agreed that, in the absence of the patient's prior instructions, the patient's wishes could be withdrawn because she had rejected a tracheotomy for her dying husband. The patient also said when she realized that "I want to leave this life without becoming a burden to others". As a result, the district court ruled that life-sustaining treatment could be canceled. Although the hospital appealed to the Court of Appeal, the appeal was dismissed[16]. In 2009, the Supreme Court of Seoul (Korea) ordered doctors to remove Eluana Englaro, an elderly woman (76 years old), from a ventilator who was diagnosed with a persistent vegetative brain death during the year previous wishes[17]. This has led to increased awareness of the rights of terminally ill patients and a public debate about the futile maintenance of

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[13] Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan's Patient Right to Autonomy. Act 42 *HastingsInt'l & Comp. L. Rev*. 2019. 485. URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 6.09.2019).

[14] Tanya Thomas. Euthanasia Legal for the Terminally Ill In S. Korea Now. *Med India*. Retrieved 15 July 2010. URL: https://www.medindia.net/news/euthanasia-legal-for-the-terminally-ill-in-skorea-now-71327-1.htm (accessed: 26.09.2019).

[15] Alex Schadenberg. Korea has not legalized euthanasia or assisted suicide. *Life site*. Retrieved 14 December 2015. URL: https://www.lifesitenews.com/pulse/korean-has-not-legalized-euthanasia-or-assisted-suicide (accessed: 26.09.2019).

[16] Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society – Taiwan's Patient Right to Autonomy. Act 42. *HastingsInt'l & Comp. L. Rev.* 485 (2019). URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 21.05.2019 p.)

[17] South Korea Authorizes Country's First Mercy Killing. URL: https://www.fastcase.com/blog/south-korea-authorizes-coutrys-first-mercy-killing/ (last accessed: 26.09.2019).

life in unjustified treatment. In February 2016, the Court ruled that patients could make life-sustaining treatment decisions, and in February 2018, doctors would be able to withhold or refuse life-support treatments such as chemotherapy, lung ventilation, cardiopulmonary resuscitation and hemodialysis from dying patients. This will have a serious impact on decision-making to end life in Korea[18].

Regarding legislative support, there are two laws in South Korea governing patients' decisions to discontinue treatment. The Cancer Law guarantees that cancer patients are eligible for palliative care. However, such care is limited to patients with cancer. Doctors are not required to explain terminal conditions to patients and their families, and there is no provision for informed consent. Another law, passed in 2016 by the Law on Hospice Care for Lifespan, allows terminally ill people aged 19 and over to claim life-supportive care.

This act was put into effect in February 2018. Life-sustaining treatment is legally defined under the following conditions: cardiopulmonary resuscitation (CPR), hemodialysis, cancer treatments, and artificial respirators.

This act does not cover palliative care, artificial nutrition and hydration, or oxygen masks (breathing without reliance on technique). Authorization of a patient's wishes requires the signature of a patient, two professional doctors and a witness. This law also stipulates that, in the event that patients are unable to express a desire or decision, they may receive hospice care. In addition, two or more family members may agree to provide hospice services based on the patient's intended wishes and personality[19].

There has been a public debate in Korea on passive euthanasia and refusal to maintain viability, taking into account current medical and legal practice. Discontinuation of treatment to maintain viability with the primary intention of ending the life of an unconscious patient (eg, in a vegetative state), and the patient could survive with such treatment is considered passive euthanasia and is prohibited in the country. However, the termination

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[18] Young Ho Yun, Kyoung-Nam Kim, in-Ah Sim, Shin Hye Yoo, Miso Kim, Young Ae Kim, Beo Deul Kang, Hyun-Jeong Shim, Eun-Kee Song, Jung Hun Kang, Jung Hye Kwon, Jung Lim Lee, Eun Mi Nam, Chi Hoon Maeng, Eun Joo Kang, Young Rok Do, Yoon Seok Choi, and Kyung Hae Jung. Attitudes of Cancer Patients, Family Caregivers, Physicians, and the General Population toward Modes of Death. Comparison of attitudes towards five end-of-life care interventions (active pain control, withdrawal of futile life-sustaining treatment, passive euthanasia, active euthanasia and physician-assisted suicide): a multicentred cross-sectional survey of Korean patients with cancer, their family caregivers, physicians and the general Korean population. URL: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6144336/ (last accessed: 26.09.2019).

[19] Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan's Patient Right to Autonomy. Act 42 *HastingsInt'l & Comp. L. Rev*. 2019. 485 (2019). URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (last accessed: 26.09.2019).

of viability, although it may be limited by passive euthanasia, permits natural death, when death is imminent even after medical treatment, it is not a life-threatening action.

However, despite the ban on euthanasia, most Koreans support the failure to maintain viability in vain, offering the possibility that passive euthanasia will be widely discussed after the Supreme Court's decision in February 2018 for Korean over-age society.

Korean doctors are more negative about active end-of-life (Active Physician-assisted death (PAD) euthanasia and Physician-assisted suicide (PAS) suicide.) A suicide doctor is a doctor who provides a means of death where the patient, rather than the doctor, will eventually administer the aircraft. Although, I note that euthanasia usually means that the doctor will act directly, such as giving a lethal injection to terminate a patient's life.

For example, Elizabeth Kubler-Ross identified five stages of the dying process: denial, anger, bargaining, depression, and acceptance. After twenty years of experience in the study of this type of terminally ill patient, she claims that physician-assisted suicide is wrong. There are many studies suggesting that terminally ill patients may change their mind about the possibility of physician-assisted suicide[20]. Therefore, the function of the latter will be reduced to helping die.

PAD and PAS are still illegal in Korea (as well as in China and Japan). Although the Supreme Court of Canada legalized the PAD in 2015. There has been a public debate in Korea about passive euthanasia. Discontinuation of treatment with the primary intention of terminating the life of an unconscious patient (eg, a vegetative patient) who could survive with such treatment is considered to be passive euthanasia and is prohibited. However, stopping useless living support when death is imminent even after medical treatment is not a life-saving act.

The share of positive attitudes towards euthanasia or physician-assisted suicide in Korea is relatively low compared to the Netherlands, USA and Canada, where 60-90% of patients support these procedures. Koreans, as a rule, support only a conservative choice of patient care, which is not surprising[21], because of the cultural values of the country.

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[20] Gupta B.D. Euthanasia: Personal Viewpoint. *Jpafmat*. 2004. № 4. P. 18. URL: http://medind.nic.in/jbc/t04/i1/jbct04i1p17.pdf (accessed: 26.09.2019 p.)

[21] Young Ho Yun, Kyoung-Nam Kim, in-Ah Sim, Shin Hye Yoo, Miso Kim, Young Ae Kim, Beo Deul Kang, Hyun-Jeong Shim, Eun-Kee Song, Jung Hun Kang, Jung Hye Kwon, Jung Lim Lee, Eun Mi Nam, Chi Hoon Maeng, Eun Joo Kang, Young Rok Do, Yoon Seok Choi, and Kyung Hae Jung. Attitudes of Cancer Patients, Family Caregivers, Physicians, and the General Population toward Modes of Death. Comparison of attitudes towards five end-of-life care interventions (active pain control, withdrawal of futile life-sustaining treatment, passive euthanasia, active euthanasia and physician-assisted suicide): a multicentred cross-sectional survey of Korean patients with cancer, their family caregivers, physicians and the general Korean population. URL: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6144336/ (accessed: 26.09.2019).

The National Assembly and the Ministry of Health and Welfare of Korea have voted in favor of active and passive euthanasia in the Well-Dying Bill[22], 22 which came into force in February 2018.

Patients eligible for active or passive euthanasia in South Korea are terminally ill patients with no chance of recovery. Patients who have a favorable response to any medication or are not in rapid deterioration of their health leading to inevitable death are not euthanized.

They must have confirmation from a registered physician and physician to die with dignity, and patients with coma must have the approval of both caregivers[23].

Japanese scientists are also of the opinion that euthanasia should not be legislated, but rather a recommendation system that is more flexible and does not impose sanctions[24].

On April 13, 2001, Associated Press reported that "mercy killings" were illegal in South Korea. But the Korean Medical Association (70,000 doctors) has developed a new draft code of ethics that will give doctors greater leeway in determining the fate of patients from unbearable pain without the hope of living. Without a clear legal definition of mercy killing in South Korea, doctors were restless when they treated patients who they believed were terminal and unbearable and had several days to live. In a widely publicized case in 1998, a Seoul doctor was sentenced to 2 1/2 years in prison for allowing an terminally ill patient to go home and die without further treatment at the request of his wife[25]. Korea's Ethics Code of Ethics was adopted in 2001 (6 sections, 78 articles), revised in 2006 (1 section, 8 articles), and in 2017, revised (10 articles)[26], permits physicians to discontinue treatment for terminally ill patients or at their own discretion will be asked to do so in writing by the family of patients and also allow doctors

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[22] New law enables South Koreans to 'die well". *The Straits Times*. 2016-01-28. Retrieved 29 January 2016. https://www.straitstimes.com/asia/east-asia/new-law-enables-south-koreans-to-die-well (accessed: 26.09.2019).

[23] Choi Won-woo. *조선일보*. Korea to Temporarily Allow Terminally Ill Patients to Choose Death with Dignity. Retrieved 23 October 2017. URL: http://english.chosun.com/site/data/html_dir/2017/10/23/2017102301468.html (accessed: 26.09.2019).

[24] Katsunori Kai. Euthanasia and Death with Dignity in Japanese Law. *Waseda Bulletin of Compartive Law*. 2010. Vol. 27.. URL: https://www.waseda.jp/folaw/icl/assets/uploads/2014/05/A02859211-00-000270001.pdf (accessed: 26.09.2019).

[25] Ole Doering. Euthanasia, and the Meaning of Death and Dying: A Confucian Inspiration for Today's Medical Ethics. 2001. P. 56. URL: https://pdfs.semanticscholar.org/1f3f/a32d070818eb636a0be4f261eb69a24a314a.pdf (accessed: 26.09.2019).

[26] Ock-Joo Kim, Yoon Hyung Park, Byung Gee Hyun. Development of the codes and guidelines of medical ethics in Korea. *J Korean Med Assoc*. 2017. № 60 (1). P. 8-17. URL: https://www.jkma.org/search.php?where=aview&id=10.5124/jkma.2017.60.1.8&code=0119JKMA&vmode=FULL (accessed: 26.09.2019).

to waive treatment requirements for patients if they feel it is medically unnecessary[27]. Doctors have greater confidence within the legal framework.

The approaches of Japan and Korea share some common features. They both allow suffering patients to opt out of life support, but they are cautious about making surrogate decisions, especially from family members.

However, when patients' true wishes cannot be determined by their previous behavior, Korea requires the full agreement of all family members[28].

Scientists say that the legal right to euthanasia will help establish his moral recognition, and that, as well as a deeper understanding of the conditions under which suicide can be rationally considered a potential choice. This is due to the fact that, of course, it is not expected that the members of the group who carry out abortion campaigns will retain all forms of euthanasia illegally. Greater public support for voluntary euthanasia does not seem to be reflected in physicians 'views, as studies of oncologists' views on euthanasia and physician-assisted suicide have shown. For example, in the case of an incurable patient (prostate cancer) with constant pain, only 22.5% of physicians supported physician-assisted suicide and only 6.5% of euthanasia. These results were significantly lower than in the previous study (since 1994, recent data were collected in 1998), in which 45.5% supported physician-assisted suicide and 22.7% supported euthanasia; life termination and palliative care were considered the best ways to handle terminal cases. Despite the opinion of doctors, 62.9% received requests for euthanasia or physician-assisted suicide from their patients[29].

Scientist MS Wolf argues that, from a legal point of view, current laws that prohibit euthanasia are of great benefit in four main areas: 1) in the formulation of treatment that is given to patients without complying with the law (through non-regulation of euthanasia) and, therefore, also allowing informal processes who demonstrate trust in doctors; 2) allow the courts to decide to refuse life-support treatment; 3) compulsory patient care until the very end, and 4) due to the fact that the hospital bed is a safe place to discuss options[30].

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[27] Ethics in Medical Field. URL: http://kams.or.kr/webzine/14vol55/sub01.php (accessed: 21.05.2019.)

[28] Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan's Patient Right to Autonomy. Act 42 *HastingsInt'l & Comp. L. Rev*. 2019. 485. URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 26.09.2019).

[29] Andrew Oberg. Reconsidering euthanasia: For a right to be euthanized and for recognizing alternative end of life methods. *Journal of International Philosophy.* 2015. No. 4. P. 297.

[30] Susan M. Wolf. Holding the Line on Euthanasia. *The Hastings Center Report.* 19:1. 1989. P. 13–15.

3. Legal regulation of euthanasia in Taiwan

In Taiwan, euthanasia has risen to the government level in 2010, when a woman, Wang Xiao-min, who died at the age of 64, had a car accident and was in a vegetative state for almost 50 years. Her parents repeatedly sought permission for euthanasia, but unfortunately, to no avail, they died sooner than she did. In 2000, the Law on Palliative Care in Hospice was adopted. This is why the Taiwan Patient Right to Autonomy Act (自主 權利 法), which was enacted by Legislative Yuan on December 18, 2015 and came into force in January 2019, has attracted much attention. The law was drafted by Professor Sun Hsiao-chih and Yang Yu-Xing, Honorary Advisor to the Taiwan Legislator[31]. This is Asia's first "natural death" law, which focuses on the good quality of death, promoting a concept that aims to pacify and provide medical assistance to patients to avoid stress and suffering for patients and their families, which has specifically protected the right patient for autonomy and set a precedent.

In Taiwan guarantee patient-centric is the patient's right to information, freedom of choice and decision in choice of behavior. She gave the patient the right to make decisions in the field of health care and a good death. The law stipulates that any person aged 20 years and above with full civil capacity has a priority right to information, choice and decision-making regarding the diagnosis and treatment options. In addition, with the help of pre-planning and preparatory assistance where the patient meets one of the five clinical conditions, he or she may accept treatment or to refuse it. In addition, the assigned medical agent can express an opinion, that the patient is in a coma or unable to clearly express own thought.

The five clinical conditions include: A. The patient is terminally ill. B. The patient is in an irreversible coma. C. The patient is in a constant vegetative state. D. The patient has severe dementia. E. Other diseases declared by the Central Competent Authority that must meet all the following requirements so that the conditions or suffering are unbearable, that the disease is incurable and that there are no other appropriate treatment options based on medical standards at the time of the illness.

Most Taiwanese are not familiar with this law on patient health autonomy, and are easily confused with the law on palliative care for hospices. In order to make the public aware of the essence of the Patient's Right to Autonomy, the Ministry of Health and Social Welfare specifically commissioned 7 hospitals in Taiwan in early 2017 to test this law. Thus, medical staff or social workers have studied the provisions of the 2015 law for 3 years and can interpret it to interested people, patients and their

[31] Patient Autonomy Act. 2016. URL: http://www.dignitas.ch/images/stories/pdf/gesetz-taiwan-patient-autonomy-act.pdf (accessed: 26.09.2019).

families[32]. It is the first law in Asia to grant terminally ill patients, including the elderly with severe dementia, the right to recognize the disease, to choose and to determine treatment options, providing the will to be fulfilled when the patient is comatose or unconscious. The patient may decide whether to continue medical treatment to prolong his life if he becomes terminally ill or unable to make decisions. The surrogate is administered if the patient is mentally or physically incapacitated[33]. The Natural Death Act was initiated in 2000, which allows a physician to refuse treatment for a terminal patient based on the patient's will to achieve a good death. The Natural Death Act was amended in 2013 to allow a physician to withdraw life-support treatment based on the patient's will to achieve a good death. Thus, the Natural Death Act, which was initiated in 2000 and amended in 2013, empowers medical teams to act for the benefit of terminally ill patients when no prior statement or surrogate exists[34].

Prior to this, there was only the Hospice Palliative Care Act (term 寧 緩 和 醫療 條例), which is intended only for patients with a terminal illness: it allows a competent patient to relinquish vain support for life, even if he is terminally ill, or to family members for incompetent patients. It did not apply to people in a vegetative state (such as Wang Xiao-min), leaving 3 684 Taiwanese families without the right to appeal from their position at the end of 2017. And even more Taiwanese who have fallen into a permanent coma or suffer from an extremely serious illness and are also left without rights. Yang Yusin, a lawmaker from 2012 to 2016 who has a rare disease, once visited family members of nearly 200 patients with rare diseases, and "each spoke of suicide," he remembers feeling frustrated. Some of the people he encountered went through 10 to 20 years of hardship, seeking relatives who had lost consciousness and were on artificial respirators to stay alive[35]. However, many polls have recently shown that 70-80% of people support euthanasia, considering that Taiwanese accept the idea of legalizing it[36].

The Law on the Patient's Right to Autonomy goes beyond the terminally ill: irreversible coma; stable vegetative state; severe cognitive impairment, other officially declared irreversible conditions. According to Taiwanese lawmaker Yang Yusin, who headed the commission to pass the Patient's

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[32] Chun-Ying Cho. From cure to care: the development of hospice care in Taiwan. *Hospice & Palliative Medicine International Journal.* 2018. Vol. 2. Issue 5. P. 286-287. URL: https://medcraveonline.com/HPMIJ/HPMIJ-02-00108.pdf (accessed: 26.09.2019).

[33] Shao-Yi Cheng. End of Life Questions~ Taiwan perspectives. URL: http://cmaao.org/news/pdf/symposium2017_32nd/8_Taiwan.pdf (accessed: 26.09.2019).

[34] Ibid. (Accessed: 01.06.2019).

[35] Sharon Tseng. Asia's First 'Natural Death' Law, Will Taiwan be Ready? 2018. URL: https://english.cw.com.tw/article/article.action?id=1975 (accessed: 26.09.2019).

[36] Lu Alkohol. The Future of Euthanasia in Taiwan. URL: https://www.shs.edu.tw/works/essay/2015/11/2015111421180943.pdf (accessed: 26.09.2019).

Autonomy Law, noted that in connection with individual articles in the Medical Assistance Act, the Medical Act and the Taiwan Criminal Code, if a patient does not have legal documents signed under the Hospice Palliative Care Act or the Patient's Right to Autonomy Act, the physician must perform resuscitation for all patients[37] (Table 1).

Table 1

«On palliative care of hospices»	**Comparative Laws of Taiwan**	**on the Patient's Right to Autonomy**
Terminally ill patients (cancer patients in the last stage with the possibility of living for no more than 6 months)	Objectives of the laws	1. Terminally ill patients. 2. Patients in irreversible coma. 3. Patients in a permanent vegetative state. 4. Patients with severe dementia. 5. Patients with other serious diseases.
1. Artificial resuscitation.	Treatment that can be denied	1. Lifelong treatment such as resuscitation, ventilation, blood transfusion, chemotherapy, dialysis, or antibiotics.
2. Continuing treatment that supports the patient's vital signs and keeping them alive without any chance of improvement.	Documents	2. Artificial nutrition and hydration (nasogastric tube for feeding).
Letter of Intent, signed personally or by a family member in which the decision is made in advance to receive palliative care, stay in hospice or receive treatment for life extension. Documents Form of a previous directive that can only be signed by an interested person.		Form of a previous directive that can only be signed by an interested person.
They will not be required before signing the letter of intent	Pre-signed medical consultations	Must be legally involved in "advance care planning" before prior directives can be signed.

[37] Tse Chun Yan. Ethical Challenges in End-of-Life Care: Local Perspectives in Hong Kong. URL: http://bioethics.med.cuhk.edu.hk/assets/files/userupload/Chun%20Yan%20Tse_Ethical%20Challenges%20in%20EOL%20care%20CU%20Dec%202017.pdf (accessed: 26.09.2019).

The law is also part of standard palliative care to respect patients who wish to speed up their deaths (including euthanasia and assisted suicide care (hereinafter referred to as ADPs)). Health care professionals should recognize these wishes and requests and interpret them as a starting point for holistic care, with adequate symptom control to relieve suffering, psychologically adequate and spiritual care and intensive communication to better understand the underlying motives and attitude of the patient. Many patients may not have the information, have misconceptions about the progression of the disease, or fearful images of complications that are expected in the future as the disease progresses. For these patients, it is not their current state, but the expectation of suffering and fear that prompts the desire for a hasty death. It should be recognized and discussed with the patient, and offer and provide appropriate psychosocial and spiritual assistance.

The International Hospice and Palliative Care Association (IAHPD) believes that no country or state should consider legalizing euthanasia or ADP until it has universal access to palliative care and related medications, including opioids for pain and shortness of breath. In countries where euthanasia and / or ADPS are legal, the IAHP agrees that palliative care units should not be responsible for overseeing and administering these practices.

The law or policy should state that any health care provider who has a disagreement should be allowed to opt out[38].

Taiwan's Law on Palliative Care for Hospices does not have strict requirements for surrogate decision-making. Some scholars have criticized this as a defect in the Law on Palliative Hospice Care. The Patient's Right to Autonomy Act corrects this shortcoming, but sets out clearer procedures to make patients' wishes effective and extend decision-making power to patients who are not terminally ill. This is an important milestone in East Asian law, as many Asian countries become aging societies, and the importance of end-of-life problems increases. The benefits and difficulties arising from the implementation of the Patient Right to Autonomy Law can be a great example of relevant reforms in East Asia. The Patient's Right to Autonomy Act protects patients' right to make previous decisions and their absolute autonomy in decisions, termination of life, and defines the procedures for making such decisions[39].

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[38] Liliana De Lima, Roger Woodruff, Katherine Pettus, Julia Downing, Rosa Buitrago, Esther Munyoro, Chitra Venkateswaran, Sushma Bhatnagar, Lukas Radbruch. International Association for Hospice and Palliative Care Position Statement: Euthanasia and Physician-Assisted Suicide. *Journal of palliative medicine*. 2017. Vol. 20. No 1. P. 10. URL: https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5177996/ (accessed: 26.09.2019).

[39] Chih-hsiung Chen, Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan's Patient Right to Autonomy Act, 42 HastingsInt'l & Comp.L. Rev. 2019. 485. URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 26.09.2019).

This the regulation is a progression in Asian culture, where family relationships are highly valued. For example, the husband of Chinese writer Yao Chiung (Yao Chiung) is constantly ventilated. He can communicate with his children and doctors using simple language and therefore cannot be considered terminally ill. Fu Da-jen, a former television sports commentator in Taiwan, was in the final stages of pancreatic cancer before he died in Switzerland. However, he did not need emergency treatment to support life. In addition, the medical assistance he requested was not allowed in Taiwan. Neither Yao Jun's husband nor Da-eun Fu is covered by the Law on the Patient's Right to Autonomy or the Law on Palliative Hospice Care. As the Taiwanese public increasingly accepts the concept of "good death," Taiwan's next step may be to legalize physician-assisted suicide if the Patient's Right to Autonomy Act is enacted and implemented[40].

CONCLUSIONS

So, the ability to perform voluntary euthanasia is aimed primarily at the well-being of patients, not the doctor, I think for the doctor it will be a burden. Family or friends may put pressure on patients to decide to end their lives, and while this cannot be completely ruled out, or family and friends may pressure patients who do not necessarily have the best interests in mind patient, but the final choice is always left to the patient. Voluntary euthanasia will be considered beneficial if there is "respect for individuals for their autonomous elections", provided that these elections do not harm others. A legalized and regulated system of voluntary euthanasia is unlikely to lead to a homicide. The peculiarity of euthanasia in Korea and Japan is that there is no direct legal regulation by law, but given the peculiarity of the country, court decisions are followed, as well as strong paternalism, which leads to the impossibility of using active euthanasia, but possible suicide by a doctor. It is interesting that the opinion of close relatives is necessarily taken into account, in my opinion it is the most positive in these countries, since terminal patients who have no chance of life, for example, in the case of brain death, can allow such existence with active body functions. person and up to 3 years, which will only burden the relatives. Such patients can live without an artificial respiration apparatus. In my opinion, it is difficult to introduce active euthanasia in Ukraine, but physician-assisted suicide is one better way to respect the right to die with dignity.

The analyzed countries support passive euthanasia without a clear definition. I believe that any person over the age of 18 who is fully capable has the right to make a written statement that if he or she will at one time

[40] Chih-hsiung Chen, Legislating the Right-To-Die With Dignity in a Confucian Society – Taiwan's Patient Right to Autonomy Act, Hastings International and Comparative Law Review. No 42, p. 485, 2019. URL: https://repository.uchastings.edu/hastings_international_comparative_law_review/vol42/iss2/4 (accessed: 01.06.2019).

suffer from a terminal condition, as a result of which he or she will not be able to make a statement or decide on his or her treatment or termination medical treatment, or at all any medical treatment he may receive, treatment should be discontinued and palliative care should be provided. The individual also has the right to entrust any decision-making, or cancellation of such statement to the competent agent by written power of attorney, or to grant such right to his lawyer. This statement shall come into force and remain in force if the principal becomes terminally ill and as a consequence is unable to make or notify his decision to treat or terminate it.

SUMMARY

The study focuses on the legal analysis of euthanasia in the countries of East Asia – Japan, South Korea and Taiwan. The peculiarity of euthanasia in these countries is found to be that there is no legal regulation of euthanasia, and there are separate laws that allow refusal of treatment, provide palliative care to patients, etc. The main obstacle to the official introduction of active euthanasia in these countries is religion.

It should be noted that passive euthanasia is not explicitly stated to be passive. Patients have the right to refuse treatment or artificial life support. And since 2019, Taiwan's Patient Right to Autonomy law sets out clearer procedures to make patients' wishes effective for discontinuation of treatment, and extends decision-making powers to patients who are not terminally ill. Important in Taiwan is the identification of 5 clinical conditions in which treatment can be refused.

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4. Chih-hsiung Chen. Legislating the Right-To-Die With Dignity in a Confucian Society. Taiwan’s Patient Right to Autonomy. Act 42 *HastingsInt'l & Comp. L. Rev*. 2019. 485. URL: https://repository.uchastings.edu/ hastings_international_ comparative_law_review/vol42/iss2/4 (accessed: 26.09.2019 p.).

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Information about the author:
Buletsa S. B.,
Doctor of Law, Professor, Head of the Department
of Civil Law and Process of the Law Faculty,
Uzhhorod National University
26, Kapitulna str., Uzhhorod, Ukraine

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THE IMPORTANCE OF ADMINISTERING JUSTICE BY THE COURT OF CASSATION FOR DEVELOPING THE LEGAL SYSTEM OF UKRAINE

Bysaga Yu. M.

INTRODUCTION

Human rights in today's society play a great role and their importance to any law-based state is scarcely estimable. Individuals and civil society are increasingly aware of the value and practical importance of protecting basic human rights. Any law-based state understands the need for the fundamental development of the idea of the rule of law as the basis not only for its development, but also for the optimal functioning of state power and personality that are even more important.

One of the main elements of the principle of the rule of law and the main means of its functioning is legal certainty, which is increasingly characterized in doctrine and domestic law as an idea of general legal, universal nature, in one form or another, which manifests itself in every branch of domestic procedural law.

One of the determining mechanisms that underscores the public's trust for the country's legal institutions is the ability to have access to justice and certainty of their position.

However, in assessing the level of public trust for domestic justice, in addition to the accessibility of the latter, the role of the highest judicial authority in the country which it executes and its legal conclusions for further improvement of the legal system and the development of domestic law are of great importance. In many countries this role is played by the Supreme Court, since being the supreme judicial authority of the state, and given that its functions are limited to matters of law, the latter's legal conclusions on a certain legal norm concerning a particular case should have legal force and be applied by lower courts when invoking the same norm. Thus, we can talk about the prospects for further development of precedent for interpretating for countries where judicial precedent itself is not a source of law.

1. Right of access to the court of cassation

An indicator of the level of development and interaction between the state and civil society is the efficiency of functioning the judicial system in the country, which can guarantee the real protection of the rights, freedoms and interests of the individual and the citizen.

However, obtaining proper judicial protection and the final decision does not always guarantee the restoration of the violated rights, freedoms and interests of the individual and the citizen. This is due, in particular, to the miscarriage of justice committed by the court, which, according to L. A. Terekhova, is the result of a wrongly resolved case in which the protection of the subject's rights was never provided[1]. The existence of a judicial error in itself guarantees the right to appeal the final decision (the case of "Ryabykh versus Russia"[2]).

Thus, judicial protection, including several constituent parts (components), where obtaining a decision of the court of first instance is only one of the structural elements of the system[3] as a guarantee of the legality of the decisions made by the courts of first instance and the appellate court, provides for the right to lodge a cassation appeal[4].

It follows from the established case law practice of the European Court of Human Rights (hereinafter referred to as the ECHR) that the first paragraph of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms, 19505[5] (hereinafter referred to as the Convention) does not guarantee the right to appeal against the judgment. Nevertheless, the state which creates such a system must provide individuals with the basic guarantees prescribed in Article 6 of the Convention ("Tolstoy-Miloslavsky v. The United Kingdom"[6]), in particular, the effective right of access to a higher court ("Levage Prestation Services v. France"[7]), since Article 6 of the Convention is fully applicable to cassation proceedings ("Airey v. Ireland"[8]).

The importance of the cassation appeal against the court decision is explained by the fact that, as D. I. Kovtkov, in the latter, more than in any other way of appealing, there are combined the public (political) interest of the state, which is manifested in its interest in ensuring the uniformity of law

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[1] Терехова Л.А. Система пересмотра судебных актов в механизме судебной защиты: монография. М.: Волтерс Клувер, 2007. С. 33.

[2] ECHR in the case «Ryabykh v. Russia» on July 24, 2003 (Application № 52854/99). URL: http://hudoc.echr.coe.int/eng?i=001-61261 (дата звернення: 26.09.2019).

[3] Терехова Л.А. Система пересмотра судебных актов в механизме судебной защиты: монография. М.: Волтерс Клувер, 2007. С. 1.

[4] Скворцов О.Ю. Институт кассации в российском арбитражном процессуальном праве (проблемы судоустройства и судопроизводства): автореф. дис. на соиск нуч. степени канд. юрид. наук: спец. 12.00.04. Санкт-Петербург, 2000. С. 18.

[5] European Convention on Human Rights. 1950. URL: https://www.echr.coe.int/Documents/Convention_ENG.pdf%23page=9 (дата звернення: 26.09.2019).

[6] ECHR in the case «Tolstoy Miloslavsky v. the United Kingdom» on July 13, 1995 (Application № 18139/91). URL: http://hudoc.echr.coe.int/eng?i=001-57947 (дата звернення: 26.09.2019).

[7] ECHR in the case «Levages Prestations Service v. France» on October 23, 1996 (Application № 21920/93). URL: http://hudoc.echr.coe.int/eng?i=001-58065 (дата звернення: 26.09.2019).

[8] ECHR in the case «Airey v. Ireland» on October 09, 1979 (Application № 6289/73). URL: http://hudoc.echr.coe.int/eng?i=001-57420 (дата звернення: 26.09.2019).

enforcement throughout the territory of the state, and the private interest of the parties involved in the process who seek to settle the dispute to their advantage[9]. The highest courts themselves should consider reviewing the errors of the court and justice gaps, but the mere possibility of having two points of view on this issue is not the ground for reconsideration, and the derogation from this principle is justified only when it is necessary to identify circumstances of a substantial and insurmountable nature. ("Ryabykh versus Russia"[10]). Consequently, the revision of judgments that have entered into force is possible only in case of exceptional and fundamental judicial errors which result from gross violations of human rights and freedoms and an unfair distribution of rights and responsibilities1[11], especially where such proceedings concern third parties and their legitimate interests ("Case of Bochan v. Ukraine"[12]). One way or another, the very fact of the potential for reviewing the adopted court acts is important because it stabilizes the judicial proceedings in the courts of first instance and the appellate court[13].

The Cabinet of Ministers of the Council of Europe, in its Recommendations, states that complaints to a court of third instance must be filed when cases merit the third trial, such as cases that will develop law or that will promote a uniform interpretation of the law, these cases may also be restricted to complaints related to matters of law which are of importance to the society as a whole and the person, lodging a complaint, is to justify why his / her case would contribute to the attainment of such goals[14]. This indicates that, by its nature, the right of access to a court requires regulation by a state which has some discretion in this matter ("Guerin v. France"[15]), and such a right may, in turn, vary over time according to the needs and resources of society and individuals ("Bellett v. France"[16]). Thus, we tend to

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[9] Ковтков Д.И. Кассационное производство в гражданском процессе: дис. на соиск. науч. степени. канд. юрид. наук: спец. 12.00.15. Москва, 2015. С. 45.

[10] ECHR in the case «Ryabykh v. Russia» on July 24, 2003 (Application № 52854/99). URL: http://hudoc.echr.coe.int/eng?i=001-61261 (дата звернення: 26.09.2019).

[11] Вишневский Г.А. Действие принципа res judicata как необходимое условие обеспечения справедливости. *Современное право.* 2013. № 11. С. 78.

[12] ECHR in the case «Bochan v. Ukraine» on May 3, 2007 (Application № 7577/02). URL: http://hudoc.echr.coe.int/eng?i=001-80455 (дата звернення: 26.09.2019).

[13] Курило М.П. Касаційне провадження: можливості його уніфікації. *Науковий вісник Ужгородського національного університету. Серія: Право.* 2013. Вип. 22. Т. 1. С. 170.

[14] Рекомендация R (95) 5 Комитета министров государствам-членам относительно введения в действие и улучшения функционирования систем и процедур обжалования по гражданским и торговым делам от 7 февраля 1995 года. URL: http://zakon.rada.gov.ua/laws/show/994_153 (дата звернення: 26.09.2019).

[15] ECHR in the case «Guérin v. France» on July 29, 1998 (Application № 51/1997/835/1041). URL: http://hudoc.echr.coe.int/eng?i=001-58204 (дата звернення: 26.09.2019).

[16] ECHR in the case «Bellet v. France» on December 4, 1995 (Application № 23805/94). URL: http://hudoc.echr.coe.int/eng?i=001-57952 (дата звернення: 26.09.2019).

think that access to a court of cassation, because of the specifics of the latter which lies in the fact of reviewing judicial decisions that have entered into force, requires special legislative regulation, as it can either correct a judicial error or violate the legal certainty that came when the contested decision became legally effective.

In this respect the state has the right to establish additional criteria for access to the court of cassation ("Egic v. Croatia"[17]). Such criteria will be considered as a legitimate and reasonable procedural requirement, taking into account the very nature of the role of the highest judicial authority, which deals only with matters of law, and therefore, in the framework of a particular case it will be only necessary to determine whether such an interference is consistent with the principle of proportionality between the means employed, namely – the limited access to the court of cassation, and the purpose to be achieved – the person's right to appeal against the court's decision (the case of "Jovanovic v. Serbia"[18]).

According to H. A. Vyshnevskyi, courts reviewing enacted judgments should have sufficient discretion to determine what can or cannot be considered as a fundamental breach, so that, on the basis of an individual approach to each case, the boundaries of fairness and unfairness can be determined in order not to allow unjustified deviation from the "res judicata" principle"[19]. Indeed, in most European countries, the highest judicial authority has the discretion to select cases for reviewing, using procedural filters that establish the criteria for their selection (the complexity of applying legal norms, cost of litigation, public significance, the importance of the case for determining the direction of the court practices, etc.)[20]. D. D. Lupenyk notes that the fact, that a certain scope of discretion is granted to the highest court in the state judicial system when deciding whether or not there are grounds for revoking or changing court decisions in cassation, provided that this concept is interpretated uniformly in the law enforcement process, – does not contradict the principles of access to justice and this corresponds to the role, place and authority of the court as an independent justice body[21]. M. V. Sydorenko is of the opposite opinion. In particular, the authoress admits that recognizing the possibility of the discretionary

[17] ECHR in the case «Egić v. Croatia » on June 4, 2014 (Application № 32806/09). URL: http://hudoc.echr.coe.int/eng?i=001-144363 (дата звернення: 26.09.2019).

[18] ECHR in the case «Jovanović v. Serbia» on October 2, 2012 (Application № 32299/08). URL: http://hudoc.echr.coe.int/eng?i=001-113294 (дата звернення: 26.09.2019).

[19] Вишневский Г.А. Действие принципа res judicata как необходимое условие обеспечения справедливости. *Современное право.* 2013. № 11. С. 81.

[20] Сердюк В.В. Правовий статус Верховного Суду України в системі судової влади: автореф. дис. … докт. юрид. наук: спец. 12.00.10. Харків, 2009. С. 7.

[21] Луспеник Д.Д. Ідеальний процесуальний кодекс: яким він має бути?. України на шляху до Європи: реформа цивільного процесуального законодавства: матеріали міжнар. наук.-практ. конф. (Київ, 7 лип. 2017 р.). Київ: ВД Дакор, 2017. С. 40.

judgment of judges in selecting a case before the court proceedings (for a particular case) start, by defining the normative content, casts doubt on the value of such justice and emphasizes the issue of the corruption component of the mentioned activity, its subordination to acts of an non-legal nature[22].

Under any circumstances, a person's access to court should not be limited or reduced by the criteria of courts' interpretation of procedural rules which regulate the filing of documents or complaints, in such a way or to such an extent that might lead to the violation of the very essence of such a right, and the rules, which regulate the conditions of the admissibility of the complaint, must be provided to the person concerned ("Karakutsia v. Ukraine» case"[23]). This highlights, in particular, the notion of "the quality of law" which means the accessibility and predictability of national law, which should lay down sufficiently clear provisions in order to provide people with adequate guidance on the circumstances and conditions under which public authorities have the right to take measures that affect the convention rights of these individuals (the case of "C. G. and others v. Bulgaria"[24]).

The fact that the procedural law leaves the determination of the conditions for admissibility of a cassation appeal to the discretion of the law enforcer may, certainly, point to the risk of judicial arbitrariness. However, on the other hand, in addition to the discretionary powers of a supreme judicial authority, the latter may, on the contrary, undermine the very essence of the right to a court by adhering strictly to the procedural rules ("Belesh et al. v. The Czech Republic"[25]). We consider it necessary to study this issue in more detail.

The principle of access to court is viewed as negative (which consist in creating no obstacles for people who desire to pursue a judicial remedy if their rights and legitimate interests are violated or contested) and positive (which consist in creating special favourable conditions of such an access, minimum requirements whose meeting must be guaranteed by the state when a person appeals to the court) obligations of the state in the sphere of administering justice[26], or only as positive[27] requirements. According to the

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[22] Сидоренко М.В. Правовая определенность российского уголовно-процессуального права: дис. … докт. юрид. наук: спец. 12.00.09. Краснодар, 2017. С. 409.

[23] ECHR in the case «Karakutsya v. Ukraine» on February 16, 2017 (Application № 18986/06). URL: http://hudoc.echr.coe.int/eng?i=001-171475 (дата звернення: 26.09.2019).

[24] ECHR in the case «C.G. and Others v. Bulgaria» on April 24, 2008 (Application № 1365/07). URL: http://hudoc.echr.coe.int/eng?i=001-86093 (дата звернення: 26.09.2019).

[25] ECHR in the case «Běleš and others v. the Czech Republic» on November 12, 2002 (Application № 47273/99). URL: http://hudoc.echr.coe.int/eng?i=001-60750 (дата звернення: 26.09.2019).

[26] Фулей Т.І. Застосування Конвенції про захист прав людини і основоположних свобод та практики європейського суду з прав людини: Навчально-методичний посібник для тренерів навчального курсу для суддів. Київ: Ваіте, 2017. С. 37.

[27] Ткачук О.С. Реалізація судової влади у цивільному судочинстві України: структурно-функціональний аспект: дис. … докт. юрид. наук: 12.00.03. Харків, 2016. С. 118.

results of the research conducted by The World Justice Project “Rule of Law Index 2019” international organization, one of the indicators which determines the accessibility of justice, is, particularly, such a criterion of the latter as the possibility of having an access to judicial system without facing groundless procedural obstacles (p. 13)[28].

N.V. Tkachova defines procedural law[29], as the main instrument for implementing the principle of accessibility of justice, which means that imposing too formalized requirements on the right to appeal a court decision can significantly narrow almost each person’s access to a higher court. The ECHR in the case of “Zubac v. Croatia» stated that excessive formalism could contradict the requirement to ensure a practical and effective right of access to a court according to the first paragraph, Article 6 of the Convention, which usually happens in case of a particularly narrow interpretation of a procedural norm which hinders the examination of an applicant’s claim and, in fact, with the attendant risk of the violation of his or her right to an effective judicial remedy[30], and, based on the strictness of procedural rule, courts can undermine the very essence of the law («Karakutsia v. Ukraine» case)[31]. Thus, as the Supreme Court itself points out, one must be guided by one of the axioms of civil litigation: «Placuit in omnibus rebus praecipuum esse iustiae aequitatisque quam stricti iuris rationem», which means: «In all legal cases, justice and fairness take precedence over the strict understanding of law”[32].

In view of the above, we consider that the imposition of legal restrictions on access to the court of cassation is justified, taking into account the caution against the inadmissibility of its transformation into the next court of third instance, since, otherwise, it may lead to the creation of subsequent instances, and consequently, the protection of rights, freedoms and interests may never occur due to an “endless” litigation. However, in order to achieve the primary goal of justice, it is necessary to increase public trust in lower courts and to destroy the postulate according to which the higher the court, the more effective judicial protection is.

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[28] The World Justice Project «Rule of Law Index 2019». 2019. 201 c. URL: https://worldjusticeproject.org/sites/default/files/documents/WJP_RuleofLawIndex_2019_Website_reduced.pdf (дата звернення: 26.09.2019).

[29] Ткачева Н.В. Принцип доступности правосудия в практике Європейского суда по правам человека. *Вестник ЮУрГУ № 38. Серия: Право.* 2010. Вып. 24. С.71.

[30] ECHR in the case «Zubac v. Croatia» on April 5, 2018 (Application № 40160/12). URL: http://hudoc.echr.coe.int/eng?i=001-181821 (дата звернення: 26.09.2019).

[31] ECHR in the case «Karakutsya v. Ukraine» on February 16, 2017 (Application № 18986/06). URL: http://hudoc.echr.coe.int/eng?i=001-171475 (дата звернення: 26.09.2019).

[32] Ухвала Верховного Суду від 4 квітня 2018 року № 310/11534/13-ц. URL: http://reyestr.court.gov.ua/Review/73335565 (дата звернення: 26.09.2019).

2. The significance of the Supreme Court's legal conclusions for the development of case law in Ukraine

In assessing the level of public trust in domestic justice, in addition to the accessibility of the latter, of great importance is the fact that it executes the role of the highest judicial authority in the country and its legal conclusions contribute to further improvement of the legal system and the development of national legislation.

Since 2015, the judicial reform[33], has begun in Ukraine, affecting most legal institutions.

The analysis of the state of Ukrainian justice prior to the beginning of the reform was determined by the low level of trust in the judiciary in general and the judges in particular (paragraph 3 of Strategy of reforming judicial organization, court proceedings, and Related Legal Institutions), in connection with which the judicial corps was updated, in particular, the re-training of judges in order to determine the level of professional competence[34] and, what is more important for our study, the creation of a new supreme judicial authority – the Supreme Court.

For example, on April 8, 2019, the Council of Europe published "The Conclusions on the procedure for selecting and appointing judges (to the Supreme Court of Ukraine) on compliance of the procedure with the standards of the Council of Europe"[35], which assessed approvingly the legislative framework for the selection and appointment of judges, which, in turn, is positively characterized by a high level of publicity (p. 31). However, it would be impractical and cost-effective to impose such a procedure on all instances, both temporally and financially. Thus, the Supreme Court should be entitled to such powers that it can become the cornerstone for building a new Ukrainian judicial system based on confidence in domestic justice.

A judicial instance is defined as a procedural judicial category, which determines a set of jurisdictional powers of a particular judicial authority in relation to a particular category of cases, as well as to which particular branch of the judicial system such powers are conferred[36]. Thus, the authority of the Supreme Court as a cassation instance is restricted to to verifying the legality of the court decisions (Article 300 of the Code of

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[33] Про стратегію реформування судоустрою, судочинства та суміжних правових інститутів на 2015-2020 роки: Указ Президента України від 20 травня 2015 року № 276/2015. *Офіційний вісник України.* 2015. № 41. Ст. 1267.

[34] Про відновлення довіри до судової влади в Україні: Закон України від 8 квітня 2014 року № 1188-VII. *Відомості Верховної Ради України.* 2014. № 23. Ст. 870.

[35] On the procedure for selection and appointment of judges to the Supreme Court in Ukraine with the focus on its compliance with the standards of the Council of Europe: Opinion. Support to the implementation of the judicial reform in Ukraine. October 2017 – February 2018. 39 p. URL: https://rm.coe.int/coe-opinion-competition-sc/168093d89e (дата звернення: 26.09.2019).

[36] Судова влада: монографія / за заг. ред. проф. І.Є. Марочкіна. Х.: Право, 2015. С. 463.

Commercial Procedure of Ukraine[37], Article 400 of the Civil Procedural Code of Ukraine [38], Article 341 of the Code of Administrative Procedure of Ukraine[39], Article 433 of the Criminal Procedural Code of Ukraine[40]).

The European Court of Human Rights (hereafter referred to as ECHR) repeatedly drew attention to the special status of the Supreme Court as the highest judicial authority of the state (for example, the case of "Yovanovic v. Serbia"[41]), recognizing different criteria of access to the latter, such as a higher degree of formality to the procedure of access to a court (the case of "Brualla Gomez de la Torre v. Spain"[42]), higher court fees (the case of "Egic versus Croati"[43]) etc. However, neither the ECHR nor any other democratic country denied the existence of this judicial authority. Does the special status of this judicial authority lie in the fact of limiting access to the latter?

So, in conditions of the European Integration globalization processes have great significance for Ukraine, particularly, for law. For example, A. H. Karas stresses that the main impact of globalization on law is manifested in its universalization, which, additionally, consists in eliminating the contradictions between national legal systems, where law becomes an important instrument of such globalization[44].

Judicial reform in Ukraine[45] has given a significant impetus to the development of case law in the country. Thus, according to the amendments to Part 6 of Article 13 of the Law of Ukraine "On Judicature and Status of Judges[46], the conclusions on the application of the rules of law set forth in the rulings of the Supreme Court are taken into account by other courts when

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[37] Господарський процесуальний кодекс України від 6 листопада 1991 року № 1798-XII. *Відомості Верховної Ради України.* 1992. № 6. Ст. 56.

[38] Цивільний процесуальний кодекс України від 18 березня 2004 року № 1618-IV. *Офіційний вісник України.* 2004. № 16. Ст. 1088.

[39] Кодекс адміністративного судочинства України від 6 липня 2005 року № 2747-IV. *Урядовий кур'єр.* № 153.

[40] Кримінальний процесуальний кодекс України від 13 квітня 2012 року № 4651-VI. *Голос України.* 2012. № 90-91.

[41] ECHR in the case «Jovanović v. Serbia» on October 2, 2012 (Application № 32299/08). URL: http://hudoc.echr.coe.int/eng?i=001-113294 (дата звернення: 26.09.2019).

[42] ECHR in the case « Brualla Gómez de la Torre v. Spain» on December 19, 1997 (Application № 26737/95). URL: http://hudoc.echr.coe.int/eng?i=001-58127 (дата звернення: 26.09.2019).

[43] ECHR in the case «Egić v. Croatia » on June 4, 2014 (Application № 32806/09). URL: http://hudoc.echr.coe.int/eng?i=001-144363 (дата звернення: 26.09.2019).

[44] Карась А.Г. Глобалізація як чинник трансформації права. *Держава і право.* 2012. Вип. 57. С. 91.

[45] Про стратегію реформування судоустрою, судочинства та суміжних правових інститутів на 2015-2020 роки: Указ Президента України від 20 травня 2015 року № 276/2015. *Офіційний вісник України.* 2015. № 41. Ст. 1267.

[46] Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів: Закон України від 3 жовтня 2017 року № 2147-VIII. *Відомості Верховної Ради України.* 2017. № 48. Ст. 436.

applying such rules of law. However, the idea «court must take into account» means «familiarization and reflection"[47].

According to scientific theory, a judicial precedent of law is a decision of a court which has a general normative character, that is, when considering cases, the court is guided by the decision that once was adopted by this very court (or another one) in a similar case. In accordance with foreign practices, where precedents are recognized as a source of law, the latter ones are of a general rather than a compulsory nature – courts may draw on the previous court decision in a similar case, but they may produce their own decision, which, in case of its further application by this or that court, may acquire the features of a judicial precedent[48]. The precedent can also repeal the law, not directly, but in the process of its application (by means of interpretation of the law)[49].

Nevertheless, there is a need to distinguish between a judicial precedent and *precedent-interpretation*. The latter, in particular, consists in interpreting a rule of law exercised by the highest judicial instance[50], resulting in a legislative provision which exists in an altered state[51], and differs from a judicial precedent in the fact that it is always based on law[52]. The precedent-interpretation thus acts not as a law-making process, but as an enforcement, but of a normative (binding) nature[53].

Indeed, jurisprudence is increasingly recognized as a source of law. However, such recognition does not imply that law-making powers are entrusted to supreme judicial bodies. In this way, the jurisprudence informs the legislative body of the country about the existing problems, about the failure of law to regulate a number of relations that require such regulation. The courts themselves do not deal with such regulation. The jurisprudence serves solely as a factor in lawmaking, on the basis of which new norms of law are formed[54].

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[47] Рішення Кіровоградського окружного адміністративного суду від 26 лютого 2018 року № П/811/231/18. URL: http://www.reyestr.court.gov.ua/Review/72406625 (дата звернення: 26.09.2019).

[48] Овсепян Ж.И. Толкование как функция высших судов Российской Федерации. *Толкование правовых актов (теоретико-правовой, конституционно-правовой, гражданско-правовой и трудо-правовой аспекты)* : материалы Всероссийской научно-практической конференции. Симферополь: ИТ АРИАЛ, 2017. С. 64.

[49] Маркин С.В. Судебный прецедент как источник международного частного права: автореф. дис. … канд. юрид. наук: 12.00.03. Волгоград, 2005. С. 21.

[50] Гук П.А. Судебное толкование и применение норм законодательства. *Известия высших учебных заведений. Поволжский регион. Общественные науки.* 2016. № 2 (38). С. 37.

[51] Васянович О.А. Правовий звичай як форма права у сучасніих правових системах: автореф. дис. ... канд. юр. наук: 12.00.01. Київ, 2010. С. 10.

[52] Тонков Е.Н. Английский прецедент и Российский прецедент толкования: соотношение феноменов. *Вестник Московского университета МВД России.* 2013. № 10. С. 30.

[53] Гицу М.А. Судебный прецедент как источник права в свете современных тенденций в России. *Государство и право.* 2017. № 6. С. 11.

[54] Морозова Л.А. Судебные акты и их роль в правообразовании. *Провинциальные научные записки.* 2018. № 2 (8). С. 28–29.

This position has repeatedly been endorsed by the ECHR. Indeed, courts must be the first ones to interpret the domestic law, including procedural norms («Saez Maezo v. Spain»[55]). Since the pursuit of law is a task for lawmakers, law enforcement bodies and officials, especially judges who apply legal norms to specific situations before others identify flaws in the law, and sometimes, because of gaps in the latter, they are engaged in creating law[56]. We, in turn, support the idea that each case is different from one another in one way or another. But at the same time, the unequal application of the same legal norms by courts of different instances, as well as the maintenance of controversial judgments, can cause a state of legal uncertainty that can diminish public confidence in the judicial system, whereas such certainty is undoubtedly one of the most important components of a law-based state (the case of "Nejdet Şahin and Perihan Şahin v. Turkey"[57]).

In the case of "Atanasovski v. the former Republic of Macedonia"[58], the ECHR noted that the development of case law does not contravene the proper administration of justice, since the failure to maintain a dynamic and evolutionary approach can lead to obstacles to reforming or improving the judiciary. Even the existence of conflicting judgments, although within the same court, cannot be considered a violation of the right to a fair trial ("Santos Pinto v. Portugal"[59]), even if the decisions were made in similar proceedings, since the independence of these courts must be respected ("Gregorio de Andrade v. Portugal" case[60]).

An inherent feature of any judicial system is developing jurisprudence (the case of "the Parish of the Greek Catholic Church of Lupen and Others v. Romania"[61]), and each state is responsible for organizing its judicial system in such a way as to avoid adopting contradictory decisions (the case of "Brezovica v. Croatia"[62]). And if divergent practice is developed in one of

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[55] ECHR in the case «Saez Maeso v. Spain» on November 9, 2005 (Application № 77837/01). URL: http://hudoc.echr.coe.int/eng?i=001-67338 (дата звернення: 26.09.2019).

[56] Гураленко Н.А. Судовий прецедент в системі джерел права: філософсько-правовий аспект: дис. ... канд. юр. наук: 12.00.12. Львів, 2009. С. 173.

[57] ECHR in the case «Nejdet Sahin and Perihan Sahin v. Turkey» on October 20, 2011 (Application № 13279/05). URL: http://hudoc.echr.coe.int/eng?i=001-107156 (дата звернення: 26.09.2019).

[58] ECHR in the case «Atanasovski v. the former Yugoslav Republic of Macedonia» on January 14, 2010 (Application № 36815/03). URL: http://hudoc.echr.coe.int/eng?i=001-96673 (дата звернення: 26.09.2019).

[59] ECHR in the case «Santos Pinto v. Portugal» on May 20, 2008 (Application № 39005/04). URL: http://hudoc.echr.coe.int/eng?i=001-86401 (дата звернення: 26.09.2019).

[60] ECHR in the case «Gregório de Andrade v. Portugal» on November 14, 2007 (Application № 41537/02). URL: http://hudoc.echr.coe.int/eng?i=001-77967 (дата звернення: 26.09.2019).

[61] ECHR in the case «Lupeni Greek Catholic Parish and Others v. Romania» on November 29, 2016 (Application № 76943/11). URL: http://hudoc.echr.coe.int/eng?i=001-169054 (дата звернення: 26.09.2019).

[62] ECHR in the case «Brezovec v. Croatia» on March 29, 2011 (Application № 13488/07). URL: http://hudoc.echr.coe.int/eng?i=001-104155 (дата звернення: 26.09.2019).

the highest courts in the country, it itself becomes a source of legal uncertainty, undermining the principle of legal certainty and reducing public confidence in the judicial system (the case of "Çelebi and Others v. Turkey"[63]). Thus, the judicial system must create effective mechanisms that should be fully and promptly implemented through the highest judicial authorities which are responsible for ensuring the uniformity of case law, so as to remedy, at any stage, any discrepancies in the decisions of different courts, and thus to maintain public confidence in the judiciary ("Albu and Others v. Romania"[64]).

That is why the Supreme Court is intended to resolve the contradictions in applying the same legal norm by the courts ("Beian v. Romania"[65]), because this Court is the source of the differences in case law and is responsible for the stability of jurisprudence ("Ferreira Santos Pardal v. Portugal" case[66]).

By their legal nature, judicial legal positions are formed with the help of the interpretation of regulations, the application of the analogy of law and rights, the direct appeal of the courts to the principles of law. In this capacity, they are the result of individual judicial regulation and serve as a means of transition to the certainty of legal provisions. Having such an idea of the correct understanding and application of rule of law on the basis of a judicial legal position transforms it into a holistic solution to the contentious legal issue[67].

CONCLUSIONS

Hence, we are of the opinion that access to the court of cassation, because of the specifics of the latter which lies in reviewing judicial decisions that have entered into force, requires special legislative regulation, as it can either correct a judicial error or violate the legal certainty that came when the contested decision entered into legal force.

Establishing legal restrictions on access to a court of cassation is justified, taking into consideration the warning of inadmissibility of turning it into a regular court of third instance, since, otherwise, it may lead to the formation of subsequent instances, resulting in a situation when rights, freedoms and interests cannot be protected due to an «endless» litigation. Nevertheless, in order to achieve the primary purpose of justice, it is necessary to increase

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[63] ECHR in the case «Çelebi and Others v. Turkey» on February 9, 2016 (Application № 582/05). URL: http://hudoc.echr.coe.int/eng?i=001-160415 (дата звернення: 26.09.2019).

[64] ECHR in the case «Albu and Others v. Romania» on May 10, 2012 (Application № 34796/09). URL: http://hudoc.echr.coe.int/eng?i=001-110805 (дата звернення: 26.09.2019).

[65] ECHR in the case «Beian v. Romania» on December 6, 2007 (Application № 30658/05). URL: http://hudoc.echr.coe.int/eng?i=001-83822 (дата звернення: 26.09.2019).

[66] ECHR in the case «Ferreira Santos Pardal v. Portugal» on July 30, 2015 (Application № 30123/10). URL: http://hudoc.echr.coe.int/eng?i=001-156500 (дата звернення: 26.09.2019).

[67] Шульга И.В. Понятие и виды правовых позиций Верховного суда Российской Федерации: автореф. дис. … канд. юрид. наук: 12.00.01. М., 2016. С. 14.

public confidence in lower courts and to erode the postulate, according to which the higher the court, the more effective judicial protection is.

Despite this, neither the ECHR in its practice nor any democratic country has denied the existence of this judicial body.

The precedent-interpretation is defined as the activity of the highest judicial bodies, which, when deciding a particular case, if the need for interpreting a legal norm emerges, are guided by the general principles of law envisaged by the Constitution and international normative legal acts that have supreme legal force. Such general principles of law, which are selected by a court within a certain legal norm, cannot be outdated a priori.

In this regard, the author expresses his support for the point of view that lower courts are not entitled to depart from the legal position of the Supreme Court in cases under similar circumstances.

SUMMARY

The paper reveals the legal nature of the cassation against court decisions as well as the status of the Supreme Court as the highest judicial authority. Currently, in many countries (including Ukraine), the functions of the latter are limited to issues of law, and the legislation provides criteria which restrict access to court of cassation.

The expediency of such restrictions is justified in the light of the warning of inadmissibility of its transformation into the next court of third instance, as otherwise it may lead to the creation of further judicial bodies, and this may result in the failure to protect rights, freedoms and interests due to an «infinite» legal battle.

The article addresses the challenging issues of determining the place and role of the Supreme Court, namely, its importance for the development of the legal system of the continental law. The author's position on the expediency of giving legal powers to the Supreme Court's conclusions on legal issues, which is the basis of developing the precedent of interpretation in Ukraine, is justified.

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2. ECHR in the case «Ryabykh v. Russia» on July 24, 2003 (Application № 52854/99). URL: http://hudoc.echr.coe.int/eng?i=001-61261 (дата звернення: 26.09.2019).
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13. ECHR in the case «Guérin v. France» on July 29, 1998 (Application № 51/1997/835/1041). URL: http://hudoc.echr.coe.int/eng?i=001-58204 (дата звернення: 26.09.2019).

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15. ECHR in the case “Egić v. Croatia” on June 4, 2014 (Application № 32806/09). URL: http://hudoc.echr.coe.int/eng?i=001-144363 (дата звернення: 26.09.2019).

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51. ECHR in the case “Atanasovski v. the former Yugoslav Republic of Macedonia” on January 14, 2010 (Application № 36815/03). URL: http://hudoc.echr.coe.int/eng?i=001-96673 (дата звернення: 26.09.2019).

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Information about the author:
Bysaga Yu. M.,
Doctor of Law, Professor,
Head of the Department of Constitutional and Comparative Law,
Uzhhorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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THE ELEMENTS OF GENDER EQUALITY IN THE LAW OF ANCIENT STATES: AN HISTORICAL-LEGAL ANALYSIS

Bysaga Yu. Yu.

INTRODUCTION

Gender equality is one of the main policy priorities of the European Union and our country. At the same time, according to the experts' analysis, not only in Ukraine but also in Europe, there are the elements of gender inequality and even manifestations of gender discrimination.

The principle of equality between men and women is enshrined in Article 24 of the Constitution of Ukraine, as well as in a number of international treaties, including: the UN Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979[1], the conventions of the ILO: «The Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value No. 100», dated June 29, 1951[2], «The Convention on Maternity Protection (revised in 1952), No. 103», June 28, 1952[3], and «The Convention concerning Discrimination in Respect of Employment and Occupation No. 111», June 24, 1975[4], «The Convention on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities No. 156»[5], Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011[6], the Charter of Fundamental Rights of the European Union of 7 December 2000[7], Recommendation No. Rec (2003) 3 of Council of Europe Committee of Ministers to the Member States «On the Balanced Participation of Women and Men in

[1] Конвенція ООН про ліквідацію всіх форм дискримінації щодо жінок від 18.12.1979. URL: https://zakon.rada.gov.ua/laws/show/995_207.

[2] Конвенція про рівне винагородження чоловіків і жінок за працю рівної цінності № 100 від 29 червня 1951 р. URL: https://zakon3.rada.gov.ua/laws/show/993_002.

[3] Конвенція про охорону материнства (переглянута в 1952 році) N 103 від 28.06.1952. URL: https://zakon.rada.gov.ua/laws/show/993_122.

[4] Конвенція про дискримінацію в галузі праці та занять N 111 від 24.06.1975. URL: https://zakon5.rada.gov.ua/laws/show/993_161.

[5] Конвенція про рівне ставлення й рівні можливості для трудящих чоловіків і жінок: трудящі із сімейними обов'язками № 156 від 23 червня 1981 р. URL: https://zakon.rada.gov.ua/laws/main/993_010.

[6] Конвенція Ради Європи про запобігання насильству стосовно жінок і домашньому насильству та боротьбу з цими явищами від 11 травня 2011 р. URL: https://rm.coe.int/1680096e45.

[7] Хартія основних прав Європейського Союзу від 07.12.2000. URL: https://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_524.

Political and Social Decision-Making» of 12 March 2003[8], etc. In Ukraine, a special Law «On Ensuring Equal Rights and Opportunities for Women and Men»[9] was also adopted to guarantee the principle of gender equality.

Taking into consideration the fact that Roman traditions are preserved in EU law and Ukrainian law, there arises the question whether there were the elements of gender equality in the law of the Ancient States. It should be noted that scholars often refer to Aristotle quote: «A woman is a woman because she lacks masculine qualities. A woman suffers from the inferiority complex». Demosthenes wrote: «There are women-slaves who are to provide us with daily care and wives – to give us legitimate children and guard our families».

At the same time, A.V. Hrubinko notes that elements of gender equality are found in the law of Babylon and Ancient Egypt[10]. That is why it is particularly important to clarify the issue of the existence of gender equality elements in the law of the Ancient States.

1. Gender Equality and the Law of Ancient Rome

Exploring the rights of spouses under Roman law, M. V. Mendzhul distinguishes two types of marriage from the perspective of the rights of men and women: cum manu (dominated by the power of the man) and sine manu (without the power of the man). What concerns de facto actual cohabitation (concubinage), it did not give rise to rights such as legal marriage. Slaves did not have the right to enter into an official marriage. The frequent practice was that the owners allowed the slaves to become couples, but a child born by a slave woman from another slave or a citizen of Rome was also a slave[11].

In marriage, cum manu, the woman was subordinate to her husband, and the property she purchased also belonged to the man who disposed of it freely. The husband was able to punish his wife, even sell her into slavery[12].

Some scholars believe that Roman culture was masculine in nature and recognized the primary purpose of women in raising children. In the history

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[8] Рекомендація № Rec (2003) 3 Комітету міністрів Ради Європи державам-членам «Про збалансоване представництво жінок і чоловіків у процесі прийняття політичних та громадських рішень» від 12 березня 2003 р. URL: https://zakon1.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=994_661.

[9] Про забезпечення рівних прав та можливостей жінок і чоловіків: Закон України від 08.09.2005, № 2866-IV. URL: https://zakon2.rada.gov.ua/laws/show/2866-15.

[10] Грубінко А.В. Права жінок у філософсько-правовій думці і практиці: зарубіжний та вітчизняний досвід. Форум права. 2013. № 1. С. 221.

[11] Менджул М. В. Права подружжя в римському приватному праві. Правова держава: історія, сучасність та перспективи формування в Україні: Матеріали міжнародної науково-практичної конференції, м. Ужгород, 15–16 лютого 2019 р. Ужгород: Ужгородський національний університет, 2019. С. 52.

[12] Лещенко В.С., Разінкова А.В. Римські та сучасні українські особисті, майнові відносини подружжя (порівняльний аналіз). Актуальні проблеми держави і права. URL: http://www.apdp.in.ua/v41/17.pdf 99.

of the development of Roman private law, there are examples of legislative restrictions on the inheritance rights of women. Indeed, in 169 BC. There was adopted Voconia's law, which forbade women, except the vestals (priestesses of the goddess Vesta), to be appointed the heirs of those citizens whose inheritance exceeded 100,000 sesterces[13].

The elements of equality were in marriage without the man's power (sine manu). In particular, the husband could not punish his wife or sell her into slavery. In such a marriage, a woman was able to stay a night outside home three times a year, but she had to respect her husband, obey him, and follow her husband if he changed his place of residence. If the woman did not perform her duties, this was the reason for the divorce. The husband had the right to demand the return of his wife from her father, was her legal representative.

During the reign of Emperor Constantine (306–337), the tradition of concluding donation agreements between the bride and the bridegroom became widespread. During the reign of Emperor Justinian (527–565), donating was allowed during marriage. During the marriage, the marriage donation was owned by the woman. If the marriage was terminated because of the woman, she passed the dowry to the husband and could not require the transfer of donatio[14].

Augustus's Law on Marriage (lex Julia de maritandis ordinibus) established that men (ages 25 to 60) and women (aged 20 to 50) had to marry, and the breach of the law led to the responsibility in the form of forbidding them to bequeath their property as well as paying by them the tax in the amount of 1% of the value of the property.

In the times of Augustus, adultery was considered a crime. In the case of convicting a woman for adultery, she lost half the dowry and could be deported. If a man murdered his wife for adultery was considered a mitigating circumstance[15].

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[13] Вовк В.М. «Жіноче питання» у римському праві. Науковий вісник Львівського державного університету внутрішніх справ. Серія юридична. 2008. № 3. С. 1–9. URL: http://www2.lvduvs.edu.ua/documents_pdf/visnyky/nvsy/03_2008/08vvmurp.pdf.

[14] Калюжний Р.А., Вовк В.М. Римське приватне право: підруч.для вищ.навчзакл. Київ, 2014. С. 127–128.

[15] Steven Fife. Augustus' Political, Social, & Moral Reforms. URL: https://www.ancient.eu/article/116/augustus-political-social--moral-reforms/.

2. The Elements of Equality between Men and Women in the Law of Ancient Greece

In ancient Greece, as scholars state, the position of women was ambiguous. In Athens, she was under the authority of her father (and after marriage – her husband), but in Sparta women and men had almost the same status[16].

Women in Ancient Athens had no right to own property other than their own clothing, jewelry and slave, and they could not enter into contracts. All financial issues were resolved by the husband (father, husband or closest relative through the male line). The woman was subjected to the guardianship of her father, and after marriage, her husband.

In contrast to Rome, in Athens, the guardianship of women in matters of money was real and unconditional. Everything the Athenian woman owned belonged to her guardian, and he could freely dispose of the property at his own discretion. However, he was responsible for ensuring that she had everything she needed for life (food, clothing, shelter, etc.).

Even in the matter of marriage, it was the father who chose the husband for his daughter, and discussed the size of the dowry. Accordingly, women with a big dowry married wealthy men, and conversely, without a dowry married a poor man. Unfortunately, when choosing a future husband, the father was usually guided by his own vision, and his interests in expanding property, the opportunity to earn extra money, establish contacts and political connections.

The traditional Athenian marriage was contracted in the presence of the witnesses, and it involved concluding an agreement on the value and size of the dowry. The age of men who were getting married for the first time was 20–30 years, and girls were aged only 14–15 years. Thus, marriages were overwhelmingly based not on feelings of mutual love. The need for early marriages for girls was explained by the erroneous, according to the modern understanding, medical rationale for a woman's physiological nature, and it was even considered necessary for their health.

Dowry had been an integral part of any marriage in Ancient Athens. The advantage of the dowry was that it could be used to support the household, to cover expenses, that is, it was a kind of contribution on the woman's side to meeting the needs of the family. Securing high dowries was a pledge of prestige in the community and a way to conclude a profitable and rewarding marriage for both parties. However, it was because of the need to provide a dowry that families preferred to have sons rather than daughters.

The dowry also provided the woman with some financial security in case of her husband's death or divorce, and it could be used if she decided to remarry. However, the thinkers and philosophers of that time noted that the

[16] Вікторія Гришко, Світлана Лівчук. Історичні передумови формування гендерної нерівності у суспільстві. Підприємництво, господарство і право. 2019. № 2 С. 141.

dowry had to be abolished. For instance, Plato believed that the abolition of dowry was necessary because it would reduce the arrogance of women and weaken the enslavement of men[17].

In the modern world, people are often critical of the dowry, and this situation is preserved in Muslim states, and this critical attitude is present at the level of traditions among some Slavic peoples.

Thus, the dowry was the wife's sole property, but it was managed by the husband who could spend it at his own discretion, without any restrictions. As a rule, the daughter did not receive land as the dowry, it was passed on to the sons.

In case of the husband's death or divorce, the value of the dowry belonged to the wife, but she could not dispose of it, the right to manage such property belonged to the father, her adult son or other relative through the male line. The guardian was to use the proceeds from the administration of the dowry for supporting the widowed wife, arranging a new marriage. After the woman's death the dowry was shared between her sons.

In ancient Greece, women were significantly restricted in their inheritance rights. After the man's death the property was distributed equally between his legitimate sons. If there were no sons, the daughters still had no right to inherit[18]. Over time, there had been worked out the norms according to which in case a man died and he had neither a son nor an adopted son, but only a daughter, it was she who temporarily inherited the property, but she did not have the ownership rights and this property was passed on to her future grandson (epikleros). If an Athenian woman died and did not give birth to a son, then her daughter passed on the property to her son's ownership, i. e. it became her grandson's property.

That is, women did not inherit the property, but rather became a means of transferring property to future descendants through the male line. The grandson acquired ownership of the property upon reaching the age of majority. Such a woman's husband had only the right to use the property of her deceased father.

Unlike in the situation with Athens, where a woman's status was clearly discriminatory compared to men, the elements of gender equality can be identified in Sparta.

Sparta consisted of three groups of people: citizens (they had political rights); free people (they were without any political rights); slaves (they had no rights and were the main labourers in most fields). In ancient Sparta, the ratio of slaves to citizens of the state was about 7 to 1, and accordingly there was the threat of a possible uprising. There are historical facts which prove that in Sparta all children with disabilities were killed.

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[17] James C. Thompson, B.A., M.Ed. WOMEN IN THE ANCIENT WORLD. The status, role and daily life of women in the ancient civilizations of Egypt, Rome, Athens, Israel and Babylonia, 2010. URL: http://www.womenintheancientworld.com/marriageinancientathens.htm.

[18] Ibid.

The boys lived at home with their mother until the age of 7, then they left their dwelling and underwent military and sports training. The men married at about the age of 20, but they visited their wives on separate occasions and lived with other men in special facilities. Only as soon as they turned thirty did the Spartans stay the night at home, however, most of their time was spent in campaigns.

Just like in all of Greece, the main role of women was in the birth and upbringing of children. However, according to the Spartans, a woman was able to better fulfill her purpose if she was healthy. That is why physical education and athletics were as important for girls as they were for boys, and competitions were regularly held (running, wrestling, etc.).

The Spartan girls did not marry until they were eighteen. The house was run by a woman. Spartan women had a reputation all over the Greek world for their ability to run the family household[19].

However, there was also somewhat negative practice when several brothers had one wife and their children from her were considered common in the family. This existed in order to prevent the division of their inheritance into several much smaller parts.

In the matter of inheritance, unlike in the situation with Athens, the Spartan women could inherit half of the property which was inherited by the sons, moreover, the land could be a part of the inheritance. Yet Aristotle also mentioned that women owned almost forty percent of the land in Sparta[20].

Scientists justify, since men had been busy almost all day, these were women who, aiming to run the family household, concluded agreements, made purchases.

And there is no evidence that they needed their husbands' consent.

Thus, in Ancient Athens, a woman's legal position was clearly discriminatory, in particular, she could have only the limited property (clothing, jewelry, slaves), had no land ownership rights, could not enter into buying-selling contracts, was placed under the full guardianship of her father or husband. Athenian women did not have the right to choose a husband, it was done by her father and she married at an early age (14–15 years).

Unlike Athens where there was the apparent inequality in the legal status of men and women, it is in Sparta that one can find elements of gender equality. The girls received a good education, were involved in sports, intellectual development, married as soon as they reached at least the age of 18, had inheritance rights, and they could even own land.

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[19] James C. Thompson, B.A., M.Ed. WOMEN IN THE ANCIENT WORLD. The status, role and daily life of women in the ancient civilizations of Egypt, Rome, Athens, Israel and Babylonia, 2010. URL: http://www.womenintheancientworld.com/marriageinancientathens.htm.

[20] Iveta Nikolājeva . Promocijas Darba Kopsavilkums Laulāto Mantisko Attiecību Institūta – PŪRA – Vēsturiskā Evolūcija Un Vieta Mūsdienu Kontinentālo Tiesību Saimē. Rīga, 2018. 29–31. URL: http://www.turiba.lv/f/2018/Kopsavilkums_Nikolajeva.pdf.

3. Gender Equality and the Law of Ancient Egypt

Scholars emphasize that that the Ancient States are the cradle of all human culture: their emergence was the next stage in the history of mankind, reflecting the the transition from the primitive society to the state organization and the sustainable development which continues to this day[21]. We agree that civilizations of the Ancient World are rightly considered the cradle of the modern world, and Egypt played an important role.

Scholars stress that birth and marriage, as well as death in Egypt were marked by performing special rituals, and were believed to be big events in human life. Marriage was public and involved celebration. No evidence has been provided by scholars in relation to the fact whether dowry practice was widespread in Egypt.

In Ancient Egypt men got married, on average, at the age of 20, and girls – at the age of 15. Analyzing the description of the scene where Ramses II is getting married, – «And then his Majesty saw how beautiful her face was and she seemed like a goddess to him. This was a great, mysterious, miraculous activity», scholars come to the conclusion that the celebration of marriage included a certain ceremony.

There are no reliable data as to whether permission to marry was required. Scholars substantiate that such permission was required for the marriage of slaves. However, given the early marriage age of girls, it is likely that the choice of the future husband was influenced by the parents. Admittedly, the situation whether the girl had the right to disagree with her father's choice and deny him during the period of the Old, Middle and New Kingdoms is not completely clear. Since the reign of Amasis XXVI the marriage required the consent of the future spouses, and the parents already played an auxiliary role in the procedure of concluding marriage. During the Ptolemaic period, when Greek and Egyptian laws existed side by side, scholars identify documents in which women with obviously Greek names married with the permission of the guardian, but Egyptian women entered into marriage without it, i. e. at their own will.

Scholars point out that there could be concluded marriage contracts, which were frequently used and made in writing. They assume that there were two types of contracts. According to the first type, the man transferred a certain amount of money and the woman became his wife. Such a kind of «payment for the bride» symbolized the seriousness of the intentions. The payment varied from low to high. If a woman decided to divorce her husband, then the money was paid to him. If the husband wanted to divorce his wife, he had to pay the fine in the same amount. Despite the fact that the payments were large, it was not a significant deterrent to prevent divorce.

[21] Євген Ланюк. Діалогічність політики і естетики у світоглядній парадигмі цивілізацій Стародавнього Сходу. Вісник Львівського університету. Серія філос.-політолог. студії. 2014. Випуск 5. С. 230.

In the second type of contract, since the husband acquired dowry, the procedure for supporting the future wife was clearly described (there was indicated the amount of money the husband had to spend on food and clothing, and a place of residence was guaranteed). With this type of contract the woman could demand divorce at any time. However, adultery was strictly forbidden and severely punished.

According to Egyptian law, in order to complete the transfer of property under a marriage contract, the husband had to assure that he had not sold or given his wealth to anyone else, and the document stated in writing that the husband no longer had the rights to the property.

Marriage contracts consistently contained a list of «woman's goods» which the wife brought with her to the family home. These items were usually of personal nature (clothing, jewelry, crockery, household items). Each item was priced and the husband promised to return it or its cost in case of divorce.

Some marriage contracts even contained the provision that obliged the husband, in case of his death, to distribute part or all of his property in some way. Scholars provide as an example the following fragments from the marriage contracts: «you are a part of my children, already born and who will be born, to have a part in everything that I own, and that I will receive»; «The children that you will give birth to for me are like my own children, and they, just as mine, possess everything I own and that I will receive»; «one-third of everything I own and I shall get, belongs to you and it will be given to the children you will give birth to for me»; «The children you will give birth to are the masters of all that I have and that I will receive».

Hence, even if something under the marriage contract had to belong to the wife, such acquisition of ownership was due to a special condition – the birth of children.

The analysis of the contracts gives grounds to conclude that they were much more restrictive of the rights of the husband than of the wife. Even without the contract, women were legally allowed to leave their dwelling at any time they wanted, and could take their personal belongings with them freely. The wife could relinquish her right to inheritance, and it could happen with or without the contract and, certainly, so that she could not leave the family at her own will without having the new place of residence.

Thus, the marriage contract restricted the rights and freedom of men and contained guarantees for women. Without a marriage contract, the husband could divorce his wife without any restrictions or property consequences, and accordingly marry someone else. It is thought that Egyptian law required men to support divorced wives until they remarried, but there is no conclusive evidence. Many marriage contracts not only provided for continued support, but also required the husband to divide his property between the children of his wife, even if he divorced her.

Unfortunately, there is no information that would explain why in one case the marriage contract gave the husband the right to divorce his wife without financial charge, and in other cases there was set the obligation to share everything the husband obtained up to the wedding day. and everything that could be obtained with his children and his ex-wife. It should also be noted that many of the remaining contracts were signed many years after the wedding and even after the birth of the children. Therefore, it is quite justifiable to conclude that the marriage contract was a means of settling property relations and the husband's duty to maintain his wife in case of divorce or after his death.

In ancient Egypt, each of the spouses was free to initiate the procedure of dissolution of marriage, and the reasons, if any, for the dissolution of marriage were not relevant. Scholars note that written divorce agreements could be concluded as well. If a woman wanted to get married again, she had to show such a document to her future husband before he allowed her to move to him.

Divorce was simple enough, but the division of property was a real problem. The former wife had the right to take her personal belongings with her – clothing, jewelry, kitchenware, etc. – and, of course, married women's separate rights of ownership of the land, buildings, slaves they owned before marriage, were always preserved[22].

It is well known that the Egyptian kings could and did have many wives, and that they married their sisters. It is also suggested that the marriage of brothers and sisters was a way for the Pharaohs to imitate gods and goddesses and distance themselves from the rest of the population. The ancient Egyptians believed that their Pharaoh was a god and he did not look like an ordinary person. Therefore, it is quite possible that marriage to a sister was seen as a way to increase the amount of royal blood in the next heir.

All the wives held the title of «the royal wives», but only the «the Great Wife» had the advantage of attending special ceremonies, and it was her son who was the first to inherit the throne. There were exceptions, for example, King Amonotep III had two «great wives» who participated in all the ceremonies simultaneously. Likewise, the titles of the royal sister and daughter of the king were of great importance in society.

The Egyptian kings gladly welcomed foreign brides aiming to establish diplomatic and economic ties, but refused to send their own daughters in return. One foreign monarch invited Pharaoh to send any beautiful woman he wanted if he simply said that she was a princess, because no one would know the difference. Pharaoh refused to even respond to the proposed compromise.

[22] James C. Thompson, B.A., M.Ed. WOMEN IN THE ANCIENT WORLD. The status, role and daily life of women in the ancient civilizations of Egypt, Rome, Athens, Israel and Babylonia, 2010. URL: http://www.womenintheancientworld.com/marriageinancientathens.htm.

It is worth noting that there were no legal restrictions on the economic activities of women in ancient Egypt. Most contracts and business papers found by scientists are the ones where men acted as a party, but there are enough legal documents of all types in which women act as a party. This shows that their rights were more than merely theoretical. Women could and did own property, bought and sold it, borrowed and lent it, they acted as a party in lawsuits, had the right to make a will and inherit property.

Undoubtedly, most Egyptians were quite poor, and accordingly, for many, their property included only their daily earnings. Therefore, quite often the widows were needy and lived in poverty.

The upbringing of children and housekeeping were the main sphere of occupation for women in Egypt. However, women could also serve the gods, that is, they were priests. There are also cases when they ruled the country, for example, Queen Hatshepsut. To become the ruler of a nomus, or even a pharaoh, it was not necessary to be the son of a ruler. It was frequently enough to just marry a daughter of a nomarch or pharaoh, and many ambitious young men from aristocratic families did so. The fact is that the title and property of the ruler were inherited equally by sons and daughters, and sometimes to a greater extent, by daughters. This is due to the fact that the ancient Egyptians traced their lineage through the maternal line, believing that the origin of children can be reliably proven only on the side of the mother who gave birth to them[23].

The status of women underwent changes depending on the historical period. In the Old and Middle Kingdoms, the royal wife had first of all to give birth to as many offspring – sons, as possible, to ensure the smooth functioning of the palace, to be regent if her husband died until the son was able to rule on his own, to provide tacit support to the husband in all things. In the New Kingdom, the Queen became much more prominent and powerful. She held secular and religious titles behind which there were real responsibilities, she had estates and the land, slaves and property managers. Similarly, if a child became a Pharaoh, then his mother (probably the Great Wife of the previous monarch) could become regent. This has happened several times in the history of Egypt, and in particular the mentioned example with Hatshepsut also confirms this. However, after having fulfilled her duties as a ruler on behalf of her son for several years, she simply renounced the regency and began calling herself the female Horus, a legitimate Pharaoh, and ruled as a full king to death.

There are also examples of child marriages. In the New Kingdom, Tutankhamun ascended the throne at the age of eight (by some sources nine). Undoubtedly, to be able to rule he needed experienced advisers, but there

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[23] Мартинюк А.В. Правове становище жінок у Стародавньому Єгипті. Історія цивілізацій стародавності та середньовіччя. 2015. С. 83–84.

was no regency. Therefore, Tutankhamun had to marry Anhesenamun immediately, although Egypt had had no history of child marriage before. However, scholars do not really know who Tutankhamun's mother was, and it is possible that she died before he ascended the throne, so it was not possible to establish a regency.

We have already emphasized that women in ancient Egypt had the same rights and responsibilities as men when it came to owning and managing property, and they regularly attended social events with their husbands. It was more than just a formality, and the Athenians did not understand Egyptian women's freedom.

The question rises how a woman in Ancient Egypt could receive some income. For example, some kept vegetable gardens, many made clothes. There is the document by which the woman buys a slave. She pays half, while borrowing the other part of money. Women's slaves were hired. There is the receipt according to which one woman received some clothing, a bull and sixteen goats as payment for 27 days of her slave's work. There were cases when women bought one slave together.

Women had the right to inherit and manage significant property. In most cases, doubtlessly, a clerical representative was hired to manage the property. There were few opportunities for a woman to get paid outside the domestic sphere. If she inherited a three- to five-acre plot of land (typical of the independent peasantry), she still needed male support to cultivate the land.

In Egypt daughters could receive the inheritance equally with their brothers. There have been identified testaments which indicate that the inheritance had to pass to certain children, not the others. Women also had the right to prepare their will and transmit the property at thier own discretion. There are examples of the papers in which the husband and the wife distributed their family assets between children in different ways. However, most people did not write their wills and their property was distributed equally among all children, that is, sons and daughters.

In addition, according to the laws of Egypt, the heir was obliged to provide for the burial of the person who left the inheritance, the wife had to receive a third of her husband's property, and after the death of the wife, her third had to be shared equally between the children. The inherited property, if there was no will, was divided equally between all heirs (children).

Thus, unlike in most other civilizations of the Ancient World, the law in Egypt did not contain such an unequal treatment of men and women. The theory and practice, of course, did not always go hand in hand, and there is the evidence proving that in many homes these were men who ran the family household. Although the prevailing rights both in the family and in other fields belonged predominantly to men, in the Old Kingdom there were cases when a woman ruled. Women played an important role in Egypt's politics,

and they were treated with respect, because the Pharaohs were born by their mothers, and they had a particularly respectful attitude towards them. Royal women had always played an important role in many public ceremonies, it is especially notable since the times of Nefertiti.

The ancient Egyptian marriage required the permission of their parents, at least before the reign of the Twenty-sixth Dynasty. Marriages between siblings were common. For the most part, marriages were monogamous, they were concluded mostly within the same social class.

Men's and women's certain ownership rights to any property that was theirs before marriage preserved. Each of the parties could initiate the divorce, moreover, no valid reason was required. The wife was usually entitled to one third of her husband's property after his death. Additionally, men and women tended to divide their property among their children.

CONCLUSIONS

Thus, gender equality is not the achievement of the 21st or 21st centuries, but the result of a thousand-year history of promoting equal rights for women and men. At present, gender equality is determined as the pivotal principle at the national level (in Article 24 of the Constitution of Ukraine, the Law of Ukraine «On Ensuring Equal Rights and Opportunities for Women and Men»), at the European level (Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence of 11 May 2011, the Charter of Fundamental Rights of the European Union of 7 December 2000, Recommendation No. Rec (2003) 3 of Council of Europe Committee of Ministers to the Member States «On the Balanced Participation of Women and Men in Political and Social Decision-Making» of 12 March 2003, etc.) and at the international level (the UN Convention on the Elimination of All Forms of Discrimination against Women of 18 December 1979, the conventions of the ILO: «The Convention on Equal Remuneration for Men and Women Workers for Work of Equal Value No. 100», dated June 29, 1951, «The Convention concerning Discrimination in Respect of Employment and Occupation No. 111» of June 24, 1975 , «The Convention on Equal Opportunities and Equal Treatment for Men and Women Workers: Workers with Family Responsibilities No. 156», etc.).

However, the historical background and elements of gender equality in the have also been identified by us in the law of the Ancient States. It is common knowledge that Roman culture was musculine in nature and recognized the primary purpose of women in raising children. In the history of the development of Roman private law, there are examples of legislative restrictions on women's inheritance rights. However, the elements of equality were present in marriages without a man's power (sine manu).

In ancient Greece, women's situation was ambiguous. In Athens inequality was evident and even discrimination against women prevailed whereas in Sparta women and men had almost equal rights. In particular, in Athens, women could only have limited rights to property (clothing, jewelry, slaves), had no land ownership rights, could not conclude buy-sell contracts, were under the full guardianship of their father or husband.

In comparison with Athens, in Sparta one can identify the elements of gender equality. The girls received a good education, were involved in sports, intellectual development, married from the age of 18, had inheritance rights, and could even own land.

In contrast to ancient Rome and Athens, the law in Egypt did not feature such an unequal treatment of men and women. In spite of the fact that the prevailing rights in the family as well as in other fields belonged mainly to men, in the Old Kingdom there were cases when there ruled a woman. Men and women retained separate ownership rights to any property that was theirs before marriage, they could freely enter into contracts. Each of the parties could initiate the divorce, and no substantial reason was required. The wife was usually entitled to one third of her husband's property after his death. In addition, men and women were free to execute their wills.

SUMMARY

The study addresses the pressing issue of finding out the preconditions and origins of gender equality in the law of the Ancient States. The study examines the rights and responsibilities of men and women in Ancient Rome, Athens, Sparta and Egypt.

It was established that under Roman law there were two types of marriage: cum manu (the power of the husband dominates) and sine manu (without the power of the husband). De facto actual cohabitation (concubinage) did not give rise to the rights such as legal marriage. In marriage, cum manu, the woman was subordinate to her husband, and the property she had purchased herself also belonged to the husband who managed it freely.

The husband could punish his wife, even sell her into slavery. The elements of equality were present in marriage without the power of a man (sine manu). In such a marriage, a woman could stay home three times a year, but she had to respect her husband, obey him, and follow her husband if he changed his place of residence. If the woman did not perform her duties, it was the reason for the divorce.

The elements of equality were present in marriage without the man's power (sine manu). In such a marriage, a woman was able to stay a night outside home three times a year, but she had to respect her husband, obey him, and follow her husband if he changed his place of living. If the woman did not carry out her duties, this was the ground of divorce.

It has been revealed that in Ancient Greece the status of a woman was ambiguous, if in Athens she was under the authority of her father (and after marriage – her husband), then in Sparta there were the elements of gender equality. It has been found out that women in Ancient Athens had no right to own property other than their own clothing, jewelry and slave, could not enter into contracts. All financial issues were resolved by the husband (father or a closest relative in the male line). The woman was under her parents' full guardianship, and after marriage – her husband', and was significantly restricted in her inheritance rights.

In comparison with Athens, in Sparta one can identify the elements of gender equality. Particularly, the girls received a good education, were involved in sports, intellectual development, married from the age of 18, had inheritance rights, and could even own land.

The study of the legal status of women in Ancient Egypt has turned out especially valuable. It has been found out that there were no legal restrictions on the economic activities of women in Ancient Egypt. Women could and possessed property, bought and sold, borrowed and lent, were parties involved in lawsuits, had the right to make a will and inherit property. Moreover, it is in the ancient history of Egypt that there are examples of a woman ruling the country. Both the man and the woman could initiate divorce without any valid reason. The wife was usually entitled to one third of her husband's property after his death. What's more, men and women were free to draw up their wills.

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Information about the author:
Bysaga Yu. Yu.,
Candidate of Law Sciences, Associate Professor,
Department of Administrative, Financial and Information Law,
Faculty of Law, Uzhhorod National University
26, Kapitulna str., Uzhhorod, 88000, Ukraine

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JOINT STOCK COMPANY BODIES AS A LEGAL INSTRUMENT FOR THE IMPLEMENTATION OF ITS ECONOMIC COMPETENCE

Harahonych O. V.

INTRODUCTION

The issue of the proper legal regulation of the economic competence relation realization by the entities of economic law acting in the organizational and legal form of a joint stock company (hereinafter referred to as JSC) comes to the fore in the conditions of reforming the socio-economic system of Ukraine. In the process of updating corporate legislation, the issues associated with the implementation of the JSC's economic competence through the system of authorized bodies come to the focus of legal science and practice. This, in turn, requires appropriate research from the standpoint of economic and legal science.

JSC is an economic organization whose realization of economic competence has certain features determined by the complex system of interests of corporate relation subjects (JSC, shareholders, officials of JSC bodies, etc.), which should be taken into account in the process of the company's activity. In this regard, in order to ensure the effective economic activity of the joint stock company, as well as the balance of influence and balance of interests of corporate relations participants, the legislator enshrines an array of necessary legal means and instruments to the legal mechanism of economic competence realization.

The main legal instrument used by JSCs to exercise their economic competence in the field of management is the bodies of commercial organizations. Thus, the JSC participates in the economic turnover through its bodies, which implement the economic rights established by the legislation and the company charter and ensure the fulfillment of the economic responsibilities assigned to it.

1. The concept and features of joint stock company bodies

Despite the crucial importance of the JSC bodies in the legal mechanism of its economic competence realization, the analysis of economic legislation elucidates its imperfection in the regulation of these issues. First of all, it is predetermined by the fact that there is no legal definition of the concept of a JSC body and its legal nature is not explicitly defined.

Thus, the domestic legislator defines the concept of the JSC body rather vaguely, without specifying at the same time neither its meaning nor the legal status of the bodies.

The question of the legal nature of joint stock company bodies has repeatedly been the subject of research by scholars since pre-revolutionary times till the present times. However, a unanimous theoretical position on this issue has not been adopted in terms of theory.

The research of the legal nature of JSC bodies, in our opinion, should be done through the analysis of the features inherent in such bodies. Therewith, it should be borne in mind that the definition of the JSC body's features is closely related to the properties of the JSC body as a business organization, which in accordance with Part 5 of Art. 55 of the Economic Code of Ukraine (hereinafter – the EC of Ukraine) has the status of a legal entity[1]. Therefore, it is expedient to analyze the JSC body's features in the light of scientific developments, including the study of the features of the legal entity bodies. The analysis of the economic legislation norms, as well as the research on the given issue, gives grounds to highlight the following basic **features of the JSC body**.

Firstly, *the JSC body is an organizationally segregated, structured part of the company as a business organization*.

The JSC body is a part of the company and not an independent entity of commercial law. On the one hand, such part is organizationally separated from other parts of the business organization (other bodies, separate units of the JSC, etc.). On the other hand, the body is a structured part of the joint stock company, which enables it to function in the corporate management system of the company. For instance, the structure of a collegial body usually includes the chairman and members of the JSC body.

Secondly, *the JSC body is formed in accordance with the procedure established by law and the company charter*.

According to par. 2 Part 1 of Article 92 of the Civil Code of Ukraine (hereinafter referred to as the CC of Ukraine), the procedure for the establishment of legal entity bodies shall be governed by the constituent documents and the law[2].

The general procedure for the formation of the joint stock company bodies is determined by the norms of the Law of Ukraine "On Joint Stock Companies" (hereinafter – the Law on JSC). At the stage of a joint stock company foundation, the question of formation of company bodies and their personal composition in accordance with par. 4, 6 of part 2, article 10 of the Law on JSC is decided at the joint stock company foundation meeting. In the course of the JSC's activities, the powers to form the bodies of a company are within the competence of the general meeting of shareholders

[1] Господарський кодекс України від 16 січня 2003 року. *Відомості Верховної Ради України*. 2003. № 18. Ст. 144.

[2] Цивільний кодекс України від 16 січня 2003 року. *Офіційний вісник України.* 2003. № 11. Ст. 461.

(par. 17-19, 21, 26 part 2 of Article 33 of the Law on JSC) and the supervisory board (point 8, 10 part 2 of Article 52 of the Law on JSC)[3].

The creation of a body is always preconditioned by the existence of appropriate provisions in the internal memorandum of a legal entity, without regard to the specific substrate of such body[4]. In this regard, the general procedure for the formation of bodies established at the level of the Law on JSC is specified in the JSC statutory and internal documents of the company.

Thirdly, *the JSC body consists of natural persons related to the company by corporate relations and having the status of officials (except for the participants of the JSC general meeting).*

According to par. 15 of part 1 of Article 2 of the Law on Joint Stock Companies, officers of joint stock company's bodies are the natural persons who occupy the posts of the chairman and members of the supervisory board, executive body, audit commission of a joint stock company, a corporate secretary as well as the chairman and members of another company's body if establishment of such a body is stipulated by the company charter. Thus, the legislator determines that the body of the joint stock company may include only natural persons. The general meeting of shareholders is no exception to this rule.

This feature of the body is foreordained by the fact that management as a type of intellectual activity, as a certain product of intelligence in general, is the process and result of decision-making, respectively, management as such can be carried out only by a person, an individual[5].

Fourth, *the body is endowed with a set of powers, the realization of which is carried out within the limits of JSC's own economic competence*.

These powers allow the body to pursue certain actions in resolving the issues of the internal organization of the legal entity and its representation in external relations, while realizing the will of the legal entity itself, and thereby acquiring rights and assuming responsibilities on its behalf[6].

As long as the JSC body operates within the limits of the powers defined by law and the company charter, its actions are presumed to be the actions of the joint stock company itself as a business organization. However, when an officer of a JSC body starts acting outside these powers, his/her actions shall be considered as the actions of such an individual as an independent entity and not the actions of the JSC. In case the company incurs losses caused to

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[3] Про акціонерні товариства: Закон України від 17 вересня 2008 року № 514-VI. *Відомості Верховної Ради України*. 2008. № 50-51. Ст. 384.

[4] Федосеев С. В. К проблеме правосубъектности органов управления акционерным обществом. *Законодательство*. 2010. № 7. С. 36.

[5] Тычинская Е. В. Договор о реализации функций единоличного исполнительного органа хозяйственного общества. Москва : Статут, 2012. С. 38.

[6] Могилевский С. Д. Органы управления хозяйственными обществами: правовой аспект : монография. Москва : Дело, 2001. С. 104–123.

the company by their actions (omission), an officer of the public company's bodies shall assume economic and legal liability in the form of damages in conformity with the law (par. 2, part 2 of Article 89 of the CC of Ukraine, part 8 of Article 53, part 2 of Article 63 of the Law on JSC).

This approach of the legislator is fully in line with the provisions of the First Council Directive 68/151/EEC of 9 March 1968 "On co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second par. of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community". Thus, according to par. 1, 2 of Article 9 of the First Council Directive, acts done by the organs of the company shall be binding upon it even if those acts are not within the objects of the company, unless such acts exceed the powers that the law confers or allows to be conferred on those organs[7].

Fifth, *the JSC body is separated from specific natural persons who constitute it at a certain moment*.

The body of a legal person is an abstraction, behind which there is always a certain human substrate, beyond which the body cannot express the will of the legal person. At the same time, having some dependence on the human substrate, the body does not have a strong attachment to specific people, since all members of the management bodies change periodically, which does not affect the existence of the organ as a whole[8].

The body should not be identified with the specific individuals forming it at the moment, since the fact of the staff change does not affect the validity of legally significant actions previously performed by the JSC through its body[9].

Sixth, the *body actions in the implementation of the JSC's economic competence in external relations are the actions of the company*.

The actions of the bodies should be understood as the actions of the legal entity itself, and the bodies themselves – as a statutory legal fiction, designed to regulate the internal structure of the legal entity, to assign certain powers to its certain part (competence)[10]. As a matter of fact, when a citizen (a group

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[7] First Council Directive 68/151/EEC of 9 March 1968 on co-ordination of safeguards which, for the protection of the interests of members and others, are required by Member States of companies within the meaning of the second paragraph of Article 58 of the Treaty, with a view to making such safeguards equivalent throughout the Community. *Official Journal L.* 065. 14. 03. 1968. P. 8.

[8] Федосеев С. В. К проблеме правосубъектности органов управления акционерным обществом. *Законодательство*. 2010. № 7. С. 33-34.

[9] Ломакин Д. В. Общие положения об органах акционерного общества. *Вестник МГУ*. Серия 11. Право. 2003. № 4. С. 28.

[10] Корпоративное право. Актуальные проблемы теории и практики / под общ. ред. В. А. Белова. Москва : Юрайт, 2014. С. 28.

of citizens), constituting its body, exercises the legal personality of a legal entity, the entity itself has the legal personality[11].

This feature of the JSC body is taken into account in court practice in the resolution of corporate disputes. Thus, the economic procedural legislation does not provide for the possibility of appealing to the commercial court with a complaint about the actions or inaction of the JSC bodies. Instead, a person whose rights have been violated by the actions or omissions of the JSC body is not deprived of the right to go to court with a claim of a company responsibility to pursue certain actions or refrain from committing such actions. Therefore, according to par. 2.7 of the Plenary assembly resolution of the Supreme Economic Court of Ukraine "On issues of resolving disputes arising from relationships of a corporate nature", the defendant in disputes on the invalidation of the decision of the general meeting and other management bodies of the legal entity is the legal entity itself[12].

Seventh, *the JSC's will as a business entity is formed and realized through the bodies.*

The will of a legal entity is formed by the natural persons who make up the body of a legal entity by exercising certain powers, i.e. by means of pursuing actions[13]. Through the body, the will of a legal entity is formed or manifested in accordance with the rights and responsibilities available to it, as provided by law, other legal acts and the charter. Expressing the will of the legal entity and representing its interests in the relations with other persons, the body does not become a direct party to such legal relations, and is not recognized as an independent subject of law[14].

There is no sufficient reason to claim that a body of a legal entity is an independent subject of law in both external and internal corporate relations since it cannot act outside the legal entity; the body of a legal entity forms the will only of a legal entity, but in nowise its own; the body of a legal entity does not have its own subjective rights and responsibilities, but acts only within the powers conferred on it by the legal entity; it cannot be held responsible for its actions on its own since the actions of the body are recognized by the actions of the legal entity itself[15].

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[11] Гелецька І. О. Правове регулювання відносин представництва у цивільному праві: дис... канд. юрид. наук : 12.00.03. Київ, 2005. С. 68–69.

[12] Про деякі питання практики вирішення спорів, що виникають з корпоративних правовідносин: постанова Пленуму Вищого господарського суду України від 25 лютого 2016 року № 4. *Вісник господарського судочинства.* 2016. № 1.

[13] Вилкин С. С. Гражданско-правовая природа волевых актов коллегиальных органов юридического лица : автореф. дис ... канд. юрид. наук. 12.00.03. Москва, 2009. С. 8–9.

[14] Ломакин Д. В. Общие положения об органах акционерного общества. *Вестник МГУ*. Серия 11. Право. 2003. № 4. С. 27–29.

[15] Федосеев С. В. К проблеме правосубъектности органов управления акционерным обществом. *Законодательство*. 2010. № 7. С. 36.

Eighth, *the economic competence, which is vested in the company, is distributed among the JSC's bodies.*

The company competence is a statute established by law, other legal acts and constituent documents of the company, subject of activity of the company body, as well as specific powers necessary for the company body to perform its functions and the tasks assigned to it[16].

The activity of any legal entity would be chaotic since in the absence of a distinct competence division between the internal parts (not to mention the complete absence (isolation) of any internal parts), the process of forming the will, as well as its expression (bringing it to all third parties) would be contradictory and inconsistent, which would ultimately lead to the impossibility of any activity at all[17].

In turn, the JSC governing bodies are a clearly structured system in which each of the units is endowed with a special, unique power in the sphere of the JSC's volition. The will of the JSC is formed directly in each of the governing bodies of the company but only on issues that fall within the competence of these bodies[18].

The analysis of features that are inherent in the bodies of JSC allows defining the concept of JSC body.

A **JSC body** can be defined as an organizationally separated and structured part of JSC being an economic organization, formed in the order stipulated by the law and the company charter consisting of individuals, endowed with a set of powers necessary for the realization of the JSC's economic competence, and through which the JSC's will as a business entity is formed and / or exercised.

2. The system of JSC's bodies

The JSC's economic competence is not implemented by any separate body but through a system of bodies.

In general, the system of JSC bodies includes a supreme body, a supervisory board, an executive body, an audit commission and other bodies in accordance with the legislature.

The implementation of the JSC's economic competence by each of the above bodies has its own peculiarities, determined by the nature, purpose, and its place in the system of the company bodies.

The general meeting of the joint stock is recognized as the company **supreme body**, which in accordance with part 1 of Article 32 and part 1

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[16] Ломакин Д. В. Корпоративные правоотношения: общая теория и практика ее применения в хозяйственных обществах. Москва : Статут, 2008. С. 302.

[17] Корпоративное право. Актуальные проблемы теории и практики / под общ. ред. В. А. Белова. Москва : Юрайт, 2014. С. 28.

[18] Эбзеев Б. Б. Участие акционерных обществ в гражданском обороте : дис. … канд. юрид. наук : 12.00.03. Москва, 2001. С. 95.

of Article 33 of the Law on the JSC may decide any issues of operation of a joint stock company except for those which fall within the exclusive competence of other bodies of the company by law.

An important feature of the general meeting in the implementation of the economic competence of JSC is their position as a will-forming body. Within the limits of their competence, the general meeting reaches decisions that are a fixed expression of a legal entity's will. Only the general meeting can determine the legal fate of a legal entity: to exist in such a form or to cease its activity due to inappropriateness[19]. It is the general meeting of JSC that creates the basic legal basis for the activities of other bodies of the company[20]. Thus, according to par. 9 of part 2 of Article 33 of the Law on JSC, the approval of the provisions on the company bodies falls within the competence of the company supreme body.

The legal status of the JSC general meeting has been repeatedly the subject of our research in the legal literature[21]. The conducted research gives the basis to conclude that although the JSC general meeting has the maximum scope of powers and is the most representative body of the company, the expression of the JSC's will in the exercise of its economic competence through direct contact with other participants of economic relations by the legislator rests with other bodies of the company, basically, the executive body.

The JSC supervisory board is the company supervisory body, which according to part 1 of Article 51 of the Law on JSC, provides protection of the interests of the company shareholders and controls and regulates the operation of the executive body within the authority specified by the company charter and the Law on JSC.

In JSC realizing banking activities, this body may also be named "bank's council" or "bank's supervisory board" (part 3 of Article 37 of the Law of Ukraine "On Banks and Banking"[22]). In the company having 9 or fewer

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[19] Корпоративные отношения: комплексне проблемы теоретического изучения и нормативно-правового регулирования : монография / отв. ред. Е. Д. Тягай. Москва : Норма: ИНФРА-М, 2014. С. 95.

[20] Спасибо-Фатєєва І. В. Цивільно-правові проблеми акціонерних правовідносин : автореф. дис. ... д-ра юрид. наук : 12.00.03. Харків, 2000. С. 17.

[21] Гарагонич О. В. Загальні збори у системі корпоративного управління акціонерного товариства. *Экономико-правовые исследования в XXI веке: общие проблемы хозяйственного права на современном этапе развития общества*: Материалы Десятой международной научно-практической интернет-конференции (г. Донецк, 21–30 сентября 2012 года). Донецк: Ноулидж, 2013. С. 59–71; Гарагонич О. В. Скликання позачергових загальних зборів акціонерного товариства з ініціативи акціонерів. *Науковий вісник УжНУ. Серія Право*. 2012. Випуск 19. Том 2. С. 171–176; Корпоративне право: навчальний посібник / за заг. ред. О. В. Гарагонича, С. М. Грудницької. Київ : Видавничий Дім «Слово», 2014. С. 160–164, 182–207; Корпоративне право : навчальний посібник / за заг. ред. О. В. Гарагонича, С. М. Грудницької, Л. М. Дорошенко. 2-е вид., випр. і доп. Київ : Видавничий дім «АртЕк», 2018. С. 167–172, 192–222.

[22] Про банки і банківську діяльність: Закон України від 07 грудня 2000 року № 2121-ІІІ. *Відомості Верховної Ради України*. 2001. № 5м6. Ст. 30.

shareholders – owners of common shares its powers shall be exercised by a general meeting if there is no supervisory board there (part 2 of Article 51 of the Law on JSC). Therefore, a supervisory board shall not be mandatory in the system of bodies of such joint stock companies.

The orientation of the will is a characteristic feature of the willpower formation in which the supervisory board is involved. The will created by the supervisory board is directed primarily at the executive body and not at third parties outside the corporate relations[23]. This is due to the fact that the presence of a supervisory board in the system of JSC bodies should promote the balance of interests in the company since this weakens the position of the executive body[24]. Therefore, a member of the supervisory board shall not be simultaneously a member of the executive body and/or a member of the audit commission (inspector) of this company (part 2 of Article 53 of the Law on JSC).

The analysis of issues referred to in part 2 of Article 2 of the Law on Joint Stock Company to the competence of the Supervisory Board, gives grounds to conclude that the Supervisory Board is the body of management of the general competence performing the general management of the company in the period between the general meetings[25].

Nevertheless, we do not agree with the suggestion put forward in the legal literature that the regulation of the supervisory board of the management should not settle the issues of the company's economic activity[26]. Contradictory to the executive body that manages the current JSC's activities, the supervisory board carries out the company's "strategic management"[27]. By exercising strategic management, the supervisory board controls the adherence of the executive body to the elaborated strategy for the implementation of the JSC's economic competence and, if necessary, regulates the activities of the executive body.

The **executive body** is the body that manages the company's current operations. The executive body of the JSC must be formed in a mandatory manner. The implementation of the JSC's economic competence in the relations with other participants in the sphere of management is performed primarily through the executive body. According to parts 1 and 3 of Article 58

[23] Корпоративные отношения: комплексне проблемы теоретического изучения и нормативно-правового регулирования : монография / отв. ред. Е. Д. Тягай. Москва : Норма: ИНФРА-М, 2014. С. 100.

[24] Долинская В. В. Общее собрание акционеров : монография. Москва : Норма: ИНФРА-М, 2016. С. 19.

[25] Корпоративне право: навчальний посібник / за заг. ред. О. В. Гарагонича, С. М. Грудницької. Київ : Видавничий Дім «Слово», 2014. С. 170.

[26] Артеменко С. В. Цивільно-правові проблеми управління акціонерним товариством : автореф. дис. ... канд. юрид. наук : 12.00.03. Київ, 2004. С. 12.

[27] Осипенко О. В. Акционерное общество. Корпоративные процедуры. Книга первая: Общее собрание и совет директоров. Москва : Статут, 2009. С. 296.

of the Law on JSC, the public company executive body may be collegial (management board, directorate) or sole (director, director-general).

The Constitutional Court of Ukraine in its resolution of January 12, 2010 № 1-rp / 2010 emphasizes that the authority of the executive body shall include settlement of all issues associated with management of day-to-day operations of the company except for the matters falling within the exclusive competence of the general meeting and the supervisory board.

In realising the management activity, the executive body implements the collective will of the members of the company who are the bearers of corporate rights[28]. Therefore, the executive body is a managing body that implements the economic competence of the joint stock company, expressing the will of the company in the relations with other entities of commercial law.

Contrary to the supreme body and the supervisory board, the powers of the JSC executive body to exercise the company's economic competence are not specified in the Law on JSC. The legislator provides the possibility of detailing such powers by the company itself in its charter and / or in the regulation on the executive body (part 4 of Article 57 of the Civil Code of Ukraine, part 5 of Article 58 of the Law on JSC).

The controlling body of the joint stock company is the **audit commission (auditor)**, which in accordance with part 1 of Article 73 of the Law on JSC shall conduct an inspection of the financial and economic activity of a joint stock company. Joint stock companies with up to 100 shareholders – owners of common shares of the company, shall introduce the post of an auditor (or select an audit committee) and in the companies with over 100 shareholders – owners of common shares of the company, must set up an audit commission.

In exercising the JSC's economic competence, the participation of the controlling body in the formation of the company's will is limited to the right to put forward proposals to the agenda of the JSC general meeting and to require the convening of an extraordinary general meeting, as well as the possibility of members of the audit commission (auditor) to attend the general meeting and participate in the agenda discussion with the right of advisory vote.

In our opinion, the inclusion of an audit commission (auditor) in the system of JSC bodies is not justified at the present stage. In practice, the audit commission usually follows the instructions of the supervisory board and the executive body and does not ensure the objectivity of the audit outcome of the JSC's financial and economic activity.

In addition, according to Article 56 of the Law on JSC, the supervisory board may, and in some cases is required, to form an audit commission from

[28] Рішення Конституційного Суду України № 1-рп/2010 від 12 січня 2010 року «У справі за конституційним зверненням товариства з обмеженою відповідальністю «Міжнародний фінансово-правовий консалтинг» про офіційне тлумачення частини третьої статті 99 Цивільного кодексу України». *Офіційний вісник України.* 2010. № 3. Ст. 113.

among its members. In this case, the performance of the audit functions of the JSC's financial and economic activities will be duplicated. In this regard, we consider it sufficient to carry out the audit of the JSC's financial and economic activity using an audit commission and exclude the audit commission (auditor) from the system of JSC bodies.

Other bodies are bodies of joint stock companies, whose formation is enshrined in the company charter in accordance with par. 15 of part 1 of Article 2 of the Law on JSC. Such bodies may include termination commission (par. 1 of part 6 of Article 83 of the Law on JSC), reorganization commission (part 3 of Article 105 of the CC of Ukraine), liquidation commission (part 4 of Article 88 of the Law on JSC), the liquidator (part 3 of Article 105 of the CC of Ukraine). The formation of these bodies is related to the decision by the JSC supreme body to terminate the company.

According to part 4 of Article 105 of the CC of Ukraine, the termination commission (reorganization commission, liquidation commission) or liquidator assume the powers over the management of joint stock company, including powers for realization of the company's economic competence from the moment of their appointment. Since this change of the bodies used to exercise the JSC's economic competence may affect the interests of other participants of economic relations in accordance with par. 26 of part 2 of Article 9 of the Law of Ukraine "On State Registration of Legal Entities, Individual Entrepreneurs and Public Formations", the information on the termination commission (liquidator, liquidation commission, etc.) should be entered into the Unified State Registry (USR)[29].

Contrary to the supreme, supervisory, executive and controlling bodies, which operate throughout the JSC's existence, the termination commission (reorganization commission, liquidation commission) or the liquidator belong to temporary bodies that perform the functions of realizing the company's economic competence only during the period of the termination procedure (reorganization or liquidation) of the JSC.

Analysing the issues of formation and activity of "the JSC other bodies", we consider it groundless to refer to the company bodies the so-called "auxiliary bodies" including the tellers, the general meeting presidium, the supervisory board office, etc. as described in the legal literature[30]. From a legal point of view, such "auxiliary bodies" do not participate in the implementation of the JSC's economic competence, but only perform the functions of the technical support in the work of the JSC bodies: collecting ballots during voting, preparing the premises for meetings of the relevant body, etc.

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[29] Про державну реєстрацію юридичних осіб, фізичних осіб-підприємців та громадських формувань: Закон України від 15 травня 2003 року № 755-IV. *Офіційний вісник України.* 2003. № 25. Ст. 1172.

[30] Могилевский С. Д. Органы управления хозяйственными обществами: правовой аспект : монография. Москва : Дело, 2001. С. 135.

The legal regulation of the issues of the JSC's economic competence implementation through the system of bodies is based not only on imperative but also on dispositive principles. This explains the fact that the order of implementation by the JSCs of economic competence in two different JSCs can differ significantly depending on certain circumstances (number of shareholders, presence / absence of the supervisory board, type of executive body, etc.).

The dispositive nature is inherent in a number of provisions of the Law on JSC, which regulates the procedure for the implementation of the JSC's economic competence through the system of authorized bodies.

Thus, according to par. 14 of part 2 of Article 13 of the Law on JSC, the composition of the company's management bodies and their competence, the method of the formation of these bodies, of electing and recalling their members, of passing their decisions, and the procedure of changing the composition of the company's bodies and their competence are set out in the charter of a Joint Stock Company.

The legislator also provides the JSC with the opportunity to resolve the issue of the distribution of powers to exercise economic competence between its bodies in the company's charter.

In the distribution of powers between JSC bodies in the charter, the so-called "residual principle" is applied[31]. Thus, the issues falling within the exclusive competence of the general meeting cannot be resolved by the supervisory board (except in cases provided for by law). Similarly, the executive body is empowered to address matters which not within the exclusive competence of the general meeting and the supervisory board.

In addition, in certain cases, the Law on JSC provides for the possibility of redistribution of powers between the JSC bodies in the course of the company activity by amending the articles in the company's charter. For instance, according to par. 8 of part 2 of Article 52 of the Law on JSC, the election and revocation of the powers of the chairman of the executive body is within the competence of the supervisory board. However, par. 1, part 5 of Article 59 of the Law on JSC envisages that the election of the executive body chairman may be within the competence of the general meeting of shareholders.

This approach of the legislator allows the JSC to build its own management system for the implementation of its economic competence. At the same time, the system enshrined in the Law on JSC envisages the establishment of internal organizational legal relations which ensure the necessary interaction between the bodies of the company and the possibility of realization of the JSC's economic competence in the economic sphere.

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[31] Могилевский С. Д. Органы управления хозяйственными обществами: правовой аспект : монография. Москва : Дело, 2001. С. 135.

In our opinion, one of the directions of further development of the legislation of Ukraine on the implementation of the JSC's economic competence on a dispositive basis may be the introduction of a legal mechanism for transferring the authority of the JSC executive body to another business organization (the managing company).

The essence of this mechanism is limited to the fact that, according to the JSC supreme body's decision, the execution of the executive body's authority is performed by another business organization, called the management company. It is suggested that the management company shall execute the powers of the executive body based on the contract concluded with the joint stock company.

The introduction of a legal mechanism for transferring the powers of the JSC executive body to another business organization (management company), in our opinion, will increase the attractiveness of the organizational form of the joint stock company for domestic and foreign investors, who fear to lose control over the activities of the company in which they have made the investment for the acquisition of shares. This mechanism may also be of interest to transnational corporations and large groups of companies whose management is objectively unable to delegate their representatives to the executive body of each controlled entity.

Some elements of the mechanism of transferring of the JSC executive body's powers to other business organizations have already been introduced by the domestic legislator in the field of joint investment. In particular, this mechanism applies to JSCs, the sole type of economic activity of which is joint venture activity, and which operate in the form of corporate funds.

In our opinion, in order to increase the efficiency of the JSC's economic competence implementation, it is advisable to allow the use of a delegation mechanism of the executive body's powers to the management company for all JSCs and not only corporate funds. Undoubtedly, this will require corresponding amendments to the Law on Joint Stock Company, Civil Code of Ukraine and other normative legal acts.

In order to introduce a legal mechanism for transferring the powers of the JSC executive body to another business organization (management company), it is suggested to amend Article 58-1 of the Law on JSC as follows:

"*Article 58-1. Transfer of powers of the joint stock company's executive body to the management company.*

1. By decision of the general meeting of shareholders, the powers of the a joint stock company's executive body may be delegated to another business organization (management company), except in cases provided by the law or the company charter.

2. The management company to which the powers of the joint stock company's executive body have been delegated shall manage the current activity of the company in the manner specified by the contract concluded

between the joint stock company and the management company. The contract is signed by a person authorized by the general meeting of shareholders on behalf of the joint stock company. The agreement on the transfer of powers of the joint stock company's executive body to the management company is subject to state registration. Information on the conclusion of such an agreement shall be entered into the Unified State Register.

3. The executive body in the company shall not formed during the management company's execution of powers to manage the current activities of the joint stock company, unless otherwise provided by the agreement on the transfer of powers of the joint stock company's executive body to the management company.

4. The agreement on the transfer of powers of the joint stock company's executive body to the management company may be terminated at the decision of the general meeting of shareholders or the joint stock company's supervisory board at any time and for any reason".

This mechanism can be further extended to other organizational and legal forms of business organizations.

CONCLUSIONS

The conducted analysis gives grounds to draw the following conclusions.

A *JSC body* is an organizationally separated and structured part of JSC being an economic organization, formed in accordance with the procedure stipulated by the law and the company charter consisting of individuals, endowed with a set of powers necessary for the realization of the JSC's economic competence, and through which the JSC's will as a business entity is formed and / or exercised.

The features of JSC body include:

- the JSC body is an organizationally segregated, structured part of the JSC as a business organization;
- the JSC body is formed in accordance with the procedure established by law and the company charter;
- the JSC body consists of natural persons related to the company by corporate relations and having the status of officials (except for the participants of the JSC general meeting);
- the body is endowed with a set of powers, the realization of which is carried out within the limits of JSC's own economic competence;
- the JSC body is separated from specific natural persons who constitute it at a certain moment;
- the body actions in the implementation of the JSC's economic competence in external relations are the actions of the company;
- the JSC's will as a business entity is formed and realized through the bodies;

- the economic competence, which is vested in the company, is distributed among the JSC's bodies.

The JSC's economic competence is not implemented by any separate body, but through a system of bodies including a supreme body, a supervisory board, an executive body, an audit commission and other bodies. The implementation of the JSC's economic competence by each of the above bodies has its own peculiarities, determined by the nature, purpose, and its place in the system of the company bodies.

The inclusion of an audit commission (auditor) in the system of JSC bodies is not justified at the present stage. It is advisable to review the JSC's financial and economic activity using the audit commission established by the supervisory board. In this regard, we suggest excluding the audit commission (auditor) from the system of JSC bodies.

In our opinion, one of the further development directions of the Ukrainian legislation on the implementation of the JSC's economic competence through the system of authorized bodies should be the introduction of a legal mechanism for delegating the authority of the JSC executive body to another business organization (the managing company).

SUMMARY

The article is devoted to the research of the issue of using the JSC bodies as a legal instrument for the realization of its economic competence. Analysing the legal nature of the joint stock company bodies, the author considers the main features of these bodies. Based on the performed research, the author elaborates his own definition of the concept of "joint stock company bodies".

The issues of joint stock companies' economic competence realization through the system of authorized bodies are thoroughly researched. The author substantiates his own vision of the role and place of each body of a joint stock company in the implementation of economic competence. The article suggests the directions of further development of the Ukrainian legislation on the realization of a joint stock company's economic competence through the system of authorized bodies. In particular, the necessity to exclude the audit commission (auditor) from the system of a joint stock company bodies is substantiated. Introducing a legal mechanism for the transfer of powers of a joint stock company's executive body to another business organization (the management company) is also suggested.

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Information about the author:
Harahonych O. V.,
PhD in Law, Associate Professor,
Professor at the Department of Civil Law and Procedure,
Academy of Advocacy of Ukraine
27, Shevchenka blvd., Kyiv, 01032, Ukraine

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EUTHANASIA: THEORETICAL AND LEGAL PRINCIPLES

Hromovchuk M. V.

INTRODUCTION

The term "euthanasia" introduced the English philosopher F. Bacon to indicate mild and painless death. In modern science, euthanasia is understood as deliberate acceleration of mild death terminally ill individual with the aim of ending his suffering and torment; in other words, euthanasia – an action or inaction aimed at putting an end to the life of a terminally ill person, meeting his own desire and performed by a doctor or other disinterested person.

The relevance of the study of the problem of euthanasia due to a number of circumstances: contradictions between the previously used criteria for determining a person's death and its new scientific understanding caused by the successes of modern resuscitation, between the cultural and religious traditions of society considering euthanasia like murder or suicide, and an increasingly recognized human right in certain cases do not continue your suffering; imperfection legislation (on the one hand, a ban on euthanasia without dividing it into active and passive is expressed in Article 45 of the Law "Fundamentals of Legislation on protection of the health of citizens of the Russian Federation", on the other, according to Art. 33 of the same Fundamentals, the patient can refuse any medical action); methodological lack of development of this issue (in the traditional there is no category of incurable medicine sick"; the main goal of medicine is to maintain health, cure diseases, while in patients the category in question this goal cannot be implemented), etc.

The results of the study showed that in the domestic public discourse is absent even relative consensus on the issue of the legitimacy of euthanasia. So, according to a survey conducted by the POF, 32% supported the idea of euthanasia and exactly the same amount against her. More than those who found it difficult to answer this question (36%). To the question, could respondents request euthanasia under certain circumstances, 27% replied positively, 35% – negatively, and 38% found it difficult to answer.

The religious view of euthanasia is more categorical than public opinion, but also ambiguous. Christianity mainly advocates against euthanasia. According to the Islamic Code medical ethics, "... the requirement to kill in order to reduce suffering, rejects", but the Code does not consider it necessary to artificially maintain life in a body with a dying mind. In 2005 The Knesset of Israel passed a law that allows terminally ill patients to demand that doctors stop their torment. Judaism stands for not to prolong life artificially: salvation

from pain is not in itself an excuse for killing, but doctors are not required make the patient suffer even more, artificially prolonging his life.

Thus, in a religious context if we can talk about the possibility of euthanasia, then only about the passive – in the form of discontinuation of maintenance therapy. Active euthanasia involves actions that lead to the soonest death. The following active forms are distinguished euthanasia: 1) death from compassion; 2) voluntary active euthanasia; 3) suicide with the help of a doctor. In the 2nd and 3rd cases, consent (or even requirement) is decisive the most ill. In the 2nd case the doctor at the request the patient makes him a lethal injection, and in the 3rd the doctor passes into the hands of the patient a means that allows him to commit suicide. For example passive euthanasia is the doctor's self-elimination from treatment of the patient and refusal of the latter from continuation of treatment. A form of euthanasia is also the case when the patient is discharged hopelessly ill, and the situation when the patient is doomed to die because of lack of medication or equipment.

The question of euthanasia arise in the situation of irreversible loss of functions of the brain, when a person is completely dependent on the apparatus of artificial support for life. In addition to active and passive euthanasia, voluntary, involuntary and involuntary euthanasia are distinguished. Voluntary euthanasia is carried out at the request of the patient or with the previously given consent, involuntary – without the consent of the patient, as a rule, who is unconscious; it is made by decision of relatives, guardians, etc. An example of involuntary euthanasia is the termination of life of "extra" people. This is the official name the eugenic program of the German National Socialists for sterilization, and later on the physical destruction of people with mental disorders who are mentally retarded and hereditarily burdened. Subsequently in a circle the persons who were destroyed were disabled persons with disabilities, as well as patients over 5 years.

Currently in Germany the concept of "euthanasia" is rarely used because it is discredited murders committed during Nazism. Individual authors distinguish between direct and indirect euthanasia, which reflects the motivation of professional decisions of the doctor. Direct euthanasia – when the doctor intends to reduce patient's life; indirect – when the death of the patient is accelerated as an indirect (by-effect) consequence of the doctor's actions toward another goal. As a rule, we are talking about increasing doses of painkillers (opioids), resulting in a shorter life of the patient. The modern understanding of euthanasia includes a whole complex of interrelated aspects, among which usually distinguish biological-medical, moral-moral, legal, religious. The biological-medical aspect of the problem lies primarily in the establishment categories of patients in relation to which the possibility of application may be considered euthanasia. At the center of the ethical aspect is question: Is it morally and merciful at all to interrupt the life of even a severely suffering person? Shouldn't such action be considered ordinary

murder? Does the idea of euthanasia itself not contradict the very essence of the medical profession, which is designed to preserve rather than lose life? Legal the problem is the need to develop a legal procedure for euthanasia in the event that this act is authorized by law. The religious aspect, which is essential for believing patients, is characterized by a solution that is unambiguous for all faiths: life, however difficult, is given to a person above, which deprives him of his right to forcibly interrupt him.

1. Euthanasia as international category

In international law during the last for years, the issue of euthanasia remains highly relevant, primarily as a result of increased interest in euthanasia in the legal doctrine and practice of some states. How often it is it is the source of a legal model of behavior in international human rights regulation is national law. Today this one the fact is recognized by all international human rights bodies, and therefore more fully analysis should also refer to the national laws of individual states. Among the international legal acts that regulate the right to life and thus are involuntarily relevant euthanasia include, in particular, the Universal Declaration of Human Rights of 10 December 1948, European Convention for the Protection of Human Rights human rights and fundamental freedoms of 4 November 1950 (as amended), certain international documents of medical associations, and namely the 1997 Council of Europe Convention on the Protection of Rights and human dignity in relation to the application of biology and Medicine: Convention on Human Rights and Biomedicine, "as well other legal acts. However, the issue of euthanasia has not been settled directly in international law, though in 1987. The 39th World Medical Assembly in Madrid has adopted the Declaration of Euthanasia. The text of the document says: "Euthanasia, as an act deliberately depriving a patient of his life, even at the request of the patient himself or at the request of his relatives, is not ethical. Not eliminates the need to respect the doctor's desire the patient does not interfere with the course of the natural process of dying in the terminal phase of the disease".

Today, euthanasia is used in many countries, whether or not permitted by law. There are a number of countries where euthanasia is legalized and widely used. The pioneer in the legislative consolidation of the right to euthanasia is the state of California in the United States, where in 1977 was adopted Law on the Human Right to Death. Following California's example, euthanasia was allowed in Oregon, subject to a number of prerequisites and careful controls. Suicide at medical assistance is not specifically prosecuted or punished under the laws of the states of North Carolina, Utah, Wyoming. Interesting is the practice of Indiana: on its territory operates a so-called life covenant in which the patient officially confirms his will to ensure that his life did not continue artificially by in certain circumstances.

International law should specifically regulate euthanasia, they must specify who to whom the way in which circumstances and on what grounds can exercise or promote the human right to "easy death". International law, as well as the national law of the states, faces problems that are impossible to properly inadequate assessment of what is happening, patients who are in a very serious condition. Given the above factors, international practice, and the fact that, at the present stage, the development of medicine allows actively combat pathological conditions that have not yet been treated it has been quite problematic for a long time, I think it is necessary to establish in international law the rules that would regulate the issue euthanasia. In this case, the right to euthanasia is regulated, understand the enshrining in international legal acts of prohibition “Murder at the request of the patient”, but also predicting the list conditions and features of euthanasia in some exceptional cases.

The Council of Europe Committee on Bioethics has conducted research on euthanasia in the States Europe and presented its results in the document "Questions and Answers on Euthanasia" by January 20, 2003. In countries that have already legalized euthanasia, there are not even clear criteria definition of this concept, not to mention on the delineation of euthanasia by species. The question of whether who is eligible for euthanasia. Sometimes it is doctor, application approved by the patient, but it's basically the third, uninterested person. There are also differences about this one who has the right to ask for euthanasia. The age of the person, their mental state, legal capacity and diagnosis. It is equally important and the question of the validity of the request for euthanasia in writing or orally.

Decriminalization of euthanasia, as stated by the Parliamentary Assembly of the Council of Europe (PACE) in a document dated 10.09.2003, will allow to control this process and limit it with clear the scope of the law. Because only controlled procedures and clear rules of application euthanasia will put an end to an arbitrary system, existing in many European countries.

On January 25, 2012, the PACE adopted a resolution (1859) “Protecting the Rights and Dignity of the Person of taking into account the previously expressed wishes of the patient”, which stated that “euthanasia, as premeditated murder, by action or the inaction of an incapacitated person in his or her best interests should be prohibited.” This resolution seeks to determine principles to be applied in Europe, such as the “covenant for life" or “early guidance”. Previously PACE in the recommendation (1418) “On the Protection of Human Rights and Dignity terminally ill and dying” insisted on the “prohibition of intentional deprivation life of terminally ill or dying person.” PACE and Council of Europe member states continue to condemn euthanasia and assisted suicide.

2. Euthanasia as category of law science

For many years, the issue of euthanasia has got a mixed reaction in society. The term "euthanasia" was introduced in XVI century by an English philosopher F. Bacon who discussing the purpose and tasks of medicine in his paper "On the Dignity and Advancement of Learning" focused on the issue of incurable diseases[1]. Furthermore, M.Koval, referring to H. Tereshkevych, marks that originally, in medicine, the term "euthanasia" meant loving help to a person who is dying, a desire to reduce his/her patience and fear. Subsequently, the term got a radically different meaning than F. Bacon's interpretation – the care of the terminally ill persons or people who are knocking on heaven's door[2].

Nowadays, "euthanasia" means completely negative and opposite concept than F. Bacon proposed. For this very reason, one can observe numerous disputes between medical workers, lawyers, psychologists, as well as religious leaders. Thus, according to some modern scholars, an attitude to death serves as a standard, indicator and characteristic of civilization, but when one looks at modern society, one observes that it represses death from the collective consciousness; the society acts as if nobody dies, and the death of the individual leaves no marks in the social structure. Moreover, in the most developed and democratic countries of the world, the death of a person is perceived as a matter of doctors and business people who deal with funeral service[3].

Euthanasia, as a medical procedure, is applied to patients whose biological death is inevitable and who feel severe physical sufferings while dying. There is another category of patients – persons who are in a persistent vegetative state. At the same time, the problem concerned has the other side. Many scholars are a bit apprehensive that a formal solution to this problem may become a kind of brake for the search for more effective means of diagnosis and treatment of acute patients. It is beyond the argument that a physician shouldn't bow to a patient wishing to use this procedure. It is permissible only in exceptional cases, that is, when there are no chances for a cure and protracting a person's life, one foredooms him/her to sufferings.

In the context of the above, we fully share M. Koval's statement that "at the same time, there cannot be two true or objective laws in the world. The truth does not need confirmation of another truth as the truth is absolute. The voice of nature originating from the Law of the Lord says

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[1] Коваль М.І. Контрміра евтаназії – паліативне лікування. *Вісник соціальної гігієни та організації охорони здоров'я України.* 2015. № 3 (65). С. 55.

[2] Терешкевич Г. Т. Основи біоетики та біобезпеки : *підручник*. Тернопіль : ТДМУ, 2014. 400 с.

[3] Коротких К. С. Эвтаназия как философско-правовая проблема. *Вісник Національного університету «Юридична академія України імені Ярослава Мудрого».* 2012. № 4 (14). С. 141–149.

"You shall not murder" (Exodus 20:13). However, the scholar says that along with the law, there is anti-law which always seeks to falsify its truth and denies the truth of the law. There is the same situation with euthanasia. The modern stage of reforming healthcare in Ukraine involves extending the bioethical knowledge of a young physician or pharmacist to form his/her moral, ethical and deontological mentality to evaluate events and phenomena from the standpoint of absolute, eternal and unchanging universal humanistic values"[4].

3. Euthanasia and bioethics: correlation issues

A terminally ill patient should be treated differently than other patients. However, there are no any legal documents which regulate a physician's actions towards a dying patient, and they can't be. Most scholars tend to think that above all, one should follow the ethical principles enshrined in the Hippocratic Oath as well as the recommendations of the World Medical Association Declaration of Helsinki[5].

However, when analyzing the issues of medical and legal aspects of euthanasia, it is also essential to pay attention to the category "bioethics". Modern international documents on medical ethics (bioethics) developed by the World Medical Association, the Council of Europe, the World Health Organization, UNESCO, World Psychiatric Association etc. include more than one hundreds of pages. Thus, let's consider extracts from the documents of the World Psychiatric Association:

- "Joining medical community: I solemnly pledge myself to consecrate my life to the service of humanity… I will maintain the utmost respect for human life from the time of conception… I will respect the secrets that are confided in me, even after the patient has died…" (WMA Declaration of Geneva, 1948, 1968, 1983, 1994);
- "A physician shall be dedicated to providing competent medical service in full professional and moral independence, with compassion and respect for human dignity. A physician shall not allow his/her judgment to be influenced by personal profit or unfair discrimination" (International Code of Medical Ethics, 1949, 1968, 1983);
- "The patient has the right to accept or refuse treatment after receiving adequate information. The patient is entitled to humane terminal care and to be provided with all available assistance in making dying as dignified and comfortable as possible" (WMA Declaration of Lisbon on the Rights of the Patient, 1981, 1955);

[4] Коваль М.І. Контрміра евтаназії – паліативне лікування. *Вісник соціальної гігієни та організації охорони здоров'я України.* 2015. № 3 (65). С. 54.
[5] URL: https://zakon.rada.gov.ua/laws/show/990_005.

- “The physician may relieve suffering of a terminally ill patient by withholding treatment with the consent of the patient or his immediate family if unable to express his will” (Declaration of Venice on Terminal Illness, 1983);

- “Euthanasia, that is the act of deliberately ending the life of a patient, even at the patient’s own request or at the request of close relatives, is unethical. This does not prevent the physician from respecting the desire of a patient to allow the natural process of death to follow its course in the terminal phase of sickness” (WMA Resolution on Euthanasia, 1987);

- “The care of terminally ill patients with severe chronic pain should provide treatment that permits these patients to close their lives with dignity and purpose. It is incumbent on the physician and on all others who care for the dying patient with severe chronic pain to understand… the needs of the patient, family and friends” (WMA Statement on the Care of Patients with Severe Chronic Pain in Terminal Illness, 1990);

- “Physicians played a prominent role in the elderly abuse movement by defining and publicizing the problem…Once high-risk individuals and families have been identified, physicians can participate in the primary prevention of maltreatment by making referrals to appropriate community and social service centres” (WMA Declaration of Hong Kong on the Abuse of the Elderly, 1989, 1990);

- “Patients with AIDS and those who test positively for the antibody to the AIDS virus must be provided with appropriate medical care... Physicians have a long and honored tradition of tending to patients afflicted with infectious diseases with compassion and courage. That tradition must be continued throughout the AIDS epidemic (WMA Statement on the Professional Responsibility of Physicians in Treating Aids Patients, 1988; WMA Interim Statement on AIDS);

- “Physicians treating hunger strikers are faced with the following conflicting values: … moral obligation on every human being to respect the sanctity of life … physicians should respect individuals’ autonomy… Ethical conduct: … any treating provided to the patient should be approved by him…Artificial feeding: when the hunger striker has become confused and is therefore unable to make an unimpaired decision or has lapsed into a coma, the physician shall be free to make the decision for his patient as to further treatment which he considers to be in the best interest of that patient, always taking into account the decision he has arrived at during his preceding care of the patient during his hunger strike” (WMA Declaration on Hunger Strikers, 1992);

- “…To be sure, the individuals involved were seriously ill, perhaps even terminally ill, and were wracked with pain… Furthermore, the individuals were apparently competent and made their own decision to commit suicide… In other instances the physician has provided medication to the individual with information as to the amount of dosage that would be lethal…

Physician-assisted suicide, like euthanasia, is unethical and must be condemned by the medical profession" (WMA Statement on Physician-Assisted Suicide, 1992);

- "It is unethical for physicians to participate in capital punishment that is not a problem for physicians to pronounce death" (WMA Resolution on Physician Participation in Capital Punishment, 1981).

However, despite a significant number of regulations related to euthanasia, studies conducted in the US and the Netherlands indicate that only a third of requests on life termination using euthanasia are caused by insufferable pain of a patient[6].

A scholar A. Panishchov[7] provides several examples where euthanasia supporters under the slogan of assistance in its implementation killed healthy people. Thus, in the USA, in 1956 Jack Kevorkian, who is called "Doctor Death", substantiated the expediency of euthanasia introduction. In 1989, he constructed a so-called "suicide machine" which assisted the death of more than 120 persons. In December 2000, a group of physicians stated that J. Kevorkian used it in the cases not related to terminal illnesses. According to this conclusion, 75% of patients treated by Death Doctor with mild death were patients who were not incurable, and 5% of them were healthy.

Another example is H. Shipman, who was a life-sentence prisoner for the murder of 15 patients. During the investigation, it was proved that the physician committed the first murder in 1984. When he visited an older woman suffering from joint pain, G. Shipman offered to give her an injection of an analgetic, the woman agreed, and the doctor administered her 30 milligrams of diamorphine (the medical term for heroin). Then he was observing as the victim was dying.

In January 2001, the UK Department of Health released a report suggesting that Mr Shipman committed about 300 murders of patients during his many years of practice in Hyde, Manchester. Before leaving the home of a murdered patient, he usually took a little knickknack as a keepsake and always sent a sympathy card to relatives. H. Shipman was suspected when he had given Hyde's former mayor an injection and then fabricated a will according to which a family physician inherited the wealth amounting £ 350,000.

It should be emphasized that in Europe, active euthanasia is permitted in three countries: the Netherlands since 2002, Belgium since 2002, Luxembourg since 2009 and the Swiss canton of Zürich since 2011[8].

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[6] URL: Kebuladze B. Termination of Life on Request and Assisted Suicide European Scientific Journal December 2016 /SPECIAL/ edition ISSN: 1857–7881 (Print) e – ISSN 1857–7431. S. 424 (421–425)

[7] Панищев А.Л. Эвтаназия (дидактические материалы по биомедицинской этике) URL: http://econf.rae.ru/pdf/2014/11/3806.pdf.

[8] Громовчук М.В. Право людини на життя: теоретичні та практичні засади. *Порівняльно-аналітичне право.* 2017. № 2. С. 38.

Thus, among many other judgments of the Netherlands Supreme Court, the attention is paid to the decision of 1984, which led to the recognition of voluntary euthanasia at the legislative level. The so-called "Alkmaar case" was about a 95-year-old woman who was terminally ill. A few days before her death, her health deteriorated significantly: she could neither drink nor eat and subsequently, she went faint. Regained consciousness, the woman begged her physician to end her life because she did not want to experience it again. The physician was convinced that day after day, the patient's condition would worsen and decided to act according to the patient's will. The Netherlands Supreme Court pointed out that although the actions of the physician were triggered by "force majeure", which caused a conflict of duties: on the one hand, the physician shall alleviate the patient's hopeless sufferings and, on the other, he has the duty to the law – to save a life. However, the physician had to provide a medical report that made it clear that the person had carefully considered the decision and allowed the patient to die with dignity. The case was taken to court in The Hague where the physician was declared not guilty.

At the same year, the Royal Dutch Medical Association marked that euthanasia might be allowable under certain circumstances. In the statement, it relied on the criteria on which courts had focused when deciding on euthanasia cases. In particular: 1) a patient should request for euthanasia, and the decision must be carefully considered and persistent; 2) a patient feels unbearable suffering (physical or mental), and if recovery is impossible; 3) a physician shall carry out euthanasia after counseling of independent expert, who is experienced in the area concerned.

Within a year (in 1985), the Netherlands State Commission on Euthanasia, which appealed to the Ministry of Welfare, Health and Culture, the Ministry of Justice to amend the Criminal Code on the part of euthanasia and assisted suicide, was established. The Commission proposed to amend the Criminal Code in such a way that deliberate termination of another person's life at his/her request would not be a crime if it is performed by a physician towards a patient who is "in an unfavourable situation without prospects for recuperation". The physician shall provide recommendations on minors, mentally disabled people, persons with disabilities and prisoners as well as on funeral procedures and death certificate, the non-involvement of others, except patients and physicians, in decision making and the preparation and dispensing drugs prescribed to end up. However, the proposal was not included in the Criminal Code.

Another factor that influenced the introduction of euthanasia at the legislative level in the Netherlands was the medical practice of physicians. After the adoption of court decisions in 1991, the Netherlands State Commission on Euthanasia headed by Prof. J. Remmelink published the international report "End-of-life decisions", which included data concerning not only euthanasia but also other medical decisions that had caused a

patient's death[9]. The researches were conducted in 1990 by Dr P. van der Maas from Erasmus University Rotterdam. The researches provide the data that euthanasia was applied to 2300 persons that are 1.8% of the total death rate – 129000 persons. It also involves 400 cases – suicides assisted by a physician (0.3% of all deaths). In 22500 cases, patients died due to the discontinuation or refused treatment that caused the end of life. In 40%, the decision on the increase of the drugs doze to hasten the death was previously discussed with a patient, and in 73% of cases, patients were not able to make that sort of decision.

Therefore, the data provided in the report made it possible to conclude that in most cases of euthanasia, the patient showed the initiative to use it. The rest of the patients were terminally ill but were incapable of making that decision. Therefore, the consent for the euthanasia was provided by close relatives or family members. In most cases, according to the physician, the time hastening the death ranged from several hours to several days.

Another research conducted by G. van der Wald from the Medical Inspectorate of Health was based on private messages from physicians received confidentially. The research was published a year later and confirmed the findings of euthanasia report of the committee. Besides, statistics indicating that in 0.8% of all deaths, physicians prescribed or administered pharmaceutical drugs to terminate patients' lives without their explicit request drawn attention. In most of these cases, death was inevitable as patients had an end-stage malignant tumour.

In 1990, the Ministry of Justice of the Netherlands and the Royal Dutch Medical Association developed a list of obligatory procedures while exercising euthanasia, which would guarantee immunity from prosecution according to Arts. 293 and 294 of the Criminal Code of the Kingdom of Netherlands. The rules are based on the abovementioned proposals which were developed by the Royal Dutch Medical Association in 1984. Therewith, procedural issues concern the following points: a physician shall conduct euthanasia; before euthanasia, the physician shall consult with an independent expert (physician) who has experience in the area under consideration; the physician shall carry out the full written history of the case; it is necessary to notify the prosecutor's office on death as about euthanasia or physician-assisted suicide but not as about natural cause death.

In the case of notice about death as about a case of euthanasia or physician-assisted suicide, the physician shall complete a form including some questions about the death. Based on the form, it is analyzed the procedure of compliance with all requirements. Subsequently, the procedure of notification was introduced into the Dutch Law "On Burial and Cremation Act".

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[9] Громовчук М.В. Право людини на життя: вибрані аспекти. *Visegrad Journal on Human Rights*. 2017. № 2/1. S. 59.

Thus, following research and discussion, on 1 June 1994, the amendments to Article 293 of the Criminal Code of the Kingdom of Netherlands came in force, which recognized euthanasia as a crime (but not a homicide) and are contained in Section XIX of the Criminal Code of the Kingdom of Netherlands "Violent crimes against life". Under Article 293 of the Criminal Code, a person who deprived another person of life at his/her express and sincere request shall be imprisoned for a term not exceeding twelve years or set a fine of the fifth category. Then, it is said that a person should not be punished if he/she is a physician and has committed a crime on the grounds of due care following Part 2 of "Termination of Life on Request and Assisted Suicide (Review Procedures) Act" and who has informed the municipal forensic pathologist according to section 7 (2) of "Burial and Cremation Act".

At the same time, the natural evolution of the issue of euthanasia legalization, which took place in several European countries, came to an end on April 2, 2002, when "Termination of Life on Request and Assisted Suicide (Review Procedures) Act" of the Kingdom of Netherlands consolidated the right to assisted suicide and euthanasia. Under the conditions of the act, persons who have reached the age of 16 have the right to manage end-of-life independently. Individuals aged between 12 and 16 need the consent of parents or other legal to carry out this act. The physician conducting euthanasia must be sure that the patient's request is independent, repeated and conscious, and the suffering of the person is long-lasting and unbearable. Moreover, it is obligatory to inform the patient about his condition and prospects for restoration. The decision on euthanasia is taken collectively by consensus, taking into account individual opinions. However, it should be noted that patients from other countries cannot come to the Netherlands for euthanasia – it is prohibited by law. The prohibition is substantiated by the fact that there must be a trusting relationship between the physician and the patient[10].

Therefore, nowadays, euthanasia can only be used in the Netherlands if the following conditions are simultaneously met: 1) the patient's suffering is unbearable, and there is no chance for recuperation; 2) the patient's request for euthanasia must be voluntary and cannot be fulfilled within a certain time if the person is under the influence of drugs or other people, has a mental disorder; 3) the patient should be fully aware of his/her condition, prognosis and his/her rights; he/she should be acquainted with at least one independent physician who must confirm the patient's health condition (in practice, two physicians are involved); 4) euthanasia should be medically performed by a physician or a patient in the presence of the physician[11].

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[10] Громовчук М. Евтаназія в зарубіжних країнах: питання конституційно-правового закріплення. Реформування законодавства України та розвиток суспільних відносин взаємодії: *Матеріали міжнародної науково-практичної конференції (21–22 квітня 2017 р.).* Ужгород. С. 17.

[11] Ibid. С. 18.

However, the issue of euthanasia runs to the absurd today. Thus, as Minister of Health Edith Schippers and Minister of Security and Justice Art van der Stehr reported in the Dutch media on October 13, 2016, in the Netherlands, the legislators are going to release a draft law according to which not only terminally ill persons but also all who consider "their life is terminated" can obtain permission for euthanasia.

CONCLUSIONS

Taking into account the provisions specified in the declarations, codes, statements and resolutions that directly relate to and regulate the activities of health workers while exercising their powers (medical practice), the authors can conclude that none of these documents provides provisions for the use of euthanasia as a primary duty of the physician. On the contrary, the medical professionals carry out their activities following the principles "do not to harm", "to reduce suffering", "to help". However, based on the analysis of the medical practice considered in the article, it is clear that the use of euthanasia didn't follow the principles of help. Moreover, all relevant procedures for euthanasia use were not observed, and physicians' decisions were untimely and unjustified. For this very reason, this practice has led to the fact that the number of euthanasia applicants is increasing today, and the medical indicators for its use are leveled off. Not only people who are terminally ill and suffering but also mentally ill people or those who have depression request for euthanasia. Taking into account the above, the authors believe, the countries which are going to introduce euthanasia at the legislative level, first of all, should pay attention to those negative factors that have arisen during its long-term application, in particular, the experience of the Netherlands.

SUMMARY

Some aspects of the possibility of using euthanasia are covered. The author draws attention to the relation between the categories "euthanasia" and "bioethics". The emphasis has been placed on the legal and medical aspects of the applying of euthanasia, based on the practice of the Netherlands.

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2. Терешкевич Г. Т. Основи біоетики та біобезпеки : *підручник*. Тернопіль : ТДМУ, 2014. 400 с.

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4. URL: https://zakon.rada.gov.ua/laws/show/990_005.
5. URL: Kebuladze B. Termination of Life on Request and Assisted Suicide European Scientific Journal December 2016/SPECIAL/edition. ISSN: 1857 – 7881. (Print) e – ISSN 1857-7431 S. 424 (421–425).
6. Панищев А.Л. Эвтаназия (дидактические материалы по биомедицинской этике) URL: http://econf.rae.ru/pdf/2014/11/3806.pdf.
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8. Громовчук М.В. Право людини на життя: вибрані аспекти. *Visegrad Journal on Human Rights*. 2017. № 2/1. S. 58–63.
9. Громовчук М. Евтаназія в зарубіжних країнах: питання конституційно-правового закріплення. Реформування законодавства України та розвиток суспільних відносин взаємодії: *Матеріали міжнародної науково-практичної конференції (21–22 квітня 2017 р.).* Ужгород. С. 15–21.

Information about the author:
Hromovchuk M. V.,
Candidate of Law, Associate Professor at the Department
of Constitutional and Comparative Law,
Uzhgorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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SPECIFICS OF IMPLEMENTATION OF JUDICIAL CONSIDERATION WITHIN JUDICIAL DISCRETION

Kotskulych V. V.

INTRODUCTION

The accepted truth says: "justitia est fundamentum regni" which means that justice is the base of the constitutional state. However the legislator is not able to regulate actions of the law enforcement officials in each specific life situation[1]. E. Kant in the work "Criticism of Pure Mind" notes that without implementation of consideration, it is impossible to learn any phenomenon, and for its implementation it is necessary to become proficient in transcendental analytics. The philosopher implies division of knowledge (concepts) into elements as a part of whole – "the ideas of aprioristic knowledge"[2]. During the research of the judicial consideration, the scientists are raising a question for themselves: what does the concept "judicial discretion" and "discretion of court" mean? Whether they appear identical? Whether there are expedient exercise of judicial discretion? In legal base the versatility of definitions of judicial discretion occurs, however most of them are almost identical according to their content and essence as they provide identical interpretation of the studied definition.

1. The concept of judicial discretion

The law professor Aaron Barack defined judicial discretion as the power provided to the person to choose between two and more alternatives, each of which is lawful[3]. A.A. Papkova emphasizes on the procedural form of the judicial discretion (or so-called institutional restrictions) and understands this concept as the motivated law-enforcement activity of the court that provided for by legal norms and means the choice of a solution of legal questions, and has general and special limits[4].

A.T. Bonner notes that under the discretion of public authorities, including vessels, it is necessary to understand activity that means the search of the most optimal solution in the legal plane[5].

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[1] Лугинец Э.Ф. Соотношение идеи «процессуальной свободы» и усмотрения следователя. Вестник Удмуртского университета, 2015. Т. 25. Вып. 4. С. 115.

[2] Кант И. Критика чистого разума. «Эксмо», 1781. С. 53.

[3] Барак А. Судейское усмотрение. Перевод з английского. Москва. Издательство Норма, 1999. С. 13.

[4] Папкова О.А. Усмотрение суда. Москва: Статут, 2005. С. 39.

[5] Боннер А.Т. Применение закона и судебное усмотрение. Советское государство и право. 1979. № 6. С. 35.

A.V. Yatsenko considers the judicial discretion as an element of legal status of the judge, along with the rights, duties and responsibility. Therefore, the researcher put into scientific turn the concept of "law-enforcement discretion" with what we completely agree, as there are no doubts about the substantial position of judicial discretion as an important component of law enforcement. However, distinguishing stages of implementation of the judicial discretion and characterizeg the first and second stages, the scientist notices that only at the third stage the judge is guided / begins to be guided by the sense of justice that performs gnoseological function[6]. We deny such opinion. The judge carries out judicial discretion based on legal consciousness, directly connected with it, and guided throughout all stages of implementation of discretion as law-enforcement activity.

There are number of scientists who deny the expedient application of judicial discretion in law-enforcement activity. Therefore, R. Dvorkin claimed that each lawsuit has only one solution, and the law covers various life situations that does not leave place for any discretion[7]. Along with it, the scientist claimed that the positive law has to be estimated also from a position of the moral bases following as a consequence of subjective rights and the principle of equality[8].

Thus, in legal base the versatility of definitions of judicial discretion occurs, however most of them are almost identical according to contents and the essence as they provide identical interpretation of the studied definition.

The judicial discretion is considered in modern jurisprudence as:

1) the principle of implementation of justice;
2) the power which allocated the judge;
3) powers of the court (rights and duties);
4) intelligently forceful activity;
5) activity of the court, as for decision-making;
6) the possibility of implementation of alternative choice in certain institutional limits.

Therefore, we suggest to consider the judicial discretion as: 1) powers on implementation of judicial function; 2) freedom of choice in the limits determined by the law.

Finding out the essence of the discretion, scientists generally apply the terms "choice alternative", "possibility of the choice", "freedom of choice" and others.

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[6] Яценко О.В. Суддівський розсуд як засіб забезпечення справедливості судочинства: дис. … канд. юрид. наук: спец. 12.00.10 – судоустрій; прокуратура та адвокатура. Київ. 2015. С. 43.

[7] Вартапетян Э.Г. Судейское усмотрение как необходимость. Актуальные проблемы российского права. 2007. № 1. С. 386.

[8] Кормич А.І. Історія вчень про державу і право: навчальний посібник. Правова єдність. Київ, 2009. С. 219.

According to the Ukrainian Academy explanatory dictionary the term "freedom" is used in many values depending on any given context. However, for our research the understanding of freedom as an opportunity "to behave at own discretion" and "to work without obstacles in any industry" will be the most distinctive[9]. The concept "discretion", in turn, is interpreted as "a conclusion, decision", "reasoning, reflection" and even "court". The phrase "to the (own) discretion" in accordance with the dictionary means "understanding something respectively to own decision"[10].

Aaron Barack suggests to consider freedom of choice at implementation of discretion in broad and narrow value. In the latter case the choice only between two options is allowed, in broad aspect – the judge has the right to choose from the whole range of alternatives or their combinations[11]. The freedom of choice does not mean an arbitrariness at all. It does not cancel social responsibility. Moreover, it provides understanding of consequences of the actions.

In our opinion, judicial discretion is an intelligently forceful process that occurs in the legal awreness of the judge during adoption of the judgment owing outcoming from determined by rules of law freedom of choice in case solution.

According to O. Rogach, after intelligently strong-willed criterion, the discretion can be internal and external[12].

The intellectual sign is that component that indicates the judge's relation as participant of trial to a specific situation which is considered in court session, the facts of the case, the made decision and also to consequences of such decision, as for the parties, the third parties, and for society in general. It is what belongs to the intellectual sphere of mental activity and provides awareness by the judge of the importance of correctness and objectivity of the made decision. The close connection of discretion and consciousness is having seen in this sense.

Considering the intellectual party of a judicial discretion, it is possible to draw an analogy to direct intention in criminal law doctrine. Consciousness and predictions make intellectual signs of intention, while the desire or the conscious assumptions of consequences – its strong-willed sign. The strong-willed (forceful) sign in criminal science means desire of approach of certain consequences of the action or inaction[13]. Thus, the strong-willed aspect of a judicial discretion directly provides adoptions of the judgment.

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[9] Свобода. Академічний тлумачний словник. URL: http://sum.in.ua/s/svoboda.

[10] Розсуд. Академічний тлумачний словник. URL: http://sum.in.ua/s/rozsud.

[11] Барак А. Судейское усмотрение. Перевод з английского. Москва. Издательство Норма, 1999. 376 с.

[12] Рогач О.Я. Зловживання правом: теоретико-правове дослідження. Ужгород: Ліра, 2011. С. 148.

[13] Положення про порядок та методологію кваліфікаційного оцінювання, показники відповідності критеріям кваліфікаційного оцінювання та засоби їх встановлення. Рішення Вищої кваліфікаційної комісії суддів України 03.11.2016 № 143/зп-16 (у редакції рішення Вищої кваліфікаційної комісії суддів України 13.02.2018 № 20/зп-18). 26 с.

2. Principles of judicial discretion

We consider that at decision-making "at discretion" the judge has to be guided to certain principles. The principles of implementation of a judicial discretion are fundamental (leading) bases which define requirements to specifics of implementation of judicial discretion. These are, first of all, the general principles of implementation of legal proceedings which are key at the implementation of judicial discretion (legality, equality of all participants before the law and court, ensuring validity of fault, competitiveness of the parties, etc.). However, it would be desirable to pay attention on the special principles that are not less important in essence and to contents.

So, except the basic principles of implementation of justice, the judicial discretion provides also such as:

1) The principle of justice – provides the choice of the most optimal and effective solution taking into account evidential information. Justice is a basis of judicial knowledge and represents a dialectic combination of moral factors and the letter of the law at adoption of the judgment.

2) The principle of expediency – in decision-making process the judge have to avoid acceptance of the final decision until the procedural moment of the end of proceedings.

3) The principle of planning – ability to differentiate evidential information according to its value on business.

4) The principle of professional optimism – provides aspiration taking into account the tool value of the law to carry out justice, promotes belief in effectiveness of the right.

5) Principle of prudence. We consider prudence in this aspect as an ability to make the justified decisions of rather specific legal situation. Prudence is nothing else than a common sense that is based on objective assessment of all facts of the case and formation of a logical conclusion taking into account appropriate judgment of legal reality on the basis of the current legislation and the moral principles that were created in society. Prudence provides wise and rational behavior at which the judge in the best way realizes the knowledge, skills.

6) The principle of active adaptation – ability to implementation of legal proceedings with a speed and ease that means the ability to apply quickly professional knowledge.

7) Principle of the moral obligation to the state and society. It is told about need of implementation of judicial discretion taking into account the feeling of a moral imperative of the judge to judge by conscience. The moral imperative of the judge is not equivalent to his professional duty.

According to P. Kuftirev, the judicial discretion is the principle of justice that consist of guarantees on investment of the judge with powers to choose an optimal variant of the solution of matter in the limits determined by rules

of law taking into account the leading legal bases and the facts of the case[14]. From the given definition is follows that the scientist identifies the concept "judicial discretion" and "judicial discretion" identical. However, according to us, hardly these legal categories are identical.

There is a certain divergence. On the one hand, the judicial discretion is out of a judicial discretion as it is not enshrined properly in the legislation. On the other hand, the judicial discretion is the tool for implementation of discretion of court. To avoid such contradictions, it is necessary to define a concept of a judicial discretion not only on doctrinal, but as well at legislative level.

3. Discretionary rights and duties of judges

We confirm above-mentioned also with data which contain in the Order of the Ministry of Justice of Ukraine of 24.04.2017 No 1395/5 where it is given generalized determination of discretion, as for activity of any public authorities: "It is set of the rights and obligations of public authorities and local government, the persons authorized for performance of functions of the state or local government that give an opportunity to define at own discretion in whole or in part the type and contents of the decision management which is made, or a possibility of the choice at discretion of one of several versions of the management decisions provided by the normative legal act, the draft of the normative legal act"[15]. Proceeding from an above-mentioned definition, the judicial discretion is powers that are carried by the legislator to maintaining any given court. That is the judicial discretion (discretion of court) is a set of the rights and obligations of the court as public authority, during performance of judicial function on legal proceedings implementation, to make the judgment at discretion, in the limits determined by the law[16].

From here one more conclusion follows: if judicial powers (discretion) include the rights and duties, means the last it is undoubtedly possible to call discretionary.

The concept "discretion" is mentioned in the resolution of the Supreme Court of Ukraine. So, according to Article 106 of the Constitution of Ukraine the President of Ukraine has the discretionary (independent) right to make the decision in the limits determined by the law. Therefore, discretion is

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[14] Куфтирєв П.В. Суддівський розсуд у теорії права : автореф. дис. … канд. юр. наук : спец. 12.00.01 «Теорія та історія держави і права, історія політичних і правових учень». Київ, 2009. С. 6.

[15] Наказ Міністерства юстиції України Про затвердження Методології проведення антикорупційної експертизи від 24.04.2017 № 1395/5 URL: http://search.ligazakon.ua/l_doc2.nsf/link1/MUS29196.html.

[16] Коцкулич В.В. Дискреційне право судді чи його моральний обов’язок? Матеріали 72-ї підсумкової наукової конференції професорсько-викладацького складу юридичного факультету (26 лютого 2018 року, м. Ужгород). Ужгородський національний університет; за заг. ред. С.Б. Булеци, Я.В. Лазура. 2018. С. 31–33.

considered in the resolution as an opportunity at discretion (without coordination) to define contents of the decision or to choose one of several solutions[17].

On this basis discretion of court is a subjective legal possibility of court to make decisions with application of a discretion, choosing from several lawful solutions of the case the most correct (taking into account the facts of the case). Among signs of discretion such as:

1) is regulated in rules of law;
2) it is carried out within discretion and appears their element;
3) is the independent right of the judge, that is does not demand permissions, coordination and is not subject to the ban;
4) connected directly with implementation of a judicial discretion;
5) the subjective right of the judge during implementation of a judicial discretion interdependent substantially legal status of the judge (objective right for adoptions of the judgment).

If with discretion the situation is clear, then definition "discretionary duties" is absent not only at the legislative level, but also separately is not allocated and is not explained by scientists (despite the fact that the judicial discretion is defined by most of modern researchers as the powers of the court which include the rights and duties).

We understand a measure of his appropriate behavior as discretionary obligations of court that is shown in implementation of a judicial discretion with observance of the oath of the judge. In other words, discretion of the court – the right to carry out a discretion, and a discretionary duty – establishment of requirements for appropriate realization of the right for a judicial discretion.

Therefore, the discretionary duty of the judge defines requirements to the process of generation of judgments in legal awareness of the judge at implementation of judicial discretion by it for the sake of acceptance of the right judgment. In our opinion the discretionary duties of the judge is the need to implement judicial discretion in compliance of accurately certain framework – assumes existence of limits of implementation of a discretion (if the right is freedom, a duty – legal restrictions).

By the way, proceeding from contents of other resolution of the Supreme Court of Ukraine accepted on the same day, September 13, 2016 it is worth paying attention to the term "discretionary behaviour"[18]. The fact that we did not meet any normative legal act in which it would have given a definitive explanation. In the resolution this legal category is used rather as a simple phrase, but not a legal phenomenon.

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[17] Постанова Верховного Суду України від 13 вересня 2016 року № 21-1044а16. 4 с.
[18] Постанова Верховного Суду України від 13 вересня 2016 року № 21-1928а16. С. 4.

It is necessary to differentiate the concept "discretionary behavior" and "legal behavior" of the judge. If the legal behavior characterizes actions of the judge in judicial and extrajudicial activity, then the discretionary behavior is a manifestation of quality characteristics of sense of justice at implementation of discretion of the judge. Respectively, the last legal category is narrower according to contents, than legal behavior as does not concern activity of the judge out of court.

4. Properties and limits of the judge's discretion

Justice admits as it if its purpose and consequences is fair protection of subjects. Some scientists, analyzing a ratio of this legal category with legal proceedings, defend other position. In particular, they note that justice is a wider concept[19]. We support opinion that legal proceedings implementation does not mean yet administration of justice as the decision that contradicts rules of law and not a right judgment.

For the Romano-German legal system the application of the term "judicial discretion" as regardless of whether the case is considered jointly or individually, the judge acts not on its own behalf, but on behalf of the state will be expedient. In turn, the concept "judicial discretion" is typical for Anglo-American legal family as the sociological approach is have been directed to the study of aspects of judge activity, research of his social function, moral criteria, legal behavior. According to us, irrespectively of the type of a legal system, the judge carries out the powers on behalf of the state as the representative of public authority – court. Therefore, it is not the reason of differentiation between judicial and judicial discretion behind above-mentioned criterion.

We support the scientists stating the difference between categories "judicial" and "judicial" discretion" because already from morphology of definitions follows that adjectives "judicial" and "judicial" are derivative of various words. Therefore, a judicial discretion is exercised by the judge, and respectively judicial is carried out by the court. From given, we draw a conclusion that the judicial discretion is much wider and more generalized legal phenomenon as represents a set of "judicial discretion" during joint decision of lawsuit.

According to N. Slotvinskaya, the level of a judicial discretion in the countries with the Anglo-Saxon system of the right is extremely high. The judgment, being a source of law, provides settlements of the uniform public relations in the future[20].

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[19] Малишев Б.В. Судова правотворчість як засіб досягнення мети правосуддя. «Вісник Вищої ради юстиції». 2011. № 1 (5).С.48.

[20] Слотвінська Н.Д. Порівняльно-правова характеристика судової нормотворчості. Порівняльно-аналітичне право. 2016. № 1. С. 32.

Implementation of a judicial discretion in Japan which aims at search of such facts of the case which provide the conclusions of the settlement agreement is interesting. For this purpose the rule of law moves in the light of consequences of its application, adverse for both parties. As V. Rozhko, as a rule, the party notes that he wishes to conclude the settlement agreement, it is found guilty. If one of the parties is the foreign person, then the judicial discretion has the signs typical for the Romano-German system of the right[21].

In the states with the Romano-German legal system the judicial precedent is not an official source of law, however the phenomenon of "the accepted judicial practice" providing recognition of the judgments by an element of interpretation of rules of law works. The judge looks for essence of each case casuistically, depending on a specific life situation. There is a decentralization of the right, and the Romano-German legal family aspires to the live right (precedent). Under such circumstances the rule of law is filled with subjective signs.

The Ukrainian state does not recognize the judgment as a source of law. However, according to the law of Ukraine "About Ensuring the Right to Fair Trial": "The conclusion concerning use of rules of law which is laid out in the resolution of the Supreme Court of Ukraine has to be considered by other courts of law at use of such rules of law. The court has the right to recede from the legal position stated in conclusions of the Supreme Court of Ukraine with simultaneous targeting of the corresponding motives"[22].

Such legal status in a certain way simplified the implementation of the judicial discretion, lifted to new level the values of the legal positions of the Supreme Court. Along with it existence of collisions at conclusions of the Supreme Court is observed, the stated above legal provision of the law has no appropriate mechanism of realization yet.

Besides we consider that the judge "creates" the right irrespective of whether he is given the right to interpret precepts of law. Right creation has the consequence adoption of the judgment and is a result of activity of professional legal awareness of the judge.

Opinions and views of the judge of rather actual circumstances and decision-making is a reflection of his outlook, professional qualities, moral and ethical characteristics. The age and gender of the judge in some way can influence the formation of judicial opinion.

There are certain features of implementation of judicial discretion depending on instance of court. Also distinctions of a judicial discretion at decision-making are observed jointly and individually.

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[21] Рожко В.В. Проблема суддівського розсуду в правових системах Японії та Китаю. Науковий вісник Львівського державного університету внутрішніх справ. 2015. № 1. С. 68.

[22] Про забезпечення права на справедливий суд: Закон України від 30.09.2016 р. Відомості Верховної Ради України. 2015. № 18. № 19–20. Ст. 132.

The implementation of judicial discretion also differs depending on a legal proceedings. So, for example, the limits of implementation of judicial discretion accurately have been set in criminal law. As the Criminal law is characterized by lack of gaps, limits of application of any given sanction of concrete criminal rule are discretion limits in criminal proceedings (though deviation from the general rules of the legislative technology of the criminal law is in some cases observed).

Considerable part of scientists notice that the discretion takes place where there are legislative collisions and as well at application of analogy of the right (when balancing legal principles) and analogies of the law.

The judicial discretion also takes place in legal rules of law as value definitions that generally contains in hypothesis. Value definitions, on the one hand, are characterized by generalization of concepts and lack of concrete definiteness, on the other hand – they leave the place for implementation of judicial discretion and give the chance to judges independently settle public relations that are not regulated by the law according to the facts of the case.

In Civil and Economic law the situation with application of judicial discretion is ambiguous. So, by consideration of disputes on contracts the court has to carry out assessment of degree of a specification of provisions of the relevant Code. Under such circumstances the interpretation of the principle of freedom of the contract as provisions of procedural codes contain only essential conditions of contract matters[23].

In general, the discretion provides a legal regulation of the choice in the civil legislation and of possible behavior during realization of the subjective rights of participants of the civil relations. The implementation of judicial discretion is provided by the civil procedural code concerning proofs, participation of the parties and the third parties, the price of the claim, contents of the decision and court costs.

We agree with V. Zaborovsky's position that the judicial discretion should be perceived in aspect of independence of the judge during implementation of its powers on the basis of internal belief. Therefore, the scientist emphasizes that the independence should be understood in the context of independence of procedural activity[24].

It is expedient to distinguish such from signs of the judicial discretion:

1) it is an evaluative activity;

2) irrespective of the of type of a legal system it's to a certain degree a rule-making activity of the judge;

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[23] Савчин М.В. Свобода суддівського розсуду у світлі обгрунтованості рішень суддів апеляційної та касаційної інстанцій. Судочинство, 2016. URL: http://yvu.com.ua/svoboda-suddivskogo-rozsudu-u-svitli-obgruntovanosti-rishen-sudiv-apelyatsijnoyi-ta-kasatsijnoyi-instantsij/.

[24] Заборовський В.В. Правовий статус адвоката в умовах становлення незалежної адвокатури України: монографія. Ужгород. Видавничий дім «Гельветика».2016. С. 51.

3) it is present at any form of implementation of legal proceedings;

4) it is characterized by relative freedom of choice which provides limits of implementation of such discretion;

5) the implementation of judicial discretion is directly characterized by independence of judges in procedural aspect.

Fair there is an opinion that implementation of judicial proceedings is a key stage of process. Existence of a discretion are reduced by commitment of legal regulation and does unambiguity of practice of application of the procedural legislation more indistinct. It can lead to a miscarriage of justice. Therefore always there have to be limits, a framework in which the judge can use the "procedural freedom" provided to him. In this case, the judicial discretion is freedom, however in a certain framework (legislatively resolved limits).

According to K. Ermakova, the necessary restrictions guaranteeing applications of this institute within ensuring legitimacy and expediency of the judgment are limits of a judicial discretion. The scientist allocates legal and moral and legal limits of implementation of a judicial discretion. Legal limits are characterized by legal principles and norms, and moral and legal are created on morally ethical concept, is standardly fixed, however optional[25].

P. Kuftirev defines the borders of judicial discretion as a frame condition of legitimacy of the choice of the most optimal variant of the solution of a legal question, according to legal principles, ideas, purposes of law and specific circumstances of the case[26].

L. Berg notes that borders of the judicial discretion –legal frameworks that established by authorized subjects by legal means which accurately limit scope of the right[27].

To reduce subjectivity during adoption of the judgment, it is necessary to enter a judicial discretion into a framework of certain material and procedural (procedural) restrictions. Procedural restrictions are defined by order of conducting judicial proceedings, respect for the fundamental principles and the constitutional requirements. Their essence is shown that the court has only two tasks – implementation of justice in the established form and creation in this regard of necessary conditions for performance by the parties of their procedural duties and implementation of the rights granted to them.

From given, we concluded that the limits of judicial discretion are standardly resolved frameworks of the right of the judge for freedom

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[25] Ермакова К.П. Пределы судебного усмотрения: дисс. ... канд. юрид. наук: 12.00.01. Москва, 2010. С. 8.

[26] Куфтирєв П.В. Суддівський розсуд у теорії права : автореф. дис. … канд. юр. наук : спец. 12.00.01 «Теорія та історія держави і права, історія політичних і правових учень». Київ, 2009. С. 12.

[27] Берг Л.М. Судебное усмотрение и его пределы (общетеоретический аспект): дис. … кандидата юридических наук: спец. 12.00.01 «Теория и история права и государства; история учений о праве и государстве». Екатеринбург, 2008. С. 109.

of choice in solving the case. So, such are features of limits of a judicial discretion:

1) provide freedom of choice of case solving;
2) are legal restrictions for such freedom;
3) are imperative, statutory defined in legislative instructions;
4) are established for ensuring adoption of the most optimum judgment taking into account the facts of the case;
5) their existence provides at the same time independence of judges during adoption of the judgment and protection against a judicial arbitrariness by establishment of a legal framework of their activity.

In the context of a research of judicial discretion it is worth paying attention as well to other legal category – internal belief of the judge. Applications of the term "internal belief of the judge" is often carried out within administration of justice and takes place not only at direct adoption of the judgment, but also at all stages of implementation of trial, and first of all – at assessment by court of proofs.

We consider that by consideration of a ratio of categories "internal" and "personal" it is necessary to consider the factor the given definitions are actually coincide by essence and contents, however the term "internal" is more abstract, generalized while the personal belief is subjective as it is formed within of the specific judge during consideration of any given circumstances of each case.

Modern scientists consider internal belief not only as the method of assessment of proofs, and as the principle which consists in lack beforehand of certain techniques of assessment and their sequence but is based on objective laws of logic and thinking and also subjective categories of lawfulness, conscience, emotions (feelings)".

Formation of internal belief is result of rational assessment of the actual facts of the case, precept of law, feelings and moods of rather obtained information, synthesis of all data. Besides, the judge influences by the behavior of the parties in court, the criminal past of the defendant and extrajudicial factors (mass media) carries out influence. The internal belief should be considered not just as feeling of confidence, conviction. The judge perceives any legal phenomena through a prism of already developed and settled views, the ideas, concepts. Here the sense of justice of the judge which is a basis, guidelines when forming internal belief is important.

The internal belief is a process of perception of rules of law and the actual facts of the case that is characterized by a peculiar individual course and matters during adoption of the judgment. Formation internal belief has to be carried out taking into account the principle of free assessment of proofs, competitiveness of the parties, judicial independence and impartiality.

The term "internal belief of the judge" is enshrined in Article 94 of the Code of Criminal Procedure of Ukraine. The investigative judge, court on the

internal belief which is based on a comprehensive, full and impartial investigation of circumstances of criminal proceedings, being guided by the law, estimate each proof in terms of accessory, admissibility, reliability, and body of evidence – in terms of sufficiency and interdependence for adoption of the relevant proceeding decision. Any proof has beforehand no established force[28].

The current state of development of legal concepts convinces that the internal belief in a certain way leans on an intuition, however does not feed it with the fundamental principle at all. The intuition at adoption of the judgment will matter only at a research of this concept of dependence with rational opinion. The factor of an intuition should not be ignored as it can be the indicator of incompleteness of thinking. After the judge checked himself in the light of criteria of compliance of the law and the principles of morals, he has to provide advantage to the rational opinion. There are a lot of chances in favor of the fact that the intuition is an accumulation of certain subjective factors. In the end result the judicial discretion has to be displayed in rational opinion, but not in objective feeling. In it the main criterion of implementation of activity which has taken into account when performing judicial function.

In our opinion, the internal belief of the judge cannot be based only on intuition as the last is the insufficient basis for adoption of the fair judgment. Confidence in correctness of the made decision which is based on comprehensive assessment of evidential information and also is carried out according to the current legislation – here that is the key to implementation of effective justice.

As manifestation of internal belief, irrational at formation, legal emotions and experiences which together with an intuition are elements of legal psychology of the judge.

Adoption of the fair decision is possible only in case the judge penetrates into essence of a legal situation, will consider it on all aspects, but the law will not be guided by a dry formalistic statement "there is a law". In this aspect judicial cognitive activity – continuous process which includes two stages: transition from precept of law to the facts and vice versa.

Therefore, the judge makes the decision taking into account subjective value orientations. The absence or negative manifestation of the last calls into question existence of internal belief of the judge and also a judicial discretion which, along with awareness in the law and legal realities of public life, existence of legal experience, is the important key to adoption of the fair judgment.

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[28] Кримінальний процесуальний кодекс України від 13.04.2012. Відомості Верховної Ради України. 2013. № 9–10. № 11–12. № 13. Ст. 88.

The ratio of internal belief and judicial discretion and also their interdependence in the context of legal consciousness of the judge was considered by scientists insufficiently. In domestic jurisprudence the due attention is not paid to problems of differentiation of these legal categories. As it was noted above, legal consciousness of the judge is a basis of formation of internal belief. Besides, as the set of the ideas, concepts, legal feelings, moods and experiences, it is used during realization of the provided right of the judge to implement judicial discretion.

Legal consciousness is an element of internal belief. Such position is supported by a considerable part of criminalists. We, in turn, will try to prove opposite. The fact is that legal consciousness (as well as consciousness) is the constant phenomenon that provides understanding of the right by the judge while the internal belief is present at assessment of proofs and formation of judicial opinion. Therefore, the belief is formed in sense of justice, on the one hand, and with another – legal views, positions, concepts, feelings, moods (legal consciousness) are its basis.

The ratio of a judicial discretion and internal belief is traced through a prism of logic of subjective thinking of judges.

Erudite A. Yatsenko suggests to exclude the concept "internal belief" from the existing normative legal acts, having set legal category of a judicial discretion at the legislative level. The researcher proves such position by the fact that the belief is the constant relation of the judge to certain circumstances. Besides, the internal belief has no standardly certain framework[29]. We not absolutely agree with such opinion, and that is why.

We consider that the internal belief is formed in legal consciousness of the judge, and judicial discretion is the right of the judge granted by the law to choose one of solutions of the case on own beliefs. The specified categories interconnected, however nevertheless differ on essence and to contents. If the judicial discretion generally is legal category, then internal belief, in our opinion – morally – ethical. However, both are followed by existence of certain processes of thinking at lawfulness of the judge.

The internal belief is based on individual vision of business and therefore different judges can give differently assess the facts of the case, characterize participants of the trial and even to make different decisions, each of which will be lawful. It is impossible to exclude from a scientific turn a concept of internal belief as decision-making directly depends on confidence, conviction of the judge about justice of such decision.

In this context, according to us, the range of opinions of the judge is important and the features of generation of his judgments. In this regard we

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[29] Яценко О.В. Суддівський розсуд як засіб забезпечення справедливості судочинства: дис. … канд. юрид. наук: спец. 12.00.10 – «Судоустрій; прокуратура та адвокатура». Київ. 2015. С. 49.

consider it necessary to provide at the legislative level a universal algorithm of formation of knowledge concerning the facts of the case. Such methods of assessment of evidential information have to include logic of creation of versions that in the end result to bring the judge to the most optimum legal decisions.

Therefore, one of conditions of the lawful decision of a dispute in court is realization of the rights in such a way that does not contradict the legislation, does not violate the right of other persons and also corresponds to moral foundations of society.

A. Selivanov notes that the judicial discretion has to be used minimum. Specified is a condition of avoidance of a miscarriage of justice[30]. Existence of a judicial discretion can lead to abuse of judges of their rights and even to delegation of a part of legislative functions to judicial authority. On the other hand, the possibility of application of judicial discretion is a necessary criterion of development of the constitutional state and a guarantee of ensuring efficiency and optimality of judgments.

According to us, the judicial discretion is necessary, however it is important legislatively to provide a certain mechanism of its application, and it is possible thanks to:

1) the application of direct effect of the Constitution of Ukraine;

2) the greatest possible legislative regulation of all public relations. The last, in turn, has to be provided by continuous updating of the legislation according to new legal realities. It will minimize applications of judicial discretion (limits of implementation of a discretion have to be very narrow);

3) to improvement of the legislative equipment that is provided with such factors:

- the norm has to be stated succinctly, clearly, consistently;
- if the law grants the right to make the judgment at discretion, then the corresponding precept of law has to surely contain a clear boundary of implementation of such discretion;
- limits of a discretion have to be not the narrowest but sufficient, on the one hand, it will not limit the lawfulness of the judge, and with another – it will avoid judicial arbitrariness;

4) direct explanation in the law of evaluative definitions.

[30] Селіванов А.О. Судова влада має пройти реформу поновлення свого авторитету і довіри. Сучасні виклики та актуальні проблеми судової реформи в Україні: матеріали Міжнародної наукової конференції, м. Чернівці, 26–27 жовтня 2017 року. За загальною редакцією Щербанюк О.В. Чернівці. 2017. С. 44.

CONCLUSIONS

The analysis showed that the judicial discretion represents the special legal phenomenon and is present at every constitutional state. Generalizing the aforesaid, we will emphasize that the judicial discretion should be considered not only as the right of the judge "to judge", but also as his duty to carry out the powers within the current legislation. Confidence in correctness of the made decision which is based on comprehensive assessment of evidential information and also implementation according to the current legislation, is the key to implementation of effective justice.

At the same time implementation of justice aims at the idea of justice and is based not only on performance of the functions according to the operating precepts of law, but also on the settled moral principles that are traditionally put by society. The specified factor is an attribute of the appropriate performance of the powers by judicial authority. Legal proceedings that is carried out without these aspects, in essence and to contents is not justice.

SUMMARY

The author examined the specifics of the implementation of judicial consideration within judicial discretion. It is established that the judge carries out judicial discretion based on legal consciousness, directly connected with it, and guided throughout all stages of implementation of discretion as law-enforcement activity. It is determined that he judicial discretion is considered in modern jurisprudence as: the principle of implementation of justice; the power which allocated the judge; powers of the court (rights and duties); intelligently forceful activity; activity of the court, as for decision-making; the possibility of implementation of alternative choice in certain institutional limits. The author proposed a classification of the basic principles of judicial discretion: the principle of justice, the principle of expediency, the principle of planning, the principle of professional optimism, principle of prudence, the principle of active adaptation, principle of the moral obligation to the state and society. It is established that if with discretion the situation is clear, then definition "discretionary duties" is absent not only at the legislative level, but also separately is not allocated and is not explained by scientists (despite the fact that the judicial discretion is defined by most of modern researchers as the powers of the court which include the rights and duties). It is justified that it is necessary to distinguish such from signs of the judicial discretion: it is an evaluative activity; irrespective of the of type of a legal system it’s to a certain degree a rule-making activity of the judge; it is present at any form of implementation of legal proceedings; it is characterized by relative freedom of choice which provides limits of implementation of such discretion; the implementation of judicial discretion is directly characterized by independence of judges in procedural aspect.

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Information about the author:
Kotskulych V. V.,
Candidate of Law Sciences, Associate Professor,
Department of Constitutional and Comparative Law, Law Faculty,
Uzhgorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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INTRODUCTION TO UKRAINIAN COMMERCIAL LAW

Lazur Ya. V.

INTRODUCTION

Since Ukraine gained its independence, there have been changes in economic management approaches and principles according to which "state-business relations" are established, effective state regulation of entrepreneurship in the form of the single state regulatory policy in the field of entrepreneurship has been introduced, etc.

Ukraine's integration into the world economy promotes the development of international business relations and entrepreneurs' international economic activity.

There have emerged new institutions that are typically involved in market conditions of running businesses: bankruptcy, freedom of competition, antitrust regulation, etc. Privatization processes are being stimulated and equity market is being significantly developed.

Hence, in order to ensure sustainable economic growth of Ukraine and its integration into the world community it is necessary to provide the proper legal and regulatory environment for business processes. All these factors stipulate the necessity for the proper regulatory framework as well as studying fundamental legal principles of business activities, which are the subject-matter of commercial law.

However, home legal science is known to be preoccupied with an issue that appears especially relevant today in spite of having been discussed by scholars for many decades. This entails the issue of identifying commercial law as a special field of law.

Taking into account a significant body of research into the issue in question it may be claimed that this issue has been given careful consideration. However, there is a marked divergence in scholars' opinions on the legal nature of commercial law.

Hence, this article is aimed at justifying the integrity and cohesiveness of commercial law as a field of law and providing reasons for the topicality and expediency of its existence by means of examining its main institutions.

1. The concept, subject and methods of commercial law

The becoming and development of commercial law as a brunch of law is inextricably linked by the technical and social revolution of the beginning of the last century. In some countries the formation of the commercial law as independent branch of law occurred on the basis of the trade and industrial

laws. In the other countries the commercial law became an independent branch of law based on legislation, which appeared in connection with the regulation of a new type of public relations related to the organization and implementation of economic activity.

In the legal system of Ukraine, the commercial law is a relatively young branch of law. In the formative period of Ukraine as an independent state, the subject of legal regulation narrowed to entrepreneurial activity, owing to with the new trends of national legal science. However, nonprofit business activity was not include in the sphere of legal regulation and it did not correspond to reality of the economic situation in the country.

The final understanding of the subject of legal regulation was formed only with the adoption on January 16, 2003 of the Commercial Code of Ukraine (hereinafter CC Ukraine).[1] In accordance with article 1 the subject of commercial-legal regulation are commercial relations. They arise as the result of the process of organizing and implementation commercial activities between entities and also between these entities and other participants of economic relations in commercial sphere.

The modern legal doctrine has a dominant approval that the subject of commercial law is defined by two concepts: functional – "organization of commercial activity" and subjective – "implementation of commercial activity".

The functional aspect of the subject of legal regulation is defined by the national legislator – the activity of subjects of the commercial relations in the social production, which is aimed to manufacturing and selling the products, to completing of the work or the provision of value-added services having price certainty.

Commercial activity can be carried out on a business or non-profit basis. In the first case, making profit as the goal of doing business, in the second – about achieving a certain socio-economic result without making a profit.

The method of commercial law is a set of methods for the regulatory impact of the norms of commercial law on the behavior of subjects of commercial legal relations.

1. The method of prescriptions: provides for the right to make legally significant decisions by the governance body (property owner) in relation to a subject subordinate to it (the decision of the owner to create an enterprise or reorganize it, liquidate it, issue a license or cancel it, place a state order at enterprises which operating on the basis of state property, enterprises which are monopolist).

2. The method of autonomous decisions – allows commercial entities to make independently (but within their competence) legally significant

[1] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст. 144.

decisions and the obligation of all entities not to impede the adoption and implementation of these decisions.

3. The method of coordination ensure that the adoption of legally significant decisions by agreement between the parties, each of which is not at liberty to impose its conditions on the other side; the decision is made by compromise (conclusion of a commercial contract).

4. The method of recommendations provides for the publication by the competent authorities of offers (recommendations) addressed to commercial entities on a specific (preferably for the company, effective) and behavior (course of action) in the field of business (sample commercial contracts, sample founding and internal legal documents of commercial organizations, including open joint stock companies).

There is a theory about the existence of a single (complex) method of legal regulation. This is a method of equal subordination of all participants in commercial relations to the public commercial order, provides an optimal combination of private and public interests and creates partnership and upstanding relations in the field of business. (The position of its opponents is based on the fact that the state in the person of governance bodies has a special status, in particular, it defines those rules of public commercial order, which subsequently must be subordinated on an equal basis with other participants in economic life. However, the country (represented by governance bodies) not only establishes , but can also change these rules, testifies to its special position among participants in commercial relations – as the organizer of economic life in the country).

2. The principles of commercial law

The subject of legal regulation of commercial law is relations, which arise in the process of organizing and implementing commercial activities in the field of economics. The principles of the commercial law based on the general principles of economics[2]:

1. The optimal combination of relations of commercial entities of self-regulated market and state regulation of macroeconomic processes.

2. Economic variety – the government recognizes the possibility of existence a various forms of ownership (state, communal, collective, private) and various forms of management.

3. Recognition of all subjects of property rights equal before the law, prevention of unlawful deprivation of property.

4. The provision by the government the protection of the rights of all subjects of the right of ownership and management. This is one of the constitutional principles, which is closely related to the above and which is

[2] Щербина В.С. До питання щодо принципів господарського права. *Вісник Південного регіонального центру Національної академії правових наук України*. 2014. № 1. С. 88.

an important guarantee for the realization by entities of the right of ownership and derivative rights of commercial management and operational management, aand also other rights with which they are entitled as commercial entities.

5. The right of everyone to entrepreneurial activity not prohibited by law.

The action of this principle is formulated in art. 43 of the Commercial Code of Ukraine[3] as "freedom of entrepreneurial activity", at the same time, has certain limitations:

a) characteristics of the implementation of certain types of entrepreneurship are established by legislative acts;

b) a list of types of commercial activities, subject to licensing, further a list of types of activities in which entrepreneurship is prohibited, are established exclusively by law;

c) the implementation of entrepreneurial activity is prohibited by public authorities and local authorities;

d) the entrepreneurial activity of officials and officers of of public authorities and local self-government bodies is limited by law in cases provided for in the second part of art. 64 of the Constitution of Ukraine.

e) providing the government with protection of competition in entrepreneurial activity, preventing abuse of monopoly position in the market, unlawful restrictions on competition and unfair competition.

d) social orientation of the economy

This constitutional principle in the context of the legal regulation of relations in the economic sphere means the implementation by the government (in particular, by establishing the appropriate organizational and economic powers of public authorities, local authorities, other authorized bodies and organizations) in the socio-economic sphere of the social policy of consumer protection, policy wages and incomes, employment policies, social protection and social security policies.

3. The concept, signs and types of commercial relations

The implementation of commercial activity is impossible without the interaction of its entities, without their entry into commercial relations. The concept of commercial relations and commercial activity is very close in meaning. They indicate specific behavioral acts of various entities in the field of business. There are various relations, which are arising and operating in the economic sphere. They are related to economic activity, not all of which relate to commercial activity (for example, tax, civil, labor, etc.). Commercial relations have their own specificity[4]:

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[3] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст. 144.

[4] Хозяйственное право: учебник / В. К. Мамутов, Г.Л. Знаменский, К. С. Хахулин и др. ; под ред. В. К. Мамутова. Київ: Юринком Интер, 2002. С. 11.

• sphere of arise – commercial systems of any level (government – the economy of the country, territorial – the economy of a particular region, local – commercial entities / commercial organizations);

• settlement of these relations through legal commercial norms;

• special subjective composition (business entities are a mandatory participant in these relations);

• the object of commercial legal relations is property in the form of things and incorporeal semolina / intangible assets, necessary for the organization and direct implementation of commercial activities;

• content – subjective rights and obligations of participants relations in the business sphere;

• a combination of property and organizational elements;

• reflection in the commercial legal public relations.

In the process of carrying out commercial activities, horizontal or economic-production, vertical or organizational-economic and intraeconomic relations arise. It is further understood that these types of relationships are not separable.

Commercial-production relations are property and other relations that arise directly during the implementation of economic activities by commercial entities.

Organizational and business relations are understood as relations associated with the manifestation of public interest through the interaction of commercial entities and business entities in the process of managing economic activity.

Intraeconomic relations arise between the structural units of the commercial entity, and also between the commercial entity and its structural unit.

4. Objects of commercial legal relations

The objects of commercial legal relations are property in the form of things and incorporeal property/intangible assets (including objects of intellectual and industrial property rights), necessary for the organization and direct implementation of commercial activity. A special type of property of business entities is securities.

A «thing» as a legal category is defined in art. 179 of the Civil Code of Ukraine[5]: “the subject of the material world in respect of which civil rights and obligations may arise”.

In order for things to become an object of commercial turnover, they must meet the signs enshrined in the first part of art. 139 of the Commercial Code:

• have a value expression;

• produced or used in the activities of business entities;

[5] Цивільний кодекс України від 16 січня 2003 року № 435-IV. *Відомості Верховної Ради України.* 2003. № 40. Ст. 356.

• displayed on the balance sheet of these entities or accounted for in other statutory forms of recording property of these entities;

• displayed on the balance sheet of these entities or accounted for in other statutory forms of recording property of these entities.

Intangible assets mean as a complex of incorporeal objects that have property value and are protected by the subjective law. Intangible assets are a complex and multi-level structure, consisting of the main objects (intellectual property rights and the right to use property) and auxiliary (rights that ensure the effective implementation of comercial activities that are organizational in nature and cannot be alienated from the owner).[6]

Part two of art. 139 of the Commercial Code of Ukraine contains a classification of the property base of commercial entities depending on the economic form that the property acquires in the process of carrying out economic activities:

• fixed assets;

• current assets;

• cash;

• goods.

The concept of fixed assets is defined in Regulation (standard) of accounting 7 "Fixed assets". These are tangible assets that an enterprise contains for the purpose of using them in the production or supply of goods, the provision of services, leasing to other persons or for administrative and social cultural functions, the expected life of which is more than one year (or the operating cycle, if it is longer than one year).

Fixed assets include: buildings, structures, machinery and equipment, equipment, tools, industrial equipment and accessories, household equipment and other durable property, classified by law as fixed assets.

Working capital – this material values that usually are consumed during one production cycle and immediately transfer their value to the finished product. The Commercial Code of Ukraine relates to working capital raw materials, fuel, materials, low-value items and items that quickly wear out, other property for production and non-production purposes, referred by the legislation to working capital.

Money in the property of economic entities is cash in national and foreign currency, intended for the implementation of commodity relations of these entities with other entities, as well as financial relations in accordance with the law.

Goods can be expressed in the form of finished products, work and services performed.

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[6] Гусь А.В. Правовий режим нематеріальних активів у складі майна державних вищих навчальних закладів: автореф. дис. ... канд. юрид. наук. спец.: 12.00.04. Київ, 2015. С. 10, 13.

A special type of objects of economic legal relations is **a document of the established** form with the relevant details that certifies monetary or other property law. It determines the relationship between the issuer of the security (the issuer of the security) and the person having rights to the security, and provides for the fulfillment of obligations on such a security, as well as the possibility of transferring rights to a security and rights on a security to other persons[7].

The main difference between the legal regime of certain types of property of business entities is the competence of the owner, which he exercises in relation to the objects belonging to him. The working capital and fixed assets are used on the basis of the competence of ownership and use, and goods and money – orders.

There are a special funds and reserves in the property of commercial entities – the funds of the enterprise / economic organization that do not directly participate in the production process, but are used for a special purpose (purpose) provided for by the legislation or the charter of the enterprise (constituent document of the economic organization). Special funds and reserves are divided into mandatory (that is, provided for by law as such) and optional, created at the discretion of the commercial entity or property owner[8].

The basis of the legal regime of property of commercial entities is the right of ownership and other property rights. According to Art. 134 of the Commercial Code of Ukraine, the right of ownership is the basic property right in the field of managing, according to which a business entity that carries out economic activity on the basis of the right of ownership, at its discretion, alone, or together with other entities, owns, uses and disposes of property belonging to him (him). Also including the right to provide property to other entities for use on the basis of ownership, the right of economic management or the right of operational management, or based on other forms of the new regime of property provided by the Civil Code of Ukraine[9].

The authority of the owner is regulated in Art. 135 of the Civil Code of Ukraine, where it is indicated that the owner of the property has the right to establish commercial organizations individually or jointly with other owners on the basis of property owned by him (or them). Carry out economic activities in other organizational and legal forms of economic are not prohibited by law, determining the purpose at his own discretion and the subject of economic activity, the structure of the enterprise formed by him (or them). The

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[7] Про цінні папери та фондовий ринок: Закон України від 23 лютого 2006 року № 3480-IV. *Відомості Верховної Ради України*. 2006. № 31. Ст. 268.

[8] Вінник О.М. Господарське право. Навчальний посібник. К.: Правова єдність, 2009. С. 206.

[9] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст.144.

composition and competence of his (or their) management bodies, the procedure for using property, other issues sys to manage the activities of a economic entity, as well as to decide on the cessation of economic activities of economic entities founded by him (or them) in accordance with the law[10].

The next property rights in commercial law are the right to conduct business and the right to operational management.

The right to conduct business is the proprietary right of a business entity that owns, uses and disposes of property assigned to it by the owner (the body authorized by it), with the restriction of the authority to order certain types of property with the consent of the owner in cases provided for by the CC and other laws.

The operational management right is understood as the property right of the commercial entity that owns, uses and disposes of the property assigned to it by the owner (body authorized by him) for carrying out non-commercial economic activities, within the limits established by the CC of Ukraine and other laws, as well as property owner (authorized by him authority).

The rights of commercial management and operational management are limited material rights, the subjects of which the powers of ownership, use and disposal of property do not belong in full, but within the limits established by applicable law and the owner[11]. In the case when the real estate being the subject of the dispute is in state ownership and assigned to the plaintiff on the basis of economic management or operational management, according to the contents of art. 136, 137 of the Civil Code Ukraine. Legal competencies of the title holder is protected by law in accordance with the provisions established for the protection of property rights.

The nature of the activities of the subjects of commercial management and operational management also determines the differences in the content of the scope of authority that they receive from the owner of the property assigned to them. The right of economic management, owned by the enterprise as a commercial organization, by virtue of this is wider than the right of operational management, which may belong to non-profit enterprises, institutions or state-owned enterprises. The object of these rights are property complexes fixed on the balance sheet of the respective legal entities (while remaining the objects of the property rights of their founders)[12].

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[10] Господарський кодекс України: навчальний посібник / ред. Н.О. Саніахметова. Харьків: Одісей, 2013. С. 98.

[11] Огляд судової практики розгляду Касаційним господарським судом у складі Верховного Суду справ у спорах щодо права власності (за період з 01.01.2018 по 01.11.2018). URL: https://ips.ligazakon.net/document/ view/VSS00256 (дата звернення: 26.10.2019).

[12] Труш І.В. Правовий режим майна комунального підприємства. *Економіка та право*. 2012. № 2.

Commercial Code determines that commercial activity can also be carried out on the basis of other property rights (ownership, use, etc.) provided for by the Civil Code of Ukraine. The property of economic entities can be fixed on another right in accordance with the terms of the contract with the owner of the property.

5. The concept, signs and types of subjects of commercial legal relations

The current CC of Ukraine does not contain a definition of the "subject of economic legal relations". According to art. 2 of the Criminal Code, economic entities, consumers, government bodies and local self-government bodies endowed with economic competence. Public and other organizations acting as founders of economic entities or exercise organizational and economic powers in relation to them, are parties to economic relations: basis of property relations**.**

However, not all of the listed categories of persons are subjects of economic legal relations (commercial law). Such entities are only those participants in relations in the economic sphere who are inherent in the totality of the necessary attributes for this:

• direct implementation of commercial activity;

• establishment (acquisition of the status of a economic entity) in the order which is prescribed by law;

• the availability of property which is necessary for the implementation of the selected entity or assigned to him economic activities or management of such activities;

• the existence of a commercial legal personality, that is, the ability recognized by the government for a particular subject of commercial relations to be a subject of law.

The concept of the subject of commercial legal relations is defined only in the doctrine of economic law. It is understood as participants in commercial relations who directly carry out commercial activity or manage such activity, created in the order prescribed by law, have the property necessary for carrying out such activity, and have the economic personality[13].

The entities of commercial legal relations are extremely diverse, however, article 2 of the CC contains their approximate list:

1. Commercial entities.
2. Consumers.
3. Public authorities and local self-government bodies mandated with commercial competence.

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[13] Вінник О.М. Господарське право. Навчальний посібник. К.: Правова єдність, 2009. С. 62.

4. Citizens, public and other organizations that act as founders of commercial entities or exercise organizational and economic powers in relation to them on the basis of property rights.

5. At the same time, entities of commercial legal relations, depending on the form of ownership on the basis of which they operate. It be divided into state, communal, collective, private and mixed (operating on the basis of two or more forms of ownership).

6. Fundamentals of the legal status of commercial entities

Commercial entities make up the largest and most important group for relations in the field of economic, the main task of which is the organization and implementation of commercial activity in all spheres of social production.

As a general rule, commercial entities include:

1) commercial organizations;

2) entrepreneurs of Ukraine, foreigners and stateless persons who carry out commercial activities and are registered in the order prescribed by law.

Commercial organizations – legal entities established according to Civil Code of Ukraine, state, communal and other enterprises created in accordance with this Code, also other legal entities engaged in commercial activities and registered in the order prescribed by law[14].

Entrepreneurs are recognized as commercial entities in the case that they carry out economic activities provided that they are registered as an entrepreneur without the status of a legal entity according to art. 58 of the Civil Code of Ukraine. They can carry out entrepreneurial activity on their own, together with other entrepreneurs (on a contractual basis), without creating a legal entity or creating a legal entity (private enterprise or commercial company – traditional, consisting of several people, or society of one person).

The specific of the legal personality of entrepreneurs consists in the scope of their property liability – they are responsible to creditors with all their property, with the exception of property, which, according to the current legislation, is not levied[15].

Besides, according to the third part of art. 55 of the Criminal Code of Ukraine, commercial entities, depending on the number of employees and income from any activity for the year, can be classified as micro, small, medium and large enterprises[16].

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[14] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст. 144.

[15] Гусь А.В. Щодо аналізу правового статусу учасників правовідносин із нематеріальними активами. *Закон и жизнь*. 2013. № 8. С. 125.

[16] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст. 144.

Essential for the functioning of commercial entities is not only the legitimization of their activities in the manner prescribed by law, but also their implementation of certain types of activities through licensing and patenting.

7. Features of the legal status of subjects of organizational and commercial powers

The entities of organizational and economic powers is the entity of economic legal relations (government authority, local government, commercial organization, citizen, foreigner, stateless person), which manages the commercial activities of commercial entities and/or its regulation (of which control is a component) under legal grounds and factual possibilities for this[17].

For the classification of entities of organizational and commercial powers are the grounds for the occurrence of such powers. The National Economic Legal Doctrine identifies legal (regulatory acts, statutory documents of commercial entities, commercial agreements) and actual (property relations, relations of control and subordination, vesting with organizational and commercial powers to regulate the commercial activities of commercial entities of various forms of ownership, delegation of such powers other entities) grounds for the emergence of organizational and commercial powers.

Thus, the subjects of organizational and commercial powers include:

a) public authorities;
b) local authorities;
c) commercial associations;
d) owners of the property.

Public authorities and local government are not management subjects, they can realize the economic competense (complex form the articles of conduct, functions, powers, rights and duties of public authorities, local government or their public servant or public servant is determined by a constitution[18]) through corresponding public or communal institutions.

Economic associations. The distinctive feature of this subject of organizatinal and economic powers is that the creation of economic association with legal entity, an actual subject of the indicated plenary powers is an economic organization from that economically and/or other members of association depend and the legal entity itself is the economic association. In case establishment of economic association without their status of legal entity (holding groups, industrially financial groups (IFG)) separated participant of the group comes forward as the subject of organizational and economic powers : holding company, and in IFG – main enterprise.

[17] Кравець І.М. Правове становище суб'єктів організаційно-господарських повноважень: монографія. К.: Юрінком Інтер, 2010. С. 51.

[18] Популярна юридична енциклопедія / В.К. Гіжевський [та ін.] ; голова ред. кол. І. С. Чиж. К.: Юрінком Інтер, 2003. С. 210.

Organizational and economic powers regarding owners of property regarding unitary enterprises and economic societies of one person are determined in the article 135 Commercial Code of Ukraine. Regarding to the property owners of corporative type organizations, then organizational and economic powers appear in case of establishment between an owner and economic organization in regard to that there were corporate laws, relations of decision dependence in understanding in the third part of the article 126 Commercial Code of Ukraine.[19]

8. General provisions on an economic agreement

Category "agreement" and "economic agreement" are correlated to a category as a common and special. As the special category of legislation and right in Ukraine an economic agreement has certain legal framework. Term "economic agreement" is widely used in a legislation, legal literature and in economic practice. However a current legislation doesn't contain the decision for economic agreement, although the Commercial code of Ukraine sanctified him a whole head 20 "Economic agreements" (articles 179–188).

The Commercial Code of Ukraine does not render the general decision of economic agreement, however, the analysis of his positions testifies in absence of general approach in relation to understanding of agreement. Thus, in one case an agreement is examined as a legal fact on the basis of that there are economic and contractual obligations (articles 179, 180 Commercial code of Ukraine). In the second case there is his equation with economic obligations (article 189 Commercial Code of Ukraine is named "Price in economic obligations", in spite of the fact that actually the question is about a price as a substantial condition of economic agreement; article 207 Commercial code of Ukraine shows a possibility for a confession about invalidating an economic obligation, it is celled by the participants of economic and contractual relationships with violations even one of their economic competencies, and also separate terms of an economic obligation). In the third – as a form that is acquired by obligations (article 186 Commercial code of Ukraine, which is named "Entering into organizational and economic contracts", envisaged, that contractual registration of organizational and economic obligations can come true by the participants of economic relations on the basis of free will).

An economic legal relationship between two or more subjects, maintenance of which is their contractual obligations to operate in a certain way: to pass and accept property, execute work, render services etc. As the special legal class an economic agreement has the special signs allowing to dissociate him from other types of agreements, including civil:

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[19] Кравець І.М. Правове становище суб'єктів організаційно-господарських повноважень: монографія. К.: Юрінком Інтер, 2010. С. 137.

- special subject structure (usually economic agreements consist with participation of the subjects (subject) of management; orientation on providing on economic activity from the participants of contractual relations : logistical support of their activity, implementation of the products (works, services) produced by them, joint activity about creating a new subject of management (of economic organization), joint investing, co-ordination in economic activity etc.;
- close connection with planned process, foremost with the a planning of participants in economic relations, and also with national (in relation to subjects, functioning on the national pattern of ownership, enterprises and monopolists) and communal planning (in relation to enterprises and organizations of communal pattern of ownership);
- combination is in economic agreement of property (making or transmission, of the products, its payment etc.) and organizational elements;
- limitations of contractual freedom with the purpose of consumer protection (requirements to quality and safety of commodities, works, services) and general interests;
- possibility of retreat from principle of equality of parties (state contracts, contracts of adhesion, agreements concluded within the framework of scope contracts).

9. Founding for violation of terms of agreement – grounds and borders of economic and legal responsibility

As well as any other legal responsibility, economic and legal responsibility is base of certain legal grounds. Firstly, its normative grounds,that is a totality of law rights about responsibility of participants in economic relations. The second founding is economic and legal personality of offender (debtor) and victim (creditor). On application of responsibility in this kind there can parties of legal relationships be management subjects, public authorities and local governments are provided with an economic competencion , and also other participants of economic relations (part 1 article 2; part 1 article 216 Commercial code of Ukraine). The third founding is named legal and actual. She is set in part 1 article 218 Commercial code of Ukraine, in obedience to that founding of economic and legal responsibilities of participant in economic relations is the offence accomplished by him in the field of management[20]. These can be illegal acts or person omission – economic offender that violates rights and legal interests of victim (creditor) or their realization.

This foundation consists of four elements, that in the theory of right which are called the terms of economic and legal responsibility fact of economic offence, losses, causal connection between illegal behavior of violator and

[20] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18–22. Ст.144.

caused to the victim by losses, guilt of offender. Totality (structure) of four adopted terms forms the actual legally economic responsibility.

Article 219 Commercial code of Ukraine set the borders of economic and legal responsibility, and also cases in which responsibility size of participant in economic relations can be decreased or such subject can be released from responsibility[21].

– methods of providing execution of obligations

According to part 1 article 199 Commercial code of Ukraine in the relation of providing a fulfilled commitment from participants of economic relations corresponding positions of the Civil code of Ukraine are used. In accordance with an article 546 Commercial code of Ukraine fulfilled commitment can be provided by a forfeit, guarantee, mortgage, withholding, advance. The indicated article, as well as commented, does not contain the exhaustive list of measures to provide a fulfilled commitment, and that is why law or agreement can set other types to provide a fulfilled commitment. For example, in obedience to an article 66 Law of Ukraine "On economic societies"[22] participants of general partnership bear solidarity in responsibility about the obligations of society by all of their property. Setting such type of civil liability, a legislator gives to the contractors of the legal entity, created in form of complete society, additional legal methods of providing an execution of obligation. Some forms of non-cash settlements (letter of credit, collection, pre-pay etc.) or even some types of agreements (insurance, credit, leasing, factoring etc.) are provided with securing properties.

Most methods of providing an execution of obligations have accessory character and at ineffectiveness of primary obligation or the termination of its action ceases to exist. But there are such methods of providing that have independent character, for example, guarantee.

Each of the methods to provide an execution of obligations has its certain features conditioned by a degree and influence mechanism on the debtor, but subordinate to one general goal – urge a debtor to carry out an obligation properly.

Only a valid obligation is secured. In this case, the invalidity of the primary obligation(requirements) draws ineffectiveness of transaction on providing the execution. But this commitment does not draw ineffectiveness in the primary obligation.

A transaction on providing the execution of obligation is accomplished in writing form. This requirement is mandatory, therefore, its violation leads to the insignificance of the transaction. Some of methods on providing the execution of obligations requires not simply writing form, but also notarized

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[21] Господарський кодекс України 16 січня 2003 року № 436-IV/ *Відомості Верховної Ради України*. 2003. № 18-22. Ст.144.

[22] Про господарські товариства: Закон України від 19 вересня 1991 року. *Відомості Верховної Ради України*. 1991. № 49. Ст. 682.

form of their realization and even special registration, for example, agreement of mortgage.

As for the obligation of state customers under agreements on the basis of government order (state contract), then they are provided by the state represented by Cabinet of Ministers of Ukraine. At the same time, the state guarantees payment for products, work, services under the state contract at the expense of the state budget.

Also, in obedience to paragraph 2 of "Orders of grant of state guarantees on the obligations of Public mortgage institution" ratified by the decision from Cabinet of Ministers of Ukraine from the august 3rd 2006 № 1094. Government guarantees are given on the obligations of public mortgage institution in a size that not exceeds the volume set by Law on the State budget of Ukraine on a corresponding year, when using in full the amount of loans, the repayment of which is guaranteed by the state, in accordance to paragraph 4 of the real "Order". The term of implementation such obligations does not exceed seven years[23].

CONCLUSIONS

Taking into account everything mentioned above, commercial law can be defined as a system of legal norms that regulate business relations in the process of organising and running business activities.

The totality of business relations that are established between businesses, their contracting parties and bodies of administration in the process of the organisation and running of business activities, the manufacturing and realisation of goods, the execution of work, and the provision of services constitutes the subject-matter of commercial law.

Commercial law comprises a range of financial-legal and civil-legal norms that in their totality regulate business relations. Financial-legal norms as the rules of conduct that are established by the state are reflected in legal rights and duties of natural persons and business entities. The subject-matter of financial-legal norms is rules of conduct that arise in the process of business activities of the state and provide for the sound management of material, labour and financial resources; civil-legal norms regulate the relations between business (entrepreneurs).

Commercial law as a science regulates the most important areas of economy irrespective of the form of ownership. In their business activities, state, private, collective, individual, family and joint enterprises must act in accordance with the Commercial Code of Ukraine and laws of market-based economy. Commercial law comprises many economic and legal norms that

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[23] Питання надання державних гарантій за зобов'язаннями Державної іпотечної установи: постанова Кабінету Міністрів України від 3 серпня 2006 р. № 1094. *Офіційний вісник України*. 2006. № 32. Ст. 84.

regulate entrepreneurship, business, finance and credit relations, assessed taxation, privatization, antitrust and international business activity, etc.

Sources of commercial law may be also legislative and regulatory framework of government bodies and bodies of administration. The norms of commercial law are found in the norms of international law, the Constitution of Ukraine, laws of Ukraine, decrees and regulations of the Cabinet of Ministers of Ukraine, President's decrees, decisions of the state executive bodies and local authorities, orders and instructions of the Ministry of Finance of Ukraine, the National Bank of Ukraine, the State Taxation Administration, etc.

Methods of commercial law are the totality of ways of regulatory control of the norms of commercial law and conduct of subjects of business legal relations.

SUMMARY

The present article examines some aspects relating to the issue of legal regulation of business relations. Consideration is given to the issue of the legal nature of economic relations in the light of current contradictions between civil and economic codification. The article concentrates on the issue of penetration of public and private origins in the aforementioned sphere. The article aims at providing grounds for identifying commercial law as a special field in the national law system.

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3. Хозяйственное право: учебник / В. К. Мамутов, Г.Л. Знаменский, К. С. Хахулин и др. ; под ред. В. К. Мамутова. Київ: Юринком Интер, 2002. 912 с.
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8. Господарський кодекс України: навчальний посібник / ред. Н.О. Саніахметова. Харьків: Одісей, 2013. 680.

9. Огляд судової практики розгляду Касаційним господарським судом у складі Верховного Суду справ у спорах щодо права власності (за період з 01.01.2018 по 01.11.2018). URL: https://ips.ligazakon.net/document/view/VSS00256 (дата звернення: 26.09.2019).

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Information about the author:
Lazur Ya. V.,
Doctor of Law, Professor,
Dean of Law Faculty,
Uzhhorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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PREVENTIVE AND JUDICIAL LEGAL PROCEDURES FOR RESOLVING CONFLICTS IN MUNICIPAL LAW

Lenher Ya. I.

INTRODUCTION

The present stage of legislation development is characterized by a large number of legal acts, moreover, municipal-legal regulation is actively developing. Most often, legal conflicts arise in the process of lawmaking and law enforcement activities. They constitute contradictions between legal norms and between legal acts.

Numerous conflicts of legal acts indicate broken links, especially within the system of legislation, which points to problems of its development and efficiency of the application.

The causes of legal conflicts are laid both in the lawmaking process and in law enforcement activities. Nowadays, the reasons, which are caused by shortcomings in the application of rules, ways and methods of legal technique, predominate to a greater extent, which leads to numerous conflicts of municipal-legal acts. In turn, as practice shows, the adoption of a large number of legal acts leads to quite frequent amendments to them, which contributes to the emergence of legal contradictions.

In most cases, the proper interaction of public authorities with each other, as well as between public authorities and local self-government bodies, is complicated by emerging legal conflicts in the area of their competence delineation. First of all, a complete and detailed analysis of the causes of legal conflicts in municipal law allows correctly applying a certain method to resolve these contradictions.

General rules for resolving legal conflicts are important in resolving legal conflicts in municipal law. They presuppose that in case of contradiction of normative legal acts of different legal force, the act having the highest legal force is applied; in case of contradiction between general and special legal acts, a special legal act shall be applied; in case of contradiction between a normative legal act adopted earlier and a legal act adopted later, a normative legal act adopted later applies; laws and other legal acts should not contradict the Constitution. General rules for resolving legal conflicts in municipal law play an important role in overcoming and resolving such conflicts.

Currently, legislation requires prompt resolution of legal conflicts. Overcoming and eliminating municipal-legal conflicts is achieved through effective ways of resolving them. The ways of resolving legal conflicts in municipal law are aimed at identifying, overcoming and eliminating the latter.

1. Basic procedures for resolving conflicts in municipal law

Law regulates social relations, including controversy, with the help of a special tool of social management – the mechanism of legal regulation[1].

Legal regulation should be understood as the activity of the state and society in the preparation and adoption of regulatory legal acts[2]. In this process, the leading role belongs to the state, its legislative and executive bodies. Local self-government bodies issue regulations within their competence.

Legal regulation is performed with certain and quite specific legal and social objectives[3]. The general legal goals of legal regulation are centered on creating a stable legal order in society, as well as bodies, institutes and institutions capable of providing protection and defense against violations of those rights, freedoms and legitimate interests, citizens and other persons, which are enshrined by the current rules of law. The overall social goals of legal regulation are aimed at achieving socially beneficial results, and above all at creating the necessary conditions for society's progressive development and prosperity.

Legal methods include legal norms, enforcement acts, contracts, legal facts, subjective rights, legal obligations, etc.[4].

In legal science, there are different ways of eliminating and overcoming legal conflicts, which are covered by the term "resolution" of the latter. Since the difference between eliminating and overcoming collisions is rather conditional, most scholars employ only the notion "conflict resolution", therefore, this study utilizes the term "conflict resolution", which includes all ways of conflict elimination and prevention.

It includes the following elements:

1) general principles, or fundamental rules of resolving conflicts in municipal law;

2) availability of normatively fixed and detailed procedures for avoiding and resolving conflicts in municipal law;

3) a statutory measure of liability for law violation.

The legal procedure is a special, statutory procedure for the implementation of legal activity, ensuring the implementation of substantive law and substantive relationships based on them, protected from violations by legal sanctions[5].

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[1] Шундиков К. В. Правовые механизмы: основы теории. Государство и право. 2006. № 12. С. 14.

[2] Толстик В. А. Технико-юридические приемы выявления, устранения и преодоления формально-логических противоречий. Проблемы юридической техники. Новгород, 2000. С. 46.

[3] Скакун О. Ф. Теорія держави і права: підручник: пер. з рос. Харків: Консум, 2001. С. 230.

[4] Матузов Н. И., Малько А. В. Теория государства и права: учебник. 2-е изд., перераб. и доп. Москва: Юристъ, 2005. С. 216.

[5] Егорова Н. Е., Иванюк О. А., Потапенко В. С. Проблемы противоречий в законодательстве и пути их решения. Журнал российского права. 2006. № 11. С. 55.

The procedures for the prevention and resolution of conflicts in municipal law is a statutory procedure for authorized entities' exercising the legal activity, aimed at preventing and resolving contradictions arising from the adoption of acts of local self-government bodies and their officials when resolving issues of local importance on the part of the population directly or indirectly through local government.

The above procedures are logically divided into two types, depending on the entities that perform them and their objectives. These fall into preventive (precautionary) and judicial.

Preventive legal procedures are statutory and detailed procedures for exercising the legal activity of authorized entities aimed at preventing and avoiding legal contradictions in municipal law when issuing acts of local self-government bodies and their officials in the field of local self-government.

They include:

1) forms of interaction between state authorities and local self-government aimed at conflict prevention (control and coordination);

2) legal appraisal of municipal-legal acts.

The basic law of our state in Article 19 of the Constitution of Ukraine stipulates that public authorities and organs of local self-government, their public servants are under an obligation to operate only on foundation, within the limits of plenary powers and in a method, that is foreseen by Constitution and laws of Ukraine[6].

Article 71 of the Law "On Local Self-Government" defines the guarantees for local self-government, its bodies and officials[7]. The indicated guarantees stipulate that the executive authorities, their officials have no right to interfere with the legitimate activities of bodies and officials of local self-government, and also to resolve issues that the Constitution of Ukraine[8] and other laws consider to be the powers of local self-government bodies and officials, except in cases the powers delegated to them by councils and in other law-stipulated cases. Article 20 of the Law stipulates that state control over the activity of bodies and officials of local self-government may be exercised only on the basis, within the powers and in the manner stipulated by the Constitution and laws of Ukraine, and should not result in the interference of state authorities or their officials in the exercise by local governments of their own powers[9].

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[6] Конституція України: станом на 1 верес. 2016 р.: відповідно офіц. тексту. Харків: Право, 2016. 82 с.

[7] Про місцеве самоврядування в Україні: Закон України від 21.05.1997 р. Відомості Верховної Ради України. 1997. № 28. Ст. 34. URL: http://zakon2.rada.gov.ua/laws.

[8] Конституція України: станом на 1 верес. 2016 р.: відповідно офіц. тексту. Харків: Право, 2016. 82 с.

[9] Про місцеве самоврядування в Україні: Закон України від 21.05.1997 р. Відомості Верховної Ради України. 1997. № 28. Ст. 34. URL: http://zakon2.rada.gov.ua/laws.

The Constitutional Court of Ukraine has aptly commented on the ability of prosecuting authorities to challenge acts of local self-government bodies in its resolution of April 16, 2009 No. 7- рп/ 2009 in the case of Kharkiv City Council's constitutional submission regarding the official interpretation of the provisions of Part 2 of Article 19, Article 144 of the Constitution of Ukraine, Article 25, Part 14 of Article 46, Parts 1, 10 of Article 59 of the Law of Ukraine "On Local Self-Government in Ukraine". It explains that supervision over observance of human and citizen's rights and freedoms, observance of laws on these issues are entrusted to the Prosecutor's Office of Ukraine by the bodies of local self-government[10].

According to Article 19 of the Law of Ukraine "On the Prosecutor's Office", the subject of supervision over the observance and application of laws is, in particular, the observance of laws on the inviolability of the person, socio-economic, political, personal rights and freedoms of citizens, protection of their honor and dignity, if the law does not provide another order of protection of these rights[11]. The Constitutional Court of Ukraine states that the prosecutor's right to appeal to the court of local self-government bodies' resolutions is not absolute, since the Constitution of Ukraine stipulates that its norms are directly applicable norms, and therefore, appeals to the court for the protection of constitutional rights and freedoms of man and citizen, as well as the right to appeal in court of local self-government bodies' resolutions, are guaranteed to each directly on the basis of the Constitution of Ukraine (Article 8, part 3, Article 55, part 2)[12].

Preventive procedures should be considered as appropriate forms of interaction between public authorities and local governments aimed at resolving legal conflicts. In addition, the procedure of carrying out legal appraisal of a local self-government body's normative-legal act and their officials' act can be considered as a preventive procedure.

The Basic Law of Ukraine provides for forms and means of exercising the right of territorial communities to local self-government and states that the organs of local self-government within the limits of plenary powers certain by a law make decisions which are obligatory to implementation

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[10] Рішення Конституційного Суду України у справі за конституційним поданням Харківської міської ради щодо офіційного тлумачення положень частини другої статті 19, статті 144 Конституції України, статті 25, частини чотирнадцятої статті 46, частин першої, десятої статті 59 Закону України «Про місцеве самоврядування в Україні» (справа про скасування актів органів місцевого самоврядування) від 16.04.2009 р. № 7-рп/2009. URL:http://zakon2.rada.gov.ua/laws/show/v007p710-09.

[11] Про прокуратуру: Закон України від 14.10.2014 р. № 1697-18. Відомості Верховної Ради України. 2015. № 2-3. 120 с. URL: http://zakon3.rada.gov.ua/laws/show/1697-18

[12] Конституція України: станом на 1 верес. 2016 р.: відповідно офіц. тексту. Харків: Право, 2016. 82 с.

on the proper territory (Part 1 of Article 144 and Part 1 of Article 59 of the Law of Ukraine "On Local Self-Government")[13].

In accordance with the regulations of the Executive Committee of Uzhhorod City Council, approved by the session resolution of June 8, 2016, part 2 clearly states that the preparation and submission of draft decisions to the Executive Committee of the City Council are carried out in accordance with the regulation requirements and the record keeping instructions in the city council and its executive bodies[14]. The preparation of the issues to be submitted to the meetings of the executive committee is carried out by the executive bodies of the city council, city communal enterprises and establishments, which is supervised by the deputies of the mayor, administrative office of the executive committee. The preparation and submission to the Executive Committee of draft decisions containing the features of a regulatory act are carried out in accordance with the procedure established by the Law of Ukraine "On the Principles of State Regulatory Policy in the Field of Economic Activity"[15]. The draft resolution, in addition to the rest of the issues, must contain a comprehensive assessment of the state of affairs in the relevant issue, taking into account previous resolutions, in order to avoid repetitions or contradictions[16].

Draft resolutions are mandatorily agreed as follows: pricing, tariff and regulatory policy issues is agreed with the head of the department of economy and business; financial issues – with the head of financial management; issues of communal property, housing and communal services and improvement – with the head of the department of urban economy; urban planning and land resources issues – with the heads of the department of urban planning and architecture, the department of land use[17].

Therefore, we can conclude that the regulations of the Executive Committee provide for the approval of draft resolutions with the relevant specialists. Regarding the proper legal appraisal of all the above acts, very little is stated in the regulation. Moreover, considering the sufficiently large number of municipal-legal conflicts in municipal-legal acts, we consider it expedient to add instructions that each draft of the relevant act, in addition to agreeing with the appropriate specialist, should still provide legal support and expert compliance not only with the established financial, economic,

[13] Про місцеве самоврядування в Україні: Закон України від 21.05.1997 р. Відомості Верховної Ради України. 1997. № 28. Ст. 34. URL: http://zakon2.rada.gov.ua/laws.

[14] Регламент Ужгородської міської ради: затв. рішенням сесії Ужгородської міської ради від 08.06.2016 р. URL: rada-uzhgorod.gov.ua.

[15] Про засади державної регуляторної політики у сфері господарської діяльності: Закон України від 26.11.2016 р. Відомості Верховної Ради України. 2004. № 9. С. 79. URL: http://zakon2.rada.gov.ua/laws/show/1160-15.

[16] Регламент Ужгородської міської ради: затв. рішенням сесії Ужгородської міської ради від 08.06.2016 р. URL: rada-uzhgorod.gov.ua.

[17] Ibid.

urban, and land indicators, but also envisage legal compliance in each case. Regulations are considered to be standard documents and these provisions should be spelled out more clearly and in detail since without proper legal support, expertise and compliance with the law and applicable sectoral laws, it is difficult to achieve an effective mechanism for preventing and resolving municipal legal conflicts. Thus, it is specified that the term of the draft decision endorsement at the Judicial Support Department should not exceed one working day, in some cases (if it is necessary to carry out a detailed legal appraisal and preparation of a legal expertise) – two working days. The above mentioned enables us to draw the following conclusion. The term of the draft legal act appraisal at a local government body is critically short and insufficient for a thorough legal analysis. In the mentioned paragraph it is noted that only in rare cases, if it is necessary to carry out a detailed legal appraisal, the term constitutes two working days. However, the list of such cases is not outlined or specified in any document. The insufficiency of the real time for legal appraisal of a municipal-legal act is often the reason for the emergence of municipal-legal conflicts. The Judicial Support Department often hires two people, one of whom is the head and the other his/her subordinate. Due to the insufficiency of time and physical resources, they are not always able to properly assess the flow of municipal acts submitted to the council session. Here again, the real cause of legal conflicts is traced.

The draft resolution is accompanied by an advisory signed by the head of the unit responsible for preparing the draft resolution. The draft resolution developer is responsible for preparing the draft resolution in accordance with the specified requirements. The Judicial Support Department carries out the inspection of the draft for its compliance with the requirements of the current legislation and regulations of the city council within two working days[18]. In this provision, it is possible to trace the parallel of compliance of a municipal act with a special branch law and a regulative act of the city council.

The draft resolution is scrutinized for the adequacy of the subject of the draft resolution to the powers of the city council executive committee; conformity of the draft resolution with the norms of the Constitution of Ukraine, laws of Ukraine, other acts of legislation; compliance of draft resolutions with the requirements of the norms of rule-making techniques, a system of rules and methods for the preparation of draft acts, which ensures the most complete and accurate compliance with the form of the normative provisions of their content, simplicity of presentation and accessibility[19].

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[18] Регламент Ужгородської міської ради: затв. рішенням сесії Ужгородської міської ради від 08.06.2016 р. URL: rada-uzhgorod.gov.ua.

[19] Примірна інструкція з діловодства в міністерствах, інших центральних органах виконавчої влади, Раді міністрів Автономної Республіки Крим, місцевих органах виконавчої влади: постанова Кабінету Міністрів України від 17.10.1997 р. № 1153. Офіційний вісник України. 1997. Число 43. 50 с.

According to the regulations of the respective bodies of local self-government, it is envisaged to perform a legal appraisal of draft resolutions of these bodies, which involves a special study of drafts for compliance with the requirements of regulatory acts with the provision of appropriate expertise. Legal examination of draft normative acts is carried out on the subject of their compliance with the Constitution and laws of Ukraine, the norms of the current international treaties of Ukraine, in particular with regard to compliance with the provisions of the Convention on the Protection of Human Rights and Fundamental Freedoms, existing normative legal acts of greater, equal or lesser legal efficacy, established principles for the construction of regulatory acts of this type, etc.

In the process of conducting an appraisal, the legal department solves only the issue of law.

According to the results of the legal appraisal, a motivated expert opinion is drawn up, which should contain the following information:

- compliance of the legal regulation subject with the competence of the relevant local self-government body;
- conformity of the draft normative legal act content to the Constitution and the laws of Ukraine[20];
- compliance of the form and text of the draft legal act with the rule-making technique;
- information on identifying corruptogenic norms and developing recommendations for their elimination;
- proposals for bringing the draft regulatory act into conformity with the Constitution and legislation of Ukraine (in case of detection of norms that do not comply with the Constitution or legislation of Ukraine)[21].

The expert opinion is initialled by the legal expert and signed by the head of the legal department.

In the case of a positive conclusion, based on the results of legal appraisal of a draft regulatory act, the director of the legal department endorses it in accordance with the established procedure[22].

Legal appraisal of a draft regulatory act, depending on the number of specialists involved, may be classified as one-person or group appraisals[23].

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[20] Про затвердження Методичних рекомендацій щодо проведення експертизи проектів нормативно-правових актів на наявність корупціогенних норм: наказ Міністерства юстиції України від 23.06.2010 р. № 1380/5. URL: http://zakon3.rada.gov.ua/laws/show/en/v3099323-11.

[21] Регламент Ужгородської міської ради: затв. рішенням сесії Ужгородської міської ради від 08.06.2016 р. URL: rada-uzhgorod.gov.ua.

[22] Ibid.

[23] Примірна інструкція з діловодства в міністерствах, інших центральних органах виконавчої влади, Раді міністрів Автономної Республіки Крим, місцевих органах виконавчої влади: постанова Кабінету Міністрів України від 17.10.1997 р. № 1153. Офіційний вісник України. 1997. Число 43. 50 с.

In the course of conducting one-person legal appraisal, the criteria of evaluation and generalization of individual evaluations by blocks of issues are unified, however, it does not eliminate the significant possibility of subjectivism, actual errors due to the lack of third-party control in the process[24].

Group legal appraisal involves the estimate of a draft legal act by a certain number of specialists. The quality of the group expert appraisal is ensured by engaging of legal specialists with various expertise and experience, who could fulfill all the tasks of the appraisal as fully as possible[25]. Group legal appraisal allows for a more comprehensive and objective estimate of a draft regulatory act, however, certain difficulties may arise during its conduct related to the formulation of the unanimous expert opinion[26].

The need for legal appraisal is conditioned primarily by the requirements of the Basic Law of Ukraine, namely – Part 2 of Article 19 of the Constitution of Ukraine[27], envisaging that public authorities and organs of local self-government, their public servants are under an obligation to operate only on foundation, within the limits of plenary powers and in a method, that is foreseen by Constitution and laws of Ukraine.

Thus, in order to enforce the rule of law in Ukraine, proclaimed by the Basic Law of Ukraine, state authorities and local self-government bodies, their officials are requested to comply with the requirements of the law, and legal appraisal of acts is a means to ensure this principle in action. In law enforcement practice, when dealing with legal conflicts, the general rules and principles of conflict resolution in legal norms and regulations are applied. Basically, they proceed from the principle of priority of one normative act over another. According to the theory of law, legal acts are in a certain hierarchy and their conformity is determined by common law principles and priorities.

Since legal conflicts are very diverse and ambiguous in their nature, there is currently no single solution or any universal way of resolving them. Thus, foreign experience may be interesting in this regard. For instance, the Basic Law of the Federal Republic of Germany contains special rules governing possible ways of avoiding legal conflicts. It is affirmed that in order to resolve inter-state disputes, the Federation accedes to agreements on international arbitration with the sole and universally binding jurisdiction.

[24] Муромцев П. И. Юридическая техника: некоторые аспекты содержания понятия. Проблемы юридической техники: сб. ст. / под ред. В. М. Баранова. Нижний Новгород, 2000. С. 209.

[25] Лисюткин А. Б. Юридическая техника и правовые ошибки. Государство и право. 2001. № 11. С. 75.

[26] Лилак Д. Д. Проблеми колізій у законодавстві України (теорія і практика): дис. ... канд. юрид. наук. Київ, 2004. С. 145.

[27] Конституція України: станом на 1 верес. 2016 р.: відповідно офіц. тексту. Харків: Право, 2016. 82 с.

Article 37 of the Basic Law envisages a mechanism for overcoming constitutional legitimacy violations[28].

Interference proceedings and a hierarchy of legal acts are also enshrined in the constitutions of foreign countries. For instance, the Spanish Constitution guarantees the principle of a hierarchy of legal acts, their mandatory publication, no retroactive effect, the right to legal defense, legal liability for abuse of power and its representatives. Special laws are issued for delegating legislative powers as outlined in Article 9 of the 1978 Spanish Constitution[29].

The correlation of legal acts is clearly and fully reflected in the Constitution of Poland. Thus, Section 3 "Sources of Law" of the above-mentioned act clearly outlines the following sources of universally binding law: the Constitution, statutes, ratified international agreements, and regulations. A ratified international agreement is regarded as part of the rule of law in the country and is directly applicable. If a ratified agreement constitutes an international organization, the rule it establishes applies directly with priority in the event of a conflict with law (Article 92 of the 1997 Constitution of Poland). The Basic Law of Poland also sets out a clear procedure for issuing by-laws (Articles 92–97)[30].

2. Legal act harmonization and monitoring as an effective and non-conventional method of resolving conflicts in municipal law

The attention should be paid to those ways of resolving conflicts that are characteristic of municipal law. The author of the article is inclined to believe that legal conflicts are easier to prevent than to eliminate. The first and one of the most important means of preventing a municipal-legal conflict is to indicate preliminary legal appraisal of acts and their harmonization. Predicting a contradictory situation in the regulatory field is particularly useful in preventing the occurrence of legal conflict. It is facilitated by the optimization of the relationship between theory and practice, and the analysis of the regulatory act's effectiveness. In its turn, the legislation systematization makes it inspectable and allows timely conflict detection.

The total concordance of normative legal acts helps to prevent conflicts in regulations issued by local governments. It is achieved through the harmonization of legal acts. Harmonization, in this case, should be understood as a process of ensuring coordination, comparison of the scope of powers of

[28] Основной Закон Федеративной Республики Германии. ФРГ. Конституция и законодательные акты: пер. с нем. / под ред. Ю. П. Урьяса. Москва: Прогресс, 1991 (наводиться за: Конституции государств Европейского Союза / под общ. ред. Л. А. Окунькова. Москва: Инфра–М-Норма, 1997. С. 181–234).

[29] Конституционное (государственное) право зарубежных стран: учебник / под ред. А. С. Автономова. Москва: Юриспруденция, 2001. 410 с.

[30] Ibid.

the entities that issue them, and achievement of goals and objectives by public authorities[31]. The harmonization of legal acts is one of the methods to overcome controversy. It is implemented in stages and is also subject to certain rules. Harmonization allows for a balance between regulatory legal acts, which in turn ensures the functionality and efficiency of the legal system.

The harmonization object may be separate legal acts or parts of them which are in conflict with each other. Harmonization thus allows overcoming legal contradictions and to ensure such correlation of normative legal acts which fully corresponds to the status of the bodies having adopted them and is determined by the constitutional principles of the legal system. Supporting this statement, we mean the restoration of a previously disturbed correlation of regulatory acts with each other. Harmonization may be accompanied by the cancellation of an act that is declared invalid. However, the best method is to bring the acts into conformity with the constitutional principles through harmonization. The approximation of contradictory acts leads to a decrease in the severity of their contradictions. It should be noted that the act harmonization is not always achieved through a concordance.

The severity degree of legal contradictions determines the method and the means to be taken into account in its settlement. Harmonization of acts is most needed in times of intense reform in the legal and public spheres. The harmonization of legal acts with higher and lower legal force, conformity with national and international law, etc. is of particular importance.

The resolution of municipal-legal conflicts consists of identifying them in regulatory acts and applying the most effective ways to overcome and eliminate them. The ways of identifying legal contradictions include the monitoring of regulatory acts which allows observing inconsistencies and contradictions. Yu. H. Arzamasov argues that monitoring of legal space and law enforcement practice is a system of assessing the analysis and forecast of the legislation state and dynamics and practice of its application with the purpose of revealing their compliance with the planned result of legal regulation, as well as the expectations of the participants in legislative process, executive officers, judiciary or other bodies and, ultimately, citizens[32]. At the stage of rulemaking activity, monitoring performs a number of functions, namely: observation, control, analysis, which allows legal conflict timely detection[33]. The function of drafting law-making programs is important. If the act does not extend to the whole country, but only to its individual territory, such as a specific administrative unit, legal prognosis and experiment are

[31] Илькина Н. А. Качество закона и юридическая техника. Юридическая конфликтология: материалы науч.-практ. конф. (г. Москва, 26 нояб. 2007 г.) / отв. ред. В. Н. Кудрявцев. Москва, 1995. 351 с.

[32] Арзамасов Ю. Г. Понятие и функции мониторинга нормативных актов. Государственная власть и местное самоуправление. 2007. № 10. С. 36.

[33] Ibid. С. 37.

important. As Yu. G. Arzamasov points out, a legal experiment is an experiment where a legal act functions as a researched factor. It verifies the effectiveness of an existing act or predicts the effect of a legislative innovation[34]. Monitoring of legal acts includes observation, collection, study, analysis of those legal acts related to the subject of regulation, and analysis of other analytical, statistical, official materials, public opinion research on the state of the legislation, forecasting the effect of certain normative acts.

Thus, it is a systematic volume of the necessary legal information on the development, operation and abolition of regulatory acts.

An important role in the detection of legal conflicts in the law enforcement activities is played by the analysis of legal acts, which, in turn, implies the duty of state bodies and other structures to constantly collect and evaluate information on emerging conflicts between legal acts.

In our opinion, the expedient methods for identifying municipal-legal conflicts include a register of legal acts, which allows identifying contradictions between legal acts, and thus to promote their resolution. The Ministry of Justice of Ukraine has created a Unified State Register of Regulatory Acts, which allows monitoring already existing and newly adopted legal acts[35]. However, the register does not appear to be fully applicable for the detection of conflicts in municipal law, since the latter often arise in disputes between different legal acts. Municipal law is characterized by by-laws, which are issued by the respective bodies of local self-government, and, accordingly, they are not subject to the provisions of the Unified State Register of Legal Acts.

In accordance with the Resolution of the Cabinet of Ministers of Ukraine of April 23, 2011 № 376 "On the Unified State Register of regulatory legal acts" and the procedure of maintaining the Unified State Register of regulatory legal acts and its usage, it is clearly established that the Register includes only regulatory acts of public authorities, acts of local self-government bodies as subordinate legislation, i.e. those of a regulatory nature and are not included in the Register. However, it should be noted that each council as a local self-government body has its own register of acts. It is worth noting the progressive side of this issue since most councils now have their own electronic sites where the ordinary user can freely access any act of the local government. Unfortunately, such registers are not interconnected, therefore, using them enables interested parties to seek conflicts only on their own, when appealing to the court or resolving a respective case.

The methods of overcoming conflicts in municipal law include conflicts-of-law rule establishing the procedure for applying legal acts and norms in

[34] Арзамасов Ю. Г. Понятие и функции мониторинга нормативных актов. Государственная власть и местное самоуправление. 2007. № 10. С. 37.

[35] Про Єдиний державний реєстр нормативних актів: Указ Президента України від 27.06.1996 р. № 468. Урядовий кур'єр. 1996. № 122–123.

case of their non-compliance; conciliation and settlement arrangements; temporary or special modes; the appeal of the relevant act in the administrative court, etc.

Legal conflicts in municipal law are very different in nature, they are ambiguous and variable. It means that a single form of conflict resolution or a certain universal solution does not exist.

As it has been noted earlier, the necessary and most commonly employed methods of preventing collisions include the activities of the entities adopting the appropriate code of conduct within the law or the competence conferred; preliminary expert appraisal of normative legal acts and determination of directions of their harmonization; systematization of legislation in order to identify conflicting rules; inventory of subordinate legislation and its accurate accounting; a clear definition of the entities' powers applying the rules of law; regulatory definition of the status of official interpretative acts and their hierarchy; regulatory consolidation of various legal procedures; determining the most optimal methods for correlating different provisions of law.

The quality of regulatory acts submitted for state registration to the justice departments is low. State registration may include acts which are not in agreement with the interested authorities, issued with competence excess of the entities of norm-making or with current legislation violation, in particular, freedoms and legitimate interests of citizens, enterprises, institutions and organizations are violated or restricted by law, or their responsibilities are not provided for by law.

Local executive authorities do not take measures to bring their legal acts into conformity with the current legislation. State registration of normative legal acts is one of the means of ensuring their legality and protection of human rights.

CONCLUSIONS

It should be emphasized that any resolution to legal conflicts, even the most serious ones, must be legal. Contradictions in municipal law must be resolved by the legal civilized method, otherwise, the conflict problem will remain.

In our view, all ways of resolving legal conflicts enshrined in domestic law interact with each other. Herewith, each of them performs its functions. The connection between the separate methods of resolving legal conflicts in municipal law can be clearly ascertained on the example of resolving legal conflicts in regulatory acts. Thus, in the process of resolving conflicts between the Constitution and other normative acts in the judicial process, the court will decide the conflict, but may at the same time apply for the interpretation to the Constitutional Court. In this way, there are ways in which collisions can be eliminated and settled.

In order to resolve legal conflicts, it is necessary to actively and comprehensively apply methods of preventing, detecting, overcoming and eliminating them. Thus, analyzing the existing methods aimed at preventing and resolving (detecting, overcoming, eliminating) legal conflicts in the municipal law, we can conclude that their resolution requires the active and complex application of these methods (especially rulemaking and judicial procedures).

Currently, legislation requires prompt resolution of legal conflicts. Overcoming and eliminating municipal-legal conflicts is achieved through effective methods of resolving them. The ways of resolving legal conflicts in municipal law are aimed at identifying, overcoming and eliminating the latter.

Monitoring as a way of identifying legal conflicts in the lawmaking process and law enforcement activities is of special importance. Such monitoring functions as observation, collection, study, analysis of legal acts, devising plans and programs of normative draft activity, legal forecasts allow to timely identify contradictions (inconsistencies) between legal acts and to apply the most effective methods of their resolution.

Finally, it should be noted that close attention should be devoted to the prevention of legal conflicts in municipal law. Prevention is aimed at preventing legal conflicts and, in our opinion, includes: conducting a preliminary legal expert appraisal of normative legal acts and their harmonization; drafting plans and programs for bills, legal forecasts, etc.

Effective ways of resolving all possible legal conflicts in public law ensure their prompt elimination. The latter consists in the existence of conflict-of-law rules establishing the procedure for the application of legal acts and rules in case of their non-compliance; conciliation procedures; temporary or special modes; appeal against regulations in courts of general and special jurisdiction.

SUMMARY

The article is devoted to clarifying the issue of preventive and judicial procedures for resolving conflicts in municipal law. Depending on the subject of the action, the study distinguishes two main types of legal procedures used in the resolution of municipal-legal conflicts. Comparing with preventive procedures, judicial procedures are proved to be the most commonly used, however, given their complexity, judicial procedures are not always highly effective. Therefore, it is suggested to focus more on preventative legal procedures, since they are the most effective as evidenced by municipal practice. They include the expert appraisal of a legal act, their monitoring and harmonization, which allow to overcome legal contradictions and to ensure the correlation of legal acts which fully corresponds to the status of the bodies adopting them and is defined by the constitutional principles of the legal system.

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Information about the author:
Lenher Ya. I.,
Doctor of Laws, Professor,
Head of the Department of Law, Faculty of Finance,
Accounting, Linguistics and Law,
Lutsk National Technical University
75, Lvivska str., Lutsk, 43018, Ukraine

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SPECIFICS OF LEGISLATIVE REGULATION OF THE GAMBLING INDUSTRY IN UKRAINE

Manzyuk V. V.

INTRODUCTION

An important element in the development of a country as a democratic state is the formation of its legislative system based on the consideration of various social needs. However, situations, where the needs of a society are contrary to other established dogmas of this society, are somewhat complicated. This situation has developed in social relations in the field of gambling. On the one hand, the democratic values proclaimed by each state imply a variety of human rights, in our case, it is the right to freely dispose of one's time and money. However, the effects of gambling addiction leave a noticeable imprint on the moral values of society.

The gambling industry per se has always existed and the obsession with gambling has not decreased. At the same time, the danger of gambling for society has been recognized at all times. Despite its positive influence on the state treasury the state has nevertheless taken control of the gambling industry.

The relevance of the topic is predetermined by the fact that after declaring independence and having freed itself from the established socialist values and feeling a liberal taste of freedom, instead of effectively regulating social relations in the sphere of gambling Ukraine has chosen an easier path – the path of its total and abrupt prohibition.

At the current stage of information technology development, even legal levers are not able to properly regulate gambling relations, especially with regard to the organization of gambling on the Internet. Due to its properties, this sphere is not subject to total control.

1. The history of gambling: social and moral factors of counteraction

"Casino is an autonomous sub-universe among other worlds of life and socialization, the world of adventure among communication, entertainment, excitement and financial risk"
Andreas Ziemann[1]

Society's attitude to gambling has always been ambiguous. For a long time, its existence has been subject to severe criticism, condemnation and persecution, it has been considered a "forbidden fruit". On the one hand,

[1] Ziemann Andreas. "Faites vos Jeux": eine kleine kiltursoziologie des casinos. *Sociologia internationalis.* Berlin: 44. Band, 2006. H. 2. S. 255.

society has estimated gambling as economic fraud (since it does not produce and invest anything in economic turnover), and on the other hand, the gambling industry and its activities can significantly contribute to the budgets of the state and local governments[2].

Gambling (from French *jeux de hazard*) is a game whose results, as opposed to commercial, are exclusively or mainly aleatory rather than depend on the player's adroitness or skill, provided that the bet is a thing whose gaining or losing cannot be treated indifferently on the part of players by means of their costs[3].

Thus, the probability of easy enrichment and excitement has provided the basis of gambling prevalence.

Probability theory as a necessary feature of gambling is section of mathematics that studies the relationship between the probabilities of various events. The probability of occurrence of one of several incompatible events is equal to the sum of the probabilities of these events[4]. Probability theory as applicable to gambling (the Gambler's Ruin Problem[5]) was elaborately developed by H. Huygens in his treatise "On calculations in gambling" (1657). Thus, the author formed the concept of "mathematical expectation of winning"[6].

However, it is not only easy money that attracts people to gambling but, most importantly, the excitement itself. The latter is considered a condition that causes passionate gambling which is accompanied by increased emotional tension[7].

The passion for easy money in general and gambling in particular was inherent in humanity in ancient times. There is evidence of gambling obsession (dice) in the ancient Greeks (gambling was completely eliminated only in Sparta). The demoralizing influence of gambling was also recognized by Roman law. However, gambling was most developed in Germany. Up till the XIII-XIV centuries, the ancient German could lose not only his property but also his freedom in gambling (the loser, who had lost all his money and

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[2] Опанасенко В.М. Чи існує економічна обґрунтованість легалізації азартних ігор на території України? *Формування ринкових відносин в Україні.* 2015. № 12 (175). С. 97.

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failed to pay, was sold into slavery). Subsequently, legislative restrictions began to emerge. However, the roulette game was encouraged since poor treasuries received heavy taxes on it.

Gambling houses first appeared in Italy in the XII century. In France, all gambling houses have been closed since 1839. In England, the law also provided for the protection of the losing party who was entitled to sue the opposing player.

However, Western European countries, forbidding gambling and gambling houses in their codes, did not invent reliable means against fraudsters and secret gambling houses, which, despite the high-profile police vigilance, held gambling games at fairs and public celebrations[8].

Since the XVIII century, gambling has been transferred from a sphere governed solely by religious norms into a sphere of legal regulation, which is explained by their prevalence and the ineffectiveness of regulating this sphere only by church canons[9].

The danger of gambling to the public has been recognized at all times, since not only the rich and wealthy but also the less wealthy and even the poor are easily addicted to gambling and sacrifice their hard-earned wealth in the pursuit of easy money. Thus, the state's primary duty was, at least, to ensure that such games did not take place publicly and did not attract a large number of people and would not adversely affect the population's material well-being[10].

The current state of social relations in the field of gambling is developing somewhat differently. This is due to the fact that in addition to the moral and social barriers to the further development of the gambling industry, it has also been hampered by such a factor as the population's health.

Thus, a side effect of excitement is a disease caused by insatiable fascination, the person's propensity to gamble – gambling or ludomania (from Lat. *ludus* – game)[11].

The ICD-10 Version of the International Classifier of Diseases, code F63.0 defines the pathological craving for gambling (pathological gambling). The essence of this disorder consists of frequent, repeated episodes of gambling that dominate the patient's life are detrimental to social, occupational, material, and family values and commitments.

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[10] Энциклопедический словарь Ф.А. Брокгауза и И.А. Ефрона / под ред. проф. И.Е. Андреевского. СПб: Семеновская Типо-Литографія (И.А. Ефрона), 1890. Т. 1. А-Алтай. С. 203–204.

[11] Иванова О.А. Азартные игры как угроза общественной нравственности. *Молодой учёный.* 2013. № 9 (56). С. 299.

A passionate gambling drive involves: excessive gambling by manic patients; aptitude for gambling and betting; gambling addiction in dissocial personality disorder (includes immoral, antisocial, asocial, psychopathic and sociopathic disorder)[12].

The American Psychological Association (APA) provides the following definition of pathological gambling – an impulse-control disorder characterized by chronic, maladaptive wagering, leading to significant interpersonal, professional, or financial difficulties (gambling disorder)[13]. The term *gambling disorder* characterizes this behavioral pathology as a nonsubstance-related addiction. The main criteria for the disorder include persistent, recurrent gambling not related to manic episodes, along with significant impairment or distress. Associated behaviors may include betting increasing amounts of money, inability to limit or stop gambling, and preoccupation with gambling[14].

Ludomania, as well as psychopathy, lies in the sphere of the subconscious. It is not treated with medication and is a chronic disease, which can be transmitted while communicating, when players incline their company to gamble[15].

Thus, we conclude that gambling has been around since ancient times. The factors that contributed to the need for the legal regulation of this sphere are determined as follows:

1) state's preservation of the individual's family values and material well-being;

2) observance of religious dogmas in society (easy profit contradicts church ordinances since all amenities must be achieved through the individual's work);

3) prevention of social disorganization of the individual (gambling is often associated with such concomitant negative social phenomena as alcoholism, brigandism and idleness[16]);

4) ensuring public health preservation.

Thus, each state faces a dilemma of choice: on the one hand, a complete ban on gambling as a negative social phenomenon in order to preserve moral values in society, the material well-being of the individual and the health of the

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[12] International Statistical Classification of Diseases and Related Health Problems 10th Revision. *World Health Organization.* Version for 2016. URL: https://icd.who.int/browse10/2016/en#/F63.0

[13] Dictionary of Psychology. DSM-IV-TR: American Psychological Association. *Pathological gambling*. URL: https://dictionary.apa.org/pathological-gambling (дата звернення: 26.09.2019).

[14] Dictionary of Psychology. DSM-IV-TR: American Psychological Association. *Gambling disorder*. URL: https://dictionary.apa.org/gambling-disorder (дата звернення: 26.09.2019).

[15] Бурдюг Д.Л., Синицына Л.В. Игровая зависимость в противоправном поведении. *Юридическая психология.* 2008. № 2. С. 35–38.

[16] Иванова О.А. Азартные игры как угроза общественной нравственности. *Молодой учёный.* 2013. № 9 (56). С. 299.

population, and on the other hand, the development of a state based on liberal values, as well as a considerable amount of revenue to fill the state budget.

2. The state of the gambling industry in Ukraine and prospects for its further legalization

"If you can't beat them, join them[17]*"*
Proverb

The state interest to gambling is conditioned, on the one hand, by the need to prevent instability in the economic circulation through transferring property from one person to another, and on the other hand – through receiving money for the budget in the form of taxes[18]. Currently, there are three models of government regulation of gambling in the world, which largely depend on the population's attitude to it:

1) a complete ban on gambling is characteristic of countries with severe religious prejudice against gambling;

2) the state allows only certain types of gambling and concentrates all gambling business in special places;

3) full legalization of gambling, however, under strict state control[19].

In Ukraine, gambling left the legal path in 2009. The prerequisite for such a dramatic change in the legal regulation of gambling was the incident that happened on May 7, 2009, in Dnipropetrovsk. There was a fire at the "Metro Jackpot" gambling club that resulted in the deaths of 9 people (13 were seriously injured). The incident attracted considerable public attention. The next day the Ministry of Finance of Ukraine suspended all 205 licenses for conducting gambling activities[20].

Experts at the site of the fire did not manage to finish their work when the perpetrators of the tragedy had already been "named" at the highest state level and loud political statements about the need to "restore order" in the field of gambling had been voiced. The tragedy in Dnipropetrovsk was extensively and skilfully "presented" to the people's deputies of Ukraine and to the whole Ukrainian society as the final convincing argument in favor of a

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[17] Ammer Christine. The American Heritage dictionary of idioms. 1997. P. 513.

[18] Ярмонова Е.Н., Федина Н.А. История развития правового регулирования игр и пари. С. 2.

[19] Беззуб І. Чи потрібна Україні легалізація грального бізнесу: думки експертів. *Центр досліджень соціальних комунікацій НБУВ.* URL: http://nbuviap.gov.ua/index.php?option=com_content&view=article&id=2218:chi-potribna-ukrajini-legalizatsiya-gralnogo-biznesu&catid=8&Itemid=350 (дата звернення: 26.09.2019).

[20] Про зупинення дії ліцензій Міністерства фінансів України на провадження організації діяльності з проведення азартних ігор: Наказ Міністерства фінансів України від 8 травня 2009 року № 650. URL: https://zakon.rada.gov.ua/rada/show/v0650201-09 (дата звернення: 26.09.2019).

categorical ban on gambling. On May 15, 2009, the Verkhovna Rada of Ukraine adopts the relevant Law of Ukraine in an extremely operational mode and then convincingly overcomes the President's veto[21]. As a result, Ukraine loses 3.5 billion hryvnias annually paid by gambling organizers to the budget [22].

However, paragraph 1 in point 4 of the Final Provisions in the Law of Ukraine "On Prohibition of Gambling in Ukraine"[23] envisaged imposing on Cabinet of Ministers of Ukraine the duty to draft and submit for consideration of the Parliament of Ukraine law on gambling organization and conducting in the special gambling areas. However, in the last 10 years, the state authorities failed to pass legislation on the organization and activity of the gambling business. Relevant bills of 2015[24] and 2016[25] as well as the collateral draft law "On bookmaking activities"[26] were prepared and registered which, however, were withdrawn, as well as the relevant Cabinet of Ministers of Ukraine draft laws "On casino activity in Ukraine" of 2014[27] and 2015[28], which were not passed.

In 2011, criminal liability for engaging in gambling was introduced (Article 203-2 of the Criminal Code of Ukraine)[29], and in 2016 the

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[21] Пояснювальна записка до проекту Постанови Верховної Ради України «Про утворення Тимчасової слідчої комісії Верховної Ради України з питань розслідування обставин, висвітлених у засобах масової інформації щодо порушень, допущених у ході досудового слідства та судового розгляду справи про пожежу в залі гральних автоматів у Дніпропетровську, яка сталася 07 травня 2009 року та призвела до загибелі 9 осіб». URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=38833 (дата звернення: 26.09.2019).

[22] Пропозиції Президента України до закону України «Про заборону грального бізнесу в Україні» від 04.06.2009 р. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=34855 (дата звернення: 26.09.2019).

[23] Про заборону грального бізнесу в Україні: Закон України від 15 травня 2009 року № 1334-VI. *Голос України.* № 116.

[24] Про детінізацію ринку азартних ігор та забезпечення доходами бюджету з метою виконання соціальних зобов'язань: Проект Закону від 11 грудня 2015 року № 3632. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57390 (дата звернення: 26.09.2019).

[25] Про детінізацію ринку азартних ігор та забезпечення доходами бюджету з метою виконання соціальних зобов'язань: Проект Закону від 13 травня 2016 року № 4663. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59089 (дата звернення: 26.09.2019).

[26] Про букмекерську діяльність: Проект Закону від 03 березня 2019 року № 2268. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=54231 (дата звернення: 26.09.2019).

[27] Про діяльність казино в Україні: Проект Закону від 28 січня 2015 року № 1869. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=53064 (дата звернення: 26.09.2019).

[28] Про діяльність казино в Україні: Проект Закону від 22 грудня 2014 року № 1571. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?id=&pf3511=53729 (дата звернення: 26.09.2019).

[29] Про внесення змін до деяких законодавчих актів України щодо удосконалення законодавства про заборону грального бізнесу в Україні: Закон України від 22 грудня 2010 року № 2852- VI. *Голос України.* № 5.

confiscation of gaming equipment was excluded from the sanction of this article[30].

The legal alternative to illegal gambling in Ukraine has been lotteries[31], where the only monopoly belongs to the state [32].

In this regard, the logical questions arise: Cui bono? Cui prodest? i.e. who benefits?[33] The state, which could receive income from tax deductions from gambling establishments and granting licenses, instead conducts an unclear fight against them, thereby facilitating the existence of illegal gambling establishments and shadowing the income from the latter.

In order to unshadow the economy, it is necessary to create favorable conditions for the functioning of various forms of business at the legislative level[34]. The European standards, strived for by Ukrainian society, require a clear legal regulation of all spheres of life that could effectively combat the features of the post-Soviet societies' development.

This pertains to a great extent to gambling as a prospect for tourism development in Ukraine. A thorough analysis of the general and local European legislation and the adoption of relevant legislation in Ukraine will allow to gain the positive effect of gambling legalization, to form an optimal model of such legalization which will benefit the Ukrainian economy, fill the budget, and change the attitude of domestic society to this sphere of economy[35]. This viewpoint is also supported by the fact that the ban on gambling in some countries, with prudent legislative regulation, one way or the other engenders its rise in other countries[36] (for example, a junket – trip has recently gained popularity[37], which is a cultural and entertaining program with obligatory visits to gambling establishments funded by the gambling

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[30] Про внесення змін до Кримінального та Кримінального процесуального кодексів України щодо виконання рекомендацій, які містяться у шостій доповіді Європейської комісії про стан виконання Україною Плану дій щодо лібералізації Європейським Союзом візового режиму для України, стосовно удосконалення процедури арешту майна та інституту спеціальної конфіскації: Закон України від 18 лютого 2016 року № 1019-VIII. *Відомості Верховної ради України.* 2016. № 11. Ст. 127.

[31] Лиськов М.О. Нормативно-правове адміністрування лотерейної сфери. *Прикарпатський юридичний вісник.* 2016. Вип. 5 (14). С. 80.

[32] Про державні лотереї в Україні: Закон України від 6 вересня 2012 року № 5204-VI. *Офіційний вісник України.* 2012. № 76. Ст. 3068.

[33] A Dictionary of Quotations, in most frequent use. The second edition, revised and enlarge. London: G.G. and J. Robinson, 1798. 234 p.

[34] Молчанов Д. Удосконалення адміністративно-правового регулювання фінансового контролю та моніторингу як засобів протидії тонізації економіки України з урахуванням міжнародного досвіду. *Підприємництва, господарство і право.* 2017. Вип. 10. С. 121.

[35] Гищук Р.Н., Бойко И.Д. Особенности функционирования игорного бизнеса в европейских странах и их опыт в контексте развития туризма в Украине. *Світове господарство і міжнародні економічні відносини.* 2017. Вип. I-II (65-66). С. 267.

[36] Ibid. С. 259.

[37] James C. Makens, John T. Bowen. Junket reps and casino marketing. *The Cornell Hotel and Restaurant Administration Quartery*. 1994. Vol. 35. Issue 5. P. 63–69.

establishments themselves, in particular, casinos). This, in turn, stimulated the development of tourism in post-Soviet countries.

Separate standards in the field of gambling were also elaborated by the European Parliament. Thus, Article 10 of Directive 2005/60 / EC envisages that Member States shall require that all casino customers be identified and their identity verified if they purchase or exchange gambling chips with a value of EUR 2 000 or more. Besides, Member States shall provide that casinos be licensed in order to operate their business legally and the competent authorities shall have enhanced supervisory powers, notably the possibility to conduct on-site inspections[38]. As to organizers themselves, the Directive requires that the persons who effectively direct or will direct the business of such entities and the beneficial owners of such entities are fit and proper persons. The criteria for determining whether or not a person is fit and proper should be established in conformity with national law (at least, such criteria should reflect the need to protect such entities from being misused by their managers or beneficial owners for criminal purposes).

Thus, after the categorical ban on gambling, the number of cases in the courts of Ukraine increased. The cases of business entities (organizers of gambling business) became widespread, in particular: the return of the superfluously paid sum from the state budget for the pre-term license revocation, which was paid for several years in advance[39]; compensation for real damages related to the license revocation (the amount of the license value for the unused period of its validity, the cost of gaming equipment, including depreciation fee, the cost of the registrars of the settlement transaction, the cost of advertising, compensation to employees for unused vacation, etc)[40]; termination of the loan agreement, since the funds were provided to the plaintiff for the development of gambling business, thereby the plaintiff was deprived of the anticipated revenue at the conclusion of the loan agreement[41].

In each case related to the violation of property rights, it must be determined whether the person concerned should incur a disproportionate and undue burden in connection with the actions or inactivity of the State[42].

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[38] Directive 2005/60/EC of the European Parliament and of the Council on the prevention of the use of the financial system for the purpose of money laundering and terrorist financing of 26 October 2005. *Official Journal of the European Union.* 2005. L 309/15.

[39] Постанова Верховного Суду України від 25 квітня 2017 року № 2а-12490/10/1370. URL: http://www.reyestr.court.gov.ua/Review/66775066 (дата звернення: 26.09.2019).

[40] Постанова Вищого господарського суду України від 22 вересня 2010 року № 41/575. URL: http://www.reyestr.court.gov.ua/Review/11413915 (дата звернення: 26.09.2019).

[41] Постанова Вищого господарського суду України від 01 червня 2010 року № 42/254-09. URL: http://www.reyestr.court.gov.ua/Review/10000135 (дата звернення: 26.09.2019).

[42] Judgment of the European Court of Human Rights in the case «Ahmet Yildirim v. Turkey» on December 18, 2012 (Application № 3111/10). URL: http://hudoc.echr.coe.int/rus?i=001-115705 (дата звернення: 26.09.2019).

Analysing the litigation practice, the author concludes that national courts have always sided with the state, motivating the measures taken by the authorities within their own powers[43], and the losses incurred by the business entities are covered by their entrepreneurial risk[44].

For the first time, the European Court of Human Rights (hereinafter referred to as the ECtHR) has come to protect the rights of business entities – organizers of gambling. The latter notes that the solutions reached by the legislature cannot be beyond the scrutiny of the ECtHR which should examine carefully the arguments taken into consideration during the legislative process and leading to the choices that have been made by the legislature and to determine whether a fair balance has been struck between the competing interests of the State and those directly affected by those legislative choices[45].

In the case "of Svit Rozvag, TOV and Others v. Ukraine"[46], the ECtHR has found a number of violations related to the adoption of the Law of Ukraine "On Prohibition of Gambling of Ukraine" (hereinafter – the Law).

has found a violation of Article 1 of Protocol No. 1 not on account of the prohibition of gambling as such but only on account of the manner in which that measure was adopted and implemented, notably the lack of a meaningful transitional period. Therefore, not all of the applicant company's losses due to the discontinuation of its gambling business need to give rise to compensation.

Thus, with the revocation of the gambling license, the right of ownership of the organizers of the latter was breached (violation of Article 1 of Protocol No. 1 to the Convention for the Protection of Human Rights and Fundamental Freedoms[47]), in particular due to the lack of any compensatory measures, even in respect of the direct costs imposed by the State itself. There has accordingly been a violation of Article 1 of Protocol No. 1 on account of the manner in which the applicants' licenses were revoked.

Another breach was the lack of a meaningful transition period for business entities, which theoretically constituted 40 days. However, the

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[43] Постанова Вищого адміністративного суду України від 26 листопада 2015 року № К/800/51343/14. URL: http://www.reyestr.court.gov.ua/Review/53927584 (дата звернення: 26.09.2019).

[44] Постанова Вищого господарського суду України від 01 червня 2010 року № 42/254/09. URL: http://www.reyestr.court.gov.ua/Review/10000135 (дата звернення: 26.09.2019).

[45] Judgment of the European Court of Human Rights in the case «Garib v. the Netherlands» on November 6, 2017 (Application № 43494/09). URL: http://hudoc.echr.coe.int/rus?i=001-177406 (дата звернення: 26.09.2019).

[46] Judgment of the European Court of Human Rights in the case «Svit Rozvag, TOV and Others v. Ukraine» on June 27, 2019 (Application № 13290/11). URL: http://hudoc.echr.coe.int/rus?i=001-193994 (дата звернення: 26.09.2019).

[47] Протокол до Конвенції про захист прав людини і основоположних свобод від 20 березня 1952. *Офіційний вісник України.* 2006. № 32. Ст. 2372.

Cabinet of Ministers of Ukraine, by virtue of its powers, terminated the applicant's license, and therefore, in essence, there was no transitional period for him. This was further exacerbated by the fact that the gambling policy changed especially rapidly: the previous rigid policies were replaced by a total ban in just 2 months. The Law itself was designed as a temporary ban and required the Cabinet of Ministers of Ukraine to submit proposals on the regulation of the gambling industry, which was never the case.

The bills[48], referred to by the government are a private initiative and there are no indications that they have ever been supported by the authorities. Failure to promise to introduce this legislation created uncertainty, placing an additional burden on the applicant company. And the vague promise that the measure would be temporary and would later be replaced by a policy of restricted gambling areas had only added an element of uncertainty to the situation and demonstrated inconsistency in internal government policy.

A norm is "foreseeable" when it affords a measure of protection against arbitrary interferences by the public authorities[49]. The expression "prescribed by law" requires firstly that the impugned measure should have some basis in domestic law; however, it also refers to the quality of the law in question, requiring that it should be accessible to the person concerned, who must moreover be able to foresee its consequences, and that it should be compatible with the rule of law[50].

The ECtHR resolution is a special form of precedent created by a supranational body and is binding upon member states of the Convention[51]. Unfortunately, the Convention for the Protection of Human Rights and Fundamental Freedoms does not provide for the institution of an *actio popularis*, and the court itself cannot decide the case in the interests of public order[52].

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[48] Про детінізацію ринку азартних ігор та забезпечення доходами бюджету з метою виконання соціальних зобов'язань: Проект Закону від 11 грудня 2015 року № 3632. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=57390 (дата звернення: 26.09.2019); Про детінізацію ринку азартних ігор та забезпечення доходами бюджету з метою виконання соціальних зобов'язань: Проект Закону від 13 травня 2016 року № 4663. URL: http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=59089 (дата звернення: 26.09.2019).

[49] Judgment of the European Court of Human Rights in the case «Lekić v. Slovenia» on December 4, 2015 (Application № 36480/07). URL: http://hudoc.echr.coe.int/rus?i=001-188268 (дата звернення: 26.09.2019).

[50] Judgment of the European Court of Human Rights in the case "Ahmet Yildirim v. Turkey" on December 18, 2012 (Application № 3111/10). URL: http://hudoc.echr.coe.int/rus?i=001-115705 (дата звернення: 26.09.2019).

[51] Новіков Д.В. Захист права власності Європейським судом з прав людини: досвід для правової системи та судової практики України: дис. … канд. юрид. наук: спец. 12.00.03. Київ, 2018. С. 29.

[52] Judgment of the European Court of Human Rights in the case "Roman Zakharov v. Russia" on December 11, 2018 (Application № 47143/06). URL: http://hudoc.echr.coe.int/eng?i=001-159324 (дата звернення: 26.09.2019).

3. Features of legal regulation of Internet gambling

It is relevant for any state that the Internet has now become one of the principal means by which individuals exercise their right to freedom to receive and impart information and ideas, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest[53]. Therefore, user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression[54].

At the current stage of information technology development and many states' focus on cybersecurity development, the regulation of online gambling, in particular, online casinos, is the subject of heated discussion. Such concern arises because of the unregulated nature of the field, which, because of its properties, is not subject to total control.

In the case of virtual gambling, there is no specific equipment that is subject to certification. Here we deal with software that is not licensed by anyone. There is not even a directory of games that can be used to check the programs for quality, for the presence of fraudulent elements, as well as to make sure that the payout is guaranteed[55].

The attractiveness of online casinos for business entities lies in the fact that its organization requires only a gaming server and electronic transfer accounts. At the same time, there is no need to have premises, equipment, license for this type of activity, personnel and to bear the whole complex of accompanying expenses. There occurs an involvement of Internet users, mostly young people, in gambling[56].

It should be noted that for the most part, states that have legalized gambling, however, have restricted its age category, typically 18 or 21 years old. In countries where gambling functions only as a shadow economy, and its identification is a matter of time, it is more difficult to find the latter in the "worldwide web". Online casino operators may not register their activities, place their server under the jurisdiction of a foreign country, use international domain zones, or operate through offshore zones.

To regulate such online business, A.Sh. Kazbekov offers P. R. China's experience that filters unwanted internet content. While this is contrary to the

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[53] Judgment of the European Court of Human Rights in the case "Cengiz and Others v. Turkey" on December 1, 2016 (Applications nos. 48226/10 and 14027/11). URL: http://hudoc.echr.coe.int/eng?i=001-159188 (дата звернення: 26.09.2019).

[54] Judgment of the European Court of Human Rights in the case «Delfi AS v. Estonia» on June 16, 2015 (Application № 64569/09). URL: http://hudoc.echr.coe.int/rus?i=001-155105 (дата звернення: 26.09.2019).

[55] Каргина Л.А., Камачо Чаваррия М.Д. Развитие интернет-офшоров в Коста-Рике. *Вестник Академии.* 2010. № 2. С. 96.

[56] Казбеков А.Ш. Современные тенденции теневого игорного бизнеса, организованного с использованием сети «Интернет». *Вестник Нижегородской академии МВД России.* 2011. № 2 (15). С. 219.

liberal views of the majority, few will object to restricting access to sites with obscene content and / or malicious software[57].

The features of gambling are the purpose of profit, where the source of the latter is the game[58]. The gambling business itself is based on a combination of two interdependent tasks – the acquisition of material goods and the satisfaction of their needs, which consist in the desire to achieve a certain stressful state[59]. Thus, one of the hallmarks of gambling is its renumeration as a prerequisite for risk[60], as well as its grounding in the theory of probability which is not accepted by gamblers. APA names it a gambler's fallacy, i.e. a failure to recognize the independence of chance events, leading to the mistaken belief that one can predict the outcome of a chance event on the basis of the outcomes of past chance events. For example, a person might think that the more often a tossed coin comes up heads, the more likely it is to come up tails in subsequent tosses, although each coin toss is independent of any other and the true probability of the outcome of any toss is still just[61]. In this regard, both gamblers and new players fall into debt bondage, taking on the available loans provided by the organizers of online casinos. When issuing such loans, the latter are inappropriate to check the income of everyone, primarily in the temporal aspect, where the main role is played by chance, and therefore "every minute matters". The author proposes to regulate such relations in Ukraine as follows.

Part 2 of Art. 36 of the Civil Code of Ukraine[62] envisages that the court may restrict a natural person's legal capability if he/she abuses alcohol, drugs, toxic substances etc. whereby bringing himself/herself or his/her family as well as other persons he/she has to maintain by the law into hard circumstances.

According to the author, it would be advisable to establish the Unified Ukrainian State Register of Incapacitated Persons and Persons Restricted in Legal Capability. Access to the latter will be granted, in particular, to licensed organizers of game zones, who will be obliged to check the register of persons requesting the credit for participation in the online game

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(in accordance with the retention of such information). In case of non-compliance with this norm, the organizers will be held administratively liable.

CONCLUSIONS

The retrospection of the gambling industry allows us to conclude that the factors contributing to the need for legal regulation in this field include:

- social (state's preservation of the individual's family values and material well-being, prevention of social disorganization of the individual);
- moral (demoralizing impact of gambling on the population);
- religious (easy profit contradicts church ordinances since all amenities must be achieved through the individual's work);
- health care (prevention of pathological gambling);

However, each state faces a dilemma of choice: on the one hand, a complete ban on gambling as a negative social phenomenon in order to preserve moral values in society, the individual's material well-being and the health of the population, and on the other hand, the development of a state based on liberal values, as well as a considerable amount of revenue to fill the state budget.

On the example of Ukraine, it can be noted that the total and drastic ban on gambling, although favorably received by the population, nevertheless led only to global litigation in national courts. Moreover, the authorities' inactivity in regulating public relations in this sphere only strengthened the public opinion as to the prolongation of their interests by the state authorities. In this regard, in 10 years the organizers of the gambling business have the right for the fair legal redress.

SUMMARY

The article reveals the features of legal regulation of the gambling industry through the retrospection of the research into gambling issues. The main factors leading to the need for government regulation of the gambling industry are analysed.

The article examines the consequences of an abrupt and total ban on gambling on the example of Ukraine. The conclusions are drawn on the negative consequences that have arisen as a result of a dramatic change in the situation at the legislative level and the inaction of state authorities in regulating relations in the field of gambling. This governmental activity violated not only the rights and freedoms of economic entities – organizers of gambling but also led to the shadowing of the gambling market. Moreover, the abrupt and total state interference with the sphere of private life was not commensurate and resulted in an imbalance between public and private interests.

The study proves the necessity of legal regulation of public relations in the sphere of the gambling industry and the direction of the state policy for

the legalization of the latter under state control. The rapid development of online gambling is also analysed. The article offers recommendations for regulating this segment at the legislative level in Ukraine.

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Information about the author:
Manzyuk V. V.,
Candidate of Juridical Sciences, Associate Professor,
Associate Professor at the Department of Economic Law,
Uzhhorod National University
26, Kapitulna str., Uzhhorod, Ukraine

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THE GENERAL PRINCIPLES OF FAMILY LAW IN ISLAMIC STATES

Mendzhul M. V.

INTRODUCTION

Globalization processes led to the rapprochement of different legal systems. At the same time, growing migratory processes over the recent years and the increase of the number of Muslims in Europe revealed many problems and collisions in the legal regulation of family relationships as well as in the politics of multiculturalism. The topicality of studying the principles of family law in Islamic states is caused by the fact that more often than not there are cases when courts in the EU countries analyze the diversity and religious pluralism. The requirements of the Shariah became the subject of analysing such issues as wearing a scarf, hijabs in educational establishments, at work, the existence of arranged and forced marriages, the recognition of polygamous marriages and the consequences of the international talaq (repudiation refers to the husband's right to dissolve the marriage by simply announcing to his wife that he repudiates her), etc. Undoubtedly, courts in the European States study such cases according to the norms of the national law, and at the same time through the prism of international private law and respect to the human rights; the norms of personal law as well as the ones of the Shariah, are taken into account.

1. The Reforming of Family Law in Islamic States

Islam is not only one of the most widespread religions in the world, but it is also recognized as the state religion in many countries and is the basis for regulating Muslim family relations. More than 88% of the population in Indonesia are Muslims, over 90% of Muslims live in Bangladesh, Egypt, the Niger, Pakistan, Sudan, Syria, Uzbekistan, from 97% to 99% of the population in Algeria, Afghanistan, Iran, Iraq, Yemen, Morocco, Turkey and Saudi Arabia are Muslims. Even in the modern legislation of Muslim countries when a legal norm is absent or while interpreting law, reference is made to the principles of law, the provisions of the Koran and the works of authoritative Muslim lawyers.

At the moment, in states where the overwhelming majority of the population practise Islam, there are three models of state-religious relations: 1) under the first model, Islam is legally recognized as the state religion, yet a special place in the legislation as well as the administration of law and justice is held by the shariah (Algeria, Bahrain, Egypt, Iraq, Jordan, Kuwait,

Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Tunisia, the United Arab Emirates, Yemen, Bangladesh, Brunei, Iran, Malaysia, Maldives, Pakistan, Afghanistan and Somalia); 2) according to the second model Islam is not formally recognized as the state religion, but private law that applies to Muslims is usually based on the Shariah (Indonesia and Nigeria); 3) under the third model, there is no legally recognized religion, and accordingly, religious norms, including the Shariah, do not apply (Bosnia and Herzegovina, Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Turkmenistan and Uzbekistan, Albania and Azerbaijan)[1].

The features of legal culture in Islamic states, the sources of Muslim law were analyzed by Nakhla Youssef[2], M. A. Voronina[3] and others. The reforming of Muslim Law in the 19th and 20th centuries, including changes in the principles of regulating family relations, were investigated by V. Kushnirenko[4], V. I. Lubskyi, T. H. Horbachenko, M. V. Lubska[5], Kristen Stilt, Salma Vaheedi, Swathi Gandhavadi Griffin[6], Lama Abu-Odeh[7], Zainah Anwar, Yana S. Rumminger[8], Mounira M. Harrad[9], Jawaid Rehman[10] and others.

A number of Islamic scholars, in particular, such as Mohamed Abdu, Abdel Aziz Taalbi, Jamal Al-Din Al-Afghani, Ibn Abi Al Diaf, Khair Al-Din Bach, Rifa'a Al Tahtawi, were convinced that one of the reasons for the socio-economic backwardness of Muslim States is the inferior status of women. They promoted liberal ideas related to the fact that the Prophet Muhammad's wives were able to read, write and even discuss business agreements, meanwhile defending Islamic norms, in particular by referring to the provisions of the Koran. At the end of the 19th century, Qasim Amin

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[5] Лубський В.І., Горбаченко Т.Г., Лубська М.В. Мусульманське сімейне право: релігієзнавчо-правовий контекст. Одеса.: «Інтерпринт», 2010. 410 с.

[6] Kristen Stilt, Salma Waheedi, Swathi Gandhavadi Griffin. The Ambitions of Muslim Family Law Reform. *Harvard Journal of Law & Gender*. 2018. Vol. 41. P. 305.

[7] Lama Abu-Odeh. Modernizing Muslim Family Law: The Case of Egypt. *Vanderbilt Journal of Transnational Law* 2004. VOL. 37:1043. H. 1131.

[8] Zainah Anwar and Jana S. Rumminger,Justice and Equality in Muslim Family Laws: Challenges, Possibilities and Strategies for Reform. *Wash. & LeeL*. 2007. 64. H. 1547.

[9] Mounira M. Charrad. Tunisia at the Forefront of the Arab World: Two Waves of Gender Legislation. *WASH. & LEEL*. REV. 2007. 64. P. 1523.

[10] Javaid Rehman. The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq. *International Journal of Law, Policy and the Family* 21,(2007), p. 117 doi:10.1093/lawfam/ebl023

published the book «The Liberation of Women» (1899), which became the impetus for the protection of women's rights not only in Egypt, but throughout the Arab Muslim world. In his book, he argued that women's access to education and socio-economic opportunities is an important first step towards modernizing Arab societies[11]. Qasim Amin notes that it was the «Islamic legal system, Shariah, that guaranteed the equality of women and men, compared with any other legal system of that time. Islam granted women rights to buy-sell relationship, charity, custody, the disposal of property, unhindered demand for permission from father or husband». Continuing to adhere to his revolutionary position at that time, Amin claimed that divorce was not a haraam (a sin) and was quite acceptable in Islam, arguing that it was necessary to give women the right to initiate a divorce, which will provide them with fairer and more humane conditions.

In the same period (the 1900s), Abdelaziz Taalbi, along with other scholars, published the book «The Liberal Spirit of the Quran», in which they drew attention to the problem of educating girls and opposed women's living a solitary life which, in their opinion, impeded social progress. All these new ideas on the status of women in Tunisia created a liberal atmosphere; this aroused interest among scientists, and led to the publishing of a number of scientific articles and works. A significant contribution was made by Tahar Haddad, who vehemently defended the position that Islam enhanced the status of women compared to pre-Islamic period. His main ideas were set forth in the book «Our Women in the Sharia and in Society» (1930). It was justified there that Islam granted women a significant range of rights. Haddad also believed that oppression of women in the case with Tunisian society had been embedded in the patriarchal system. However, such revolutionary views at that time caused a lot of criticism.

It is traditionally accepted in the doctrine of law to distinguish four main sources of Muslim law: the Koran, the Sunnah, Ijma and Qiyas. The historical analysis allows us to conclude that the Koran was quite progressive for its time in regulating family relations. Indeed, in pre-Islamic Arabia, women had a status similar to slaves, they were not recognized as subjects of relations and, like movable things, were sold by the elders on behalf of the clan. The instantaneous and unreasonable talaq («repudiation», in its modern meaning, divorce) was a common and widespread practice, as well as unlimited polygamy. Hence, it was established by the Koran that a woman is a subject of relations, limited polygamy (up to four wives). Unlike the Koran, which contains the thoughts and sayings of Mohammed (or Muhammad), the Sunna is a collection of the practices and sayings of the prophet described by theologians and lawyers known at that time (7th – 9th cent.).

[11] Khedher, Rayed (2017). Tracing the Development of the Tunisian 1956 Code of Personal Status. *Journal of International Women's Studies*. 18(4), p. 31.

The codification of the Shariah in Sunni Islam was carried out mainly by four lawyers, in particular: Abu Hanifa, Malak Ibn Anas, Muhammad Ibn Idris al-Shafi and Ahmad Khanbal. If there were no specific answers in the Koran and the Sunna, Muslim lawyers were looking for similar situations in which a certain decision was made, and in this process they were relying on a number of secondary sources, including Ijma and Qiyas. Ijma, which means «consensus», is an important secondary source that provided the Islamic community with the necessary tools to reach an agreement and created a powerful methodology in interpreting the Koran and Sunnah[12]. Muslim lawyers also apply judgments by analogy (Qiyas), the essence of which is to form a conclusion on the case on the basis of a previously adopted rule (decision) on a similar case, which allows us to solve the problem by means of combining «divine revelation with human thinking»[13].

In general, only in the 20th century, in most Islamic states, the reform of family law took place and special legislative acts were adopted. The beginning of this process is associated with the adoption of the Majallah in 1869 – 1877, which was operating in most Arab states that were part of the Ottoman Empire, except Egypt. This act regulated issues of legal capacity and its limitations, however, it did not concern family relations. Around the same period, Muhammad Kadri Pasha in Egypt made a serious attempt to codify the right of personal status, he prepared «Shariah Norms on Personal Status». This project was not put into effect as an official law, but was actually applied in Egypt until the 1920s. The Civil Code of the Arab Republic of Egypt entered into force on October 15, 1949, and it regulates family relations in combination with the norms of special laws and Islam. Almost until the middle of the 20th century family law in most Muslim states remained generally uncodified[14].

In Tunisia, as early as 1956, a new law on personal status (also translated as a code), was adopted, it granted women equal rights to divorce men, established the principle of voluntary marriage, obliging both parties to consent to marriage (articles 5 and 9), abolished polygamy (article 18) and granted women equal rights with men to work, move, open bank accounts.

The most significant family law reform in Pakistan in recent decades was the Muslim Family Law Ordinance of 1961, based on the 1956 report from the Marriage and the Family Law Commission. The reform was taking place

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[12] Javaid Rehman. The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq. *International Journal of Law, Policy and the Family*. 2007. 21, p. 112.

[13] Чепульченко Т.О. Особливості правового регулювання в країнах релігійного права. *Вісник НТУУ «КПІ». Політологія. Соціологія. Право*. Випуск 1(21). 2014. С. 118.

[14] Лубська М.В. Загальні аспекти реформування мусульманського шлюбно-сімейного права у контексті визнання правового статусу особи в державах ісламської традиції. *Вісник НАУ. Серія: Філософія. Культурологія.* 2010. № 2 (12). С. 126–127.

in the confrontation between modernists and supporters of the secular approach. Associations such as the Pakistan Women's Association and the United Front for Women's Rights supported the reform and, in the late 1950s and early 1960s, actively advocated for the expansion of women's rights in marriage, during the divorce process and inheritance procedure. Among the Commission's proposals was the establishment of the simplified procedure (not general civil procedure) for considering family disputes. It was proposed to establish that the trial cannot exceed three months, and the decision of the family court could not be reviewed. The court had to be vested with great discretionary powers to regulate the proceedings in accordance with the circumstances of each case. The recommendations of the Commission were immediately implemented. Only in 1996, it was established by law that the term for considering divorce cases may not exceed 4 months.

Some scholars argue that the Muslim Family Law Ordinance of 1961 is Pakistan's most definitive step in giving women and men equality in rights, while others point to the weakness of the reform and the fact that there were made the significant concessions to traditionalists[15].

In 2000, in the Arab Republic of Egypt the Personal Status Law was substantially amended, granting women the right to establish the terms of a marriage contract linked to the right to divorce in case of a man's other marriage. Further reforms in 2005 also included the establishment of family courts, a family fund which provides alimony payments to support women, and reformed approaches to child custody[16].

In 2004, in Morocco, there were introduced fairly progressive norms as a result of the reform of family law. Mudawana (the name of the Moroccan family code), is based on the Maliki Islamic Law School, codified in 1957–1958, after Morocco gained independence from France. Mudawana, as amended in 1958, provided for unlimited polygamy (up to four wives), unilateral termination of a marriage by a husband for no reason, and the dependent position of a woman on a man. Since the 1980s, the movement for women's rights and the promotion of equality in family relations had intensified in Morocco. In 1992, a women's rights group launched the One Million Signatures Campaign, which aimed to collect signatures for a petition to reform Mudawana. The campaign was quite successful, as a result it was an impetus for the creation of a working group on reforming the family code, and in October 2003 the project was submitted to the Moroccan parliament. According to the new Moroccan family code of 2004, spouses have equal family rights, a husband's guardship over the wife has been

[15] Haider Nadya. Islamic Legal Reform: The Case of Pakistan and Family Law. *Yale Journal of Law & Feminism*. 2000. Vol. 12: Iss. 2, 287–341. P. 298–308.

[16] Camilo Gómez-Rivas. Women, Shari'a, and Personal Status Law Reform in Egypt after the Revolution. October 1, 2011. URL: https://www.mei.edu/publications/women-sharia-and-personal-status-law-reform-egypt-after-revolution.

eliminated, the marriage age has increased, women are given the right to conclude a marriage contract on their own, the husband's right to unilateral rejection of marriage has been cancelled, women's rights to inheritance and property have been expanded, children born out of wedlock are recognized, polygamy was not eliminated, but it was limited.

Iranian women played an important role in the Persian Constitutional (conditional) Revolution of 1905–1911, which led to the formation of the first parliament in Iran. Women were involved in public affairs after this event and were engaged in journalism, education, etc. Among the prominent Iranian women who played an important role in the revolution, there was even the first woman in the first parliament – Bibi Khatun Istrabadi. In 1907, the first women's magazine «Danesh» was published, as well as other publications in various regions. During 1921–1925 there was a period of narrowing women's rights, the closure of women's magazines. After the White Revolution of 1962, a law was passed granting women the right to vote. The Family Protection Act of 1967, banned an extrajudicial divorce, limited polygamy and envisaged the establishment of family courts. Unfortunately, the Family Protection Act of 1975 was a step backward in terms of ensuring women's rights. And after the revolution in 1979 and the creation of the Islamic Republic of Iran, women's rights were significantly limited, both Muslims and non-Muslims were obliged to wear the hijab. There was ensured accountability in the form of 70 lashes or 60 days of imprisonment for violating the obligation to wear the hijab. Women were forbidden to work in the judicial system, they were forbidden to play sports with men.

In the early 1990s, there was an increase in the level of education of women and their employment in various sectors of the economy. In 2006, women made up more than half of university students in Iran; their percentage in science and technology was more than 70%. In 2012, in Iran there was taken a decision to prevent girls from choosing a specialty. The Nobel Peace Prize laureate and human rights activist Shirin Ebadi appealed to the Executive Director and Under-Secretary-General of the United Nations for Gender Equality and Empowerment to stress the fact that this is a new type of discrimination against Iranian women. As a result of this policy, girls could not choose specialties in the fields of computer science, chemical engineering, industrial engineering, civil engineering, mechanical engineering, agricultural engineering and chemistry, political science, accounting, business administration, electrical engineering, etc. In 2008, on the initiative of the President of Iran, a draft law on family support was submitted to the parliament, which allowed a man to marry his second wife without his first wife's permission and establish financial restrictions for women. The parliament rejected the bill. Thus, now in Iran it is difficult to talk about the equality of men and women; even the positive practices at the beginning of

the 20th century are already part of the history of rule-making, and by no means, of reality.

In 2005, family law was reformed and in Algeria, in particular, women's right to divorce was granted, polygamy was limited, but there was no real adoption of the principle of equality.

Sudan is an example of a state that has not yet implemented family law reform. The law on the personal status of Muslims, adopted in Sudan in 1991, caused a lot of criticism because it legalized child marriage, provided for the full custody of the husband over his wife (qawama principle), including the provision of work permit. In 2006, the National Committee to review the status of women in legislation (the First National Committee) was established to review all Sudanese laws in the light of the Constitution of 2005. In 2009, the National Committee identified 88 articles in the laws that need to be reformed to ensure gender equality, yet aiming to abolish the guardianship of men over women, raise the minimum marriage age up to 18 years old, recognize the paternity of children born out of wedlock and others, which unfortunately were never accepted.[17] Women's human rights organizations in Islamic states continue to support the reform of Muslim family laws based on the principles of equality and justice.

Currently, family relations in Muslim states are regulated not only by religious norms, but also by normative acts. For example, the Turkish Civil Code was adopted on November 22, 2001 (entered into force on January 1, 2002) consists of five books, of which the second is devoted to family law. In Pakistan, the sources of family law are the Law on the Muslim Personal Law (Shariat) Application (1935), the Law on the Muslim Law (Shariat) Application (1937), the Law on the Application of Muslim Law in Western Punjab (Shariat) (1948), The Child Marriage Restraint Act (1929), The Dissolution of Muslim Marriages Act (1939), The Dowry and Bridal Gifts (Restriction) Act (1976), The Guardians and Wards Act (1890), The Family Courts Act (1964), The Muslim Family Laws Ordinance (1961), The West Pakistan Family Court Rules (1965) and others.

Hence, at present, family relationships in the Muslim law are regulated by the Personal Status Law and in the majority of Muslim states there is special legislation, which regulates either civil and family relations (The Civil Code) in general or only family relations, or certain institutions of family law (special laws); such laws quite frequently contain the norms of the Inheritance Law.

[17] Samia El Nagar, Liv Tønnessen. Family law reform in Sudan: Competing claims for gender justice between sharia and women's human rights. CMI report, number 5, December, 2017. URL: https://www.cmi.no/publications/file/6401-family-law-reform-in.

2. Basic principles of family law of Islamic states

At the constitutional level, Muslim states have enshrined the principles of family law, in particular: equality (Art. 4, Art. 9 of the Constitution of the Arab Republic of Egypt, Art. 21 of the Tunisian Constitution, Art. 10 of the Constitution of the Republic of Turkey, Art. 14 and Art. 16 of the Constitution of Iraq, Art. 20 of the Iranian Constitution, Articles 14 and 25 of the Constitution of the United Arab Emirates', Article 41 of the Constitution of Yemen, Article 25 of the Constitution of Pakistan, Article 32 of the Constitution of Algeria), justice (Art. 4 of the Constitution of the Arab Republic of Egypt), the prohibition of discrimination (Art. 53 of the Constitution of the Arab Republic of Egypt, Art. 10 of the Constitution of the Republic of Turkey), equality between men and women (Art. 11 of the Arab Republic of Egypt, Art. 19 of Morocco's Constitution, Art. 46 of the Tunisian Constitution, Art. 36 of the Constitution of Algeria), counteraction to domestic violence (Art. 11 of the Constitution of the Arab Republic of Egypt, Art. 72 of the Constitution of Iraq, Art. 29 of the Tunisian Constitution, Art. 41 of the Constitution of the Republic of Turkey), state protection of the family (Art. 72 of the Constitution of Algeria, Art. 15 of the Constitution of the United Arab Emirates, Art. 26 of the Constitution of Yemen, Art. 35 of the Constitution of Pakistan, Art. 21 of the Constitution of Iran, Art. 29 of the Constitution of Iraq), the protection of private and personal life (Art. 57 of the Constitution, Art. 24 of the Constitution of Morocco, Art. 24 of the Constitution of Tunisia, Art. 20 of the Constitution of the Republic of Iraq, Art. 17 of the Constitution of Iraq), welfare of the family (Art. 41 of the Constitution of Turkey Republic), the best interests of the child (Art. 80 of the Constitution the Arab Republic of Egypt, Art. 47 of the Tunisian Constitution), and the upbringing of children in accordance with Islam (Art. 9 of The Constitutional Decree of the Saudi Arabia).

In Muslim states, there is are different approaches to understanding the concept of marriage. According to Art. 4 of the Morocco Marriage Code, marriage is a mutual agreement and legal relationship between a man and a woman on a permanent basis to protect the family and create a stable family in accordance with the provisions of this code. Indonesia's Marriage Act (1974) in Art. 1 defines marriage as a physical bond between a man and a woman as husband and wife in order to form a happy and eternal family on the basis of the Sole God. According to Art. 3 of Iraq's Personal Status Law of 1959, marriage is a contract between a man and a woman which is legally permitted, the purpose of which is bonding, cohabitation and having children.

There are certain conditions for getting married in all Muslim states, first of all, marriageable age. Since marriage age is not defined in the Koran, it is set differently in Islamic states. In 2004, the age of 18 was set as the marriage age in Morocco, for both men and women. Similarly, the Egyptian legislation was amended in 2008 and the marriage age of 18 was set as appropriate for both

the bride and the groom. The Jordanian Family Law (2010) set 18 as the marriageable age. In 2005 Algeria set the minimum age of 19 for getting married. Admittedly, the marriage age for men in Bangladesh is 21, Indonesia – 19 years, Syria, Iraq, Tunisia, Turkey, Lebanon, Pakistan – 18, Kuwait – 17, for women in Bangladesh, Tunisia, Iraq and Morocco – 18, Malaysia, Turkey, Syria and Lebanon – 17, Pakistan – 16, Kuwait –15. In countries where the minimum marriage age for girls has been raised, a marriage can be concluded before the marriage age is reached provided there is the court's order as well as the legal guardians' consent (for example, in Turkey for those aged 16, Jordan, Iraq and Morocco – 15).

In spite of the positive examples in some Muslim states, where the equal approach regarding the marriage age for both fiances and fiancees has been established (Algeria, Morocco, Egypt, Jordan), most Islamic states have the opposite situation, and moreover, child marriage is essentially allowed.

In this context, Iran is not an exception. Here the marriage age for men is 15 and for girls – 13[18]. Iran ratified the Convention on the Rights of the Child in 1994, which sets 18 years old as the minimum marriage age, but with the caveat, which allowed the national law to remain unchanged. According to the Civil Code of Iran in 2007, marriage is «forbidden» unless the age is reached. However, the legal age of majority is 9 lunar months (8 years and 9 months) for girls and 15 months for boys. Back in 2014, Iran pledged to study recommendations related to repealing the laws that allowed child marriage and amend the Civil Code so that it might be possible to set 18 years old as the minimum marriage age. However, at this point, the issue is not resolved, and girls in Iran can get married at the age of 13, and they can marry from the age of 9 if there is the permission of their parents and the court. According to the statistics, in Iran 17% of girls under 18 are married and 3% of girls are married under 15. The UN Special Rapporteur on the Human Rights Situation in Iran said that in 2012–2013 there were registered about 40,635 marriages of girls under 15, of which more than 8,000 marriages were the ones where men were over 10 years older than their women[19]. According to the statistics of the UNICEF for 2018, 17 percent of Iranian girls are married under the age of 18[20].

In Saudi Arabia, the marriage age is not legally defined and the media continue to periodically report on child marriages, even with girls under the age of 8. In January 2019, there was made a proposal to set 18 as the

[18] Best Practices. Progressive Family Laws in Muslim Countries. August 2005. p. 8. URL: https://www.wilsoncenter.org/sites/default/files/Best%20Practices%20%28English%29.pdf.

[19] What's the child marriage rate? How big of an issue is child marriage? URL: https://www.girlsnotbrides.org/child-marriage/iran/.

[20] Patrick Goodenough. Iran Won't Outlaw Marriage of Under-13 Girls, as Islamic Countries Fare Worst in Annual Gender Survey. URL: https://www.cnsne.ws.com/news/article/patrick-goodenough/iran-wont-outlaw-marriage-under-13-girls-islamic-countries-fare.

minimum marriage age and given there was the court order – 15; however, it has not been adopted so far.

The authoress has analyzed the principle of equality in Muslim states in a separate article[21].

As for the principle of voluntary marriage, Islam clearly requires the consent of the bride and the groom, but it is traditionally accepted that parents arrange marriages, they search and select the future bride and groom. In addition, in most Muslim countries, there is the institution of guardianship over women. According to the Koran, the father (another closest relative of the male gender) is the guardian of the girl, and he selects the bridegroom, also gives his consent to the marriage, discusses the terms of the marriage contract, etc. For example, in Morocco, Turkey and Tunisia, the consent of legal guardians is required to marry the one who is under the age. Indonesia's Marriage Law states that a person must obtain consent to marriage from both parents before the age of 21[22]. In Saudi Arabia, the consent of the guardian is required for marriage. According to Art. 18 of the Algerian Family Code, a marriage concluded without a guardian or two witnesses must be declared invalid prior to its actual commencement. In our view, the institution of guardianship over women is the evident violation of the equality principle.

In some Muslim states, forced marriages are criminalized. Article 9 of the Iraqi Personal Status Act establishes that no relative or third person can force any person (a man or a woman) to marry without their consent. Forced marriages are considered invalid if the marriage has not been completed. Relatives or third parties cannot prevent the marriage of eligible persons. In case this norm of law has been violated, it gives rise to liability in the form of imprisonment for a term of up to three years and / or a fine, if the offender is a relative of the first degree, if not, then up to ten years of imprisonment. However, in most Islamic states, the practice of coercion to marry by parents and relatives of the bride and the groom is widespread. In Pakistan, forced marriages are still used as a means of reconciliation of families and tribes, it is certainly illegal and can be appealed in court, but there are not many such cases.

The Koran has established a ban on marrying those women who were married to their fathers (4:22), as well as mothers, daughters, sisters, paternal and maternal aunts, daughters of a brother and a sister, mothers who were breast-feeding, breast-feeding sisters , mothers of wives, adopted daughter, wives of sons, or two sisters (4:23), married women (4:24).

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[21] Менджул М. В. Принцип рівності та сімейне право ісламських держав. Visegrad Journal on Human Rights. 2019. № . 4. Vol. 1. P. 70–75.

[22] Syahril Jamil. Konstruksi Hukum Keluarga Islam Di Indonesia. Jurnal Usrah. Vol. 3 No. 1, Juni 2017. P. 70.

In September 2017, Tunisia lifted a ban on Muslim women's marrying to non-Muslim men. This discriminatory legislative provision was part of a series of circulars issued by the Ministry of Justice in 1973. In accordance to Art. 65 of the Family Code of Morocco, Family Court grants permission: to marry a person under the age, to conclude another marriage (polygamy), to marry a person with a mental illness that has led to disability, for the marriage between a Muslim and a foreigner.

Such principle of family law as monogamy is important for European states, and it is common knowledge that Islam tolerates polygamy.

Polygamy is based on the norms of the Koran (4: 3) and is not limitless. First of all, it is possible to have up to four wives at the same time, and in most Islamic states at the level of law it is determined that the right to remarry is granted by the court, when the consent of the first wife is provided, the second wife should be informed of the fact that her future husband has the first wife, and the husband must guarantee fair treatment of all wives.

Among Muslim researchers there has been still a heated debate about the fact whether polygamy is prohibited, except where the protection of orphans' rights is the main objective cause?[23] Many scholars have argued that the Koran's norms of polygamy were adopted in such a historical context when multiple wars resulted in a disproportion between men and women, thus in order to protect the rights of widows and orphans, men were allowed to have up to four wives.

The Family Law Commission in Pakistan noted that «if this way of solving the problem leads to injustice in family relations, then Muslims are advised to practise monogamy only». In its report, the Commission states that a marriage license, allowing one to have more than one wife, established social justice at the time it was written, i. e. in the 7th century. Similarly, regulating the practices will enable us to set the modernist goal of social justice today[24]/

Article 3 of the Indonesian Marriage Law stipulates, on the one hand, that in marriage a husband can only have a wife and a woman – only a husband (part one), on the other hand, in part two, it is stated that courts may grant a husband permission to have more than one wife at the stakeholders' will. In 2007, the Indonesian Constitutional Court was considering the petition linked to lifting restrictions on polygamy and, in its decision, upheld the existing law on the grounds that «its norms aimed at protecting the fundamental rights of existing and future women».

Among Muslim states, polygamy is banned only in Tunisia and Turkey. Thus, justifying the prohibition of polygamy, Article 18 of the Tunisian

[23] Nadya Haider. Islamic Legal Reform: The Case of Pakistan andFamily Law. Yale Journal of Law & Feminism: Vol. 12: Iss. 2.Article 5. P. 311.

[24] Ibid. P. 312.

Law on Personal Status (1956) used the argument that actual «fair treatment» cannot be guaranteed to all wives. For the violation of the polygamy ban there comes the responsibility for both the man and the woman in the form of a year of imprisonment or a fine of two hundred and forty thousand Tunisian francs.

In Islamic states, a marriage contract may limit polygamy (there is a rule that a husband will no longer marry another wife), grant a woman the right to divorce without any cause specified by law, prohibits the husband from restricting his wife's employment and traveling abroad. However, because of traditions and religious norms, women rarely use such opportunities in marriage contracts.

Notwithstanding the prevailing principle of polygamy, in Islamic states, the number of monogamous families has been increasing, one of the reasons is the material one, – most Muslim men are unable to provide equal financial support and create equal conditions for more than one wife. In countries such as Tunisia, the Arab Republic of Egypt, Jordan, Turkey, etc., the situation when both spouses work, is becoming more prevalent.

CONCLUSIONS

Thus, Muslim states, according to the ratio of religious and legal regulation of family relations can be divided into the following groups: 1) states where family relations are regulated by the laws as well as norms of Islam, but the latter are given priority, including in the administration of justice (Algeria, Bahrain , Egypt, Iraq, Jordan, Kuwait, Libya, Mauritania, Morocco, Oman, Palestine, Qatar, Saudi Arabia, Tunisia, UAE, Yemen, Bangladesh, Brunei, Iran, Malaysia, Maldives, Pakistan, Afghanistan and Somalia); 2) states where Islam is not recognized as a state religion but widely used in the regulation of family relations (Indonesia and Nigeria); 3) states where Muslims predominate but family relations are regulated solely by law (Kazakhstan, Kyrgyzstan, Tajikistan, Turkey, Turkmenistan, Uzbekistan, Albania, and Azerbaijan).

In general, only in the 20th century in most Islamic states family law was reformed and specific legislative acts were adopted. Nowadays, family relations in Muslim law are regulated by the law of personal status and in most Muslim states there is the special legislation that regulates either civil and family relations on the whole (the civil code), or only family relations or individual institutions of family law (special laws), they quite often contain the rules of inheritance law.

Among the basic principles of family law of Muslim states there are: justice, the principle of equality, the prohibition of discrimination, the countering of domestic violence, state protection of the family, the protection of private and personal life, welfare of the family, the best interests of the child, the upbringing of children in accordance with the norms of Islam.

Despite the fact that in many Islamic States there has been singled out the principle of equality between men and women at the constitutional level (Article 11 of the Constitution of the Arab Republic of Egypt, Article 19 of the Constitution of Morocco, Article 46 of the Tunisian Constitution, Article 36 of the Algerian Constitution), in the majority of Islamic states there have been practical problems with its implementation, in particular, different marriage age for men and women, the institution of men's guardianship over women, polygamy, violence against women in the family. In Islamic states, a marriage contract may limit polygamy (there is the rule that a husband will no longer marry another wife), grant a woman the right to divorce without a legally specified cause, may prohibit the husband from restricting his wife's employment and traveling abroad. However, due to traditions and religious norms, women seldom make use of such possibilities in marriage contracts. Given the convergence of legal families in today's globalized world, there is an obvious need for further research into the legal regulation of family relations in Muslim states.

SUMMARY

The issue of reforming family law in Islamic states has been studied. There has been established the correlation between legislative (state) and religious regulation of family relations in Muslim states. Based on this, there have been identified three groups of states, namely: states where family relations are regulated by laws and norms of Islam, but the latter are given priority, including in the administration of justice; states where Islam is not recognized as a state religion but is widely used in the regulation of family relations; states where the majority of population are Muslims but family relations are regulated solely by law.

It has been found out that at present family relations in Muslim law are regulated by the personal status law and in most Muslim states there is special legislation that regulates either civil and family relations in general (the Civil Code), or only family relations or individual institutions of family law (special laws), such laws quite commonly contain the rules of inheritance law.

It has been analyzed what principles were formed during the reforming of family law in Islamic states. It has been found out that among the basic principles of family law of the Muslim states there are the following: justice, the principle of equality, the prohibition of discrimination, the countering of domestic violence, the protection of the family, the protection of private and personal life, the well-being of the family, the best interests of the child, the upbringing of children according to the norms of Islam.

Although the principle of equality between men and women is singled out at the constitutional level in a number of states, in the vast majority of Islamic states there are practical problems with its implementation, particularly, different marriage age for men and women, the establishment

of the institution of men's guardship over women, polygamy, violence against women in the family. Among Muslim states, polygamy is banned only in Tunisia and Turkey.

It has been determined that in Islamic states in a marriage contract polygamy can be limited (there is the rule that the husband will not marry another woman), the woman is granted the right to divorce without the reasons stipulated by law, the husband cannot prohibit his wife from working and travelling abroad. Nevertheless, owing to traditions and religious norms, women rarely take advantage of such opportunities in marriage contracts.

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Information about the author:
Mendzhul M. V.,
Candidate of Law Sciences, Associate Professor,
Department of Civil Law and Procedure, Law Faculty,
Uzhgorod National University
26, Kapitulna str., Uzhhorod, Ukraine, 88000

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THE IMPLEMENTATION OF STATE ENVIRONMENTAL POLICIES AT THE NATIONAL, REGIONAL AND LOCAL LEVELS IN UKRAINE

Petretska N. I.

INTRODUCTION

Today the tendency of rapid development of both international environmental law and national environmental legislation has been established in the world; it is accompanied by an unprecedented phenomenon – the mutual "flow" of advanced environmental ideas within the framework of national and international environmental law.

The human right to a clean environment in the constitutions of modern states is the legal basis for the consolidation of the ecological function of the state. Preserving the environment for the present and future generations is seen as a shared responsibility of the state, civil society and man in modern law theory and constitutional practice. The right to a safe environment which is based on the natural legal doctrine, expresses the social purpose of environmental law. This doctrine reflects the idea of orienting the entire environmental policy of the state towards protecting the life and health of its citizens by means of guaranteeing a safe and quality environment.

Ever since Ukraine became independent, the issue of forming state environmental policy emerged in the context of overcoming the consequences at the Chernobyl Nuclear Power Plant after the disaster happened. The other problems such as: industrial pollution, waste treatment, agrarian sector reform, the control of emissions of harmful impurities and substances into the atmosphere, water and land pollution have not been of great importance. Hence, the right to environmental safety has been neglectful for a long time.

State environmental policy is an activity of state bodies aimed at ensuring the constitutional right of everyone to a safe and healthy environment and compensation for the harm caused by a violation of this right. It can also be talked about implementing Environmental policy within enterprises or organizations[1].

L. Vasylchuk distinguishes several stages in the development of the right to environmental safety as an integral part of environmental policy. They are:

1. The establishment of the system of realization of the right to a safe and healthy environment in Ukraine 1991–1993.
2. The nuclear disarmament of Ukraine – from 1994 until June 28, 1996.

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[1] Національна екологічна політика: міністерство екології та природних ресурсів. URL:https://menr.gov.ua/timeline/Nacionalna-ekologichna-politika.html.

3. The Constitutional recognition and consolidation of the right to a safe and healthy environment in Ukraine from 28 June 1996 to 22 February 2014.

4. The latest stage in the realization of the right to a safe and healthy environment in Ukraine connected with the process of integration to Europe, has started since February 22, 2014 and continues to this day[2].

The sharp exacerbation of environmental problems in Ukraine is caused by a number of political, socio-economic, technical, technological, organizational and other factors. The main ones are: the ecologically unbalanced extensive development of productive forces and consequently, the exhausting exploitation of natural resources, the irrational structure of the economy in terms of ecology; the ignoring of the environmental imperatives by almost all manufacturers; the technical and technological, and organizational backwardness of social production and underdevelopment of environmental infrastructure; low rates of introducing the economic and legal mechanism for the rationalization of environmental management and implementation of environmental measures; the lack of regulatory and methodological support of legislative acts in the activities of regional and local authorities[3].

Modern scientists distinguish three main levels of implementing environmental policy: global, national and local ones. However, as noted by A. Lazor, it is necessary to recognize such levels of the implementation of environmental policy: local – the level of an enterprise / an organization; the level of an administrative district, a city; the regional level; subnational – the level of several regions; national – the state level; stat-to-state – the level of several states; global – the level of the planet[4].

1. The implementation of Ukraine's national environmental policy: pros and cons

The national environmental policy is formed by the Ministry of Ecology and Natural Resources. Until recently, it has been the Ministry's responsibility to simultaneously develop and implement environmental policy. Currently, as part of public administration reform, the Ministry is planning to focus on expert, analytical work, which will be related to developing solutions in environmental protection activities, however, their

[2] Реалізація права на безпечне для життя і здоров'я довкілля в Україні: монографія. Л.Б. Васильчук, Ю.М. Бисага. Ужгород, 2019. 208 с.

[3] Костицький В.В. Екологія перехідного періоду: право, держава, економіка (економіко-правовий механізм охорони навколишнього природного середовища в Україні). К., ІЗП і ПЗ, 2003. 772 с.

[4] Лазор О.Я. Адміністративно-правові засади державного управління у сфері реалізації екологічної політики в Україні. Автореферат дисертації на здобуття наукового ступеня доктора наук з державного управління, К., 2004., ст. 8–9.

direct implementation will be entrusted to various state agencies, services or local authorities[5].

It is important to briefly delineate the specifics of the notions of state regulation and public administration in Ukraine, since environmental policy is a separate area of activity of the state and public administration. Public administration is an activity aimed at the implementation of laws and other regulations through the use of various forms of the organizational influence on social phenomena and processes. Almost all spheres of human life are the object of managerial relations, and the determining principle of this activity is subordination. In its content, the notion «public administration» makes use of administrative influences, that is, direct communication methods, in contrast to state regulation, which provides for the implementation of comprehensive measures in the field of environmental policy with methods of direct communication. In contrast, state regulation involves the implementation of integrated measures in the field of environmental policy for the purpose of streamlining them, establishing common norms and rules of public behavior for protecting the animate and inanimate nature of the environment, the population's health and life, organizing and maintaining the rational use and reproduction of natural resources. Provided the functioning of state regulation is effective, there is the need for direct intervention of the state and its institutions in the activities of environmental structures[6].

That is why the development of fundamental principles of state environmental policy in terms of ensuring environmental safety is largely complicated by the heterogeneity and ambiguity of approaches to the identification of the content of the latter. For example, in the specialized literature, environmental safety is interpreted in several conceptual meanings:

a) the protection of humans and the environment against emergencies;

b) the condition of preserving human health and ensuring a sustainable socio-economic development;

c) the guarantee of preventing ecological catastrophes and accidents;

d) the balance of developing ecosystems[7].

There is a high risk of natural and man-made emergencies in Ukraine. In Ukraine there are 23767 potentially dangerous enterprises and other objects, yet accidents at each of them can cause emergencies of technogenic and natural character at the state, regional, local and object levels. Up to 300

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[5] Національна екологічна політика: міністерство екології та природних ресурсів. URL:https://menr.gov.ua/timeline/Nacionalna-ekologichna-polityka.html.

[6] Лазор О.Я. Адміністративно-правові засади державного управління у сфері реалізації екологічної політики в Україні. Автореферат дисертації на здобуття наукового ступеня доктора наук з державного управління, К., 2004., ст. 8–9.

[7] Андрейцев В.І. Політика. Інновації. Приватизація. Екологологічна безпека. Право. К. 1996, С. 5–6.

natural and man-made disasters are recorded annually, leading to the loss of human lives as well as major economic loss[8].

Environmental security relationships are closely linked to the rational and efficient use of natural resources, the protection of the environment, the use of environmentally hazardous sites and objects, and this determines the complexity of the content of the concept of environmental safety, which includes: a) a certain state of a natural object (security of nature) and b) the system of guarantees provided by the state to its citizens which ensure normal daily activities of people[9].

When forming the basis of state environmental policy in terms of legal support for environmental safety, it is advisable to take into account the fact that the current environmental legislation of Ukraine, as the legal criteria for a safe environment, provides for special standards of environmental safety:

a) the maximum permissible concentrations of pollutants in the natural environment;

b) maximum permissible levels of acoustic, electromagnetic, radiation and other harmful effects on this environment;

c) the maximum level of permitted contaminants in food.

It is obvious that the first two standards characterize the quality level of external environmental safety of a person, whereas the third one indicates its internal security. It is clear that this legislative model leads to a somewhat broadened understanding of a safe environment, within which environmental safety must be ensured[10].

Contemporary environmental policies, both at the national and regional levels, are developed and implemented under tense political conditions, which are caused by various political goals and interests of agencies, and this often leads to conflicts between individuals. There are situations in which it is extremely difficult to find political consensus between environmental authorities and environmentalists, whose interests are often lobbied by relevant agencies and local governmental and non-governmental institutions. This, in particular, concerns the utilization of natural resources of public use, the distribution of economic requirements and costs, the responsibility for the future environmental consequences of an activity (or inactivity), etc[11]. The issue of environmental safety is gaining priority at the regional level. In the near future, ecology will determine the norms and lifestyle of society.

[8] Про Основні засади (стратегію) державної екологічної політики України на період до 2020 року. Закон України від 21.12. 2010. № 2818-VI. Відомості Верховної Ради України. 2011. № 26. Ст. 218.

[9] Екологічне право: підручник. За ред. А.П.Гетьмана. Х.: Право. 2014. С. 295.

[10] Андрейцев В.І. Політика. Інновації. Приватизація. Еколологічна безпека. Право. К. 1996. С. 5–6.

[11] Заржицький О.С. Актуальні проблеми правового забезпечення екологічної політики України (теоретичні аспекти). Монографія. Д.: Національний гірничий університет, 2012. 200 с.

The excessive concentration of environmentally hazardous establishments, out-of-dated and ineffective environmental protection equipment at the final stages of technological chains, the reliability of technical systems and low qualifications of personnel at enterprises with a high level of environmental risk, and, finally, the issue of ensuring environmental safety of conversion, – all of these can cause social and political tension[12].

For years, environmental problems in Ukraine have not been solved by a specially created organism called the state. It may not suffice to say that everything depends on the person, if at every step they are offered «for convenience» to use means which are far from being environmentally friendly. By the way, taxes are paid for these harmful means to the state budget, both by the producer and the consumer. The question rises whether it is feasible to replenish the state budget in this way and then use these funds to solve environmental problem. This is, of course, a very profitable business, since three times less money is allocated for protecting the environment in the state budget in comparison with the costs received from the environmental tax. This is the so-called socialist «residual principle», which is still heavily used in budget planning.

All this is explained by many scientists as a transitional period in Ukraine after its independence was gained. It is a very convenient term for use in the post-Soviet countries, because, as one of French researchers points out, different authors characterize it differently. In particular: the transition from one type of political regime to another; the systematic reconstruction of social structures; changes occurring in the economic sphere; accompanied by some determinative criterion, this concept often indicates that political and economic systems are being reconstructed compared to Western countries[13].

Freedom House contracts independent researchers from academia, journalism, and civil society for each country to draft the country reports and make the initial scoring. The Nations in Transit annual report researchers score the countries on a scale of 1 to 7 in seven categories: National Democratic Governance, Local Democratic Governance, Electoral Process, Independent Media, Civil Society, Judicial Framework and Independence, and Corruption. Category scores are based on a detailed list of questions available here. These category scores are straight-averaged to create a country's "Democracy Score" on a scale of 1 to 7, with 1 being the most democratic, and 7 the least.

Their conclusion about Ukraine in 2013: «Far-right extremism represents a threat to the democratic development of Ukrainian society. The brief provides an overview of the activities and influence of the far right,

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[12] Заржицький О.С. Актуальні проблеми правового забезпечення екологічної політики України (теоретичні аспекти). Монографія. Д.: Національний гірничий університет, 2012. 200 с.

[13] Фріб М. Як осмислити посткомунізм? Політична думка. 1997. № 4. С. 109–110.

differentiating between groups that express radical ideas but by and large operate within a democratic framework and extremist groups, which resort to violence to influence society»[14].

As of 2018, Ukraine, according to Freedom House is partly free[15]. Regrettably, the status of a transitional state for Ukraine is obviously beneficial for persons holding positions in the ministry. Hence, the irrational «enrichment» of the state budget, mentioned above, costs its citizens a low standard of living, poor health, which is a consequence of violating the right to a safe and healthy environment. Obviously, the status of a transitional state can last for decades, provided there is no strategy for the development of the branches of the state on the basis of the rational management of nature.

Contemporary environmental policy at the national level is rather disappointing. Fight against corruption is likely to be the biggest tragedy for Ukraine. It is impossible to improve the state of the economy, let alone global environmental problems, without being unaware of the rational use of funds, which are written off for obscure and unprofitable purposes of the society.

At the same time, each country, adopting its national strategy of sustainable development, transforms them according to the specific conditions. The implementation of the principles of sustainable development requires an appropriate public management in all sectors of the economy, at the levels of governance against the background of considerable fines and the effectiveness of laws. Such conceptual approaches should envisage the transformation of all types of education and the formation of ecological culture of the population; the change of communicational and informational, political, economic, social spheres according to the priority of interests and needs from local communities to the state as a whole; the use of environmental tax only for stabilizing and solving environmental problems; the proceeding to a new level of information potential of environmental protection and nature management; the metrological and in accordance with its and world scientific achievements, the harmonized regulatory support for the state, trends, quality of the environment and drinking water, food, the population's diseases from the combined action of food additives, industrial allergens, the evolution of antibiotics and drugs, etc[16].

To the most important problems that have transformed from the national into the global ones in nature belong the problems of environmental safety and environmental protection. In The Main Principles (strategies) of the State Environmental Policy of Ukraine for the period up to 2020 there have been established the root causes of Ukraine's environmental problems:

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[14] URL:https://freedomhouse.org/report-types/nations-transit.

[15] URL:https://freedomhouse.org/report/freedom-world/2019/ukraine.

[16] Скрипчук П.М., Строченко Н.І., Вега А.Ю. Соціо-еколого-економічні засади природокористування: інновації, інвестиції та механізм реалізації. Монографія під редакцією Скрипчука П.М. Рівне: НУВГП, 2014. 454 с.

– the inherited structure of the economy with a predominant share of resource- and energy-intensive sectors, whose negative impact was exacerbated by the transition to market conditions;

– the depreciation of the fixed assets of industrial and transport infrastructure;

– the existing system of public administration in the field of environmental protection, regulation of the use of natural resources, the lack of clear delineation of environmental and economic functions;

– the poorly formed institutions of civil society;

– he lack of understanding in society the priorities of environmental protection and the benefits of sustainable development;

– non-compliance with environmental legislation[17].

As a matter of fact, currently, the priorities in environmental policy, determined in the Draft Law of Ukraine «On the Main Principles (Strategy) of State Environmental Policy in Ukraine for the Period up to 2030», are being developed strategically. However, the proposals from the Ministry of Nature to the Ukrainian Parliament to significantly increase fines for environmental damage will not improve the environmental situation. At the beginning of our research, it has been noted that the financing of environmental needs from the state budget relies on «the residual approach». It means that environmental security funding receives one-third less money from environmental taxes collected.

Taking into account the Draft Law on Environmental Policy by 2030, it is becoming quite clear that there will be no suprapositive changes in improving the environmental situation in Ukraine. The introduction of an ecosystem approach to sectoral policies and improvement of the system of integrated environmental management is of particular importance. The endorsement of the strategy is challenging, as it should be admitted that there is the need for the integration of environmental policy with other policies, as well as for the mandatory consideration of the environmental component when developing and approving state planning documents and in the process of decision-making related to conducting economic activities that can have a significant environmental impact. After all, at the legislative level, such norms have already been established. The problem lies in the mechanism of implementing this strategy.

The introduction of environmentally safe, resource- and energy-saving technologies, the development of renewable energy sources, the utilization of intangible natural resources occur in Ukraine asystematically. Studying

[17] Про Основні засади (стратегію) державної екологічної політики України на період до 2020 року (Затверджено Законом України від 21 грудня 2010 року № 2818-VI. Відомості Верховної Ради України. 2011. № 26. Ст. 218. URL: http://zakon0.rada.gov.ua/laws/show/2818-17.

foreign experience is extremely important. The economic component in state environmental policy is central.

Environmental issues cannot be tackled in isolation from global environmental issues caused by anthropogenic impacts: drinking water problems; pollution of the oceans by sewage, petroleum products, debris; the protection of the ozone layer; soil erosion and contamination; massive deforestation and no restoration of forests; the decline in flora and fauna species; freshwater pollution in rivers, lakes and other reservoirs; the destruction of fishery resources; the irrational use of natural resources; global warming.

2. The implementation of Ukraine's state environmental policy at the regional and local levels

Admittedly, one of the priorities of the state regional policy, along with improving material, financial, informational, personnel and other resource support for the development of the regions, promoting the exercise of powers of local governments is also the creation of an effective environmental protection system by taking into account the ecological componentin the strategies of regional development, the estimation, equalization and reduction of technogenic and ecological environmental load in the regions[18].

According to The Law of Ukraine «On the Principles of State Regional Policy», state regional policy is understood as a system of goals, measures, means and concerted actions of central and local executive bodies, local self-government bodies and their officials that are there to ensure a high quality of life of people throughout Ukraine taking into account the natural, historical, ecological, economic, geographical, demographic and other features of the regions, their ethnic and cultural identity[19].

The implementation of the state regional policy is carried out on the basis of a system of interrelated documents based on the Strategy of development of Ukraine, the General scheme of planning the territory of Ukraine, the regional and local planning schemes.

The importance of territorial planning of areas is set out in the State strategy for regional development for the period up to 2020, approved by the Cabinet of Ministers of Ukraine from August 6, 2014, Decree No. 385, which states that the proper planning of territories shall contribute to the improvement of regional investment and innovation infrastructure; shall ensure the formation of the favorable investment climate, a positive investment image and the promotion of the investment opportunities of the regions of Ukraine in the foreign market; shall contribute to the introduction of various instruments and mechanisms to stimulate local economic development, the creation of new

[18] Про засади державної регіональної політики. Закон України від 05.02.2015 р. № 156-VIII. Відомості Верховної Ради України. 2015. № 13. ст. 90.

[19] Ibid.

business that focus on local sources of raw materials, meet the needs of the internal market; shall facilitate the implementation of projects aimed at improving the level of socio-economic development of border areas, improving their ecological state, building border infrastructure, developing tourism and so on. The European Union Strategy for the Danube Region sets out general guidelines for territorial planning and states that transport infrastructure has a positive impact on the development of the region, but in the absence of proper planning, it can have a negative impact on the diversity of species as well as on the quality of air and water[20].

Due to the lack of detailed planning, a number of economic operations are not carried out, which in turn has affects the attraction of foreign investments that would contribute to the flow of funds to the state and local budgets, which would favour the socio-economic development of the regions. In particular, investors prepare projects in which information about the specifics of their activities and their impact on the environment should be stated.

Owing to the poor state policy at the regional and local levels, there is the lack of funds in the local budgets for performing work connected with the development of urban planning documentation, which is extremely unprofitable for the state.

It is worth emphasizing that consolidating the status of local authorities at the legislative level, providing them with independence in the formation of local budgets and expanding their scope of competencies gradually contributes to the development of local self-government. In particular, in the process of forming regional policy the leading place is taken by cross-border cooperation. In this regard, new opportunities are opening up for enhancing economic activity in the peripheral territories and increasing their competitiveness by mobilizing the natural resource potential of the neighboring territories. Cross-border cooperation is regulated by the Law of Ukraine «On Cross-Border Cooperation» and a number of regulatory acts. The spatial arrangement of the cross-border region is carried out in accordance with the main provisions of the laws of Ukraine «On the General Planning Scheme of the Territory of Ukraine» and «On Planning and Building Development of Territories». Yet it is also regulated by international acts, in particular: the European Convention on the Basic Principles of Cross-Border Cooperation between Territorial Communities or Authorities (1980); two more ratified protocols – the Additional Protocol and Protocol No. 2 to this Convention; «On the Ratification of the Convention on Environmental Impact Assessment in a Transboundary Context»;

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[20] Державна стратегія регіонального розвитку на період до 2020 року. Постановою Кабінету Міністрів України від 06 серпня 2014 року № 385. URL: https://zakon.rada.gov.ua/laws/show/385-2014-%D0%BF.

«On Ukraine's Accession to the Convention on the Protection and Use of Transboundary Watercourses and International Lakes»; «On Accession to the European Charter of Local Self-Government», etc.

A significant part of the legislative base of Ukraine regarding cross-border cooperation is formed by interstate agreements of good neighborliness and cooperation, in which separate articles stipulate the development of cross-border cooperation, or intergovernmental agreements on cooperation between the border regions of Ukraine and the administrative-territorial units of the neighboring states. Today, all regions of Ukraine have concluded cross-border agreements on cooperation with the neighboring territories of the neighboring countries.

At the moment, an important role in the formation of state regional policy is played by the local authorities. It is due to the development of local self-government in Ukraine that cross-border cooperation with individual cities and regions is possible. Here is brief information about the current content of the institution of local self-government in Ukraine.

The constitutional content of the institution of local self-government has two characteristics. The first is the independence of the territorial community, local authorities in solving a certain range of issues. The second – the local self-government deals with not only issues of public life, but also with matters of local importance, that is, those that are primarily related to the life of territorial communities. The list of such issues is defined in the Constitution of Ukraine and the Law of Ukraine «On Local Self-Government in Ukraine»[21].

It is appropriate to consider the essence of local self-government through the prism of two main theories: the communal (municipal) theory, which stands for the independence of local self-government from the state, and the state theory, which defines local self-government as a form of exercising state power locally. These theories became the basis for the formation of two most common models of local self-government: Anglo-Saxon (the local authorities are autonomous in relation to state power) and continental (both local self-government and state administration are combined at the local level). Each of the theories of local self-government has its advantages and disadvantages[22].

However, it should be noted that local affairs can only be administered if there are appropriate rights, arising from the public nature of the activities

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[21] Рішення Конституційного Суду України у справі за конституційним поданням Міністерства внутрішніх справ України щодо офіційного тлумачення положення частини другої статті 28 Закону України «Про статус депутатів місцевих Рад народних депутатів» (справа про охорону трудових прав депутатів місцевих рад від 26 березня 2002 року № 1-9/2002). URL: http://zakon.rada.gov.ua/laws/show/v006p710-02.

[22] Слесар К. Теорії та моделі місцевого самоврядування. URL: https://naub.oa.edu.ua/ 2017.

of the population, the bodies and officials elected by it, that act in the interests of society with certain obligations[23].

A. Batanov stresses: «the member states of the Council of Europe, which signed the European Charter on Local Self-Government, proceeded from the fact that «the existence of local authorities endowed with real powers can ensure the administration which is effective and close to citizens» (the preamble of the European Charter on Local Self-Government). We are talking about the activities of the individual elements that make up the mechanism of the local self-government (local government bodies and officials, territory, regulatory legal acts, communal property, etc.), as well as the focused activities of the entire socio-political system of society and democratic statehood as a whole, which comes down to solving important problems and achieving global goals that arise in a given historical period in society and the state in general[24].

Addressing the issues of global importance begins at the local level. In particular, the UN Vienna Declaration on the Right to Development, 1986[25] recognizes that a person must be an active participant and beneficiary of the right to development. The European Declaration of Urban Rights, adopted by the Permanent Conference of Local and Regional Authorities of Europe (CLRAE) of the Council of Europe 1992, states that residents of European cities, being aware of their responsibility for the condition of cities, show solidarity and commit themselves to ensuring for all residents of cities equal rights to legal safety, environmental safety, the opportunity to find work and thereby ensure their personal financial independence, housing, safe traffic, health protection, sports and recreation, the possibility to be engaged in a variety of cultural and creative activities, the peaceful coexistence of various cultural, ethnic and religious communities, quality architecture, a harmonious life, their personal political life, economic development, harmonious development (when the local authorities strive to achieve a balance between the economic development and environmental protection), a wide range of goods and services, the rational use of natural resources, cooperation between cities, financial security, equality of all citizens independently of gender, age, religion, material and political status, physical or mental impairments[26].

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[23] Яворський В. Д. Основні напрямки удосконалення законодавства про місцеві вибори в Україні. Державне будівництво та місцеве самоврядування: зб. наук. пр. 2001. Вип. 1. С. 119–124.

[24] Батанов О.В. Принципи місцевого самоврядування як ціннісний вимір муніципального права та сучасного муніципалізму в Україні. Вісник Дніпропетровського університету імені Альфреда Нобеля : Серія «Юридичні науки». № 1(2). 2012. С. 61–66.

[25] Декларація про право на розвиток» 1986 URL: http://zakon3.rada.gov.ua/laws/show/995_301.

[26] Європейська декларація прав міст. URL: http://www.eru.org.ua/index.php?page=1206.

It is no coincidence that the United Nations Conference on Environment and Development, held up to the mark in June 1992 in Rio de Janeiro (Brazil), showed that the state of the environment is one of the most important factors of global, regional and national security[27]. The basic provisions for addressing sustainable environmental management are the principles set forth in the Declaration on Environment and Development endorsed at the United Nations Conference (Rio de Janeiro, 1992).

At the same time, the involvement in solving local issues is voluntary. This is evidenced by the signed Additional Protocol to the European Charter of Local Self-Government on behalf of Ukraine of October 20, 2011 (adopted by the Parliament on September 2, 2014). The Additional Protocol to the European Charter of Local Self-Government significantly expands the rights of citizens to participation in the affairs of the local authorities, it contains a warning against bribery or the use of force or forced forms of participation of a person in the public life of local communities. The signing of the Additional Protocol, its implementation in the national legislation and the practical application of the standards envisaged therein will contribute to the democratization of society.

Nevertheless, there are a number of unresolved issues of local (municipal) democracy, which leave an imprint within the context of the initiated and quasi-implemented in Ukraine – constitutional, administrative, educational, medical, public administration reforms and other reforms. A reform which is considered to be successfully implemented is the one that is applied in reality at the local level and is positive for the individual and citizen.

Particularly, the development of urban planning documentation is extremely important for the implementation of state environmental policy at the local level, it is normative in nature and is adopted on the basis of legislation and by-laws of the executive authorities in order to ensure an appropriate social result. This act establishes not only a map of the city with streets, but it should also take into account important environmental components for the safe and healthy living of the residents – the city's community. Solving the problems of the life of society or the so-called issues of local importance determines the municipal sociality. The implementation of local democracy is the fundamental grounds for a democratic political regime of a state. Local democracy is a teleological reference point for the existence of municipalism, the local community, and the individual[28].

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[27] Хилько М. І. Екологічна безпека України: Навчальний посібник. К. 2017. С. 37.

[28] Петрецька Н.І. Забезпечення права на екологічну безпеку громади під час розроблення містобудівної документації. Матеріали міжнародної науково-практичної конференції «Конституційно-правове будівництво на зламі епох: пошуки оптимальних моделей», м. Ужгород, 3–4 травня 2019 р. Ужгород: Ужгородський національний університет, 2019. 310 с.

Urban planning documentation is the basis of the master plan of the settlement and, accordingly, the general planning scheme of the territory of Ukraine. Issues related to urban planning documentation, that is, approved textual and graphic materials on the regulation of planning, development and other use of territories, are extremely complex. The planning and zoning of the territory play an important role in the development of urban planning documentation[29].

When the plan of the territory is being designed the mutual consent in state, public and private interests is required during planning and developing the territories, which also includes: the identification and rational mutual arrangement of residential and public development zones, industrial, recreational, environmental, wellness, historical and cultural zones and objects; the conservation, creation and restoration of recreational, environmental, wellness areas and objects, landscapes, forests, parks, squares, separate green spaces[30].

Speaking about the unification of territorial communities and issues arising in the course of exercising powers by their bodies and officials in the newly formed communities, the cornerstone is the division of objects under jurisdiction between public authorities and local administrations. And this is also the peculiarity of carrying out public policy and the strategy both at the national and regional levels. It is impossible to further develop the state without realizing the need to bring the decentralization process in Ukraine to its logical end.

The accession of Ukraine and its regions to the pan-European process of regionalization requires from the country the application of regional development mechanisms whose contents are similar to those used in European countries and, above all, the implementation of program-targeted approaches. Despite their diversity, their main feature is that they organize participation and unite the efforts of various levels of government in regional development. Of particular importance are the processes of using «eco-marketing» relations in the field of environmental policy[31].

The challenging issue is to rebuild the development strategy of the state in order to overcome the complex crisis phenomena and finally get rid of the status of a transition state. The point is that it is necessary to develop cities and regions which, in the territorial sense, constitute the state. Each region of our state is special in terms of environmental management. The legislation regulates various guarantees of the right to general (public) use of natural resources, however, it should be noted that recently, with the development

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[29] Про регулювання містобудівної діяльності. Закон України. Відомості Верховної Ради України. 2011. № 34. Ст.343. URL: https://zakon.rada.gov.ua/laws/show/3038-17.

[30] Ibid.

[31] Крук В.Ю. Екологічна політика України: сучасний стан та перспективи розвитку (регіональний аспект). Актуальні проблеми державного управління: зб. наук. праць. ОРІДУ. О. 2006. Вип. 2(26). С. 264–270.

of market relations, the emergence of multi-entity ownership of land, water bodies, forests, this human right, has, unfortunately, been narrowed. Based on the analysis of Art. 22 of the Constitution of Ukraine the right to use natural resources is guaranteed, whereas narrowing the content and scope of this right is not allowed[32].

The general right to natural resource use, established by national legislation, is based on the principles of environmental law, which in its turn is based on generally recognized provisions of international environmental law. The best way out of this situation is considered to be the possibility of granting public easement by state bodies and local self-government bodies, which would make it possible to better balance the interests of owners (users) of natural objects and territorial communities, and would act as a legal guarantee of ensuring the right to the common use of nature[33].

Cherkashchyna M. highlights that the public easement law on nature use has features that correspond to the rights of citizens to a safe environment, to the exercise of the right to general use of natural resources to the extent determined by resource legislation. This opinion cannot be rejected and we believe that in the development of urban planning documentation such easements should be marked. It is close to impossible that regional and local policies can develop without the proper territory planning.

SUMMARY

Modern scholars distinguish three main levels in the implementation of environmental policy: global, national and local. Contemporary environmental policy, both at national and regional levels, is developed and implemented under tense political conditions which are caused by various political goals and interests of agencies and this often leads to conflicts between individuals within society; this concerns the issues of natural resources use by public, the distribution of economic requirements and costs, the responsibility for environmental crimes and their consequences.

The approval of the national development strategy requires good public management in all sectors of the economy, levels of government in order to form an ecological culture, change the communication and information sphere, political, economic, social spheres in line with the priority of interests and needs from local communities to the state as a whole; it is important that environmental taxes be used only for stabilizing and solving environmental problems. A number of constitutional rights, especially the right to truthful and reliable information about the state of the environment are to be ensured.

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[32] Конституція України: Відомості Верховної Ради України. від 28.06.1996. № 254к/96-ВР. № 30, ст. 141.

[33] Черкащина М.К. Юридичні гарантії права природокористування. За ред. проф. А.П. Гетьмана. Монографія. Харків: Вид. «ФІНН», 2010. 176 с.

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10. URL: https://freedomhouse.org/report-types/nations-transit.

11. URL:https://freedomhouse.org/report/freedom-world/2019/ukraine.

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Information about the author:
Petretska N. I.,
Candidate of Law, Associate Professor at the Department
of Constitutional and Comparative Law,
Uzhhorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

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CHARACTERISTICS OF THE ATTRIBUTES OF THE ADMINISTRATIVE PROCEDURAL LAW PRINCIPLES

Sharaia A. A., Pokataiev P. S.

INTRODUCTION

The principles of administrative procedural law are the central categories of the administrative procedural law and belong to the fundamental concepts of this sub-branch of administrative law that is why importance is being increasingly attached to the need to define the concept of "principles of administrative procedural law" and formulate their characteristic attributes. Quite often, the principles and their significance for the formation of any branch, sub-branch and institute of law are underestimated and considered only transitive and transient doctrinal provisions. The lack of in-depth comprehensive attention among scholars of administrative law to the study of the principles of administrative procedural law creates an impression that these principles do not have a significant impact on the regulation of social relations, are secondary and supportive premises. However, it should be noted that administrative law as a whole is very rapidly developing, its subject, content, and system are being revised systematically, and the scholars of administrative law have been paying increasingly greater attention to the nature and role of administrative procedural law as a sub-branch of administrative law, so the analysis of modern doctrinal approaches to defining the concept of principles as the fundamental category of the latter plays an important role. Present-day changes that are taking place in the political, social and legal life of Ukraine also require a renewed perspective on the principles of the administrative procedural law as a sub-branch of administrative law.

1. Principles of administrative procedural law as a derivative category of principles of administrative law

Given that administrative procedural law is a structural part of administrative law (being, in particular, its sub-branch), it should be considered that the "principles of administrative procedural law" are part of a broader and more complex concept, namely, the "principles of administrative law", the definition and basic doctrinal approaches to which should be considered in more detail. Determining the essence of the latter, the authors of the textbook "Administrative Law of Ukraine", edited by Yu.P. Bytiak, V.M. Harashchuk and V.V. Zui, noted that the principle is "the basis of law, it is an active center capable of playing a leading and guiding role in the

formation and development of administrative law. They express its nature, ensure the unity of its scope, define its focus and the most essential features of regulation" [1]. It is safe to say that principles are a foundation on the basis of which scholarly research and normative processes are being carried out. V.K. Kolpakov rightly states that the principles of administrative law are "positive regularities, known in scholarship and practice, enshrined in legal norms, or a generalization of the rules in effect in the state"[2]. That is, the scholar emphasizes that the principles of administrative law are objective substantive connection, which is based on experience, facts, tested by both scholarship and practice, and is directly reflected in the rules of law, "governmental rules". Indeed, it should be borne in mind that the principles are primary with respect to the rules of law, because, even if they are not explicitly named or defined, they are still always taken into account when making and modifying the rules of law.

Noteworthy is the definition of the principles of administrative law given in the monograph of the same name, edited by T.O. Kolomoiets and P.O. Baranchyk, which defines them as "imperative, unconditional, universal, enshrined in the rules of administrative law provisions that outline in general terms the rules of behavior of its subjects and to which administrative and legal norms must comply"[3]. This definition is quite broad in its scope and includes an extended range of characteristics of administrative law principles that should also be addressed. Thus, the imperative of certain provisions is that they require unconditional subordination, response, fulfillment, and have a definite imperative modality – that is, if a separate provision is formulated as a principle, relevant scholarly research and rulemaking processes must be based on it. The unconditional character of the principles of administrative law presupposes that they should not be restricted, are complete in their scope and independent of any conditions. The universality of the principles of administrative law means that they have different purposes, can be "adapted" to different spheres or system elements, and are comprehensive. The fact that the principles are enshrined in the rules of administrative law reflects the close relationship between these interdependent elements, which is manifested in the situation where the principles of administrative law necessarily determine the rules of conduct of its subjects. Thus, it can be concluded that scholars of administrative law, offering their own approaches to defining the concept of "principles of administrative law" tend to agree on the following: 1) the principles of administrative law are the essential premises, ideas, provisions on

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[1] Адміністративне право : підручник / [Ю.П. Битяк, В.М. Гаращук, В.В. Богуцький та ін.] ; за заг. ред. Ю. П. Битяка, В.М. Гаращука, В. В. Зуй. Харків : Право, 2010. С. 33–34.

[2] Колпаков В.К., Кузьменко О.В. Адміністративне право України : підруч. Київ : Юрінком Інтер, 2003. С. 18.

[3] Коломоєць Т.О., Баранчик П.О. Принципи адміністративного права : монографія. Запоріжжя : Поліграфичний центр «Copy Art», 2012. С. 44.

which the branch is based; 2) they are the footing for the formation and functioning of the system and scope of the branch; 3) they are the foundation of the legal rules; 4) they are the basis of the activity of the subjects of administrative law; 5) they are a guarantee of ensuring the rights and freedoms of the individual and the citizen, the proper functioning of civil society and the state. It is hardly possible to argue with the validity of these theses, so it should be noted that they reflect the true scope and meaning of the principles of administrative law, and therefore should be the foundation for formulating a single, generally accepted doctrinal definition of the principles of administrative law, and subsequently the principles of administrative procedural law as sub-branch principles, and its subsequent normative consolidation. A.S. Kravtsov, reviewing the system of principles of administrative law, distinguishes the general (branch-wide), special (specific), sub-branch and private (institutional) principles of administrative law[4], in connection with which it can be said that the principles of administrative procedural law occupy their own "niche" among sub-branch principles of administrative law. At the same time, it is worth supporting R.C. Melnyk, who rightly emphasizes that "the principles of administrative law and the principles of administrative procedure are not synonymous, and therefore it is necessary to see the difference between them, because the principles of administrative procedure are a specific list of administrative law principles in only one sphere of public administration, the administrative procedural one. The principles of administrative law, so to speak, cover all directions and spheres of functioning of public administration, in particular, those that find expression in its depth (internal organizational relations)", and one should refrain from equating the "principles of administrative law" with the "principles of administrative procedural law." This thesis should be considered as "basic" in the further analysis of the principles of administrative procedural law and their definition.

2. The essence of the principles of administrative procedural law

Thus, considering the principles of administrative procedural law as derived from the principles of administrative law (as one of the elements used in a specific area of relations – the administrative procedural one), scholarly approaches to their definition and characteristics of scope should be examined. So, in particular, O.I. Mykolenko, thoroughly analyzing the subject of the discipline of administrative procedural law, notes that at present "the subject does not completely reflect the object of the discipline, since many aspects and properties of the object are not considered essential

[4] Кравцов А.С. Пріоритет прав і свобод людини та громадянина як принцип адміністративного права України: автореф. дис. ... канд. юрид. наук : 12.00.07. Київ, 2011. С. 17.

and relevant for this period of time, while others are simply unknown[5]. In this connection, the scholar proposes to include in the subject of the discipline of administrative procedural law (which is the name he proposes to use) a number of elements (history of origin and development; categorical framework; methodology; subject and method; administrative procedural rules; administrative procedural relations, etc.) among which a separate position is occupied by the goals and *principles of administrative procedural regulation*[6]. Thus, attention should be paid to the fact that the principles in his definition occupy their own "niche" in the structure of administrative procedural law, along with other independent structural elements, and one cannot but agree with that. O.S. Lagoda states that "the essence of administrative procedural regulation of relations lies in the proper use of the principles that underpin the law enforcement practices of the administrative bodies"[7], and in this context pays particular attention to "the relevance of the correct formulation of principles, because their clarity and consistency of the definition are reflected in the effectiveness of practical activities of administrative bodies"[8]. It is worth supporting the scholar's position that the principles of administrative procedural law are the basis for the proper law enforcement practices of the public administration bodies. The authors of the textbook "Administrative Law of Ukraine. The complete course" quite reasonably reckon that "as of today, when there is a legislative and regulatory framework for the implementation of administrative procedures, there are several drafts of omnibus acts dedicated solely to the normalization of these issues, there is every reason to speak about the possibility and expediency of formulating a system of principles of administrative procedures"[9]. Therefore, it can be said that today objectively 'the time is ripe' for the question of studying the principles of administrative and procedural law to aid the further development of this sub-branch of administrative law, normalization of relations between public administration bodies and individuals, and improvement of administrative procedural legislation. I.V. Kryvoruchko rightly states that "the effectiveness of the administrative procedure depends directly, among other things, on the completeness and quality of the legal confirmation of the principles that determine it. The identification and comprehension of the content of these principles require reference to a certain range of legal acts that regulate the

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[5] Миколенко О.І. Місце адміністративного процедурного права в системі юридичних знань та системі права України : автореф. дис ... д-ра юрид. наук. 12.00.07 : Запоріжжя, 2011. С. 16.

[6] Ibid.

[7] Лагода О.С. Адміністративна процедура: теорія і практика застосування : автореф. дис... канд. юрид. наук: 12.00.07. Ірпінь, 2007. С. 19.

[8] Ibid.

[9] Адміністративне право України. Повний курс : підручник / Галунько В., Діхтієвський П., Кузьменко О., Стеценко С. та ін. Херсон : ОЛДІ-ПЛЮС, 2018. С. 208.

sphere of public administration activities[10]. In addition, I.V. Kryvoruchko, as a specialist in the field of public administration, states that the question of the principles of administrative procedure is “a phenomenon that is on the border of such two disciplines as public administration and law, primarily its administrative branch, which is conditioned by the notion of administrative procedure as a formalized order, regulated by the rules of administrative law and one of the procedural types of activity of public administration bodies in the exercise of the rights, freedoms, duties and interests of individuals and legal entities"[11]. In view of this position, it should be noted that the principles of administrative procedural law do have a “dual” legal nature, because, first, they determine the general direction of the exercise of legal powers by public administration bodies (in particular, we refer to the procedural aspect), and, second, they define the fundamental provisions of the relationship between public administration and private individuals. According to Yu.M. Frolov, “the initial provisions of administrative procedural activity are being confirmed in the principles of applying administrative procedures. Implementation of modern principles of administrative procedure into the law enforcement activities of public administration bodies is essential for the effective regulation of administrative procedural relations of the authorities with other entities of legal relations, since the principles are the necessary basis which allows protecting the rights and legitimate interests of any person in the relations with the state and helps limit manifestations of bureaucracy, abuse of power and corruption on the part of the public employees, improving the efficiency of these public authorities”[12]. S.V. Chyryk points out that “the definition and analysis of ways of formation and development of the principles of administrative procedure, their essence, system, legal regulation and directions of improvement of procedural legislation are becoming more and more relevant in connection with guaranteeing the constitutional rights of individuals and legal entities in this field, ensuring procedural safety of the state. These and other issues call for scholarly substantiation of the holistic concept of administrative procedure principles, examination of the nature, functions, main legal categories and classifications, review of the history of development and stages of formation of administrative procedure principles in Ukraine, summarizing the historical experience of their development in foreign countries, their possible use in our state, determining trends in the evolution of the procedural sphere, the

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[10] Криворучко І.В. Класифікація принципів адміністративної процедури та її застосування наукою державного управління. *Наук. вісн. Акад. муніцип. упр.: зб. наук. пр. Серія «Управління»*. 2016. Вип. 1. С. 71..

[11] Криворучко І.В. Визначення поняття принципів адміністративної процедури в науці державного управління. *Вісник НАДУ при Президентові України.* 2016. № 1. С. 23.

[12] Фролов Ю. М. Класифікація принципів адміністративних процедур. *Форум права*. 2013. № 4. С. 423. URL: http://nbuv.gov.ua/UJRN/FP_index.

adaptation of existing administrative procedural legislation to international law standards"[13]. A.M. Shkolyk completely legitimately notes that "the principles of administrative procedure should be used as guidelines in the practical activity by public administration bodies, and more specifically by particular civil servants and officials of local self-government (the last two terms accord with the current legislation of Ukraine). In particular, the importance of the principles increases in cases where normative legal acts do not regulate this activity of public administration in a sufficiently detailed manner and, accordingly, give these entities a sphere of administrative discretion limited by legal instructions. In such a situation, the very principles can and should become the benchmarks for the good (proper) fulfillment by the public administration bodies and specific public officials of their tasks and functions"[14]. So, the scholar appropriately underlined the "super-level" position of the principles of administrative procedural law in comparison with the rules of law. At the same time, T.O. Kolomoiets rightly emphasizes that "the principles of administrative procedure are not something amorphous, they are filled with real legal mechanisms and are in actual fact applied by participants of administrative procedural relations"[15], with which one cannot but agree.

It should be mentioned that there is a trend not to use the concept of "principles of administrative procedural law" in the scholarly legal environment, but one can find such concepts as "principles of administrative procedure," "principles of administrative procedural regulation," "principles of administrative procedural activity," the development of which should be viewed as a prerequisite for the formation of a system of principles of administrative procedural law as a system of sub-branch principles of administrative law. Taking into consideration the definitions offered in the discipline-specific scholarly and educational sources, one can find positions according to which the principles of administrative procedures should be understood as "the key basic ideas which underlie procedural activities, are characterized by the universality and determine the direction of the actions of public administration entities"[16]; or "the main ideas (fundamentals), enshrined in the rules of law, that define the rules of engaging in an action,

[13] Чирик С. В. Принципи адміністративної процедури. *Адміністративна процедура: особливості формування української концепції* : матеріли Круглого столу, м. Харків, 15 вересня 2017 р. – Харків : Національна академія правових наук України, Національний юридичний університет імені Ярослава Мудрого, 2017. С. 101.

[14] Школик А.М. Значення та перелік принципів адміністративної процедури. *Вісник Запорізького національного університету. Юридичні науки.* 2017. № 2. С. 93. URL: http://nbuv.gov.ua/UJRN/Vznu_Jur_2017_2_13.

[15] Коломоєць Т.О. Адміністративне право України. Академічний курс : підручник. Київ : Юрінком Інтер, 2011. С. 225.

[16] Адміністративне право України. Повний курс : підручник / Галунько В., Діхтієвський П., Кузьменко О., Стеценко С. та ін. Херсон : ОЛДІ-ПЛЮС, 2018. С. 208.

decision-making, the conclusion of administrative contracts aimed at the exercise by individuals of their rights and obligations in the field of public administration and the satisfaction of public interest"[17]. N.L. Huberska believes that the principles of administrative procedures are "basic ideas, initial principles, intended to be applied in the implementation of a particular administrative procedure by an authorized state body, and aimed at protecting and realizing the rights, legitimate interests and responsibilities of individual and collective entities in the administrative relations"[18]. A.A. Pukhtetska notes that the principles of administrative procedure should be understood as "the basic requirements that should guide the parties in administrative proceedings, including the administrative body, when considering and resolving individual administrative cases"[19], adding that "the principles of administrative procedure are key to a proper legal regulation of the procedure for resolving individual administrative cases and for the correct application of the relevant legal rules"[20]. A generalized analysis of all the above-mentioned provisions allows us to define the principles of administrative procedural law as *universal, fundamental and conditioned by the social laws, moral principles and legal customs; the basic ideas and guiding provisions, enshrined in administrative procedural rules, which are the basis for the relations of public administration entities with private individuals and other entities while resolving individual administrative cases in the field of public administration*.

3. Attributes of the principles of administrative procedural law

In order to explore the true potential and the real resource of the principles of administrative procedural law, it is necessary to draw up a general description of the characteristics that are inherent to them and allow them to be unified into a separate block of principles. Given the insufficient amount of research on the issues of administrative procedural law (in scholarly, publicistic, monographic works), one can say that unfortunately, the problem of identifying the attributes of administrative procedural law has not yet been conclusively resolved; the question of their essence still remains controversial and needs additional substantiation and concretization in the conditions of modern governmental and political transformations. So, we will try to offer an original list of attributes of the principles of administrative procedural law.

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[17] Адміністративна процедура : конспект лекцій / І. В. Бойко, О. Т. Зима, О. М. Соловйова ; за заг. ред. І. В. Бойко. Харків : Право, 2017. С. 20.

[18] Губерська Н.Л. Основні принципи організації та реалізації адміністративних процедур. *Публічне Право*. 2015. № 1(17). С. 54.

[19] Пухтецька А.А. Принципи адміністративного права: адміністративно-правові та євроінтеграційні аспекти оновлення змісту та практики застосування : монографія. Київ ; Харків : ПП Панов, 2016. С. 203.

[20] Ibid. С. 304.

It is quite logical to begin the analysis of the attributes of the principles of administrative procedural law with such an attribute as the *presence of a specific sphere of regulatory influence, namely, administrative procedural activity*. So, for example, I.V. Boiko, analyzing the formation of the institute of administrative procedure in modern legal science, notes that "the idea of human-centrism, which originated with the independence of the Ukrainian state and was enshrined in the Constitution of Ukraine, fully accepted by administrative scholars, played the role of a catalyst for the development of administrative law doctrine towards ensuring the rights of individuals who exercise them in relations with the public administration. It pushed administrative law away from the outdated paradigms in which a person was given the place of the object of managerial influence exercised by the state, and apparently formed an idea of administrative law as a branch of law, the main purpose of which is the realization and protection of human and citizen rights in the sphere of public administration"[21]. These very circumstances were the impetus also for the formation of such a sub-branch of administrative law as administrative procedural law, within the framework of which the concept of "administrative procedural activity" should be examined. In public administration, the procedure is central, because "the primary purpose of public administration entities is to resolve specific administrative cases by adopting administrative acts. The vast majority of such cases are positive in nature, aimed at the exercise of the rights of individuals and not related to the jurisdictional activities of public administration"[22]. T.O. Kolomoiets points out that administrative procedural activity is "the activity of administrative bodies not related to the administration of justice in administrative cases" and that "although it is related to certain actions that involve consistency and duration over time, but it is not related to justice," and therefore "should not be regarded as an analogue of administrative litigation," furthermore "this activity is not processual, though it is specific"[23] Taking into account these theses, it should be noted that administrative procedural activity is public in nature, as it is manifested in the sphere of functioning of public administration bodies and is accompanied by the exercise of governmental authority powers; it is characterized by a sequence of administrative actions and decisions; it differs

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[21] Бойко І.В. Становлення інституту адміністративної процедури в сучасній правовій науці. *Публічне адміністрування в умовах змін та перетворень : проблеми організації та правового забезпечення*: зб. наук. пр. за матеріалами III Міжнар. наук-практ. конф (м. Харків, 11–12 квіт 2019 р.). Харків : Право, 2019. С. 358.

[22] Адміністративна процедура : конспект лекцій / І. В. Бойко, О. Т. Зима, О. М. Соловйова ; за заг. ред. І. В. Бойко. Харків : Право, 2017. С. 5.

[23] Коломоєць Т. О. Термінологія адміністративного процесу: проблеми визначеності суміжного термінологічного ряду. *Наукові праці Національного університету "Одеська юридична академія"*. 2012. Т. 11. С. 339. URL: http://nbuv.gov.ua/UJRN/Nponyua_2012_11_36.

in its personalized nature as it relates to the interests of individuals; it is non-conflicting in nature, since it is aimed at resolving positive cases that arise in the process of exercising governmental authority functions.

In addition, such a feature of the principles of administrative procedural law as *universality and general validity* is worth being singled out. The universality of the principles of law means that they "pervade all legal matter and they must be taken into account in any legal situation. The universality of the principles of law presupposes that they guide the whole mechanism of legal regulation of social relations"[24].

Similarly, the principles of administrative procedural law proposed within the framework of the administrative legal science and enshrined in administrative legislation have a universal orientation, they must be such that they can be applied to any kind of administrative procedure. Alongside this, such an attribute reflects "the possibility of transferring the principles to any administrative procedural relationship, regardless of their subject, object or content, that is, the effect of the principles of administrative procedural law is non-personified and inexhaustible. The impersonality, that is, the absence of reference to a particular addressee, allows the principles to be applied not to one person but to many not listed by name. The inexhaustibility of the principle means the possibility of its repeated implementation. In other words, the principle establishes a rule (standard) for an indefinite (potentially infinite) number of cases of a certain kind and an unknown number of persons of a certain category."[25] Furthermore, one should support A.A. Pukhtetska in that "the basic principles of the administrative procedure have a constitutional basis. In particular, the provisions of the Constitution of Ukraine imply the principles: the supremacy of law, the reign of law, equality before the law and the guarantee of the protection of the law"[26], which once again confirms the universality and general validity of the principles of administrative procedural law.

Taking into account the fact that the principles of law are "a product of the consciousness and will of people that contain certain orders, regulations, rules of conduct, that are implemented into life by the society and the state and that regulate as much as the law itself regulates"[27], it is reasonable to propose to name *the regulatory character* as the next feature in the list of

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[24] Явич Л.С. Право развитого социалистического общества. Сущность и принципы. Москва : Юрид. лит., 1978. С. 11.

[25] Погребняк С.П. Основоположні принципи права (змістовна характеристика): монографія. Харків: Право, 2008. С. 22.

[26] Пухтецька А.А. Принципи адміністративного права: адміністративно-правові та євроінтеграційні аспекти оновлення змісту та практики застосування : монографія. Київ ; Харків : ПП Панов [вид.], 2016. С. 304.

[27] Міжнародно-правові аспекти Конституції України / [Ю. С. Шемшученко, Ф. Г. Бурчак, В. В. Цвєтков та ін.] ; під ред. В. М. Семенова, О. Я. Прагнюк. Ін-т держави і права ім. В. М. Корецького НАН України. Київ : Ін Юре, 1997. С. 12–14.

attributes. Due to the high level of generalization of legal ideas, the principles determine the general foundations of both the whole sub-branch of administrative procedural law and its individual components (varieties of administrative procedures). Their purpose is to regulate the conduct of the subjects of administrative procedural law by setting certain frameworks for them, and, therefore, the principles are not only a means of reflecting ideas and views that are dominant in the state, they also include requirements for the parties in these legal relationships, being an important tool of regulating these relations. Of course, administrative procedural regulation is carried out on the basis of administrative procedural rules, but all rules of administrative legislation must be consistent with and based on the principles of administrative procedural law. O.V. Starchuk believes that "the regulatory character is an auxiliary attribute of the principles, because social relations are regulated by the rules of law. And so all the rules of law have a regulatory character, and the principles determine the norm itself, because they underlie it. However, the regulation of social relations by means of principles is carried out in individual cases, in particular, in the absence of such a norm (analogy of statute), the general principles of law (analogy of law) are applied"[28]. At the same time, the regulatory features of the principles cannot be equated with the regulatory characteristics of the rules of law, since the principles are more abstract. In this case, the regulation of administrative procedural relations is carried out from "higher" positions, because, using only principles, it is impossible to regulate specific legal relations in all cases.

Attributes of the principles of administrative procedural law include *social conditionality*. This attribute implies that, as a rule, the ideas that are in congruence with the socio-economic conditions of the social development, as well as political, ideological and other processes taking place in the state, are transformed into principles. This feature reflects the content of the law with its social foundations – those patterns of social life on which a specific legal framework is built. After all, the principles in their original form (up to the moment of well-formedness) are worldview ideas, a consequence of views, beliefs, conceptions, ideals, life or scholarly doctrinal directions (which can be reflected, for example, in the "duty of good faith," the "principle of honesty," the "principle of politeness," etc.) dominant in the society. The subjects of formation of such ideas are individuals, their association, the society as a whole. For example, such a criterion as good faith "requires the subject of authority to act in good faith, that is, with a sincere intention to exercise its authority and commitment to the purpose and task of the law, without the selfish desire to achieve personal gain, privilege

[28] Старчук О.В. Щодо поняття принципів права. *Часопис Київського університету права*. 2012. № 2. С. 41.

or advantage through committing actions or making decisions. Good faith decision-making, action or inaction do not preclude the possibility of deviation from the law, but exclude the intent for such a violation. Good faith can be understood as an aspect of the requirement that a person should not abuse his or her rights and perform the duties required by law. At the same time, this requirement is aimed not only at the protection of the public interest, but also at the protection of the rights and legitimate interests of other persons, given the possibility that the parties in the proceedings might have different status (and interests)."[29] Theoretical generalizations, legal theories, through objectification in the rules of law or doctrinal studies, become the principles of administrative procedural law. The content of the principles is determined by objective social laws.

Another attribute of the principles of administrative procedural law is their *normative regulatedness*. O.H. Kotenov points out that "the principles of law are of the same nature as the law of which they are a part. Law, in turn, materializes in relevant sources of law. Therefore, it is logical to conclude that the principle of law must be enshrined in some way in normative acts or other sources of law. However, it should be emphasized that it is appropriate or even compulsory to enshrine the principles of law in legislation when it is necessary to put into effect certain principles"[30]. The content of the concept of "normative regulatedness" includes the confirmation or reflection of the principle in the rules of law. Until such a confirmation, a fundamental idea, which has the status of an "applicant" for the role of a principle, and is not yet enshrined in law, cannot be considered a principle of law, it remains only a theoretical, scholarly idea that belongs to the system of the research area of legal science. It is possible to say that no ideas *per se* can regulate legal relations, until they are enshrined in legal norms and acquire the governmental authority character as well as attributes of normative regulatedness. At the same time, the confirmation of the principles in the rules of law should ensure the continued adherence to them under the threat of negative consequences for the offenders or under the threat of the cancellation of decisions taken in cases with such violation[31]. O.M. Soloviova and V.A. Somina state that "the relationship of administrative bodies with individuals (legal entities and natural persons) should be clearly regulated by law and based on fundamental principles of public administration, which will ensure the effective implementation of the

[29] Пухтецька А.А. Принципи адміністративного права: адміністративно-правові та євроінтеграційні аспекти оновлення змісту та практики застосування : монографія. Київ ; Харків : ПП Панов [вид.], 2016. С. 319.

[30] Котеньов О.Г. Принципи права природокористування : дис. ... канд. юрид. наук : 12.00.06. Харків, 2017. С. 42.

[31] Козюбра Н. И. Социалистическое право и общественное сознание. Киев: Наук. думка, 1979. С. 189.

basic tasks and functions of the state on the one hand, and, observance of the rights and legal interests of natural persons and legal entities in all spheres of state activity on the other hand"[32]. That is why this attribute reflects the guarantee of the strict observance of the basic provisions expressed in the principles of administrative procedural law by all law enforcement agencies.

Given that the principles of administrative procedural law constitute a logical sequence rather than operate in a chaotic fashion, it is necessary to pay attention to such an attribute as their *systematicity*. The principles are an interconnected system of legal rules, which is the basis of the whole scope of administrative legislation including its procedural sub-branch. The importance of each principle is determined not only by its own content, but also by the functioning of the whole system of principles, which implies their interconnection, interdependence, as well as the consistency of their content and forms of implementation. This interconnection ensures the unity of all spheres and areas of administrative procedural law. The principles must not only be mutually consistent but also comply with other elements of legal regulation. An important issue to be considered when forming a holistic view of the system of principles is the importance of each. Summarizing the above, one can argue that within the entire system each of the principles has its own content which should not duplicate the other principles. At the same time, the principles precondition each other and very often serve as guarantees of the realization of other principles. They necessarily complement rather than contradict each other, and determine the structure of administrative procedural law as a whole. However, the individual principles are in equilibrium or in competition.

Among the attributes of the principles of administrative procedural law one should distinguish such a feature as *fundamentality*. Principles are most often defined as the most general, principal and fundamental legal provisions and ideas distinguished by their paramount character with respect to other rules of administrative procedural activity, which, in turn, should be derived from the principles, be based on them, specify the effect of one or another principle, but in no way contradict them. Thus, due to its generality, each principle sufficiently "brightly" characterizes the essence of administrative procedural law. The ideas that underpin the system of principles of administrative procedural law are a compromise that arises on the basis of the aggregation of several, sometimes competing, ideas of a smaller scale. As a result of such a generalizing association, a general idea emerges that is capable of influencing a wider range of administrative procedural relations. The fundamentality of the principles determines their content, nature and

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[32] Соловйова О.М., Сьоміна В.А. Щодо принципів адміністративної процедури. *Адміністративна процедура: особливості формування української концепції :* матеріли Круглого столу, м. Харків, 15 вересня 2017 р. – Харків : Національна академія правових наук України, Національний юридичний університет імені Ярослава Мудрого, 2017. С. 92.

legitimacy: the principles may be the basis for changing individual administrative procedural rules. In addition, as an exception to the general rules of the functioning of legal norms, the principles have a retroactive effect, enabling them to extend their effect to any rule that had been confirmed earlier than the principle itself, including its cancellation and non-recognition of its consequences.

It is worth singling out such an attribute of the principles of administrative procedural law as their *stability*. While the rules of administrative procedural law are sufficiently variable and are adopted and modified for the proper regulation of administrative procedural relations, the principles of administrative procedural law are long-lasting, which testifies to their stability. So, for example, R. David and K. Geoffre-Spinozi state that "the rules of law may change with a stroke of the pen of the legislator. However, they have many such elements that cannot be freely altered because they are closely linked to our civilization and our way of thinking. The legislature cannot influence these elements"[33]. The authors are apparently referring to the principles of law. It should be emphasized that the higher the position of a certain principle in a hierarchical system of principles is, the less variable it is. Such principles as the principle of justice, equality, freedom, humanism, which are universal principles of law, have the most sustainable character, thus ensuring the stability of legal regulation. The principles of law "change not so much in terms of their own formula, but rather in terms of the social content that is poured into this formula"[34]. At the same time, such a stable nature of the principles of law does not prevent them from simultaneously ensuring the dynamism of legal regulation. According to M.I. Koziubra, legal regulation is carried out "not only by the rules of law, which stipulate what specific actions should be taken and from which one should abstain, but also by the principles of law (at all their levels – general, branch, inter-branch, principles of the institutes of law). Unlike the rules of law, the principles of law do not "rigidly" establish the content of behavior, they are able to respond "more quickly" to changes in public life. The general principles of law (justice, liberty, equality, etc.) are endowed with a particularly large "power reserve" in this respect"[35].

A separate attribute of the principles of administrative procedural law to be distinguished is their *progressiveness*, since they contribute to the development of the sub-branch and are aimed at improving its individual constituent elements. Given the general lexical meaning of the word "progressive" as: "1) promoting progress; politically, socially, economically

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[33] Давид Р., Жоффре-Спинози К. Основные правовые системы современности ; пер. с фр. В. А. Туманова. Москва.: Междунар. отношения, 1999. С. 19–20.

[34] Явич Л. С. Проблемы правового регулирования советских общественных отношений. Москва: Юрид. лит., 1961. С. 153.

[35] Козюбра Н.И. Социалистическое право и общественное сознание. Киев.: Наук. думка, 1979. С. 187–188.

advanced; the one which leads to improvement, enhancement of something thanks to their ideas, moods, views; the one that strives for progress by sharing ideas, moods, views, and fights for progress; 2) the one that gradually grows, enlarges, increases proportionally"[36], it can be argued that it fully reflects the role and influence of the principles on the formation and improvement of the sub-branch of administrative procedural law. P.M. Rabinovych, defining the content of the universal human principles, states that these are "legal foundations, ideals that determine a certain level of world civilization development, embody the progressive achievements of the legal history of mankind and are widely recognized in international regulations"[37]. That is, taking into account the progressive achievements of the legal history of mankind in order to effectively regulate social relations is characteristic of the principles. Thus, according to the authors of the textbook "Administrative Law of Ukraine. A Complete Course", the principles of administrative law are characterized by progressiveness, and attest to the fundamental foundations of the conduct of the subjects of administrative law, ideal under the modern conditions, that are actually attainable[38]. And taking into consideration the extension of the principles of administrative law to all its components (including the sub-branch of administrative procedural law), it is possible to assume by analogy that the principles of the latter are also characterized by progressiveness.

An unmistakable attribute of the principles of administrative procedural law is their *inviolability*. Ignoring the principles or their violation by the legislator, public administration or other entities of administrative procedural law may undermine the stability of the legal system, adversely affect the state of legal consciousness or violate the legal order. So, "an administrative authority, when resolving an administrative case, is obliged to use its legal power for the purpose for which such power is conferred. The purpose of the legal power is defined by the law or follows from its purposes. The criterion of the use of the legal powers for the proper purpose is extremely important for the control over the legality of the activities of administrative bodies, first of all, in administrative litigation and the adoption of administrative acts. Decision making, taking action using authority for the purpose with which that authority is granted constitute the criterion that can be formulated as a principle of using authority for a proper purpose. … The use of legal powers with improper purpose is an intrinsic abuse of them: namely, using them

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[36] Словник української мови : у 11 т. / гол. ред. кол. І. Білодід. Київ : „Наукова думка", 1970–1980. Том 8, 1977. С. 159. URL: http://sum.in.ua/s/proghresyvnyj.

[37] Рабінович П.М. Принципи права // Юридична енциклопедія: В 6 т. / [за ред. Ю. С. Шемшученко (голова ред. кол.) та ін.]. К.: Вид-во «Українська енциклопедія» імені М. П. Бажана, 1998-2004. Т. 5. 2003. С. 128.

[38] Адміністративне право України. Повний курс : підручник / Галунько В., Діхтієвський П., Кузьменко О., Стеценко С. та ін. Херсон : ОЛДІ-ПЛЮС, 2018. С. 40.

dishonestly, with wrongful intentions, with ill will, with a distorted interpretation of the purpose with which the legal power was given, with a personal interest in taking a decision or taking an action"[39]. That is why a violation of any principle must necessarily entail the responsibility of the law enforcement entities and / or the annulment or review of the decision in the case of such violation. The principles have other important features and characteristics, but the ones listed above are basic for the characterization of the principles of administrative procedural law.

CONCLUSIONS

Thus, it should be noted that at present, the concept of principles of administrative procedural law has not yet been formed within the framework of the administrative legal science, which gives rise to discussions concerning their inventory and content, as well as their role in the relevant sub-branch of administrative law. This necessitates the exploration of this basic concept in the field of this sub-branch of administrative law. Among the attributes inherent in the principles of administrative procedural law the following ones should be named: the presence of a specific sphere of regulatory influence – administrative procedural activities, universality and general validity, regulatory character, social conditionality, normative regulatedness, systematicity, fundamentality, stability, progressiveness, and inviolability. The principles reflect the worldview ideas concerning a proper model of the relationship between public administration entities and individuals; they express the essence of the rules of conduct of such entities; they act systematically as a set of basic and general rules; their effect extends to all kinds of administrative procedures; they cause improvements in the sub-branch, and their violation entails the cancellation or revision of decisions in the case or the use of other means of liability.

SUMMARY

In the paper, on the basis of the provisions of domestic doctrinal administrative law, characteristic features of the principles of administrative procedural law are analyzed. The relation between the principles of administrative law (as a general, large-scale concept) and the principles of administrative procedural law (as their integral part) is traced. The essence of the concept of "principles of administrative procedural law" has been clarified, taking into account the provisions and trends of the domestic administrative law science. An original list of attributes of the principles of administrative procedural law is offered and their content is elucidated.

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[39] Пухтецька А.А. Принципи адміністративного права: адміністративно-правові та євроінтеграційні аспекти оновлення змісту та практики застосування : монографія. Київ ; Харків : ПП Панов [вид.], 2016. С. 314.

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Information about the authors:
Sharaia A. A.,
Candidate of Juridical Sciences,
Zaporizhzhia National University
66, Zhukovskoho str., Zaporizhzhia, 69600, Ukraine

Pokataiev P. S.,
Doctor of Law, Doctor of Sciences of the State Administration,
Professor, First Vice-Rector,
Classic Private University
70b, Zhukovskoho str., Zaporizhia, 69002, Ukraine

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RECEPTION AS A GENERAL LEGAL AND CONSTITUTIONAL LEGAL PHENOMENON

Verlos N. V.

INTRODUCTION

In the current conditions of internationalization and globalization of all spheres of life of the world society, which is being formed under the influence of many factors: social, political, economic, historical, scientific and technical, geographical, climate, etc. – there is an irreversible tendency towards gradual convergence (cohesion, interpenetration) of legal systems.

Of course, legal systems have never existed autonomously, but "trade turnover of the legal ideas"[1] has increased dramatically in the recent decades, and migration of legal norms is undoubtedly the "most common form of legal changes"[2]. Constitutional law does not stay apart from this process, and the Constitution itself is a systematic matrix within which the goals of state building and the basic vectors for the development of constitutionalism are set.

The modernization of the constitutional dimension of the functioning of the modern democratic state, the solution of the global problems of the humanity through the establishment of an international (transnational) constitutional legal order requires a thorough analysis and a balanced approach in view of the problems of regulatory legitimacy. The problems of the sort may arise referred to the formation of an organized system of crossconstitutional clusters.

The main threat to this process may be the reception under the auspices of the transnational (international) constitutionalism of normative models without taking into account national legal traditions, features of constitutional culture as well as national mentality. Which in its turn can cause a legal mutation, a distortion of constitutional justice, a loss of national identity and, ultimately, a loss of state sovereignty. However, despite the threats and fears, there is an innovative potential in the design of inter-constitutional (trans-constitutional) relations, which is to combine the constitutional configurations of national, international and European levels.

Under the influence of these factors, the legal system of Ukraine is being transformed, also accompanied by a dynamic process of reforming of the legislative system. For the balanced functioning and development of the

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[1] Kahn-Freund O. On Uses and Misuses of Comparative Law. The Modern Law Review. 1974. Vol. 37, № 1 (Jan.). P. 10.

[2] Watson, A. Legal Origins and Legal Change, London ; Rio Grande, Ohio, USA : Hambledon Press, 1991. P. 73.

Ukrainian statehood, the key priority is to carry out a systematic constitutional and legal modernization in accordance with the foreign policy vector of the European and Euro-Atlantic development of Ukraine, determined in accordance with the changes in the preamble to the Constitution of Ukraine of February 7, 2019[3]. Moreover, this process is accompanied by the reception of the certain ideas, concepts, doctrines, institutes and norms in the constitutional law of Ukraine in general and the Constitution in particular. Today, research into the problem of reception in the constitutional law of Ukraine is an urgent need, and it requires the establishment of the doctrinal definition and development of a qualitatively updated concept of the state construction.

1. Reception as a scientific category

Systematic research and formation of a holistic view of the reception in constitutional law as a political and legal phenomenon requires analysing, first of all, the semantics and etymology of the term "reception". Since the term has been widely used in the scientific discourse, not only in legal science, but also in philology, cultural studies, psychology, literature, linguistics, music, history and others.

The term comes from lat. "*receptio*" – a reception, a perception, but there is no unambiguous interpretation in the reference literature, so, some dictionaries offer to understand it as "borrowing and adaptation by a society of the sociological cultural forms that have arisen in another country or in another era"[4]. Another vocabulary of foreign words and expressions suggests considering the term as "the perception of the legal system and principles of another state as the basis of national law"[5]. The newest vocabulary of foreign words and expressions interprets the term "reception" in three meanings: 1) the borrowing by the society of sociological and cultural forms that have arisen in another country or in another era; 2) borrowing from one state more developed law of another state; 3) transformation of energy of stimuli on nervous excitations carried out by receptors of perception[6].

The content of the term "reception" also differs in the branch research. In psychology, in particular, the term is considered a process of physiological display of a physical stimulus in the receptor, which can obtain in the central part of the analyser the systemic quality of a subjective image or experience,

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[5] Новейший словарь иностранных слов и выражений. Мн.: Совр. лит., 2007. С. 701.

[6] Словник іншомовних слів /За ред. О. С. Мельничука. Київ : Головна редакція УРЕ, 1974. С. 675.

and only through this, it can become a psychic reflection in the forms of pain, sensation and perception[7]. Another psychological dictionary interprets the term as the process of perception and transformation of energy of various stimuli (mechanical, thermal, chemical, etc.) of the outside world into nerve signals[8].

In literature studies, the reception is understood by some researchers as "... the process of borrowing and adapting to a particular society different cultural texts that have arisen in different countries during different epochs"[9]. According to A. A. Goncharuk, the receptive approach is to consider the work not to be an artistic value that exists in itself, but a component of the system in which it interacts with the recipient. And as a result, the work is not researched as a historically open phenomenon, the value and meaning of which are historically transferred, variable and amenable to rethinking. Others, for example, Khamedova O. B. defines reception as "… a way of perceiving and understanding (processing, comprehending) creativity…"[10]. M. M. Levakin proposes to understand the artistic reception as "perception and reproduction on the basis of perceived (read, experienced, seen, realized) own texts (thoughts, ideas, impressions, paintings), i.e., in fact, the reception according to the researcher is a form of perception"[11]. The term reception is also actively used in linguistic research, for example, Simonok V. P. consider the lexico-semantic reception to be borrowing and the gradual adaptation of foreign language elements to the new system of the recipient language[12]. Pidkaminna L. V. considers the reception as a dynamic process of re-creation by the reader of the aesthetic landmarks embedded in the poetic text by the author[13]. This process is relatively limited both by the text itself (and implies mandatory intersubjective agreement) and by the individual characteristics of the reader as well as the cultural aspect that determines the coordinates of the reception.

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T. V. Poliashenko in the study of art studies analyses the reception of the Ukrainian customary law, understanding its historical evolution within the implementation of the customary law in the culture of Ukraine XX – XXI centuries and its influence on the development of Ukrainian artistic culture[14]. Letina M. M. defines the term as "an episodic ... conscious borrowing of ideas, materials and motives considered as the samples to adapt them to own aesthetic, ethical, political and other interests"[15].

Pedagogical science interprets the reception as an intellectual process of perception of a scientific concept, which occurs through its reconstruction, analysis and criticism[16].

In the art of music, Ya. Oleksiv emphasizes the understanding of the reception in the context of the restoration of musical genres of the past in other historical conditions, " … their revival and rethinking ..."[17].

S. F. Oliynyk also believes that the term "reception not only denotes the fact of aural perception of a composer's work or works. But it also includes certain activities and actions that make the recipients to het a spiritual response to the creative heritage of a certain composer and that are documented or evidenced, and thus they can influence to promote composer creativity in the society"[18]. In other words, the researcher characterizes the reception as a process of perception and assimilation.

Representatives of historical science emphasize the need to understand the reception as "... the process of perception and interpretation of national history ... and the impact of these scientific and historical interpretations on the process of national self-identification ..."[19]. In philosophy, the reception is also equated with "perception and modification"[20].

The study has shown that the term reception is widely used in the natural sciences and humanities; however, there is no fixed or uniform terminological

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[17] Олексів Я. Рецепція жанрів сюїти і партити в українській баянній музиці другої половини XX ст. : автореф. дис. … канд. мистецтвознав. : 17.00.03 Львів, 2011. С. 3.

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[20] Мотренко Т. Рецепція гегелівських ідей у світоглядно-релігійній парадигмі російської філософії XIX – початку XX століть : автореф. дис. … д-ра філос. наук : 09.00.05. К., 2004. 37 с.

understanding, which complicates the use of the term to specify certain phenomena or processes. However, there is a large number of PhD theses in various fields of humanities and the authors use the term "reception" in the names of the works. Nevertheless, the authors do not provide a clear definition of the term, understanding of which impliedly influence the general nature of the study, and therefore the perception of its content depends mainly on interpretation and imagination of the acceptor. In particular, the analysis of the use of the category "reception" in various fields of science allows to determine the main qualitative characteristics of this phenomenon, namely, it is used in the understanding: "borrowing and adjustability", "borrowing and adaptation", "perception", "perception and transformation", "perception and comprehension", "perception and assimilation", "perception and interpretation", "perception and modification", "revival and rethinking". These findings suggest that there are four basic semantic characteristics of understanding the phenomenon under study: 1) borrowing; 2) revival; 3) perception; 4) mastering (adaptation, adaptation, modification, interpretation, etc.).

2. Reception as a common law phenomenon

In jurisprudence, there is no unity of doctrinal approaches to understand the term "reception of law", although it has a long history of use. In legal dictionaries, encyclopaedias, and other reference literature, "reception of the law" is defined as "borrowing and adjusting to the conditions of any state – a law developed by another state or in a previous historical era"[21] or "... the process of interaction, borrowing, perception of any domestic law system of principles, institutions, basic features of another domestic (national) legal system"[22]. There is also an ambivalence in understanding the reception of law, namely in broad and narrow sense. At the same time, in broad sense, the reception of law is the conscious borrowing and mastering of the assets of another's culture for enriching domestic culture. In addition, in narrow sense, the use of the Roman law system in some countries of Western Europe, especially in Germany, since the 12th century, which peaked in the 15–16 centuries[23].

Therefore, before deciding on the legal nature of reception in modern constitutional law, it is worth considering the doctrinal approaches to this phenomenon used in other branches of legal science. A well-known scientist in the field of comparative jurisprudence A. Kh. Saidov argues that the reception is the restoration of the action (selection, borrowing, processing

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[21] Большая советская энциклопедия. Под ред. А. М. Прохорова. М.: Изд-во «Советская энциклопедия», 1975. Т. 22. С. 67.

[22] Большой юридический словарь. Додонов В. Н., Ермаков В. Д., Крылова М. А. и др. М.: 2001. С. 476; Словарь международного права [С. Б. Бацанов, Г. К. Ефимов, В. И. Кузнецов и др.]. 2-е изд. М.: Международные отношения, 1986. С. 356.

[23] Тихомирова Л. В., Тихомиров М. Ю. Юридическая энциклопедия. М., 2002. С. 757.

and assimilation) of the normative, ideological and theoretical content of Roman law, which proved to be suitable for regulating new relations that are higher degree of social and legal development. However, at first, this reception was doctrinal: Roman law was not directly used, its conceptual fund, a sufficiently developed structure, internal logic and legal technique were studied. Ultimately, the reception of Roman law led to the fact that even in the Middle Ages, the legal systems of European countries – their legal doctrine, legal technique – gained some similarities[24].

Although there is a contrary opinion in the legal literature, expressed by F. Wieacker[25] and supported by V. Tomsinov, who believes that "... the phenomenon, which was called in the legal literature as the reception of Roman law in Western Europe in the Middle Ages" was not really the reception[26].

Researcher of Roman law A. I . Kosarev notes that during the reception process, there was a complement of less developed legal systems with the experience of a higher status. Over time, there was their partial incompatibility and alienation, which was not consistent with the existing standards of national life and fundamental principles, traditions of their own law (as it was in the Middle Ages with the knowledge of Roman law, obtained by "elegant lawyers"[27]). That is why, in his opinion, reception is not a mechanical transfer, but a complex (and multi-stage) process of borrowing based on selection, then processing according to the certain conditions, finally, assimilation, when foreign becomes an organic part of national right. The struggle of the new with the old, the victories of the new, the defeats, the victories again were determined by the multistage of the reception process. Finally, in the early stages of the bourgeois society, Roman law was perceived as it was[28].

Modern domestic researcher L. V. Shala also regards the reception of Roman law as the process of transferring, adapting, rooting, preserving and using of historically perfect ideas, principles and norms by the legal systems to regulate public relations on private property[29].

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[24] Саидов А.Х. Сравнительное правоведение (основные правовые системы современности): учебник. Под ред. В.А. Туманова. М.: Юристъ, 2003. 448 с.

[25] Wieacker F. The importance of roman law for western civilization and western legal thought. Boston College International and Comparative Law Review. 1981. Vol. 4. № 2. P. 270.

[26] Томсинов В. А. О сущности явления, называемого «рецепцией римского права» / в кн. Виноградов П. Г. Очерки по теории права. Римское право в средневековой Европе / Под редакцией и с биографическим очерком У. Э. Батлера и В. А. Томсинова. М.: Издательство «Зерцало», 2010. С. 279.

[27] «Елегантними юристами» називають осіб, що займаються історією римського права.

[28] Косарев А.И.. Римское частное право. М.: Юриспруденция, 2007. С. 177.

[29] Шала Л. В. Концепція приватної власності у римському праві та її рецепція у праві України. Автореф. дисертації на здобуття наукового ступеня кандидата юридичних наук за спец. 12.00.01, Львів, 2010. 19 с.

The exclusively historical aspect of the reception is emphasized by domestic researchers of Roman law O. A. Pidoprigora, E. O. Kharytonov. They define the reception as the process of revival of Roman law, perception of the spirit, ideas and main principles and basic provisions of the civilization at a certain stage of its development in the context of the general process of cyclical renaissances[30]. Another researcher F. D. Finochko interprets the reception of Roman law as the acceptance of sources, mainly in the Middle Ages, the basic principles of Roman law[31].

The representative of the Russian legal science K. M. Denisova argues for the need to understand the reception as the process of perception, the transformation of the system of Russian law from socialist to Romano-German legal system based on the reception of Roman law "as a common ancestor of European – Roman law is a theoretical expression of the genetic community of legal development. In addition, in her opinion, the secret to the longevity of Roman law is that the Romans learned to perceive and synthesize creatively not only their own but also others' experiences[32].

Consequently, the representatives of theory of state and law traditionally consider "the reception" as a universal phenomenon through the prism of the reception of Roman law, and it is understood mainly as the process of revival of Roman law in modern legal relations, which consists in borrowing, perception, selection and adaptation, etc. At the same time, understanding the reception of law exclusively through the study of the evolution of Roman law influence on European legal systems does not reflect the essence of this general theoretical phenomenon.

Concurring with N. V. Parshkova, who denies reducing the understanding of the reception exclusively to the reception of Roman law, arguing that the processes similar to the medieval reception of Roman law, took place in the Far East, where Chinese law was the source of the reception[33]. Other examples include borrowing from the Scandinavian legal systems of German commercial and commercial law, the formation of a Europeanized secular component by the Japanese legal system[34].

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[30] Підопригора, О.А., Харитонов, Є.О. Римське право : підруч. 2-ге вид. К. : Юрінком Інтер, 2009. С. 130.

[31] Фіночко Ф. Д. Роль рецепції римського права у формуванні європейських традицій адміністративного права *Вісник Харківського національного університету внутрішніх справ*. 2007. № 38. С. 24–31. URL: http://nbuv.gov.ua/UJRN/VKhnuvs_2007_38_6.

[32] Денисова Е.М. Проблема рецепции римского права в России. *Вестник ТвГУ. Серия. Право*. 2012. Вып.32. С. 328–329.

[33] Паршкова Н.В. Определение преемственности в рецепции права: общетеортетический аспект. Вопросы современной юриспруденции: сб. ст. по матер. VIII междунар. науч.-практ. конф. – Новосибирск: СибАК, 2012. URL: https://sibac.info/conf/law/viii/26094.

[34] Егоров А.В. Сравнительное правоведение и правовая рецепция. *Вестник Полоцкого государственного университета.* Серия D. Экономические и юридические науки. 2013. № 6. С. 164.

Modern representatives of the theory of state and law and comparative jurisprudence have departed from the interpretation of the reception solely in understanding the perception or revival of the system of Roman law, but there are studies in which it is still interpreted within historical context.

Domestic researchers E. Kharytonov and O. Kharytonova insist that according to the origin of the term "reception", it is justified to use it precisely in cases of revival, perception of spirit, categories, principles, concepts and basic provisions of the law. All these was formed by the previous civilizations and considered by the subsequent civilizations in a particular stage of development and in the context of general process of cyclic revival[35]. In addition, scientists emphasize that this approach should not be about "interaction" of legal systems but about "continuity of law – the impact of one legal system on another". Besides they claim "... the extension of this concept is not justified because it is related to a violation of the Occam blade principle"[36]. Z. M. Chernilovskyi also considers the reception to be only a transition of norms from the legal system of one formation to the legal system of another[37].

Giving the due to the supporters of the traditional understanding of the reception of law, we believe that it is necessary to take into account the modern realities in which the rapid development of social relations and the relentless process of internationalization of law. Thus, there is a need for the development and improvement of classical, traditional doctrines, as well as for expanding the content legal categories in the legal science. That is, in this we have a fully justified semantic rethinking of the category "reception" in terms of adapting it to the modern needs of legal reality and legal science.

The German scientist F. Wieacker does not rule out the possibility of use of the term "reception" to describe the perception of Roman antiquity by Southern Europe in the early Middle Ages or its perception in Northern Europe a little later. The scientists insists on the need to expand its content and believe that "… it is correctly to use the term "reception" in the case of the adoption of one legal order by another legal order, which is contemporary to the first one, for example, the "reception" of Civil Code of Switzerland by Turkey"[38].

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[35] Харитонов Є., Харитонова О. Від осмислення рецепції римського права – до формування загальної теорії взаємодії правових систем. *Право України*. 2014. С. 280; Харитонов Є.О. Методологічні засади дослідження проблем правової адаптації України до внутрішнього ринку ЄС. *Наукові праці Національного університету «Одеська юридична академія»*. Т. 17 / голов. ред. М.В. Афанасьєва; МОН України, НУ «ОЮА». Одеса : Юрид. л-ра, 2015. С. 242.

[36] Харитонов Є., Харитонова О. Від осмислення рецепції римського права – до формування загальної теорії взаємодії правових систем. *Право України*. 2014. С. 280.

[37] Черниловский З.М. Русская Правда в свете других славянских судебников. Древняя Русь: проблемы права и правовой идеологии : Сб. науч. тр. М.: ВЮЗИ, 1984. С. 3–35.

[38] Wieacker F. The importance of Roman law for western civilization and western legal thought. *Boston College International and Comparative Law Review*. 1981. Vol. 4. № 2. P. 270.

Researchers characterize the "reception of the right" solely as borrowing or borrowing and perceiving of the legal material of one legal system by another, but still the interpretations differ.

A number of scholars have emphasized that the interpretation of the reception solely as legal borrowing (or one of its forms). V. I. Lafitskyi notes, "… reception is a mechanism for voluntarily borrowing of the most effective legal models of other states"[39]. Researching the problem of legal borrowing, A. V. Skorobogatov proposes to classify them into several groups: 1) reception of law; 2) legal dialogue; 3) legal acculturation; 4) legal transfer and 5) legal expansion[40]. In other words, the researcher actually attributes the reception to the legal borrowing group and accepts it as a borrowing of the legal norms, principles and values of the donor society, with further adaptation to the conditions of the national legal family of the recipient society. At the same time, revealing the concept of legal acculturation, the author almost duplicates it with the reception, because in both cases he emphasizes "… the need to assimilate the legal norms and legal values of the donor society…"[41].

Yu. M. Folgerova also understands the reception as the process of borrowing from one state of the experience of legal regulation for the national legal system of another state (states)[42]. V. O. Tomsinov believes that the process of perception in a particular state of the elements of the legal system of another state is called "reception of right"[43].

Another scientist L. V. Avramenko also argues for such a position and believes that the reception should be considered as "… perception – transfer, storage and use"[44]. In addition, the scientist concludes that "… reception" and "succession" are close in meaning categories that can be used interchangeably".

A rather large group of scholars advocate an expanded interpretation of the concept of reception as the process of borrowing and perceiving the law of one state by another.

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[39] Лафитский В.И. Сравнительное правоведение в образах права. Том первый. М.: Статут, 2010. С. 113.

[40] Скоробогатов А. В. Правовые заимствования как средство совершенствования национальной правовой системы. *Актуальные проблемы экономики и права*. 2018. Т. 12. № 1. С. 77–88.

[41] Ibid. С. 80–81.

[42] Фольгерова, Ю. Н. Преемственность и рецепция в конкурсном процессе стран Западной Европы и России: Историко-сравнительный анализ: автореф. дис. на соискание уч. степени канд. юр. наук. спец 12.00.01. Саратов, 2008. С. 7.

[43] Томсинов В. А. О сущности явления, называемого «рецепцией римского права» / в кн. Виноградов П. Г. Очерки по теории права. Римское право в средневековой Европе / Под редакцией и с биографическим очерком У. Э. Батлера и В. А. Томсинова. М.: Издательство «Зерцало», 2010. С.2 64.

[44] Авраменко Л.В. Розмежування наступності у праві з іншими суміжними поняттями. *Проблеми законності*. 2012. № 121.С. 5.

In particular, E. Yu. Kuryshev proposes to define the reception of right as a phenomenon involving the processes of perception, repetition and borrowing of a right produced in another state (legal system). The socio-economic conditions of the states are similar because of the historical continuity and connection of the legal culture of countries[45]. G. M. Aznagulova argues for a similar position: "Reception is the basic form of interaction of national legal systems and it can be understood as a process of perception and adaptation to the conditions of any state of law, produced in another state or in a previous historical epoch"[46].

I. M. Mutai believes that reception is the process of bringing to the legal system of the state the legal norms that originally belonged to the legal system of a foreign state or a donor state[47]. As I. M. Sharkova notes, "not excluding the possibility of using the concept of reception in the study of problems of European legal integration, it is necessary to remember the cultural and historical continuity in the interaction of legal systems. Forgetting continuity, ignoring the cultural and legal context of the development of modern legislation in Romance studies is defined by another concept – "vulgarization of the law"[48]. Another researcher Prieshkina O. O. points out that "the reception of law is a complex phenomenon, which includes processes of succession, perception, repetition and borrowing of the right made in another state (legal system) by virtue of the historical continuity and connection of the legal culture of the states, socio-economic conditions in which are similar"[49].

Describing the reception of law, S. V. Tkachenko proposes to understand it as borrowing and introducing ideas, legal institutions and norms of terminology of foreign law in order to modernize the legal system, to acquire international authority or to consolidate political and economic dependence on other countries[50].

Z. P. Melnyk defines the reception of law as "a unilateral, voluntary process of borrowing, accepting and further adapting to the conditions of a

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[45] Курышев Е.Ю. Рецепция в российском праве: автореф. дисс. на соискание учен. степени канд. юрид. наук : спец. 12.00.01. Саратов, 2005. С. 12.

[46] Азнагулова Г. М. Рецепция права как форма взаимодействия национальных правовых систем: автореф. дисс. на соискание учен. степени канд. юрид. наук : спец. 12.00.01. Казань. 2004. С. 11.

[47] Мутай И.М. Рецепция и реставрация в праве. *Журнал зарубежного законодательства и сравнительного правоведения*. 2011. № 5. С. 55.

[48] Шаркова И. Н. Понятие рецепции права: неизменная сущность и новое содержание в эпоху глобализации. *Журнал научных публикаций аспирантов и докторантов*. 2013 URL: http://jurnal.org/articles/2013/uri106.html.

[49] Приешкина Е.А. Категория рецепции в современной юридической литературе. *Актуальные инновационные исследования: наука и практика: электронное научное издание*. 2011 . № 4 . http://www .actualresearch . ru/nn/2011_4/Article/index .htm.

[50] Ткаченко С.В. Идеологический компонент рецепции права. *Юридические записки*. 2014. № 2. С. 26.

particular country of more advanced law, created at another time or in another state, with the aim of improving the functioning of its own legal system"[51]. V. K. Samigullin has a similar point of view, considering that the legal reception should mean borrowing and perception that occur in the process of interaction of different legal systems over a considerable period[52].

Despite the existence of classical approaches to the modern understanding of the reception as the process of borrowing, continuity and perception, it is possible to agree with some exceptions in general, but there is a number of quite original interpretations of the studied legal phenomenon in the legal literature.

For example, N. V. Parshkova believes that the reception is a way of harmonization, which is manifested in the fact that not the law of a particular state is perceived, but the experience of developed legal systems. The aim is not only to reorganize the legal order but also the achievement of rapprochement, that is, the harmonization of national law with that of the other states, since differences in law impede the interaction between them. While in the process of harmonization, the researcher assumes the role of the reception as a "link between legal systems"[53]. Despite all the originality, such an understanding of the reception is quite debatable, since it raises a number of questions, for example, it is unclear what the researcher understands by the "experience of developed legal systems? What legal systems does she consider to be developed? Finally, how will harmonization happen if an "experience" but not the law will be perceived?

The radical position with the negative connotation is expressed by M. Yu. Ryazanov, who consider the phenomenon to be the process of borrowing foreign legal experience, abstracted from the peculiarities of the national mentality, which led to the break with the Slavic legal culture and the formation of legal nihilism[54]. Such interpretation of the reception cannot be agreed at all, because in fact, the researcher considers only one type of reception – I "decorative", without taking into account the positive consequences and promising trends.

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[51] Мельник З.П. Рецепція як засіб вдосконалення правової системи (теоретико-правовий аспект): автореф. дисс. канд.. юрид. наук. спец. 12.00.01. К., 2009. С. 8.

[52] Самигуллин В.К. О природе рецепции права. *Вестник Восточной экономико-юридической гуманитарной академии*. 2013. № 5 (67). С. 68.

[53] Паршкова Н. В. Категория «рецепции» в современной юридической литературе. *Право и государство: теория и практика : федеральный научный юридический ежемесячный журнал.* М. 2012. № 7 (91). С. 24–29

[54] Рязанов М.Ю. Слов’янське право і слов’янська правова культура: загальнотеоретичний аспект. Автореф. дис. … кандидата юридичних наук за спеціальністю 12.00.01 – «Теорія та історія держави і права; історія політичних і правових учень». – Національний університет «Одеська юридична академія», Одеса, 2013. С. 6.

K. A. Zhebrovska considers the reception to be a way of universalization of the national law[55]. The researcher thinks that the reception is the perception, recognition and approval of the national legal system of rules and principles of the supranational law, aimed at the universalization of the national law. This definition is also debatable because in this case one of the types of reception – forced – is under consideration.

A rather original position on the understanding and interpretation of "the reception of the right" was expressed by V. O. Rybakov. According to his position: "... the reception of the right is a sanctioned law-making, based on the legal material of other countries. The inclusion of the reception in the law-making process is a kind of protective mechanism against the direct invasion of third-party norms into the sovereign national system of law. For this method of law development to be effective, it is necessary to take into account the similarity of the types of law involved, to evaluate the limits of coincidence of the subject of their legal regulation, the systemic nature of law, as well as to have complete information on the practice of borrowed legal material[56].

The mechanical nature of the reception as a basic feature is the basis for its understanding according to M. O. Pshenychnov. In his opinion the reception is a form of international legal harmonization of legislation under which he understands the adoption by the state of rules of the national law, which textually replicate the rules of the international law, specify and adapt them to the peculiarities of the social system and legal system. The reception, as the researcher considers, is possible only in the rulemaking process, because in this way the international legal model is borrowed without changing its shape and internal logical construction[57].

V. O. Letyaev insists on understanding the reception as the process of borrowing legal experience related to the systematization of legal norms[58]. The scientists also regards the reception just as a methodological tool of law-making. L. V. Sokolska suggests the original approach, offering to understand the reception as "a kind of historical form of legal acculturation" and to define it "... as a unilateral process of transferring elements of the legal system of the

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[55] Жебровська К.А. Правові цінності у взаємодії правових систем : дисс. … кандидата юридичних наук спеціальність: 12.00.01. Одеса, 2017. С. 60.

[56] Рыбаков В. А. Преемственность в отечественном праве в переходный период: общетеоретические вопросы : Автореферат диссертации на соискание ученой степени доктора юридических наук. Специальность 12.00.01. Омск, 2009. С. 9.

[57] Пшеничнов М.А. Гармонизация российского законодательства (теория, практика, техника): автореф. дисс. доктора юрид. наук. спец. 12.00.01. Нижний Новгород, 2011. С. 50; Пшеничнов М.А. К вопросу о формах международно-правовой гармонизации российского законодательства. *Вестник Нижегородской академии МВД России*. 2013. № 24. С. 21.

[58] Летяев В.О. Систематизация законодательства и рецепция в праве: закономерности взаимодействия. *Вестник Саратовской государственной академии права*. 2009. № 4. С. 140.

donor society with the obligatory assimilation of the recipient society. In addition, the initiator of the reception is a party wishing to implement a partially or fully the legal system of the donor. The donor, however, is usually indifferent to such a borrowing process"[59]. Of course, the position is quite interesting from a scientific point of view, but the logical question arises, if the donor is indifferent to this process, how the condition of "obligatory" in the process of assimilation by the recipient will be realized?

L. A. Ackerman has the opposite point of view and regards the reception as "... one of the options of acculturation, but one that has been given some independence"[60]. That is, the researcher considers the reception as the global acculturation in which the national legal system is being changed, there are profound changes in the legal culture, global borrowing of elements of foreign law – its essence, system or structural elements (industries, institutions)[61].

There is also the opinion that the borrowed norm plays the role of a kind of "enzyme" and promotes the transformation of the whole institution, either by literally copying what is abroad or, more often, by synthesizing elements of the national and foreign law. The mechanism of influence may be different precisely because the features of socio-cultural development of the West and East of Europe are also different. These features, as well as differences in the legal mentality of European countries, largely influence the peculiarities of the reception processes of law in different countries[62].

Summarising research findings made by scholars in the field of state theory and law, it can be stated that mainly the reception is considered as the process of borrowing, perception and continuity, etc. But there is also a variety of quite original positions, although they all significantly narrow the content of the studied legal category, don not consider all semantic aspects of the phenomenon and in some cases the scientists even deny the characteristics.

In foreign legal doctrine, the reception is mainly regarded in historical context as the reception of Roman law, in particular the importance of the reception of Roman law for Western Europe, emphasized by F. C. Savigny[63]. The German lawyer F. Pringsheim thinks that understanding the concept of the reception is quite voluminous, so it is easier to determine what the concept does not mean. He also noted that not only the alien scientific

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[59] Сокольская Л.В. Виды правовой аккультурации. *Научные труды МГЮА*. 2009. № 6. С. 1289.

[60] Акерман Л. А. Рецепція права та правова акультурація. Актуальні проблеми держави і права. 2005. Вип. 25. С. 131. URL: http://nbuv.gov.ua/UJRN/apdp_2005_25_30.

[61] Ibid.

[62] Макарова И. В. Влияние римского права на становление института обязательст-венного права России :Вопросы истории и теории : автореферат диссертации … кандидата юридических наук. Специальность 12.00.01. Волгоград, 2005. С. 20.

[63] Savigny F. C. Geschichte des romischen Rechts im Mittelalter. Heidelberg, 1834–1851. Bd. 1–7;

method or another's philosophical and legal world view is reciprocated, but also another's right[64].

Wolfgang Wiegand believes that the term "reception" is used to refer to the integration of foreign ideas and ways of thinking. Using the terminology "reception of the American law", he draws an analogy with the process of the spread of Roman law as an ius commune throughout the whole Europe in the 12th-16th centuries. In his study, he notes that there is a striking parallel between the process by which Roman law took root in Italian universities in the Middle Ages and turned into European ius commune on the one hand, and the spread of the American law on the other[65].

Jean-Michel Klett notes that the reception of foreign law is a practice that exists in almost all legal cultures. In particular, in the area of commercial law, they predominantly use the US approach, as in the state there is a substantial legal experience borrowed from other countries[66].

For the first time in the general context, Jan von Hein considers the reception of US company law in Germany, and the author believes that such factors as legal culture, political or economic situation in the country may interfere with the reception process[67].

Polish scientist Yu. Bardakh considers the reception as "... borrowing, assimilation of alien cultural models by a certain society"[68].

In foreign legal doctrine the study of the reception of the right conducted by R. Robertson and F. Lechner is worth while discussing. They state that the understanding of the reception of the specifics is gradually being asserted, which consists in the fact that not only national legal systems but as donors and recipients are meant. Individual states and the European Union are recognized as the subjects of the reception as well. Consequently, the reception is increasingly understood as the form of the Europeanisation of law. In this connection, it is of particular interest that the use of the new concept allows to expand the range of countries involved in the process of the European integration. This assumption is confirmed by the practice of using this concept to describe the possibilities of borrowing (reception) of the legal experience of the European Union by the non-EU countries. Different types of reception (formal, behavioural, communicative, discursive), which depend on the nature of the international institutions involved in the

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[64] Pringscheim F., Reception, în Revue internationale des droits de l'Antiquité, 2009, vol. 8, p. 244–245.

[65] Wiegand W. The Reception of American Law in Europe/ The American Journal of Comparative Law. 1991. Volume XXXIX. № 2. P. 229–230.

[66] Klett J.-M. Die Trust-Struktur im Vertragsmodell des Investmentrechts Berlin: Duncker & Humblot, 2015. 243 p.

[67] Jan von Hein Die Rezeption US-amerikanischen Gesellschaftsrechts in Deutschland, 2008 1089 Seiten.

[68] Bardach J. La reception dans l'histoire de l'etat et du droit. Le droit romain et sa reception en Europe. Varsovie, 1978. P. 27.

reception process, are also specified to predict the implementation of these opportunities. The reception itself is classified in two dimensions: the probability of a non-EU recipient country adopting its reception as well as the implementation and enforcement of these rules, which is key to assessing the EU's internal policy impact, i.e. the results of the reception[69].

Thus, it can be noted that there is a lack of scholarly attention to study of the reception, and its understanding is mainly associated with the restoration of Roman law in the modern law, although there are researches on reception as the process of borrowing and perception. Mostly foreign scholars are adherents of the theory of "legal transplantation" or "legal borrowing" as well as other ideas of "legal displacement", "legal migration", "legal contamination", "legal stimuli" and others.

3. Reception in constitutional law: basic approaches and doctrinal interpretations

In constitutional law, the constitutionalist scholars give little attention to the problems of the reception. Although in the context of constitutional and legal modernization in Ukraine this issue is of particular relevance. As V. V. Kochetkov rightly points out: "… speaking of one form or another of constitutionalism, we analyse the process of the reception of constitutional public-law institutions in a specific system of state law and the features of rationalization of archetypes of constitutional justice in legal doctrine"[70].

In modern constitutional law, scientists are mainly considering the need for the reception (or some of its methods of transformation, harmonization, adaptation, implementation, etc.) in the context of the European integration processes, which significantly narrows the understanding of the essence of this phenomenon. Thus, M. O. Pshenychnov notes that the constitutional reception of international law eliminates changes in the content of norms that promote approximation, unification of national legal systems governing similar relations. This is mostly relevant to the problems of human survival in the context of the global threats such as the proliferation of nuclear weapons, environmental disasters, etc.. The solution of the problems depends on the existence of coordinated and unified actions of many states[71].

Ilchenko T. Yu. supposes the constitutional reception to be the process of borrowing and the perception of pan-European constitutional values. The researcher warns that the transfer of constitutional values to "churlish soil" can

[69] Robertson R., Lechner F. Modernization, Globalization and the Problem of Culture in the World-Systems *Theory*. *Theory, Culture & Society*. 1985. № 2. P. 103–117.

[70] Кочетков В.В. Конституционализм и архетипы русской власти (cacus 1906 года). *Российский журнал правовых исследований*. 2015. № 1 (2). С. 156.

[71] Пшеничнов М.А. К вопросу о формах международно-правовой гармонизации российского законодательства. *Вестник Нижегородской академии МВД России*. 2013. № 24. С. 21.

lead to negative consequences, to their deformation, to the formation of distorted ideas about democratic institutions, legal nihilism, absolutization of power, and as a consequence – disappointment of the population in these institutions[72].

The low level of constitutional culture, the systemic inadequacy of the mechanisms of securing the rule of law, the existence of an internally contradictory legal system, the lack of a unified value-systematic understanding of the social guidelines of social development also encourages negative consequences.

Anichkin E. S. and Kokina M. N. uphold the position of understanding the reception in constitutionalism as borrowing from national or foreign experience[73].

Some scholars in the field of constitutional law propose to consider the reception solely in the sense of borrowing. I. O. Hosha supposes that "... reception is the process of borrowing the right system of the recipient, elements of the legal system of the donor and it can serve as an instrument for improvement, modernization of law, a mean of interaction of legal systems"[74]. In addition, the researcher actually reduces the understanding of the reception to "the consequence of harmonization", which is possible only if the legal systems are in the same system of legal values, which are expressed in the relevant principles[75].

While researching the reception in constitutional law, A. I. Dudko suggests to imagine the phenomenon as a process of borrowing the legal system (the recipient) and elements of another legal system (the donor). At the same time, the author emphasizes that in the case of a prudent approach to the transfer of models of the constitutional and political order of one state to other states, the reception acts as an instrument for the improvement of constitutional law[76]. V. I. Lafitskyi also emphasizes the understanding of the reception as borrowing the constitutional models of other states, which is the main instrument of the impact of globalization on the constitutional order[77].

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[72] Ильченко, Т. Ю. Рецепция российской конституции. *Право и государство: теория и практика*. 2015. № 9. С. 48–49.

[73] Аничкин Е. С., Кокина М. Н. Виды рецепции в российском конституционализме. *Евразийский юридический журнал*. № 5 (84) 2015. С. 125–127.

[74] Гоша І.О. Конституційно-правове забезпечення гармонізації законодавства України із законодавством ЄС: проблеми теорії та практики: дис. … канд. юрид. наук: спеціальність 12.00.02. Маріуполь, 2012. С. 118.

[75] Ibid. С. 119.

[76] Дудко А.И. Рецепция в конституционном праве России: автореф. дисс. … канд. юрид. наук : спец. 12.00.02. Челябинск, 2010. С. 9, 13.

[77] Лафитский В.И. Механизмы воздействия процессов глобализации на конституционный строй // Реализация Конституции: от идей к практике развития конституционного строя (состояние и перспективы российского конституционализма на общемировом фоне). Международное исследование : сборник / Международный институт мирового развития. – М. : Издательский центр Фонда конституционных реформ, 2008. С. 311.

In his research, S. A. Panasyuk concludes that "reception", "transformation" or "incorporation" are in fact the ways of implementation"[78]. B. A. Safarov also supposes that implementation, transformation, incorporation, reception and adaptation are the ways of fulfilling international obligations[79]. The doctrinal position of M. O. Baimuratov implies an understanding of the reception as a way (form) of harmonization of constitutional law of Ukraine with the international law[80].The acceptable for us in the opinion of V. V. Manturov. According to his thought such phenomena as "borrowing", "adaptation" and "perceptions", considered in a narrow sense, to be referred to the parts of large-scale process of "the reception" of law. In a broad sense, the author proposes to understand the reception as the complex process, involving not only the transposition of the rules (that is, their borrowing), but also the process of implementation of these rules by the legal system of the recipient[81].

Savchyn M. V. considers the problem of constitutional borrowing in the fact that they are close to the problem of copying specific constitutional institutions and systemic constituent elements, which is debatable[82].

According to V. V. Homonai, "... the reception is first of all the complex process that is not referred to a mechanical transposition of certain normative provisions, but also it involves the further assimilation and use of ideas, principles, institutions, etc. of the legal system of other times and other peoples"[83].

Indeed, by ratifying certain international agreements, the Parliament of Ukraine, on behalf of the State, actually agrees to their implementation into the national law and it is obliged to textually reiterate the provisions set out therein, thus harmonizing, adapting or transforming domestic legislation to EU law.

I. V. Kenenova believes that borrowing of the constitutional and legal experience does not always require prior sophisticated research into its usage. The researcher finds the justification of such a position in the "instrumental approach" and insists: "… it is necessary to borrow only legal

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[78] Панасюк С.А. Принципи європейської хартії місцевого самоврядування та актуальні проблеми їх імплементації в законодавство України : дис. … кандидата юридичних наук спец.: 12.00.02. Маріуполь, 2015. С. 158.

[79] Сафаров Б.А. История воплощения концепций и международных стандартов в области прав человека в правовую систему Республики Таджикистан: дисс. ... д-ра юрид. наук. спец. 12.00.01. Душанбе, 2015. С. 165.

[80] Баймуратов М. А. Международное публичное право : учебник. Х. : Одиссей, 2003. С. 18–19.

[81] Мантуров В.В. Соотношение рецепции и иных форм правовых заимствований. *Сибирский юридический вестник*. 2012. № 4(59). С. 108–109.

[82] Савчин М.В. Конституціоналізм і природа конституції: монографія. Ужгород: Поліграфцентр «Ліра», 2009. С. 46.

[83] Гомонай В.В. Рецепція права як фактор євроінтеграційних процесів. *Порівняльно-аналітичне право*. 2013. № 1. С. 11.

instruments that do not have obvious ideological or traditional "colouring"[84]. Namely, it is proposed to borrow only: 1) logical moves that are used in the construction of the legal norms, institutions, as well as to build the argumentation provided in the justification of legal decisions that have proven effective; 2) methods of systematization of legal material and organization of law enforcement practices (acceptable to relevant social or professional groups); 3) ways of implementing universal norms and principles of constitutional law[85].

According to our opinion, it is quite a debatable idea, since if one does not directly borrow from the constitutional-legal norms, institutions, doctrines that have proven their effectiveness in the process of functioning, is it possible that the reception then contributes to the development of a system of constitutionalism? Therefore, we convince that we should not focus on a just "instrumental" approach, since it significantly impairs the substantive content of the reception (at least borrowing as one of its forms) as a constitutional and legal phenomenon.

Summarising research findings, it can be noted that in the constitutional law of Ukraine the concept of the reception is reduced to transfer or borrowing, which significantly impairs the substantive content and semantic meaning of this legal category. It is believed that the reception itself from the point of view of law is an ideologically neutral, mechanical act, which can be based on a variety of reasons and a diverse ideological base[86], but this approach poses certain threats and can ultimately lead to various constitutional and legal distortions.

Thus, from the foregoing it becomes obvious the relevance, lack of research and doctrinal uncertainty in the interpretation of the reception in general and the reception in constitutional law, in particular.

Constitutional law is a leading public-law branch of the national system of law, and the peculiarity of constitutional norms, as L. O. Murashko notes, is the ability to integrate social relations, distinguishing their most stable types. In this connection, these norms are characterized by a high degree of generalization of the possible or proper behaviour of the subjects of law, legal guidelines, specific value-oriented rules for the state building[87]. Therefore, the importance and necessity of studying the reception in constitutional law is related, first, to the specifics of constitutional legal

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[84] Кененова И.В. Некоторые современные проблемы преподавания конституционного права зарубежных стран. *Вестник Московского университета*. Серия Право. 2010. № 1. С. 112.

[85] Ibid. С. 112–113.

[86] Мутай И.М. Рецепция и реставрация в праве. *Журнал зарубежного законодательства и сравнительного правоведения*. 2011. № 5. С. 57.

[87] Мурашко Л.Г. Аксиологическое измерение процесса правообразования: история и современность. Автореф. дисс. доктора юридических наук. Спец. 12.00.01. М., 2015. С. 34.

norms, which, unlike the norms of other branches, determine the normative-value guidelines and influence the constitutional activity of the subjects of constitutional-legal relations. The regulatory capacity of other branches is to promote the observance of axiological constitutional guidelines and to strive for their implementation.

Increasingly, researchers point to the gradual internationalization of constitutional law, that is, the threat that constitutional law ceases to be national and authentic. In particular, R. Goodin points out that "… reading large volumes of constitutional texts strikes the similarity of their language; reading the history of the constitution of any country, it is striking how large the amount of conscious borrowing is"[88].

Saunders Ch. also highlights the linguistic and substantive similarity of the constitutions of different countries, and studies of the history of their creation indicate that they originate from each other, but must conform to the value system of the society for which constitutional principles and norms are intended. Otherwise, they will remain on paper and will not be realized in practice or become a reality. Moreover, inconsistency with the value system of the reality can lead them to change from a stimulus for innovation of the social sphere to the source of deep social contradictions or an instrument of coercion of the authorities[89].

We would like to highlight that the Constitution is a special system of values specific to a proper social community, with its specific features, problems and approaches to solving them. This does not mean absolutization or ossification. It would be impossible to ignore the general principles, best international practices, requirements of the international law, international case law and international constitutional culture[90].

To ensure systemic progress it is important to try to harmonize all of the above with own value system instead of mechanical replication. As V. Osiatynskyi rightly states, borrowing is inevitable because there are universal constitutional principles and mechanisms that were known in the past, they are universally recognized and act as so-called standards or norms and principles of international law[91].

While carrying out the technical and textual transfer of constitutional legal norms from the donor country to the recipient country, it should be considered that the existence of each norm or institute is the embodiment of

[88] Goodin R. Designing Constitutions: the Political Constitution of a Mixed Commonwealth. Constitutionalism and Transformation: European and Theoretical Perspectives / Ed. by R. Bellamy, D. Castiglione. Blackwell, 1996. P. 223.

[89] Saunders Ch. A. Constitutional Culture in Tradition. Constitotional Cultures. Ed. by M. Wyrzykowski. Warsaw, ISP, 2000. P. 41–42

[90] Harutyunian G. Constitutional culture: the lessons of history and the challenges of time. Yerevan: Revised English edition. 2009. P. 115.

[91] Осятынский В. Парадоксы конституционного заимствования. *Сравнительное конституционное право.* 2004.№ 3. С. 53.

the constitutional traditions, values, ideology and national mentality. Therefore carrying out the reception it is worth to be conscious about the process taking into account the specifics of the constitutional development of a particular state.

CONCLUSIONS

Summarising research findings, it can be noted that in the legal literature the reception is understood as "borrowing of foreign law", "the process of perception and adaptation to the prescriptions of law of a particular country, produced in another state or in a previous historical era", "historical form of legal acculturation". There are thoughts about understanding the reception "as a borrowing system of general views of individual communities of the society or society as a whole as for the foundations (principles) of social, political and legal order". In addition, the reception is understood as "an organized form of legal borrowing in the process of implementation of which scientific approach is used in the form of comparative justification for the transfer of the legal elements from one national legal environment to another". Besides the phenomenon can be considered as "an assimilation by a society of another cultural models" or "a way of harmonizing norms of international law and national constitutional law".

The analysed doctrinal interpretations of the reception as a legal phenomenon allow us to highlight the polysemanticity and heterogeneity of this category. Meanwhile, in the constitutional law, the lack of comprehensive studies of this issue adversely affects both the development of the functioning of the reception mechanism as a whole and the effectiveness of implementing a qualitatively updated model of the entire constitutional mechanism of public power.

Constitutional law science must synthesize and develop traditional theories of the legal reception, which will result in the development of a modernized doctrine of the reception in constitutional law. Today, the development of scientific and technological progress and global challenges to the humanity (demographic, environmental, terrorist, etc.) have raised the issue of changing the era of legal thinking and need to modernize the doctrine of constitutionalism as a whole. These processes imply the need for close cooperation between states, which further strengthens their interconnection, requires the development of supranational institutions and the convergence of legal systems.

The reception in constitutional law, of course, has a dramatic political and legal connotation and it is directly dependent on constitutional justice and constitutional culture, since the success of the reforms carried out will remain only an imitation of constitutionalism if the society does not accept them and adhere to them.

SUMMARY

The article deals with the systematic research and formation of a holistic view of the reception in constitutional law allowed to determine its essence as a political and legal phenomenon. Also the term "reception" has been widely used in the scientific discourse, not only in legal science, but also in philology, cultural studies, psychology, literature, linguistics, music, history and others. Summarising research findings defined the analysed doctrinal interpretations of the reception as a legal phenomenon allow us to highlight the polysemanticity and heterogeneity of this category. Meanwhile, in the constitutional law, the lack of comprehensive studies of this issue adversely affects both the development of the functioning of the reception mechanism as a whole and the effectiveness of implementing a qualitatively updated model of the entire constitutional mechanism of public power.

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Information about the author:
Verlos N. V.,
Candidate of Juridical Sciences, Associate Professor,
Department of Constitutional and Labor Law,
Zaporizhzhia National University
66, Zhukovskoho str., Zaporizhzhia, 69600, Ukraine

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FORMALIZATION OF POWERS AS AN ELEMENT OF OBTAINING THE LAWYER'S LEGAL STATUS

Zaborovskyy V. V.

INTRODUCTION

A lawyer's empowerment is an important element in his/her professional activity since it not only establishes the essence of his/her relationship with a client but also determines the peculiarities of the lawyer's individual legal status. It is determined by the fact that, on the one hand, documents that certify the lawyer's powers, in particular, can determine the limits of his/her procedural capacity, and on the other hand – the proper registration of the lawyer's powers is undoubtedly a guarantee of his/her successful preparatory as well as all subsequent activities in providing professional legal assistance. In addition, the proper formalization of the lawyer's powers is, first of all, one of the main guarantees of a qualified professional judiciary (legal) assistance to a client (first of all, regarding the client's realization of his / her claims concerning the lawyer's unlawful activity).

The relevance of the study topic is also manifested by the fact that from the moment of attaining a lawyer's status, a person receives only a professional status, however, the realization of a significant number of elements of this status is impossible beyond his/her exercise of their procedural and (or) non-procedural form of advocacy activity, therefore, full realization of a professional component of the lawyer's status is possible only with the proper formalization of the lawyer's powers. It is determined by the fact that from the moment of the lawyer's powers formalization and his/her introduction in the corresponding process (providing documents confirming his/her powers to certain authorized entities), he/she acquires an appropriate individual legal status, which gives him/her the opportunity to fully use the complex of professional (provided by legislation on the bar) as well as procedural rights.

Unfortunately, neither in theory nor in practice the uniform approaches have been elaborated as to the proper formalization of the lawyer's procedural powers. Despite the fact that most procedural codes clearly state the grounds and documents confirming a lawyer's powers, there are cases when courts and other authorized entities unreasonably fail to recognize the validity of their powers on the basis of certain documents. Regarding the non-procedural form of the lawyer's activity, given the multifaceted possibility of its realization, it can be argued that the law enforcement activities of other institutions and organizations do not differ from courts in these matters.

The relevance of the study is also evident in the fact that the provision of the Law of Ukraine "On the Bar and Practice of Law»[1], according to which the authority of an attorney as of the counsel for the defendant or as of the representative in commercial, civil, administrative proceedings, criminal proceedings, administrative offence proceedings, as well as of the representative authorized by the assignment in constitutional proceedings shall be verified in the order prescribed by law is prescribed by law (Part 3, Art. 26), specifies the need to analyze the provisions of the procedural codes governing these issues.

The analysis of the provisions in the current versions of the procedural codes indicates that the CPC, EPC and CAP of Ukraine have established identical norms prescribing that the lawyer’s powers as a representative are confirmed by a power of attorney or a warrant. It indicates that in these types of procedures, the Ukrainian legislator no longer provides for the possibility of confirming the lawyer's powers through a contract on the provision of legal services and the assignment by a body (agency) authorized by law to provide free legal aid. In contrast to civil, administrative and economic litigation, the CPC of Ukraine and CUAO points to the possibility of using such documents to certify a lawyer's powers in court, which indicates the inconsistency of the Ukrainian legislature in determining the list of documents that can be used to certify a lawyer's powers in a particular type of court and the need to examine the legal nature of each of them.

1. Legal aid agreement as a basis for the advocacy practice

According to the provisions of the Law of Ukraine “On the Bar and Practice of Law”, the sole basis for the practice of advocacy is a legal aid agreement. Such agreement, in the new editions of the CPC, EPC and CAP of Ukraine, was a document that could confirm the lawyer's powers in all types of proceedings.

Unfortunately, the overwhelming majority of the advocacy establishment (especially young lawyers), as D.P. Fiolevsky rightly points out, inappropriately treated the conclusion of such an agreement with the client, moreover, some of them dispensed with such a “formality” at all[2]. There is also an assertion that such an agreement (contract, deal) is treated as a legal professional privilege and therefore cannot be “provided as a document confirming the lawyer's powers to participate in the case”[3]. We do not share this view, but agree with the position of the Ukrainian legislator, who not

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[1] Про адвокатуру та адвокатську діяльність: Закон України від 5 липня 2012 р. № 5076-VI. *Офіційний вісник України*. 2012. № 62. Ст. 17.

[2] Фіолевський Д.П. Адвокатура: підручник. 3-тє вид., випр. і доп. К.: Алерта, 2014. С. 172.

[3] Борзих Н.В. Адвокат як суб’єкт захисту та його повноваження. *Вісник Донецького університету. Серія В «Економіка і право»*. 2007. № 2. С. 449.

only regards the legal aid agreement as a document certifying the lawyer's powers but also places the utmost importance on it in the relationship between the lawyer and his/her client.

This contract is a “starting point” in the relationship between the lawyer and the principal”[4], and is the basis for the realization of a person's constitutional right to professional legal assistance since its conclusion is a condition for the initiation of such assistance. The conclusion of the contract is the lawyer’s responsibility, provided by the law, the violation of which may be a reason for bringing the lawyer to disciplinary liability (the decision of the Bar Council of Ukraine issued February 26, 2016 No. 74[5]).

The Legal Aid Agreement is also the basis for the further relationship between the lawyer and the court, since in almost all procedural codes (except criminal procedural) there is a clear stipulation according to which a person whose rights, freedoms and legal interests are represented by a lawyer in court, has the right to limit the rights of the latter to commit certain procedural actions. That is, the lawyer's client determines the peculiarities of the lawyer's individual legal status, setting, in particular, the limits of his/her procedural autonomy[6].

Unfortunately, there is no single point of view in legal science as to the legal nature of a legal aid agreement. This has resulted in a variety of viewpoints regarding the referring of this contract to a particular group of contracts. The Ukrainian legislator does not answer this question failing to differentiate the concepts of “legal aid” and “legal services” and being inconsistent in defining the contract name itself. Thus, in the law on the bar, he uses the name “legal aid contract”, while in the CPC of Ukraine – “contract with the lawyer”, in other procedural codes the term “agreement on legal services” is used, in the previous version – the very term “contract” (an analogous situation has been reproduced, in particular in the Code of Administrative Offenses and Customs Code of Ukraine).

Therefore, various points of view have emerged in the legal literature regarding the definition of the legal nature of a legal aid agreement. Thus, I.I. Pankov proceeds from the existence of three main points of view regarding the legal nature of such a contract, pointing out that some authors refer the provision of legal aid to the sphere of constitutional and social relations; others consider the contract under investigation to be a special (unnamed) civil-law contract having a public-law nature; others attribute

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[4] Коробицын М.Г. Существенные условия соглашения об оказании юридической помощи. *Адвокат*. 2006. № 10. С. 19.

[5] Про затвердження роз’яснення щодо гарантій адвокатської діяльності та окремих умов дисциплінарної відповідальності, затверджено рішенням РАУ від 26 лютого 2016 року № 74. URL: http://unba.org.ua/assets/uploads/legislation/rishennya/2016-02-26-r-shennya-rau-74_56e baf5d9f 6da.pdf (дата звернення: 25.09.2019).

[6] Заборовский В.В. Правовая природа независимости и самостоятельности украинского адвоката. *Studia Prawnoustrojowe*. 2018. № 39. S. 224.

legal aid to certain types of civil liability (only to paid services, or only to a commission, or to a mixed contract)[7]. A common view among scholars refers a legal aid contract to a group of service contracts (O.L. Dziubenko[8], M.V. Kratenko[9]. A number of scholars are of the opinion that the legal aid agreement is a variant of the commission (H.O. Svitlychna[10], M.Yu. Yefimenko[11]). The viewpoint that the legal aid contract is regarded as a mixed agreement is also widespread (K.H. Knyhin[12], D.Ye Koldayev[13], Yu.V. Romanets[14].

One of the most widespread viewpoints in the legal literature is the view considering a legal aid contract as an independent, specific contract, that is, a contract of a particular kind. The independent type of contract, which should be regulated in detail by the law on the bar, and not by the civil code, is indicated by I.I.Zaitseva[15] and O.Ye. Shpahin[16]. The necessity of special civil legal regulation of the contract on rendering legal aid taking into account, first of all, its public-legal nature is also pointed out by I.I. Pankov[17]. All this points to the existence of different points of view regarding the legal nature of the legal aid contract, which results in the lack

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[7] Панков И.И. Соглашение об оказании юридической помощи как особый гражданско-правовой договор. *Актуальные проблемы науки XXI века*: сб. ст. уч. науч.-практ. семинара молодых ученых (г. Минск, 17 февраля 2011 г.). Минск: Минский ин-т управления, 2011. С. 44–45.

[8] Дзюбенко О.Л. Загальні положення договору про надання правової допомоги (правової послуги). *Вісник Луганського державного університету внутрішніх справ імені Е.О. Дідоренка*. 2013. Вип. 2. С. 266. URL: http://nbuv.gov.ua/UJRN/Vlduvs_2013_2_30 (дата звернення: 25.09.2019).

[9] Кратенко М.В Договор об оказании юридической помощи в современном гражданском законодательстве: автореф. дис. на соиск. научн. степ. канд. юрид. наук: спец. 12.00.03. Томск, 2005. С. 14.

[10] Світлична Г.О. Повноваження адвоката та їх посвідчення при здійсненні представництва у цивільному судочинстві. *Проблеми цивільного права та процесу*: матеріали наук.-практ. конф., присвяч. пам’яті проф. О.А. Пушкіна (м. Харків, 22 травня 2010 р.). Х.: Нац. ун-т внутр. справ, 2010. С. 312.

[11] Єфіменко М.Ю. Оформлення повноважень адвоката в цивільному процесі. *Вісник Маріупольського державного університету. Сер.: Право*. 2014. № 7. С. 185.

[12] Книгін К.Г. Поняття і місце договору про надання юридичних послуг адвокатом у цивільному праві України. *Вісник Академії митної служби України. Сер.: Право*. 2011. № 2. С. 103.

[13] Колдаев Д.Е. Правовая основа взаимоотношений между адвокатом и клиентом. *История, философия, экономика и право*. 2013. № 1. URL: ифэп.рф/1-2013/12.pdf (дата звернення: 25.09.2019).

[14] Романец Ю.В. Общая характеристика договоров оказания юридических услуг (поручение, комиссия, агентирование). *Законодательство*. 2001. № 4. С. 40.

[15] Зайцева И.И. Адвокатура России: автореф. дис. на соиск. научн. степ. канд. юрид. наук: спец. 12.00.11. Екатеринбург, 2003. С. 33–36.

[16] Шпагин А.Е. Соглашение об оказании юридической помощи. Красноярск: Центр информации, 2014. С. 10.

[17] Панков И.И. Соглашение об оказании юридической помощи как особый гражданско-правовой договор. *Актуальные проблемы науки XXI века*: сб. ст. уч. науч.-практ. семинара молодых ученых (г. Минск, 17 февраля 2011 г.). Минск: Минский ин-т управления, 2011. С. 47.

of a unified approach in establishing the place of such agreement among other groups of contracts. This is primarily due to the absence, as it has been already noted, of a clear distinction between the concepts of "legal aid» and "legal service» and the perception of what the subject matter of the contract is.

In one of our works, based on a comprehensive study of the concepts “legal aid” ("professional legal assistance») and "legal service», we came to the conclusion that they can be distinguished according to the subject of assistance receipt (assistance is received by a person being in a difficult (problematic) legal situation – object of assistance); the subject of assistance (a person with a special professional status – a lawyer); the mechanism of implementation and the scope of legal regulation (securing and guaranteeing the constitutional right to professional legal assistance); focus on achieving the result (a lawyer may only provide a certain outcome when providing legal aid, but in no case he/she is able to guarantee its occurrence) and the nature of the activity in which they are pursued (advocacy is an independent professional activity, which, in its nature, is not an entrepreneurial activity and devoid of commercial component)[18].

Therefore, having come to the conclusion that it is necessary to distinguish between legal aid and legal service and that legal aid should be associated with the professional activity of a lawyer, we consider it possible to assume that the legal aid contract should be regarded as an independent, specific contract, the basis of which is the law on the bar. In this case, we foremost assume that the subject matter of a contract is one of the main criteria for distinguishing one type of contract from another[19], which is crucial in this delineation.

One of the most debatable issues in terms of defining the essence of the subject matter of the contract is the expediency and limits of its specification. A.H. Kucherena proceeds first of all from the viewpoint of the necessity for clear detalization of the subject matter of the contract on rendering legal aid[20]. Another point of view is held by scholars[21], who point out that the subject matter of a legal aid contract should not be specified in detail, given, first of all, the complexity of the maximum detalization of the legal aid volume at the time the contract was concluded.

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[18] Заборовський В.В. Деякі критерії розмежування понять «правова допомога» та «правова послуга» в аспекті визначення сутності професійної діяльності адвоката. *Порівняльно-аналітичне право*. 2016. № 5. С. 311-314. URL: http://pap.in.ua/5_2016/94.pdf;

[19] Шимон С. Об’єкт і предмет договору і цивільного правовідношення: нотатки до наукової дискусії. *Юридична Україна*. 2011. № 4. С. 62.

[20] Кучерена А.Г. Адвокатура: ученик. 2-е изд., перераб. и доп. М.: Юристъ, 2009. С. 281.

[21] Ковтун Н.Н. Пределы оказания юридической помощи по соглашению. *Уголовный процесс*. 2008. № 7. С. 45.; Подольный Н.А. Всегда ли в интересах доверителя, чтобы адвокат действовал в соответствии с его волей? *Адвокатская практика*. 2004. № 3. С. 16.

In our opinion, it is necessary to take into account the position according to which, first of all, one of the constituents of the subject of the contract, in addition to an indication of a legal problem (dispute) and a state body (other organization), where it is envisaged to exercise representation (protection) is also a type of legal assistance, and secondly, if the procedure for providing legal aid by a lawyer is not regulated by the procedural law, then the type of legal aid must contain a comprehensive list of specific actions to be performed by the lawyer[22].

We agree with the above given view, since this approach is aimed at specifying the type of legal assistance provided by a lawyer (to prevent possible conflict situations between him/her and the client), and at the same time does not imply unreasonable restrictions on the practice of a lawyer in providing legal assistance. Therefore, the peculiarity of the subject matter of a contract for the provision of professional legal assistance (including the complexity of specifying the type of such assistance at the time of the contract conclusion), combined with the fact that such assistance is deprived of both a commercial component and the possibility of guaranteeing the occurrence of a certain result, once again confirms our view of the specific nature of the legal nature of this agreement.

The peculiarity of the contract on legal aid is manifested both at the stage of signing and terminating the contract. Thus, when signing a contract, a lawyer must undoubtedly comply with the requirements stipulated, in particular, by the Law of Ukraine "On the Bar and Practice of Law» (Article 28) and the Attorneys Code of Ethics (Section 3)[23]. Attention should also be paid to certain aspects of the involvement of a defense lawyer, investigator, prosecutor, investigating judge or court for the implementation of dock defence. The analysis of the provisions in Art. 49, 52, 53, 54 of the CPC of Ukraine gives the opportunity to agree with the statement that the introduction of a defense lawyer in cases according to which the law provides for his/her obligatory participation can take place without taking into account the will of the defendant (suspect) as well as concluding an agreement with him. The specifics of a legal aid agreement are also reflected in the procedure for terminating the contract. It should be noted here that, for instance, a criminal defense lawyer has the right to refuse to perform his/her duties only on the grounds provided for in Section 4 of Art. 47 of the CPC of Ukraine.

Therefore, the existence of these features, both at the stages of signing and terminating the legal aid contract, indicates the difference between this type of contract and other types of contracts (in particular, the service

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[22] Панков И.И. Существенные условия соглашения об оказании юридической помощи. *Веснік Беларускага дзяржаўнага эканамічнага ўніверсітэт*а. 2012. № 4. С. 93.

[23] Правила адвокатської етики, затверджені Звітно-виборним з'їздом адвокатів України від 9 червня 2017 року. URL: http://vkdka.org/wp-content/uploads/ 2017/07/PravilaAdvokatskoji Etiki2017.pdf (дата звернення: 25.09.2019).

contracts, including the commission contract) and is an additional confirmation of our opinion on peculiarity of its nature. In addition, the provisions of Section 3 of Art. 27 in the Law of Ukraine "On the Bar and Practice of Law", according to which the contract on provision of legal services shall be subject to the general requirements of contract law which does not allow us to attribute the legal aid contract to any particular type of contract, but indicates to the need to regard it as a separate type.

Having analyzed the essence of the legal aid agreement, as well as reaching the conclusion that it is necessary to distinguish between the concepts "legal aid» and "legal service» and the possibility to agree with the statement of scholars who refer such assistance, in particular, to the sphere of constitutional legal relations, we consider it necessary to determine the scope of this contract legal regulation.

According to I.I. Pankov, the lawyer and his/her client must reach agreement on the terms of legal assistance, therefore, this agreement is a "civil-legal form of the enforcement of the right enshrined at the constitutional level and guaranteed by the state to every person»[24]. This necessity is due to the fact that "no sphere other than civil law is able to offer any specific means of regulating legal aid provision"[25]. Therefore, we share the opinion of the Ukrainian legislator, who in the above mentioned Section 3 of Art. 27 of the Law of Ukraine "On the Bar and Practice of Law" envisions that the contract on provision of legal services shall be subject to the general requirements of contract law, which in their essence are the norms of the Central Committee of Ukraine in this sphere, however, the basis for the legal regulation of the contract is the law on advocacy (in particular, the Law of Ukraine "On the Bar and Practice of Law» and the Attorneys' Code of Ethics).

Given the independent nature and specifics of the legal nature of the legal aid agreement (being the sole basis for both the exercise of advocacy and the exercise by a person of his or her constitutional right to professional legal assistance, on the one hand, it regulates the lawyer's relationship with his/her client, and on the other hand, it is the basis for further relationship of the lawyer with the court), we consider that in case neither the client nor the lawyer pursues the purpose of maintaining attorney-client privilege, which may be outlined in the terms of the agreement, it must be the main and only document certifying the attorney's powers in court.

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[24] Панков И.И. Соглашение об оказании юридической помощи как особый гражданско-правовой договор. *Актуальные проблемы науки XXI века*: сб. ст. уч. науч.-практ. семинара молодых ученых (г. Минск, 17 февраля 2011 г.). Минск: Минский ин-т управления, 2011. С. 45.

[25] Кратенко М.В Договор об оказании юридической помощи в современном гражданском законодательстве: автореф. дис. на соиск. научн. степ. канд. юрид. наук: спец. 12.00.03. Томск, 2005. С. 14.

Therefore, we do not share the position of the Ukrainian legislator, who in the new editions of the CPC, EPC and CAP of Ukraine does not envisage the possibility of certifying the lawyer's powers through a legal aid agreement, while leaving this possibility in other legal and regulatory acts.

2. Documents certifying the lawyer's powers (lawyer's warrant and power of attorney)

According to Art. 26 of the Law of Ukraine "On the Bar and Practice of Law» one of the documents that certify the lawyer's powers to provide legal assistance is a lawyer's warrant. The specificity of this document is that it can certify the attorney’s powers in all types of proceedings. Generally, a lawyer's warrant is considered as a written document issued by an attorney, attorney bureau or attorney company and must have a signature of the attorney. The standard form of a warrant is approved by the Provision on a Warrant for Legal (Judicial) Assistance (New Edition)[26].

The lawyer’s use of a warrant as a document certifying his/her powers is one of the most debatable issues in the legal literature. Proponents of the position on the expediency of the lawyer’s using this document proceed from the fact that it is the most progressive and most functional lawyer’s right[27] or the only document that must certify his/her powers altogether[28]. The advantages of using a warrant, in comparison with other documents, include, first of all, the simplification of the permit to litigate the case and the possibility of its use in urgent cases, as well as maintaining the legal professional privilege (V.V. Voloshyn, O.V. Panchuk[29]). The opposite point of view is held by scholars, who point out both the illogical nature of its use[30], and the fact that no country with a developed legal tradition has a document that is analogous to a lawyer's warrant[31].

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[26] Положення про ордер на надання правничої (правової) допомоги (нова редакція), затверджено рішенням РАУ від 12 квітня 2019 року № 41. URL: https://unba.org.ua/assets/uploads/legislation/pologennya/2019-04-14-polozhennya-41_5cdc17a3782b5.pdf (дата звернення: 25.09.2019).

[27] Волошин В.В. Насущні проблеми адвоката. Ордер адвоката України. *Часопис Академії адвокатури України*. 2011. № 4 (13). URL: http://archive.nbuv.gov.ua/e-journals/Chaau/2011-4/11vvvoau.pdf (дата звернення: 25.09.2019).

[28] Борзих Н.В. Адвокат як суб’єкт захисту та його повноваження. *Вісник Донецького університету. Серія В «Економіка і право»*. 2007. № 2. С. 448.

[29] Панчук О. Окремі питання надання адвокатом правової допомоги свідку. *Закон и жизнь*. 2013. № 3. С. 33.

[30] Єфіменко М.Ю. Оформлення повноважень адвоката в цивільному процесі. *Вісник Маріупольського державного університету. Сер.: Право*. 2014. № 7. С. 185.; Марчук В.І. Особливості документального оформлення повноважень адвоката і вдосконалення у межах чинного законодавства. *Вісн. Нац. ун-ту «Львівська політехніка»*. 2014. № 807. С. 178.

[31] Буробин В. Адвокатский ордер – необходимость или анахронизм? URL: http://fparf.ru/news/all_news/blogs/VBurobin/ (дата звернення: 25.09.2019).

Investigating both the historical aspect and the position of the previous legislation regarding the use of the warrant as a document certifying the lawyer's powers[32], we concluded that there were significant shortcomings in its application. Thus, the need to add to the warrant and the excerpt from the contract (except for criminal proceedings), which stated the lawyer's powers as a representative (defense counsel) or the restrictions of his/her rights to execute certain procedural actions, indicated that the warrant in its essence only formally confirmed the existence of powers but did not determine the scope of these powers. All of this neutralized such unconditional advantage of the warrant as the possibility of its use in cases of providing emergency legal aid, when there is no possibility to conclude a contract for providing the assistance, taking into account the need both to submit an extract from the contract in the case of using the lawyer's warrant and to indicate the number (if available) and the date of concluding the agreement.

The adoption of Law No. 2147-VIII[33] indicates that the Ukrainian legislator has changed their attitude to the use of the warrant as a document confirming the powers of the lawyer-representative. Thus, the CPC, EPC and CAP of Ukraine have already enshrined identical rules according to which the powers of a lawyer as a representative are confirmed by a power of attorney or a warrant issued under the Law of Ukraine "On the Bar and Practice of Law». Such legal regulation (the absence of the requirement to add an excerpt from the legal aid agreement to the warrant, as well as the possibility to confirm the power of the attorney-representative in such types of court, only by means of a commission in addition to the warrant), turned the warrant into one of the leading documents confirming the lawyer’s powers, which can be used in all types of proceedings.

At the same time, given the provisions of Section 2 of Art. 26 of the Law of Ukraine "On the Bar and Practice of Law», which does not contain a requirement for the obligatory acceptance of a warrant by all bodies, institutions, organizations to confirm the lawyer's powers, indicates the possibility of using it, except for procedural codes, only by certain normative acts, namely: the Criminal Code of Ukraine, the Customs Code of Ukraine, however, the requirements of the need for mandatory addition of excerpt from the contract to the warrant remain unchanged, which indicates the

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[32] Заборовський В.В. Правова природа довіреності та ордера як документів, що посвідчують повноваження адвоката на надання правової допомоги. *Реформування законодавства України та розвиток суспільних відносин в Україні: питання взаємодії*: матеріали Міжнародної науково-практичної конференції (м. Ужгород, 28-29 березня 2014 р.). Ужгород: Ужгородський національний університет, 2014. С. 273–276.

[33] Про внесення змін до Господарського процесуального кодексу України, Цивільного процесуального кодексу України, Кодексу адміністративного судочинства України та інших законодавчих актів: Закон України від 3 жовтня 2017 року № 2147-VIII. *Відомості Верховної Ради України*. 2017. № 48. Ст. 436.

inconsistency of the Ukrainian legislator on the possibility of using the document to confirm the lawyer's powers.

The existing legal regulation of the procedure for using a lawyer's warrant testifies, first, to the change by the Ukrainian legislator of their attitude to using it as a document confirming the lawyer's powers, since the warrant is in fact no longer considered as such; in fact it only formally confirmed the lawyer's powers and did not determine their scope but only served as evidence of the conclusion of a legal aid agreement between a lawyer and his/her client (given the absence of the need to file an extraction of the contract together with a warrant in most cases) and secondly, the turning of warrants into one of the leading documents.

A power of attorney is one of the documents that can attest to a lawyer's power as a representative (defense counsel) of a person in court. In accordance with the procedural codes, a power of attorney may be used by a lawyer in all types of proceedings, except in criminal proceedings (its application is allowed only by a representative of the legal entity involved in the proceedings, and only when such a representative is not a lawyer).

Exploring the ongoing debate in the civilized doctrine on the legal nature of the power of attorney[34], we share the view of those scholars who broadly regard it as a unilateral juristic act[35], being a complex legal structure[36], the basis of which is the contract. Regarding the relationship between the power of attorney and the contract, which is the basis for its issuance, O.L. Nevzhodina views the power of attorney as "one of the most common ways of expressing the content of power from the outside, but not the basis of the powers»[37]. In our view, such a position is characteristic of both a lawyer acting as a representative and a representative who is not endowed with such status. However, if the contract of attorney is the basis (grounds) for the emergence of representation relations between the solicitor (representative without the status of a lawyer) and the principal, then the specifics of the legal nature of the contract on legal aid (the possibility of its certifying the lawyer's powers) indicates otherwise. All this again testifies to the special role of such an agreement and to its delimitation from the contract of commission.

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[34] Заборовський В.В. Довіреність як документ, що посвідчує повноваження адвоката. *Порівняльно-аналітичне право*. 2016. № 6. С. 270-271. URL: http://pap.in.ua/6_2016/80.pdf (дата звернення: 25.09.2019).

[35] Гордон А. Представительство в гражданском праве. С.-Пб.: Тип. Шредера, 1879. С. 85.; Дороженко М.Ю. Гражданско-правовое регулирование представительства: проблемы теории и законодательства: автореф. дис. на соиск. научн. степ. канд. юрид. наук: спец. 12.00.03. М., 2007. С. 18.

[36] Орлова М.М. Доверенность как письменное уполномочие. *Бюллетень нотариальной практики*. 2003. № 4. С. 22.

[37] Невзгодина Е.Л. Основания добровольного представительства в современном гражданском праве России. *Вестник Омского университета*. 2008. № 4. С. 104.

Regarding the provisions of the current editions of the CPC, ECP and CAP of Ukraine, they stipulate identical norms on the power of attorney on behalf of a legal entity (issued by signature (electronic digital signature) of an official authorized by law, constituent documents) and are almost analogous to the power of attorney on behalf of physical entities. Thus, allowing the possibility of testifying the power of attorney on behalf of physical entities, notarized or, in cases determined by law, by another person, as well as by an official of a body (institution) that has made a decision on granting a person free secondary legal aid, the CPC and the CAP of Ukraine provide for the possibility of testifying the powers by a court resolution.

With regard to the notarized powers of attorney and the powers of attorney, which are equivalent to such, the procedure for their certification is regulated, in particular, by the Law of Ukraine "On Notary»[38] and the Cabinet of Ministers Resolution "On the Procedure of Certifying Covenants and Powers of Attorney Equal to Notarized Certificates»[39].

Pursuant to paragraph 26 of the abovementioned Resolution, a power of attorney in the name of a lawyer should include the number and date of issuing the certificate on the right to practice as a lawyer and the organizational form of the practice of advocacy. The need to provide this additional information, on the one hand, clearly identifies the legal status of the lawyer-representative in the relevant proceedings and, on the other hands, impedes his or her ability to abuse the choice of legal status of the lawyer-representative or the actual representative (in particular, in terms of avoiding disciplinary liability).

Therefore, a power of attorney is one of the documents that can attest to a lawyer's powers as a representative (defense counsel) of a person in all types of judicial proceedings, except criminal proceedings. The imperfection of Ukrainian legislation on the use of a warrant and a legal aid agreement makes the power of attorney a basic document that attests to the status of a lawyer in the exercise of his/her non-procedural form of activity. However, regardless of the form in which the lawyer conducts his/her professional activity, the legal aid agreement always serves as a basis for issuing a power of attorney, which in turn is the basis for the exercise of his/her powers in the relations with other individuals.

In addition, in the aspect of examining the issue of the lawyer's powers formalization, in one of our works[40] we disclose the essence of the power of

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[38] Про нотаріат: Закон України від 2 вересня 1993 р. № 3425-XII. *Відомості Верховної Ради України*. 1993. № 39. Ст. 383.

[39] Про порядок посвідчення заповітів і доручень, прирівнюваних до нотаріально посвідчених: Постанова Кабінету Міністрів України від 15 червня 1994 р. № 419. URL: http://zakon3.rada.gov.ua/laws/show/419-94 (дата звернення: 25.09.2019).

[40] Заборовський В.В. Правовий статус адвоката в умовах становлення незалежної адвокатури України: монографія. Ужгород: Видавничий дім «Гельветика», 2017. С. 375–378.

attorney, first, in the context of certifying the representative’s authority in the constitutional court, and second, as one of the documents certifying the lawyer's power in providing free legal aid.

Based on the conducted research, we conclude, in particular, that a power of attorney in a constitutional court should not be considered as a document certifying the representative's powers, but as a way of delegating powers, whereas such documents may, in fact, be any documents stipulated by Art. 26 of the Law of Ukraine "On the Bar and Practice of Law». It also analyses the legal nature of an assignment by a body (agency) authorized by law to provide free legal aid, where we primarily share the existing procedure for issuing such a commission, since it aims at significantly accelerating the initiation of such assistance.

CONCLUSIONS

An important element of a lawyer's professional activity is the formalization of his or her powers, which both establishes the essence of the lawyer's relationship with his/her client and determines the peculiarities of his/her individual legal status. The lawyer’s powers formalization is performed by means of documents confirming his/her powers including a legal aid agreement; a warrant (taking into account the need to submit an excerpt from such agreement in some cases); assignment by a body (agency) authorized by law to provide free legal aid and the power of attorney of a physical or legal entity.

Although a lawyer's warrant and, apart from criminal proceedings, a power of attorney are documents that certify the lawyer's powers in all types of proceedings, the sole basis for the practice of advocacy is a legal aid agreement, which in the case of neither the client nor the lawyer seeks to maintain the attorney-client privilege, which may be outlined in the terms of such agreement, should be the main and only document certifying the lawyer's powers in court.

Based on the distinction between the notions "legal aid» ("professional legal assistance») and "legal service», taking into account the peculiarities of concluding and terminating the legal aid agreement, in combination with the fact that the provision of such assistance should be associated with the lawyer’s professional activity, we come to the conclusion that such agreement should be regarded as an independent, specific contract, which is a type of civil-legal contract (although unnamed in the Civil Code), and the basis of legal regulation is, in particular, the Law of Ukraine "On the Bar and Practice of Law " and the Attorneys' Code of Ethics.

The existing legal regulation of the procedure for using a lawyer's warrant testifies, first, to the change by the Ukrainian legislator of their attitude to its use as a document confirming the lawyer's powers, and, second, to turning the warrant into one of the leading documents in this aspect. A power of attorney is one of the documents that can attest to a lawyer's powers as a representative

(defense counsel) of a person in all types of judicial proceedings, except criminal proceedings.

The imperfection of Ukrainian legislation on the use of a warrant and a legal aid agreement makes the power of attorney a basic document that attests to the status of a lawyer in the exercise of his/her non-procedural form of activity. However, regardless of the form in which the lawyer conducts his/her professional activity, the legal aid agreement always serves as a basis for issuing a power of attorney, which in turn is the basis for the exercise of his/her powers the in relations with other individuals.

SUMMARY

The article reveals the legal nature of such an important element in his/her professional activity as a lawyer's empowerment. This element not only establishes the essence of his/her relationship with a client but also determines the peculiarities of the lawyer's individual legal status being a prerequisite for the full implementation of the professional component of this status.

The article addresses the problematic issues of determining the nature of a legal aid contract, taking into account, inter alia, the lack of a unified approach to establishing the place of this contract among other groups of contracts. It also rationalizes the need to differentiate the concepts "legal aid» and "legal services», given that the provision of such assistance should be associated with the professional activity of a lawyer. Taking into account the abovementioned facts, as well as the peculiarities of both conclusion and termination of the legal aid agreement, it is concluded that it is necessary to regard the agreement as an independent, specific contract, which is a type of civil-legal contract.

This article analyzes the nature of other documents that confirm the lawyer's powers in terms of the procedural and non-procedural form of his/her activity. The advantages and disadvantages of the practical application of each of these documents are revealed, as well as attention is paid to the existing legislative gaps in their usage.

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Information about the author:
Zaborovskyy V. V.,
Doctor of Law, Associate Professor,
Professor at the Civil Law And Procedure Department,
Uzhhorod National University
26, Kapitulna str., Uzhgorod, 88000, Ukraine

NOTES

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