

**IMPLEMENTATION OF LAW POLICY
IN THE SPHERE OF STATE
BORDER SECURITY**

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THE CRIMINAL LAW ASPECTS OF UKRAINIAN BORDER SECURITY PROVIDING

Natalya Orlovska

INTRODUCTION

Experts believe that the modern answer to the negative aspects of globalization is so-called “glocalization” – the process of various spheres of human existence reaction at the local levels to world globalization. In other words, “glocalization” presents itself a kind of effort to reduce the severity of the contradictions of international development in the regional and even bilateral plane. At the same time the role and importance of state borders which are intended, on the one hand, to divide different political and institutional systems, and on the other, to provide contact between different state entities, are growing.

In such circumstances the issues of border security are aggravated, since the contradictions of the country’s development in international, regional and national aspects are most clearly revealed in the border space. Border security was constituted around the turn of the XX and XXI centuries¹. And until its basic elements are not clearly outlined, it complicates accurate analysis and preparation of appropriate recommendations².

However, even with the current development of these issues seems a narrowed approach in which the purpose of border security is to foresee the creation of favorable factors for the national interests at the border³. In our opinion, threats to the state border inviolability, to human rights and

¹ Kupriienko D.A. (2014) *Osnovni poniattia ta katehoriï u sferi zabezpechennia prykordonnoi bezpeky* [Basic concepts and categories in the field of border security]. Zbirnyk naukovykh prats Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy. Seria: Viiskovi ta tekhnichni nauky. №1. P.358.

² Halaniuk Ya.S. (2018) *Napriamy vzaiemodii derzhavnoi prykordonnoi sluzhby Ukrainy z orhanamy publichnoi vlady u sferi prykordonnoi bezpeky* [Interaction directions of the State Border Guard Service of Ukraine with public authorities in the field of border security]. Visnyk NADU pry Prezydentovi Ukrainy (Seria «Derzhavne upravlinnia»). №2. P.43.

³ Tsevelov O.Ie., Zhuk S.M. (2017) *Aktualni pytannia zabezpechennia prykordonnoi bezpeky Ukrainy u systemi natsionalnoi bezpeky* [Actual issues of border security of Ukraine in the national security system]. Investystsii: praktyka ta dosvid. №10. P.90.

freedoms in the around border area affect the socio-political and economic situation in the country as a whole, testify to the emergence and certain tendencies of the development of negative phenomena nationwide. Accordingly, there is a direct dependence of the national security level on the solution of problems related to the definition and functioning of the state border, as well as ensuring its protection and defense, and the security of the peripheral (border) territories adjacent to it⁴.

Confirmation of this is the analysis of those threats that occur in the border area. By nature, that is, by influencing specific social relationships, these threats can be political, military, economic and the so like. However, in law manifestations, they are overwhelmingly criminal offenses. It is no coincidence that modern European border security strategies are aimed, inter alia, at ensuring a high level of security for citizens, creating an effective system of countering cross-border threats, above all for international terrorism and illegal migration⁵. Although such a wording refers to large-scale negative phenomena they are made up of specific manifestations – terrorist crimes, crimes related to illegal migration. This list can be continued, for example, through illegal smuggling of illicit items across the border.

Thus, studies of the criminal law aspects of Ukraine's border security are appropriate and timely, and are aimed at security issues resolving in the border area as well as in the field of national security as a whole.

1. Border security as a object of criminal law defense

If the threats to border security are overwhelmingly criminal ones the question of whether border security is classified as criminal law protection objects should be raised.

In Part 1 of Art. 1 of the Criminal Code of Ukraine the legislator captures the objects of criminal law protection – the most important social values which are the objects of systemic social relations. Their importance to society is so great that without criminal means it is impossible to reach a proper level of security against antisocial attacks.

⁴ Kupriienko D.A. (2014) *Osnovni poniattia ta katehorii u sferi zabezpechennia prykordonnoi bezpeky* [Basic concepts and categories in the field of border security]. Zbirnyk naukovykh prats Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy. Serii: Viiskovi ta tekhnichni nauky. № 1. P. 358.

⁵ Halaniuk Ya.S. (2018) *Napriamy vzaiemodii derzhavnoi prykordonnoi sluzhby Ukrainy z orhanamy publichnoi vlady u sferi prykordonnoi bezpeky* [Interaction directions of the State Border Guard Service of Ukraine with public authorities in the field of border security]. Visnyk NADU pry Prezydentovi Ukrainy (Serii «Derzhavne upravlinnia»). № 2. P. 43.

Herewith in the criminal law of Ukraine there is no clear hierarchy of objects of criminal legal protection: neither the sequence of articles in the Criminal Code, nor the severity of the relevant norms sanctions give grounds for unambiguous conclusions on this.

At first sight border security is not related to the objects of criminal law protection, because it is not mentioned in the normative list which refers to human and citizen's rights and freedoms, property, public order and public security, environment, constitutional establishment of Ukraine, peace and security of humanity. However, firstly, this list is indicative one, and secondly, border security actually provides the proper level of realization and protection of these social values.

It seems that the current edition of Part 1 of Article 1 of the Criminal Code does not fully reflect the most important social relations and the scope of their criminal law protection. In particular, the norm does not mention national security emphasizing only on the constitutional establishment. But this does not even correspond to the content of Section I of the Special Part of the Criminal Code. In view of this it is possible to suggest an amendment to Part 1 of Article 1 of the Criminal Code with an indication on national security protection which part is a border security.

It should be agreed that the role of border security cannot be assessed using formal quantitative criteria. It has many immeasurable aspects related to the image of government and the state. Therefore, some experts consider it as a level of protection of the state territory from dangerous trans-border factors and conditions which presuppose, as a rule, a serious violation of the territorial integrity of the state and the established border regime⁶.

In this vision, the emphasis is on the state survey of border security. However, in the modern world the state is an important, even the main, but not the only subject of its compliance and providing.

A somewhat different approach involves an anthropocentric survey – the protection of the territorial integrity and sovereignty of the state, all spheres of public life and human activity, rights and freedoms of citizens in the border area. It achieves timely detection, prevention, neutralization of real and potential internal and external threats and ensures the

⁶ Kupriienko D.A. (2014) *Osnovni poniattia ta katehorii u sferi zabezpechennia prykordonnoi bezpeky* [Basic concepts and categories in the field of border security]. Zbirnyk naukovykh prats Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy. Serii: Viiskovi ta tekhnichni nauky. №1. P.361.

sustainable development of border areas, transparency of the state border for cross-border activities and travel of persons⁷.

Border security analysis in the context of a criminal law protection object can both be interpreted as complementary ones. The first focuses on the state's authority on border security; the second – on the volume of human rights and freedoms in the border area that can be realized with the proper level of border security. However, it is necessary to clarify that border security is only protected by criminal law when the threats are so dangerous that other legal instruments are insufficient.

We have already expressed the opinion that social values, which are protected by criminal law, can be classified according to the criterion of importance for participants of criminal legal relations:

if social value reflects a person's private interest then it may be attributed to private-public values;

when a person is "interested" in a particular value not in the private but in the general social plane (i.e. as a member of society) such value can be described as public-private.

In our view, border security can be attributed to public-private social values the significance of which is determined by the state's international legal obligations, by a strategy for the social system development⁸. And every member of society «takes advantage» of the opportunities provided by the achieved level of such common values realization. This is consistent with the understanding of criminal law as a sphere of coincidence between public and private interests.

In the professional literature it is emphasized that the content of border security includes prevention of illegal movement of various goods, cross-border crime, cybercrime, illegal migration, terrorism etc.⁹ However, modern border policy is not only a complex of political and legal measures aimed at combating crime in the border area with all political measures and legal means available in the arsenal of the state in

⁷ Demianiuk Yu.A. (2012) *Prykordonna bezpeka: kontseptualnyi pidkhd do defynitsii poniattia* [Border security: a conceptual approach to the notion definition]. Hileia: naukovy visnyk : zb. nauk. prats / hol. red. V. M. Vashkevych. K.: VIRUAN. Vol. 67. P. 660.

⁸ Orlovska N.A. (2012) *Sanktsii kryminalno-pravovykh norm: zasady ta pryntsypy formuvannia* [Criminal law sanctions: bases and principles foundation]: dys... d-ra yuryd. nauk. Odesa. P.187.

⁹ Demianiuk Yu.A. (2012) *Prykordonna bezpeka: kontseptualnyi pidkhd do defynitsii poniattia* [Border security: a conceptual approach to the notion definition]. Hileia: naukovy visnyk : zb. nauk. prats / hol. red. V. M. Vashkevych. K.: VIRUAN. Vol. 67. P. 660.

view of the main characteristics of the society in which such policy is implemented¹⁰.

The question should be addressed much wider. Border security makes sense to be understood as the systematic activities of state bodies, public institutions and individual citizens aimed at the reliable protection of national interests from external and internal threats that are manifested in the border area, and effective counteraction to them¹¹.

If criminal law issues of border security are considered in this context it is obvious that without active support of the population the state risks to collapse of the law enforcement system as a whole or in certain areas, in particular. And border security is therefore a prime example.

In view of the above it can be concluded that the criminal law aspects of ensuring the border security of Ukraine are such issues:

systemic – understanding border security as a public-private value and object of criminal law protection;

substantive – peculiarities of criminal law understanding and prevention of socially dangerous manifestations that pose threats to border security;

institutional – criminal legal support for preventive activity in the field of border security and the possibility of criminal law to provide support for such activity by the population.

2. Criminal threats to Ukraine's border security

In order to consider the mentioned issues it is necessary to determine the scope of those concepts that create criminal threats to border security:

in what sense should border area be understood for the territorial localization of border security specification;

what kinds of crimes pose a criminal threat to Ukraine's border security, whether they can be classified, whether there are grounds for isolating border crime /crime in the border area.

What is about the first remark it should be noted that the border area (in the border security context) is considered by scientists in a narrow

¹⁰ Kuryliuk Yu.B. (2017) *Deiaki suchasni kryminalno-pravovi ta kryminolohichni aspekty zabezpechennia prykordonnoi bezpeky derzhavy* [Some current criminal and criminological aspects of state border security]. Prykarpatskyi yurydychnyi visnyk. №4. P.81.

¹¹ Kupriienko D.A. (2014) *Osnovni poniattia ta katehorii u sferi zabezpechennia prykordonnoi bezpeky* [Basic concepts and categories in the field of border security]. Zbirnyk naukovykh prats Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy. Serii: Viiskovi ta tekhnichni nauky. №1. P.362.

and broad sense. In a narrow sense such area is limited directly by the state border and the controlled border area (region).

In a broad sense it is advisable to refer to the border area the state border, border territory, air and underwater environment within the border area, continental shelf, exclusive economic zone.

According to experts opinion it is exactly broad meaning of the “border area” paradigm has to become the basis for determining main concepts related to the corresponding type of national security¹².

Thus, criminal threats to border security must be localized in the border area which should be understood in a broad sense. It is advisable to address the question that such localization is not limited within national border area. The border areas of neighboring countries have also to be taken into account.

Such vision takes place because the specificity of border security threats lies in the «multilateralism» of their sources located on both sides of the border. It is known, in particular, that in the event of a deterioration of the criminal situation in the adjacent territory the threats of violation of the state border are significantly increased; criminal groups whose activities are related to the violation of the state border have their «bases», partners and clients in the territory of neighboring countries, etc.

What is about the kinds of crimes that pose a criminal threat to Ukraine’s border security and whether they can be classified it is appropriate to note the following.

In the professional literature, as a rule, there are lists of such crimes or phenomena the manifestations of which are criminal offenses. For example, Ya. Galanyuk (2018) speaks about international terrorism, illegal migration, transnational organized crime, proliferation of weapons of mass destruction, drug trafficking, etc.¹³ V. Zelka (2015) offers a much broader range of actions – from political (aimed at undermining

¹² Zelka V.L. (2015) *Obschaya charakteristika administrativno-pravovyih osnov gosudarstvennogo upravleniya obespecheniya natsionalnoy bezopasnosti v pogranychnoy sfere* [General characteristics of the administrative and legal foundations of the state administration for ensuring national security in the border sphere]. *Visegrad Journal on Human Rights*. № 2. P. 111.

¹³ Halaniuk Ya.S. (2018) *Napriamy vzaïemodii derzhavnoi prykordonnoi sluzhby Ukrainy z orhanamy publichnoi vlady u sferi prykordonnoi bezpeky* [Interaction directions of the State Border Guard Service of Ukraine with public authorities in the field of border security]. *Visnyk NADU pry Prezydentovi Ukrainy (Seriia «Derzhavne upravlinnia»)*. № 2. P. 46.

the sovereignty and territorial integrity of Ukraine) to environmental (ecological) ones. At the same time these actions can be both related to violation of state border integrity, and to be performed in the territory of Ukraine (in the border band and border areas)¹⁴.

It seems that trying to list crimes as the threats to border security is enough difficult and inappropriate task. From our point of view a more productive way consists in ability to approach this issue comprehensively – depending on the specific nature of the corresponding crimes objective side (modus operandi) – whether they are related to the movement of goods / items / people across the state border, or that they occur in the border area of Ukraine. In other words, these threats can be localized directly at the border or take place in border areas simultaneously creating favorable conditions (economic, social, demographic, etc.) for immediate threats to border security.

They represent themselves a system of crimes among which the most significant part is formed by economic socially dangerous acts. The self-interest component is dominant here – the focus is on obtaining criminal proceeds. Accordingly, this is illegal, but economic in nature activity. In addition, there are so-called «providing» crimes which include corruption, related to the creation of organized criminal structures, fictitious business, money laundering, etc.¹⁵

The core of criminality in border area consists from cross-border crimes:

on the one hand, such acts fall within the scope of crimes of a transnational nature (Part 2 of Article 3 of the United Nations Convention against Transnational Organized Crime);

on the other hand, the characteristic of cross-border crimes is the fact that the offender crosses the state border, moves certain persons, objects,

¹⁴ Zelka V.L. (2015) *Obschaya harakteristika administrativno-pravovyih osnov gosudarstvennogo upravleniya obespecheniya natsionalnoy bezopasnosti v pogranychnoy sfere* [General characteristics of the administrative and legal foundations of the state administration for ensuring national security in the border sphere]. *Visegrad Journal on Human Rights*. № 2. P. 114.

¹⁵ Orlovska N.A. (2016) *Kontseptualni zasady uchasti hromadianskoho suspilstva v zabezpechenni bezpeky derzhavnoho kordonu (kryminolohichni vymir)* [The conceptual bases of civil society involvement in the state border security (criminological survey)]. *Visnyk Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy*. Seriya : Yurydychni nauky : elektron. nauk. vyd. Khmelnytskyi. URL: https://nadpsu.edu.ua/wp-content/uploads/2018/11/visnik_1_2016_ur.pdf

cargo and more across the border. According to S. Filippov (2019), as a specific feature of cross-border crimes can be considered violations of certain border regimes¹⁶.

Therefore, we are talking not only about crossing the border neighboring countries, for example, when crossing the border at an air border point is taking place.

An important issue regarding transnational / cross-border crime understanding is its recognition of criminal wrongdoing in those countries whose interests are affected by the act. The resolution of this issue is significantly complicated by the unequal attitude of legislators from different states to the same violation. In other words, it is so-called multiple criminalization – in order to be recognized cross-border crime must be criminalized in at least two countries.

Quite illustrative in this regard is the draft International Classification of Crimes for Statistical Purposes suggested by the United Nations Office on Drugs and Crime. In this project it is noted that the crime is a criminal offense or a violation of the restriction or requirements concerning behavior as defined by the national criminal legislation. Accordingly, the attribution of a crime to a cross-border is based on a description of the behavior, but not a legal specification¹⁷. Therefore, the presence of criminalization in at least one country should be considered a sign of a cross-border crime.

Thus, cross-border crime embodies local criminality, with locality signifying regional rather than national level. Cross-border crime reflects the socio-economic, political, demographic specificity of the territories on both sides of the border, its specificity is directly determined by the degree of «transparency» of the borders, by the organization of their protection¹⁸.

¹⁶ Filippov S.O. (2019) *Kryminolohichni zasady protydii transkordonnii zlochynnosti* [Criminological basics of combating cross-border crime]: avtoref. dys....d-ra yuryd. nauk. Dnipro. 43 p.

¹⁷ International classification of crimes for statistical purposes.Principles – Structures – Application.Draft.UNODC, 2014. P. 6, 8.

¹⁸ Orlovska N.A. (2018) *Transkordonna zlochynnist: hlobalizatsiia chy hlokalizatsiia* [Cross-border crime: globalization or glocalization]. Kryminalne pravo v umovakh hlobalizatsii: mater. Mizhnar. naukovo-prakt. konf. (Odesa, 25 travnia 2018 roku). Odesa. P. 46-48.

In view of this it can be argued that there are grounds for isolating crime in the border area as a relatively independent type of criminal activity. This is determined by:

a localization of criminal activity in a specific space – border area;
an existence of a certain structure of such crime for which cross-border crime is a part;

a relatively limited range of crimes with an emphasis on economic cross-border offenses;

an organized character that is related to the economic nature of the criminal activity – it requires a long-term preparation, establishment of relations, in particular, in the territory of the neighboring state. Criminal groups on the state border in their activities resort to violence, launder huge sums of money, bribe officials, as well as harm and threaten the economic system of the state¹⁹.

Directly related to crime in the border area is the opposition to preventive action on the part of the border population. It means involving local residents in criminal practices, minimal willingness to actively cooperate with law enforcement, significant opportunities to evade social control at the expense of the border factor itself²⁰. Local residents are an active participant in criminal schemes. Violation of customs rules, smuggling (in the criminal law sense), organization of illegal migration, other kinds of shadow economic activity, first of all, cross-border ones – this is the most profitable area of employment for local residents²¹. Exactly from the local population representatives the organized criminal groups are being formed providing shady economic activity through

¹⁹ Kuryliuk Yu.B. (2017) *Deiaki suchasni kryminalno-pravovi ta kryminolohichni aspekty zabezpechennia prykordonnoi bezpeky derzhavy* [Some current criminal and criminological aspects of state border security]. Prykarpatskyi yurydychnyi visnyk. №4. P.81.

²⁰ Orlovska N.A. (2017) *Do pytannia zabezpechennia bezpekovoï skladovoi transkordonnoho spivrobotnytstva* [On the issue of ensuring a secure component of cross-border cooperation]. *Transkordonna spivpratsia: problemy ta shliakhy yikh vyryshennia: mater. II Rehionalnoho kruhloho stolu (Odesa, 28-29 veresnia 2017 roku)*. Kyiv: Natsionalna akademiia prokuratury Ukrainy. P.144-147.

²¹ Orlovska N.A. (2016) *Kontseptualni zasady uchasti hromadianskoho suspilstva v zabezpechenni bezpeky derzhavnogo kordonu (kryminolohichni vymir)* [The conceptual bases of civil society involvement in the state border security (criminological survey)]. *Visnyk Natsionalnoi akademii Derzhavnoi prykordonnoi sluzhby Ukrainy. Seria : Yurydychni nauky : elektron. nauk. vyd. Khmelnytskyi*. URL: https://nadpsu.edu.ua/wp-content/uploads/2018/11/visnik_1_2016_ur.pdf

extra-economic coercion, violent (sometimes armed) confrontation with law enforcement and corruption schemes.

As an example we can analyze the statistics on those crimes where border guards and customs officers were become victims: for example, in 2014 – 183 border guards and 44 customs officers were injured in criminal offenses; in 2015 – 55 and 45; in 2016 – 52 and 39; in 2017 – 50 and 16; in 2018 – 43 and 17 respectively. It can be seen that the number of special victims is decreasing, but the public danger of individual crimes is not reduced (for example, the killing of government officials related to their official activities).

Thus, this opposition can be considered as a significant criminogenic factor, and in some cases it represents itself the criminal activity in the form of open resistance to law enforcement activities and is part of crime in the border area.

Having taken into account the above it can be concluded that the manifestations of crime in the border area are criminal threats to border security. At the same time, prevention of cross-border crime is one of the priority tasks of border areas development on both sides of the border.

3. Criminal law aspects of border security institutional providing

In the context of criminal aspects of institutional providing border security, first of all, it is necessary to identify those subjects whose activities are related to counteracting criminal threats – subjects of crime prevention. In our view, we can distinguish the state and non-state actors between them.

As in any security field it is precisely the public authorities that play a main role in ensuring border security. This is due to the fact that, first of all, border security is a component of Ukraine's national security and, accordingly, its security is the main task of the state; secondly, security is associated with the enforcement of compulsory measures, restrictions on human rights and freedoms what is impossible for non-state actors and requires state control.

Public authorities in the field of border security are law enforcement and other executive authorities. In this context it is possible to distinguish such subjects as:

general – those who carry out this activity throughout the country including at the border area (in particular, the National Police, the Security Service of Ukraine);

special – their activities are directly related to border security and counteracting the relevant threats (State Border Guard Service of Ukraine).

Corresponding authority bodies set up to address specific issues of border security include, for example, the State Migration Service of Ukraine, the State Custom Service (new custom), etc.

Since it is a crime in the border area then is an obligatory component of preventive action to engage with counterparts in neighboring countries. The forms and methods of such interaction can be very diverse: information-analytical cooperation; operative-search and technical cooperation; cooperation in the field of search and return of stolen items; detention of perpetrators of crimes, etc. There is difficult to overestimate the importance of sharing information about the emergence of new ways and types of crime, about the features of crimes concealment, technologies and technical means used in their commission; short- and medium-term assessments of criminogenic situation in regions with complex operational situation, etc.²².

Civil society (a totality of non-state actors in the prevention of criminal threats) implements its participation in a number of forms – institutional and non-institutional. From our point of view, there is no sense in talking about individual citizens in the field of border security providing because the scale of the tasks implies mass involvement of the population in combating crime. Therefore, in the context of the analysis of non-state actors it is advisable to consider only organized forms of citizen participation in the protection of the state border and public order at the border area.

Such public associations operate under the authority of state entities. However, subordination does not mean their secondary nature. As long as the population does not support preventive action then it is inappropriate to hope that only the efforts of state structures can provide border security. In view of the above it is possible to outline the limits of the criminal justice provision of border security in the institutional survey.

²² Orlovska N.A. (2017) *Do pytannia zabezpechennia bezpekovoï skladovoï transkordonnoho spivrobotnytstva* [On the issue of ensuring a secure component of cross-border cooperation]. *Transkordonna spivpratsia: problemy ta shliakhy yikh vyryshennia: mater. II Rehionalnoho kruhloho stolu* (Odesa, 28-29 veresnia 2017 roku). Kyiv: Natsionalna akademiia prokuratury Ukrainy. P. 147.

First of all, in this context criminal law support of law enforcement activities should be considered. Traditionally it involves issues of execution of an order (Article 41 of the Criminal Code), performance of a special task for the prevention or disclosure of criminal activity of an organized group or criminal organization (Article 43 of the Criminal Code), as well as a group of norms aimed at protecting law enforcement officers as representatives of the state and the bearers of its authority, among which are Articles 342, 343, 345, 347, 348, 349 of the Criminal Code.

As for employees of other executive bodies involved in border security members of public formations for the protection of public order and the state border (citizens who perform public duties) then in order to ensure their activities the Criminal Code equals their criminal status to law enforcement officers, in part, provides for special rules (for example, Art. 350, 352 of the Criminal Code).

In our view, this context should be complemented by issues related to the prevention of corruption by officials, as the area of border security is fraught with numerous corruption risks. Accordingly, the criminal law aspects of border security must be supplemented by articles providing for criminal responsibility for crimes containing corruption (in the first place, Article 368, 368-5 of the Criminal Code).

The current situation in the sphere of law enforcement, including border security, raises questions about the presumption of lawfulness of actions and decisions of an official who is obliged to act only on the basis, within the powers and in the ways provided by the Constitution and laws of Ukraine²³.

Indeed, the presumption of law enforcement officer lawfulness is true in many countries and is a usual social norm. However, along with this presumption there must be opportunities for effective judicial protection of human rights and freedoms. Only the court can evaluate the right or wrong of the law enforcement officer. It should be noted that law enforcement must be protected not only by special means, but also by law.

²³ Kyrbatiiev O.O. (2019) *Kryminalno-pravovyi vymir problemy prezumptsii pravoty pratsivnykiv pravoohoronnykh orhaniv, yaki vykonuiut profesiini обов'язky* [Criminal law survey of the presumption of correctness of law enforcement officers performing professional duties problem]. *Naukovyi visnyk Dnipropetrovskoho derzhavnogo universytetu vnutrishnikh sprav*. Vol. 1. P. 119.

They must have the appropriate powers and the citizens are obliged to obey them. At the same time, this approach is justified and can only be favorable if the public is convinced that the police officer who is on duty only acts within the limits of authority and law, and is a professional capable of making quick decisions in a difficult and dangerous situation.

Thus, the criminal law aspects of border security institutional providing have to be analyzed in the context of the support of the activities of crime prevention subjects, both state and non-state. This refers not only to law enforcement agencies of special purpose (for example, SBGSU), but also to other law enforcement and executive authorities established to ensure border security. Of particular importance at this stage should be given to civil society institutions – public associations involved in the protection of public order and the state border.

The Criminal Code of Ukraine contains an enough large number of rules that allow law enforcement agencies to provide border security by which established the criminal responsibility for counteracting and unlawfully influencing preventive actors in this field. At the same time, it is advisable to pay special attention to the anti-corruption policy and to address the issue of the presumption of the lawfulness of the enforcement officer and its correlation with the proper and effective judicial protection of human rights and freedoms.

CONCLUSIONS

The above points out that the criminal law aspects of Ukraine's border security studies are aimed at addressing security issues both in the border area and in the field of national security in general. Border security threats are overwhelmingly criminal by nature.

The criminal law aspects of Ukraine's border security include:

systemic issues (understanding of border security as a public-private value and object of criminal protection (as element of Ukraine's national security));

substantive issues (crimes in border area are criminal threats to border security; prevention of cross-border crime is one of the priority tasks of border development on both sides of the border);

institutional issues (the Criminal Code of Ukraine contains a large number of rules that allow law enforcement agencies to provide border security, which establishes criminal liability for counteracting and

unlawfully influencing preventive actors in this field; but it is advisable to pay special attention to anti-corruption policy and address the issue of the presumption of law enforcement officer).

SUMMARY

The article is devoted to the issues of criminal law provision of Ukraine's border security at the present stage. It is concluded that the threats to border security are, in the vast majority, criminally illegal ones. There is argued the point of view that the criminal law aspects of Ukraine's border security include systemic, substantive and institutional issues.

Systemic issues present themselves understanding of border security as a public-private value and object of criminal law protection (as element of Ukraine's national security). Substantive issues suppose crimes in border area as criminal threats to border security. That is why prevention of cross-border crime is one of the priority tasks of border development on both sides of the border. Institutional issues should be considered with a special attention to anti-corruption policy and presumption of authority officer lawfulness problems.

Studies of the criminal law aspects of Ukraine's border security are aimed at security issues resolving in the border area as well as in the field of national security as a whole.

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**ORGANIZING DETENTION OF ILLEGAL MIGRANTS
ADMINISTRATIVELY APPREHENDED BY THE STATE
BORDER GUARD SERVICE OF UKRAINE**

Andrii Mota

INTRODUCTION

The State Border Guard Service of Ukraine (hereinafter referred to as the SBGS of Ukraine), as a special-purpose law-enforcement agency fulfills tasks that are directly aimed at securing, protecting and exercising rights and freedoms of individual persons. This is due to both the powers to fight offenses and to the fact that the state border guard bodies perform their activities in areas of migration flows. During 1991–2018, the state border guard bodies of Ukraine apprehended 152.25 thousand illegal migrants, among whom 124.17 thousand – for illegal border crossing, 26.63 thousand – for violation of the rules of stay on the territory of the country, 1.45 thousand – for other offences. Officials of the state border guard bodies made a decision on forced return, forced expulsion and readmission of 42.05 thousand foreigners – offenders. The State Border Guard Service of Ukraine detained 2,054 illegal migrants in just 9 months of 2019¹.

The level of the threat of cross-border crime is estimated to be moderate but has a steady upward trend. Ukraine’s geographical location makes it attractive for the transit movement of illegal migrants and drugs. There are regular attempts at crossing the border by migrants and the illegal movement of goods². Although the overall situation related to illegal migration through the Ukrainian territory remains stable, implementation of provisions of law-enforcement legislation based on generally accepted legal principles is of current interest.

Respect for and observance of human rights and freedoms as a principle underlying activities of the bodies designed to control the

¹ The State Border Guard Service of Ukraine (2019) *Operating results for 9 months*. Retrieved from: <https://dpsu.gov.ua/ua/potochniy-rik/> (accessed 5 November 2019).

² Cabinet of Ministers of Ukraine (2019) Integrated border management strategies for the period up to 2025, approved by the order of the Cabinet of Ministers of Ukraine № 687-p of 24 July 2019. Official Bulletin of Ukraine, no. 70, art. 2472.

national border takes on particular significance in case of adopting enforcement measures associated with restriction of personal freedom of individual³. In recent years, there has been an increase in the level of migration to Ukraine from politically unstable states. One of the five major routes of illegal migration passes through the territory of Ukraine – Central European one, which runs through the Russian Federation, Ukraine, Poland, Slovakia to the countries of Western Europe⁴. Amid the military conflict in eastern Ukraine and exacerbation of the migration crisis in the European Union member states, operation of the places for holding illegal migrants where their freedom is actually abridged remains an important task. Proper organization of activities of the facilities carrying out administrative detention, which is used by the state border guard bodies and units, requires appropriate statutory regulation and its scientific understanding.

The purpose of the research the powers to keep persons detained in administrative order is to identify the specifics of legal regulation of activities of the Ukrainian SNGS bodies aimed to organize detention of illegal migrants. Such scholarly studies are intended to find out the legal nature of individual administrative enforcement measures used in the course of field-service state border protection activities, their implementation based on the principle of respect for and observance of human rights and freedoms.

1. History

The establishment of the SBGS of Ukraine in 2004 eliminated the then existing legal conflict pursuant to all requirements of the Constitution of Ukraine of 1996 Art. 17 of which prohibits using troop formations to restrict rights and freedoms of citizens⁵. The competence of the State Border Guard Service of Ukraine was based on the authority to apply measures of administrative compulsion. In fact, this approach was initiated in accordance with the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine on Combating Illegal Migration»

³ Holovatyi M. (2015) The State and Society: The Conceptual Foundations and Social Interaction in the Context of Formation and Functioning of States. *Economic Annals-XXI*, no. 9–10, pp. 4–8.

⁴ Cabinet of Ministers of Ukraine (2019) Integrated border management strategies for the period up to 2025.

⁵ Verkhovna Rada of Ukraine (1996) The Constitution of Ukraine, adopted at the Fifth Session of the Verkhovna Rada of Ukraine on 28 June 1996 (with subsequent amendments and additions). *Official Bulletin of the Verkhovna Rada of Ukraine*, no. 30, art. 141.

of 18 January 2001. Subsequently, the complex of relevant powers was constantly expanding. The situation was also influenced by the fact that, in the process of reforming the state border security authorities, they abandoned the investigative (inquiry) apparatus in the structure of the border agency, and now, as before, the border guards carry out an operative-investigative function in criminal proceedings.

It was during the time of the present-day Ukrainian state that the Border Guard Service received the broadest range of competencies in combating illegal migration. In previous historical periods, there were only certain powers of migration control, which, in relation to the general normative regulation, forms and methods of activity, reflected the designation of the state border protection authorities as a military formation. The State Border Service of Ukraine, as a special purpose law enforcement agency, performs tasks that are directly aimed at securing, protecting and exercising the rights and freedoms of individuals. This is due both to the authority to counter the offense and to the fact that border guards carry out their activities in the migration flows.

Between 1991 and 2018, 2 billion 004.78 million people and 423.47 million vehicles were passed through the state border of Ukraine by the units of the Border Troops and the State Border Guard Service of Ukraine. 684.06 people were denied a pass. During the 9 months of 2019 alone, 77.73 million persons were missed (76.40 million in 9 months of 2018, an increase of 1.7 %) and 13.09 million in vehicles (15.57 million in 9 months of 2018, a decrease of 15.9 %)⁶.

It is obvious that such activity is primarily aimed at meeting the needs of ordinary citizens who have been able to travel abroad legally on the territory of Ukraine. However, the implementation of law enforcement tasks in the migration sphere by the State Border Guard Service of Ukraine provides for a number of procedural guarantees for foreigners and stateless persons: accepting applications for recognition of persons as refugees or persons in need of additional protection; ensuring the right to protect oneself personally or to use the legal assistance of a defender, as well as informing the Center on the provision of free secondary legal aid; observance of norms and standards that make it impossible to cruel, inhuman or degrading treatment of detainees. Consequently, the powers to combat offenses in the protection of the state border are based on the

⁶ The State Border Guard Service of Ukraine (2019) *Operating results for 9 months*.

rule of law, since the coercive measures applied are capable of substantially restricting human rights.

However, statutory regulation of the system of detaining administratively apprehended persons began to shape even before that moment. In practice, not only identifying an illegal migrant but also providing conditions of his/her stay consistently with the international obligations assumed by Ukraine proved to be important. An urgent need arose to fit out the temporary detention places for a significant number of people who illegally entered and are in the Ukrainian territory. Legal regulation of their activities aroused mixed feelings.

Thus, “in April 2001, the Zakarpattia regional state administration decided to transfer a camp of a former military base near Mukacheve to border guards in order for them to fit out there a temporary detention facility for illegal migrants without, however, an appropriate government action.” The territorial state border guard bodies and local authorities had to build up that facility known as `Pavshyno` using their own resources and maintain its operation. From 2002 till 2008, almost 14 thousand illegal migrants were held in temporary detention facility `Pavshyno`⁷. Persons who violate the legislation of Ukraine on the state border and legal status of foreigners (stateless persons) and who have been detained in controlled border areas during the attempt or after illegal crossing of the state border have not been transferred to the internal affairs bodies of Ukraine for their detention and expulsion from the state since 2004⁸. For this purpose, in accordance with the provisions of the migration legislation and with the financial assistance of the EU, a system of detention of illegal migrants in the units (bodies) of the state border protection of Ukraine was created.

The legal literature has traditionally devoted attention to organizing detention of those imprisoned for committal of crimes, the purpose and

⁷ Clipnews.info. Society (4 December 2008) “*The Facility for Illegal Aliens in Pavshyno to be Closed Today*”. Retrieved from: <http://www.clipnews.info/newstopic.htm?id=5509> (accessed 2 November 2018).

⁸ State Committee on State Affairs the border of Ukraine, Ministry of Internal Affairs of Ukraine (1997) Instruction on the Procedure of Transfer of Foreigners and Stateless Persons by the Border Troops of Ukraine that violate the legislation of the State on the State Border and the Legal Status of Foreigners, the Reception of Those Persons by the Internal Affairs Bodies of Ukraine, Their Retention and Removal from the State: Order of the State Committee on State Affairs the border of Ukraine and the Ministry of Internal Affairs of Ukraine № 477/877 of 25 December 1997, expired on the basis of an order of the State Border Guard Service, Ministry of Internal Affairs of Ukraine № 742/1090 of 15 October 2004. *Official Bulletin of Ukraine*, no. 44, art. 2930.

system of places of deprivation of liberty. Such scholars as Y. Aleksandrov, V. Rudnyk, A. Stepaniuk and others have conducted relevant research. In science of administrative law, statutory instruments regulating application of administrative arrest as an administrative penalty and administrative detention as a measure ensuring administrative proceedings have represented a subject matter of analysis. The legal nature of such administrative enforcement measures is covered in works by Y. Dodin, Y. Kasaraba, A. Komziuk, T. Kolomoets, A. Kliushnychenko and some other authors. S. Albamasov, Y. Bilousov, V. Ziolka, R. Liashuk, B. Marchenko, M. Mykheyenko, V. Polovnikov, L. Servatiuk, and V. Khoma have studied activities of the state border guard bodies related to administratively applying enforcement measures. In more recent times, apprehending a person began to be studied based on the human rights concept, which manifests itself primarily in the international legal area. In this regard, works written with the assistance of international human rights organizations and reflecting the content and, in particular cases, interpreting international legal rules on possible restriction of human rights are of scholarly and practical interest. The above-mentioned theoretical studies and their results are undoubtedly important for identification of the specifics of organizing detention of illegal migrants administratively apprehended by the Ukrainian SBGS bodies.

The literature on administrative law usually reckons detention among measures of administrative restraint⁹. As A. Komziuk notes, that “the main purpose of these measures is defined as prompt response to any given antisocial acts, termination, suppression of unlawful conduct and thereby prevention of ensuing of its harmful consequences”¹⁰. According to E. Dodin, administrative detention also “has important preventive properties as it prevents the continuation of unlawful behavior”¹¹. In administrative proceedings, detention has, first of all, a procedural

⁹ Bytiak Y. P., Haraschuk V. M., Diachenko O. V. [et al.]; ed. by Y. Bytiak (2006) *Administratyvne pravo Ukrainy* [Administrative Law of Ukraine]. Kyiv: Yurinkom Inter. (in Ukrainian), p. 167.

¹⁰ Komziuk A. T. (2002) *Administratyvnyj pryms v pravoohoronnij dijalnosti militsiji v Ukraini* [Administrative compulsion in law and order keeping activity of Ukrainian militia] (abstract of the thesis for a doctor’s degree), Kharkiv: National University of Internal Affairs, pp. 16–17.

¹¹ Dodin E. V. (1982) *Protessual’nye formy profilaktiki administrativnykh prostupkov* [Procedural forms of prevention of administrative offences]. *Problems of Socialist legality*, Kharkov: High school, pp. 36–41.

purpose as a measure intended to ensure such proceedings and aimed to possible bringing to responsibility¹². “The peculiarity of the legal regulation of administrative and procedural issues related to the administrative detention by the bodies of the State Border Service is that they are enshrined in the norms of the Law of Ukraine “On the State Border Service of Ukraine” and detailed in the Instruction on registration of officials of the State Border Guard on administrative offences¹³.

V. Polovnikov points out an important feature of administrative detention in his thesis research. In his opinion, this measure, inter alia, also includes “and detention of a person in premises (places) designed for this purpose”¹⁴. That an administratively apprehended person is detained in a dedicated facility is a no less important guarantee of observing his/her rights than grounds for, period and formalization of such apprehension. Although legislation on administrative responsibility mentions only the place of detention of arrestees – in a guardhouse or in places to be specified by the National Police bodies¹⁵.

The European practice of detaining illegal migrants that is based on the principles of democracy and respect to human rights permits apprehension of a person in order to prevent his/her unauthorized entry to a country or of a person subject to the deportation or extradition process, which is specific to law-enforcement agencies guarding the national boundaries¹⁶.

Although “European countries do not have a uniform established name for the facilities ... for detention of migrants with unregulated status... Such names as reception centers, registration centers, holding

¹² Klyushnichenko A. P. (1979) *Mery administrativnogo prinuzhdeniya, primenyayemye militsiei (Osobennosti. Klassifikatsiya. Sistemovyrazhenie.)* [Measures of administrative compulsion applied by the police (Features. Classification. System expression.)]. Kiev: KVSh MVD SSSR. (in Russian), p. 50; Komziuk, *op.cit.*, pp. 16–17.

¹³ Ziolkva V. L. (2015) *Ohorona nacional'nyh interesiv Ukrainy u prykordonnij sferi (administrativno-pravovyy aspekt)* [The Safeguarding National Interests of Ukraine in the Border Sphere (administrative and legal aspect)]. Khmelnytsky: NADPSU. (in Ukrainian), p. 297.

¹⁴ Polovnikov V. V. (2007) *Zakhody administrativnogo pryusmu v dijalnosti Derzhanoji prykordonnoji sluzhby Ukrainy* [Administrative Enforcement Measures in Activities of the State Border Guard Service of Ukraine] (PhD Thesis), Kharkiv: National University of Internal Affairs, pp. 16–17.

¹⁵ Verkhovna Rada of Ukrainian SSR (1984) The Code of Ukraine on Administrative Offenses (with subsequent amendments and additions). *Official Bulletin of the Verkhovna Rada of Ukrainian SSR*, no. 51, art. 1122.

¹⁶ Solovey S., Kuzmenko L. (2013) Observance of the Rights of Migrants in the Activities of the Border Guard Service: Generalization of Rules of International Law. Teaching and Reference Aid International. Organization for Migration, p. 54.

centers are used, as well as those comprising the word detention as in immigration detention centers, migrant custody centers”¹⁷.

2. The normative regulation

As of today, the legal basis for detaining administratively apprehended foreigners and stateless persons by the SBGS of Ukraine consists in the provisions of part 1 paragraph 16 art. 20 of the Law of Ukraine “On the State Border Guard Service of Ukraine”¹⁸. It provides for the exercise of relevant powers used in the course of guarding the national frontier when persons are administratively detained for extended lengths of time (up to 72 hours). According to the Law of Ukraine «On the Legal Status of Aliens and Stateless Persons», the State Border Service of Ukraine is obliged to make «in the established order the decision on the placement of aliens and stateless persons detained within controlled border areas during the attempt or after illegal crossing of the state border of Ukraine points of temporary stay of foreigners and stateless persons illegally staying in the territory of Ukraine, with subsequent notification within 24 hours of the prosecutor»¹⁹.

However, the activities of the facilities designed for detention of apprehended persons are legally regulated at the departmental level. The Instruction on the Procedure for Detaining the Apprehended Persons in State Border Guard Bodies (Units) approved by the order of the Ministry of Internal Affairs of Ukraine № 352 of 30 March 2015 (hereinafter referred to as Instruction) specifies two types of temporary detention places depending on the system-structural configuration of the SBGS of Ukraine – temporary detention facility (hereinafter referred to as TDF) and special premises (hereinafter referred to as SP). Administratively apprehended persons are held in premises specially equipped for these purposes at two lower levels of the SBGS of Ukraine – in bodies (in whose department’s territory a TDF is located) and units (in whose

¹⁷ BLANK-PRES (2015) *The International Terminology in the Area of Migration: a Ukrainian-English Explanatory Dictionary*. Kyiv: BLANK-PRES, p. 36.

¹⁸ Verkhovna Rada of Ukraine (2003) On the State Border Guard Service of Ukraine, Law of Ukraine of 3 April 2003 (with subsequent amendments and additions). *Government Courier*, 7 May 2003.

¹⁹ Verkhovna Rada of Ukraine (2012) On the Legal Status of Foreigners and Stateless Persons, Law of Ukraine of 22 September 2011 (with subsequent amendments and additions). *Official Bulletin of the Verkhovna Rada of Ukraine*, no. 19–20, art. 179.

territory a SP is being fitted out), which are directly intended for the national border control²⁰.

Therefore, persons detained in administrative order are kept in specially equipped premises for these purposes in the bodies and units of the State Border Guard Service of Ukraine. The State Border Protection Body is the main body in the general structure of the State Border Guard Service of Ukraine, which directly fulfills the tasks assigned to the State Border Guard Service to ensure the inviolability of the state border of Ukraine and participates in the protection of Ukraine's sovereign rights in its exclusive (maritime) economic zone, as well as provides other legislation of Ukraine²¹. The border detachment as a state border guard may include border commanders, border service departments, border guards, checkpoints, border control units²². The Border Service Division is the main unit of the Border Detachment (Border Commandant), intended for the direct protection and protection of a certain section of the state border, the implementation of border control and passage through the state border of Ukraine and to the temporarily occupied territory and from it to persons, vehicles, ensuring compliance with the regime of the state border of Ukraine, the border regime and the regime at the points of passage through the state border of Ukraine (control points, checkpoints of entry and exit), as well as the exercise of other powers provided for by the legislation of Ukraine²³.

Sixty-two temporary detention places (hereinafter referred to as TDP) designed for simultaneous detention of 350 persons, 10 of which are TDFs designed for 155 persons and 52 are SPs designed for 195 persons were in 2017. Their purpose is related to the competence of the SBGS of Ukraine to counter both crimes and administrative offenses and

²⁰ Ministry of Internal Affairs of Ukraine (2015) The Instruction on the Procedure for Detaining the Apprehended Persons in State Border Guard Bodies (Units), approved by the order of the Ministry of Internal Affairs of Ukraine № 352 of 30 March 2015, *Official Bulletin of Ukraine*, no. 39, art. 1172.

²¹ Ministry of Internal Affairs of Ukraine (2019) Regulation on the State Border Protection Body of the State Border Guard Service of Ukraine, approved by the order of the Ministry of Internal Affairs of Ukraine № 971 of 30 November 2018. *Official Bulletin of Ukraine*, no. 3, art. 86.

²² Verkhovna Rada of Ukraine (2003) On the State Border Guard Service of Ukraine, Law of Ukraine.

²³ Ministry of Internal Affairs of Ukraine (2016) Regulations on the Border Service Division of the State Border Guard Service of Ukraine, approved by the order of the Ministry of Internal Affairs of Ukraine № 311 of 15 April 2016. *Official Bulletin of Ukraine*, no. 41, 44, art. 1555.

encompasses two aspects, which can be considered by convention as respectively positive and negative ones. The positive aspect envisages reasons for placement of apprehended persons in a TDF or SP, while the negative aspect is associated with prohibition on such placement. Paragraph 1 of section VI of the Instruction specifies five reasons for placement of an apprehended person in a temporary detention place. Aside from the fact that such reasons include for the most procedural instruments, in content they are related to response to unregulated migration²⁴.

Persons suspected of committing a criminal offence may be accommodated in a special premise only under a certain condition – an arrangement that ensures the reliable protection and the security of the personnel of the state border guard bodies (units). Accordingly, detainees suspected of committing criminal offences are housed separately from detainees in an administrative order consistent with international detention practices²⁵.

It is prohibited to place (receive) in TDPs (negative aspect) persons:

“apprehended for the committal of administrative or criminal offenses, countering of which is not referred to the competence of the SBGS;

for disciplinary, educational action or sobering purposes”²⁶.

In addition, in order to avoid abuse it is prohibited to detain servicemen apprehended for the committal of military administrative offenses in departmental places of temporary detention of violators of legislation on border-related issues²⁷.

Based on analysis of the above aspects describing the purpose of TDPs within the SBGS of Ukraine it should be acknowledged that they are set up primarily to detain illegal migrants. The stay of such a category of persons during their detention in places designed for this purpose is one of the requirements of international standards²⁸. In this

²⁴ Ministry of Internal Affairs of Ukraine (2015) The Instruction on the Procedure for Detaining the Apprehended Persons in State Border Guard Bodies (Units).

²⁵ *Ibid.* Paragraph 18 of section VI.

²⁶ *Ibid.* Paragraph 2 of section VI.

²⁷ Administration of the State Border Guard Service of Ukraine (2015) “On Organizational Measures to Counter Military Administrative Offenses within the SBGS”, order of the Administration of the State Border Guard Service of Ukraine № 74 of 1 April 2015 (unpublished).

²⁸ Kasaraba Y. (2006) Mizhnarodni standarty zatorymannja: teoretyko-pravovyj aspekt [International Detention Standards: The Theoretical-Legal Aspect]. *Law of Ukraine*, no. 7, p. 49.

connection, a specifically designated purpose of such places is manifest. “Making the departmental system of detaining persons apprehended for breach of legislative requirements on border-related issues consistent with international standards” is strategically defined as a component of ensuring development of border infrastructure²⁹. For this very reason, S. Albamasov rightly points out two components of securing rights and freedoms of the persons detained in TDPs – “the human and technological factors, that is, conditions in which an apprehended offender is held”³⁰. And while the principles of humanity and respect for human rights also apply to the penal correction system, to which the scientific literature has continually drawn attention³¹, organization of detaining illegal migrants apprehended by the SBGS bodies of Ukraine abandoned ‘prison-specific’ approaches to arrangement of the places designated for this purpose. Among other things, the reason for this also is that “establishment of criminal for illegal entry into the country goes beyond the legitimate intent of the state to control and regulate illegal migration and leads to unlawful apprehensions”³².

²⁹ Cabinet of Ministers of Ukraine (2015) The Strategy of development of the State Border Guard Service, approved by the order of the Cabinet of Ministers of Ukraine № 1189-p of 23 November 2015. *Official Bulletin of Ukraine*, no. 94, art. 3227.

³⁰ Albamasov S. O. (2012) Zabezpechennja prav i svobod osib, jaki utrymujutsja v punktakh tymchasovogho trymannja ta specialnykh prymishhennjakh vidomchoji systemy trymannja Derzhavnoji prykordonnoji sluzhby Ukrainy [Ensuring the rights and freedoms of persons held in temporary detention centers and special premises of the departmental detention system of the State Border Guard Service of Ukraine]. *Scientific Herald of the State Border Guard Service*, no. 1, p. 30.

³¹ Aleksandrov Y. V. (2015) Shhodo dejakykh vymogh rezhymu u vypravnykh kolonijakh [Anent Some Security Requirements in Correctional Colonies]. *IAPM Scientific Works*, vol. 44(1), p. 49; Rudnyk V. I. (2004) Pravo derzhavy na pokarannja u vyghjadi pozbavlennja voli v konteksti dotrymannja prav ljudyny [The Right of the State to Impose Punishment in the Form of Imprisonment in the Context of Human Rights Observance]. Proceedings of the *Reforming the Legal System of Ukraine: Problems of and Prospects for Development in the Context of European Integration Processes. The International Research-to-Practice Conference (Ukraine, Kyiv, April 28–29, 2004)* (eds. S. A. Yerokhin, V. F. Pohorilko, and Y. M. Shevchenko et al.), Kyiv: National Academy of Management, part 2, pp. 469–476; Stepaniuk A. F. (2002) *Aktualjni problemy vykonannja pokaranj (sutnistj i pryncypy kryminalno-vykonavchoji dijalnosti: teoretyko-pravove doslidzhennja)* [Important Aspects of Punishment Enforcement (essence and principles of enforcement activity: theoretic research)]. (abstract of the thesis for a doctor’s degree), Kharkiv: Yaroslav Mudry National Law Academy of Ukraine, pp. 18–19.

³² Reshitov A. A., Solodkov T. A., Selivanov A. V. (eds.) (2013) *Rukovodyashchie printsypy po zaderzhaniyu i sodержaniyu pod strazhey: rukovodstvo po primenyemym kriteriyam i standartam v omoshenii zaderzhaniya i sodержaniya pod strazhey lits, ishchushchikh ubezshishcha, a takzhe al'ternativam sodержaniyu pod strazhey* [The Guiding Principles on Apprehension and Custodial Detention: Guidance on the Criteria and Standards Applied to Apprehension and Custodial Detention of Asylum-Seekers, as well as on Alternatives to Custodial Detention], Minsk: Peresvet, pp. 55–56.

Such approaches were developed at the State Border Guard Service of Ukraine on the basis of the European practice of dealing with migrants who have `unregulated` status. Priority in such activities was the international legal obligations of our state on the prohibition of torture or inhuman or degrading treatment or punishment. However, the provisions of international law, by virtue of their generalization, can only produce general rules that can be introduced and detailed in the domestic law of a particular country. The universalism of the rules of administrative law enables the implementation of international standards for detention. The purpose of administrative-legal regulation is to encourage subjects of the right to act independently, exercise their rights and perform duties in established regimes and procedures. Accordingly, the rules of international law can be implemented in the requirements of the regime to certain bodies, individuals and objects through a combination of many elements.

Thus, the localization of foreigners and stateless persons in a certain place (buildings, rooms) makes important norms of technical content that are unlikely to be fully reflected in any international document. Denial of the name `camera` in favor of the term `room` to indicate the buildings where the detained person should be detained is only a formal sign of the regime of his stay in a designated place. At the same time, the placement of persons in unsuitable premises is regarded as ill-treatment³³.

The system of places for temporary detention of illegal migrants in the SBGS of Ukraine was formed on the basis of the soviet border guard bodies and has underwent significant transformation with the assistance of various international organizations. Overall, it meets the international standards and the national border control needs. In the current context, however, border guards also fulfill tasks at the administrative boundary line with the Autonomous Republic of Crimea and the delimitation line in the Donetsk and Luhansk regions, where new bodies and units of the SBGS of Ukraine are established. And if the results of the activities of Berdiansk and Kherson border guard detachments indicate a decrease in the number of detected administrative offences and, as a result, of apprehended persons, then the same figures for Donetsk, Kramatorsk and Luhansk border guard detachments have grown. In 2018, 768 reports on administrative offences were drawn up in the Special Forces Operation Area (the Anti-terrorist Operation Area) (in 2017 – 187, an increase by 4.1 times) of which 440 under art. 204-1 of the Code of Ukraine on Administrative Offenses “Illegal Crossing of the State Border” (2017 –

³³ Solovey, Kuzmenko, *op.cit.*, p. 65.

151, an increase by 2.9 times). In the long run, the number of apprehended persons can even grow. Law of Ukraine “On Amending the Code of Ukraine on Administrative Offenses and Some other Laws of Ukraine Related to Providing Border Security of the State” was passed on 27 February 2018, which supplemented the above-said Code with article 204-4 “Violation of the Procedure for Entry into the Anti-Terrorist Operation Area or Exit from it.” In case of detection of such an offense, officials of the SBGS bodies and units of Ukraine also were vested with powers to apply administrative detention for up to 72 hours³⁴.

Therefore, an important organizational task is to establish places for detention of administratively apprehended persons at the newly created border guard units. Based on the results of the monitoring visits of representatives of the National Preventive Mechanism Implementation Department of the Secretariat of the Ukrainian Parliament Commissioner for Human Rights to Donetsk border guard detachment it was found that checkpoint `Hnutove` lacks a place specially designed for administratively apprehended persons. In the opinion of representatives of the monitoring group of the national preventive mechanism, in the context of military operations it creates a real basis for abusive treatment of the apprehended persons³⁵.

The task of detaining detainees and securing the regime in the TDFs is entrusted to a detention unit that is part of the State Border Protection Body. Within the system-structural organization of the bodies of the State Border Guard Service of Ukraine, their place is determined within the subdivisions administrative and jurisdictional activity of staffs. However, the detention of detainees also rests with other detachment officials. The largest amount of authority to organize such activities belongs to the first Deputy Head of the detachment – Chief of Staff, who is directly and subordinate to the Chief of the Detention Unit³⁶.

³⁴ Verkhovna Rada of Ukraine (2018) On amendments to some legislative acts of Ukraine on ensuring the state border security, Law of Ukraine of 27 February 2018. *Official Bulletin of Ukraine*, no. 36, art. 1259.

³⁵ Administration of the SBGS of Ukraine (2015) *Zvit pro rezul'taty monitoryngovoho vizytu ta rekomendaciji shhodo poperedzhennja nenalezhnogho povodzhennja iz zatrymanymy osobamy* [Report on the Monitoring Visit Results and Recommendations on Prevention of Improper Treatment of Apprehended Persons], an Attachment to the letter of the Ukrainian Parliament Commissioner for Human Rights № 8 – 1328/15-120 of 28 May 2015 (Administration of the SBGS of Ukraine, receipt № 1159/0/1-15 of 14 August 2015).

³⁶ The Instruction on the Procedure for Detaining the Apprehended Persons in State Border Guard Bodies (Units).

The security detention of persons in the TDPs is appointed from the personnel of the body (unit) of the state border guard in which it is stationed. One (two) changes in detention units (for TDF) or personnel of the border outfit «Regime Control» change of border outfits (for SP at the Border Service Division) shall security detention of persons. The following outfits can be assigned from a security change staff: senior security change officer, senior security change assistant, regime unit inspector, administrative unit inspector³⁷. These outfits are not border guards, as defined in the Instruction on Border Guards Service of the State Border Guard Service of Ukraine, approved by Order of the Ministry of Internal Affairs of Ukraine of October 19, 2015 No. 1261³⁸. However, they are part of a common system of management within state border protection bodies and units, which requires their interaction with other regular forces, means and officials.

CONCLUSIONS

Consequently, the system of TDPs is organized in the SBGS of Ukraine consistent with the tasks of this special-purpose anti-illegal migration law-enforcement body. The administratively apprehended persons are held in premises specially equipped to this end at two lower levels – in bodies and units, which are directly intended for the national border control. Statutory regulation of the activities of such facilities is mainly carried out at the departmental level with due regard to international human rights standards. Creating the proper conditions for detaining people detained for violating border law requirements is one of the goals of achieving the strategic goal of identifying illegal migrants and returning them to their countries of origin³⁹.

In the long term, it will require improvement in view of establishment of places of detention at the newly created border guard units in particular areas of Donetsk and Luhansk regions.

The specifics of equipment of such premises must be statutorily regulated, which requires amendments to both the Instruction and the Temporary Procedure to Controlling Movement of Individuals, Transport Facilities and Cargoes (Goods) across the Conflict Line within the Donetsk and Luhansk Regions.

³⁷ *Ibid.* Paragraph 2, 4, 8 of section VIII.

³⁸ Ministry of Internal Affairs of Ukraine (2015) Instruction on Border Guards Service of the State Border Guard Service of Ukraine, approved by Order of the Ministry of Internal Affairs of Ukraine № 1261 of 19 October 2015. *Official Bulletin of Ukraine*, no. 94, art. 3233.

³⁹ Cabinet of Ministers of Ukraine (2019) Integrated border management strategies for the period up to 2025.

International standards governing the conditions of detention of migrants in detention facilities are being implemented through requirements for state, in particular, law enforcement, individuals and facilities. The administrative and legal rules governing the regime of detention of illegal migrants in the TDPs of the State Border Guard Service of Ukraine are established at the departmental level and detailed through a local act – an order on the organization of detention of detained persons. The practice of their application gives grounds to consider the security component as a priority in ensuring the detention regime of detainees. The personnel of the state border guard bodies (units) must take into account the individual characteristics of the detention of illegal migrants in such activities, based on the need to locate them in a certain place.

SUMMARY

The peculiarities of the organization of detention of illegal migrants detained by the bodies of the State Border Guard Service of Ukraine in administrative order are analyzed. The theoretical bases and legal regulation of activity of places of temporary detention have been clarified. Their purpose, organizational and structural construction and some aspects of improvement of departmental detention system are determined.

The bodies of the State Border Guard Service of Ukraine are empowered to apply administrative enforcement measures to illegal migrants. During their administrative detention, they are held in places specially designed for this purpose. Organization of the activities of such facilities is carried out in accordance with international human rights standards subject to the specifics of the national border control.

The system of places for temporary detention of illegal migrants was formed on the basis of the soviet border guard bodies and has underwent significant transformation with the assistance of various international organizations. Overall, it meets the international standards and the national border control needs. In the current context, however, border guards also fulfill tasks at the administrative boundary line with the Autonomous Republic of Crimea and the delimitation line in the Special Forces Operation Area, where new bodies and unites of the State Border Guard Service of Ukraine are established.

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REALIZATION OF THE LEGISLATIVE COMPETENCE OF LOCAL MUNICIPALITY AUTHORITIES

Roman Liashuk

INTRODUCTION

Local self-government in Ukraine is a state-guaranteed right and a real capacity of the territorial community of residents of a village or voluntary association of residents of several villages, settlements, cities – independently or under the responsibility of bodies and officials of local self-government to resolve issues of local importance within the Constitution and laws of Ukraine. Regulatory decisions can be made both directly by the territorial community through a local referendum and through representative bodies of local self-government (village, settlement, city, district and regional councils).

Recent decades have become historic for local government in Ukraine. It has received public and state recognition, is enshrined in the Constitution of Ukraine, has developed a regulatory framework and has extensive experience. There was a rather intense and stable development of the science of municipal law, formed a domestic municipal law school. Established non-governmental organizations promoting local self-government: Association of Ukrainian Cities¹, Interregional Union of Local Self-Government Bodies, Foundation for Promotion of Local Self-Government in Ukraine² and others.

1. General characteristics of municipal rulemaking

For the study of municipal rulemaking, the determination of the nature of local self-government and its relation with state power are of paramount importance. The question of what it is must be resolved local government, what they are its legal features and properties that determine not only its functional purpose, but also the forms of its implementation.

¹*Asotsiatsiya mist Ukrayiny* [Association of Ukrainian Cities]. – URL:<https://www.auc.org.ua/proposal>

²*Pro Derzhavnyy fond spryannya mistsevomu samovryaduvannyu v Ukrayini* [About the State Fund for Promotion of Local Self-Government in Ukraine]: Presidential Decree of June 24, 2010, № 723/2010. – URL:<https://zakon.rada.gov.ua/laws/show/723/2010>

This approach reflects not only theoretical interest in local self-government, but also has applied value, since the establishment of legal features and properties of local self-government contributes to a proper understanding of the purpose and content of municipal rulemaking. At the same time, it should be noted that the concept of «municipal rulemaking», along with another similarly meaningful term «municipal lawmaking» is only being introduced into scientific circulation, and the concept of «local government» has long been referred to in the terminology of legal science.

The legislation of Ukraine on local self-government empowers the subject of local self-government with public authority, which allows it to resolve issues of local importance, either directly or through bodies created by it. Individuals do not have such authority as members of the territorial community, they have the right to participate in local self-government in statutory forms.

Local self-government is a separate form of exercise of public authority, Art. 5 of the Constitution of Ukraine³: “People are the bearer of sovereignty and the sole source of state power in Ukraine. The people exercise state power directly and through state authorities.» As a subject of local self-government, the territorial community has the right to resolve issues of local importance in any legal form.

The specific subject of local self-government is defined in item 1 of Art. 3 of the European Charter of Local Self-Government of 15 October 1985 (hereinafter: the Charter of Local Self-Government)⁴ because of the concept of «a large part of state affairs», in Art. 140 of the Constitution of Ukraine and Art. 2 of the Law on Local Self-Government through the concept of «local issues». Or abstract concepts are partly specified in Art. 143 of the Constitution of Ukraine and several articles of the Law on Local Self-Government.

Naturally, the constitution of a modern democratic state cannot contain an exhaustive list of issues pertaining to local self-government, and therefore, the specific laws (in Ukraine – in the Law on Local Self-Government) are specified in many signatories of the Charter of local self-government. In order to specify the subject of local self-government

³*Konstytutsiya Ukrainy* [Constitution of Ukraine]: Adopted at the fifth session of the Verkhovna Rada of Ukraine on June 28, 1996. – URL: <https://zakon.rada.gov.ua/laws/show/254%D0%BA/96-%D0%B2%D1%80>

⁴*Yevropeys'ka khartiya mistsevoho samovryaduvannya* [European Charter of Local Self-Government]: 15 October 1985. – URL: https://zakon.rada.gov.ua/laws/show/994_036

in European countries, two criteria are used: formal and legal – referring to local issues by the legislation on local self-government, and material – ensuring the livelihood of territorial communities⁵.

Local self-government is not at all opposed to state power. The explanation for this is to be found in the very nature of these two social phenomena, in that state power and local self-government are only different forms of self-organization of society.

Legal features and properties of local self-government in Ukraine:

1) local self-government is structured in the system of public authority in the form of public-self-government in the process of state awareness of the presence of other, non-state interests – interests of local character, which are not identical to the state, but not contrary to them;

2) local self-government is characterized by a high level of democracy, and its subject is a territorial community consisting of residents who are permanently resident within a certain territory;

3) the main purpose of structuring local self-government in the public authority system is to address local issues most effectively⁶.

Many social relations, in view of their content, local conditions and peculiarities, require the publication of normative-legal acts of local self-government in order to specify the norms of legislation. Municipal rulemaking is not carried out only in cases where the rules of the law directly regulate public relations in the sphere Local Government. With the exception of these cases, legal regulation public relations on the basis of and for the implementation of the law is ensured by issuing regulations of local self-government and local action.

In the science of municipal law, the opinion of the subordinate nature of the rulemaking activity of local self-government bodies is quite common. The powers of local self-government bodies in the field of adoption of normative legal acts are based on the delegation by the state to the municipal level of authority of law-making powers. Issuing legal

⁵ Barksy V.R. (2006) *Normotvorchist' predstavnyts'kykh orhaniv mistsevoho samovryaduvannya v Ukrayini* [Rulemaking of representative bodies of local self-government in Ukraine]. – Odessa. – 221 p. P. 13.

⁶ Barksy V.R. (2006) *Normotvorchist' predstavnyts'kykh orhaniv mistsevoho samovryaduvannya v Ukrayini* [Rulemaking of representative bodies of local self-government in Ukraine]. – Odessa. P. 18.

acts by local governments on their competence is a law-making, previously authorized by the state⁷.

Local authorities, which are excluded from the system of state bodies, cannot assign to themselves the function of law-making, because it is the most important state function. Only the state or its separate bodies can authorize the creation by the local self-government bodies of legal norms that give rise to legal rights and obligations.

Authorization of rulemaking activity of local self-government bodies is carried out in the following ways:

local self-government bodies, on their own initiative, develop norms that acquire the legal character of a prior state sanction;

state bodies approve the normative acts developed by self-government bodies;

the state creates general (typical) norms in the form of recommendations, and local governments detail them in relation to specific conditions and submit them for approval (registration) to the relevant public authority⁸.

It should be noted that the above characteristic of the properties of municipal rulemaking is only partially undeniable. On the one hand, the rulemaking activity of local self-government bodies is a way of fulfilling their self-governing powers and delegated powers of executive bodies. On the other hand, local self-government seems to be an expression of will that is carried out in the light of Art. 140 Constitution of Ukraine by the territorial community directly or through bodies local self-government and is not based, therefore, on delegation to him by the state of law-making powers.

The general legal features of municipal rulemaking as a form of lawmaking include its social purpose, which is to set certain standards, requirements for the behavior of participants in legal relationships.

Specific legal features of municipal rulemaking reflect the functional purpose of local self-government, the form of its implementation.

Municipal norm-making expresses the will of a local government entity – a territorial community. Municipal rulemaking is carried out by the territorial community directly or through local governments. The

⁷ Maslovskaya T.S. (1998) *Normotvorchestvo organov mestnogo samoupravleniya Rossiyskoy Federatsii* [Rulemaking of local authorities of the Russian Federation]. – Omsk. – 23 s. (in Russian).

⁸ Shugrina E.S. (2000) *Munitsipal'noye pravo* [Municipal Law]. Moscow: Case. – 496 s. (in Russian).

subject of legal regulation of normative legal acts that are created within the framework of municipal rulemaking, are mainly issues related to the subject of local government – that is, issues of local importance.

Municipal rulemaking authority is directly related to the municipal-territorial system, because the public-self-government is exercised in a certain territory. Local self-government regulations are the legal means of exercising power in a localized territory, making their scope limited by the respective territory of the administrative and territorial unit and the number of entities located in that territory.

Municipal rulemaking is carried out in the form of a rulemaking process. The rulemaking process is a system of interdependent, specially ordered actions and operations subject to a specific purpose, which, through appropriate techniques and means, leads to a specific result, the method of communication of which is an appropriate procedural and procedural form⁹. It should be borne in mind that the concept of «municipal rulemaking» covers: direct rulemaking of the territorial community (local referendum) and rulemaking of representative bodies of local self-government. Each of the varieties of municipal rulemaking is different in legal regulation and procedural form.

2. Competence of local self-government bodies in the field of rulemaking

Local self-government is a complex socio-political institute of modern society. The municipal legislation of Ukraine provides for a complex structural and organizational mechanism for the implementation of local self-government, called the “system of local self-government”¹⁰.

У структурно-організаційному плані система являє собою сукупність органів місцевого самоврядування, органів самоорганізації населення й організаційних форм, за допомогою яких відповідна територіальна громада чи її складова частина здійснюють задачі і функції місцевого самоврядування, вирішують завдання місцевого значення.

According to the Law on Local Self-Government, this system includes: territorial community; village, settlement, city council; village,

⁹ Onischenko N. (2002) *Yurydychnyy protses yak forma pravovoyi diyal'nosti* [Legal process as a form of legal activity] Law of Ukraine. – № 7. – P. 7-13. (in Ukrainian).

¹⁰ Bilenchuk P.D, Kravchenko V.V., Podmogilny M.V. (2000) *Mistseve samovryaduvannya v Ukrayini (munitsipal'ne pravo)* [Local Self-Government in Ukraine (Municipal Law)] Kyiv: Attica. – 304 p. Pp. 25-26. (in Ukrainian).

town, mayor; executive bodies of the village, settlement, city council; district and regional councils representing the general interests of the territorial communities of villages, towns and cities; bodies of self-organization of the population (Art.5)¹¹. Each element of this system plays a special role in the implementation of local self-government.

The leading role in this system belongs to the territorial community. However, as stated earlier, the provisions on the right of territorial communities to resolve local issues cannot be absolutized. For a number of objective reasons, territorial communities are virtually unable to directly exercise their right to local self-government, leading modern scholars to believe that it is not the local community but the local self-government that should be considered a core element of the local self-government system. According to leading domestic legal scholars, state and local affairs are more effectively able to carry out on-site relevant bodies, unlike the community, on a permanent basis, qualified and should be held accountable for their activities not inherent in the territorial community¹².

The system of representative bodies of local self-government consists of two levels (subsystems): 1) village, town, city councils; 2) district, regional councils.

The presence of these two levels of representative bodies of local self-government does not mean subordination of one to the other. Their representative nature differs: rural, settlement, city councils represent relevant territorial communities; district and regional councils – general interests of territorial communities of villages, towns and cities.

Legal regulation of the activity of the vast majority of representative bodies of local self-government is carried out by the norms of the Constitution of Ukraine, legislative acts and their regulations. An exception to this rule is the additional regulation of certain aspects of the activity of local councils by the norms of the statutes of territorial communities, if adopted. As a result, the legal rules governing the activity of local councils have different legal force, which depends on the place in the hierarchy of legal acts that the act in which they are contained.

¹¹ *Pro mistseve samovryaduvannya v Ukraini* [On Local Government in Ukraine]: Law of Ukraine of May 21, 1997, № 280/97-BP. – URL: <https://zakon.rada.gov.ua/laws/show/280/97-bp>

¹² Pogorilko V.F., Fritsky O.F. (2001) *Munitsypal'ne pravo Ukrainy* [Municipal Law of Ukraine] Kyiv: YurinkomInter. – 352 p. Pp. 151-152. (in Ukrainian).

The subjects of municipal normative legal relations are significantly different from each other by the level of legal knowledge. Against this background, they have different interpretations of the purpose of regulations, which ultimately leads to the fact that different local councils regulate the same issues, both by legal and individual acts. But such a situation is unacceptable because it violates the unity of the legal space of Ukraine. The attribution of a legal act of a local council regulating a particular issue to one of two types – regulatory or individual – determines the features of its preparation, adoption, promulgation, entry into force.

Local self-government normative act is the legal result of rulemaking activity, which is motivated by the objective need for legal registration of relevant social relations. It is adopted for the purpose of regulating social relations that are within the scope of local government.

Taking into account the social purpose of local government regulations, their adoption is carried out in a strictly defined procedural and procedural form.

A legal act enters into force only upon its official publication. Its implementation is provided by various means, including means of coercion, which is justified by «concern for the public good». Failure to enforce or improperly enforce a local government normative act entails legal liability.

Local self-government regulation is an official document adopted directly by the territorial community or representative body of local self-government within the scope of the subject of local self-government, in a certain procedural and procedural form, aimed at establishing, modifying, supplementing or abolishing legal rules designed for repeated use of prescriptions. Legal acts of local self-government that do not meet the above characteristics are individual.

The procedure for adopting acts of local self-government bodies and officials is defined in Art. 59 of the Law of Ukraine “On Local Self-Government in Ukraine”¹³.

The Council, within the limits of its powers, adopts regulations and other acts in the form of decisions. The decision of the council is taken at its plenary session after discussion by the majority of the members of the general council. In determining the results of the vote, the chairman shall

¹³ *Pro mistseve samovryaduvannya v Ukrayini* [On Local Government in Ukraine]: Law of Ukraine of May 21, 1997, № 280/97-BP. – URL: <https://zakon.rada.gov.ua/laws/show/280/97-BP>

be included in the general composition of the council if he or she participates in the plenary meeting of the council and his vote is taken into account. The decision of the Board is made by open (including roll call) or by secret ballot. The decision of the council within five days from the moment of its adoption can be stopped by its chairman and submitted for reconsideration of the respective council with justification of the comments. The council is bound to reconsider the decision within two weeks. If the council rejects the chairman's remarks and affirms the previous decision by two-thirds of the council members, it shall enter into force. Decisions of the regulatory board shall enter into force on the day of their official promulgation, unless the board has a later date for the implementation of these decisions. In particular, an example of a decision of the regulatory character of representative bodies of local self-government is the decision of the city council «On approval of the Rules for the organization of collection, transportation, recycling and disposal of solid household waste in the city» of June 12, 2008 № 157 or «On approval of the procedure for the competition for the right to lease of communal property «dated 7.06.2007 № 772.

The executive committee of the village, settlement, city, district in the city council within its powers makes decisions. Decisions of the Executive Committee are taken at its meeting by a majority of votes from the general composition of the Executive Committee and are signed by the village, town, city, district head of the city council. In case of disagreement of the mayor, the mayor (the mayor of the district in the city council) with the decision of the executive committee of the council, he may suspend the decision by his own order and submit the matter to the relevant council.

The village, settlement, city mayor, the chairman of the district in the city, the district, regional council within its powers issues orders.

Decisions of the executive committee of the council on matters within the competence of the executive bodies of the council may be reversed by the relevant council.

Permanent commissions, on behalf of the council, the chairman, respectively the deputy chairman of the district in the city, the district council or the first deputy, the deputy chairman of the regional council, the secretary of the village, settlement, city council or on their own initiative, study the activities of the accountable and controlled councils and the executive committee of the village, city, district and city councils of bodies, as well as issues related to the management of the council, local state administrations, enterprises, institutions and organizations,

their branches and offices regardless of ownership and their officials, submit on the results of verification of the recommendation for consideration of their heads, and in necessary cases – for consideration by the council or the executive committee of the village, settlement, city, district in the city council; exercise control over the implementation of the Board's decisions, executive committee of village, settlement, city, district in city council¹⁴. The organization of the work of the standing committee of the council is vested in the chairman of the commission. The chairman of the commission convenes and conducts the meeting of the commission, gives orders to the members of the commission, represents the commission in relations with other bodies, associations of citizens, enterprises, institutions, organizations, as well as citizens, organizes work on the implementation of the conclusions and recommendations of the commission.

A meeting of the standing committee shall be convened as necessary and shall be competent if it is attended by at least half of the total composition of the commission.

A standing committee for the study of issues, drafting decisions of the council can create preparatory commissions and working groups with the involvement of members of the public, scientists and specialists. Issues related to the management of several standing committees may, on the initiative of the commissions, as well as on the instructions of the council, its chairman, respectively the deputy chairman of the district in the city, the district council or the first deputy, the deputy chairman of the regional council, the secretary of the village, settlement, city council joint committees. The conclusions and recommendations adopted by the standing committees at their joint meetings shall be signed by the chairmen of the respective standing committees.

Standing committee committees prepare and adopt conclusions and recommendations. Temporary control commissions submit reports and proposals to the city council.

Deputies of city council on the basis of party affiliation can unite in deputy factions. Deputies may also include non-partisan city council deputies. The order of entering and leaving the faction is determined by the faction itself. A deputy may be a member of only one faction¹⁵.

¹⁴ Rusnak B.A. (2011) *Mistseve samovryaduvannya v Ukrayini: teoriya i praktyka* [Local self-government in Ukraine: theory and practice]. – Odessa. P. 127. (in Ukrainian).

¹⁵ Rusnak B.A. (2011) *Mistseve samovryaduvannya v Ukrayini: teoriya i praktyka* [Local self-government in Ukraine: theory and practice]. – Odessa. P. 238. (in Ukrainian).

The parliamentary faction may be formed at any time within the term of office of the city council by the decision of the assembly of deputies who have expressed a desire to join it. The parliamentary faction defines the persons authorized to represent it in the council.

The decision to unite the deputies into a faction shall be notified to the deputies of the city council chairing the plenary session of the council on the basis of the minutes of the meeting of the faction and a written notice of the head of the faction, signed by members of the faction, indicating the name of the faction, personal composition, party affiliation.

At the next, after the registration of the deputy faction (group), the plenary session of the council, the chairman informs the deputies about the formation of the group (faction), its quantitative composition and the authorized representative.

Deputies' factions (groups) have the right: to submit proposals for consideration of issues at the plenary session of the council, as well as for inclusion of issues in the agenda of the session;

At the request of a faction (group), the council apparatus shall distribute the materials prepared by the faction (group) as a draft official document of the session of the council, if they are submitted for consideration by the session.

In order to take into account the historical, national-cultural, socio-economic and other peculiarities of local self-government, a representative body of local self-government based on the Constitution of Ukraine and within the framework of this Law may adopt the statute of a territorial community of a village, settlement, city. Law of Ukraine "On Local Self-Government in Ukraine"¹⁶ contains a number of articles which explicitly state that a particular issue should be regulated not only by law but also by the statute of the territorial community. In particular, it concerns the procedure for forming and organizing the activity of councils (h. 4, Art. 10), holding general meetings of citizens at their place of residence (h. 3, Art. 8), the procedure for submitting a local initiative to the Council (h. 2, Art. 9). , organization of public hearings (Part 4 of Article 13), etc. Accordingly, the Model Statute of a territorial community may consist of the following main sections:

¹⁶ *Pro mistseve samovryaduvannya v Ukrayini* [On Local Government in Ukraine]: Law of Ukraine of May 21, 1997, № 280/97-BP. – URL: <https://zakon.rada.gov.ua/laws/show/280/97-bp>

In the first section «General Provisions» it is stated that the Statute of a territorial community in accordance with the Constitution of Ukraine, the Law of Ukraine «On Local Self-Government in Ukraine», other laws of Ukraine defines the legal principles, forms, procedure for exercising local self-government by the relevant territorial community, its bodies and officials due to historical, geographical, national-cultural, socio-economic and other features of the given administrative-territorial unit (villages, settlements, cities). The same section gives a brief description of the relevant territorial community, in particular, whether it consists solely of citizens of Ukraine who reside within a given village, settlement, city, or residents of several settlements who have voluntarily united into one territorial community, including without preserving the independence of each of them (on the principle of municipal unitarism) or with maintaining such independence (on the principle of municipal federalism).

The second section of «Territory» gives a detailed description of the respective administrative and territorial unit. If it is a separate village, town, city, then its current and historical names are defined, year of establishment, division into districts, micro-districts and other micro-structures, an exact description of the surrounding lands is under the jurisdiction of the respective territorial community and local self-government bodies, the territory of the village is indicated, settlements, cities as an administrative unit.

In the third section «Material and financial base», are defined:

first, the communal property of a given territorial community: land and other natural resources; enterprises, institutions, organizations; housing and non-residential premises; the share of this community in communal property created or merged under contracts with other territorial communities; share in the capital of business structures; local budget revenues (indicating number, size, category, bank value, source of revenue, etc.).

secondly, the specificities of the legal regime of individual communal property are determined, including the list of those objects that are exclusively relevant to the collective needs of a given territorial community and are not subject to alienation without a decision, for example, by the territorial community itself.

The fourth section “Bodies and officials of local self-government” defines the features of the system of local self-government bodies, which are determined by the peculiarities of the given territorial community: the quantitative and qualitative composition of the council, the system of

its standing commissions; quantitative and qualitative composition of the executive committee, departments, departments, other executive bodies of the council; peculiarities of the status of mayor, mayor, mayor, if any.

The fifth section of «Self-Organizing Bodies» defines the system and nature (committees, councils, etc.) of these bodies, the nature of those powers delegated by this body, the list of communal property transferred to the management of these bodies, as well as the amount of funds that are sent to them from the local budget.

In the sixth section «Forms of direct implementation of local self-government by the territorial community and its members» on the basis of the current legislation defines a system of such forms, due to the peculiarities of this territorial community (local referendums, consultative polls, general meetings of citizens at their place of residence, local initiatives, public hearings, community other non-prohibited forms). Regarding the peculiarities of holding local referenda, advisory polls, public hearings, the charter could specify the list of issues that should be subject to the above mentioned forms.

In the last section, Final and Final Provisions, other issues not covered by the previous sections could be envisaged: the symbolism of this territorial community; membership of the relevant council in associations or other voluntary local self-government associations, indicating the amount of annual membership contributions to these associations; the nature of the powers delegated respectively by the village, settlement, city councils to the district, regional council and under what conditions it was done; other issues¹⁷.

The acts of bodies and officials of local self-government on the grounds of their inconsistency with the Constitution or the laws of Ukraine are declared illegal in court.

The acts of bodies and officials of local self-government are brought to the attention of the population. At the request of citizens, they may be issued a copy of the relevant acts of local self-government bodies and officials.

CONCLUSIONS

Therefore, local government is a separate form of exercise of public authority. The signs of local self-government in Ukraine are:

¹⁷ Ryndyuk V.I. (2009) *Normotvorcha diyal'nist'* [Rule-making activity] Kyiv: KNEU. – P. 107. (in Ukrainian).

local self-government is structured in the system of public authority in the form of public-self-government in the process of the state's awareness of the presence of other, non-state interests – interests of local character, which are not identical to the state, but not contrary to them;

local self-government is characterized by a high level of democracy and its subject is a territorial community consisting of residents who are permanently resident within a certain territory;

The main purpose of structuring local self-government in the public authority system is to address local issues most effectively.

Many social relations, in view of their content, local conditions and peculiarities, require the publication of normative-legal acts of local self-government in order to specify the norms of legislation.

Implementation of normative competence of local self-government bodies is carried out by making normative decisions. Regulatory decisions can be made both directly by the territorial community through a local referendum and through representative bodies of local self-government (village, settlement, city, district and regional councils).

The system of representative bodies of local self-government consists of: village, settlement, city councils; district, regional councils. Councils, their executive committees and standing committees, within the limits of their powers, adopt regulations in the form of decisions. Rulemaking competence of village, city mayors, heads of rayon in the city, rayon, regional council is realized in the form of orders.

SUMMARY

The article deals with the legal status of local self-government bodies as law-makers. It is noted that local self-government is a separate form of exercise of public authority. The features of local self-government in Ukraine are presented, in particular: local self-government is structured in the system of public authority in the form of public self-government; is characterized by a high level of democracy, and its subject is a territorial community consisting of residents who are permanently resident within a certain territory; The main goal of local government is to address local issues most effectively.

The author concludes that many public relations, in view of their content, local conditions and features, require the publication of normative legal acts of local self-government in order to specify the norms of legislation.

It is emphasized that the legislative-making competence of local self-government bodies is realized through the adoption of regulatory

decisions. Regulatory decisions can be made both directly by the territorial community through a local referendum and through representative bodies of local self-government (village, settlement, city, district and regional councils).

Representative bodies of local self-government constitute a system of two levels: village, town, city councils; district, regional councils. Councils, their executive committees and standing committees, within the limits of their powers, adopt regulations in the form of decisions. Rulemaking competence of village, city mayors, heads of rayon in the city, rayon, regional council is realized in the form of orders.

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EUROPEAN INTEGRATION CRIMINAL LAW POLICY AND ACHIEVEMENT OF FREEDOM AND SECURITY

Liliya Timofeyeva

Introduction. One of the main tasks of Criminal Law is to ensure the human security and freedom. Some issues related to security and freedom in Criminal Law were researched by foreign and domestic scientists, including: P.A. Albrecht, V.K. Grischuk, M.W. Karchevskiy, N. Christie, N.A. Orlovskaya, A. Prince, N.A. Savinova, V.O. Tulyakov, S.O. Filippov, V.V. Shablystiy and others. However, in the context of European integration, as well as taking into account the changes in the reality of the perception of this task and the Criminal Law itself, it is different among scientists and scholars, as well as subjects of Criminal Law relations. Due to differences in perception, the effectiveness of Criminal Law is reduced. Contradictions between the attainment of individual liberty and the security of the state, in particular, can be traced to issues related to migration processes, transborder crimes, etc.

1. Approaching European humanistic values

The implementation of the Association Agreement between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, has led to a set of significant regulatory and institutional changes in Ukraine.

European integration trends are embodied both in general terms and in individual Criminal Law institutions.

The Criminal Law of Ukraine should take into account the peculiarities of the impact of global and regional imbalances and conflicts on the rule of law, as well as the urgent need to protect people's security on the European continent.

The EU Treaty uses two terms: approximation and harmonization. *The approximation* implies achieving a certain level of conformity of the national legal system with the EU legal system; instead, *harmonization* is the main means of legal integration, approximation of the legal systems of the EU Member States. Harmonization of Ukrainian and EU

legislation provides for harmonization of national legal norms with European norms, standards and principles¹.

The state reserves the choice to implement international or European standards in national legislation or not. It is another matter that the implementation of certain provisions is a condition for accession to the EU. It should be noted that Ukraine has already taken some steps towards such an approximation, but there remain many unresolved issues, including methodological ones.

First of all, it is necessary to get closer to European values and principles.

It is very important that the Association Agreement emphasizes that Ukraine and the European Union share common values, including: respect for democratic principles, the rule of law, good governance, human rights and fundamental freedoms, including the rights of persons belonging to national minorities, non-discrimination against persons belonging to minorities, and respect for diversity, human dignity and commitment to the principles of a free market economy.

All of these values are humanistic and fit the model of the humanistic paradigm².

The values are also reflected in other Council of Europe, EU and international instruments, the Convention for the Protection of Human Rights and Fundamental Freedoms, ECtHR decisions and the like. It (values) are really common and not only for the EU and Ukraine, but also for many countries of the world, because they are human. Another thing is that it is not always an effective mechanism for their implementation.

Respect for democratic principles, human rights and fundamental freedoms, as defined in particular in the Helsinki Final Act of the 1975 Security and Cooperation Council in Europe and the Paris Charter for a New Europe of 1990, as well as in other relevant human rights instruments, among them the UN Universal Declaration of Human

¹ Trykhlіb, K.O. (2014). Harmonizatsiia zakonodavstva Ukrainy i zakonodavstva YeS: nablyzhennia zahalnopravovoi terminolohii [Harmonization of Ukrainian and EU legislation: approximation of common law terminology]. Extended abstract of candidate's thesis. Kharkiv: NLU. Y. the Wise. P. 8-9. [in Ukrainian].

² Timofeyeva, L.Yu. (2019). Euro-integration and Criminal Law policy. Proceedings of the Int. sci. conf.: ECHR's Jurisprudence in Digital Era. (Pp. 93-93). Odesa: Publishing house "Helvetica". [in English]; Timofeyeva, L.Yu. (2018). Humanistychna paradyhma kryminal'noho prava Ukrainy. [Humanistic paradigm of Criminal Law of Ukraine]. Extended abstract of candidate's thesis. Odesa: NU OLA. [in Ukrainian].

Rights 1948 and the Council of Europe Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, as well as respect for the rule of law, must form the basis of the Parties' domestic and foreign policies and are fundamental to the cries of the Agreement. Ensuring respect for the principles of sovereignty and territorial integrity, inviolability of borders and independence, as well as counteracting the proliferation of weapons of mass destruction, related materials and their means of delivery, are also essential elements of the Agreement (Article 2 of the Association Agreement).

The rule of law, good governance, the fight against corruption, the fight against various forms of transnational organized crime and terrorism, the promotion of sustainable development and effective multilateralism are the main principles for strengthening relations between the Parties (Article 3).

The main components of the rule of law as one of the European principles are legality, legal certainty, and the prohibition of arbitrariness, access to independent and impartial justice, respect for human rights, non-discrimination and equality.

2. Euro integration humanistic directions and providing freedom and security

The Association Agreement sets out a number of important areas that have a humanistic content, directly related to criminal policy, and which Ukraine seeks to implement and approximate to EU law. Among them are: combating illegal migration and trafficking in human beings, organized crime, terrorism, environmental protection, strengthening interpersonal contacts³. These areas are highlighted in vain because they

³ The Treaty of Lisbon under Art. 83.1 states that «The European Parliament and the Council may, by means of directives adopted in accordance with the ordinary legislative procedure, lay down minimum rules governing the definition of criminal offenses and sanctions for particularly serious offenses with a cross-border dimension, the nature or impact of such offenses or of special necessity to counter them on a common basis. These areas of crime are: terrorism, trafficking in human beings and sexual exploitation of women and children, drug trafficking, drug trafficking, money laundering, corruption, counterfeiting, cybercrime and organized crime. «The Stockholm Program widens» extends these ideas to the harmonization of EU criminal law disciplinary practice. / Tuliakov, V.O. (2018). «Eurocrimpol» project: methodology of analysis. Proceedings from the Conference: Kryminalne pravo v umovakh hlobalizatsii: materialy Mizhnar. nauk.-prakt. konf. – Criminal Law in the context of globalization: materials Intern. Research Practice Conf., (Pp. 63-65). Odesa: NU OLA. P. 65 [in English]; Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. Delivering an area of freedom, security and justice for Europe's citizens. Action Plan implementing the Stockholm Programme – COM(2010)171 final, 20 April 2010. (2010, April 20). [in English].

cause the greatest damage not only at the national but also at the international level.

Recommendations formulated in the Strategic Guidelines for Legislative and Operational Planning in the Area of Freedom, Security and Justice, adopted by the European Council of 27 June 2014, and the Strategic Guidelines for Justice and Home Affairs cover aspects such as border control, migration and asylum policies, police and judicial cooperation.

Areas such as migration and asylum, the fight against terrorism and the protection of personal data, which have a global dimension, must be addressed both within the EU and in relations with third countries.

On the issue of *illegal migration*, strategic recommendations call for action aimed at overcoming the root causes of this phenomenon and overcoming migration flows. In both of these aspects, cooperation with the countries of origin and transit of migrants plays a fundamental role. This cooperation on migration is defined in the global approach to migration and mobility, within the EU for dialogue and cooperation with non-EU countries of origin, transit and destination.

The main tasks of the European Council on illegal migration were: to strengthen and expand regional protection programs, to compel smuggling and human trafficking, to implement an effective common return policy.

Addressing *human trafficking* is part of the United Nations Sustainable Development Program. According to Art. 3 of the Protocol to Prevent, Suppress and Punish Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 15 November 2000: «*Trafficking in human beings*» means committed for the purpose of exploitation of the recruitment, transportation, transfer, concealment or receipt of persons by threat of force or its use or other forms of coercion, abduction, fraud, abuse of power or vulnerability, or by bribery, in the form of payments or benefits, to obtain the consent of the person controlling the other. Exploitation shall include, at a minimum, the exploitation of the prostitution of others or other forms of sexual exploitation, forced labor or services, slavery or customs similar to slavery, servitude or removal of organs.

According to the Global Trafficking in Persons Report 2018⁴ trafficking in human beings for sexual exploitation remains the most prominent form.

Countries around the world are finding and reporting more victims and condemning more traffickers. Although the number of reporting countries has not increased significantly, the overall number of casualties in each country is increasing. In previous years, for which UNODC collected these data, the trend of the average number of identified and reported victims per country has fluctuated previously, but has increased steadily over the last few years.

As stated in the Preamble to the Protocol, States Parties, stating that a comprehensive international approach in countries of origin, transit and destination, including preventive measures, is needed to take effective measures to prevent and combat trafficking in human beings, especially women and children. Such trafficking, the punishment of persons engaged in it, and the protection of victims of such trafficking, including through the protection of their internationally recognized human rights.

In Chapter III of the *Council of Europe Convention on Action against Trafficking in Human Beings* from May 16, 2005 there are certain «step-by-step» interrelated measures, in particular: prevention of trafficking in human beings (Article 5), measures to discourage demand (Article 6), border measures (Article 7), security and control of documents (Article 8), legality and validity of documents (Article 9). In particular, Art. 7 of the Convention «Border measure» indicated that would without prejudice to international commitments on free movement of persons Parties shall strengthen, to the extent possible, such border controls as may be necessary to prevent and detect trafficking.

On the plus side, these measures are not separate from each other but represent a specific system.

In accordance with the decision «On Prevention of Trafficking in Human Beings» No. 6/17, December 8, 2017, it is necessary to promote

⁴ The institutions, which are engaged in trafficking human beings, should have the opportunity to define the various and often complex contexts and realities, in which there is sexual exploitation, with the aim of responding to physical, psychological, social and economic needs of the victims. Trafficking in children – especially girls – remains a key issue. The implementation of measures to combat child trafficking for children may be more effective if they are included in quality education programs for all, especially in the context of increased risk of trafficking in human beings, such as refugee camps. / (2018). Hlobalnyi zvit pro torhivliu liudmy. [Global Trafficking in Persons Report]. Retrieved from <https://reliefweb.int/report/world/global-report-trafficking-persons-2018>. [in Ukrainian].

the implementation of multi-agency, cross-sectoral and multinational programs aimed at preventing trafficking in human beings in all its forms, with particular emphasis on the factors that affect people to human trafficking; take appropriate measures to effectively combat trafficking in human beings through the development of harmonized procedures and training courses, in particular to identify and protect victims of trafficking in human beings, including relevant authorities, civil society organizations, medical and social workers, and others who may have first contact with victims; implement a gender-sensitive approach that fully respects human rights and fundamental freedoms in all preventive and supportive measures⁵.

This mechanism seems rational, because if it does not work a preventative measure, you can go to corrective or alternative. In addition, it combines both purely criminal and criminal proceedings, as well as civil.

Domestic and foreign scientists (V.O. Tuliakov, M.I. Khavroniuk, I.M. Gorbacheva, O.V. Kozachenko) also turn their attention to the multi-track system of criminal-law influence, but in practice it is not yet embodied in full.

With the adoption of the Criminal Code in 2001, it became possible to prosecute trafficking in human beings. According to Part 1 of Art. 149 of the Criminal Code (as amended by the Law of Ukraine «On Amendments to Article 149 of the Criminal Code of Ukraine on Compliance with International Standards» No. 2539-VIII of September 6, 2018) trafficking in human beings, as well as the recruitment, transfer, transfer or getting a person committed for the purpose of exploitation, using coercion, abduction, deception, blackmail, material or other dependence of the victim, his vulnerable condition or bribery of a third person who controls the victim to obtain consent for his exploitation.

However, despite the possibility of bringing persons involved in trafficking in persons to criminal liability, as well as the corresponding changes aimed at bringing in compliance with Art. 149 of the Criminal Code with international standards, counteraction and prevention of such acts, ensuring protection of victims of human trafficking remains relevant.

⁵Strengthening efforts to prevent trafficking in human beings decision No. 6/17, 8 December 2017 (2017, December 8). Retrieved from <https://www.osce.org/chairmanship/362096?download=true>. [in English].

In international norms, the issue of victims of trafficking in human beings is given considerable attention. According to Art. 6 of the Protocol on the Prevention and Suppression of, and Punishment for, Trafficking in Persons, Especially Women and Children, supplementing the UN Convention against Transnational Organized Crime of 15 November 2000 provides for measures to assist and protect *victims of trafficking in human beings*.

In summary, the following can be summarized as follows: protection of privacy, including, inter alia, by ensuring the confidential nature of trade-related proceedings; providing information on appropriate judicial and administrative proceedings; assistance that does not prejudice the rights of the defense and allows them to express and consider their thoughts and fears at the appropriate stages of criminal proceedings against the perpetrators; physical, psychological and social rehabilitation of victims of trafficking in human beings (in particular, proper roofing, advisory assistance and information, especially regarding their legal rights, language, clear victims of human trafficking, medical, psychological and material assistance, employment, education and vocational training opportunities).

In addition, the age, gender and special needs of victims of trafficking in human beings, including the special needs of children, including proper roofing, education and care, should be taken into account, as well as a real mechanism to compensate victims of trafficking for harm.

According to Art. 9 of the Protocol, with a view to preventing trafficking in human beings and protecting victims of trafficking in human beings, especially women and children, from the state party's revitalization, elaborate and adopt comprehensive policies, programs and other measures; seek to take measures such as research, information campaigns, including in the media, as well as socio-economic initiatives aimed at preventing and combating trafficking in human beings; take or improve, including through bilateral or multilateral co-operation, measures aimed at mitigating the effects of trafficking-related factors such as poverty, low development and lack of equal opportunities; take or improve legislative or other measures, such as in the fields of education, culture or the social field, including through bilateral and multilateral cooperation aimed at counteracting the demand for exploitation of people, especially women and children, in all its forms, leads to human trafficking.

Also note the provisions of Directive 2011/36 / EC of 5 April 2011 of the European Parliament and of the Council on the prevention and

suppression of trafficking in human beings and the protection of its victims; Directive 2017/541 of 15 March 2017 of the European Parliament and of the Council on the Suppression of Terrorism; Council Framework Decision 2008/913 / JHA of 28 November 2008 on combating certain forms and manifestations of racism and xenophobia and others.

It should be noted that organized crime and terrorism are often linked to human trafficking.

Strategic guidelines for justice and home affairs include: mobilizing all instruments of judicial and police cooperation, strengthening the role of Europol and Euro just in the fight *against organized crime and terrorism*⁶. It should also support: reviewing the internal security strategy, developing a comprehensive approach to cyber security and cybercrime, preventing radicalization and extremism.

Terrorism is increasingly functioning as a business that is dependent on criminal organizations and fueled by corruption. Terrorists are diversifying their range of illegal products. Illicit trafficking in weapons, persons, drugs, smuggling and falsification of cigarettes and alcohol, falsification of drugs, smuggling of antiquities and natural resources (gold, precious metals, stones, minerals, wildlife products) are used to profit and finance acts of terror. coal and oil). Terrorists as well as organized criminals need professional services: expert facilitators allow terrorists to participate in cost-benefit analysis, control supplies, seek strategic alliances⁷.

Anti-corruption. The risk of corruption is also due to the impact on other crimes of the European integration area (terrorism, organized crime, trafficking in human beings, illegal migration, etc.).

Corruption is the basis for terrorist offenses, as it undermines governance, the economy, health, the social sphere, order and sustainable development in all regions of the world. It deligitizes public services by facilitating crime. This is precisely what experts say about the need for a unified international approach to combating corruption.

⁶ Strengthening efforts to prevent trafficking in human beings decision No. 6/17, 8 December 2017 (2017, December 8). Retrieved from <https://www.osce.org/chairmanship/362096?download=true>. [in English].

⁷ Nikolenko, R.O. (2019). Kryminalno-pravova protydia zlovzhvanniu povnovazhenniamy osobamy, yaki nadaiut publichni posluhy [Criminal legal counteraction to abuse of power by persons providing public services]. Candidate's thesis. Odesa: NU OLA. P. 23-24. [in Ukrainian].

Trafficking in human beings, trafficking in human beings, arms and drugs trafficking, exploitation of prostitution, illegal migration, trafficking in cultural heritage, encroachment on environmental security are supranational and impossible without arranging and using a transnational network of persons specializing in the provision of specific or special services. In the exercise of power over and above the public interest. According to experts from the UN Commission on Crime Prevention and Drug Trafficking, terrorists, as well as organized criminals, are involved in corrupt operations with government officials for their own survival, as they depend on arms smuggling and the shadow market for conspiracy officials.

Therefore, countering corruption offenses should be systemic. But a strategy whereby government officials are substantially restricted in their right to be justly punished leads to a shadowing of relations and an increase in non-institutional services and criminal practices. For example, it is advisable to introduce a number of restrictions on persons who have committed a corruption crime. However, it is not in a way that contradicts the CC of Ukraine⁸. However, the adoption of a number of anti-corruption laws does not contribute to such systematically.

3. European integration and challenges of the information society

European integration trends are also largely dependent on the opportunities and challenges of the information society. The rapid development of technological processes in an information society environment has also led to criminal attacks on the security of this field. Issues related to the Internet of Things, the mass spread of spam, issues of the rights, responsibilities and responsibilities of robots, artificial intelligence, and the spread of human rights abuses using information technology, including the commission of crimes, were updated.

The EU is responding quickly enough to changing public relations. On 13 February 2019, the Committee of Ministers of the Council of Europe adopted a *Declaration on the Manipulative Capabilities of Algorithmic Processes*, which states that Member States should ensure the rights and freedoms enshrined in the Convention for the Protection of Human Rights and Fundamental Freedoms (ETS No. 5) under their

⁸ Nikolenko, R.O. (2019). Kryminalno-pravova protydiia zlovzhvanniu povnovazhenniamy osobamy, yaki nadaiut publichni posluhy [Criminal legal counteraction to abuse of power by persons providing public services]. Candidate's thesis. Odesa: NU OLA. P. 28. [in Ukrainian].

jurisdiction, as well as offline and online, in the face of unprecedented political, economic and cultural globalization⁹.

It should also be noted that the provisions set out in the Declaration are justified by the fact that the Council of the Member States of Europe has undertaken to build a society based on the values of democracy, human rights and the rule of law. This commitment remains and must be fulfilled through a long process of transformation of society, fueled by technological advances.

It should be borne in mind that the use of Internet of Things technologies creates both positive points and significant risks, in particular in terms of the development of the humanistic paradigm.

«Internet of Things» means complexes and systems consisting of sensors, microprocessors, actuators, local and / or distributed computing resources and software, artificial intelligence applications, cloud computing, data transmission between which is carried out via the Internet, and intended for rendering services and carrying out works in the interests of subjects (legal or natural persons). As notes O.A. Baranov, «society is not in a position to make informed decisions, because the modern process of their adoption is characterized by the fact that it is necessary to take into account significant amounts of information (data); a large number of actors and objects involved in the decision-making process; in most cases, it must be resolved in real or for a limited time. The output is seen in the application of Internet of Things technologies because they allow you to make and execute decisions in real time based on the use of mathematical algorithms, including algorithms of artificial intelligence, the collection and processing of vast amounts of data, the identification of all objects that take participation in processes»¹⁰.

In today's context, it is really impossible for such a person to analyze such a large amount of information, or not to be able to do so in such a short period of time. Using Big Data (making decisions based on too

⁹ Declaration by the Committee of Ministers on the manipulative capabilities of algorithmic processes (Adopted by the Committee of Ministers on 13 February 2019 at the 1337th meeting of the Ministers' Deputies). (2019, February 13). Retrieved from https://search.coe.int/cm/pages/result_details.aspx?objectId=090000168092dd4b. [in English].

¹⁰ Baranov, O.A. (2016). «Internet rechei» yak pravovyi termin [«Internet of Things» as a legal term]. Yurydychna Ukraina – Legal Ukraine, 5-6, 96-103. [in Ukrainian].

much information)¹¹ and Internet of Things technologies could help a person.

For example, the processing of property declarations in the short term and taking into account many factors for analysis while correlating this information with other sources (in particular, through the «you control» capabilities) would contribute to the timely detection of corruption, corruption risks and accordingly to counteraction and prevention corruption. That is, the Internet of Things would help the state fulfill its function of ensuring its own security and that of the society as a whole.

The state is now ready to cede to the fundamental humanistic rights, freedom and security of its citizens, morality for the sake of security from certain crimes, in particularly grave crimes with a cross-border dimension. These include, for example, terrorism, trafficking in human beings, sexual exploitation of women and children, drug and weapons trafficking, money laundering and counterfeiting, corruption, cybercrime and organized crime.

To prevent crime, the state at the level of the law allows derogating from absolute prohibitions of encroachment on property, health and even human life, as well as privacy. The state justifies such steps by the absence of other means to counteract crime. At the same time, it should be remembered that such retreats are allowed in order to protect human rights and freedoms, and not vice versa.

Although the latest TARICCO II, ECJ 2017, TSEZAR AND OTHERS v. UKRAINE, ECHR 2018, demonstrate the collective priority over the individual (European and national values) and the authority to punish their citizens.

However, due to the processing and availability of big data, including «big private data», there are other issues related to the security of a particular person and their private information.

For example, in modern China, there is a system of disclosure of private information in public access, according to which the «rating of the person» is formed and taken into account when hiring, etc. In Ukraine, as well (though not officially) for individual positions, the person is checked, including through social networks and media (for

¹¹ Karchevsky, M.V. (2016). *Mozhlyvosti Big Data ta kryminalno-pravova komunikatsiia* [Big Data Opportunities and Criminal Communications]. Proceedings from the Conference: *Polityka v sferi borotby zi zlochynnistiu: Mizhnarodna naukovo-praktychna konferentsiia – Crime Policy: International Scientific and Practical Conference* (Pp. 52-58). Ivano-Frankivsk. [in Ukrainian].

example, to work in the Anti-Corruption Court). Regular users of the Internet are already actively using programs to identify a person's location using a mobile phone, applications that allow you to view contacts in another person's mobile phone, etc. All this breaks privacy. But how much are we ready to give in to our freedom and privacy in the future for the sake of state security.

When it comes to the use of Internet of Things technologies, they carry as positive aspects related to ensuring the security of the state, but carry the risks of not being able to control their own lives by citizens of the state. It is unknown who and for what purpose personal data will be used, how and under what circumstances it will be used against people¹².

Proponents of the use of «big data» including to counter the crime refer to the fact that an honest human has nothing to hide. But the question is not so much whether the person has something to hide, but whether she has the choice to share her personal information with the public, whether she can control the use of her data in the future (who watched, for what purpose, etc.), as well as who will be responsible for the misuse of such information, including the commission of crimes against that person and the manipulation of personal data about which he or she has shared access.

The technological capabilities of the Internet make it easier to commit crimes. In particular, corruption practices make it easier to pay for corruption services through electronic money (Bit coin, Satoshi, Ethereum, etc.)¹³. Social networks allow you to register not under your own name, etc. In addition, Internet capabilities have simplified the spread of pornography, including child pornography, the use of prostitution services, prostitution has emerged online (the so-called webcam model), facilitated the sale and sale of organs, trafficking in

¹² For example, criminal proceedings are strictly regulated by law, including procedures for the taking of evidence. If a person collects evidence in contravention of the procedure prescribed by law, they cannot be admitted with proper and admissible evidence and accordingly used in criminal proceedings. Although now, the correspondence on Facebook and other social networks, photos, account information and more are provided as evidence. In addition, you should pay attention to video creation technologies, photoshop and more.

¹³ To use electronic money for perpetrators of crime is convenient and advantageous for many reasons. Firstly, they are not currently recognized as the national currency of Ukraine, and accordingly, they are not taxable; the procedure for their production and legitimating has not been approved, therefore it is impossible to prosecute for the illicit manufacture of such money. Second, it is not possible to personalize the payer for third parties. However, the movement of transactions is seen very well.

human beings and the like. That is, in order to commit cross-border crimes, you do not even need to cross the border now.

However, it should also be noted that information technology is also of great benefit, in particular from a humanistic paradigm perspective, information technology facilitates the retrieval and processing of information that contributes to crime prevention.

Therefore, greater attention should be paid to regulating these issues. In particular, refer to European Criminal Law sources (for example, the 2016/679 Shared Data Protection Rules, applicable from 25 May 2018, which include specific rules for the control of personal data of individuals to prevent, investigate, detect or prosecute criminal offenses, or enforcement of criminal penalties), Directive 2013/40 / EC of 12 August 2013 of the European Parliament and of the Council on the fight against information systems.

Strengthening interpersonal contacts. However, as one legal regulation has repeatedly stated, it is not possible to effectively influence the commission of crimes, especially of a supranational nature. This requires other mechanisms. Such mechanisms can be negotiation, dialogue, mediation practices that contribute to the peaceful settlement of disputes.

Goal 16 of the United Nations on Sustainable Development from 2016 to 2030 is «Promoting a Peaceful and Open Society for Sustainable Development, Ensuring Access to Justice for All», which fully complies with the humanistic planning concept that takes everyone's mind into account.

According to Art. 33-1 Chapter VI of the UN Charter (Peaceful Settlement of Disputes)¹⁴ the parties involved in any dispute which may continue to threaten the maintenance of international peace and security should, first of all, seek to resolve the dispute through negotiation, mediation, conciliation, arbitration, litigation, referral to regional bodies or agreements or other by peaceful means of their choice. The Security Council, when it considers it necessary, shall require the parties to resolve their dispute by such means. Without prejudice to the provisions of Articles 33-37, the Security Council shall be empowered if all parties involved in any dispute so request to make recommendations to the parties with a view to the amicable settlement of this dispute (Article 38).

¹⁴ The Charter of the United Nations and the Charter of the International Court of Justice. (N.d). Retrieved from <https://treaties.un.org/doc/publication/ctc/uncharter.pdf>. [in English].

Dialogue practices can also contribute to the compensation and restitution of crime victims.

In addition, as outlined in the Preamble to Recommendation No. R (99) 19 of the Committee of Ministers of the Council of Europe to Member States on criminal mediation of 15 September 1999, *mediation* is able to increase awareness of the important role of the individual and community in crime prevention and development related conflicts, thereby contributing to the more constructive and less repressive consequences of criminal justice.

The case law of the European Court of Human Rights imposes human rights standards. Effective protection of human rights and freedoms is an integral part of a legal, democratic state. Human rights are understood as universal, inalienable and equal for each person the basic capabilities necessary for their existence and development, which are defined and guaranteed by the state in the scope of international standards. According to the Law on the Enforcement of Judgments and the Practice of the European Court of Human Rights, the courts of Ukraine use the ECtHR and it is a source of law.

In the changing modern world, it is necessary to make a humanistic paradigm an effective model of transformation of legislation, criminal policy, law enforcement practices taking into account European integration tendencies.

It is necessary to establish the directions of Criminal Law policy and specific models of Criminal Law providing for agreements on association of EU member states, as well as their doctrinal basis.

The new structure of Criminal Law and its theoretical basis must be analyzed and formulated, focusing on European Criminal Law policy (EU rules affecting Ukrainian law, judicial and preventive practice). In such a situation, the strategic guidelines, tasks, directions and goals of the criminal impact on crime against the basics of the economy, migration order, environmental security, cyber security, as well as the criminal justice provision of anticorruption security of economic activity and the means to achieve them need to be revised; sources and procedural elements and instruments of European Criminal Law¹⁵.

¹⁵ Tuliakov, V.O. (2018). «Eurocrimpol» project: methodology of analysis. Proceedings from the Conference: Kryminalne pravo v umovakh hlobalizatsii: materialy Mizhnar. nauk.-prakt. konf. – Criminal Law in the context of globalization: materials Intern. Research Practice Conf., (Pp. 63-65). Odesa: NU OLA [in English]. P. 65.

CONCLUSION

Criminal Law should help to meet the human natural needs, in particular in security and freedom. When a person feels safe, he or she is open to development, to interaction with others (including the state). In the context of European integration, it is important for state to form a legitimate Criminal Law, that is, one that is perceived and accepted by the citizens of a state that is geared to the needs of human beings. It is desirable that the state take care of the benefits of choosing right-wing behavior (so that such a choice does not contradict the natural needs of the individual, including privacy).

The Criminal Code of the future should be guided by current conditions and opportunities (in particular, the capabilities of the Internet of Things), as well as the actual needs of modern people. It seems that we should start with agreements between the state and civil society about their list, the objectives of the criminal legislation and the limits of its intervention, the list of principles of lawmaking and enforcement. Then, formulate new legislation in accordance with the needs of the individual, society and state, and bring into force the current legislation.

In the context of European integration, in addition to the classic instruments of counteraction to crime (reaction to crime) (for crime – punishment), it is advisable to develop restorative, dialogical practices, practices of nonviolent communication.

SUMMARY

One of the main tasks of Criminal Law is to ensure the human security and freedom. Contradictions between the attainment of individual liberty and the security of the state, in particular, can be traced to issues related to migration processes, transborder crimes, etc.

The implementation of the Association Agreement between Ukraine, on the one part, and the European Union, the European Atomic Energy Community and their member states have resulted in a set of significant changes in Ukraine. European integration trends are implemented both in general terms and in separate institutes of Criminal Law (in particular, the specifics of criminal liability).

The Association Agreement contains several important areas of humanistic content that are directly related to the criminal law policy and which Ukraine seeks to implement and to become closer to the EU legislation. Among them, in particular, – counteracting illegal migration and trafficking in human beings, organized crime, terrorism, environmental protection, strengthening of people-to-people contacts.

It is important that the acts of the European Union and the Council of Europe not only declare certain principles but also provide for specific mechanisms for their implementation, as well as demonstrate a response to their violation.

The EU shows a quick reaction to change social relations. For example, modernity is characterized by the rapid development of information technology, the Internet of Things, and, accordingly, the spread of human rights violations, using information technologies, including the commit of crimes.

Strategic guidelines, tasks, directions and objectives of criminal legal influence on the crime against the bases of the economy, the order of migration, environmental security, cyber security, as well as criminal-law support of anticorruption security of economic activity and means of their achievement are required; sources, as well as procedural elements and instruments of European criminal law. In particular, it is necessary to harmonize Criminal Law with the practice of the ECtHR.

Criminal Law should contribute to the protection of human natural needs, in particular in the area of security and freedom.

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CRIMINAL ACTIVITY THAT ENCROACHES ON THE INTEGRITY OF THE STATE BORDER OF UKRAINE

Liudmyla Litvin

INTRODUCTION

Since effective date of independence, Ukraine has faced new threats caused by the newly formed and existing in 1991 state borders. It is a threat to the territorial integrity and sovereignty of Ukraine, the terrorist threat, the growth of transnational and organized crime and illegal migration, smuggling of weapons, explosives and drugs, in the context of the present military conflict on the territory of the state.

An integral attribute and spatial basis of existence of the state is its territory, the boundaries of which are determined by the state border, and within which it has sovereignty and territorial supremacy. Today, this fundamental basis in relation to Ukraine as a state has been grossly violated by the Russian Federation, which inflicts aggressive actions with the aim of destroying our state and seizing its territory.

Therefore, the issue of protection and defense of the state border without exaggeration is more acute and urgent than ever and refers both to the state as a whole and to its individual institutions.

1. Types of encroachments on the integrity of the state border

In 1991, the State Border Guard Service of Ukraine detained 885 border violators, of which 148 were irregular migrants, then in 1994 were already detained 20529 border violators, of which 11444 irregular migrants (Kabačynsky, 2006)¹.

Since 1991, border guards revealed on the border of Ukraine about 330 thousand illegal migrants, some of whom were sent out from the country. From this number 123 thousand illegal migrants have been detained for illegal border crossing. Another 180,000 people, who were considered potential migrants, were denied entry.

¹ Kabačynsky.I. (2006) Na varti rubezhiv Batkivshchyny: Prykordonni viyska Ukrainy v 1991-2003 rokah [Guarding the borders of the homeland: Border Guard Troops of Ukraine in 1991-2003]. Khmelnytsky: Publication of National Academy of State Border Guard Service of Ukraine, B. Khmelnytsky. 564 pp. (in Ukrainian)

In 2017, the National Police of Ukraine (NPU), together with the Security Service of Ukraine (SSU) and the State Border Guard Service of Ukraine (SBGSU), terminated the activity of two organized criminal groups involved in illegal activity in the field of illegal migration, which were revealed in the Volyn and Kharkiv regions. Each of these groups consisted of three people. In 2017, law enforcement agencies identified 159 criminal offenses under article 332 of the Criminal Code of Ukraine (Illegal transportation of persons across the state border) (in 2016 – 154), 97 persons who were involved in this illegal activity were identified (56 in 2016). The state migration service of Ukraine (SMSU) identified 9,678 illegal migrants in 2017 (6,390 in 2016, that is the increase is 51.5 %). There were taken 9,264 decisions on forced return regarding the illegal migrants, of which 4,416 and 376 – on forced return, of which 214 were performed. The SBGSU in 2017 detected three thousand cases of irregular migration and 3.8 thousand people. In January 2018, the SBGSU of Ukraine sent out 93 illegal migrants (2017-863 people). According to the SBGSU in 2017 compared to the previous year, the number of illegal migrants increased by 26 % (Besida, 2018)².

In 2018, 3270 illegal migrants were detained by the SBGSU. At the same time, the number of detainees for illegal border crossing increased by 26% and is 1130 people. Besides, if in 2017 678 illegal migrants were detained at the EU border for illegal border crossing, in 2018 were detected 24% more (842) of them. Mostly they tried to get to the EU countries across the border with Slovakia – 405 people and Poland – 252 people, as well as with Hungary – 97 people and Romania – 88 people. Another significant part of the detained illegal migrants, and this is more than 2100 people, violated the rules of stay in Ukraine. Among them are the citizens of Moldova (1372), Russia (141), Bulgaria (97), Azerbaijan (70), Vietnam (52) and Turkey (50), who most often violated Ukrainian legislation. Besides, during border control at the border cross points, employees of the SBGSU found and denied entry to the territory of Ukraine almost 4650 potential illegal migrants.

The main ways of smuggling illegal migrants through the border crossing point are by using of valid passport documents along with invitations from fake individuals or non-existing enterprises, fake invitations from educational institutions, as well as foreign and fake

² Besida D. (2018) Migrantska kriza v YeS ta yii vplyv na bezpekovu sytuatsiiu v Ukraini [The migration crisis in the EU and its impact on the security situation in Ukraine]. *Entrepreneurship, economy and law*. no. 12. Pp. 299-303.

passports, including European countries, permanent (temporary) residence permit in Ukraine, and during transit through Ukraine – the use of a double package of passport documents. At the same time, beyond the border crossing points the illegal migrants smuggling is performed by the organizers and usually in small groups (3-4 people) on their own, when migrants are «equipped» with mobile devices and GPS navigators, or accompanied by accomplices from among the local residents of the border areas or representatives of foreign diasporas.

At the same time, there is a tendency to increase the number of groups of illegal migrants to 10 – 20 people. The general trends of threats of illegal migration in 2017 was characterized by a practical cessation of functioning of channels of transportation of illegal migrants from Afghanistan and decline of illegal migration of citizens of Georgia to Slovakia, Syria and Turkey to Hungary; the intensification of illegal migration to Slovakia by citizens of Vietnam, India, Syria, Turkey and the growth of the risks of smuggling of illegal migrants in Ukraine from Vietnam, Bangladesh and India beyond the border crossing points with Russia (2017)³.

In January-June 2018, according to article 332 of the Criminal Code of Ukraine «Illegal transportation of persons across the state border of Ukraine»: 157 criminal violations were taken into account, persons were served a notice of suspicion for 52 criminal violations, and for 40 – sent to court with an indictment. Thus, the number of cases that reached the court as of June 2018, is 25.5% of the total number of criminal offenses for this period (of those that are included in the URPI).

In modern scientific works, as a rule, it is stated, that the subject of forensic science covers two groups of regularities – the mechanism of committing crimes and their reflection in the environment, as well as the regularities manifested in the activities of detection, disclosure, investigation of crimes and their prevention (Korzh, 2018)⁴.

Forensics are interested in crime not in general, not as a complex social phenomenon, but as illegal activity, as an act of human behavior, emphasizing that the object of criminology is the functional side of the crime, that is, criminology is interested only in part of the system

³ Migrantsiyni profil Ukrainy za 2017 rik. [Migration profile of Ukraine for 2017]. Retrieved from: <https://dmsu.gov.ua/diyalnist/monitoring-migracijnij-nix-procesiv/migracijnij.html> (accessed 14.06.2019).

⁴ Korzh V. P. (2018) Deaki diskusijni pytannja shchodo suchasnoho rozvytku nauky kryminalistyky. [Some debatable questions concerning modern development of forensic science]. *Criminology and judicial examination*. Vol. 63(1). Pp. 27-36.

«criminal activity» – its display (prints, mental images), its mechanism, which is a system of interrelated elements, resulting in a «trace picture», which the investigator learns during the investigation of a specific crime (Averyanova, 2000)⁵.

M. V. Danshin points out that criminal activity, as a specific (negative) kind of human activity, in criminology is reflected in the form of the doctrine about the mechanism of committing a crime, as well as in the form of forensic characteristics of crimes of certain types in the methods of their investigation (Danshin, 2013).⁶ There is a point of view that criminology should study criminal activity much wider than understanding of the mechanism of the crime. Thus, N. S. Karpov identifies areas of forensic study of criminal activity, which relate to the organization of criminal communities, organization of the distribution of functional responsibilities of their members, «training», their counterintelligence activities to counter law enforcement agencies, etc. (Karpov, 2004)⁷.

V. P. Bakhin believes that criminal activity fully corresponds to the definition of activity as an active influence of a social subject on the object, which is carried out with the help of certain means (methods, techniques, tools) to achieve the goal set by the subject. Therefore, the fight against crime requires the study of criminal activity as a social phenomenon and a factor in the life of crime, and not only its individual components – criminal acts (Bakhin, 2002)⁸.

Criminal activity as an object of criminology, according to V.V. Tishchenko, represents beforehand planned system of actions of the person, and quite often organized group of persons for preparation, commission and concealment of a series of crimes for achievement of constant results and planned for rather long period of their activity (Tishchenko, 2006)⁹.

⁵ Averyanova T. V., Belkin R. S., Korukhov Yu. G., Rossinskaya E. R. (2000) Krymynalystyka [Forensic science]. Moscow: NORMA, 990 pp. (in Russian)

⁶ Danshin M. V. (2013) Pro ob'iekt i predmet krymynalystyky ta yii zv'iazky z inshymy yurydychnymy naukamy [On the object and subject of criminology and its connection with other law sciences]. *Collection of scientific works of Kharkiv national pedagogical University named after G. S. Skovoroda «LAW»*. Issue 20. Pp. 98-107.

⁷ Karpov N. S. (2004) Zlochynna diialnist [Criminal activity]. K.: Semenکو S. Publishing, 310 pp. (in Ukrainian)

⁸ Bahin V. P. (2002) Krymynalystyka. Problemy y mnenyia (1962-2002). [Criminology. Problems and opinions (1962-2002)]. Kiev, 2002. 268 pp. (in Russian)

⁹ Tishchenko V. V. (2006) Zlochynna diialnist yak ob'iekt krymynalystyky. [Criminal activity as object of Criminology]. *Actual problems of state and law*. Vol. 27. Pp. 139-145.

S. F. Denysyuk adheres to the point of view that criminal activity is a way of existence of a certain part of society, the procedure of its life support, and not only specific acts to achieve specific (individual) criminal goals. Therefore, it is necessary to study criminal activity as a social phenomenon, and it should be studied along with other types of human activity, taking into account all the main components, such as, the motive, purpose, means and ways of achieving this goal, the sequence of actions, the object, the subject of activity, the process of work, the result, without the limitations to the study of individual acts of criminal behavior. Like any activity, its criminal variety has a sequence of development, its inherent elements of professionalism and organization. If during the fight against crime do not take into account these aspects and study only individual crimes, and develop accordingly to them the means of counteraction, it is impossible to talk about an effective fight against modern crime. Only by recognizing the existence of a socially dangerous phenomenon of criminal activity, carefully studying it, observing its development, it is possible to develop effective ways of countering this phenomenon, that will correspond to reality (Denysyuk, 2011)¹⁰.

In the forensic aspect, as L. I. Arkusha marks that the essence of organized crime is such criminal activity that is carried out by criminal organizations and is characterized as a special kind of criminal trade of criminal organizations that have the structure, internal organization, management and external relations (including corrupt ones) appropriate to the set of criminal goals. The level of organization of criminal organizations, as well as the scope of their activities depend on the methods of committing crimes by members of these formations. The higher the level of community organization, the more sophisticated and effective these methods are (Arkusha, 2017)¹¹.

The trend in the development of organized crime is its globalization, which means, first of all, the globalization of criminal entrepreneurship that becomes part of the world economic system. This trend is the result of manifestations of the worldwide globalization of society, which is accompanied by serious criminal consequences that are associated with the increasing influence of organized crime and the abatement of the

¹⁰ Denysyuk S. F. (2011) Zlochynna diialnist: poniattia, struktura ta kharakterystyka yii elementiv [Criminal activity: the concept, structure and characteristics of its elements]. *Law and Security*. No. 1. Pp. 135-140.

¹¹ Arkusha L.I. (2017) Poniattia ta rivni orhanizovanoi zlochynnoi diialnosti [The concept and levels of organized criminal activity] *Actual problems of operational-search counteraction to organized crime: materials of the international scientific-practical Internet conference*. (Odessa, April 28, 2017). Odessa. Pp. 11-12.

capacity of national states to combat it: «transparency of borders» in the presence of obstacles to the activity of the police of one state on the territory of another facilitate the transition across Europe of the members of criminal gangs; the increase of migration leads to the creation in the European states of numerous criminal groups on national or ethnic basis, rather solid and closed to the control of law enforcement agencies, etc.

Yevdokimenko S.V. defines organized crime as a form of hierarchical construction of the criminal community, the scale of which affects the socio-economic structure of the state (Yevdokimenko, 2002)¹².

Some authors among the characteristic features of organized crime highlight:

- total influence on the social situation that is beyond the influence of the individual crime committed;
- the possibility to evolve from a social organization to individual illegal actions, when the organization formed with «non-criminal» purpose begins to commit crimes under certain circumstances;
- actual immunity from «traditional» preventive activities, the need to use the institutions of the state to counter this phenomenon;
- the highest level of organization of criminal practices rooted in the sphere of political relations which simultaneously covers economic, professional and official criminality;
- internationality, that consists in inclusion in structure of such criminality representatives of different nationalities; it does not exclude existence in its structure also organizations formed on an ethnic sign;
- structuring, that is manifested in the presence of such organizations by having a complex structure of relationships associated with other social institutions, as well as a strict hierarchy;
- flexibility, that is, the ability to interact with various socio-political institutions, to penetrate the legal institutions of the state, economy and society;
- propensity to use force, threats and blackmail to solve problems that impede the implementation of criminal schemes;
- criminal innovation, which is the use of the latest technology to achieve mobility, increase profits and avoid liability;
- mobility, which is the ability to change location, move beyond national borders, use modern international logistics corridors and communications;

¹² Yevdokimenko, P. V. (2002) *Zlochynna diialnist: sutnist ta kryminalistychni aspekty borotby z neiu* [Criminal activity: essence and criminalistic aspects of struggle against it]. Kiev: Soviet school. 17 pp.

- focus on establishing control over a certain area of illegal activity, which is achieved in a tough confrontation with competitors;
- the ability to adapt to changes in the situation, economic, political, legal and other conditions, the use of gaps in legislation and institutional system for the implementation of criminal schemes;
- expressed material, mercenary motives of illegal activity (Zharovska, 2013)¹³.

2. Illegal migration as a type of organized crime that encroaches on the inviolability of the state border

World processes in the era of globalization are significantly affected by such a complex socio-economic, legal and political phenomenon as migration – one of the most serious problems of our time, the flows of which have reached such proportions that the governments of different countries cannot ignore this phenomenon (Malynovska, 2018)¹⁴.

As evidenced by the analysis of scientific sources, despite certain differences, the concept of migration is defined as resettlement, the movement of population (individual or groups of people) within a country or from one country to another, which is aimed at the attainment of resources in new territories and is associated with a temporary or permanent change of residence (Gusarov, 2016)¹⁵.

Types of migration depend on the criteria of its classification, such as: by type – organized and unorganized; by degree of control – legal and illegal; by territorial features – internal and external; by temporary signs – irreversible, temporary, seasonal, nomadic; attitude to the host country – emigration, immigration, assimilated, transit (Mosiondz, 2005)¹⁶.

On a legal basis, migrants are divided into: legal (who cross international borders legally); semi-legal (those who arrive legally and change their status), illegal (this provides for crossing the border: beyond border crossing points; through border crossing points using fake (invalid) documents; through border crossing points with concealment in

¹³ Zharovska G. (2013) Transnatsionalna zlochynnist : dzhherela, oznaky, struktura vzaïmozv'iazkiv [Transnational criminality: sources, features, structure of interrelations]. *Scientific Bulletin of Chernivtsi University*. Issue 660. Jurisprudence. Pp. 111-117.

¹⁴ Malynovska O.A. (2018) Mïhratsiïna polityka: hlobalnyi kontekst ta ukraïnski realii [Migration policy: global context and Ukrainian realities]. K.: NISD. 472 pp. (in Ukrainian)

¹⁵ S. M. Gusarov, A. T. Kosyk, O. Yu. Salmanova (2016) Mïhratsiïne pravo Ukraïny [Migration law of Ukraine]. – Kharkiv: House of advertising. 296 pp. (in Ukrainian)

¹⁶ Mosiondz S. O. (2005) Administratyvno-pravovi osnovy derzhavnoi mïhratsiïnoi polityky v Ukraïni [Administrative and legal bases of the state migration policy in Ukraine]. K. : Master of the XXI century. 206 pp. (in Ukrainian)

the design features of vehicles, in goods, using other ways to avoid border control).

Today, there is no single approach to the definition of «irregular (illegal) migration». We support the point of view of those scientists who believe that illegal migration is crossing the borders of a state for a purpose or in a manner that violates its legislation, including international law (Ognev, 2017)¹⁷.

Illegal migration as a kind of migration and transnational organized criminal activity was studied by the scientists of Ukrainian and other countries: P. Bahin, O.F. Bantyshev, O.I. Bastrykin, I.K.Vasylenko, A.V. Ishchenko, L.Y. Kapitanchuk, N.S. Karpov, N.I. Klimenko, V.S. Kuzmichev, O.V. Kuzmenko, Yu.I. Litvin, O.A. Malynovska, A.P. Mozol, S.O. Mosiondz, A.F. Mota, T.E. Ognev, V.I. Olefir, N.A. Orlovska, O.I. Onysko, I.B. Pohila, A.M. Prytula, Yu.I. Rymarenko, A.S. Sainchyn, L.D. Samygin, I.I. Serov, V.O. Sych, I.V. Ivakhnyuk, G.M. Lapshin, V.F. Kozlov., N.P. Frolkin, V.H. Yarmaki and others. (Mota, 2019; Bahin, 2013; Sainchin, 2008; Yarmaki, 2015)^{18,19,20,21}.

According to scientific studies of illegal migration, it has now reached the level of threat to national and border security not only in Ukraine, but also in other countries (2018)²².

¹⁷ Ognev T. E. (2017) Nezakonna mihratsiia: kryminalno-pravovi ta kryminolohichni aspekty [Irregular migration: criminal-legal and criminological aspects]. Kiev. – 20 pp.

¹⁸ Mota A. F. (2019) Teoriia i praktyka protydiv nelegalnii mihratsii orhanamy Derzhavnoi prykordonnoi sluzhby Ukrainy: administratyvno – pravovyi aspekt. [Theory and practice of combating illegal migration by the State border service of Ukraine: administrative and legal aspect]. dis. doc. of legal sciences. 12.00.07 «administrative law and process; financial law; information law». Khmelnytsky . 519 pp.

¹⁹ Bahin V. P. (2013) Vyiavlennia ta rozsliduvannia nelegalnoi mihratsii [Identification and investigation of illegal migration]: [monograph]. / V. P. Bahin, L. Yu. Kapitanchuk, Yu. I. Litvin. – Khmelnytsky: Publishing House of the National academy of state Border service of Ukraine named after B. Khmelnytsky. 164 pp. (in Ukrainian)

²⁰ Sainchin A. S. I. B. Pohila, A. M. Prytula (2008) Metodyka rozkryttia nezakonnoho perepravlennia osib cherez derzhavnyi kordon Ukrainy (kryminalistychni ta operatyvno-rozshukovi aspekty) [Methods of disclosure of irregular transportation of persons across the state border of Ukraine (forensic and operational-search aspects)]. Odessa: Phoenix. 368 p.: 4 ill. (in Ukrainian)

²¹ Yarmaki V. Ch. (2015) Henezys nelegalnoi mihratsii ta yii suspilna nebezpeka [Genesis of illegal migration and its public danger]. South ukrainian legal chronicles. No. 1. Pp. 118-122.

²² Pro natsionalnu bezpeku Ukrainy. Zakon Ukrainy [On the national security of Ukraine. Law of Ukraine] No. 2469-VIII // Data of Verkhovna Rada of Ukraine. – 2018. – No. 31. Article 241.

Illegal migration has the same reasons as other migrations, but they are more global, tragic, conflict. Some authors define the following classification of the main causes of illegal migration, in particular:

- political: incompleteness of contractual and legal registration of the state border of Ukraine; potential possibility of intervention in internal affairs of Ukraine in border areas from other States; existence of separatist tendencies in separate border areas; absence of effective mechanisms of ensuring legality, the rule of law, fight against crime, especially it's organized forms and terrorism; political persecution, the conflict or war.

- economic: low level of earnings and life of society; contradictions between the existing manufacturing and the needs of the population; unresolved problems of resource, financial and technological dependence of the national economy from other countries; uncontrolled outflow of material and financial resources outside of Ukraine; plundering of national wealth on the state border of Ukraine and in the exclusive (marine) economic zone, intensification of smuggling activities, uncontrolled export of capital and strategically important raw materials and goods; cross-border accidents, catastrophes and natural disasters; the possibility of spreading epidemics (epizootics), dangerous diseases of people and animals from neighboring States.

- psychological: the subjective factor, which means that defects of consciousness are determined by the main component in the complex of causes and conditions of offenses, and sometimes are it's only cause.

- sociological: gender, age, career, level of education, nationality of the offender; time of year; prices for consumer goods; society itself, in which the offender grows; the heterogeneity and variability of the normative-value system of society; social inequality of society; social assessment of the actions that society defines as illegal; low standard of living and social security of large segments of the population, the presence in the border areas large number of citizens of working age, not employed in socially useful activities which are potential base of complicity in illegal activities on the border.

- legal: imperfect legal framework that governs the state border regime, not only internal but also external; legal nihilism of citizens traveling across the state border of Ukraine; uncontrolled migration processes in Ukraine; illegal arrival in Ukraine for business trips, training, tourism and further moving to Western Europe countries.

- military: the potential possibility of encroachment on the state sovereignty of Ukraine and its territorial integrity; the accumulation near the borders of Ukraine of troops and weapons that violate the balance of forces that have developed; military-political instability and conflicts in neighboring countries; creation and functioning of irregular armed groups both in Ukraine and in neighboring states (Dzudza, 2001)²³.

Illegal migration, as such, carries a political, economic, demographic, ethno-cultural and, most importantly, criminal threat to the security of the Ukrainian state.

The complex «industry» of irregular migration is interlinked with human trafficking, drug trafficking and other transnational organized criminal activities.

The problem of irregular migration remains relevant, as it affects the security of the state, its international relations and can aggravate in the conditions of the Operation of the joint forces, the lack of control over a significant portion of the eastern border. Over the past decade, irregular migration of foreigners to / from and through Ukraine has become part of the overall migration process. Until 2015, there was a tendency to a constant decrease in the number of illegal migrants that were detained at the border and detected in the state, and since 2015 – to an increase in the number of illegal migrants detected inside the state and at its borders (2017)²⁴.

The threat of terrorism forces governments to revise migration laws, to pay more attention to border protection, inevitably predetermines the strengthening of control, leads to a more picky, and even suspicious attitude to foreigners as carriers of certain threats. This trend was especially intensified after the terrorist attack on the United States in September 2001, and was further developed as a result of violent terrorist attacks in France, Belgium, the United Kingdom. Most immigrants are not terrorists, but most terrorists are immigrants. The researchers analyzed the files of 212 terrorists detained or killed in the United States and Western Europe in 1993-2003, 86 % of whom were immigrants or citizens of immigrant origin. However, there is no reason to talk about a

²³ Dzudza O. M. (2001) Kryminolohiia. Spetsializovanyi kurs lektsii zi skhemamy. (Zahalna ta osoblyva chastyny) [Criminology. Specialized course of lectures with diagrams. (General and special parts). K.: Atika. 366 p. (in Ukrainian)

²⁴ Stratehiia derzhavnoi mihratsiinoi polityky Ukrainy na period do 2025 roku. [Strategy of the state migration policy for the period up to 2025]. Approved by the order of the Cabinet of Ministers of Ukraine dated July 12, 2017 No. 482-R. // <https://zakon.rada.gov.ua/laws/show/482-2017-%D1%80>

causal link between migration and terrorism. The only common thing between them is that in the context of globalization both of these phenomena are transnational in nature. Terrorists can live in one country, raise funds in another, and commit criminal acts in a third. Moreover, terrorism is not a product of migration. According to the global database of terrorist acts, from 1970 to 2015, 20,975 terrorist attacks were carried out in European countries, most of which were motivated by the struggle for recognition or independence of certain European radical groups. Only 2% of terrorist attacks were Islamic in nature (Malynovska, 2019)²⁵. According to Frontex, 1.82 million migrants arrived in Europe in 2015, most of them are Muslims.

According to Western European experts, for all the chaotic movements of single migrants or small groups, irregular migration is a global phenomenon, which has its own complex structures and a high level of commercialization. In some cases, organizations that smuggle people may be comparable to large multinational corporations. Some authors indicate the availability of information on the involvement of the special services of Central Asian States in illegal migration and related crimes (Fedulov, 2004)²⁶.

Today there is a phenomenon of «irregular migration in the international student exchange», which consists of two interrelated processes – illegal and criminal types. Thus, the flows of migrants, in order to realize their illegal intentions, plan to use the educational industry of Ukraine, caused mainly by the peculiarities of economic development, which, in particular, expand the possibilities of criminal business. Criminal migration in the international student exchange of Ukraine is considered as a kind of international voluntary migration with the use of invitations to study in educational institutions, due to factors of a criminal nature, and is defined as a set of movements of citizens of one state, that settling permanently or for a long time on the territory of our state for the purpose of criminal activity, as well as this activity itself and its consequences. The main type of crimes in the sphere of international

²⁵ Malynovska O. A. (2018) *Mihratsiina polityka: hlobalnyi kontekst ta ukrainski realii* [Migration policy: global context and Ukrainian realities]. K.: NISS. 472 p. (in Ukrainian)

²⁶ Fedulov A.V., Terekhin V.V. (2004) *Problemy rassledovaniya prestupleniy, sovershennykh myhrantamy* [Problems of investigation of crimes committed by migrants] // *Migration, human rights and economic security of modern Russia: state, problems, effectiveness of protection*: SB. art. / ed. V. M. Baranova. N. Novgorod. Pp. 452-457.

student exchange is illegal migration in the form of illegal transportation of persons across the state border of Ukraine (Chernyak, 2017)²⁷.

The phenomenon of illegal migration, characterized by the fact that migrants leave the country of their permanent residence and cross the borders of another state without official permission or violate the terms of stay established by the legislation of this country on its territory, is dangerous for any state, including Ukraine. Usually Ukraine acts in two roles: the final destination for immigrants mainly from the CIS countries; transit territory on the way to the European Union, mainly for immigrants from Asia and Africa.

Recently, a new threatening trend has emerged in the sphere of illegal migration. Due to the strengthening of measures to combat illegal migration in the European Union, there has been an increase in the number of migrants who are trying at any cost to get to Ukraine to stay here, to be able later to illegally enter the territory of the member states of the European Union.

The analysis of illegal migration gives grounds for the conclusion that it is a kind of transnational organized criminal activity. At the same time, it has such features as illegality, organization, scientific and information support, conspiracy, specialization, improvement, economy, scale, professionalism, transnationality and high technical armament.

The peculiarity of professional crime is that it «nurtures» in its environment a new kind of crime – organized crime, the activation of which often depends on the crisis phenomena in the state. Organized crime does not separate from the professional crime, and also takes it under its control, uses it as a branch of the shadow economy, from which it receives «income tax» (Kalganova, 2014)²⁸.

In his scientific research Kremenchutsky S.M. draws attention to the fact that in Ukraine the activity of organized criminal groups, which specialize on creating highly efficient transnational system of management of illegal migration flows, the increasing of the flow of uncontrolled illegal immigration has led to a significant increase in the

²⁷ Chernyak A.M. (2017) Poniattia ta klasyfikatsiia zlochyniv u sferi mizhnarodnoho studentskoho obminu [The concept and classification of crimes in the field of international student exchange] / *Scientific Bulletin of Uzhgorod national University*, 2017. Vol. 46. Volume 2. Pp. 133-136.

²⁸ Kalganova O.A. (2014) Profesiiina zlochyinnist u II polovyni XX stolittia [Professional crime in the second half of the XX century]. *Scientific Bulletin of Kherson state University. «Legal Sciences» Series. Issue 1 Volume 3 Pp. 42-45*

criminalization of society in the border regions of Ukraine (Kremenchutsky, 2010).²⁹

Evidence of this is the functioning of established sustainable channels of illegal migration. It is the system created by groups of persons that provides illegal entry into Ukraine, stay and departure from its territory of migrants, and also – set of forces and means which are necessary for search of wishing to migrate illegally to the recipient countries, formation of groups, equipment with the corresponding documents, support on a route, temporary accommodation and accommodation in transit points.

The activities of such organizations are characterized by flexibility, which depends on the nationality of migrants, their ability to pay, the capacity of the organizers, the mode of transportation and other factors, and the channels of illegal smuggling of migrants often coincide with the channels of drug trafficking and illegal arms trade.

According to Interpol, 90 percent of people arriving in Europe get there through the system of illegal transportation, consists of a variety of loosely connected criminal groups. Criminals from more than a hundred countries are suspected of this activity. Interpol experts conclude that transport routes are changing rapidly under the influence of external conditions, such as strengthening border control. The illegal structure includes both criminal authorities, weakly controlling the entire route, and petty criminals, who organize transportation at the local level through personal connections. Illegal carriers of migrants earned in 2015 from 5 to 6 billion dollars (4.4-5.3 billion euros) It is one of the most important sources of income for organized crime in Europe (Delfinov, 2016)³⁰

In 80% of cases, irregular migration through the territory of Ukraine is not spontaneous, but on the contrary, it is a well-organized and well-established business over the years.

Among the personnel of border units, which carried out tasks of operational and service activities 79.9% of respondents believe that illegal immigration is tied to illegal human transition across the border,

²⁹ Kremenchutsky S. M. (2010) Dіialnist pravookhoronnykh orhaniv Ukrainy shchodo administratyvno-pravovoi protydiv nelehalnii immihratsii [Activity of law enforcement agencies of Ukraine concerning administrative and legal counteraction to illegal immigration]. Lviv. 2010. 20 p.

³⁰ Delfinov A. (2016) Interpol: Nelehalnye perevozchyky myhrantov zarabotaly myllyardy evro [Interpol: Illegal migrant carriers have earned billions of euros]. Deutsche Welle. URL: <http://www.dw.com/ru/a-19264332/17.05.2016/02.10.2019>

67.9 percent – forgery of documents and use of them, 41.6% – human trafficking. Officers of operational-search units (93.6%) answered about the dominant phenomenon of illegal migration with the transfer of humans across the border. Among the national diasporas that exist on the territory of Ukraine and contribute to illegal migration, 17.1% of servicemen (employees) with practical experience named Syrian, 14.3% – Afghan, 7.2% – Vietnamese, 3.8% – Somali and Turkish, 2.7% – Azerbaijani, Armenian, Georgian, Indian and Uzbek (Mota, 2019).³¹

The study of illegal migration shows that it covers not only migrants themselves, but also a structured global criminal network of a transnational nature, which includes criminal groups operating in several countries with sufficient technical support, while improving the forms and methods of criminal activity, which are becoming more sophisticated and improved, and accrue tens and even hundreds professionally trained and well-equipped members.

Monitoring of the ways of origin of illegal migrants indicates that 5.7% of offenders who entered the territory of the state illegally, it is mainly immigrants from foreign countries (Pakistan, India, China, Bangladesh, Sri Lanka, etc.); 94.3% of illegal immigrants (of the total number of detainees) entered Ukraine legally, but after the prescribed period of stay moved to an illegal situation; about 60% of illegal immigrants enter Ukraine through the border areas under formation – a border zone with Russia, Belarus and Moldova. The functioning of channels of illegal migration through Ukraine is also facilitated by the unsettled borders according to European parameters, the lack of control over part of the border in the East of Ukraine, corruption in our country, which allows migrants to cross the border and enter the EU.

The results of the activities of the SBGU in recent years indicate that the number of illegal migrant, following through the territory of Ukraine, is constantly growing, and the number of detained illegal migrants only in the areas of responsibility of the border protection bodies of the southern regional administration of the SBGU has increased 3-5 times. The analysis of detention of irregular migrants, filtration and verification measures testifies to existence of the fulfilled channels of illegal transit

³¹ Mota A. F. (2019) Teoriia i praktyka protydii nelehalnii mihratsii orhanamy Derzhavnoi prykordonnoi sluzhby Ukrainy: administratyvno – pravovyi aspekt [Theory and practice of combating illegal migration by the State border service of Ukraine: administrative and legal aspect]. Khmelnytsky. 519 pp. (in Ukrainian)

migration through the territory of Ukraine, also with use of forged documents.

The peculiarity of the functioning of channels of illegal migration is that illegal migrants from countries of origin to countries of destination are transported in stages through accumulation centers – hotbeds of criminal groups, as well as an increase in the migration flow of women (up to 58.5%) and children (Sysiuk, 2014).³²

Today, the territory of Ukraine is a place of ”temporary stay» for foreigners, which means that foreigners arrive in Ukraine for a certain period of time for the purpose of tourism, training, employment, as a rule, remain illegally in Ukraine for 10 months or more, and after that illegally cross the western borders of the country in order to leave for permanent residence and employment in the EU countries.

CONCLUSIONS

However, due to significant changes in the migration policy of Western European countries, which are trying to stop the flow of illegal migrants, Ukraine is gradually turning from a transit country to a country of accumulation of illegal migrants. This is also facilitated by international agreements signed by Ukraine with the EU, according to which illegal migrants who arrived in transit through the territory of Ukraine in the order of readmission can be returned to Ukraine (2008).³³

Ukraine is and, in the available for forecasting future, will remain a zone of criminal interests of organized crime. There will be a diversification of criminal activity, growth of its criminal professionalization. The strengthening of political, economic and humanitarian ties between our country and the European Union as a whole, as well as the member states adjacent to our state, will be used by organized crime to carry out cross-border crimes.

Occupying a significant place in the structure of migration flows, illegal migration is a socially dangerous, harmful, unlawful phenomenon that really threatens the national and border security of Ukraine.

³² Sysiuk L. P. Giluk L. O.. (2014) Problemy nelegalnoi mihratsii v Ukraini ta v sviti [Problems of illegal migration in Ukraine and in the world] *X International Scientific-Practical Conference «Strategic Questions of World Science, 2014»*. (Przmysl, 07-15 february 2014). Przmysl. Pp. 78-82.

³³ Pro ratyfikatsiiu Uhody mizh Ukrainoiu ta Yevropeiskym Spivtovarystvom pro readmisiu osob :[On ratification of the Agreement between Ukraine and the European Community on the readmission of persons]: Law of Ukraine of 15 Jan. 2008 No. 116-VI// Data of the Verkhovna Rada of Ukraine. 2008. No. 9. St. 86.

The analysis of migration processes and the causes of their occurrence gives grounds to assert that the overall level of migration processes, including illegal ones, will grow and that the world economic cataclysms will also significantly affect the increase and complication of the military confrontation in the Middle East.

SUMMARY

The article deals with the issue of illegal migration as one of the main threats to Ukraine's national security at the border area. The statistics on offenses at the state border was presented. The tactics of actions of offenders of border legislation are revealed.

In the article the author presented the results of the analysis of scientific researches which were conducted in the forensic sphere of scientific researches. The subject and subject of forensic science and its relation with other legal sciences are disclosed. It was determined the main types, causes, dynamic changes of organized criminality which implements illegal migration making a focus on its globalization, new threats to the world economic system, including the national security of Ukraine.

The author emphasizes that due to the intensification of counteract measures illegal migration in the European Union countries, the number of migrants entering Ukraine as a transit country, for father illegal entry the territory of the Member States of the European Union was increased.

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PECULIARITIES OF ESTABLISHMENT AND DEVELOPMENT OF LEGAL RELATIONS IN THE SPHERE OF BORDER SECURITY OF UKRAINE

Oleh Hanba

INTRODUCTION

Scientific understanding of the nature and essence of legal relations by modern science will contribute to a deeper understanding of the characteristic features of specific legal relations that are inherent to the narrow spheres of law enforcement activities of the state. Namely, the sphere of border security of Ukraine is among them.

The study of the process of origin, formation and development of legal relations in the sphere of border security of Ukraine is instructive and currently important, because it enables us to correctly ascertain their content, structure, specific features within our field of study under present circumstances on the basis of the previous achievements as well as objectively determine their future prospects.

As the expert on the philosophical problems of legal science D. A. Kerimov rightly points out, knowledge of the essential completeness of the legal phenomena of the present (in our case these are legal relations), as well as all their qualitative sides outside the historical processes of evolution, is impossible, since something always remains in society from the past, the principles of the present and the origin of the future¹. Logical in this approach is the true essence, and historical is its form, which is defined by the specific content. If the historical component makes it possible to investigate legal relations in their complete entirety, with all the coincidences, deviations, details that not rarely distort the objective logic of their development, then the logical component allows us to abstract from minor facts, irrelevant in total, to determine objective characteristics and features of the researched legal relations of a certain historical period, to trace the nature of internal relationships between structural elements (subject, object, content, etc.),

¹ Kerimov D. A. (2001) *Metodologiya prava (predmet, funktsii, problemy filosofii prava)* [Methodology of law (subject, function, problems of philosophy of law)]. Moscow: Avanta+. P. 110, 115.

which will contribute to the objectivity and comprehensiveness of the research².

Our research, as it has already been noted, is a special scientific exploration, which is devoted to the study of the peculiarities of the formation and development of legal relations and related legal realities in the sphere of border security of Ukraine. Undoubtedly, they have their own specifics, peculiarities of formation, manifestation, functioning, realization, etc.

Therefore, it is necessary to refer to legal relations origins in the world practice of human coexistence in order to conduct an effective general-theoretical research of their concept.

1. Development and Regulation of Legal Relations in the Sphere of Border Security of Ukraine (from Ancient Times to the Present)

In our opinion, the emergence of legal relations in the sphere of border security of Ukraine goes back to the pre-state period and originates from the need to protect the boundaries of the territory of compact residence of the family, fraternity, and tribe. The area of residence of the original social community was of paramount importance to it. After all, such territory included hunting grounds, fish and raw materials resources, berry-fields, wild fruit bushes and trees, natural reserves of building materials, farmlands and other sources of livelihood.

The boundaries of this habitation were largely determined by geographical features such as rivers, forest margins, streams, lake banks, canyons, gorges, mountain ranges, etc. The availability of own assimilated territory, ruled by the relevant human community, was the main condition for its survival, because it provided the resources of daily life for present and future generations. Therefore, the issue of protecting one's own territory of habitation, outlined by certain contingent boundaries, has always been given the highest priority, and in the event of a military threat to its territorial integrity, all material and human resources of a particular social community have been directed to its defence and protection.

The category of "border" from the moment of its formation is decisive in the research of border legal relations, as they arise, change and end up due to its legal or illegal crossing, the movement of goods, animals, permitted or unauthorized goods across it.

² Skakun O. F. (2016) *Teorija prava i derzhavy* [Theory of Law and State]. Kyjiv: Alerta. P. 19–20.

The concept of “border” in the theory of the state is not only a line on a geographical map, the boundary of a certain geographical space or relevant territory, but also the edge of the space of power, as well as the zone of collision, intersection, mutual overlapping of interests of different structures and areas of power³. The above-mentioned action of the power gives rise to a number of various legal relations connected with the defence and protection of the state border, as well as with economic, cultural, humanitarian and other activities within the border-zone.

The concept of “border” was purely conditional, vague, devoid of specifics in the first state formations. Borders were not marked afield in any way, were not constantly protected, were not legally registered and agreed with the neighbouring peoples⁴.

Returning to the origins of our research, it should be emphasized that, according to some scholars, namely the tribe itself was the supreme owner of the territory in which it lived; it was determined by the commonality of economy, culture, way of life, language, relative size of the tribe, etc.⁵. Accordingly, the protection of its own territory, which was characterized in relatively permanent and poorly organized way, was also subject to social regulation through mono-norms of archaic law. At the same time, the protection of contingent borders, boundaries of the territory of habitation (since there were still no official, legally defined borders, as it has already been mentioned) wore collective, at first, spontaneous counteraction in the event of a real threat, which was accompanied by forceful expulsion or destruction of enemies in their own territory. Therefore, the archaic relations that have arisen on this occasion were of the greatest life-changing and, accordingly, obligatory-protective nature, since such participation was a primary duty of every member of the tribeship, regardless of his/her gender and age.

The moral right to defend and protect one’s own territory was based, in our opinion, on the principle of its primacy of settlement by the ancestors of a particular human community of the ancestral society.

The development of the defensive and protective border relations on the lands of Ukraine was facilitated by the formation of the first Slavic

³ Kuprijenko D. A., Dem’janjuk Ju. A., Didenko O. V. (2014) *Derzhavna terytorija i derzhavnyj kordon* [State territory and state border]. Khmelnjtskyi: Vydavnytvo NADPSU. P. 57.

⁴ Kabachynskij M. I. (2005) *Istorija okhorony kordoniv Ukrajinj* [History of border protection of Ukraine]. Khmelnjtskyi: Vyd-vo Nac. akad. Derzh. prykordonnoji sluzhby Ukrajinj imeni Boghdana Khmeljnycjkocho. P. 37.

⁵ Danilova V. Yu. (2014) *Istoriya pervobytnogo obshchestva* [The history of primitive society]. Vladimir: Izd-vo VIGU. P. 40.

states and the construction along the then contingent boundaries of serpentine walls (peculiar land fortifications), the system of guard towns, fortress cities at the intersection of the main trade routes and on the Desna, Ostri, Trubezh, Suli, Ross rivers and other water arteries of the Ukrainian lands of that time, the development of which became the most active during the reign of Vladimir Sviatoslavovych and his son Yaroslav the Wise⁶.

Formation and development of border relations of the Kievan Rus was also facilitated by the improvement of the use of forms and methods of border guard organization (construction of signal towers, use of smoke fires, warning bells, etc.), the main task of which was timely notification of the Prince and his *druzhina* about approaching the enemy, delaying the advancement of enemy units and the timely setting of special surveillance patrols that have performed observation and reconnaissance functions.

Significant slowdown in the development of border relations was caused by the feudal fragmentation of the lands of Kievan Rus, which in turn resulted in the destruction of the centralized structure of border protection. Thus, each principality began to protect only its borders independently with the help of an outdated system of fortresses with small strength garrisons, which tried to protect, first of all, the centre of the principality⁷.

At the same time in the process of the development of states, their borders and the legal regulation of their defence and protection caused by economic growth and intensive development of trade, legal relations in this sphere were gradually formed and diversified.

However, it should be emphasized that if at the beginning of the emergence of states the protection of their borders was haphazard, spontaneous in nature due to lack of state experience, clearly defined borders, weakness of the legal regulation of the aforementioned sphere, then with the development, first of all, of customs procedures, as a source of state treasury replenishment, there was a need to strengthen the protection of the state border in order to prevent smuggling. To this end, not only casual people, but also professional princely men-at-arms were involved in the protection of the border, permanent guard details were

⁶ Lytvyn M. M. (2004) *Derzhavna prykordonna sluzhba Ukrainy : istorija ta suchasnistj* [State Border Guard Service of Ukraine: History and Modernity]. Kyjiv: PRINT-EKSPRES. P. 12.

⁷ Lytvyn M. M. (2004) *Derzhavna prykordonna sluzhba Ukrainy : istorija ta suchasnistj* [State Border Guard Service of Ukraine: History and Modernity]. Kyjiv: PRINT-EKSPRES. P. 13.

created, and in later times army units that began to conduct border protection on a professional basis⁸.

The first mention of the organization and activities of the border guards on the borderlands of Ukraine and, accordingly, the beginning of the development of legal relations in this sphere refer to the 40-ies of the XII century. At that time, the weakened hordes of Pincenates, Turkils, Berendeis, and others, known as “black capuches”, succumbed to the authority of the Kiev princes, thanks to which they were allowed to reside in the territory of the steppe border-zone for the duty of carrying out patrol border guarding.

However, as I. P. Krypiakevych emphasizes, those steppe settlers he called the predecessors of the Cossacks, although being the debris of the steppe hordes, but maintained their military organization, were quite good in fight and could throw out significant military forces, which were important in the protection of the borders of the state and the border-zone⁹.

The Zaporozhye Cossacks made a significant contribution to the development of various legal relations in the sphere of border security; they became a special manifestation of the Ukrainian military formation performing border tasks and functions¹⁰. Ever since 1503, an irregular Cossack army consisting of the Cherkasy Cossacks and Cossacks of Prince Dmitry was used to protect the Lithuanian borders from Tatar attacks under the command of “so-called starostas i.e. heads of regions, cities and castles of the state”¹¹.

The “Boyars Decision on Cossack Village and Sentry Service” adopted in 1571 in the Moscow kingdom which determined the procedure for the organization of the then border guard service played an

⁸ Kabachynskij M. I. (2005) *Istorija okhorony kordoniv Ukrainy* [History of border protection of Ukraine]. Khmelnytskyi: Vyd-vo Nac. akad. Derzh. prykordonnoji sluzhby Ukrainy imeni Boghdana Khmeljnyckogho. P.18–27.

⁹ Kryp’jakevych I., Ghnatyvych B., Stefaniv Z. (1992) *Istorija ukrajinsjkogho vijsjka (vid knjazhykh chasiv do 20-ko rokiv XX st.)* [History of the Ukrainian army (from princely times to the 20 years XX century)]. Ljviv: Svit. P. 22.

¹⁰ Mota A. F. (2018) *Dijalnistj Derzhavnoji prykordonnoji sluzhby Ukrainy z protydijj nelegalnij mighraciji (administratyvno-pravovyj aspekt)* [Activities of the State Border Guard Service of Ukraine on Combating Illegal Migration (Administrative-Legal Aspect)]. Khmelnytskyi: Vydavnytvo NADPSU. P. 10.

¹¹ Javornycykj D. I. (1991) *Istorija zaporizjkykh kozakiv* [History of Zaporizhzhya Cossacks]. Ljviv: Svit. P.8.

important role in the development and improvement of border relations¹².

Some contribution to the development of migration relations, directly related to the sphere of border security, was made by the Code of Laws of Tsar Olexii Mykhailovych in 1649, which regulated exit procedure to other states with concluded peaceful relations on the basis of a transit charter with a simultaneous ban for exit without such charter. The aforementioned Code of Laws established a differentiated liability of a person for the illegal crossing of the border, depending on the purpose of the illegal crossing¹³.

During the reign of Peter I smuggling was greatly intensified due to the increase in tariff duties on imported goods and the border guards were entrusted with responsibility to strengthen the fight against smuggling. Therefore, a new specialized state body the Commerz College was created in 1718 to fulfil the specified task, as well as to improve the quality of the border service and to expand the regulatory and legal framework of its regulation¹⁴. The activity of the above-noted body contributed to the development of stable public regulatory as well as security and protection legal relations and the accumulation of positive experience in ensuring the protection of the state border, and, accordingly, the development of legal relations in the border sphere of the Russian Empire, which included the then Ukraine.

Continuing to enhance the regulatory and legal framework of the sphere of border security regulation, improve the quality of the mechanism of legal regulation through the approval and expansion of progressive legal relations, the tsarist government approved the Regulation on the arrangement of military guards along the borders of the western provinces in 1811, which promoted the improvement of quality and effectiveness of official authority application by the personnel, as well as the delineation of jurisdictions of the bodies and

¹² Boyarskiy V. I. (1992) *Na storozhe Rusi stoyati* [Stand on the watchman of Russia]. Moscow. P. 30.

¹³ Karnovich E. P. (1874) *Ulozhenie. Sobranie uzakoneny Russkago gosudarstva; izdanie E. P. Karnovicha. T. I. Tsarstvovanie tsarya Aleksya Mikhaylovicha s 1649 po 1676*. [Arrangement. Collection of legalized Russian state; edition of E. P. Karnovich. T. I. The reign of Tsar Alexei Mikhailovich from 1649 to 1676.]. Sankt Peterburg: Tipografiya A. A. Kraevskago. P. 8.

¹⁴ Kabachynsjkyj M. I. (2006) *Na varti rubezhiv Batjkivshhyny: Prykordonni vijsjka Ukrajinj v 1991–2003 rokakh* [Guarding the Frontiers of the Motherland: Frontier Forces of Ukraine in 1991–2003]. Khmelnytskyi: Vyd-vo Nac. akad. Derzh. prykordonnoji sluzhby Ukrajinj imeni Boghdana Khmeljnyckogho. P. 272.

officials of the border guard. Later, the army Disciplinary Charter was introduced in 1877 in order to reinforce the service discipline among border guard personnel.

However, at the end of the XIXth century, despite the attempts to improve the activities of the tsarist border guards by improving the quality of its legal regulation, there was an urgent need to reform it. In this connection, the tsarist power established a Separate Border Guard Corps on October 15, 1893, whose activity was regulated by more sophisticated normative legal documents: the Rules on the Separate Border Guard Corps of 1910; Instruction of the service of the ranks of the Separate Border Guard Corps of 1912; statutes governing the various spheres of its service activity, adopted in 1910-1912, etc.¹⁵.

Further improvement of the regulatory and legal framework and mechanism of legal regulation of legal relations in the sphere of the border guard service of Ukraine is connected with the activities of Hetman P. P. Skoropadskiy, whose government decided to create a Separate Border Guard Corps in 1918, the effective activity of which was not achieved for a variety of reasons.

Special Border Protection Unit was established under the All-Russian Emergency Commission (AREC) following the restoration of Soviet power in Ukraine, on November 24, 1920. Such protection was provided by the military units of the Red Army on a permanent basis¹⁶.

Partial improvement of the mechanism of legal regulation of legal relations in the sphere of the state border security in Soviet times is connected with the assertion of Soviet legality and the rule of law of the positivist manner in the spirit of Stalinist ideology.

Qualitatively new approaches to the establishment and improvement of the mechanism of legal regulation of legal relations in the sphere of border security on a European basis began to be implemented after the collapse of the USSR in the time of Ukraine's political independence.

2. Periods of Evolution of Legal Relations in the Sphere of Border Security in the Conditions of Ukrainian State Formation

Summarizing the above and analysing relevant historical sources and statutory and regulatory enactments enables us to distinguish the

¹⁵ Kabachynskiy M. I. (2008) *Istoriya kordoniv Ukrainy* [History of Ukraine's borders]. Khmelnytskyi : Vyd-vo Nac. akad. Derzh. prykordon. sluzhby Ukrainy imeni Boghdana Khmeljnjycjkogho. P. 153, 162.

¹⁶ Kabachynskiy M. I. (2008) *Istoriya kordoniv Ukrainy* [History of Ukraine's borders]. Khmelnytskyi : Vyd-vo Nac. akad. Derzh. prykordon. sluzhby Ukrainy imeni Boghdana Khmeljnjycjkogho. P. 186–188, 203.

following periods of evolution of legal relations in the sphere of border security in the territory of Ukraine:

1) the pre-state period, characterized by the existence of primitive archaic relations, which were governed by the rules of archaic (customary) law and emerged and were realized with regard to the protection of the territory i.e. the particular living space of the original social community, which was the main place of habitation and source of subsistence for them. Such protection was fateful for the tribe as the supreme owner of the territory, so that all available human and material resources of the primitive community were used to secure it;

2) the second state period of establishment and development of relations of the border security sphere concerns the activity of the border guard of the first early feudal state entities of the Eastern Slavic tribes. The Ante State was one of these major state formations, the centre of which, according to scientists, could be Kyiv. It existed for about two centuries and was destroyed by the invasion of nomadic hordes in the beginning of VII century¹⁷.

It was difficult for the first East Slavic state formations to withstand the invasions of mobile, well-armed nomads for whom military affairs were the usual way of life, so they provided the defense and protection of their own territory mainly through the construction of fortified towns, one of which was in the status of a head one like a center of political and economic life¹⁸.

Though, the system of fortified towns ensured the assertion of state independence and preservation of material and human resources, it did little to promote border relations related to the improvement of forms and methods of border guard activity, etc.

Border activity improved significantly during the period of strengthening the statehood of Kyivska Rus and the Kingdom of Galicia–Volhynia, which created favourable conditions for the development of its legal regulation and improvement of legal relations in the border sphere. However, the feudal fragmentation, the invasion of the Golden Horde led to the destruction of the centralized structure of the defence and protection of the borders of Kyivska Rus and the slowdown of the

¹⁷ Dnistrjanskyj M. S. (1992) *Kordony Ukraïny. Terytorialjno-administratyvnyj ustrij* [Borders of Ukraine. Territorial and administrative structure]. Ljviv: Svit. P. 11.

¹⁸ Kryp'jakevych I., Ghnatevych B., Stefaniv Z. (1992) *Istorija ukrajinskogho vijsjka (vid knjazhykh chasiv do 20-gh rokiv XX st.)* [History of the Ukrainian army (from princely times to the 20 years XX century)]. Ljviv: Svit. P. 7.

development of border activity and, accordingly, the legal relations of the aforementioned sphere.

The further restoration of the border function of the Ukrainian state and the intensification of the development of border relations date back to the fourteenth and eighteenth centuries characterized by the loss of Ukraine's state independence, which resulted in the Ukrainian lands being divided between Lithuania, Poland, the Principality of Moldova and Hungary which were characterized by different levels of development and type of government. This led to the fact that the colonization states were forced to protect the Ukrainian territories and form border guard structures, which to some extent facilitated the further development of border relations in the Ukrainian border-zone¹⁹;

3) the third period of evolution of legal relations in the sphere of border security concerns bourgeois statehood, which is characterized by a radical reform of the border service since 1893 in connection with the creation of the Separate Border Guard Corps with its military type manual and a number of normative legal documents that contained progressive legal rules for the detailed regulation of various legal relations in the sphere of border security on a systematic, scientifically substantiated basis. The above-noted regulatory and legal framework successfully operated until 1917, contributing to the development of forms and methods of border activity, and accordingly to the improvement of border relations both in the whole Russian Empire and within the border sphere of Ukraine²⁰;

4) the fourth period of evolution of legal relations in the sphere of border security of Ukraine falls on the Soviet stage of state development, which was preceded by an unsuccessful attempt of the Ukrainian national forces to restore and consolidate an independent Ukrainian state in 1917-1921 within its ethnic borders and to create its own border structures of national character. These attempts were carried out in the times of the Central Council and the Hetmanate and the Directory, but none of them was brought to a logical conclusion for objective and subjective reasons²¹. This significantly impeded the development of

¹⁹ Kabachynskij M. I. (2008) *Istorija kordoniv Ukrajinjy* [History of Ukraine's borders]. Khmelnytskyi : Vyd-vo Nac. akad. Derzh. prykordon. sluzhby Ukrajinjy imeni Boghdana Khmeljnjcjkogho. P. 85.

²⁰ Lytvyn M. M. (2004) *Derzhavna prykordonna sluzhba Ukrajinjy : istorija ta suchasnistj* [State Border Guard Service of Ukraine: History and Modernity]. Kyjiv: PRINT-EKSPRES. P. 15.

²¹ Kabachynskij M. I. (2005) *Istorija okhorony kordoniv Ukrajinjy* [History of border protection of Ukraine]. Khmelnytskyi: Vyd-vo Nac. akad. Derzh. prykordonnoji sluzhby Ukrajinjy imeni Boghdana Khmeljnjcjkogho. P. 232.

border infrastructure, the legal basis of border authorities' activity and the legal regulation of border security relations.

Their further evolution is connected with the restoration of power of the Bolsheviks and the accession of Ukraine to the USSR. The system of state border protection instituted in Soviet Russia was automatically extended to Ukraine and other Soviet republics, created on December 30, 1922 by the USSR, despite the recognition of Ukraine's formal independence by resolution of the VIII All-Russian Conference of the Soviet Communist Party on June 1, 1919. In parallel with the numerous, not always justified and deliberate reforms initiated under the ideological pressure of the Bolshevik Party in the sphere of border activity of the Soviet state, positive practical experience has been accumulated in improving the principles, forms and methods of activity of border authorities and bodies, the generalization of which contributed to the improvement of the quality, first of all, of the agency border related rulemaking, which had a positive impact upon the effectiveness of legal relations development within the specified sphere. However, since the 1930s, scientific studies of legal relations in the sphere of border security, and, above all, customs matters have been almost ceased through the monopolization of foreign trade, and the introduction of rigid centralization of state control over the border sphere under the total ideological pressure of the Bolshevik Party²²;

5) the fifth period of evolution of the sphere of our research concerns an independent Ukraine, the peculiarity of which is that they begin to develop on the basis of legal norms of national legislation.

It should be specifically emphasized that the flow of the stated periods of evolution of legal relations in the sphere of border security was not uniform, linear, but it was characterized by ups and downs, stagnation and destruction, etc.

Thus, in the pre-state period of development of tribal societies, these relations were characterized by spontaneity, haphazardness and a certain chaotic nature of their origin and realization on the basis of mono-norms of archaic (customary) law. However, their maximum significance to the life of the society at the time led to the protection of the tribe's own territory of habitation and the conditional geographical boundaries of its

²² Vasilenko A. I. (2001) *Pogranichnaya deyatel'nost' v Rossii: teoriya, praktika i tendentsii razvitiya (konets XIX–XX vv.)* [Border activity in Russia: theory, practice and development trends (end of the 19th–20th centuries)] (Doc Thesis), Moscow: Academy of the Federal Border Guard Service of the Russian Federation. P. 234.

determination as a primary duty of each adult member of the family (tribe).

During the birth of the early Slavic states in the territory of present-day Ukraine, the gradual development of their economy led to the intensification of trade, which was the main condition for the intensification of the development of customs relations in order to replenish the state treasury. The reluctance of the merchants to pay a high fee for the transportation of goods across the border has created massive smuggling i.e. the illegal transportation of goods across the state border bypassing customs posts. This contributed to the development of border security relations caused by the fight against smuggling.

The development of the regulatory and legal framework of the border activity improved with the improvement of the statehood, strengthening of its economic and political basis: the subjective composition of legal relations expanded, the border guard gradually began to be carried out on a continuous professional basis, which contributed to the accumulation of practical experience in the effective implementation of the content of legal relations of the specified sphere, forms and methods of border activity were refined.

The weakening or loss of statehood caused reverse processes in the border sphere: the destruction of a unified system of state border protection, the inhibition of the development of the specified legal relations, the loss of part of own territory as a result of moving the state border line by the enemy for his own benefit, which ultimately led to the breakdown of the regulatory and legal framework on legal relations regulation within the researched sphere.

Therefore, the proper conditions for the development of legal relations in the sphere of border security and the improvement of the regulatory and legal framework for their regulation are only created in a strong, politically and economically stable state.

3. Peculiarities of Formation and Implementation of Border Security Relations in the Modern Independent Ukrainian State

Returning to the analysis of the evolution of legal relations in the sphere of border security in the post-Soviet period in connection with the gaining of political independence by Ukraine due to the collapse of the USSR, it should be noted that the further process of development of legal regulation of relations in the investigated sphere largely coincides with

the stages of the construction of new border structures in independent Ukraine.

Thus, the first stage (1991 – beginning of 1992) is devoted to the problems of creating a regulatory and legal framework for the activity of the Ukrainian Border Guard Troops and developing best practices on the basis of the European principles related to civilized regulation of border relations in close interaction with the public and with the border structures of neighbouring states based on the grounds of the best European and world standards. This contributed to the gradual liquidation of Soviet templates and ideological dogmas in this sphere and the establishment of qualitatively new legal relations through the adoption of a number of regulatory legal enactments: Decree of the Presidium of the Verkhovna Rada of Ukraine of August 30, 1991 No. 1464-XII “On Subordination of the Border Guard Troops Dispositioned in the Territory of Ukraine to Ukraine”; laws of Ukraine: “On the State Border of Ukraine”, “On the Border Guard Troops of Ukraine”, etc.^{23,24,25}.

The second stage (March 9, 1992 – end of 1993) was characterized by the improvement of activities on ensuring the security of the state border of Ukraine and approval of new legal relations by enhancing the mechanism of their legal regulation along with continuing development and expansion of the regulatory and legal framework to meet new challenges and threats to the security of the state border. In this connection, the Cabinet of Ministers of Ukraine adopted the Comprehensive Program for Building the State Border of Ukraine on September 9, 1993 which was approved by the Decree of the President of Ukraine of December 16, 1993 No. 596/93²⁶. The Law of Ukraine “On

²³ *Pro pidporjadkuvannja Ukrajini prykordonnykh vijsjk, shho dyslokujutsja na jiji terytoriji : Ukaz Prezydiji Verkhovnoji Rady Ukrajiny vid 30 serpnja 1991 roku № 1464-XII.* [On subordination of border troops stationed on its territory to Ukraine : Decree of the Presidium of the Verkhovna Rada of Ukraine of August 30, 1991 No. 1464–XII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1464-12> (accessed 16 October 2019).

²⁴ *Pro derzhavnyj kordon Ukrajiny : Zakon Ukrajiny vid 4 lystopada 1991 roku № 1777–XII.* [On the State Border of Ukraine : Law of Ukraine of November 4, 1991 No. 1777–XII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1777-12> (accessed 16 October 2019).

²⁵ *Pro Prykordonni vijsjka Ukrajiny : Zakon Ukrajiny vid 4 lystopada 1991 roku № 1779–XII.* [On the Frontier Forces of Ukraine : Law of Ukraine of November 4, 1991 No. 1779–XII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1779-12> (accessed 16 October 2019).

²⁶ *Pro Kompleksnu prohramu rozbudovy derzhavnogho kordonu Ukrajiny : Ukaz Prezidenta Ukrajiny vid 16 hrudnja 1993 roku № 596/93.* [On the Comprehensive Program for Building the State Border of Ukraine : Decree of the President of Ukraine of December 16, 1993 No. 596/93]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/596/93> (accessed 17 October 2019).

General Duty and Military Service” and the Decree of the President of Ukraine of October 7, 1993 No. 431/93 “On Temporary Field Manuals of the Armed Forces of Ukraine” were adopted^{27,28}.

The third stage (January 1994 – end of 1999) of the development of legal regulation of relations in the sphere of the state border security of Ukraine is characterized by intensification of the implementation of the Comprehensive Program for Building the State Border of Ukraine provisions aimed at improving the mechanism of legal regulation of relations within the sphere of our research²⁹.

The fourth stage (beginning 2000 – March 2003) was marked by a rethinking of the role and status of border structures in the state mechanism of Ukraine, continuation to update the legislative base in order to increase the efficiency of regulation of legal relations and reorganization of the State Border Guard Service of Ukraine into a special purpose law enforcement agency. In this connection, the Decree of the President of Ukraine approved the Program of actions on November, 2000 which was aimed at maintaining the regime of the state border and regulations on restricted access to border areas, the development of the Ukrainian Border Guard Troops and customs authorities for the period up to 2005³⁰.

The fifth stage (March 27, 2003 – 2014) was characterized by the reorganization of the Border Guard Troops of Ukraine into the State Border Guard Service of Ukraine as a special-purpose law enforcement

²⁷ *Pro vijskovyj obov'jazok i vijskovu sluzhbu : Zakon Ukrainy vid 25 bereznja 1992 roku № 2232–XII*. [On military duty and military service : Law of Ukraine of March 25, 1992 No. 2232–XII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/2232-12> (accessed 17 October 2019).

²⁸ *Pro tymchasovi statuty Zbrojnykh syl Ukrainy : Ukaz Prezydenta Ukrainy vid 7 zhovtnja 1993 roku № 431/93*. [On Temporary Statutes of the Armed Forces of Ukraine : Presidential Decree of October 7, 1993 No 431/93]. Retrieved from: <https://zakon2.rada.gov.ua/laws/show/%20431/93?lang=ru> (accessed 17 October 2019).

²⁹ *Pro Kompleksnu prohramu rozbudovy derzhavnogho kordonu Ukrainy : Ukaz Prezydenta Ukrainy vid 16 ghrudnja 1993 roku № 596/93*. [On the Comprehensive Program for Building the State Border of Ukraine : Decree of the President of Ukraine of December 16, 1993 No. 596/93]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/596/93> (accessed 17 October 2019).

³⁰ *Pro Prohramu dij, sprjamovanykh na pidtrymannja rezhymu derzhavnogho kordonu i prykordonnogho rezhymu, rozvytok Prykordonnykh vijsjk Ukrainy ta mytnykh orghaniv Ukrainy na period do 2005 roku : Ukaz Prezydenta Ukrainy vid 16 lystopada 2000 roku № 1241/2000*. [On the Program of Actions aimed at Supporting the State Border and Border Regime, Development of the Border Guard of Ukraine and the Customs Authorities of Ukraine for the Period up to 2005 : Presidential Decree of November 16, 2000 No. 1241/2000]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1241/2000> (accessed 18 October 2019).

agency, with detailed regulation of its activity, differentiation of competences of different bodies and departments of the agency, which caused expansion of types of legal relations due to the complexity and explicitation of the border agency tasks.

At this stage, the Law of Ukraine “On the State Border Guard Service of Ukraine”, the Concept of the State Border Guard Service of Ukraine Development for the Period up to 2015, and other regulatory legal enactments became important documents for determining the strategy of improving the mechanism of legal regulation of legal relations in the sphere of border security of Ukraine^{31,32}.

The sixth stage (2014 – present) i.e. the improvement of the mechanism of legal regulation of relations in the sphere of border security is characterized by the fact that it accounts for the period of open aggression of the Russian Federation against Ukraine, encroachment upon the territorial integrity and sovereignty of our state, which was manifested in the annexation of the Crimea and Sevastopol, launching military aggression in eastern Ukraine and trying to destroy the unity of the democratic world, by trying to revise the world order that formed after the end of World War II, to undermine the foundations of international security, etc.³³.

This political situation has caused the urgent need to create a new system of the state border protection, to increase the efficiency of implementation of state policy in the sphere of the state border security, to implement European standards of integrated border management, to create proper conditions for the realization of human rights and freedoms, to develop cross-border cooperation³⁴. In this regard, a number

³¹ *Pro Derzhavnu prykordonnu sluzhbu Ukrainy : Zakon Ukrainy vid 3 kvitnja 2003 roku № 661-IV*. [On the State Border Guard Service of Ukraine : Law of Ukraine of April 3, 2003 No. 661-IV]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/661-15> (accessed 19 October 2019).

³² *Pro Koncepciju rozvytku Derzhavnoji prykordonnoji sluzhby Ukrainy na period do 2015 roku : Ukaz Prezidenta Ukrainy vid 19 chervnja 2006 roku № 546/2006*. [On the Concept of Development of the State Border Guard Service of Ukraine for the period up to 2015 : Presidential Decree of June 19, 2006 No. 546/2006]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/546/2006> (accessed 20 October 2019).

³³ *Pro rishennja Rady nacionaljnoji bezpeky i oborony Ukrainy vid 6 travnja 2015 roku «Pro Strategiju nacionaljnoji bezpeky Ukrainy» : Ukaz Prezidenta Ukrainy vid 26 travnja 2015 roku № 287/2015*. [On the Decision of the National Security and Defense Council of Ukraine of May 6, 2015 “On the National Security Strategy of Ukraine” : Presidential Decree of May 26, 2015 No. 287/2015]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/287/2015> (accessed 21 October 2019).

³⁴ *Pro skhvalennja Strategiji rozvytku Derzhavnoji prykordonnoji sluzhby : rozporjadzhennja Kabinetu Ministriv Ukrainy vid 23 lystopada 2015 roku № 1189-r*. [On

of regulatory legal enactments have been adopted aimed at improving the mechanism of legal regulation of relations in the border sphere and the creation of new, more progressive theoretical models of legal relations in the sphere of border activity and implementation of border policy in accordance with the best European and world standards. The following regulatory legal enactments should be referred to: Presidential Decree of January 12, 2015 “On the Strategy for Sustainable Development “Ukraine 2020”, Ordinance of the Cabinet of Ministers of Ukraine of November 23, 2015 No. 1189-p. “On Approval of the Strategy for the State Border Guard Service Development”, as well as a number of other regulatory legal enactments related to border security issues^{35,36}. However, a special place among them is taken by the Law of Ukraine “On National Security of Ukraine”³⁷.

CONCLUSIONS

Summarizing the above-mentioned, we can summarize the following conclusions:

legal relations in the sphere of border security of Ukraine have come a long way of evolution in their development, from their pre-state development in the conditions of the patrimonial society as archaic relations of customary law and ending with modern legal relations within the researched sphere;

archaic relationships that arose over the protection of the boundaries of the territory of habitation of a particular social community (family, fraternity, tribe) were extremely fateful and, accordingly, obligatory-protective in nature, since such participation was a primary duty of every member of the tribeship, regardless of his/her gender and age;

Approval of the Strategy of Development of the State Border Service : Order of the Cabinet of Ministers of Ukraine dated November 23, 2015 No. 1189-p.]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1189-2015-p> (accessed 22 October 2019).

³⁵ *Pro Stratehiju stalogho rozvytku «Ukrajina–2020» : Ukaz Prezydenta Ukrainy vid 12 sichnja 2015 roku № 5/2015*. [On the Ukraine 2020 Sustainable Development Strategy : Presidential Decree of January 12, 2015, No. 5/2015]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/5/2015> (accessed 22 October 2019).

³⁶ *Pro skhvalennja Stratehiji rozvytku Derzhavnoji prykordonnoji sluzhby : rozporjadzhennja Kabinetu Ministriv Ukrainy vid 23 lystopada 2015 roku № 1189-r*. [On Approval of the Strategy of Development of the State Border Service : Order of the Cabinet of Ministers of Ukraine dated November 23, 2015 No. 1189-p.]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/1189-2015-p> (accessed 22 October 2019).

³⁷ *Pro nacionaljnu bezpeku Ukrainy : Zakon Ukrainy vid 21 chervnja 2018 roku № 2469-VIII*. [On the National Security of Ukraine : Law of Ukraine of June 21, 2018 No. 2469-VIII]. Retrieved from: <https://zakon.rada.gov.ua/laws/show/2469-19> (accessed 23 October 2019).

at the beginning of the emergence of states the protection of their borders was haphazard, spontaneous in nature due to lack of state experience, clearly defined borders, weakness of the legal regulation of the aforementioned sphere, then with the development of customs procedures, as a source of state treasury replenishment, there was a need to strengthen the protection of the state border in order to prevent smuggling;

the development of legal relations in the sphere of border security was not uniform, linear, cyclic in nature but it was characterized by rotating certain ups and downs, which in some way correlate with the stages of development of Ukrainian statehood. Accordingly, the formation of the researched legal relations has been reflected within the five evolutionary periods of their establishment;

the process of development of legal regulation of relations in the sphere of border security in the territory of an independent Ukraine essentially coincides with the six stages of the development of the border guard agency of the Ukrainian state;

the current development of legal regulation and the effective implementation of border security relations are significantly influenced by Ukraine's involvement into a hybrid war with Russia and desire of our country for Euro-Atlantic integration, which contradicts the strategic political plans of the aggressor state.

SUMMARY

The scientific article is devoted to the research of peculiarities of formation and development of legal relations in the sphere of border security of Ukraine.

The author emphasizes that the origins of modern legal relations within the researched sphere reach back to the pre-state period and originate from the need to protect the boundaries of the territory of compact habitation of the primitive community (family, fraternity, tribe). At the same time, the protection of their own territory was spontaneous, poorly organized and subject to social regulation through mono-norms of archaic law.

It is substantiated that simultaneously with the development of states and their borders, as well as the legal regulation of their defence and protection caused by economic growth, trade and customs development, legal relations in the sphere of border security have been gradually formed and diversified.

Attention is drawn to the fact that the establishment of a mechanism for the legal regulation of legal relations in the sphere of the state border

security in Soviet times is connected with the establishment of the legitimacy and legal order of the positivist type in the spirit of Stalin's ideology. And qualitatively new approaches to increase the effectiveness of the mechanism of legal regulation of relations in the sphere of border security on a European basis began to be implemented after the collapse of the USSR in the time of Ukraine's political independence.

Five periods of legal relations evolution in the sphere of border security under the difficult conditions of the Ukrainian statehood have been distinguished.

It is also noted that the process of development of legal relations within the researched sphere of independent Ukraine as a whole coincides with the six stages of development and improvement of the activity of its border agency which has been analysed by the author.

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THE CONCEPT OF DEVELOPMENT OF THE LEGISLATION AS THE WAY OF IMPROVEMENT OF THE REGULATORY FRAMEWORK OF THE STATE BORDER GUARD SERVICE OF UKRAINE

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INTRODUCTION

New types of threats at the state border of Ukraine caused by constant attacks on our territory, spreads of terrorism and other illegal activities, require from the State Border Guard Service of Ukraine proper counteractions in order to ensure the security of the state border as an element of the national security of Ukraine. Obviously, the implementation of the functions by border-guards should be based on qualitative regulatory support. To date, the legal regulation of public relations in the sphere of activity of the State Border Guard Service of Ukraine is carried out by a number of normative acts, the legal norms of which require substantive analysis as they are in some way obsolete, contain conflicts, gaps and inaccuracies.

The problem of the effectiveness of regulatory framework of the border service is widely discussed by our scholars: Oleh Han'ba, Valentyn Z'olka, Yuriy Ivashkov, Mykola Kabachyns'kyy, Roman Lyashuk, Iryna Kushnir, Yuriy Kurylyuk, Nataliya Orlovs'ka, Serhiy Khalymon and others. Unfortunately, there are practically no systematic approaches in the scientific literature to determine the ways of further development and improvement of legislation of the State Border Guard Service of Ukraine activity.

The listed factors contribute to the formation and adopting the conceptual document with the set of main principles in the norm-making sphere on border protection.

The problem presented in the publication concerning the comprehensive study of the current state of the legislation of the State Border Guard Service of Ukraine as an independent normative complex in the system of national legislation and defining the concept of its development.

1. The notion and the structure of the legislation of the State Border Guard Service of Ukraine

For today the conceptual basis of the legislation that regulates operational and service activity of the State Border Guard Service of Ukraine is in a process of formation. That is why in order to work out the concept of its development we have to understand the meaning of the notion – “legislation”.

The problem of investigation of the legislation as the legal phenomenon is still considered actual both in Ukraine and abroad. In European Union countries with continental legal system it is also paid the great attention to it, especially in the context of correlation of national and European Union legislation¹. As a rule the content of this notion is interpreted as a totality of laws issued and officially approved by parliament².

In Ukrainian theory of law there are three approaches to “legislation”:

- broad – it is the system of the all normative and legal acts;

- median (between broad and narrow meaning) – it is the system of the normative and legal acts of public authorities: parliament, president, government;

- narrow – it is the system only of the parliamentary acts and treaties ratified by parliament.

Taking into consideration that operational and service activity of the State Border Guard Service of Ukraine is regulated by the great number of subordinate normative acts the broad approach is more acceptable for our scientific research.

The analysis of the nature of functions of the State Border Guard Service determined in legal acts let us make a conclusion that the subject of legal regulation of the mentioned legislation is social relations, connected with full-filling by border-guards law-enforcement, special, operational and combat activities in the social space that creates the separate sphere of legal regulation.

Law-enforcement activity includes: control through the state border and to the temporarily occupied territory and from it persons, vehicles, cargoes, as well as detection and termination of cases of illegal

¹ Alexander Turk. (2006) *The Concept of Legislation in European Community Law: A Comparative Perspective*. New York: Kluwer Law International B.V. p.10.

² Cambridge Dictionary Cambridge: Cambridge University Press University Printing House. Retrieved from: <https://dictionary.cambridge.org/dictionary/english/legislation> (accessed 16 October 2019).

movement of them; conducting information-analytical and operational-search activities; combating organized criminality and illegal migration at the state border of Ukraine and within controlled border areas; combating terrorism; coordination of activities of bodies carrying out different types of control at the state border.

A characteristic feature of the law-enforcement activity of the State Border Guard Service of Ukraine is that it is carried out in accordance with the current legislation of Ukraine and it is realized with the set of measures aimed at preventing and ending offenses at the state border of Ukraine.

In the context of combat actions in the east of our country and the involvement of separate border units first in the anti-terrorist operation and now in the operation of the joint forces the staff of the State Border Guard Service Ukraine together with law-enforcement functions performs operational and combat activities related to the protection of the territorial integrity of our country.

To date, the main military threats that border guards must counteract are: provocations of the enemy at the state border (administrative border, demarcation lines); the destructive activity of the enemy's sabotage and reconnaissance groups in the border area and the controlled border area; armed invasions of illegal armed formations or units of the armed forces into the territory of Ukraine.

Operational and combat activity of the State Border Guard Service Ukraine includes: conducting intelligence, information-analytical and operational-search activities on the state border of Ukraine; combating the activities of illegal militarized or armed forces (groups) on the state border of Ukraine; coordination the activities of military formations and law enforcement agencies related to the protection of the state border of Ukraine.

Separate form of State Border Guard Service function that cannot be attributed to the law-enforcement or operational and combat activities is special activity. It is connected mainly with participation of the border guards in protection of places of permanent and temporary stay of the President of Ukraine and other officials, as well as the protection of foreign diplomatic institutions of Ukraine.

Based on the results of the research of a number of approaches related to understanding the content of legislation and functions of border guards the essence of the legislation regulating activity of the State Border Guard Service of Ukraine is proposed to understand as the system of current material and procedural legal acts of Ukraine and the norms of

international law, which determine the performance of the State Border Guard Service special functions in law enforcement, special, operational and combat forms of activity in order to ensure the inviolability of the state border and the protection of the sovereign rights of Ukraine in its exclusive (maritime) economic zone.

The particular importance of finding out conceptual approaches for developing the legislation of the State Border Guard Service stipulates the need to analyze the structure of its system. Normally, the structure of legislation is organization of legal acts, which is expressed in their coherence, differentiation and integration into structural units. The structure of the legislation definitely ensures its integrity.

Mainly the structure of legislation is studied in three dimensions:

hierarchical (vertical) – analyzing the legal force of acts;

legal branch principle (horizontal) – by division of normative legal acts on the subject of legal regulation;

state-organizational (federal) – dividing legal acts by territorial significance.

Each of these structures has its own characteristics and allows to analyze the legislation, applying different approaches of studying its nature.

Taking into consideration the theme and aim of our research it would be better to study the hierarchical structure of legal framework of the Border Guard Service. For, as Victoria Sukhodubova rightly points out that practical importance of the hierarchical (vertical) structure of legislation is that it embodies exclusively hierarchical relations in the system (subordination, integrity and conformity of acts), it also makes a significant impact on ensuring internal coherence and legal unity of the system³. And in addition, the study of conceptual approaches to the development of legislation is impossible without a detailed analysis of the entire structure of regulatory acts, beginning with the law and ending with local act.

The hierarchical structure of the legislation of the State Border Guard Service of Ukraine depends on the legal force of normative acts caused by position of agency issued it.

Taking into account scientific positions regarding the classification of normative acts by their legal force, let us define the hierarchical (vertical)

³ Sukhodubova I. V. (2015) *Ekonomichna teorija ta pravo* [Economic theory and Law]. *Law and security*, vol. 1, no. 20, p. 272–273.

structure of the legislation in the sphere of the State Border Guard Service activity; the Constitution of Ukraine; the laws of Ukraine; decrees and orders of the President of Ukraine; resolutions of the Cabinet of Ministers of Ukraine; directives and orders of the Ministry of Internal Affairs of Ukraine and the Administration of the State Border Guard Service of Ukraine; orders of normative character of regional departments and divisions of the State Border Guard Service of Ukraine.

Considering that tasks at the state border are related to the foreign policy and foreign economic activity of our country, which implies international cooperation on border issues, norms of international law can also be considered as an element of the legislation of the State Border Guard Service of Ukraine.

Under the Article 9 of the Constitution of Ukraine international treaties, ratified by the Verkhovna Rada of Ukraine are considered as a part of the national legislation of Ukraine⁴. In the border guard sphere international treaties can be signed on demarcation, friendship, cooperation, mutual assistance in security and boundary aspects.

International treaties of Ukraine may be concluded by the President of Ukraine, or on his behalf; by the Cabinet of Ministers of Ukraine, or on its behalf; by ministries, other central executive bodies, as well as state bodies on behalf of ministries, other central executive bodies, state bodies.

The laws of Ukraine form the starting point in the legal regulation of public relations on the state border. They have the highest legal force in relation to other normative acts and create the legal frame of the Border Guard Service.

Among the characteristic features that distinguish laws from other normative acts are the following:

they can be issued by specially authorized subjects – parliament or people through a referendum;

regulate the most important social relations and establish their baselines;

have a higher legal force;

they can be adopted in accordance with a specific legislative procedure.

⁴ *Konstytucija Ukrajiny vid 28 chervnja 1996 roku No. 254k / 96-VR.* [Constitution of Ukraine of June 28 1996 No. 254k / 96-VR.]. Retrieved from: <http://zakon3.rada.gov.ua/laws/show/254%D0%BA/96-0%B2%D1%80> (accessed 16 October 2019).

On the top of the structure of legislation there is the Constitution of Ukraine of 28 June 1996. Constitutional norms create the legal basis for regulating the activity on the state border. As a rule general norms of Constitution are implemented in ordinary laws. For example, Article 17 of the Basic Law determines that military formations and law enforcement agencies are responsible for the security of the country and protection of the state border of Ukraine. The detailed explanation of this statement is in the ordinary Law “On the State Border Guard Service of Ukraine” of 4 November 1991 where it is written that the protection of the state border is an integral part of the national security system, coordination of activities of military formations and law enforcement agencies on the state border protection is carried out by the State Border Guard Service of Ukraine⁵.

Taking into consideration scientific positions on the classification of ordinary laws we have classified ordinary laws in the sphere of the Border Guard Service activity into general and special laws. General laws have general content and can be applied to all subjects of law. For example: “On the Defense of Ukraine” of 6 December 1991, “On the State Secret” of 21 January 1994, “On Legal Regime of Emergency” of 16 March 2000, “On Protection of Personal Data” of 1 June 2010, “On the Legal Regime of Martial Law” of 12 May 2015, “On the Features of State Policy for Ensuring State Sovereignty of Ukraine in Temporarily Occupied Territories in Donetsk and Luhansk Regions” from 18 January 2018, “On the National Security of Ukraine” from 21 June 2018 etc. Otherwise special laws refer to particular activity of the border guards detailing the performance of their functions. For example: “On the State Border Guard Service of Ukraine” of 3 April 2003, “On the State Border of Ukraine” of 4 November 1991, “On the Border Control” of 5 November 2009 etc.

Codified normative acts, that are presented by the Codes: Criminal Code of 5 April 2001, Customs Code of 13 March 2012, Code of Ukraine on Administrative Offenses of 7 December 1984 etc., play also an important role in regulating public relations in the sphere of activity of the State Border Guard Service of Ukraine and have the same legal force as ordinary laws.

⁵ *Pro Derzhavnu prykordonnu sluzhbu Ukrainy : Zakon Ukrainy vid 3 kvitnja 2003 roku No. 661-IV* [On the State Border Service of Ukraine: Law of Ukraine of 3 April 2003 No. 661-IV]. Retrieved from: <http://zakon2.rada.gov.ua/laws/show/661-15/page> (accessed 31 October 2019).

Subordinate legal acts form the largest group of acts regulating the activities of the State Border Guard Service of Ukraine, they detail and specify the norms of acts of higher legal force, carry out a more detailed legal norms of social relations in the field of activity at the state border. The hierarchy of subordinate legal acts depends on the body that issue an act.

The President of Ukraine signs international treaties of Ukraine, issues decrees and orders related to appointment of the Chairman of the State Border Guard Service of Ukraine; use of the Armed Forces and border units in the armed aggression against Ukraine; total or partial mobilization; declaration of martial law in Ukraine or in some of its localities; declaration of a state of emergency in Ukraine or in certain localities; declaration certain areas of Ukraine as zones of emergency ecological situation conducting negotiations etc. For example: “On the National Security Strategy of Ukraine” of 6 May 2015, “On the new version of the Military Doctrine of Ukraine” of 2 September 2015, “On the Concept of Development of the Security and Defense Sector of Ukraine” of 4 March 2016 etc.

Resolutions of the Cabinet of Ministers of Ukraine play an important role in regulating the activity of the State Border Guard Service of Ukraine because due to their legal nature they concretely detail general norms of the higher legal acts. In other words they explain how and in what way the tasks of the higher state authorities should be implemented. As a rule, the government issues resolutions related to the contractual legal border clearance, maintaining legal relations on it, as well as carrying out activities to ensure the implementation of state policy in the field of border protection. For example: “On the Border Regime” No. 1147 of 27 July 1998, “On Controlled Border Regions” No. 1199 of 03 September 1998, “On Approval of the Procedure of Entry into the Temporarily Occupied Territory of Ukraine and departure from it” No. 367 of 4 June 2015, “Issues of counteraction to illegal movement of goods across the state border of Ukraine” No. 371 of 8 June 2016 etc.

At the bottom of the hierarchical structure of legislation that regulates the Border Guard Service activity are the directives and orders of the Ministry of Internal Affairs of Ukraine and the Administration of the State Border Guard Service of Ukraine that despite the presence of a certain number of primary norms, contain derivative norms from acts of higher legal force. The main task of such acts is to give proper instructions for caring out norms of higher legal force acts. For example: “On Approval of the Instruction on the Border Guard Service of the State

Border Service of Ukraine” No. 1261 of 19 October 2015, “On Approval of the Regulation on the Border Commandant’s Rapid Response of the State Border Guard Service of Ukraine” No. 190 of 21 March 2016, “On approval of the Regulation on the Border Service Division of the State Border Service of Ukraine” № 311 15 April 2016.

Under the Order of Agency of the State Border Guard Service of Ukraine “On the List of Basic Guidance Documents” No. 63 of 16 March 2015⁶ orders of normative character can also be issued within their powers by heads of regional departments and divisions of the State Border Guard Service of Ukraine: “On the organization of operational and service activities”, “On the organization of operational and search activities”, “On the organization of counter-terrorism events”, “On the organization of protection of the exclusive (maritime) economic zone of Ukraine, its territorial and inland waters”, “On Engineering and Technical Support of State Border Protection and Environmental Security”, “On the organization of rear support of the state border protection” etc.

Thus, we can conclude that nowadays the State Border Guard Service of Ukraine has required quantity of different legal force acts that constitute structured legal system in the separate sphere of regulation and form the firm regulatory framework for its functioning. But despite of this it does not matter often quality.

2. Theoretical approaches to the creation of the Concept of development of the legislation of the State Border Guard Service of Ukraine

A comprehensive research of scientific works on this topic, analysis of the legislation regulating the activity of Border Guard Service, and the results of a survey of border guards allowed us to highlight the following regulatory deficiency:

some of normative acts are obsolete, contain conflicts and inaccuracies;

insufficient promptness of amendments to legal documents in line with changes in the situation at the state border;

⁶ *Pro perelik osnovnykh kerivnykh dokumentiv : Nakaz Administraciji Derzhavnoji prykordonnoji sluzhby Ukrainy vid 16 bereznja 2015 roku No. 63* [On the List of Basic Guidance Documents: Order of the Agency of the State Border Guard Service of Ukraine dated March 16, 2015 No. 63]. Retrieved from: <https://dpsu.gov.ua/> (accessed 31 October 2019).

gaps in legal regulations of the State Border Guard Service of Ukraine activity;

the declarative nature of some legal acts.

In percentage ratio this problem gave the following results (Fig. 1).

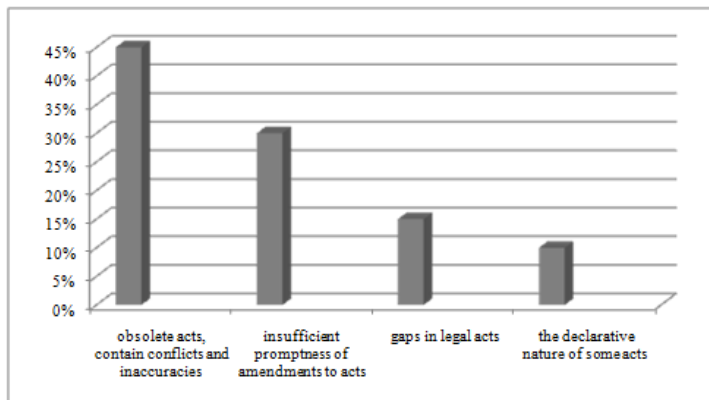


Fig. 1. The percentage ratio of current regulatory deficiency of the State Border Guard Service of Ukraine

In view of the foregoing the problem of the effectiveness of legislation in the sphere of the State Border Guard Service activity demands systematic research and working out approaches to its developing in order to improve it. Analysis of scientific positions on ways of improving the regulatory framework of the State Border Guard Service of Ukraine leads us to conclusion that at the end of the process of improving legislation must be effective legislation.

The famous Ukrainian lawyer Petro Rabinovych points out that legal effectiveness comes when the content of the purpose of the law is precisely legal consequences, such as changes in the legal status of a certain group of persons, or in the specific rights and obligations of personified entities. In all other cases it is possible to speak about the social effectiveness of the law⁷.

Natalia Onishhenko proposes to consider the problem of the effectiveness of legislation taking into account the following factors: the

⁷ Rabinovych P. M. (2007) *Osnovy zagaljnoji teoriji prava ta derzhavy* [Fundamentals of the general theory of law and state]. Lviv: Kraj, p.192 (in Ukrainian)

legislative process; the quality of the law; professionalism of norm-makers; integration processes⁸.

Similar views are held in scientific work by Natalia Dubyna⁹. Pavlo Kindrat adds to such criteria of effectiveness of legislation as social efficiency of legislation and quality of legislation mentioned above the socially beneficial character of the result of the effect of the legal norm, which is expressed in material costs of human energy and time to achieve the goals¹⁰.

Summarizing the aforementioned scientific positions, it can be argued that the effectiveness of legislation is a very important feature, reflecting the ability of legal acts to solve social and legal problems, while ensuring the proper legal regulation of social relations in any spheres.

The existence of a large number of scientific approaches to formulating the effective legislation brought us to conclusion that the main requirements for its creating are quality and quantity of normative acts. Because a certain qualitative certainty of the subject always corresponds to not only quantitative certainty, but the necessary¹¹. Therefore, in order to create the high quality legislation of the Border Guard Service, it is necessary to have a sufficient number of interconnected and mutually agreed upon content and form of legal acts that will complete the inclusive regulation of public relations at the state border.

The existing regulatory framework on border issues is represented by a large number of legal acts, among which 10% are laws of Ukraine, 5% – decrees of the President of Ukraine, 15% – resolutions and enactments of the Cabinet of Ministers of Ukraine, 30% – orders of the Ministry of Internal Affairs of Ukraine and the Administration of the State Border Guard Service of Ukraine, 40% – orders of heads of regional departments and divisions of the state border protection bodies (Fig. 2).

⁸ Onishhenko N. M. (2008) Gharmonizacija pravovoji systemy Ukrajinjy jak chynnyk zabezpechennja prav, svobod i zakonnykh interesiv ghromadjan [Harmonization of the legal system of Ukraine as a factor in ensuring the rights, freedoms and legitimate interests of citizens]. *University research notes*, vol. 4, no. 28, p. 20.

⁹ Dubyna N. A., Taruta O. V. (2015) Problemy efektyvnosti zakonodavstva Ukrajinjy [Problems of the effectiveness of Ukrainian legislation]. *Law and security*, vol. 2, no. 57, p. 25.

¹⁰ Kindrat P. V. (2014) Efektyvnistj zakonodavstva: ponjatijno-terminologhichnyj aspekt [The effectiveness of Legislation: Conceptual and Terminological Aspect]. *Legal Informatics*, vol. 3, no. 43, p. 57.

¹¹ Shherba S. P., Shhedrin V. K., Zaghlada O. A. (2004) *Filosofija* [Philosophy]. Kyjiv: MAUP, p. 104 (in Ukrainian)



Fig. 2. The quantitative indicator of normative acts that regulate activity of the State Border Guard Service of Ukraine

Such a percentage ratio does not raise any particular questions and is logical for any branch of legislation, including legislation regulating the activity of the Border Service, where the norms of laws are detailed in subordinate normative acts, the specific gravity of which is significant, taking into account the need for detailed legal regulation of the specific functions of the State Border Guard Service of Ukraine to ensure the inviolability of the state border and the protection of Ukraine's sovereign rights in its exclusive (maritime) economic zone.

However, our detailed analysis of normative regulation of public relations at the state border shows its regulatory deficiency. In this case we can speak about mismatch of quantitative indicators with qualitative ones.

There are two scientific positions about the quality of normative acts. Representatives of the first speak about its correspondence to social needs. Thus, Natalia Onishhenko distinguishes two main aspects of the quality of legislation: social and legal.

Social manifests itself in accordance with the legal norms of the basic directions of development of society and correspondence to its real living conditions.

The legal aspect means that the normative acts must be lawful and include the principles of democracy and social justice.

The second position implies the mandatory presence of a set of features that make up the quality itself. In particular, Lyudmyla Legin names the following properties (attributes) of qualitative law: properties

that characterize the law act as a form and source of law; properties that characterize the legal norm as the content of the law. In this case, the scientist talks about the form and content of the legal act, which must be accepted as the basis of a high quality legal act¹².

In view of the above, under the quality of the legislation of the State Border Guard Service of Ukraine, we propose to consider the internal set of social and legal properties inherited its form and content, which determine the ability of normative acts to respond to the situation and new threats at the state border.

To date, the indicator of the quality of legislation in the field of border service activity needs to be refined. The most specific qualitative defects is shown on the figure 1(Fig. 1).

Many of the legal deficiencies, in our opinion, are caused by the lack of a clear and scientific-based recommendation, a general concept of development of legislation governing the activity of the Border Guard Service, which could clearly identify the vector of its further improvement, while ensuring its integrity, clear structure, mobility, stability and compliance with the state border situation. This conclusion is confirmed by the results of our poll, where 93% of respondents said they needed to create such a document¹³. Also, in the context of the aforementioned, I would like to cite the quite fair opinion of Oleksandr Yarmysh, who states that any transformations should have a systemic, scientifically based character¹⁴.

Working out the concept of legislation is a common practice today. Thus, while researching the problems of land legislation, Victoria Sydor proposed the Concept of its development¹⁵. At one time, the Concept of

¹² Leghin L. M. (2016) Ponjattja ta kryteriji jakosti zakonu: problemy vyznachennja [Concepts and criteria of quality of law: problems of definition]. *Problems of legality: a collection of scientific works*, vol. 132, no. 16, pp. 196–204.

¹³ Basarab O. T. (2019) *Zakonodavstvo, shho rehuljuje dijajlnistj Derzhavnoi prykordonnoji sluzhby Ukrainy: formuvannja ta perspektyvy rozvytku* [Legislation Regulating the Activity of the State Border Guard Service of Ukraine: Formation and Development Prospects] (PhD Thesis), Khmelnytskyi: Bohdan Khmelnytskyi National Academy of State Border Guard Service of Ukraine.

¹⁴ Ghetjman A. (2013) *Koncepcija rozvytku ekologichnogho prava ta zakonodavstva jak peredumova zabezpechennja nacionaljnoji ekologichnoji polityky* [The concept of the development of environmental law and legislation as a prerequisite for ensuring national environmental policy]. *Bulletin of the National Academy of Law of Ukraine*, vol. 2, no. 1, pp. 165–173.

¹⁵ Sydor V. D. (2012) *Teoretychni problemy rozvytku zemelnogho zakonodavstva Ukrainy* [Theoretical problems of development of the land legislation of Ukraine] (Doctor of Law Thesis), Odessa: Odessa Law Academy.

codification of the information legislation of Ukraine was presented by the authors of the Scientific Research Center of Legal Informatics with the Rights of the Research Institute of the National Academy of Law Sciences of Ukraine in the scientific journal “Information and Law”¹⁶.

It goes without saying that conceptual approach must be based on the compulsory combination of legal and specially applied knowledge of activity of the Border Guard Service, complex theoretical approaches to its further improvement, as well as recommendations for its optimization.

Taking into consideration the analysis of the modern legal framework on border protection and given means of its improvement by norm-making activity and systematization we worked out the Concept of development of the legislation of the State Border Guard Service of Ukraine as the way of improvement of its regulatory framework. The document consists of: general provisions; the main problems are planning to be solved; the ways of overcoming legislation problems; expected results of the Concept implementation.

The legal basis for the drafting of the Concept was the Constitution of Ukraine, laws and other acts of Ukraine in the border area, as well as international treaties. The purpose of the Concept is to create the basic legal and organizational grounds for the development and further improvement of the system of legislation in the sphere of the Border Guard Service activity in the context of its effective implementation at the state border.

The main problems that are planning to be solved with the help of the Concept are:

- imperfection of norm-making activity, acts contain conflicts, gaps and inaccuracies;

- lack of special terms in some spheres of Border Guard Service activity;

- gaps in regulation of obligations of certain subjects of norm making activity in the sphere of Border Guard Service activity;

- the level of scientific elaboration of the norm-making problem is not sufficient;

- the regulatory framework on border issues has not been systematized earlier that is why it includes disorders;

¹⁶ Концепція кodyfikacji informacijnogho zakonodavstva Ukrajiny [The concept of codification of information legislation of Ukraine]. *Informacija i pravo* Information and law, vol. 1, no. 4. Retrieved from: <http://ippi.org.ua/vid-redaktsiinoi-kolegii-rozrobka-proektu-kontseptsii-kodifikatsii-informatsiinogo-zakonodavstva-ukr.> (accessed 31 October 2019).

absence in each border unit an accessible electronic database of accounting of the current normative legal acts.

In the Conception it is proposed to overcome legislation problems in such ways:

- planning and continuous monitoring of norm-making activity;
- determination of areas that require priority regulation;
- normative definition of powers of norm-making entities in the sphere of the State Border Guard Service of Ukraine activity;

- working out orders and instructions on the procedure for creating legal acts on border issues, taking into account the specifics of secret documents;

- conducting a large-scale audit of all regulatory material on border protection in order to identify regulatory deficiencies;

- systematization of the regulatory framework of the State Border Guard Service of Ukraine;

- introduction of proper accounting of legal acts and control over changes of legislation in order to maintain legal acts in a state of prompt receipt of the necessary legal information and readiness to apply norms.

Expected results of the Concept implementation are predicted as following:

- regulatory framework of the State Border Guard Service of Ukraine will be improved;

- normative accumulation will decrease;

- an effective legal basis will be created for the management and control in the sphere of the State Border Guard Service of Ukraine activity;

- the level of proper applying of acts during the border protection will increase, the number of errors in the process of implementation of legal norms will be reduced.

CONCLUSIONS

Taking into consideration results of the conducted research we can conclude that the legislation regulating activity of the State Border Guard Service of Ukraine can be accepted as the separate regulatory framework that is presented by the system of current material and procedural legal acts of Ukraine and the norms of international law, which determine the performance of the State Border Guard Service special functions in law enforcement, special, operational and combat forms of activity in order to ensure the inviolability of the state border and the protection of the sovereign rights of Ukraine in its exclusive (maritime) economic zone.

Based on the doctrine of interpretation of the continental legal system the hierarchical structure of the legislation in the sphere of the State Border Guard Service activity consists of norms of international law, laws and subordinate legal acts (decrees and orders of the President of Ukraine; resolutions of the Cabinet of Ministers of Ukraine; directives and orders of the Ministry of Internal Affairs of Ukraine and the Administration of the State Border Guard Service of Ukraine; orders of normative character of regional departments and divisions of the State Border Guard Service of Ukraine).

Comprehensive researches of the current regulatory framework of the State Border Guard Service of Ukraine draw us to conclusion that it needs to be improved because of its regulatory deficiency (some of normative acts are obsolete, contain conflicts, inaccuracies, gaps in legal regulations, have declarative nature and insufficient promptness of amendments to legal documents in line with changes in the situation at the state border etc).

It is proved that many of the legal deficiencies are caused by the lack of a clear and scientific-based recommendation, a general concept of development of legislation governing the activity of the Border Guard Service, which could clearly identify the vector of its further improvement, while ensuring its integrity, clear structure, mobility, stability and compliance with the state border situation.

Totally, it can be assumed that today the legal framework on border protection needs quality conversion and the Concept of development of the legislation of the State Border Guard Service of Ukraine can definitely be considered as the way of its improvement.

SUMMARY

The article is devoted to the comprehensive study of the current state of the legislation in the sphere of the State Border Guard Service of Ukraine activity and the development of scientifically grounded proposals for its improvement. The Concept of development of the legislation of the State Border Guard Service of Ukraine was worked out.

The essence of the legislation regulating activity of the State Border Guard Service of Ukraine is proposed to understand as the system of current material and procedural legal acts of Ukraine and the norms of international law, which determine the performance of the State Border Guard Service special functions in law enforcement, special, operational and combat forms of activity in order to ensure the inviolability of the

state border and the protection of the sovereign rights of Ukraine in its exclusive (maritime) economic zone.

The hierarchical structure of the legislation of the State Border Guard Service of Ukraine depends on the legal force of normative acts. It consists of the norms of international law, laws and subordinate legal acts.

Taking into consideration the analysis of the modern legal framework on border protection and given means of its improvement by norm-making activity and systematization it is proposed to work out the Concept of development of the legislation of the State Border Guard Service of Ukraine. The content of the document consists of: general provisions, which define the legal basis, the purpose of the Concept, the main problems that are planning to be solved, the ways of overcoming legislation problems and expected results of the Concept implementation. The presented proposals in the research are directed to the development of the legislation of the State Border Guard Service of Ukraine in order to improve the quality of its implementation during the border protection.

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