JURIDICAL SCHOLARLY DISCUSSIONS AS A FACTOR FOR THE SUSTAINABLE DEVELOPMENT OF LEGAL DOCTRINE AND LEGISLATION

Collective monograph

Lviv-Toruń
Liha-Pres
2019

Reviewers:

Prof. dr hab. ***Sabina Grabowska,*** *Uniwersytet Rzeszowski / University of Rzeszow (Republic of Poland);*

Prof. dr hab. ***Joanna Marszałek-Kawa,*** *Uniwersytet Mikołaja Kopernika w Toruniu / Nicolaus Copernicus University (Republic of Poland).*

Juridical scholarly discussions as a factor for the sustainable development of legal doctrine and legislation : collective monograph / S. S. Andreichenko, G. V. Chebotareva, L. V. Didenko, O. S. Kizlova, etc. – Lviv-Toruń : Liha-Pres, 2019. – 328 p.

ISBN 978-966-397-181-0

Liha-Pres is an international publishing house which belongs to the category „C" according to the classification of Research School for Socio-Economic and Natural Sciences of the Environment (SENSE) [isn: 3943, 1705, 1704, 1703, 1702, 1701; prefixMetCode: 978966397]. Official website – www.sense.nl.

CONTENTS

DOI https://doi.org/10.36059/978-966-397-181-0/1-15

THEORIES OF THE FAULT OF THE STATE IN INTERNATIONAL LAW

Andreichenko S. S.

INTRODUCTION

The intensification of the global processes of globalization, which characterize the current trends in the development of legal life, pose new challenges to researchers, in solving which they will always turn, on the one hand, to the development of legal ideas, on the other-to offer new ones, comparing different positions and developing optimal solutions. As Mr. Galet puts it, "questions raised by circumstances always require a solution, or at least an answer". One such legal concept, the application of which requires hasty answers, is "guilt". The increased interest in the category of "guilt" is explained by its importance in the system of philosophical, social and legal values. The principle of responsibility for guilt has long been defended by humanistic human thought and gradually found reflection in the legal systems of society. With the development of civilization, when human life and individual freedoms acquired the highest value, the question of" guilt " becomes Central to the system of legal reality. The category of guilt is one of the Central and important international responsibility.

It is necessary to agree with the position of A. M. Talalaev, stated in the review of the monograph by D. B. Levin's "Responsibility of States in modern international law" (1966): "One can argue whether there is such a concept in international law itself as a set of legal norms, whether there is a mandatory prerequisite for international legal responsibility of the state, but the fact that this concept exists in the theory of international law is a fact that was confirmed during the discussion of the question of responsibility in the UN international law Commission. Moreover, this concept is perhaps Central to the doctrine of the international legal responsibility of States".

A witty example is given by A. Gattini in an article on the place of guilt in the ILC articles on state responsibility "Smoking or not Smoking: some observations on the actual place of guilt in the ILC Articles on state responsibility" (1999): Jagota, a former member of the ILC, referring to the place of guilt in the Draft articles on state responsibility, remarked: "It's like when you walk into a room and you can say that someone has just smoked a cigarette. You can't see the smoker, but you know he's there".

Having analyzed the theoretical developments and jurisprudence on the fault of the state in international law, we can identify the following main approaches to its essence: the theory of subjective responsibility (fault responsibility), the theory of objective responsibility (objective responsibility), an eclectic approach to the question of guilt.

1. The theory of fault responsibility

According to the theory of subjective responsibility, guilt is a prerequisite for the emergence of international responsibility. Supporters of the allocation of guilt proceed from the fact that the state shows its will.

The need for guilt as one of the important elements of an international offense is recognized by many representatives of the international legal doctrine, despite the different approaches of each of them to the problem of guilt and guilt: G. ago, D. B. Levin, G. I. Tunkin, Y. M. Kolosov, J.-P. Queneudec, V. A. Vasilenko, L. Oppenheim, G. Lauterpacht, A. Verdross, C. Sepulveda,A. Navarro, A. Ross, E. Menzel, A. Hershey, M. Krol, and others.

The assertion that the guilt of the offending state is a necessary condition for the characterization of her conduct as internationally wrongful has traditionally prevailed in the doctrine of international law since the time of Grotius. In the XIX century., imitating G. Grotius, lawyers took the Roman principle as the basis of responsibility in international law. The corresponding concept was quite popular in the future.

Most Soviet lawyers defended the concept of guilty state responsibility for international offenses. The support of a number of the most prominent Soviet international lawyers for the concept of guilty state responsibility is primarily due to the importance that the Soviet doctrine of international law gave to responsibility for international crimes. Speaking in support of the inclusion of *animus* in the definition of aggression, the Soviet representative to the UN Special Committee on the definition of aggression noted that aggression is a serious international crime and the responsibility of the aggressor is directly determined by its intention .

It is worth noting that guilt as a mandatory element of an international wrongful act is also provided for in certain cases by international treaties. In particular, according to part 2. article 56 IV of the Convention on the laws and customs of land war of 1907," any intentional seizure, destruction or damage to such institutions, historical monuments, works of art and science is prohibited and shall be subject to prosecution". Article 2 of the Convention on the prevention and punishment of the crime of genocide of 1948 States: "... genocide means any of the following acts committed with intent …" that is, we are talking about guilt in the form of direct intent. The

term “genocide”, writes Professor N. A. Zelinskaya, etymologically associated with two languages (in Greek: “genos” – *“genos”* and in Latin*: “caedo”* – “kill”) and combines two characteristics, one of which is associated with the definition of the victim, and the other – with the purpose of the offender . The international court of justice notes that an essential characteristic of genocide is the deliberate destruction of national, ethnic, racial or religious groups.

Various arguments were put forward in favor of the theory of guilt. Thus, the proponents of the theory of guilt strongly rejected the argument of the representatives of the objective theory that the question of attribution to the state of the behavior of its organs can be left to the consideration of national law. In their view, such attribution depends directly on international legal norms. Such rules may provide for the guilt of officials as a necessary prerequisite for attributing an internationally wrongful act to a state, and the conduct of public authorities will be considered unlawful, regardless of the fact that such conduct is considered lawful and even mandatory under the national law of the state concerned.

Another argument in favour of the theory of guilt is the fact that it would be unfair to attribute to a state those acts or omissions that were committed without fault on their part by individual perpetrators and to qualify the acts as internationally wrongful.

The theory of guilt is taken into account by international arbitration and judicial bodies. It is customary to refer to the 1920 *Home Missionary society claim* between great Britain and the United States to illustrate the theory of subjective responsibility. In this case, the imposition of the *“hut tax”* on the protectorate over Sierra Leone provoked a local uprising, which damaged the property of the missionary Association and killed missionaries. The Tribunal rejected the claim of the missionary Association (represented by the United States) and noted that “there is a well-established principle in international law that a government cannot be held accountable for acts of rebel groups committed contrary to the actions of the authorities, in cases where the government is not guilty of violations or lack of good faith in suppressing the rebellion” (more details on the attribution to the state of the conduct of rebel movements will be discussed in Chapter 2).

Another example of an illustration of guilt theory is the *Corfu channel case* (1949). The case concerned the laying of mines by private actors in Albanian coastal waters. The court had to determine, from the point of view of the law, the legal obligations of Albania arising from its control over the territory. Taking into account that Albania knew about the mining, the UN IPU considered it not to prevent, as a violation of international law as a result of inaction. The court held that each state had an obligation “not to

knowingly permit its territory to be used for acts contrary to the rights of other States" .

In the *Corfu Channel* case, the international court of Justice tended to apply the theory of guilt, noting that the mere fact that mines were planted in Albanian waters did not entail *prima facie* liability and did not obviate the need for evidence.

The approach taken in the Corfu Strait case, in turn, is difficult to reconcile with the approach taken in the *Case concerning United States Diplomatic and Consular Staff in Tehran* (1980), when Iranian public authorities were aware of the unlawful conduct of individuals and did not take any action. The topic of guilt, however, was not addressed in the UNIC. This may have been because the exact role of the state was unclear and providing evidence would have caused almost insurmountable problems .

The element of intent enshrined in the norm that prohibits genocide was addressed in the ICJ Decision on the application of the Convention on the prevention and punishment of the crime of genocide of 26 February 2007 (Bosnia and Herzegovina V. Serbia and Montenegro) . On January 9, 1992, the Serbian Republic of Bosnia and Herzegovina declared independence. On March 6, 1992, Bosnia and Herzegovina itself officially declared its independence. In the period 1992–1995, an armed conflict between Bosnian Serbs and Bosnian Muslims took place in the territory of this state. Bosnian Serbs were supported by Serbia and Montenegro, against which 1993 Bosnia and Herzegovina brought charges of genocide.

The court found that genocide presupposes intent and special intent (*dolus specialis*): "it is not Enough that members of a group are targeted because they belong to that group, that is, because of the discriminatory intent of the perpetrator. In addition, it is necessary that the acts listed in article II were committed with the intention to destroy, in whole or in part, this group as such". The court established the fact of Commission of the acts provided by art. II, however, did not detect the existence of a specific intention to destroy the group as such and noted that the acts concerned could be war crimes and crimes against humanity, which it was not competent to consider.

This intention was established by the Court only when considering the incident in Srebrenica, where in July 1995 Bosnian Serbs killed more than seven thousand Bosnian Muslims. These actions were qualified as acts of genocide, however, the Court recognized that they could not be blamed on Serbia and Montenegro. The court found that the Respondent state had failed to fulfil its obligation to prevent genocide because, while it had the capacity to influence Bosnian Serbs, it had done nothing to prevent the Srebrenica massacre. The court also found that the Respondent state had failed to

comply with its obligation to cooperate with the Yugoslavia Tribunal, which follows from article VI of the Convention, since it had failed to take appropriate measures to search for, detain and place at the disposal of the Tribunal General G. Mladic, who was being prosecuted for committing acts of genocide.

In decisions on the use of force against Yugoslavia, the Court rejected that country's reference to the genocide Convention, inter alia, on the grounds that the bombing did not in fact include an element of group intent, as required by the genocide Convention .

On the basis of the analyzed doctrine and practice of international law, it can be concluded that guilt can be a necessary element of an internationally wrongful act, but only in specific cases, namely, if it is provided for by specific rules of international law. This position is supported by such authoritative scientists as D. Levy,I. Brownlie,E. Aréchaga, P. M. Kuris and others.

2. Theory of strict liability

Since the beginning of the XX century, some authors have tried to understand the role of guilt in the origin of international legal responsibility of the state in a different way. As A. Verdross (1959) noted, "in the past, the science of international law considered it certain that responsibility for an international offense arises for a state only if the act is committed or the omission is committed by a state organ is guilty; there is currently a divergence on the question of how such a subjective factor can have significance in international law".

According to the objective theory, the famous representatives of which were D. Anzilotti, E. Aréchaga, M. Bourquin,E. Borchard, C. Eagleton, J. Combacau, I. I. Lukashuk, J. P. Monnier, D. P. O'Connel, P. Okowa, S. Olleson,N. Politis, J. Starke et al., the act of a state is qualified as internationally wrongful as a result of a breach of an international obligation by state organs, that is, only the objective conduct of the organ by which the international obligation is breached is relevant.

Proponents of the theory of objective responsibility insist that the theory of culpable responsibility looks like a "real anachronism", that "the very nature of international law precludes the possibility of considering guilt as the basis of interstate responsibility".

In the international legal literature there is a considerable amount of arguments in support of the objective theory of international responsibility of the state.

One such argument is the absence of a single concept of guilt within the domestic legal systems of States. International arbitrations and courts also

refrain from applying the concept of "fault" in cases of international responsibility of States.

Some of the arguments are related to the idea that attribution of a wrongful act to the state is a legal operation-an *imputation*-which is directly or indirectly carried out according to national legal norms. Proponents of the objective theory believe that according to the national legal order, the state can be assigned only the authority's responsibility, which is carried out within the competence of the authority and in accordance with the current legislation.

Opponents of taking into account the element of guilt in the imposition of international legal responsibility often cite the following argument: "the requirement of establishing guilt gives the delinquent state the opportunity to challenge the legality of imposing responsibility on it (which it bears from the moment of the tort) by reference to the absence or unproven intent or negligence on the part of its organs". This fact is pointed out by *G. Palmisano :* "in this context, the problem is also the extreme difficulty of proving intent to act unlawfully, if the act is committed by a large number of different bodies. This would clearly cause confusion in the area of state responsibility, to the detriment of the principle of legal certainty in international relations".

I. Brownlie pointed out that "in their practice, States, arbitral tribunals and the international court of Justice have followed the theory of objective responsibility as a General principle, which in some cases may be modified or not applied" .

Let us turn to some of these cases. For example, in the case of the *Union Bridge Company (United States) v. Great Britain*, which dealt with English mistakes of an employee in respect of supplies of materials for the construction of a bridge (they were neutral property) and their purpose (they were intended for conventional, not the railway bridge) and the transfer of materials to the disposal of the Imperial Railways, the court established the liability of great Britain, noting that "it does not depend on the fact that an English clerk made a mistake regarding the identity and destination of the materials, as well as the fact that the British authorities did not intend to assign them" .

The state may be held liable "without fault" for the actions of officials not only in cases where they directly exceed the authority to violate orders, but even in cases where such officials are in good faith mistaken. In *Jesse Lewis (United States) v. Great Britain (David J. Adams case)* (1921), the arbitration held that each government must be held accountable to others for errors in the decisions of its officials who acted within their authority and were empowered to enforce their claims .

In *Thomas H. Youmans (U. S. A.) v. United Mexican States* (1926), the claims Commission also raised the issue of guilt . The case concerned the failure of the Mexican government to protect foreigners from the fury of the mob. In its decision, the Commission succinctly stated that the *"lack of diligence"* on the part of Mexico for the protection of aliens is important for the introduction of state responsibility. However, the exact role of guilt remained unclear. In the *Trail Smelter* award (1938), concerning harmful emissions into the atmosphere by a steel plant that caused damage to the United States, Canada should have been liable on the grounds that it had breached its obligation not to allow its territory to be used in a way that did not cause damage to the territory or in the territory of another state. Possible exculpatory circumstances were not taken into account by the court, and the question of guilt was not considered.

In the case of *Neer Claim* (1926), which concerned the murder of an American overseer in the mines of Mexico, the United States, on behalf of the widow and daughter of the deceased, sought damages due to the lack of thoroughness in the investigation by the Mexican authorities. The General Commission for the review of mutual claims rejected the claims by applying an objective criterion.

Well-known experts in the field of international law, in particular, *Malcolm N. Shaw,M. Akehurst, A. Cassese* and others, have repeatedly noted that the practice of the International court of justice in the vast majority of cases corresponds to the concept of objective responsibility, so the issue requiring proof in the process of recognition of the state responsible for certain actions, is to establish the necessary connection between the state and the person or persons who directly committed an internationally wrongful act.

As for the position of the UN international law Commission, this body did not include the element of state guilt in the draft articles on state responsibility in 1980, 1996 or 2001, thus avoiding difficulties in resolving the question of the presumption of guilt or innocence of the state and the problem of proof of guilt. This approach of the Commission was objected to in the comments of some governments on the articles of the first part of the draft (for example, the government of Austria). The Commission's position has also attracted much criticism in the literature, although some international law experts have supported this decision.

I. I. Lukashuk also pointed out the dominance of the concept of objective responsibility. According to the scientist, this trend is determined both by the nature of international law and the need to improve the level of international legality. Therefore, objective responsibility naturally found its way into the

articles on state responsibility, starting with the principle of responsibility itself.

Apparently, the principle of objective responsibility has every reason to be considered a universal principle. It provides a solid basis for the maintenance of normal standards in international relations and for the establishment of the principle of reparation, – concluded *I. Brownlie.*

All this allows us to conclude that the principle of objective responsibility is firmly entrenched in modern international law, which is confirmed by the relevant developments of scientists and decisions of international judicial institutions.

At the same time, in the Western international legal literature, there are increasingly statements in the sense that neither the theory of culpable responsibility nor the theory of objective responsibility can independently point to the actual grounds of international legal responsibility. For example, *R. Luzzatto* considered it necessary to abandon the attempt to find a single answer to the question on what is the basis of responsibility arising in international law in all possible cases and noted that the solution of the problem of guilt is possible only "on the basis of practice" .

With regard to international judicial and arbitration practice, it provides many examples where decisions were based both on the fault of the state and on an objective violation of international law.

Moreover, there are numerous cases when one and the same arbitral award is indicated by some authors to confirm one theory, and by others – the second. As a possible solution to the question of state responsibility in a particular case, the doctrine of international law proposes the use of the so-called eclectic approach to the concept of guilt, which will be the subject of the next paragraph.

3. Eclectic approach to the issue of state guilt

In the XX century. the whole history of the theory of international legal responsibility of the state was marked by the struggle between the proponents of the theories of guilty responsibility and objective responsibility.

O. Diggelmann, describing the debate over the" nature " of state responsibility that has been going on in the legal literature for several decades, rightly observes that "it was an ideological debate that took a lot of energy from the authors and speakers on this topic. The discussion of the" nature " of state responsibility was an abstract dispute in which fundamental positions depended heavily on ideological beliefs that are difficult to prove. Therefore, the approach of the ILC gave hope that it was finally possible to overcome the long-standing dispute". The approach of the international law

Commission undoubtedly ended the discussion, since the topic of guilt no longer concerned secondary norms. These rules contain only a few hidden references to subjective elements-mainly in the articles dealing with force majeure (article 23), disaster (article 24) and necessity (article 25) in the Chapter on "Circumstances precluding wrongfulness". They do not, however, contain any General rules as to mental requirements.

At the same time, the discussion of guilt reappears in disputes arising in the context of the interpretation of primary norms.

Given that the existing classical theory about wine – the theory of objective responsibility theory the subjective responsibility − do not provide solutions to all issues related to the fault in the sphere of international responsibility, a large part of the modern doctrine, in particular *K. Zemánek, I.Brownlie, P.Dupuy, B. Graefrath,* prefer an eclectic approach to the problem of guilt in international law. This approach is based on the specific content of the primary rules that have been violated by an internationally wrongful act, rather than secondary rules that define in General terms the elements and conditions of responsibility of States for wrongful acts.

An eclectic approach on the part of the state was laid out in the ILC commentary to Articles on responsibility of States for internationally wrongful acts of 2001, the ILC has avoided a clear decision on fault in the norms on the elements of an internationally wrongful act (article 2 Articles), and the rules on attribution of conduct to a state (articles 4–11 of the Articles). However, in the commentary to article 2, the ILC explained: "the attribution Element is often described as 'subjective' and the excitation element as 'objective', but such terminology is avoided in the Articles. The answer to the question of whether there is a violation of any rule may depend on the intention or knowledge of the relevant public authorities or agents and in this sense may be "subjective"... In other cases, the criterion of finding a breach of an obligation may be "objective" in that attention or inattention on the part of the relevant public authorities or agents may not be relevant to the case. Whether the liability is "objective" or "subjective" in this sense depends on the circumstances, including the content of the primary obligation in question. ... This is also true for other criteria, whether they involve some degree of infringement, fault, negligence or failure to exercise due diligence. They vary depending on the circumstances for reasons that are ultimately related to the object and purpose of the contractual provision or other rule that underlies the primary obligation. The Articles do not establish any presumption as to the various possible criteria. It is a matter of interpretation and application of the primary rules violated in each case". (Commentary to article 2 (3) of the Articles).

When speaking about the interpretation of primary obligations, it is necessary to focus on the distinction between primary and secondary rules of international law, because the Articles on state responsibility of 2001 are based on the fundamental distinction between "primary" and "secondary" rules on state responsibility.

Primary norms directly regulate the behavior of subjects. Secondary rules determine the consequences of non-performance of obligations arising from primary rules. This division is close to the division of norms into material and procedural. However, it is not identical to it, which was emphasized by the special Rapporteur *R. Ago,* who introduced this division. His report said it was "not just procedural rules". The articles on responsibility are devoted to the latter. The Commission sought to avoid delving into the definition and codification of the primary rules whose violation gave rise to liability.

The United Nations international law Commission, in preparing the draft articles on state responsibility for offences, concluded at its twenty-fifth session that it was necessary to focus on the study of the rules governing responsibility and to draw a clear distinction between that task and the task of establishing "primary" rules that imposed on States an obligation whose violation might entail responsibility. At the XXVIII session of the UN General Assembly, a significant number of representatives in the Sixth Committee endorsed the Commission's intention to focus on the study of "secondary" rules, which determine the legal consequences of non-performance of obligations under the "primary" rules.

Primary and secondary rules are inseparable, interrelated and complement each other in consolidating the international legal order. The content of the obligations enshrined in the primary rules cannot be disregarded in determining the content and consequences of the offence.

At the same time, the distinction between primary and secondary norms has its critics. For example, the first report of *J. Crawford* argued that "secondary" rules are a mere abstraction and have no practical utility; that the assumption that there are generally accepted secondary rules does not take into account the possibility that specific substantive rules, or substantive rules in a particular branch of international law, may become the source of their own special secondary rules, and that the draft articles themselves do not make this distinction consistently, indicating its artificial nature .

It should be emphasized that, in practice, the distinction between primary and secondary rules has a number of advantages. It is impossible not to agree with special Rapporteur *J. Crawford*, that such a distinction allows for the revision and development of some General rules on liability, without the need to address many questions about the content or application of specific rules, the violation of which may entail liability. For example, the question

of whether a state is liable in the absence of harm or loss to another state or States was discussed in detail. If harm is understood as losses expressed in monetary valuation, it is quite clear that it is not always necessary. However, there are certain situations where there is no legal harm to another state if it has not suffered material damage . This position varies depending on the material or primary norm in question. It is only necessary to formulate the draft articles in such a way that they provide for different possibilities depending on the primary rule applied .

J. Crawford specifically emphasizes the issue of guilt: "a similar analytical method could be used in relation to the question of whether a certain 'psychic element', or *culpa,* is necessary for state responsibility to occur, or whether state responsibility is *'strict'* or even *'absolute*', or whether it depends on *'due diligence'.*

Thus, the absence of the requirement that there is an element of state guilt to establish an internationally wrongful act in the Articles on state responsibility does not mean that there is no such element in the legal rules on state responsibility. Rather, – as writes *J. Crawford*, – this reflects the important point that different primary rules on international responsibility may set different standards of fault ranging from "due diligence" to "strict liability".

Despite the existing controversies, the literature argues that the eclectic approach is generally acceptable, but at the same time its individual provisions are either insufficient or subject to criticism . Due to the lack of consensus among the authors, there are reasonable doubts that the eclectic theory can have the same meaning as the theory of objective responsibility and the theory of subjective responsibility .

Thus, the approach according to which the question of guilt is made dependent on the interpretation of primary rules, along with the advantages, has its drawbacks, associated primarily with the complexity of the monotonous interpretation of the primary rules of international law, the lack of unanimity among scientists and practitioners.

CONCLUSIONS

The articles on state responsibility of 2001 do not establish the content of obligations under a specific primary norm, do not contain their interpretation, do not answer the question of the duration of the obligation for States. The purpose of these Articles is to formulate the basic rules of international law with regard to the responsibility of States for internationally wrongful acts, namely the General conditions under which a state is responsible for the breach of its obligations, as well as the legal

consequences arising from such responsibility, i.e. the focus is on secondary rules of international law on state responsibility.

In order to deal in practice with the question of state responsibility for the presence or absence of such an element of the composition of an internationally wrongful act as "guilt", it is important, inter alia, to properly interpret the relevant primary obligations of a particular state. In this aspect, interpretation is undoubtedly one of the key points of theory and practice in the field of international responsibility. In fact, the correctness of the application of international norms depends on interpretation and, accordingly, the effectiveness of the system of international law as a whole largely depends on its effectiveness. Interpretation is one of the necessary tools to ensure the functioning of the international legal system.

The classical theories of *fault responsibility* and *objective responsibility* (the struggle between the proponents of which marked the entire history of the development of the theory of international legal responsibility of the state in the XX century) alone are not able to point to the actual grounds of international legal responsibility. As a possible solution to the question of state responsibility in a particular case, the doctrine of international law proposes an eclectic approach to the understanding of state guilt, based on the specific content of the primary rules that have been violated by an internationally wrongful act, rather than secondary rules that define in General terms the elements and conditions of state responsibility for wrongful acts. This compromise approach has led to discussions about state guilt in the context of the interpretation of the primary rules of international law.

SUMMARY

Since the beginning of the XX century, attempts have begun to rethink the role of guilt in the establishment of international responsibility of the state. Gradually appeared more and more supporters of the theory of objective responsibility. The concept of objective responsibility is of paramount importance in modern international legal doctrine and is confirmed by the practice of international courts and arbitrations, which prefer not to deal with the problem of guilt.

The classical theories of fault responsibility and objective responsibility (the struggle between the proponents of which marked the entire history of the development of the theory of international legal responsibility of the state in the XX century) alone are not able to point to the actual grounds of international legal responsibility. As a possible solution to the question of state responsibility in a particular case, the doctrine of international law proposes an eclectic approach to the understanding of state guilt, based on the specific content of the primary rules that have been violated by an

internationally wrongful act, rather than secondary rules that define in General terms the elements and conditions of state responsibility for wrongful acts.

REFERENCES

1. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro). Judgment of 26 February 2007 // ICJ Reports. 2007.
2. Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) Judgment of 26 February 2007 // ICJ Reports. 2007.
3. Commentaries to the draft articles on Responsibility of States for internationally wrongful acts adopted by the International Law Commission at its fifty-third session (2001). Report of the Commission to the General Assembly on the work of its fifty-third session // Yearbook of the International Law Commission. 2001. Vol. II, Part Two.
4. Diggelmann O. Fault in the Law of State Responsibility : Pragmatism *ad infinitum ?German Yearbook of International Law*. 2006. Vol. 49.
5. First report on State Responsibility by Mr. James Crawford / International Law Commission. Fiftieth session. Geneva, 20 April – 12 June 1998. New York, 27 July – 14 August 1998. Para. 14. UN Doc. A/CN.4/490.
6. First report on State Responsibility by Mr. James Crawford / International Law Commission. Fiftieth session. Geneva, 20 April –12 June 1998. New York, 27 July – 14 August 1998. Para. 16. UN Doc. A/CN.4/490.
7. Flemme M. Due Diligence in International Law.Master thesis, 2004.
8. Gattini A. Smoking / No Smoking : Some Remarks on the Current Place of Fault in the ILC Draft Articles on State Responsibility. *European Journal of International Law.* 1999. Vol. 10.
9. Home Frontier and Foreign Missionary Society of the United Brethren in Christ (United States) v. Great Britain, 18 December 1920 // Reports of International Arbitral Awards. Vol. VI.
10. Jesse Lewis (United States) v. Great Britain (David J. Adams case) (1921) // Reports of International Arbitral Awards. Vol. VI.
11. L. F. H. Neer and Pauline Neer (U. S. A.) v. United Mexican States (1926) // Reports of International Arbitral Awards. Vol. IV.
12. Luzzatto R. Responsabilità e colpa in diritto internazionale / R. Luzzatto // Rivista di diritto internazionale. – Milano, 1968. Vol. Ll, fasc. 1.
13. Palmisano G. Fault . *Max Planck Encyclopedia of Public International Law*. Vol. III.

14. Pisillo-Mazzeschi R. The Due Diligence Rule and the Nature of the International Responsibility of States. *German Yearbook of International Law*. Vol. 35. 1992.

15. Report of the International Law Commission on the work of its twenty-fifth session, 7 May – 13 July 1973. UN Doc. A/9010/Rev.1 Official Records of the General Assembly. Twenty-eighth session. Supplement № 10 // Extract from the Yearbook of the International Law Commission. 1973. Vol. II.

16. The Corfu Channel case (United Kingdom v. Albania). Judgment of 9 April 1949 // ICJ Reports. 1949.

17. homas H. Youmans (U.S.A.) v. United Mexican States (1926) // Reports of International Arbitral Awards. Vol. IV.

18. Trail Smelter Arbitration (United States of America v. Canada) (1938) // Reports of International Arbitral Awards. Vol. III.

19. Union Bridge Company (United States) v. Great Britain) (1924) // Reports of International Arbitral Awards. Vol. VI. P.

20. United States Diplomatic and Consular Staff in Tehran (United States of America v. Iran). Judgment of 24 May 1980 // ICJ Reports 1980.

21. Lake Lanoux Arbitration (France v. Spain) (1957) // Reports of International Arbitral Awards. Vol. XII.

22. Елынычев В. Н. Вина в международном праве. *Советское государство и право*. 1972. № 3.

23. Зелінська Н. А. Міжнародно-правова концепція міжнародного злочину : дис. … доктора юрид. наук : 12.00.11, 2006.

24. Кроуфорд Д. Статьи об ответственности государств за международно-противоправные деяния. United Nations Audiovisual Library of International Law. URL: www.un.org/law/avl.

25. Курис П. М. Международные правонарушения и ответственность государства. Вильнюс : Минтис, 1973.

26. Лукашук И. И. Право международной ответственности. М. : Волтерс Клувер, 2004.

27. Международное право. В 2-х книгах : перевод с английского. Кн. 2 / Броунли Я. ; под ред. : Тункин Г. И. ; пер. : Андрианов С. Н. М. : Прогресс, 1977.

28. Международное право. В 2-х книгах : перевод с английского. Кн. 2 / Броунли Я. ; под ред. : Тункин Г. И. ; пер. : Андрианов С. Н. М. : Прогресс, 1977.

29. Международное право. Изложилъ Де Галетъ.Санктпетербургъ, 1860. (Предисловие).

30. Международное право. Перевод с немецкого ; под ред. : Тункин Г. И. (Предисл.) ; пер. : Кублицкий Ф. А., Нарышкина Р. Л. М. : Иностр. лит., 1959.

31. Талалаев А. Н. Д. Б. Левин. Ответственность государств в современном международном праве. М. : Международные отношения, 1966. 152 с. : [Рецензия]. *Правоведение.* 1967. № 2.

Information about the author:
Andreichenko S. S.,
Doctor of Sciences in Law, Associate Professor,
Professor at the Department of International Law and Comparative law,
International Humanitarian University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/16-35

REVIEW OF COURT DECISIONS ON APPEAL AND CASSATION

Chebotareva G. V.

INTRODUCTION

Until now, in the science of both civil procedural and economic procedural law of Ukraine there is no special study entirely devoted to the Institute of appellate proceedings.

In the legal literature before 1917, an appeal was considered as a request by a party who considers a decision of the court of first instance completely or partially incorrect, for a new examination and a new decision of the case by the court of higher instance. So, the purpose of the appeal is the review, that is, the secondary consideration of the case on the merits as a whole or in part.

The Institute of cassation proceedings in the economic process, which has been operating in Ukraine since June 21, 2001, differs significantly from traditional forms of cassation proceedings. On the one hand, cassation proceedings in the economic process are limited to checking compliance with the norms of substantive and procedural law by lower courts. On the other hand, the part powers of the economic court of cassation instance the lawmakers the right to change the decision of the court of first instance, appellate court, or to revoke them and make new decisions that are not characteristic for classic appeal system, but is inherent in the audit procedure of reviewing judicial acts, distinctive for legislative of number of foreign countries and domestic civil procedure.

Another guarantee of protection of the rights and legitimate interests of legal entities and citizens is the review of judicial decisions of the Supreme economic court of Ukraine by the Supreme Court of Ukraine in the economic process.

1. Essence and concept of appeal proceedings

Characteristic features of the appeal may be the following:

1) an appeal shall be made against a court decision that has not entered into force;

2) the case on appeal is transferred to a higher court;

3) the appeal is due to the incorrectness of the decision of the court of first instance, which is, in the opinion of the person who filed the appeal, or in the wrong establishment of actual circumstances or incorrect application of law or incomplete performance by the parties of required material;

4) the court of appeal, reviewing the case, considers both the factual circumstances and questions of law, that is, has the right to check both the legal and factual sides of the case to the extent that the court of first instance;

5) an appeal may be allowed only once in each case.

This characteristic of the appeal is the most General. However, with the General concept, features and purpose of the appeal, there are special features characteristic of different types of appeal.

Thus, appeal proceedings are a set of actions of the economic court of appeal and persons participating in the case, carried out in order to verify the legality and validity of acts of the economic court of first instance, which have not entered into force and re-examination of the case on the merits.

For the implementation of the appeal proceedings it is necessary to have a number of prerequisites of an objective and subjective nature. The prerequisites for appeal are understood as preconditions for the realization of the right to appeal[1].

One of the main objective prerequisites for the admissibility of the appeal is the presence of the object on which the appeal is filed. The object of the appeal is the decision of the court of first instance, which has not entered into force and contains, in the opinion of the person filing the appeal, adverse consequences for him of the dispute resolution.

The objective conditions of admissibility of the appeal include compliance with a certain period of appeal. That is, the appeal proceedings cannot arise if the term for the appeal is missed and its restoration was refused.

So, according to Art. 93 of the CPC of Ukraine, the appeal is filed, and the appeal submission is made within ten days from the date of the decision by the local economic court, and if only the introductory and operative parts of the decision were announced at the court session – from the date of signing the decision, issued in accordance with the law. Restoration of the missed deadline for filing an appeal (submission) is possible within three months from the date of the decision of the local economic court.

Determining the appeal period, it is worth considering that during this time, the persons involved in the case are dissatisfied with the court decision, must prepare for its appeal. They must carefully consider what facts, inconsistencies they have not sufficiently identified, justified and therefore not taken into account by the court of first instance. They should as far as possible correct their shortcomings of evidence, Supplement, develop their defense, in connection with which it will be necessary to submit to the court of appeal new explanations, objections, arguments, evidence. In addition, as

[1] Borodin M. review of civil cases on appeal. Right of Ukraine. 2004. No. 8.

correctly noted by I. Zaitsev, you need to psychologically prepare for the appeal, make a motivated complaint, which will be quite difficult to do without the help of lawyers, and pay the state fee.

Therefore, in our opinion, it would be more expedient to revise the term of appeal against decisions of the economic court and increase it to one month, as provided in civil proceedings[2].

It is necessary to agree with the opinion of E. Borisova that the appeal period should meet two main goals:

1) to provide persons involved in the case, the necessary time to prepare for judicial protection;

2) to provide the necessary time to arrive from their place of residence in the city where the court of appeal.

A subjective prerequisite for the admissibility of an appeal is the presence of a certain circle of persons entitled to appeal against the decision of the court of first instance. It is a question of those persons to whom the decision rendered by court of the first instance does harm that is expressed for them in adverse consequences. Such persons may be:

a) persons whose claims submitted to the court of first instance remained wholly or partially dissatisfied;

b) persons who disagree with the reasoning part of the decision. In this regard, those persons who are quite satisfied with the decision taken in their favor cannot appeal against the decision. This provision follows from the requirement of the need for the interested person to have a legal interest in the process, as a prerequisite for participation in this process.

In accordance with article 91 of the code of civil procedure of Ukraine, the parties have the right to file an appeal, and the Prosecutor-an appeal against the decision of the local economic court, which has not entered into force.

Thus, the subjects of the appeal are the persons involved in the case-the parties (plaintiff, defendant), third parties, their representatives and successors, the Prosecutor.

These persons have the right to appeal if:

1) they have a certain legal interest in the case, that is, they are not satisfied with the decision of the court of first instance and intend to defend their claims in the court of appeal;

2) they have procedural capacity. The opponent on the appeal can become only the person in whose favor the decision of the court of the first instance, or its successor.

[2] Shevchuk P. Institute of appeal: experience of settlement in procedural legislation of certain post-Soviet countries. Bulletin of the Supreme Court of Ukraine. 2000. No. 4.

2. Initiation of appeal proceedings

In order to exercise the right of appeal, in addition to procedural prerequisites (bringing a complaint against a decision subject to appeal in accordance with the law; compliance with the appeal period; filing a complaint by a person who has the right of appeal), it is also necessary to comply with a number of formal conditions. One of them is the condition of compliance of the appeal (submission) with the requisites specified in the law[3].

In accordance with article 94 of the code of civil procedure of Ukraine, the appeal (submission) is filed (made) in writing and must contain:

1) the name of the economic court of appeal to which the complaint is filed (submission);

2) the name of the local economic court that made the decision, the case number and the date of the decision;

3) requirements of the person filing the appeal (representation), and also the bases on which the question of revision of the decision is raised, with reference to the legislation and the materials available in business or presented in addition;

4) the list of documents attached to the complaint (submission).

The appeal shall be signed by the person filing the complaint or his representative. The complaint shall be accompanied by evidence of payment of the state fee and sending a copy of the complaint to the other party in the case.

The person filing the appeal shall send to the other party in the case a copy of the complaint and copies of the documents attached thereto, which the party does not have.

The Prosecutor, who makes the appeal submission, sends to the parties in the case a copy of it and copies of the documents attached to it, which are absent in the case (article 95 of the COD of Ukraine).

A party to the case, having received an appeal (representation), has the right to send a response to it to the appellate instance and to the person who filed the complaint (representation). This review is signed by the person involved in the case, or his representative. A power of attorney confirming his authority to conduct the case shall be attached to the withdrawal signed by the representative.

The recall may be accompanied by documents that have not been provided previously. In this case, the withdrawal shall be accompanied by evidence of the direction of other persons involved in the case, copies of those documents that these persons do not have.

---

[3] Course of civil procedure: Textbook / V. Komarov, V. Bigun, V. Barankova et al.; ed. Kharkiv: Pravo, 2011. 1352 p.

The direction of the response to the appeal – the right of the person participating in business. Be required to submit a comment, the economic court cannot. Therefore, the absence of a response to the appeal (submission) does not prevent the revision of the Decision of the local economic court (article 96 of the CPC of Ukraine). The content of the review applicable rules article 59 EPC of Ukraine, which regulates the content of the statement of defense.

According to Art. 97 of the code of civil procedure of Ukraine, the appeal (representation) is not accepted for consideration and is returned by the appellate economic court if:

1) the appeal (representation) is signed by the person who has no right to sign it, or the person whose official position is not specified;

2) the complaint (submission) is not accompanied by evidence of sending a copy of it to the other party (parties);

3) documents confirming payment of the state duty in the established order and the size are not attached to the complaint;

4) the complaint (submission) is filed after the expiration of the period established for its filing, without a request for the restoration of this period;

5) before making a determination on the acceptance of the complaint (submission) to the proceedings, the person who filed the complaint filed an application for its withdrawal.

A cassation appeal may be filed against the decision to return the appeal (submission).

About acceptance of the appeal (representation) to production the appellate economic court takes out determination in which reports on time and the place of consideration of the complaint (representation).

The resolution is sent to the parties and the Prosecutor who participated in the consideration of the case or entered into consideration of the case (article 98 of the COD of Ukraine).

It is worth paying attention to the omission of the term of appeal. The missed deadline set for filing an appeal may be restored at the request of the party if there are valid reasons[4].

Only persons entitled to file an appeal may apply to the economic court for the restoration of the missed deadline. The application may be made in a written application or in a complaint and shall be filed simultaneously with their filing. The petition must specify the reasons for missing the deadline for filing an appeal.

[4] Shevchuk P. On the creation and operation of appellate courts in the judicial system of Ukraine. Bulletin Of The Supreme Court Of Ukraine. 1998. No. 2.

The petition for restoration of term on filing of the complaint is considered by the judge of appellate instance individually without notification of the persons participating in business before the decision of a question of acceptance of the appeal to production.

Based on the results of the consideration of the petition for the restoration of the missed deadline for filing an appeal, a determination is made. At restoration of the missed term in this definition it can be specified about acceptance of the complaint to production.

The decision to restore the missed deadline is not subject to appeal.

The decision to refuse to restore the missed deadline for filing an appeal may be appealed in cassation.

3. Procedure for consideration of the case in the appellate instance

In the appellate instance, cases are reviewed according to the rules of consideration of these cases in the first instance, taking into account the features provided for by law. The economic court of appeal, reviewing the decision on appeal, uses the rules provided to the court of first instance (article 99 of the CPC of Ukraine).

Unlike the court of first instance, the court of appeal hears all cases in a collegial composition.

The session of the court of appeal consists of three interrelated parts: 1) preparatory; 2) consideration of the complaint on the merits; 3) making and announcement of the decision.

In assigned to the case time the presiding officer opens the meeting, announces the membership of the court explains to the persons participating in business, their rights and obligations, determines the order, figures out whether the participants in the economic process of the application, petition, taps to structure of court, expert, and translator, will lead the discussions, contributing to the full and comprehensive clarification of all circumstances of the case, provides in meeting the proper order.

When considering the case in the appellate instance, the economic court considers the case again on the merits on the evidence available in the case and additionally submitted. The court is not bound by the arguments of the appeal and checks the legality and validity of the decision in full, both in the contested and in the non-contested part, regardless of the arguments set out in the appeal.

Additional proofs are accepted by economic court if the applicant has proved impossibility of their representation in court of the first instance for the reasons which are not depending on it.

The appellate instance does not accept or consider new claims that were not presented during the consideration of the case in the first instance. This

is one of the features of the consideration of cases in the second instance (article 101 of the CPC of Ukraine).

As A. Keilin notes, the possibility of presenting new claims in the appeal proceedings would contradict the principle of procedural economy, since it could turn out that only part of the claims is considered in the court of first instance, while the other part of the claims the parties could reserve for presenting it when considering the case in the court of appeal.

According to K. Malyshev, the principle of immutability of claims has a strictly defined, limited meaning and is that the claim relationship, as the subject of the process and the decision must remain identical throughout the proceedings, so that the court of second instance under the pretext of appeal did not decide the case for a new claim, which can and should be presented in the proper court of first instance[5].

However, it should be noted that the court of appeal allows the possibility of changing the original requirements. It is a question, for example, about the requirement of payment of percent which size increased during production on business, about recovery of cost of the lost property that makes a case subject, requirements of judicial offset, about decrease or increase in the size of the claim and other.

These claims can be admitted because they do not change the case, are in direct connection with the essence of the dispute and cannot be considered separately from it.

These requirements, as rightly noted A. Zagorovsky, will not prevent the identity of the subject.

New claims may also be made by agreement of the parties, if such agreement does not violate the public procedure of legal proceedings.

Speaking about the new requirements, it should be noted that in this case we are talking only about substantive requirements, in connection with which the rule in question has no relation to the requirements of a procedural nature.

Refusal of the appeal (submission). In accordance with Art. 100 of the civil procedure code of Ukraine, a person who filed an appeal (representation), has the right to refuse it before the decision. The economic court of appeal has the right not to accept the refusal of the complaint if these actions contradict the legislation or violate the rights and interests protected by the law.

About acceptance of refusal of the complaint (representation) the appellate economic court takes out determination if the decision of local economic court is not appealed by other party.

[5] Course of civil procedure: Textbook / V. Komarov, V. Bigun, V. Barankova et al.; ed. Kharkiv: Pravo, 2011. 1352 p.

Thus, the interested person may exercise his right to refuse the appeal (submission) as follows:

1) the person who filed the appeal may refuse it before the beginning of the oral proceedings;

2) the person who filed the appeal may refuse it until the end of the trial, that is, until the court of appeal makes a decision on the case;

3) refusal of the appeal – the duty of the person who brought the appeal and refused it, to pay to the opposite party all court costs incurred as a result of filing of this complaint. On the issue of reimbursement of expenses, the court of appeal must make a determination.

The term of consideration of the appeal (submission) is established in Art. 102 of the COD of Ukraine and is two months from the date of its receipt in the economic court.

The decision of the appellate instance. Having listened to explanations of the persons participating in business, having investigated available in business and the presented additional proofs, the appellate economic court accepts the resolution.

When making a decision the court is obliged to solve the following questions:

1) full of the court of first instance of the experiments of the circumstances relevant to the case;

2) are the circumstances proven that the court found established;

3) do the conclusions of the court set out in the decision correspond to the circumstances of the case;

4) are the norms of substantive and procedural law not violated, are they correctly applied;

5) whether arguments of the appeal are proved.

According to Art. 105 of the civil procedure code of Ukraine, the decision of the economic court of appeal must be specified:

1) name of the appellate commercial court that considered the appeal, the court, case number and the date of the decision;

2) the name of the parties and the name of the person who filed the complaint (submission);

3) name a local commercial court, whose decision is being appealed, the case number, date of decision, name of the judge (judges);

4) summary of the essence of the decision of the local economic court;

5) the grounds on which the question of revision of the decision is raised;

6) the arguments set out in the response to the appeal (submission);

7) the circumstances of the case established by the appellate instance, the arguments on which the appellate instance rejects certain evidence, the reasons for the application of laws and other regulations;

8) in case of cancellation or change of the decision of local economic court-arguments on which the appellate instance didn't agree with conclusions of court of the first instance;

9) conclusions on the results of consideration of the appeal (submission);

10) new distribution of court costs in case of cancellation or change of the decision.

The resolution shall enter into force from the date of its adoption.

The decision is sent to the parties in the case within five days from the date of its adoption.

The decision of the appellate instance may be appealed in cassation.

4. Powers of the court of appeal

In accordance with article. 103 COD Ukraine appellate instance by results of consideration of the appeal (submission) has the right:

1) to leave the decision of local economic court without changes, and the complaint (representation) – without satisfaction;

2) cancel the decision in whole or in part and make a new decision;

3) cancel the decision in whole or in part and terminate the proceedings or leave the claim without consideration in whole or in part;

4) to change the decision.

The court of appeal leaves the decision of the local economic court unchanged, and the complaint without satisfaction in the event that it comes to the conclusion that the decision made by the court of first instance is lawful and justified, and the motives of the complaint are insignificant. At leaving of the complaint (representation) without satisfaction in the resolution motives on which arguments of the appeal are recognized wrong or not being the basis to cancellation of the decision shall be specified[6].

Economic procedural legislation of Ukraine does not contain such a power as the transfer of the case for a new trial in the court of first instance. Its absence is due to the nature of the appeal proceedings, adapted for re-examination of the case and the exercise of judicial control by a higher court. Therefore, having convinced that the decision is illegal or unreasonable, the appellate instance should correct the mistakes made by the court of first instance. Introduction in COD of Ukraine of this rule is caused by "procedural economy, aspiration to accelerate consideration of cases and to

[6] Borodin M. review of civil cases on appeal. Right of Ukraine. 2004. No. 8.

eliminate unnecessary red tape". Making a new decision is necessary when violations of substantive law or other circumstances of the case affected the final conclusions of the court of first instance on the rights and obligations of the parties.

Termination of proceedings or abandonment of the claim without consideration in whole or in part may take place only on the grounds provided for in articles 80 and 81 of the code of civil procedure of Ukraine. The Commission of these actions shall entail procedural consequences specified in the law.

The right to change the decision of the appellate instance arises under the same conditions as the right to make a new decision. However, this right, unlike the right to make a new decision, can be exercised only when the mistakes made did not affect the final conclusions of the court of first instance on the rights and obligations of the parties. In particular, the change of the decision will be necessary in case of reduction or increase in the amount of the recovered amount. The change may involve not only the operative but also the reasoning of the decision. Thus, to change the decision-means to make corrections in it, do not influence final conclusions of economic court of the first instance about the rights and obligations of the parties.

According to Art. 104 of the civil procedure code of Ukraine, grounds for cancellation or change of the decision of the local economic court:

1) incomplete clarification of the circumstances relevant to the case;

2) lack of evidence of circumstances relevant to the case, which the local court found established;

3) discrepancy of the conclusions stated in the decision of local economic court to circumstances of business;

4) violation or improper application of substantive or procedural law.

Norms of substantive law are considered violated or incorrectly applied if the economic court: a) did not apply the law to be applied; b) applied the law not to be applied; c) misinterpreted the law.

Non-application of the law to be applied takes place in those cases when the court not only does not specify in the decision the norm of substantive law to be applied in this case, but also resolves the case contrary to the norms of the current legislation. This violation is also a case of application by the court of the cancelled law or norms of the regulatory legal act contradicting the current law, or norms of the act accepted with violation of the established order.

The essence of the application of improper law is that the court in deciding the case is not guided by the norm that regulates the disputed legal relationship. Such violation is caused, as a rule, by incorrect qualification of relations of the parties.

A misinterpretation of the law takes place in cases where the law to be applied is applied, but its meaning is misunderstood, as a result of which the court makes a wrong conclusion about the rights and obligations of the parties in the decision. An example of such a violation is the court's broad or restrictive interpretation of substantive law.

Violation of the norms of substantive law, as a rule, entails a change or cancellation of the decision of the economic court.

Violation or improper application of procedural law may be grounds for cancellation or change of the decision only if this violation led to the adoption of an incorrect decision[7].

Violation of the rules of procedural law is in any case the basis for the cancellation of the decision of the local economic court, if:

1) the case was considered by the economic court in the illegal composition of the panel of judges;

2) the case is considered by the economic court in the absence of any of the parties not duly informed of the place and time of the court session;

3) the economic court decided on the rights and obligations of persons who were not involved in the case;

4) the decision is not signed by any of the judges or is not signed by the judges specified in the decision;

5) the decision was made not by the judges who were part of the panel that considered the case;

6) the decision is made by economic court with violation of rules of subject or territorial jurisdiction, except the cases provided by the law.

The question of whether this or that procedural violation led or could lead to the adoption of an incorrect decision, in each case, is decided by the court of appeal. The same procedural violation, depending on the circumstances of the case, may entail different procedural consequences and does not always lead to the reversal of the decision. Minor procedural violations committed by the court of first instance during the consideration of the case, if they did not or could not influence the final conclusions of the court, are not grounds for revocation of the decision.

5. Appeals against the decisions of the local economic court

The norms of economic procedural legislation provide for appeals not only against decisions of economic courts, but also against rulings made by the court of first instance when considering the case on the merits.

[7] Civil process: the Textbook. No. / A. Andrushko, Y. Belousov, G. Stefanchuk, A. Ugrinovskaya et al. Kyiv: Precedent, 2005.

According to article 106 EPC of Ukraine, local economic court ruling may be appealed before the appellate order in the cases stipulated by the EPC of Ukraine and Law of Ukraine "On restoring debtor's solvency or declaring bankruptcy".

Appeals against the decisions of the local economic court shall be considered in accordance with the procedure established for consideration of appeals against the decision of the local economic court.

Appeals against the decisions of the local economic court may be filed by the parties and other participants in the judicial process.

In cases cancellation of appeal decisions 1) refusal to accept the claim or 2) the application for commencement of bankruptcy proceedings, 3) the return of the statement of claim or application for initiation of bankruptcy proceedings, 4) the suspension of the proceedings, 5) the termination of the proceedings, 6) the abandonment of the claim without consideration or 7) abandonment of the application instituting bankruptcy proceedings without consideration, the case is submitted to local economic court.

It is also worth considering that not every ruling of the economic court of first instance can be appealed separately from the decision. Among the definitions there are those that do not directly affect the correctness of the resolution of the case on the merits and appeal them before the decision is not necessary. Therefore, such determinations cannot be appealed separately from decisions[8].

6. The nature, value and the right to appeal against

Cassation proceedings are a stage of the economic process, which involves checking by the economic court the legality of judicial acts that have entered into force.

This stage is characterized by the following features:

1) the objects of cassation appeal are judicial acts that have entered into force, including the appellate instance;

2) cassation proceedings are initiated, as well as appeal proceedings, only on complaints (submission), which must indicate what is the violation or improper application of the law;

3) the purpose of cassation proceedings is to verify the legality of judicial acts;

4) the court of cassation is not bound by the limits of the complaint (submission), but checks the legality of judicial acts in General;

5) cassation proceedings shall be carried out only by the Supreme economic court of Ukraine;

[8] Emelyanova I. Appellate and cassation review of court decisions in civil proceedings: theoretical and practical aspects. Right of Ukraine. 2004. No. 2.

6) the court of cassation does not consider the case on the merits, does not check the validity of judicial acts, but checks their legality, that is, the correctness of the application of the norms of substantive and procedural law by the court of first and appellate instance.

Cassation proceedings consist of the following stages:

1) violation of cassation proceedings;

2) preparation for consideration of the cassation complaint (submission);

3) judicial proceedings on the cassation complaint and adoption of the resolution.

The right to cassation appeal arises from the date of entry into force of decisions and decisions adopted by economic courts in the first and appellate instances, in the presence of the prerequisites specified in the law. Such prerequisites are: 1) availability of the decision which has entered into force, the decisions taken out by court of the first or appellate instance; 2) reference of subjects of the appeal to number of the persons participating in business.

In accordance with article 107 EPC of Ukraine, the parties in the case have the right to file a complaint, and the Prosecutor cassation representation on the decision of local economic court, which entered into legal force and the decision of the court of appeal. A cassation appeal may also be filed by persons not participating in the case, if the court has made a decision or decision concerning their rights and obligations.

So, we can distinguish the following entities filing a cassation complaint: 1) parties; 2) third parties; 3) the Prosecutor; 4) persons who are not involved in, but on the rights and obligations which the commercial court received the decision or ruling.

The object of the appeal may be: 1) the decision of the commercial court that entered into legal force; 2) the decree of the appellate instance; 3) determine the economic court, the possibility of appeal which provided for the CCP, separate from the solution.

Appeal (representation) is fed (introduced) to the Supreme economic court of Ukraine through local or appeal economic court that made the judgment or order, subject to appeal.

The local or appellate economic court which has accepted about the decision or the resolution which is appealed is obliged to submit the complaint (representation) together with business to the Supreme economic court of Ukraine within five days from the date of its receipt[9].

According to article. 110 COD Ukraine cassation complaint (representation) can be filed (made) within a month from the date of entry of

[9] Civil process: the Textbook. no. / A. Andrushko, Y. Belousov, G. Stefanchuk, A. Ugrinovskaya et al. Kyiv: Precedent, 2005.

the decision of the local economic court or the decision of the economic court of appeal into force.

The cassation complaint (representation) is submitted (brought) in writing and shall contain:

1) name of cassation instance;

2) the name of the local or appellate economic court, the court decision of which is appealed, the case number and the date of the decision or decision;

3) the name of the person filing the complaint (submission), and the other party (parties) in the case;

4) the requirements of the person who filed the complaint (submission), indicating the essence of the violation or improper application of substantive or procedural law;

5) the list of documents attached to the complaint (submission).

References in the cassation complaint (representation) to unproven circumstances of the case are not allowed.

The cassation complaint shall be signed by the person who filed the complaint or his authorized representative.

The complaint shall be accompanied by evidence of payment of the state fee and sending a copy of the complaint to the other party in the case.

The person who filed the cassation complaint, sends to other party in business of the copy of the cassation complaint and the documents attached to it which are absent at this party. The Prosecutor, who makes a cassation submission, sends to the parties in the case a copy of it and copies of the documents attached to it, which are absent in the case.

The party receiving the appeal (representation), shall be entitled to send a review of cassation and the person who filed the complaint (representation). The absence of a response to the cassation appeal (submission) does not prevent the review of the appealed court decision[10].

The cassation complaint (representation) is not accepted for consideration and is returned by court if:

1) the cassation complaint (representation) is signed by the person who has no right to sign it, or the person whose official position is not specified;

2) the complaint (representation) is directed differently, than through the local or appellate economic court which made the decision or the resolution;

3) the complaint (submission) is not accompanied by evidence of sending a copy of it to the other party (parties) in the case;

4) documents confirming payment of the state duty in the established order and the size are not attached to the complaint;

[10] Civil process: the textbook. allowance / per zag. ed. NATs. UN-t EXT. cases'. Kharkiv: Vid-vo Hark. NATs. UN-t EXT. del, 2009. 266 p.

5) the complaint (representation) is filed after the expiration of the term established for its filing, without a request for restoration of the term or such request is rejected;

6) the complaint (submission) does not specify the essence of the violation or improper application of substantive or procedural law;

7) before the direction of determination on acceptance of the complaint (representation) to production from the person who submitted the complaint (representation), the statement for its withdrawal arrived.

About return of the cassation complaint (representation) the definition is taken out.

After elimination of the above circumstances, the party in the case has the right to appeal again, and the Prosecutor to make cassation representation in the General order (Art. 111-3 COD of Ukraine).

About acceptance of the cassation complaint (representation) about production the court takes out definitions in which the time and the place of consideration of the complaint (representation) is reported. Orders are sent to all participants in the trial.

7. Procedure for consideration of the cassation complaint (submission)

In cassation instance the complaint (representation) is considered by rules of consideration of business in court of the first instance without considering the procedural actions connected with establishment of circumstances of business and their proof.

The cassation instance uses the procedural rights of the court of first instance exclusively for checking the legal assessment of the circumstances of the case and the completeness of their establishment in the decision or decision of the economic court.

Consideration of the complaint by the cassation instance consists of three interrelated parts: 1) preparatory; 2) consideration of the cassation complaint on the merits; 3) making and announcement of the cassation decision.

In the preparatory part of the hearing, the court of cassation as court of first instance must decide 1) whether the case be dealt with in this part of judges, 2) whether the proceedings in the absence of persons who do not appear involved in the case; 3) explain to the persons participating in business, their rights and responsibilities and to resolve their stated application.

Consideration of the cassation complaint (representation) is carried out by three judges of economic court and begins with: 1) the report of the presiding or one of judges then the cassation instance; 2) hears the persons participating in business, and their representatives. Having listened to

explanations of the persons participating in business, the court should; 3) familiarize with additional materials.

Reviewing in the order of judicial decisions, the cassation instance on the basis of the established factual circumstances of the case checks the application by the court of the first or appellate instance of the norms of substantive and procedural law[11].

The cassation instance has no right: 1) to establish or consider as proved circumstances which were not established in the decision or the resolution of economic court or are rejected by it; 2) to solve a question of reliability of this or that proof; 3) about advantage of one proofs before others; 4) to collect new proofs or in addition to check proofs.

In cassation instance the requirements which were not a subject of consideration in court of the first instance (Art. 111-7 of COD of Ukraine) are not accepted and are not considered.

In cassation instance, as in appeal, and in the court of first instance, the principle of competition. The content of this principle is enshrined in article 111-6 of the COD of Ukraine. According to this article, a person who has filed a cassation complaint (submission) has the right to refuse it before the cassation instance makes a decision.

However, the cassation instance has the right not to accept the refusal of the complaint if these actions contradict the legislation or violate the rights and interests protected by the law.

About acceptance of refusal of the complaint (representation) the cassation instance takes out determination if the decision or the resolution of economic court is not appealed by other party.

Term of consideration of the cassation complaint (submission). The cassation complaint (representation) is considered within two months from the date of receipt of the case together with the cassation complaint (representation) in the Supreme economic court of Ukraine.

The decision of cassation instance. By results of consideration of the cassation complaint (representation), the court accepts the resolution that has to consist of 1) introductory, 2) descriptive, 3) motivational and 4) resolute parts.

According to article. 111-11 COD Ukraine, the resolution must be specified:

1) the name of the cassation instance, the composition of the court, the case number and the date of the decision;

2) the name of the parties and the name of the person who filed the cassation complaint (representation);

[11] Course of civil procedure: Textbook / V. Komarov, V. Bigun, V. Barankova et al.; ed. Kharkiv: Pravo, 2011. 1352 p.

3) the name of the local economic court or the economic court of appeal, decision, ruling of which carious, case number, date of decision, decision, the name of the judge (judges);

4) summaries of decisions of local economic court, the decisions of the appellate commercial court;

5) the grounds on which the decision, the resolution is appealed;

6) the arguments set out in the response to the appeal (submission);

7) the reasons for which the cassation instance does not apply the laws and other regulatory legal acts referred to by the parties, as well as the laws and other regulatory legal acts that guided the court in making the decision;

8) in case of cancellation or change of the decision, the resolution, – motives on which the cassation instance didn't agree with conclusions of court of the first or appellate instance;

9) conclusions on the results of consideration of the cassation complaint (submission);

10) actions to be performed by the parties and the court of first instance in case of cancellation of the decision, decision and transfer of the case for new consideration;

11) new allocation of court costs in case of cancellation or change of the decision.

The resolution shall enter into force from the date of its adoption. The decision is sent to the parties in the case within five days from the date of its adoption.

It should be noted that the instructions contained in the decision of the cassation instance are mandatory for the court of first instance at the new hearing of the case. However, the decision of cassation instance cannot contain instructions on 1) reliability or unreliability of this or that proof, 2) about advantages of one proofs before others, 3) about what norm of the material right has to be applied and what decision has to be made by results of new consideration of business (Art. 111-12 of COD of Ukraine).

According to the current legislation, decisions of the economic court may be appealed in cassation, but in cases expressly provided for in the CPC of Ukraine. The economic procedural legislation does not contain rules that cassation check can take place only after the address of interested persons in appellate instance. Therefore, the rules of the COD of Ukraine, providing for the right to appeal against decisions, after the expiration of the term for appeal or refusal to satisfy the complaint are equally applicable to the cassation instance.

Appeal against determination of local or appeal economic court considered in the order provided for the consideration of cassation complaints to the decision of local economic court, the appellate commercial court.

Appeal against determination of local or appeal economic court can be filed by parties and other participants in the judicial process provided for GIC Ukraine and Law of Ukraine "On restoring debtor's solvency or declaring bankruptcy".

In case of cancellation by the court of cassation decisions of 1) refusal to accept the claim or application for initiation of bankruptcy proceedings, 2) about returning of the statement of claim or application for initiation of bankruptcy proceedings, 3) the suspension of the proceedings, 4) the termination of the proceedings, 5) the abandonment of the claim without consideration or without the abandonment of the application for proceedings on the bankruptcy case, the case is referred to the court of first instance (article 111-13 HPK of Ukraine).

8. Powers of court of cassation instance at consideration of the case

Powers of court of cassation instance are defined in Art. 111-9 of COD of Ukraine according to which cassation instance by results of consideration of the cassation complaint (representation) has the right:

1) to leave the decision of the first instance or the decision of the appellate instance without changes, and the complaint (representation) without satisfaction;

2) cancel the decision of the first instance or the decision of the appellate instance in whole or in part and make a new decision;

3) cancel the decision of the first instance or the decision of the appellate instance and transfer the case to the court of first instance for a new hearing if the court has committed violations provided for by the CPC of Ukraine;

4) cancel the decision of the first instance, the decision of the appellate instance in whole or in part and terminate the proceedings or leave the claim without consideration in whole or in part;

5) change the decision of the first instance or the decision of the appellate instance;

6) to leave in force one of the earlier decisions or resolutions.

The appeal court leaves the decision of first instance or the appellate instance without change, and the complaint (submission) dismissed if it is established that the court of first or appellate instance when considering the case correctly applied the substantive and procedural law. Leaving the complaint without satisfaction, the court of cassation instance in its determination must indicate the reasons for which the arguments of the complaint were rejected[12].

[12] Emelyanova I. Appellate and cassation review of court decisions in civil proceedings: theoretical and practical aspects. right of Ukraine. 2004. No. 2.

The court of appeal may reverse the decision of first instance or the appellate court fully or in part and adopt a new decision if the first or appeal instance of circumstances of the case were established fully and correctly, but there was a mistake in the application of substantive law.

The decision of the first instance or the appellate instance are subject to cancellation, and business transfer on new consideration in court of the first instance, if the decision or ruling is unfounded. The decision or the resolution is recognized unreasonable if: 1) the circumstances having value for business are incomplete clarified; 2) the circumstances having value for business the economic court considered established, are not proved; 3) the conclusions of court stated in the decision do not correspond to circumstances of business.

Thus, the basis for cancellation or change of the decision of local or appellate economic court or the decision of appellate economic court is violation or wrong application of norms of material or procedural law.

According to Art. 111–10 of the code of civil procedure of Ukraine, violation of procedural law is in any case the basis for cancellation of the decision of the local or the decision of the economic court of appeal, if:

1) the case was considered by the court in the illegal composition of the panel of judges;

2) the case is considered by the court in the absence of any of the parties not properly notified of the time and place of the court session;

3) the economic court made a decision or resolution concerning the rights and obligations of persons who were not involved in the case;

4) the decision or the resolution is not signed by any of judges or signed not by those judges who are specified in the decision or the resolution;

5) the decision was not made by the judges who were part of the panel that considered the case;

6) the decision adopted by the economic court in violation of the rules of substantive or territorial jurisdiction, except for the cases stipulated by the law (part 4, article 17 GIC Ukraine – if, after recusal of judges it is impossible to consider the case in the commercial court, to the jurisdiction which referred the case, the Chairman of the Supreme economic court of Ukraine or his Deputy have the right to request any business that you have in the production of local economic court, and to submit it for consideration in another local court).

CONCLUSIONS

Cassation proceedings under the current arbitration procedural legislation is a new mechanism for verifying the legality of judicial acts and has no analogues in the procedural legislation of other States. A fairly short period

of activity of the courts of cassation instance showed that such a mechanism really contributes to the correct solution of economic disputes and protection of the rights and legitimate interests of organizations and citizens.

SUMMARY

The article reveals the essence and the concept of appeal to initiate appellate proceedings, order the proceedings in appellate court powers of appellate court appeal on the definition of local economic court, in cassation proceedings, procedure for consideration of cassation complaints (representations) of the powers of the court of cassation in the proceedings

REFERENCE

1. Civil process: the textbook. allowance / per zag. ed. NATs. UN-t EXT. cases'. Kharkiv: Vid-vo Hark. NATs. UN-t EXT. del, 2009. 266 p.
2. Civil process: the Textbook. no. / A. Andrushko, Y. Belousov, G. Stefanchuk, A. Ugrinovskaya et al. Kyiv: Precedent, 2005.
3. Course of civil procedure: Textbook / V. Komarov, V. Bigun, V. Barankova et al.; ed. Kharkiv: Pravo, 2011. 1352 p.
4. Emelyanova I. Appellate and cassation review of court decisions in civil proceedings: theoretical and practical aspects. right of Ukraine. 2004. No. 2.
5. Shevchuk P. Institute of appeal: experience of settlement in procedural legislation of certain post-Soviet countries. Bulletin Of The Supreme Court Of Ukraine. 2000. No. 4.
6. Shevchuk P. On the creation and operation of appellate courts in the judicial system of Ukraine. Bulletin of The Supreme Court Of Ukraine. 1998. No. 2.
7. Borodin M. review of civil cases on appeal. right of Ukraine. 2004. No. 8.

Information about the author:
Chebotareva G. V.,
Doctor of Law, Professor,
Professor at the Department of Administrative,
Criminal Law and Procedure,
International University of Business and Law
37-A, 49 HGD str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/36-50

THE SYSTEM OF CIVIL PROCEDURAL RELATIONS

Didenko L. V.

INTRODUCTION

As with other areas of law (such as labor or civil), the system of civil procedural relations is a set of legal relations in the field of justice in civil cases, so their classification by many features is necessary. In spite of this, the problem of defining the system of civil procedural relations has not acquired a special interest of scientific, theoretical and scientific-practical interest to this day. Domestic scientists who in one way or another address this issue, use works dating back to the Soviet era. There have been very few studies conducted within the framework of the development of domestic legal institutions.

The urgency of the analysis of this problem can be expressed in the following directions: first, the proper definition and classification of civil procedural relations guarantees the effectiveness of the procedural rights of citizens secured and guaranteed by the current legislation; secondly, a situation in which a highly-researched institute of civil procedural relations generally has separate elements that are actually outside the attention of scholars is unacceptable. Therefore, the low level of scientific development and the importance of this issue for the theory of civil procedural relations generally determine the need to study the system of civil procedural relations.

However, despite the substantial amount of theoretical material on civil procedural relations, the issue of their system is still poorly understood, which makes the current study relevant.

1. Concepts of research of the system of civil procedural relations

A system is an order that is predetermined by the correct, systematic arrangement and interconnection of parts of something, or an established, accepted order[1]. That is, the system of civil procedural relations is a certain set of its components, characterized by mutual connection and a certain order. Elements of systems of any social relations are their varieties. In other words, the study of the system of civil procedural relations involves establishing their varieties, as well as the relationships between them.

[1] Великий тлумачний словник сучасної української мови (з дод. і допов.) / уклад. і голов. ред. В. Т. Бусел. К.; Ірпінь : ВТФ “Перун”, 2005. С. 1320.

The analysis of the scientific literature showed that, at present, studies of the system of civil procedural relations were not actually carried out after the proclamation of Ukraine's independence[2]. Textbooks and monographs on civil procedural law reveal the essence of civil procedural relations, first of all, taking into account their concepts, features, subjects, object, content and grounds of origin[3]. In their turn, researchers of directly civil procedural relationships are also largely oblivious to the disclosure of this issue. The most complete question was revealed in the work of A.L. Pascar[4], however, in this case, the question under study requires a little deeper analysis.

First of all, note the work of the said scientist in view of the qualitative study of the evolution of scientific thoughts on the system of civil procedural relations. Thus, the researcher noted that the issue of the unity of civil procedural relations was investigated even before the revolutionary processualists. For example, E.O. Nefediev wrote: "In the process as regulated by the law of activity, there is unity and integrity. If there are all conditions for the process to occur, then the process itself emerges as a whole"[5]. From this point, we can conclude that the civil process is a set of interrelated actions of its members. At the same time, all activities performed by them are regulated by law. This, on the one hand, ensures unity and, on the other, regulates the behavior of participants in the process. In the same period E.V. Vaskovsky, exploring the structure of relations that arise in the civil process, noted that they are united by a common element and form a whole[6]. That is, all the activities of the parties to the civil process is a set of civil-procedural relations of the participants, which function in unity to achieve a common goal. However, as A.L. notes. Pascar[7], despite the high level of scientific attention to the unity of civil procedural relations on the part of the procedural scholars of the time, the study of the structure and factors at the expense of which this unity was ensured, was not carried

---

[2] Диденко Л. В. Сущность системы гражданских процесуальних правоотношений. *Право и политика.* 2015. Спецвыпуск. С. 73.

[3] Васильєв С. В. Цивільний процес України : навчальний посібник. К. : "Центр учбової літератури", 2013. С. 39–42; Кілічава Т. М. Цивільне процесуальне право : навч. посіб. К. : Центр учбової літератури. 2007. С. 31–37.

[4] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 83–87.

[5] Гражданский процесс : хрестоматия : учеб. Пособие / под ред. проф. М. К. Треушникова. 2-е изд. испр. и доп. М. : ОАО "Издательский Дом "Городец", 2005. С. 95–96.

[6] Васьковский Е. В. Курс гражданского процесса. Том 1. Субъекты и объекты процесса, процессуальные отношения и действия. М. : Издание Бр. Башмаковых, 1913. С. 685–686.

[7] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 83.

out at that time. Note that such a situation can be observed today, because unity and systematicity is defined as one of the main features of civil procedural relations by virtually all researchers, however, the essence of this "systematic" is beyond their attention.

In the era of Soviet law, as noted by A.L. Pascar[8], the concept of a single civil procedural relationship has remained relevant. Among the researchers of the time, the examples of V.P.P. Mozolina[9] and D.R. Dzhalilova[10], from which we can distinguish the following features of the current understanding of the system of civil procedural relations:

1) there are no separate procedural relations in the civil process, since in such a case, the civil procedural relationship loses its integrity by splitting into separate parts;

2) a civil procedural relationship can exist only in the unity of activity of all subjects, and separate relations of the court with the plaintiff, with the defendant, with other participants of the process represent only certain aspects of a single civil procedural relationship in a particular case;

3) each of the parties to a single civil legal process is distinguished by its specific object, content, legal grounds of origin and termination.

That is, the foundations of the modern institute of civil procedural relations were laid already in the Soviet period. The system of civil procedural relations was considered solely in the unity of elements, that is, there were no classifications of varieties of civil procedural relations – there was a single legal relationship, which included the whole set of relations between the court and participants in the trial. Given their multiplicity and unity, disclosure of their structure was considered inappropriate. However, it is noted that not all researchers agreed with this concept, but these ideas were developed only in the following decades.

A.L. Pascar[11] notes that criticism of the concept of a single civil procedural relationship has taken place both in Soviet times and since the independence of Ukraine, and as an example the following argument is given:

1) M.B. Zader pointed out that in each particular case there were a number of numerous legal links between court and plaintiff, between court

[8] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 83.

[9] Мозолин В. П. О гражданско-процессуальном правоотношении. *Сов. государство и право*. 1955. № 6. С. 56.

[10] Джалилов Д. Р. Гражданское процессуальное правоотношение и его субъекты. Душанбе, 1962. С. 34.

[11] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 84.

and defendant, etc. (that is, between the parties), aimed at achieving procedural goals. However, the totality of these relationships does not appear to be a single, albeit complicated legal relationship[12]. That is, despite the systematic nature of civil procedural relationships, they are still interdependent. This means that the occurrence of some relationships causes the termination of others. The same processes can occur in the case of a change of legal relationship. In other words, specific civil procedural relationships as elements of a system cannot exist separately from other elements;

2) already in times of independence and, accordingly, formation of the national institute of civil procedural relations, V.V. Komarov argued that in the process of civil proceedings there are a number of legal relationships, which are interconnected, though independent in content, because they are inherent in the complex of civil rights and responsibilities, the specific composition of the subjects, the grounds and time of their occurrence, as well as termination[13]. That is, each case is subject to a series of civil procedural relations between the court and other entities. Legal relations are different in content, they may be different in the subject composition, rights and obligations of the participants, etc., so they cannot be considered as just one elemental legal relationship. Accordingly, the very concept of a single civil procedural relationship was further developed in Soviet times.

The period from the birth of the Soviet institute of civil procedural relations to the formation of the corresponding domestic institute is characterized by constant disputes of scientists on this subject. In fact, by the 1960s, two basic models of understanding of the system of civil procedural legal relations were formed, about which most scientific discussions were conducted:

1) a model of a single legal relationship;

2) a model of a multiplicity of civil procedural legal relations, each characterized by its own content, subject composition, object, rights and obligations of the parties, etc.

However, it was already clear at the time that the resolution of existing disputes was possible only through the further development of the Institute and the improvement of scientific formulations. Therefore, in the 1960s and 1970s, another model emerged, which was a compromise for both parties. Representatives of the new concept focused on the constituent parts of the

[12] Зейдер Н. Б. Гражданские процессуальные правоотношения. Саратов : СГУ, 1965. С. 11.

[13] Цивільне процесуальне право України : підручник для юрид. вузів і фак. / В. В. Комаров, В. А. Бігун, П. І. Радченко та ін. ; за ред. В. В. Комарова. Харків : Основа, 1992. С. 51.

procedural legal relationship and their interconnection, and emphasized the existence of a complex civil procedural legal relationship, which encompassed a system of individual elementary legal relations[14]. This model can be explained as follows: the scientists concurrently agreed with both the unity of civil procedural relations and the expediency of allocating a number of elementary procedural relations within each of them.

That is, it was considered that a single procedural relationship consists of a series of elementary civil procedural relationships, each of which, at different stages, is combined into a single whole. Such a concept, as A.L. notes. Pascar, existed until the early 80's of the twentieth century[15]. Its importance for the further development of the system of civil procedural legal relations is that, unlike its predecessors, the researchers of this group directed their activity to the study of elements – elementary civil legal relations. At the same time, they did not dispute the unity of the civil procedural relationship, and the basic idea was to form a complex civil procedural relationship out of the simple relations.

Another concept, dating from that period, is the model of the "system of civil procedural relations", which appeared on the basis of provisions developed by supporters of the concept of a single and complex civil procedural relationship[16]. As with the concept of a complex civil legal process, the new model was designed to address the shortcomings and gaps of previous concepts and provide a more modern explanation of the links between civil procedural relationships. Both concepts have not existed in this form for a long time and have always been the subject of debate. The model of "system of civil procedural relations" is still considered to be a more advanced version of the concept of "complex civil procedural legal relations", since its content was clear connections and the nature of the interaction of numerous elementary civil legal relations.

In fact, the model of the "system of civil procedural relations" is the concept that is relevant today. However, it should be borne in mind that it has also come a long way in evolution. At the scientific level[17], it is considered that the essence of this concept has been fully and thoroughly explained by N.O. Chechnya. The researcher found that civil procedural

[14] Гурвич М. А. Гражданские процессуальные правоотношения и процессуальные действия. В 3-х т. Том 3 : Вопросы гражданского процессуального, гражданского и трудового права. М. : ВЮЗИ, 1965. С. 88–92.

[15] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 84.

[16] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 84–85.

[17] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 85.

relations always exist as an integral part of a certain system, that is, they are in mutual and obligatory connection with one another. No procedural legal relationship can exist and develop separately, by itself, without further, necessarily subsequent relations, or without the relations that precede them in time[18]. In other words, civil procedural relations cannot exist separately, each by itself, and individual elementary civil procedural relations are interconnected and exist solely within the framework of a common system.

Over time, more and more scientists have become supporters of this theory. There are still controversial points, in particular, a number of scholars did not support the term "system"[19]. However, the theory of domestic law, the research institute came into being as a system. A.L. Pascar explains that the term system means a whole made up of parts, that is, a set of elements that are in relationship and bond with each other, forming a certain integrity and unity. Moreover, the "system" is characterized in view of the main features: elements – components; structure – the connection between the forming elements; integrity[20]. From this, we can conclude that the formulation of "system" is still successful for civil procedural relations, because it fairly and clearly defines the nature and nature of the relations of the structural elements of the studied institute. It is also noted that during the period under review, the scientific debate was not to refute the ideas of unity of civil procedural relations or scientific positions of each other, but to form a correct understanding whereby this unity was ensured. Scholars who have been in favor of a single civil procedural relationship have argued that "unity" means one, and therefore, the selection of elements in this category is inappropriate. Accordingly, "systemic" concepts were based on the fact that civil process as a judicial system is a system of civil procedural relations, the unity of which is the link between them. At the same time, each legal relationship in the system is subject to a common purpose and is consistent with it.

So, let's summarize the research of the development of scientific ideas for understanding the essence of the "system of civil procedural relations". The main models in the pre-Soviet and Soviet periods were:

1) a model of a single legal relationship;

2) a model of a multiplicity of civil procedural relationships, each characterized by its own content, subject composition, object, rights and obligations of the parties, etc.;

3) model of complex civil procedural relationship;

---

[18] Чечина Н. А. Гражданские процессуальные отношения. Л. : Изд-во Ленингр. ун-та, 1962. С. 56–63.

[19] Гурвич М. А. Основные черты гражданского процессуального правоотношения. *Советское государство и право*. 1972. № 2. С. 32.

[20] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 85.

4) model of the system of civil procedural legal relations.

Each of these categories has in one way or another influenced the development of the following, so it is not advisable to analyze their impact on the current state of the research institute.

2. Modern model of the system of civil procedural legal relations

Today, the most relevant and relevant is the most recent concept – the model of the system of civil procedural relations. In the scientific literature, this term is predominantly found. However, in the post-Soviet period, the study of the essence of the system of civil procedural relations in our country actually stopped. Among the adherents of this model can be distinguished, in particular, the previously mentioned scientist V.V. Komarov, who notes that any system is described by reference to its three main components: elements, structure (connection between elements) and integrity, and, accordingly, supports the very model of the system of civil procedural relations[21]. In this case, integrity is a prerequisite for the existence of a system of civil procedural relations. That is, the whole set of civil procedural relations must be united and be one. Each legal relationship cannot exist on its own. A.L. Pascar explains this in the following example – there are separate independent civil procedural relationships between the court and the participants in civil procedural relations. At the same time, having first arisen between the court and the person who appealed to the court for protection, they become the legal basis for the emergence of procedural legal relations between the court and other participants in civil proceedings[22]. That is, individual civil legal relationships do not arise, change or terminate on their own – they are part of a single system, and their occurrence, termination or change is solely due to the emergence, termination or alteration of other civil legal systems integrated with them.

Based on the works of domestic scientists[23] we will conclude that the modern model of the system of civil procedural relations is characterized by the following features:

1) civil procedural relations are regarded as a system of specific, individualized legal relationships that develop in the course of a civil case from its occurrence to termination;

---

[21] Проблемы науки гражданского процессуального права / [В. В. Комаров, В. А. Бігун, В. В. Баранкова та ін.] ; под ред. проф. В. В. Комарова. Х. : Право, 2002. С. 53.

[22] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 85.

[23] Проблемы науки гражданского процессуального права / [В. В. Комаров, В. А. Бігун, В. В. Баранкова та ін.] ; под ред. проф. В. В. Комарова. Х. : Право, 2002. С. 53.

2) civil procedural relationships form a system of closely interrelated and interrelated legal relationships;

3) the system of civil procedural legal relations consists of a set of relatively independent legal relationships that differ from each other on grounds of origin, subject composition, content, object;

4) none of the legal relationships that are in the system can exist in isolation from the others.

From these features, it can be noted that the content of the concept clearly demonstrates the use of all historical background since pre-revolutionary times. This model is much clearer and more formulated than all previous ones[24]. Let's agree with A.L. Pascar, that each of the analyzed models should not be considered in their contradictions, but more expedient to be understood as complementary and logical evolutionary path[25]. Moreover, the recent development and support of scientists, who received the most recent model, shows that today the system of civil procedural relations is indeed the most successful expression of their structure, among all the existing alternatives.

Therefore, we formulate the following definition: the system of civil procedural legal relations is an order of closely interrelated and mutually related relatively independent legal relations that differ from each other on grounds of origin, subject composition, content, object and cannot exist in isolation from others, between which establishes specific, individualized legal relationships that develop in the course of a civil case from its occurrence to termination.

At the same time, it should be understood that the system of civil procedural relations is independent and individual for each specific case. This can be understood, in particular, by the fact that the cases differ in subject composition, content, object, and there are individual legal links between the elements of the system. The analysis of the rules of the CPC of Ukraine[26] shows the complexity of the procedure of civil proceedings in the civil process. This causes a variety of legal relationships between the court and the parties, between the parties, between the parties and third parties, between the court and third parties, etc. Therefore, in the administration of justice in civil cases, all the diversity of such relationships is manifested.

At the same time, the individualized nature of the composition of the system and the large number of possible civil procedural relations

---

[24] Діденко Л. В. Система цивільних процесуальних правовідносин. *Visegrad journal of human rights*. 2016. № 6\4. P. 32.

[25] Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 86.

[26] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40–41, 42. Ст. 492.

necessitate their successful classification for the purpose of ordering, as well as a better understanding. An analysis of the scientific literature has shown that this issue is not actually being addressed properly. There are only a few examples of the scholarly attention to the issue of classification of types of civil procedural relations. One of the most successful examples is the concept formulated by the authors of the textbook "Theoretical Problems of Civil Procedural Law", as amended by M.M. Yasinka[27]. Scientists classify civil procedural relations into the following types:

1. By the nature of the relationship between the subjects of the process, civil procedural relations are divided into:

1) the principal is the relationship between the court and the parties to the process (for example, filing a claim by the plaintiff, setting out the requirements for the subject matter of the dispute and their justification);

2) derivatives – interaction of the court with others, persons involved in the case (in particular, the legal relationship between the court and the witnesses);

3) auxiliary – relations between the court and other participants in the process that contribute to the administration of justice (including legal relations that arise between the court and experts, translators, the secretary, etc.);

2. By the nature of their interaction, civil procedural relations are divided into:

1) competitiveness relations – competitiveness relations are any civil procedural relations during civil proceedings, under which the parties have equal rights over the exercise of all procedural rights and obligations provided for by law, and each party must prove the circumstances relevant to the case and to which it refers as a basis for its claims or objections;

2) relations of cooperation – as an example of relations of cooperation we note the pre-judicial settlement of the dispute, which can be carried out voluntarily by the parties;

3) management relations – such legal relationships, in particular, are those which provide for the enforcement of court decisions;

3. Depending on the functions and tasks performed, civil procedural relationships are classified into:

1) regulatory – such legal relations are legal relations regarding the settlement of a dispute in a case involving a judge;

2) security:

[27] Теоретичні проблеми цивільного процесуального права : підручник / М. М. Ясинок, М. П. Курило, О. В. Кіріяк, О. О. Кармаза, С. І. Запара та ін.; за заг. ред. д.ю.н. професора М. М. Ясинка. К. : Алерта, 2016. С. 168–169.

– restorative – for example, legal relations concerning the restoration of the civil capacity of an individual in the order of separate proceedings;

– punitive – failure to comply with a judgment is grounds for liability established by law;

– Compensation – for example, a witness is entitled to compensation for costs associated with subpoena;

4. According to the division of rights and responsibilities between the subjects of civil procedural legal relations, the latter are divided into:

1) unilateral – yes, justice in Ukraine is exercised exclusively by the courts, and therefore civil procedural legal relations for the administration of justice are unilateral, since the rights belong exclusively to the courts;

2) bilateral – any legal relationship between the court and the parties, between the parties, between the court and third parties, between the parties and third parties;

5. According to the presence and nature of the subjects' interest, civil procedural relations can be classified into:

1) the relationship between the court and persons having a material interest in the results of the case;

2) the relationship between the court and persons having a procedural interest;

3) the relationship between the court and individuals who are not interested in the outcome of the case, but which contribute to the administration of justice (experts, translators, secretary, etc.).

Such a variety of criteria is, above all, indicative of the feasibility of the conclusions drawn in the work – any system of civil procedural relationships can indeed involve as many elementary legal relationships as possible. In this case, the composition of the system will be different and characterized by unique features in each case.

S. Ya. Fursa, highlighting the same criteria for the classification of civil procedural relations, similar varieties and thus explaining their essence[28]. This is the basis for the conclusion that today the issue of the system of civil procedural relations is characterized by the same vision on the part of different scholars. At the same time, the existence of each of the selected types of civil procedural relations is confirmed in the rules of the CPC of Ukraine[29]. Thus, the existence of the main, derivative and auxiliary civil procedural relations is evidenced by the subject composition. As we have

[28] Фурса С. Я. Цивільний процес України: академічний курс : підручник для студ. юрид. спец. вищ. навч. закл. – К. : Видавець Фурса С.Я., КНТ, 2009. С. 134–135.

[29] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40-41, 42. Ст. 492.

established, the court is the obligatory subject of civil procedural relations. Chapter 4 of the Code is devoted to regulating the issue of the parties involved, that is, the persons involved in the case. The main civil procedural legal relationship arises between the court and such persons. In paragraph 3 of this chapter, a number of articles regulate the procedural status of persons facilitating the trial and settlement of a case. Witnesses are an example of such persons. However, other litigants who contribute to the administration of justice may also be involved in civil legal proceedings. Article 65 of the CPC of Ukraine refers to such persons as an Assistant Judge, Registrar, Court Clerk, Witness, Expert, Law Expert, Translator, Specialist. The court and such persons have ancillary civil procedural legal relationship.

By the nature of the interaction, civil procedural relations are customary to be divided into competitiveness relations, cooperation relations and management relations. Competitiveness, as their name implies, arises in civil proceedings. As set out in Article 12 of the CPC of Ukraine[30], competitiveness relations are characterized by the following features: 1) each party must prove the circumstances relevant to the case and to which it refers as the basis of its claims or objections, except as provided by law; each party bears the risk of the consequences associated with committing or failing to proceed with it; 2) the court controls the course of the trial; facilitates dispute settlement by reaching an agreement between the parties; clarifies, as necessary, the litigants, their procedural rights and obligations, the consequences of committing or failing to act; assists participants in litigation in the exercise of their rights; prevents the abuse of the rights of participants in the trial and takes measures to fulfill their responsibilities. That is, the competitiveness relations are those civil procedural relations that arise during civil proceedings and are characterized by the parties' proving their positions while facilitating the court's such evidence. In turn, cooperative relationships differ from those of competitiveness in that they can occur not only during the trial, but also before it begins. An example of a civil procedural relationship of cooperation is the pre-trial settlement of the dispute, provided for in Article 16 of the CPC of Ukraine[31]. Another example, the amicable agreement of the parties, is regulated by the norms of Article 207 of the same legal act. Cooperation by means of a settlement agreement is carried out in order to settle the dispute on the basis of mutual concessions. The last highlighted type of civil procedural relationship in the nature of interaction is management relations. An example of such legal relationships is the

[30] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40–41, 42. Ст. 492.

[31] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40–41, 42. Ст. 492.

enforcement of court decisions provided for in Section VI of the CPC of Ukraine. That is, those relationships in which one party (namely the court) exerts a leading influence over the other parties. That is, such a criterion for the distribution of civil procedural relations should also be agreed.

Depending on the functions and tasks performed, civil procedural relationships are generally classified as regulatory and protective. Civil procedural relationships aimed at the settlement of a dispute involving a judge are regulatory. The largest civil procedural legal relations are of a regulatory nature. For example, civil litigation on pre-trial settlement of a dispute between the parties or civil litigation on litigation involving a judge are regulatory. In turn, protective civil procedural relationships include a number of other civil procedural relationships, including restorative, punitive and compensatory. Examples of restorative civil procedural legal relations are legal relations on renewal of procedural terms, provided by Article 127 of the CPC of Ukraine; legal relations on the resumption of proceedings in the case, regulated by Article 254 of the CPC of Ukraine, etc. Punitive civil procedural relations arise in the case of non-compliance with the subject of judicial prescribing. For example, Article 18 of the CPC of Ukraine[32] establishes that failure to comply with a judgment is a ground for liability established by law. Witnesses may be brought to participate in punitive civil legal proceedings in the case of knowingly giving false testimony or refusing to give evidence at the request of a court, as evidenced by the provisions of Article 91 of the CPC of Ukraine. The last type of protective civil procedural legal relationship is the compensatory legal relationship. The current CPC of Ukraine provides a number of grounds for the emergence of such relationships. For example, the provisions of Article 51 of this regulatory act indicate that such legal relationships may arise in the event of the defendant being replaced by another defendant. In such a case, the defendant has the right to make a claim for compensation for the legal costs incurred by him as a result of the plaintiff's unjustified actions, which is the basis for the occurrence of compensatory civil procedural relations. Similarly, a witness may initiate civil proceedings for compensation for his expenses related to a subpoena, as provided for in Article 69 (4) of the CPC. That is, in general, we agree with the expediency of allocating such a criterion for the classification of civil procedural relations.

According to the division of rights and obligations between the subjects of civil procedural relations, the latter are divided into one-sided and two-sided. Justice in Ukraine is exercised exclusively by the courts, and therefore civil procedural legal relations for the administration of justice are unilateral,

[32] Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40–41, 42. Ст. 492.

since the rights are vested exclusively in the courts. Accordingly, any legal relationship between the court and the parties, between the parties, between the court and third parties, between the parties and third parties is bilateral.

The last distinguished criterion is the presence and nature of interest of the subjects of civil procedural relations. The relations between the court and the persons having a material interest in the results of the case are highlighted; relations between the court and persons having a procedural interest; relations between the court and persons who are not interested in the outcome of the case, but which contribute to the administration of justice (experts, translators, secretary, etc.). The very essence and content of this variety arises from the name of each particular relationship. An analysis of the content of the CPC of Ukraine shows that each of the selected varieties is indeed characteristic of civil procedural relations. Therefore, we conclude that, despite the low level of scientific attention, the existing concept of classification of types of civil procedural relations is relevant.

CONCLUSIONS

Thus, the study of the system of civil procedural relations revealed a low level of scientific attention to this issue and the presence of theoretical gaps. This institute has come a long way in evolution, and its current state is the result of many years of development. However, after Ukraine's declaration of independence, there is actually no scientific interest in the system of civil procedural relations. To date, there are very few works on this subject, dating from the last two decades. Domestic scientists mostly use the works of Soviet authors in their works. Therefore, today the issue of the system of civil procedural legal relations needs further elaboration, improvement of the conceptual and categorical apparatus, as well as the return to scientific discussions, because the discussions at the time were the same impetus, which significantly contributed to the development of theoretical models of the system of civil procedural legal forms. as it exists now.

Among the existing groups of scientific concepts of determining the institute of civil procedural relations we join a complex (synthetic, universal) group. Civil procedural relations, according to a complex (synthetic, universal) group of scientific concepts, are dynamic multi-stage social relations that arise on the basis of the rules of civil procedural law, have imperative-dispositive character, constitute an individualized social ties between the obligatory subject – the court, and other participants in the civil process, are characterized by the presence of legal rights and obligations that ensure the proper and prompt consideration and resolution of civil cases, and t takozh fulfillment of court decisions on protection of violated, unrecognized or disputed rights, freedoms and interests of individuals, the rights and interests of legal entities, state interests etc.

The modern model of the system of civil procedural legal relations is characterized by the following features:

a) civil procedural relationships are regarded as a system of specific, individualized legal relationships that develop in the course of a civil case from its opening to termination;

b) civil procedural relationships form a system of closely interrelated and interrelated legal relationships;

c) the system of civil procedural relations consists of a set of relatively independent legal relationships that differ from each other on the basis of origin, subject composition, content, object;

d) none of the legal relationships that are in the system can exist in isolation from the others.

SUMMARY

The article deals with the analysis of the definition of civil procedural relations. Investigates the model of "system of civil procedural relations". The author states that today the most appropriate and relevant is the concept – the model of the system of civil procedural relations.

The author examines the features of the modern model of the system of civil procedural relations. Notes that the content of the concept of such a model clearly demonstrates the use of all historical background since pre-revolutionary times. The author provides a classification of civil procedural relations.

The author emphasizes that the system of civil procedural relations is independent and individual for each specific case.

REFERENCES

1. Васильєв С. В. Цивільний процес України : навчальний посібник. К. : "Центр учбової літератури", 2013. 344 с.

2. Васьковский Е. В. Курс гражданского процесса. Том 1. Субъекты и объекты процесса, процессуальные отношения и действия. М. : Издание Бр. Башмаковых, 1913. 691 с.

3. Великий тлумачний словник сучасної української мови (з дод. і допов.) / уклад. і голов. ред. В. Т. Бусел. К.; Ірпінь : ВТФ "Перун", 2005. 1728 с.

4. Гражданский процесс : хрестоматия : учеб. Пособие / под ред. проф. М. К. Треушникова. 2-е изд. испр. и доп. М. : ОАО "Издательский Дом "Городец", 2005. 896 с.

5. Гурвич М. А. Гражданские процессуальные правоотношения и процессуальные действия. В 3-х т. Том 3 : Вопросы гражданского процессуального, гражданского и трудового права. М. : ВЮЗИ, 1965. С. 62–116.

6. Гурвич М. А. Основные черты гражданского процессуального правоотношения. *Советское государство и право*. 1972. № 2. С. 29–36.

7. Джалилов Д. Р. Гражданское процессуальное правоотношение и его субъекты. Душанбе, 1962. 72 с.

8. Диденко Л. В. Сущность системы гражданских процесуальних правоотношений. *Право и политика.* 2015. Спецвыпуск. С. 70–75.

9. Діденко Л. В. Система цивільних процесуальних правовідносин. *Visegrad journal of human rights*. 2016. № 6\4. P. 29–35.

10. Зейдер Н. Б. Гражданские процессуальные правоотношения. Саратов : СГУ, 1965. 72 с.

11. Кілічава Т. М. Цивільне процесуальне право : навч. посіб. К. : Центр учбової літератури. 2007. 352 с.

12. Мозолин В. П. О гражданско-процессуальном правоотношении. *Сов. государство и право*. 1955. № 6. С. 50–57.

13. Паскар А. Л. Система цивільних процесуальних правовідносин. *Науковий вісник Чернівецького університету*. 2011. Вип. 578. С. 83–87.

14. Проблемы науки гражданского процессуального права / [В. В. Комаров, В. А. Бігун, В. В. Баранкова та ін.] ; под ред. проф. В. В. Комарова. Х. : Право, 2002. 440 с.

15. Теоретичні проблеми цивільного процесуального права : підручник / М. М. Ясинок, М. П. Курило, О. В. Кіріяк, О. О. Кармаза, С. І. Запара та ін.; за заг. ред. д.ю.н. професора М. М. Ясинка. К. : Алерта, 2016. 890 с.

16. Фурса С. Я. Цивільний процес України: академічний курс : підручник для студ. юрид. спец. вищ. навч. закл. – К. : Видавець Фурса С. Я., КНТ, 2009. 848 с.

17. Цивільне процесуальне право України : підручник для юрид. вузів і фак. / В. В. Комаров, В. А. Бігун, П. І. Радченко та ін. ; за ред. В. В. Комарова. Харків : Основа, 1992. 416 с.

18. Цивільний процесуальний кодекс України : Закон України від 18.03.2004 № 1618-IV. *Відомості Верховної Ради України.* 2004. № 40–41, 42. Ст. 492.

19. Чечина Н. А. Гражданские процессуальные отношения. Л. : Изд-во Ленингр. ун-та, 1962. 68 с.

Information about the author:
Didenko L. V.,
PhD, Associate Professor at the Department of Civil
and Economic Law and Procedure,
International Humanitarian University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/51-66

APPARATUSES OF PUBLIC AUTHORITIES: CONCEPTS, FEATURES AND TYPES

Hnatovska A.

INTRODUCTION

During the period of deep transformations that covered all spheres of life of our society, its economy, politics, moral principles, the problems of improving the state apparatus providing the activity of the main links of state power acquire special significance.

The process of development ukrainian statehood, state mechanism strengthening and public administration improvement are inextricably linked to the organization and functioning of the apparatus of public authorities.

The state authorities in implimintationnof their powers, needs the assistance of competent specialists in organizational, scientific, personnel, financial, economic, legal, logistical and other support of their activities. State apparatus are created and acted upon to fulfill these tasks.

Modern conditions for the management, development and adoption of normative legal acts by state authorities require an increasing participation of subsidiary state bodies.

It is important to study the problem of systemic interaction between the legislative and executive branches of government and the functioning of the state mechanism through the prism of participation in it of the corresponding subsidiary state bodies.

Today, the emergence of managerial decisions and their implementation in regulatory acts has been little researched. Only few scientists describe the functioning of those bodies that facilitate the work of state bodies of all branches of government, ensure their interaction and cooperation with each other.

1. Legal research variety of subsidiary bodies titles

In Ukraine, such subsidiary bodies have different names, such as: secretariats, administrations, offices. In addition, their names change periodically with the change in political power that comes to power. Therefore, before proceeding directly to the analysis of the activity of the said bodies, we want to dwell on the definitions of the said concepts.

The term “administration” in the legal dictionary of 1956 is defined as the heads of enterprises, institutions or organizations, which are obliged

within the limits of the rights and duties assigned to them to manage the assigned work area[1].

The Legal Encyclopedic Dictionary of 1987 defines the administration as a state body that performs executive-administrative activity, ensures the implementation of laws and other decisions of legislative bodies on a national scale or within the scope of a separate sphere of public administration[2].

The Legal Encyclopedia of 2003 gives the following definitions of administration – an institution that performs management functions in various spheres of public life. There are several aspects to using the term "administration":

1) in the phrase "public administration" is sometimes used to define the system of executive bodies;

2) the name of the specific executive bodies of administrative-territorial units in Ukraine;

3) with the introduction of the presidency institute in Ukraine, a working apparatus of the head of state was created, called the Administration of the President of Ukraine;

4) the most common name of the governing body of an enterprise, institution, organization[3].

Thus, the term "administration" has been inextricably linked to the exercise of managerial functions since the 1950s.

In Ukraine, to ensure the effective implementation of its constitutional powers, the realization of a consolidating role for the unification of all constructive forces in society, accelerated resolution of urgent social, economic and other problems, reduction of expenditures of the State budget, in accordance with Article 106, paragraph 28, of the Constitution of Ukraine, the Presidential Administration of Ukraine operates[4].

It should be noted that the name of the apparatus of the President of Ukraine changed periodically. Only in the last 10 years has this body been reorganized by the Decree of the President of Ukraine from January 24, 2005 from the Administration of the President of Ukraine to the Secretariat of the President of Ukraine[5]. Further, to confirm this, by the Decree of the

---

[1] Юридический словарь : у 2 т. / П.И. Кудрявцев. М : .Государственное издательство юридической литературы, 1956. Т. 1. 688 с. С. 22.

[2] Юридический энциклопедический словарь / А.Я. Сухарев. М. : Сов. энциклопедия, 1987. 528 с. С. 19.

[3] Юридична енциклопедія: в 6 т. / Ю.С. Шемшученко. К. : Укр. енцикл., 2003. URL: http://leksika.com.ua/16930528/legal/administratsiya.

[4] Про першочергові заходи із забезпечення діяльності Президента України : Указ Президента України від 25.02.2010 р. № 265/2010 URL: http://zakon.nau.ua/doc/?doc_id=533672.

[5] Про Секретаріат Президента України : Указ Президента України від 24.01.2005 р. № 108/2005 URL: http://zakon.nau.ua/doc/?doc_id=469993

President of Ukraine of 14.10.2005 No. 1445/2005 "On the creation of the Secretariat of the President of Ukraine" in accordance with paragraph 28 of the first article of Article 106 of the Constitution of Ukraine it was decided to create the Secretariat of the President of Ukraine as an helper body to ensure that the President of Ukraine implements his powers[6].

Presidential Decree No. 265/2010 of February 25, 2010 "On Priority Measures to Ensure the President of Ukraine's Activities" The Secretariat of the President of Ukraine was abolished and formed the Presidential Administration of Ukraine, which was entrusted with the organizational, legal, advisory, logistical and other support for the implement of constitutional powers by the head of state[7].

While the authority of this body did not actually change, they were constantly exercised regarding:

- organizational support;
- preparation of speeches of the President;
- organization of observance of the State Protocol and Ceremonial; staffing;
- state legal support; documentary support;
- domestic policy and regional development;
- issues of international cooperation; security and defense policy;
- the activities of law enforcement agencies;
- socio-economic development;
- humanitarian development issues;
- information policy;
- ensuring relations with the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine;
- analysis and prompt response;
- work with citizens' appeals;
- conferring state awards and heraldry;
- citizenship issues;
- questions of pardon;
- ensuring relations with the Constitutional Court of Ukraine;
- ensuring communication with the Verkhovna Rada of Ukraine;
- ensuring communication with the Cabinet of Ministers of Ukraine;
- control and regime-secret activity.

What is the meaning of changing the name of the Presidential Office to the secretariat or administration?

---

[6] Про створення Секретаріату Президента України : Указ Президента України від 14.10.2005 р. № 1445/2005 URL: http://zakon.nau.ua/doc/?code=1445/2005

[7] Про першочергові заходи із забезпечення діяльності Президента України : Указ Президента України від 25.02.2010 р. № 265/2010 URL: http://zakon.nau.ua/doc/?doc_id=533672

After all, the actual powers of the body remained unchanged, its structure and civil servants holding managerial positions in the body partly changed, and the actual auxiliary character of the activity of this body remained unchanged[8].

The term "secretariat" (late Latin secretariatum – the office of the secretary) is defined as an elected body or administrative department in an institution, organization, conference, congress, which directs the current work or performs organizational and technical functions, or as a set of employees of such body, department[9].

We begin to analyze the activity of the executive bodies apparatuses. And let's start with the regulatory definition according to which the apparatus of the executive authorities – it is an organizationally combined set of structural units and positions, which are intended to perform advisory or service functions for the performance of the respective powers (competences) assigned to them by the respective bodies. The civil servants and other employees of the apparatus are the personnel of the executive branch.

Such a definition of the apparatus of the executive authorities in section 7 is laid down in Presidential Decree No 810/98 of 22 July 1998 "On Measures to Implement the Concept of Administrative Reform in Ukraine"[10].

In order to ensure the fullest and most accurate implementation of the constitutional status of the Cabinet of Ministers as the supreme body in the system of executive bodies of Ukraine, the Cabinet of Ministers should become a center of public administration, the effectiveness of which is based on the support of the Parliament and the President of Ukraine. He shall be responsible to the President of Ukraine, under the control and accountability of the Verkhovna Rada of Ukraine within the limits provided for in Articles 85 and 87 of the Constitution of Ukraine[11].

---

[8] Гнатовська А.І. Історичний аналіз правового регулювання діяльності Адміністрації Президента України / А.І. Гнатовська *Вісник Чернівецького факультету Національного університету "Одеська юридична академія" : збірник наукових статей*. Чернівці, 2014. № 4. С. 48–50.

[9] Юридична енциклопедія: в 6 т. / Ю.С. Шемшученко. К. : Укр. енцикл., 2003. URL : http://leksika.com.ua/16930528/legal/administratsiya.

[10] Про заходи щодо впровадження Концепції адміністративної реформи в Україні : Указ Президента України від 22 липня 1998 р. № 810/98 URL: http://zakon.nau.ua/doc/?uid=1082.2758.7&nobreak=1

[11] Конституція України : Закон України від 28.06.1996р. 254к/96-ВР *Відомості Верховної Ради України*, 1996, № 30, ст. 141.

An important condition for the realization of the constitutional status of the Cabinet of Ministers is to ensure a harmonious relationship between the Government and the Presidential Administration.

It is appropriate to establish by law that officials of the Cabinet of Ministers are involved in the relations of the Cabinet of Ministers services with the Presidential Administration, advisory, advisory and other subsidiary bodies and services established by the President.

In addition, the Concept of Administrative Reform in Ukraine states that changes in the organization of work of the Cabinet of Ministers necessitate the reorganization of its apparatus, the task of which should be, inter alia, organizational, information-analytical, legal, logistical and other services of the Cabinet of Ministers, governmental committees.

The Cabinet of Ministers apparatus is proposed to be called the Secretariat of the Cabinet of Ministers, which is more in line with the tasks and functions assigned to it.

The Secretariat of the Cabinet of Ministers ensures the creation of conditions for the collective work of the Cabinet of Ministers as a whole and of governmental committees as well as ministers as members of the Cabinet of Ministers. The Secretariat does not instruct ministers, and its work does not replace the activities of ministers as members of government.

Cabinet of Ministers Secretariat:

a) assists the Prime Minister and the Deputy Prime Ministers in organizing the work of the Government;

b) inform relevant ministries of documents submitted to the Cabinet of Ministers and governmental committees;

c) ensure that the decisions of the Cabinet of Ministers and governmental committees are documented, these decisions are forwarded to the ministers and the government receives information on their implementation;

d) supervise the implementation of decisions of the Cabinet of Ministers;

e) provide expert opinions to the Prime Minister and Vice Prime Ministers on sectoral (sectoral) politics;

f) provide organizational support to the meeting of governmental committees (councils);

g) liaise with the Secretariat of the Verkhovna Rada and the Presidential Administration and inform the Presidential Administration of the decision of the Cabinet of Ministers;

h) provide legal expertise of draft decisions of the Cabinet of Ministers and other legislative acts.

According to Part 10 of Art. 48 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine"[12] and the Concept of Administrative Reform in Ukraine 12.08.2009 by Resolution No. 850 the Cabinet of Ministers of Ukraine approved the Regulation on the Secretariat of the Cabinet of Ministers of Ukraine[13].

This Regulation defines the Secretariat of the Cabinet of Ministers of Ukraine as a permanent body providing its activities and fulfilling the tasks of organizational, expert-analytical, legal, informational, logistical support of the Government's activity.

In its activities, the Secretariat cooperates in due course with the Presidential Administration of Ukraine, the Verkhovna Rada of Ukraine, the apparatus of the National Security and Defense Council of Ukraine, the ministries and other central executive bodies, the Council of Ministers of the Autonomous Republic of Crimea, oblast, Kyiv and Sevastopol state administrations, bodies, bodies of local self-government and their officials, associations of citizens, enterprises, institutions and organizations.

We draw your attention to the fact that item 9 of the Regulation states that in order to ensure the exercise of the Prime Minister of Ukraine of his powers within the Secretariat, the Office of the Prime Minister of Ukraine is formed, whose head is appointed and dismissed by the Cabinet in due course. Ministers of Ukraine upon the submission of the Prime Minister of Ukraine. That is, the Prime Minister's Office operates within the Secretariat of the Cabinet of Ministers of Ukraine.

Thus, the activity of the apparatus of the Cabinet of Ministers of Ukraine is not limited to organizational activities or the implementation of logistical operations, therefore, we believe that the concept of "secretariat" does not reveal the full content of the activity of the apparatus of a higher executive body. Such a name restricts its activities solely to the exercise of organizational and logistical functions, which is absolutely not consistent with the validity of its legal status.

The definition of the term "apparatus" (from Latin apparatus – equipment) is given as an institution or a set of institutions serving a particular branch of management, economy or as a set of employees of the institution (organization), its staff[14].

---

[12] Про Кабінет Міністрів України : Закон України від 27 лютого 2014 року № № 794-VII URL: https://zakon.rada.gov.ua/laws/show/794-18.

[13] Положення про Секретаріат Кабінету Міністрів України : Постанова Кабінету Міністрів України від 12 серпня 2009 р. N 850 URL: https://zakon.rada.gov.ua/laws/show/850-2009-%D0%BF.

[14] Українська радянська енциклопедія URL: http://leksika.com.ua/19430110/ure/aparat

Considering the auxiliary nature of the activities of bodies that contribute to the operation of the entire state mechanism, we believe that among the above concepts, the most appropriate is the "apparatus".

In support of this we give the opinion of V.B. Averyanov, who defines the organ of the body as an organizational entity whose main purpose is to create all the necessary conditions for the effective exercise of the powers conferred on him by the body, although in itself the "apparatus" performs certain power and administrative actions that have exclusively internal organizational orientation and character[15].

To confirm this view, let us turn to the characteristics of the activity of the Verkhovna Rada of Ukraine Apparatus, which ensures the functioning of the legislative branch of power.

This body carries out legal, scientific, organizational, documentary, informational, personnel, financial and economic, logistical, social and other supporting activity of the Verkhovna Rada[16]. The legal status of the apparatus of the Verkhovna Rada of Ukraine is determined by the Principle on the Apparatus of the Verkhovna Rada of Ukraine approved by the Prescript of the Chairman of The Verkhovna Rada of Ukraine No. 769 of 25.08.2011.

The structure of the Verkhovna Rada's apparatus consists of secretariats, departments, departments and the Legislation institute of the Verkhovna Rada.

All these units are working to improve the work of Parliament, get it better and develope the quality of its work.

The apparatus of the Verkhovna Rada of Ukraine provides various directions of parliament activities. Properly organized work of the apparatus of the Verkhovna Rada of Ukraine is the key to effective implementation of their powers by the Verkhovna Rada of Ukraine and the Deputies of Ukraine, as well as the adoption and control over the implementation of normative and individual legal acts[17].

Among the functions of the apparatus of the Verkhovna Rada of Ukraine aimed at ensuring quality cooperation of the Parliament with other branches of government are the following:

---

[15] Авер'янов Вадим Борисович. Вибрані наукові праці / Ю.С. Шемшученко, О.Ф. Андрійко. К. : Інститут держави і права ім. В.М. Корецького НАН України, 2011. 488 с. С. 159.

[16] Положення про Апарат Верховної Ради України : Розпорядження Голови Верховної Ради України від 25.08.2011 р. № 850 URL : http://zakon.nau.ua/doc/?code=769/11-%D0%C3

[17] Колодій А.М., Олійник А.Ю. Державне будівництво і місцеве самоврядування в Україні: підручник. К. : ЮрінкомІнтер, 2007. 504 с. С. 114-115.

1) facilitating cooperation on the legislative work of committees of the Verkhovna Rada, parliamentary factions and groups with the Administration of the President of Ukraine, the Cabinet of Ministers of Ukraine, ministries, other central executive bodies, scientific and public organizations, local self-government bodies;

2) interaction with the executive authorities, local self-government bodies in preparation of issues submitted to the Verkhovna Rada of Ukraine, its committees;

3) participation in the organization of control over the implementation of laws and other acts of the Verkhovna Rada of Ukraine and its bodies;

4) organization of control over the observance of the terms of consideration of requests of the Deputies and execution of orders contained in the acts of the Verkhovna Rada of Ukraine by the Cabinet of Ministers of Ukraine, ministries and departments, etc.[18]

The content activity of the apparatus of the Verkhovna Rada of Ukraine is that this body carrying out all the "draft" work of the Parliament, helps the deputies to implement qualified legislative activity without burdening with organizational and logistical issues.

Ukrainian deputies is objectively unable to have specific knowledge of all spheres of public life, so during passing laws they receive professional help from the apparatus of the Verkhovna Rada of Ukraine, which consists of qualified specialists of different profiles.

That is, the apparatus of the Verkhovna Rada of Ukraine creates the necessary favorable conditions for the deputies of the Verkhovna Rada of Ukraine to adopt grounded, qualitative and effective norms.

Having conducted a general theoretical analysis of the activity of the apparatus of the higher bodies of state power, we come to the conclusion that such use of terms in regulatory legal acts is not very appropriate. Secretariat covers only activities related to organizational and technical support and paperwork, while the functions of the Secretariat of the Cabinet of Ministers of Ukraine also include legal, scientific, expert, analytical activity, which is more characteristic of the apparatus of the state authority.

Moreover, the term "apparatus" is broader and more capacious in terms of its functions, which is why the secretariat cannot include an official's apparatus in its structure.

That is why, it would be appropriate to change the name of the Cabinet of Ministers of Ukraine to the Apparatus of Ministers of Ukraine.

[18] Адміністративне право України. Академічний курс : підручник : у 2 т. Т. 1. Загальна частина / ред. колегія: В.Б. Авер'янов (голова) та ін. К. : Вид-во "Юридична думка", 2004. С. 231–232.

2. The features and types of public authorities apparatus

Having justified the expediency of using the term "apparatus" in the name of a body which directs its activities to the assistance and support of the work of public authorities, we proceed to determining the features of the apparatus of public authorities. But before that, we consider it necessary to determine the difference between the apparatus and the state authorities.

The apparatus of a public authority belongs to the system of public authorities, but its legal status should be distinguished from the legal status of public authorities. To do this, let us define what a public authority is and how the apparatus of a public authority differs from it.

It is necessary to distinguish between public authorities in their competence, which includes the powers of public authorities and their functions.

The functions of public authorities determine the scope of their activity, and the powers determine what actions these functions are implemented. The functions and powers of the apparatus of the bodies of state power depend on the competence of the bodies at which they are created.

Quite often, the activity of the apparatus of public authorities is expressed in regulatory acts adopted by the public authority. Thus, the President of Ukraine often reflects in his decrees the work of his administration. That is, the implementation of the work and decision of the apparatus occurs through a regulatory act of the body of work which he promotes.

The legal status apparatus of public administration bodies differs significantly from the legal status of public authorities in that they do not have state powers and are not responsible for the consequences of their activities.

Let us distinguish the following differences between the apparatus of public authorities and state-governmental entities:

– Apparatuses of public authorities differ from public authorities in the order of their creation and formation;

– the internal organization of the apparatus of a public authority depends on the state-power entity to which it acts;

– the result of apparatus activity of a public authority cannot be state-government decisions or normative-legal acts

– apparatus of public authorities are accountable to the public authority which they operate, but not to the state.

Apparatus of state bodies carrying out auxiliary functions act under different state-governmental entities, each of them with the basis for activity has its own legal act, its structure and so on.

In this regard, we distinguish the types of apparatus of public authorities by the criteria:

1. By scope:

– apparatus of public authorities of general competence are bodies whose activity is aimed at ensuring the realization of all the basic powers of a public authority;

– apparatus of public authorities of special competence are bodies whose activity is aimed at providing certain spheres of activity of the body of a public authority.

2. By structure:

– the apparatuses employees of which are the officials, whose duty is to ensure the activity of the public authority under which they are established;

– the apparatuses employees of which are the officials, which have their own powers for which the provision of the activities of public authorities is an additional activity.

3. By the structure of public authority:

– apparatus of collegial bodies – of the Verkhovna Rada of Ukraine, of the Cabinet of Ministers of Ukraine, etc .;

– apparatus of single bodies (single state government entities) – Administration of the President of Ukraine, personal assistants (referents) and secretaries of parliamentarians, etc.

The apparatus of the collegial bodies may have a vertical structure in which the units established under bodies with a large scope of competence are superior to the units of bodies with a smaller scope of competence. The secretariat of the chamber is considered to be the highest in relation to the secretariats of committees. There may not be a hierarchical relationship between such units, but the coordinating function of the secretariats of committees is inevitably exercised by the secretariat of the chamber.

Personal assistants and secretaries lock in on their parliamentarian and work autonomously. He himself defines their tasks and functions.

In fact, it is the apparatus of the public authority that ensures the quality and professionalism of its work (especially with regard to the apparatus of parliament).

In addressing the ancillary issues, the apparatus enables the public authority to focus on the skilled exercise of its public authority functions. Nowadays, no one is able to be equally aware in all spheres of society, so the apparatus of the state authority with professional and qualified specialists of different profiles comes to the rescue.

The purpose of the apparatus is to assist the official or public authority to obtain all possible information on an urgent matter that will help to formulate an objective position adequate to the situation in order to resolve a particular issue.

Public authorities require maintenance, so organizational and technical functions (information gathering, communication support, correspondence, organization and documentation, accounting, etc.) are important elements of the apparatus.

The considerable amount of stored and updated information allows these institutions to carry out serious research on the most important problems of economy, legislation, public service, provide quality expert assessments and provide parliamentarians with independent information.

An important area of activity of the apparatus of the public authority is to maintain relations with other public authorities and officials. For example, the legislative and executive branches of power act each in their own sphere and therefore have their own specific interests, between them inevitably there are contradictions, lack of understanding, which, in turn, entails ignorance of the other party's intentions, distrust, desire to counteract. There is inconsistency in actions and even discrepancies in terminology.

Helping the government find out the legislator's intentions, facilitating a co-ordination of the approaches of the two branches of government to the problem are often resolved by an auxiliary apparatus: by the Secretariat of the Cabinet of Ministers of Ukraine and the apparatus of the Verkhovna Rada of Ukraine[19].

Such contacts between state authorities are the basis and preparation for political cooperation between the Cabinet of Ministers of Ukraine and parliamentary committees.

Apparatuses of both branches of power are connecting bodies that help to reconcile issues of joint competence in the early stages of work, which undoubtedly contributes to the reduction of conflicts and differences of opinion at the level of state-governmental entities.

In addition to the fact that the bodies of state authorities facilitate the work of their bodies with other entities, they contribute to the exercise of control and supervisory functions of the body over other entities. The device collects the necessary information, analyzes it and gives conclusions about it.

The apparatus promotes the interaction of the body not only with other state-governmental entities, but also establishes contacts with public organizations, entrepreneurs, trade unions and other groups of society.

Contacts with the media are important: organizing interviews, press conferences and briefings with the government and their officials. For this purpose, special departments – press services are created in the apparatus, as well as special assistants of deputies, ministers and officials.

[19] Tamara Latkovska, Lyubov Bila-Tiunova Political and economic governance: a comparative analysis of Eastern European countries and Ukraine. Baltic Journal of Economic Studies. Volume 5 Number 3. Riga: Publishing House "Baltija Publishing". 2019. P. 94.

The content of the activity of the apparatus of the state authorities is of a "provisional" nature, that is, they are aimed at supplementing the state-power powers of the body under which the apparatus operates. The said "provisional" powers of the apparatus of the state authority are manifested in the fact that they exist for the implementation of the decisions of the state-governmental entity, with the help of which it influences the state authorities and the society in pursuit of its purpose.

The apparatus of officials of public authorities, as a rule, is made up of persons who are close to an official of one or another circumstances to whom he may entrust the execution of his duties and the exercise of his powers, unlike professional civil servants.

Apparatuses of public authorities carry out an important function of mediation between the body with which they are created and operate, and other public authorities. They shall fully inform the Authority of any external circumstances that are relevant to the Authority's activities in the making of its competence.

Apparatuses of public authorities have a wealth of information that enables them to influence all kinds of relationships in the legal, administrative, business or other fields. Thus, the apparatus of public authorities have significant leverage on the external relations of the public authority.

They can use this situation to their advantage and do not always perform their functions as envisaged by the state authority, so it is important to carry out a number of control and monitoring measures to check the quality of its activity in order to prevent abuse of the state authority's apparatus.

The peculiarity of the powers of state bodies apparatuses is that they often perform not only those powers enshrined in a normative legal act that enshrines their legal status, but also powers that are not spelled out but due to the nature of the close interconnection of the organ and its apparatus. This is especially true for apparatus operating with an official who completely trusts his assistants and gives tasks that do not always correspond to those stipulated in the legal act.

There is no common approach to identifying characteristics of public authorities that exercise ancillary functions. States have different names, different order of establishment and different legal status for apparatuses. This situation leads to the absence of common scientific views on the issue of determining the legal status of the apparatus of public authorities and does not allow to develop the basic principles of their activity. But after learning the content of the activity of the apparatus of public authorities and highlighting their differences from the public authorities, we can identify the following features of the apparatus of the public authority:

– the apparatus is created and operates in the manner determined by the normative legal acts (both by laws and by-laws);

– the apparatus does not have managerial functions, but implement the authority of the body under which it operates;

– the purpose of the apparatus is to promote and support the work of a state authority or official;

– the apparatus has the status of a public authority;

– acceptance, passage and termination of service in the apparatus of the authority depends on the official or the body at which the apparatus operates;

– the apparatus does not bear legal responsibility for the exercise of its powers before the state, but only before the state-governmental entity for the benefit of which it carries out its activities.

Therefore, each branch of government has its subsidiary bodies, which differ in their structure, scope of competence and field of activity.

However, for each of them the functions such as organizational, informational, scientific, personnel, financial, logistical, legal, documentary support of the activity of the state authority are common. Therefore, in order to avoid confusion in defining the names of such bodies and taking into account their common functions defined in regulatory legal acts, we consider the term “apparatus of a public authority” to be most relevant.

CONCLUSIONS

Each branch of government has its subsidiary bodies, which differ in structure, scope of competence and field of activity. However, for each of them the functions such as organizational, informational, scientific, personnel, financial, logistical, legal, documentary support of the activity of the state authority are common. Therefore, in order to avoid confusion in defining the names of such bodies and taking into account their common functions defined in regulatory legal acts, we consider the term “apparatus of a public authority” to be most relevant and relevant.

The apparatus of a public authority ensures the activity of all public authorities. The apparatus of state authority directly carry out all the “draft” work to ensure the solution of problems. Due to the fact that they are entrusted with the functions of facilitating the work of such bodies as the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, etc. the bodies under study are active participants in the implementation of tasks and functions of state power.

Public authorities have state-power powers to adopt normative legal acts, make legally significant decisions, and regulate public relations. Apparatuses of public authorities direct their activities to ensure the implement of powers of public authorities. For this purpose the apparatus carry out many auxiliary

and support functions, the purpose of each of which is to promote the work of the authority and to provide high-quality, scientifically substantiated and technically supported work of the state authority.

The legal status of the apparatus depends entirely on the status of the body with which it operates, but due to the diversity of its activities, the apparatus has a much wider range of information about the state of affairs, which gives it the opportunity to influence the work of a public authority, which is not always correct and appropriate.

Having conducted a study of the activity of the apparatus of public authorities, defining their types and features, we establish that the apparatus of the public authority is a public authority that functions in accordance with the procedure established by law to ensure the activity of a state-governmental entity within the powers assigned to it for the purpose of securing and promoting its activities.

SUMMARY

The article is devoted to the study of the concepts of "apparatus", "secretariat" and "administration" of a public authority. The outlined concepts are investigated in legal encyclopedias, in the works of domestic scientists and in the normative legal acts of Ukraine. We described the advisability of using the definition – staff by the researching of legal norms which govern the working of The Verkhovna Rada of Ukraine Secretariate, Presidential Administration and Cabinet of Ministers of Ukraine Secretariate.

The article explores the powers of the auxiliary bodies of state power. Priority directions of work of state authorities' apparatus are determined.

By means of systematic analysis, common features of the apparatus of public authorities are identified.

The article proposes the criteria for division of apparatus of state authorities: by the scope of the apparatus, by the composition of the apparatus, by the structure of the body at which the apparatus operates.

REFERENCES

1. Юридический словарь : у 2 т. / П.И. Кудрявцев. М : .Государственное издательство юридической литературы, 1956. Т. 1. 688 с.

2. Юридический энциклопедический словарь / А.Я. Сухарев. М. : Сов. энциклопедия, 1987. 528 с.

3. Юридична енциклопедія: в 6 т. / Ю.С. Шемшученко. К. : Укр. енцикл., 2003. URL: http://leksika.com.ua/16930528/legal/administratsiya.

4. Про першочергові заходи із забезпечення діяльності Президента України : Указ Президента України від 25.02.2010 р. № 265/2010 URL: http://zakon.nau.ua/doc/?doc_id=533672.

5. Про Секретаріат Президента України : Указ Президента України від 24.01.2005 р. № 108/2005 URL: http://zakon.nau.ua/doc/?doc_id= 469993.

6. Про створення Секретаріату Президента України : Указ Президента України від 14.10.2005 р. № 1445/2005 URL: http://zakon.nau.ua/doc/?code=1445/2005.

7. Про першочергові заходи із забезпечення діяльності Президента України : Указ Президента України від 25.02.2010 р. № 265/2010 URL: http://zakon.nau.ua/doc/?doc_id=533672.

8. Гнатовська А.І. Історичний аналіз правового регулювання діяльності Адміністрації Президента України / А.І. Гнатовська Вісник Чернівецького факультету Національного університету "Одеська юридична академія" : збірник наукових статей. Чернівці, 2014. № 4. С. 47-56.

9. Юридична енциклопедія: в 6 т. / Ю.С. Шемшученко. К. : Укр. енцикл., 2003. URL: http://leksika.com.ua/16930528/legal/administratsiya.

10. Про заходи щодо впровадження Концепції адміністративної реформи в Україні : Указ Президента України від 22 липня 1998 р. № 810/98 URL: http://zakon.nau.ua/doc/?uid=1082.2758.7&nobreak=1.

11. Конституція України : Закон України від 28.06.1996р. 254к/96-ВР Відомості Верховної Ради України, 1996, № 30, ст. 141.

12. Про Кабінет Міністрів України : Закон України від 27 лютого 2014 року № № 794-VII URL: https://zakon.rada.gov.ua/laws/show/794-18.

13. Положення про Секретаріат Кабінету Міністрів України : Постанова Кабінету Міністрів України від 12 серпня 2009 р. N 850 URL: https://zakon.rada.gov.ua/laws/show/850-2009-%D0%BF.

14. Українська радянська енциклопедія URL: http://leksika.com.ua/ 19430110/ure/aparat.

15. Авер'янов Вадим Борисович. Вибрані наукові праці / Ю.С. Шемшученко, О.Ф. Андрійко. К. : Інститут держави і права ім. В.М. Корецького НАН України, 2011. 488 с.

16. Положення про Апарат Верховної Ради України : Розпорядження Голови Верховної Ради України від 25.08.2011 р. № 850 URL: http://zakon.nau.ua/doc/?code=769/11-%D0%C3.

17. Колодій А.М., Олійник А.Ю. Державне будівництво і місцеве самоврядування в Україні: підручник. К. : ЮрінкомІнтер, 2007. 504 с.

18. Адміністративне право України. Академічний курс : підручник : у 2 т. Т.1. Загальна частина / ред. колегія: В.Б. Авер'янов (голова) та ін. К. : Вид-во "Юридична думка", 2004. 584 с. С. 231–232.

19. Tamara Latkovska, Lyubov Bila-Tiunova Political and economic governance: a comparative analysis of Eastern European countries and Ukraine. Baltic Journal of Economic Studies. Volume 5 Number 3. Riga: Publishing House "Baltija Publishing". 2019. P. 91–98.

Information about the author:
Hnatovska A.,
Candidate of JuridicalSciences, Associate Professor,
Senior Lecturer at the Department of Constitutional,
Administrative and Finance Law,
Chernivtsi Law Institute,
National University "Odessa Law Academy"
7, Skovorody str., Chernivtsi, 58000, Ukraine
ORCID ID: orcid.org/0000-0001-7171-3209

DOI https://doi.org/10.36059/978-966-397-181-0/67-83

PROTECTION OF PROPERTY RIGHTS IN THE CONVENTION FOR THE PROTECTION OF HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS AND THE PRACTICE OF THE ECTHR

Kizlova O. S.

INTRODUCTION

It is well known that the fundamental ownership right in the sphere of business is the property right. Property right is the right of a person to a thing (property), which he performs in accordance with the law of his own will, regardless of the will of other persons (Article 316 of the Civil Code of Ukraine). The basis of any property is the economic relations of appropriation created in the process of social production of tangible goods (natural resources, means and products of productive activity, etc.), through an appropriate socio-economic system, which expresses the attitude of some persons to these tangible goods as "their", and others as "someone else's". Therefore, the first ones acquire the power of the "owner" of the property, the second ones- acquire the obligation to refrain from encroachment on him and to create obstacles to the "owner" in the dominance of this property. Property is a public relation between people about aught whose behavior is volitional. However, the functioning of this attitude and the behavior of its participants requires the necessary legal regulation.

In the context of the above subject of guarantee of property rights in accordance with Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, in addition to this Article of the First Protocol, are also guaranteed the right to a fair trial (Article 6), the right to an effective remedy (Article 13), and the prohibition of discrimination (Article 14), the prohibition of abuse of rights (Article 17). The first Protocol defines the boundaries of international legal regulation of property rights issues. Legal regulation of property protection is a prerogative of the internal law of States. At the present stage of development, the legal ownership regime is changing significantly. This process is objectively caused by the need of the economy and at the same time the need to strengthen social regulation and fulfill the social functions of the state[1].

[1] Civil and Commercial Law of Foreign States: a textbook: in 2 volumes / answer. ed. E.A. Vasiliev, A.S. Komarov. 4th ed., Rework and add. M.: International Relations, 2008. Vol. 1. P. 336. 560 p.

According to Article 53 of the Convention, it is generally acknowledged that the protection mechanism provided for in the Convention is subsidiary to a mechanism which is required to be provided by a State party to the Convention at national level, since nothing in the Convention can be construed as restricting or invalidating any human rights and fundamental freedoms that may be recognized by the laws of any High Contracting Party or any other agreement to which it is a party[2].

A protection system of property rights at the national level looks like mechanism that includes juridical tools, functional and institutional elements. Thus, institutional guarantees that are set out in Article 55 of the Constitution of Ukraine. Accordingly, universal protection of property rights is judicial protection. At the same time, everyone is guaranteed the right to challenge in court the decisions, actions or omissions of public authorities, local self-government bodies, officials, as well as to obtain compensation for material and moral damage caused by such illegal decisions, actions or inaction (Part 2 of Article 55, Article 56 of the Constitution of Ukraine). At the same time, there are two mechanisms of judicial protection. The first one acts as a national legal guarantee covering the system of national remedies (Articles 124, 125 of the Constitution of Ukraine). The second mechanism for judicial protection relates to international legal guarantees and is based on the recognition of the individual's rights and the creation of appropriate conditions for such protection to be applied to international judicial institutions, in particular the ECtHR.

1. The essence of property rights in the civilistic doctrine

Legal regulation of economic relations of ownership gives rise to the formation of property rights, by which the domination of the rightful person, which is the owner, over the things owned by him in the form of sole powers of ownership, use and disposal of them. Today, the thesis about the absolute nature of property rights is debatable and one that raises some questions among scholars. According to the researchers, Roman law did not know at all jus utendi et abutendi as the right of any use of a thing up to its destruction or a clear contradiction to the public interest[3]. Such an "absolute" characteristic of Roman private property law, according to F. Pichinelli, appeared in 1563, when the lawyer F. Hotomanus (Hotman) mistakenly interpreted the corresponding place of Corpus juris civils. Undoubtedly, due

[2] Convention for the Protection of Human Rights and Fundamental Freedoms: International Document of 04 November 1950 // Official Journal of Ukraine. 1998. № 13. Art.

[3] Lazar J. Property in bourgeois legal theory: trans. with him. / J. Lazar. M.: Law. Lit., 1985. 182 p. P. 8.

to the poor development of historical and legal science at the time, this assertion was accepted without a doubt.

Property relations constitute the economic foundation of any society, regardless of the degree and level of maturity. It confirms M.F. Vladimirsky-Budanov, who noted: "There is no doubt that rights of things and their highest expression – property rights – appear from the earliest times of human coexistence"[4]. History of economic and socio-political transformations shows that property relations are among the first to receive their doctrinal development and legal support.

At the same time, the property relations themselves with the change of political formations and the implementation of transformations in the sphere of economy are significantly complicated, which facilitates their more thorough study by the representatives of various sciences[5].

In particular, in the Ukrainian civilistics, some prominent scientists, such as D.V. Bobrova, O.V. Dzera, O.M. Klimenko, N.S. Kuznetsova, V.M. Kossak, V.V. Luts, R.A. Maidanyk, I.V. Spasibo-Fateeva, E.O. Kharitonov, O.I. Kharitonova, J.M. Shevchenko., dedicated their aspects to the protection of property rights. In the context of exploring the practical aspects of applying the rules of Article 1 of the First Protocol and, accordingly, the ECtHR practices, there are certain developments among practitioners such as Z. Bortnovskaya, O. Davidchuk, D. Popovych, V. Milius, J. Romanyuk, P. Pushkar, O. Kot, P. Kulinich, A. Miroshnichenko, V. Kravchuk.

It is believed that the classical structure of property rights originates from Roman law. However, the authors of some recent studies argue that attributing to the Romans the interpretation of property rights as a triad of powers is an exaggeration, since no source of Roman law indicates such a construction of property. According to the concusions of V.A.Saveliev, the common identification of Roman dominium and proprietas is incorrect because they were used to denote different aspects of property relations[6].

According to some scholars, the reference to the provisions of Roman law, under the influence of which allegedly formed modern ideas about property rights and the essence of economic relations of owners, seems exaggerated and somewhat Erroneous[7]. So, scientists refer to the work of

[4] Vladimirsky-Budanov M.F. Review of the history of Russian law / M.F. Vladimirsky-Budanov. 7th ed. Petrograd, Kiev: N.Y. Oglobin, 1915. 699 p. P. 507.

[5] Public Property: Problems of Theory and Practice: Monograph / ed. V.A. Ustimenko / NAS of Ukraine, Institute of Economic and Legal Research. Chernihiv: Desna Polygraph, 2014. 308 p. P. 7.

[6] Savelyev V.A. Legal concept of property in Ancient Rome and modernity / V.A. Savelyev. The Soviet state and law. – Moscow: Nauka, 1990. No 8. P. 135–140. P. 139.

[7] Public Property: Problems of Theory and Practice: Monograph / ed. V.A. Ustimenko / NAS of Ukraine, Institute of Economic and Legal Research. Chernihiv: Desna Polygraph, 2014.

J. Lazar "Ownership in bourgeois legal theory"[8] which, in their view, sheds light on certain aspects of the reception and interpretation of Roman law on property.

Roman lawyers simply could not come to a consensus and could not define a property right shared by all without exception. There is a growing recognition among scholars in the field of classical jurisprudence that the "passion for definitions", such characteristic of medieval canon law and later inherited by European rationalism, was deeply alien to Roman lawyers.

Roman law did not produce a "single" and "absolute" definition of property rights; instead, the institution of property rights, "divided" into separate powers, was well designed. Dominium meant full legitimate authority, proper domination of a certain bodily object, in which the legal and personal aspects were combined; it was acquired only in legitimate ways. Proprietas is a property right that is opposed to another property right – ususfructus – the right to use the thing and to receive income. The purpose of proprietas is to emphasize, not the aspect of ownership of a thing, but its belonging to a particular person; so there is nothing in common between property (proprietas) and ownership[9].

According to the conclusion V.M. Smirin makes in his article on the property in Roman law, the absence of a conceptual system in the Romans testifies to the preference given to the logic of relations[10].

It is noted that the forerunner of the change in the concept of property rights in the domestic legal system was the scientist of the Soviet period Y.G. Basin. He proposed to use the term "property right" as a generic term – the statutory absolute right of the subject at his discretion and in his own interests to exercise full control over the immediate objects belonging to him. The scientist also identified the following types of property rights: property rights to things, ownership of substantive symbols of property benefits; ownership of current assets; intellectual property rights.

In other words, the concept of property can be considered necessary only if it does not suppress existing and emerging relationships, and is able to include all their variety. It remains, finally, the opportunity to proceed when determining ownership not from the subject area (which in fact determines the diversity of powers of the owner), but from the particular protection enjoyed by certain relationships. If absolute protection, resistance to

[8] Lazar J. Property in bourgeois legal theory: trans. from germ. / J. Lazar. M.: Law. Lit., 1985. 182 p.

[9] Shimon S.I. Property rights in the context of modern concepts of property rights in civilistics // Journal of the University of Law of Kiev. 2012/2. P. 192–195.

[10] Smirin V.M. Roman "familia" and the Romans' ideas about property // Life and history in antiquity. M., 1988, pp. 18–40.

encroachment on the part of any third party can be considered primary, determining the property, then the objects of property will be all those objects that society desires and is able to protect in this way[11].

2 General provisions on the protection of property rights in ECtHR positions

By its legal nature, property rights require regulation by the state, may be restricted, and the state is entitled to take certain measures of interference with property rights, including the deprivation of property. Herewith, the State must adhere to the established principles of lawful interference, in particular those elaborated by the European Court of Human Rights (hereinafter – ECHR), because of which decision the content of the provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – the Convention) is understood., The First Protocol, their practical application.

The most favorable for the modern application of ECtHR Article 1 of Protocol 1 to the Convention is the concept of ownership in terms of the function's logic of defining property as the dominion of a thing, which is justified as far as the concept of limited real domination over real things is justified and also because this concept is the result of an inductive (in the sense that Cassirer put it) study[12].

However, there is no need to understand a thing as a material unit (property). As Oswald Spengler remarked that in the current legislation (and since the time of O. Spengler – the second volume of "The Sunset of Europe" was published in April 1922 – the legislation in the field of property rights has practically not changed) "persons" and "things" in general are not concepts of law, but "only draw a banal boundary between man and everything else, they make, so to speak, a natural science distinction". From the above, O. Spengler concludes that if ancient law was the right of the body, then the modern law is the right of functions[13].

The ECtHR's practice has a significant effect on the substantive content of the principles enshrined in the Convention for the Protection of Human

[11] Yakushev M.V. Voynykanys E.A. Information. Property. Internet. Tradition and short stories in modern law // Access mode: http://www.nnre.ru/kompyutery_i_internet/information_sobstvennost_internet_tradicija_i_novelly_v_sovremennom_prave/index.php

[12] Yakushev M.V. Voynykanys E. A. Information. Property. Internet. Tradition and short stories in modern law // Access mode: http://www.nnre.ru/kompyutery_i_internet/information_sobstvennost_internet_tradicija_i_novelly_v_sovremennom_prave/index.php

[13] Spengler O. The sunset of Europe. Essays on the morphology of world history. 2. World-historical perspectives / trans. from germ. and note. I.I. Makhankova. M .: Thought, 1998. – 606, P. 86.

Rights and Fundamental Freedoms and its protocols. As a consequence, the established minimum legal standards are gradually being expanded and supplemented.

One of the first multilateral international treaties on the property rights' protection of certain categories of persons include the Hague Conventions of 1899 and 1907, which confirmed the principle of inviolability of private property during hostilities, which was formed as a customary rule of international law. The protection of property rights during hostilities was further developed in the provisions of the Geneva Conventions for the Protection of the Victims of War of 1949.

Thus, in the international legal context, the problem of the protection of property rights was initially considered exclusively in relation to foreigners, individuals and legal entities, since the regulation of relations between states and citizens regarding guarantees of protection of property rights was within the internal competence of states. With the development of international trade, happens an increase in the movement of persons, capital, services, goods (property) and related rights to it, making it necessary to regulate the protection of property rights at the international level as well.

Property right is fundamental, protected in accordance with the rules of national law, taking into account the principles of Article 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms. Particular protocols are included in the Convention, which supplement and develop its provisions. States Parties to the Convention are obliged to respect everyone's right to peaceful enjoyment of their possessions and to ensure that they are protected first and foremost at national level. This provision in Ukraine is enshrined at the constitutional level by the principle of inviolability of property rights (Article 41 of the Constitution of Ukraine).

The basic standards in the field of legal regulation of property relations include the Universal Declaration of Human Rights (1948) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (1950), of which almost all European states, including Ukraine, are parties.

The function of ensuring a uniform interpretation and application of international agreements, compliance with international agreements on the part of States parties and on the part of organs of international organizations is entrusted to the judiciary, which are included in the structure of international organizations, European court of human rights (in the framework of the Council of Europe) and the European Court of justice (in the framework of the European Union). The European court of human rights is the judicial body explicitly mandated to solve disputes related to compliance with the European Convention for the protection of

fundamental rights and freedoms of man and the European Court of justice decides the case on compliance of European Union law. Today, the judicial activity of the European court of human rights and the Court of the European Communities is one of the main guarantees of the effectiveness of European law and an important factor in its further development.

Article 17 of the Universal Declaration of Human Rights proclaims the property right as a fundamental and inalienable human right. The Convention for the Protection of Human Rights and Fundamental Freedoms is an international agreement, which establishes a list of the most important subjective human rights. To date, 45 countries have ratified this Convention. The Verkhovna Rada of Ukraine ratified it on July 17, 1997, and on September 11, 1997, it entered into force for our country. Now, under the jurisdiction of Ukraine, after all national remedies have been exhausted and within six months from the date of the final decision at the national level, not only is there a right, but also a real opportunity to apply to the European Court of Human Rights (France, m. Strasbourg) for the protection of their rights and freedoms as set out in the Convention and the Additional Protocols.

The term "exhaustion of national remedies" should be understood as referring the applicant to all the courts of the state, including the cassation instance – the Supreme Court. Thus, in the practical life introduced part 4 of Article 55 of the Constitution of Ukraine: "Everyone has the right, after the use of all domestic remedies, to apply for the protection of his rights and freedoms to the relevant international judicial institutions or to the relevant bodies of international organizations of which Ukraine is a member or party".

It is of great importance for the harmonization of the national legislation of the Parties to the Convention and European standards in the field of economic relations to consider the case law of the European Court of Justice (Article 1 of Protocol No. 1 to the Convention), since in most civil and economic disputes between physical or legal entities and the state being brought forward, ultimately, to the European Court of Justice, the issue of violation of property rights is raised.

Although there is no single clear doctrinal approach to defining what is property, there is still the ECHR, the case law of the European Court of Human Rights, there are EU regulations, the case law of the EU Court of Justice, which deals with a wide range of economic issues protected as

provisions of Article 1 of the First Protocol and the provisions of Article 17 of the Charter of Fundamental Rights of the European Union[14].

Thus, the ECtHR has repeatedly stated that the Convention is not a fixed legal act and is open to interpretation in the light of the needs of today. The object and purpose of the Convention as a legal act to protect human rights requires that its

rules be interpreted and applied in such a way as to make its safeguards effective and real[15]. Moreover, in modern science, this approach has been called "evolutionary interpretation"[16].

Thus, Article 1 of Protocol No. 1 to the Convention defines the legal guarantees of property rights and regulates the substantive relations of property rights. In addition to this article, part of the property rights concerns article 6 of the Convention, which establishes guarantees of judicial protection, as well as article 13 of the Convention, which provides for the possibility of effective legal protection of violated rights.

Paragraph 1 of Article 17 of the Charter of Fundamental Rights of the European Union states that "Everyone has the right to own, use, dispose of and bequeath his lawfully acquired property. No one shall be deprived of his property, except in the interests of society and under the conditions provided for by law, provided that he is justly and timely compensated for the damage caused. Use of property may be regulated by law in accordance with the public interest"[17].

In terms of the current judicial interpretation of the European Convention on the Protection of Human Rights and Fundamental Freedoms of 1950, the Institute of Property is the foundation of all private individual rights. The modernity of the view of international judges should be emphasized, since the legal regulation of private property relations is historically more ancient than the regulation of public-public relations. It is important to note that in the original text of the 1950 European Convention, there were no articles on the protection and respect of property rights. This is due to very different ideas about the concept of property and how it regulates States Parties.

Approaches to solving the problem were only clarified until 1952 in Protocol No. 1, which supplements the European Convention. Article 1 of

[14] Charter of Fundamental Rights of the European Union. European Union; Charter, International document dated 07.12.2000 // Access mode: http://zakon3.rada.gov.ua/laws/show/994_524

[15] V.A. Tumanov European Court of Human Rights: an outline of organization and activity / V.A. Tumanov. M.: Norm, 2001. – P. 90–91. 295 p.

[16] D.T. Karamanukian, Provocation of Crime in the Case Law of the European Court of Human Rights / D.T. Karamanukyan, Act. question publ. right. – 2013. – № 1. – P. 10–24.

[17] See ibid

Protocol No. 1 guaranteed everyone the right to peacefully own their property and to defend their property rights. The term "property" is mentioned not in the text of the Convention for the Protection of Human Rights and Fundamental Freedoms, but in the text of Protocol No. 1 thereto. However, given that all protocols to the Convention are integral parts of the latter, the term "Convention" covers both the Convention itself and the Protocols thereto. Confirmation of this conclusion is contained, for example, in Art. 1 of the Regulation of the European Court of Human Rights, which states in paragraph (a) that the term "Convention" means the Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols.

According to P. Pushkar, regarding Art. 1 of the First Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, the relevant provision is a norm of "constitutional" nature within the framework of EU law, part of the common property of the member states of the Council of Europe, part of the general principles of EU law, applied directly or through norms by EU states and institutions. Charter of Fundamental Rights of the European Union[18].

An analysis of the case law of the European Court of Justice on the protection of property rights makes it possible to conclude that one of the problems is the correlation of national and pan-European property law when making court decisions.

The rulings of the European Court of Justice, in particular in the area of property relations, are a particular source of law and guide everyday practice for the legislative, judicial and other bodies of the member states of the Council of Europe, including in Ukraine. So, according to Art. 17 of the Law of Ukraine No. 3477-IV "On the Enforcement of Judgments and the Practice of the European Court of Human Rights" the ECtHR's practice is applied by the Ukrainian courts as a source of law. Therefore, it should be govern that the ECtHR, in examining cases under applications for the protection of the right to peaceful enjoyment of property, has worked out a number of generally recognized standards for the protection of this right, which boil down to such a general rule: when deciding whether a violation of Art. 1 of the First Protocol, it must be determined: whether the plaintiff owns the property covered by the content of Art. 1; whether there was an interference with the peaceful possession of the property and what is the nature of such interference; whether the deprivation of property occurred.

Judge scholars believe that since the ratification of the Convention and the First Protocol by Ukraine, the domestic judicial system has made

[18] Ownership: European experience and Ukrainian realities: Proceedings of the International Conference (Kyiv, October 22–23, 2015). – K .: BAITE, 2015. – 324 p. P. 93.

significant progress in applying the ECtHR's practice. It cannot be said that for all, however, for many judges, ECtHR decisions have ceased to be a "foreign body" in the legal system. Judges understand the ECtHR's findings and apply them to justify court decisions[19].

Article 1 of Protocol No. 1 (1952) to the Convention provides: "Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his property except in the public interest and on the terms provided by law or by the general principles of international law".

The main purpose of Art. 1 of the First Protocol to the Convention is to prevent the arbitrary seizure of property, confiscation, expropriation and other violations of the principle of free use of their property, which are often or are likely to be practiced by the governments of States. And in this case, the principle of "inviolability of property rights" applies. The principle of "inviolability of property rights", according to P. Pushkar, can be considered as the main principle of legal regulation of property relations under EU law, in which particular attention is paid to the legality and proportionality (proportionality) of elements of interference with property rights as elements of assessing the legality of interference with property rights in general. In this regard, the case-law of the EU Court of Justice and the case-law of the European Court of Human Rights (for example, the case "Bosphorus Hava Jolari Tourism against Ministry of Transport of Ireland) concerning the right to conduct an airline's commercial activities (arrest of an airplane) under the existing UN embargo on FR Yugoslavia citing the decisionin the case"Sporrong and Lönnrotagainst Sweden") is indicative[20].

The requirement of inviolability of property right implies compliance with the key principles of property protection, displayed in both EU law, ECHR and at the case law of the European Court of Human Rights: the lawfulness of interference with property relations, the proportionality of such interference, the review of actions or inaction of the State as a whole during the intervention in property relations, the principles of "fair balance" intervention, as well as the availability and adequacy of compensation, procedural protection and due legal guarantees pro that for such intervention (as well as the presence of guarantees).

Among all the rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, Art. 1 of Protocol No. 1 has a

[19] Ownership: European experience and Ukrainian realities: Proceedings of the International Conference (Kyiv, October 22–23, 2015). – K .: BAITE, 2015. – 324 p. P. 7–23.

[20] Ownership: European experience and Ukrainian realities: Proceedings of the International Conference (Kyiv, October 22–23, 2015). – K .: BAITE, 2015. – 324 p. P. 93

special place, along with the guarantees of the right to a fair trial and the effective remedies provided for in Articles 6 and 13 of the Convention. This provision of the Convention is a distinguishing feature that makes the Convention a unique instrument among other similar international legal instruments, and, above all, the existence of this provision distinguishes the Convention from the International Covenant on Civil and Political Rights.

Analyzing Art. 1 of Protocol No. 1 to the Convention, it should be noted that this is the only article of the Convention and the Protocols thereto which, firstly, explicitly addresses the guarantees of the rights not only of individuals but also of legal person, and, secondly, concerns the issue property.

The basis of Art. 1 of the First Protocol to the Convention imposes twospecific decisions, "Marx v. Germany" and "Sporrong and Lonroth v. Sweden". The decision in the case of "Marx v. Germany" defined the purpose of Art. 1 of the First Protocol recognizes the right of any person to the free use of his property. The decision in the case of "Sporrong and Lonrothv. Sweden" identified the main requirements for the application of Art. 1 of the First Protocol on the Protection of Property Rights. As the Court found, the provisions of Art. 1 of the First Protocol provides for the following rules for the protection of property rights: the first norm, expressed in the first sentence of the first paragraph, is of a general nature and establishes the principle of unimpeded use of property, the second norm, expressed in the second sentence of the same paragraph, regulates cases of deprivation of property, setting certain conditions; in the third norm, expressed in the second paragraph, States Parties recognize the right to control the ownership of property in accordance with the common interest and the right to enforce the laws necessary to do so. Before finding out whether the first norm has been complied with, the Court must establish that the other two norms (Sporrong and Lönnrothv. Sweden) of 23 September 1982 are applicable in the present case NoNo 7151/75; 7152/75, Series A, No 52.).

However, as N.G. Gorobetsnotes, these principles are not separate from each other. The second and third rules "relate to specific cases of interference with the right to peaceful possession of property" and should be interpreted in the light of the general principle of the first sentence of Art. 1 of the First Protocol. Thus, the second and third rules relate to the three most important sovereign powers of the state, namely: the right to seize property in the public interest (eminent domain powers); rights to regulate the use of property (police powers); the right to set up a tax system[21].

[21] Gorobets N.G. The concept and essence of property rights in the context of the First Protocol to the Convention for the protetonnes of Human Rights and Fundamental Freedoms 1950. and the European Court of Human Rights // Journal Kyiv University of Law • 2014/4 s. 307–312.

The term "peaceful possession" in the context of Art. 1 of the First Protocol deserves attention. Violation of such "peaceful possession", which belongs to individuals and legal persons, is, in fact, any interference with the property rights of these persons. Such interference can take the form of deprivation of the opportunity to use the objects belonging to the property right to the specified persons, non-granting of the permits stipulated by the legislation, other forms of obstruction of the realization of the property right. As usually, the subjects of the last forms of interference with property rights are state bodies and officials. An analysis of the ECtHR's practice shows that the Court considers the protection of property rights precisely by interpreting the concept of "property". Herewith establishes a number of mandatory conditions that are necessary for the deprivation of property belonging to the respective persons on the property right[22].

In Art. 1 of the First Protocol it is emphasized that "peaceful possession" means that a breach of the principle set out in the first sentence may also occur in the absence of direct or physical interference with the property right of a person. In their interpretation of the term "peaceful possession", the Commission and the Court often distinguish between "deprivation of property" and "control over its use". For example, a violation may take the form of deprivation of the opportunity to use property, failure to grant appropriate permits or other forms of impediment to the realization of property rights resulting from the application of legislation or measures by public authorities. Deprivation of property is the most serious restriction of ownership. This is, in fact, the subject of direct regulation of the second sentence of the first part of Art. 1 of the First Protocol, which requires that such deprivation occur in the public interest. According to a standard developed in the case-law of the Court, three criteria must be examined in order to determine whether a government measure complies with the requirements of this principle: whether the purpose of deprivation of property is "public interest"; whether the measure was in proportion to the stated objectives; whether such a measure was legitimate[23].

The largest number of judgments of the European Court of Human Rights concerned the non-enforcement or prolonged non-enforcement of judgments of national courts concerning the protection of the possession of

[22] Kars-Frisc M. The right to property: the question of the implementation of Article 1 of the First Protocol to the European Convention on Human Rights / M. Kars-Frisco; in a row. AL Zhukovsky // European Convention on Human Rights: Basic Provisions, Application Practice, Ukrainian Context. – K., 2004. – P. 183.

[23] VP Kononenko, The Role of the Universal Declaration of Human Rights in the European Court of Justice's Interpretation of the 1950 Convention / VP Kononenko // Problems of Legality. – H., 2008. – Vyp. 99. P. – 206–220.

their property. These categories of cases may be classified as substantive in the cases of: Piven' v. Ukraine, Zhovner v. Ukraine, Voitenko v. Ukraine, Shmalko v. Ukraine, Naumenko v. Ukraine, Dubenko v. Ukraine, Mikhailenko and others v. Ukraine, Derkach and Palek v. Ukraine, Sharenok v. Ukraine, Katsiuk v. Ukraine, etc. The number of such cases is increasing every year.

European Court comes from the fact that the establishment of the state of certain restrictions on the right to own property and useby the state measures to ensure to secure the payment of taxes should be considered as evidence of state interference in the peaceful enjoyment of property that is determined as one of the fundamental human rights. These facts should be analyzed on the reasonable using, that is legality, appropriateness and proportionality. As the analysis of the practice

shows, in this area the state tax authorities of Ukraine are often suspected of violating both the norms of the law and the general principles of law.

The third principle laid down in Art. 1, concerns not the deprivation of property but the sovereign powers of the state to regulate property relations. Despite of the Court's rather restrained approach to determining the compatibility of national property relations measures, which was inherent in the early years of the Convention's institutions, the Court's case-law further developed a more rigid standard for dealing with cases under Art. 1. As with most other provisions of the Convention, Art. 1 of the First Protocol may require the State to take appropriate affirmative action to ensure respect for property rights, even in relations between individuals and the like.

The obligation of the state to take measures to protect the rights guaranteed by the Convention (as opposed to the obligation to abstain from violating them) is referred to in the ECtHR as a "positive obligation".

The concept of positive obligations of the state is associated with Art. 1 of the Convention, which enshrines the obligations of the High Contracting Parties to respect human rights: "The obligation to protect the right to life contained in this rule (Article 2) shall be considered in conjunction with the general obligation of States under Article 1 of the Convention., "To provide for everyone within their jurisdiction the rights and freedoms set forth in Title I of this Convention".

Article 1 of Protocol No. 1 does not impose on the State an obligation to protect the property of citizens against encroachments on the part of individuals. This protection is indirectly exercised through the guarantees of Article 6 (right to a fair trial), which oblige the State to observe the procedural guarantees of the parties and to ensure the effective enforcement of judgments.

It is the duty of the State to interfere in civil-law relations between individuals in situations where one party to the agreement (especially the

average citizen) puts by the law in obviously unequal conditions with respect to other parties to the agreement acting directly or indirectly in the interests of the state. In this case, the state should create such conditions in which the participants should be informed of the negative consequences of their actions (inaction) and can make decisions based on this information.

In establishing that there is a positive State obligation for a particular Convention law, the Court shall ensure that a fair balance is struck between the general interests of the public and the interests of the individual, the search for such a balance is inherent in the entire Convention. In doing so, it is guided by common positions, resolving specific cases: positive obligations cannot impose too heavy burden on the state in the course of their implementation or compliance, they are also narrowly worded as far as possible and should relate to fundamental conventional values.

The positive duties of the State are to take certain measures to ensure that individuals enjoy their rights; these measures should also aim at preventing the enjoyment of these rights by other individuals (the classical theory of D. Mill) and, conversely, by preventing the use of these rights by individuals.

In determining the positive obligations of a State in the application of certain articles of the Convention, their content and scope is significantly changed by the very fact of recognition of these responsibilities of those obligations. The Court has not, to date, formulated any coherent theory of positive obligations, and it is necessary to refer to the practice of applying separate articles of the Convention to analyze their content.

According to the researchers, the boundaries between the positive and negative obligations of the State provided for in Article 1 of Protocol No. 1 are not clearly defined. Nevertheless, these two responsibilities require the same principles to be applied. And in the case when the case is analyzed through the prism of a positive duty of the state, and in the case of determining the legality of intervention of the state authority there is no significant difference in the applied criteria. The European Court of Human Rights pays considerable attention, in particular, to providing the State with the possibility of judicial protection of the infringed law, so that the State has obligations that envisage certain measures necessary to protect property rights and, in particular, an obligation to provide a judicial procedure which would contain the necessary procedural safeguards and, thus, allowed the national courts to resolve all possible disputes between individuals effectively and fairly. In other words, to ensure compliance with the principle of peaceful possession of property, the state must ensure that the right to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law, the need for which arises from a violation of the right to peaceful possession, is respected.

In the absence of compliance with this requirement, the Court may find a violation of such a right[24].

CONCLUSIONS

Thus, considering Art. 1 of the First Protocol to the Convention and the mechanism for its application, it is necessary to remember the 3 provisions which form the content of this article:

(I) The principle of peaceful possession of property;

(II) Deprivation of property;

(III) Control of use.

This article contains three separate norms. The first norm, of a general nature, proclaims the principle of peaceful possession of property; the second norm deals with cases of deprivation of property and subordinates it to certain conditions – it is contained in the second sentence of the first part. The third norm recognizes that States have the right, in particular, to control the use of property, in accordance with the common interest, by introducing laws which they consider necessary for the purpose; this provision is contained in part two[25].

Otherwise, Article 1 of Protocol No. 1 has three main points:

1) respect for property rights ("Every natural and legal person has the right to peacefully own his property");

2) impossibility of deprivation of property ("No one may be deprived of his property except in the interests of society and under the conditions provided by law and the general principles of international law");

3) conditions of restriction of property right in the form of control of the State over its use ("The preceding provisions shall not detract from the right of the State to enforce such laws as it deems necessary to exercise control over the use of property in the general interest or to secure the payment of taxes or other fees or penalties").

SUMMARY

The article explores the general provisions on the protection of property rights in the case law of the European Court of Human Rights. In particular, the fundamental guarantee of the protection of property rights is the ability to apply to the European Court of Human Rights for the protection of

[24] DV Novikov Guarantees for the protection of property rights in the ECtHR practice // Civil, Business, Commercial and Labor Law European Perspectives No. 2, 2016 . P. 93–94.

[25] Karss – Frisc N. Right to property: the issue of implementation of Article 1 of the First Protocol to the European Convention on Human liters of Judah / V kn .: The European Convention on Human Rights: principal provisions, practice of application, Ukrainian context. – K., 2004. – P. 686.

infringed, unrecognized or contested rights. Attention is drawn to the peculiarities of the interpretation by the European Court of Human Rights of the rules of Article 1 of the First Protocol. The doctrinal definition of ownership is analyzed. The necessary conditions for the application of the principle of peaceful ownership of property have been determined.

REFERENCES

1. Civil and Commercial Law of Foreign States: a textbook: in 2 volumes / answer. ed. E.A.Vasiliev, A.S. Komarov. – 4th ed., reworked and add. – M.: International Relations, 2008. – Vol. 1. – P. 560 p.
2. Convention for the Protection of Human Rights and Fundamental Freedoms: International Document of November 04, 1950 // Official Journal of Ukraine. – 1998. – № 13. – Art. 270.
3. Vladimirsky-Budanov M.F. Review of the history of Russian law / M.F. Vladimirsky-Budanov. – 7th ed. – Petrograd, Kiev: N.Y. Oglobin, 1915. – 699 p. P. 507.
4. Public ownership: problems of theory and practice: monograph / ed. V.A. Ustimenko / NAS of Ukraine, Institute of Economic and Legal Research. – Chernihiv: Desna Polygraph, 2014. – 308 p. P. 7.
5. Savel'ev V.A. Legal concept of property in Ancient Rome and modernity / V.A. Savel'ev. – The Soviet state and law. – Moscow: Nauka, 1990. – No 8. – P. 135–140. – P. 139.
6. Lazar J. Property in bourgeois legal theory: trans. from germ. / J. Lazar. – M.: Law. Lit., 1985. – 182 p.
7. Shimon S.I. Property rights in the context of modern concepts of property rights in civilistics // Journal of the University of Law of Kiev – 2012/2. P. 192–195.
8. Smirin V.M. Roman "familia" and the Romans' ideas about property // Life and history in antiquity. M., 1988, pp. 18–40.
9. Yakushev M.V. Voinikanis E.A. Information. Property. Internet. Tradition and novels in modern law // Access mode: http://www.nnre.ru/kompyutery_i_internet/information_sobstvennost_internet_tradicija_i_novelly_v_sovremennom_prave/index.php
10. Spengler O. Sunset of Europe. Essays on the morphology of world history. 2. World-historical perspectives / trans. from germ. and note. I.I. Makhankova. – M.: Thought, 1998. – P. 86.
11. Charter of Fundamental Rights of the European Union. European Union; Charter, International document dated 07.12.2000 // Access mode: http://zakon3.rada.gov.ua/laws/show/994_524
12. Ownership: European experience and Ukrainian realities: Proceedings of the International Conference (Kyiv, October 22–23, 2015). –

K.: BAITE, 2015. – 324 p. P. 93; Gorobets N.G. The concept and essence of property rights in the context of the First Protocol to the 1950 Convention on the Protection of Human Rights and Fundamental Freedoms and the European Court of Human Rights / / Journal Kyiv University of Law • 2014/4, s. 307–312.

13. Kars-Frisc M. The right to property: the question of the implementation of Article 1 of Protocol No. 1 to the European Convention on Human Rights / M. Kars-Frisc; in a row. O.L.Zhukovsky // European Convention on Human Rights: Basic Provisions, Application Practice, Ukrainian Context. – K., 2004. – P. 183–686.

14. Kononenko V.P. The role of the Universal Declaration of Human Rights in the interpretation by the European Court of the 1950 Convention / V.P. Kononenko // Problems of legality. – H., 2008. – out. 99. P. 206–220.

15. Novikov D.V. Guarantees for the protection of property rights in the ECtHR practice // Civil, Business, Commercial and Labor Law European Perspectives No 2, 2016. P. 93–94.

Information about the author:
Kizlova O. S.,
Doctor of Laws, Professor, Head of the Department of Civil and Business Law and Process,
International Humanitarian University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/84-103

THE ESSENCE AND GENERAL CHARACTERISTICS OF THE LEGAL POSITION OF THE SUBJECT OF CRIMINAL PROCEDURAL EVIDENCE

Klyuev O. M.

INTRODUCTION

Proof, like any volitional act of human behavior, combines external (objective) and internal (subjective) properties. The outer side forms its objective side, and the inner side forms its subjective side. Today, criminal procedural science in General and the theory of proof, in particular, unfortunately, do not pay due attention to many subjective moments, do not recognize the proper role played by the category of "personality" in criminal procedural proof. This is explained by the fact that the study of subjective principles is traditionally the subject of the study of General and legal psychology, legal logic and criminology. However, the "dispersion" of the external and internal of the same concept in different branches seems illogical, erroneous, because it affects the completeness of its research. This is the reason for the need to study the subjective side of criminal procedural evidence.

The subjective side of any legal category is its internal component, these are the mental processes that take place in the consciousness of a person and reflect the attitude of her consciousness and will to a certain type of activity that she carries out, and to its consequences. These mental processes (in one form or another and measure) are always manifested in the external world. Moreover, they are decisive in the knowledge of certain phenomena and processes.

The subjective side of the proof of a certain subject is formed by mental processes (which for cognitive purposes can be divided into intellectual and volitional) occurring in the consciousness and will of the subject of proof, and which in their totality Express his personal attitude to the evidentiary activity, it's possible or real consequences. It is obvious that it is not possible to legislatively describe the totality of processes occurring in the conscious-volitional sphere of the subject of proof. That is why science should select (and in the future, probably, and fix in the law) separate, the most significant, typical processes which dominate in consciousness of the subject of proof, and define its relation to criminal procedural evidentiary activity. Among such processes (characteristic features) of the subjective side of

criminal procedural evidence, we believe, should include the legal position (as the main feature), motive and purpose.

1. The concept, signs and types of the legal position of the subject of proof.

In scientific publications, the term "legal position" is quite common, primarily in the context of the constitutional Court of Ukraine[1]. V. Stepankov carried out the study of the essence of the legal position in the General theoretical context of the monographic level. However, in criminal procedural science, the study of this phenomenon, unfortunately, has not received proper development, although, in our opinion, it reflects the essence of the situation, which directly affects the mental processes occurring in the consciousness of the subject of Criminal procedural evidence. Moreover, even in dictionaries and encyclopedias of legal profile interpretation of this term in criminal proceedings. That is, criminal procedural proof can be considered only consciously-volitional behavior of the subject of proof. Thus, all components of the unconscious mental activity of the person are outside the framework of the doctrine of proof, in particular, such an element of its content as the subjective side.

Dictionary offers only understanding of the term "Position": 1) location, location, location, role, place anyone in public life, science, etc. (for Example, a complicated protection position; best position of attorney – example V.); 2) view on a particular issue, point of view, the attitude that determines the nature of the actions, behaviors (for example, the lawyer defended his position, the tough stance of the prosecution, the rightful, fair position of the court – an example of Vladimir)[2].

The Ukrainian legislator does not pay due attention to the legal position of the subject of proof, although it should be noted that this category has already been introduced into the criminal procedural legislation. Thus, in accordance with part 1 of article 22 of the code of criminal procedure "the criminal proceedings is adversarial, providing independent advocacy by the prosecution and by the defense of their legal positions, rights, freedoms and legitimate interests by the means provided in this Code," According to section 6 of article 368 CPC "the court has the right to deviate from the legal position stated in the conclusions of the Supreme Court of Ukraine, with the simultaneous guidance of the relevant motives". However, it is worth noting

[1] Slinko T. Legal positions of the Constitutional Court of Ukraine on the activities of courts of General jurisdiction. Problems of legality. 2011. No. 117. P. 3–13.

[2] Danilyuk I. Modern dictionary of foreign words for secondary and higher schools. Donetsk: LLC PKF "BAO", 2008. P. 383.

that so far there are no more references to this term in the current CPC; in other articles, only the term "position" is used to denote the legal position (see, in particular: part 2 of article 292, part 3 of article 349, part 2 of article 364, part 1 of article 419, part 1 of article 442 of the CPC).

As we can see, the concept of "legal position" has entered into legal circulation, but its official interpretation is not contained in the legislation or reference publications. Given the above lexical understanding of the term "position", as well as expressed in the legal scientific literature opinions on the concept of "legal position", without resorting to their critical analysis, we can offer this definition in General theoretical aspect: "legal position" – a system of views, judgments, expressing the attitude of the subject to legal phenomena and processes. Legal positions in the above sense in the legal literature are divided into doctrinal, law-making and law-enforcement.

Doctrinal legal positions is an element of professional legal consciousness, which expresses the idea of law and legal phenomena, which are formed on the basis of philosophical worldview, special legal knowledge and legal practice (an example of such a legal position, views, judgments of scientists, for example, we proposed a vision of the complex-system concept of criminal procedural evidence).

Law-making legal positions are systems of views of subjects of law-making on a way and the maintenance of normative regulation of legal relations (for example, a legal position of the legislator concerning the concept, architectonics and the maintenance of the certain bill).

Law enforcement legal positions are official or unofficial opinions, judgments about the legality, validity and fairness of the implementation of legal norms (their kind are the positions of the subjects of criminal proceedings during criminal proceedings). As part of our research, we are interested in this particular kind of legal position.

As already noted, in criminal procedural practice, the term "legal position" became well known and quite actively used. However, despite the seemingly external simplicity of understanding the legal position, in the domestic science of criminal procedure, there is no study at the proper level of this concept at all. To understand the place and essence of the legal position in criminal proceedings and to propose its definition, in our opinion, it is advisable to highlight the essential features of this category[3].

The emergence of categories (the formation of categorical concepts) or the transformation of a concept into a category is the next step in the scientific knowledge of the essence of a phenomenon. Despite the lack of

[3] Tsalin S. Logical dictionary-reference book / S. Tsalin. Kharkiv: Fact, 2006. P. 135, 253–255).

developments in the science of criminal procedure, we believe that the epistemological status and level of scientific abstraction "legal position" is precisely the category. Such a vision of the solution of this issue is dictated by General theoretical scientific developments and criminal procedural practice, which, in turn, requires adjustment of conceptual and categorical series of criminal procedural law in General and evidentiary law in particular.

First. Understanding of the legal position as a certain set of mental processes that characterize the attitude of the subject of proof to significant legal facts that relate to the circumstances of the committed criminal offense, in controversial criminal procedural vidnosin1. Such a mental attitude is by its nature conscious (because, as already noted, only the conscious-volitional behavior of the subject is a proof) and systematic (that is, such that it consists of separate interrelated considerations).

Second. The legal position of any subject of proof is always conditioned by a certain motive and purpose and is formed on the appropriate evidentiary basis.

Third. The specificity of criminal proceedings implies the need to understand the essence of the legal position not only as a certain mental attitude to evidence, but also the introduction of certain evaluative elements of its content. Indeed, the vision of the legal position only as a mental attitude of the subject of proof there is no procedural significance without its Declaration (public expression, demonstration) and its corresponding assessment by himself and other subjects of proof. It is this understanding of the essence of the legal position can be found in the legislation (in those few cases when the law mentions this term, in particular, in part 1 of article 22 of the criminal procedure code) and practice.

Fourth. The expression of a legal position is an act of conviction in one's own rightness, the truth of one's own conclusions. The subject may have a certain point of view, but he may not always adhere to it. Only when he is sure that his opinion is correct (and this can take place only if there is additional reasoning and, perhaps, practical approbation), it is possible to talk about the emergence of a formed legal position and the beginning of its implementation. Therefore, the legal position is not a simple form of perception of the world-as a thought or point of view, but a complex of mental conclusions, which is characterized by a high degree of stability. In addition, the subject must seek to convince others of the truth of his legal position.

The legal position of the subject criminal procedure evidence (as synonymous, we believe, could be used "the procedural position" or "evidence-based position") – this is due to a certain motive and purpose, formed on the evidence-based conscious belief in the truth of his

understanding of certain facts of the particular criminal, the justice who publicly expressed (shown) in the form of a private legal evaluation, and assessment of other subjects of proof and has an earnest desire to convince the other.

Based on our proposed definition of the concept of "legal position", we emphasize another aspect of understanding this category. The legal position is not a simple mechanical sum of beliefs, views, opinions, legal feelings, emotions, moods, etc., but a synthesized holistic education, not devoid of its quantitative and qualitative parameters, numerous external contacts and interactions (which, in turn, gives us the opportunity to identify certain types of legal positions of the subjects of proof with simultaneous analysis of the problems of their formation and implementation).

The legal positions of the subjects of evidence in criminal proceedings can be classified:

– by subject-the legal position of the accused, the defender, the Prosecutor, the victim; if the subjects of one party occupy the same, agreed position, the legal position of the defense or the prosecution;

– depending on the legal authority or binding – official (court decision) and unofficial (position of the judge, set out, for example, in his scientific article);

– depending on the method of registration-documented (the indictment of the investigator, approved by the Prosecutor, the verdict of the court) and not documented (the comment of his position by the defender of the accused in a private conversation, in the media or in social networks);

– the degree of relationship with the moral attitudes of society

– moral and immoral;

– on character of interaction of legal positions of various subjects: (a) conflict-free when beliefs of one subject of proof coincide with beliefs of another. Its variety is a conformist legal position, when several subjects agreed their views and came to the same conviction in certain facts; (b) conflict, when the beliefs of one subject of proof contradict the beliefs of others;

– depending on the nature of the external manifestation-passive and active. Passive forms of manifestation of the legal position take place when the subject of proof is contained (evades) from the Commission of normative established or permitted (permissible) actions. The passivity of this type of legal position does not indicate the absence of a goal and motive (the subject of proof believes that he will be able to achieve his goal and satisfy his interests in this passive way, that is, there is a meaningful lack of active actions, a certain reaction). The active form of the legal position of the subject of proof is manifested in the active implementation of certain actions

(for example, when applying for petitions, complaints, challenges, etc.). Depending on the degree of its external manifestation, it is possible to distinguish such varieties as expressive and impulsive (the latter occurs as a response to a particular situation, sometimes short-term, instantaneous);

– depending on the method of external objectification (bringing to the addressees): (a) verbal, in which the subject of evidence States its position orally (when giving testimony, filing statements, filing petitions, filing complaints, speaking in court debates or with the last word, etc..); (b) textual, when the legal position of the subject of evidence can be expressed in writing (in the indictment, sentence, etc.); (c) visual-aspects, which means a Commission of a subject of proving any demonstrative actions (movements, gestures, adherence to a particular behavior) that allow the addressees of the legal position to see her (nastavena at a time when the court comes to the courtroom when giving evidence during the trial or sentencing court.

2. The content of the legal position of the subject of proof

Based on the above mentioned considerations about the nature of the legal position as the primary feature of the subjective side of the criminal procedural evidence and practice of criminal proceedings defined by the subjects of proving that in the implementation process to defend its legal position, we believe that it is possible to allocate the following elements of the content of legal positions: 1) the thesis evidence; 2) evidence-based basis; 3) evaluation of self-proving entity and the legal position of the other sub єктів. The content of these elements of the legal position is not static, it can change. Such situation can take place, in particular, in case of change of circumstances of criminal proceedings, volume of the evidentiary basis (in connection, for example, with recognition of separate proofs inadmissible or emergence of new), legal positions of other subjects of proof and so forth.

1. Availability of the thesis of proof. One of the elements of the content of the legal position, in our opinion, is a reasonable (that is, based on a certain evidentiary basis) assumption about the possible and, in the opinion of the subject of proof, the results of Criminal procedural proof are necessary. In the consciousness of the subject of proof, as already noted in the analysis of the subject of proof, may be defined as an educated guess regarding the circumstances of the main facts (events of a criminal offense and a person's guilt in committing criminal offences, the form of guilt, motive and purpose of the Commission (p. p. 1, 2 tbsp. 91 CPC)), and in respect of a number of facts constituting the General thesis of proof. Such assumption in science is called hypothesis (and in criminal process and criminalistics versions).

2. Evidence-based Foundation. Depending on the version, the existing evidence in the case, subject of proof in the system-the basis of proof of the legal position of the subject. Thus, the evidentiary basis is the systematization of evidence at the discretion of the subject of proof. Its signs are (should be) the logic, integrity, connection of evidence with the disputed legal fact.

Systematization by each subject of proof of the evidence available to him does not exclude the possibility of supplementing, correcting them, which is caused by the course of evidence and factors that affect such a system (in particular, the position of the procedural opponent, the opinion of the court, etc.).

3. Assessment of the subject's own evidence and other subjects of evidence. Legal science treats evaluation in evidence only as an evaluation of evidence. However, there are other objects of evaluation that affect it, but sometimes are not taken into account by the subjects of proof, which leads to inaccuracies and errors. This is similar to when we would estimate the weather solely by temperature: except that it is warm or cold, we would know nothing, because we would exclude such indicators as wind, precipitation, cloud cover, wind direction and speed, and the like.

In the approach to the assessment of evidence from the standpoint of only the assessment of evidence, remain without attention:

– the object of proof (the circumstances in which the evidentiary activity of its subjects);

– the subjective side of the proof of a subject of proof (the thesis of proof, evaluation features (as other substantive elements of the legal position), the purpose and motives of the procedural opponent).

These features of the subjective side cannot be excluded from the assessment, which is carried out by the subject of proof (note that in practice, the assessment of these features, as a rule, is actually carried out);

– specific features of the objective side of criminal procedural evidence (in particular, the time, place, situation and methods of its Commission);

– specific features of certain subjects of evidence that may affect its results.

In addition, it should be noted that evaluation of the subject of proof will be effective not only in accounting for all the components of the content of evidentiary activities of another entity evidence (procedural enemy), but also provided an unbiased and critical attitude to their own evidence (primarily with their own legal positions, in particular, to your goal and interest, which, although not elements of its content, however, determine the legal position of the subject of evidence as well as his thesis of proof (their version) and own evidence base).

In connection with the above, we believe that in the legislation, scientific and educational procedural literature it will be more correct to use the term not “evaluation of evidence”, but “evaluation of evidence”.

What is the content of the assessment of evidence? From our point of view, the criteria of belonging, admissibility, sufficiency, significance and reliability are the main ones in the assessment of one’s own and “someone else’s” procedural evidence, but in another, somewhat broader in comparison with the generally accepted (since it concerns only the assessment of evidence) aspect.

Assessment of evidence means the need to analyze the relationship of the legal position with the circumstances of the committed criminal (or procedural) offense, which are the object of criminal procedural evidence. In addition, from the point of view, this communication will assess all elements of its legal positions (extended version, the evidentiary basis, particularly in assessing one’s own evidence and evidence of other subjects), as well as such symptoms subjective evidence of the subject as the objective and the motive that lead to his legal position.

By the way, some of the provisions of the current (and previous) of the act, from our point of view are such, that, in fact, reglamentary requirements affiliation evidence (so, in particular, according to section 6 of article 364 of the CPC, the presiding judge may stop the performance of the participant in the judicial debate, if he comments again gone beyond criminal proceedings, which is carried out, or repeatedly made statements offensive or obscene nature). First, the term “limits of production”, we believe, refers not only to the circumstances of the subject of proof, but is a broader concept and may include the points we have mentioned above. Secondly, the content of the speech of the debater is not limited only to the analysis of evidence; it can Express his subjective attitude in the course of criminal proceedings in General, and individual actions and decisions, as well as to the participants in the process, in particular.

Assessment of the admissibility of evidence means the legality of its implementation (i.e. compliance with the legal and social norms governing the procedure for its conduct). When assessing the admissibility of evidence, first of all it is necessary to analyze the main features of the objective side of criminal procedural evidence, which form its content (actions, results and the relationship between them), as well as such features of the objective side of evidence as the place, time, situation, methods and means of its implementation.

Evaluation of the reliability of evidence means the analysis of the results obtained in the process of its implementation from the point of view of their truth.

The significance of evidence is its value, strength and weight for a particular criminal proceeding. The results of the proof are evaluated for significance first of all, but this does not exclude the possibility of considering them from the point of view of the strength of each of the elements of the legal position of a subject of proof in the process of its implementation. We can talk about the assessment of the claimed thesis of proof, the weight of the evidentiary basis of each subject of proof (the constituent elements of which, incidentally, sometimes may not be used in the results of proof), as well as the importance of the assessment of proof of both their own and other subjects.

Assessment of the sufficiency of evidence means the need to analyze the presence of a set of elements of the legal position of the subject of proof, necessary for making a certain procedural decision (for example, a report of suspicion, carrying out a certain investigative (search) action, a court verdict, etc.).

Based on the above, we can draw this conclusion: assessment of evidence – is a mental (logical) analysis of facilities, affordability, reliability, relevance and sufficiency of the evidentiary activities of all its subjects in specific criminal proceedings.

Summing up given in this part of the reasoning, we emphasize that the authors ' position regarding the assessment of evidence is based on the understanding that, in the practice of criminal proceedings the range of objects procedure legal studies is not limited to evaluation of evidence; evaluation of positions considered (if not, you should consider all elements of proof of criminal procedure (the object, the objective side, all the peculiarities of the subjective side of proof of a specific subject, the subject of proof)[4].

3. Assessment of evidence in criminal proceedings

In the history of criminal proceedings, there are two systems of evidence assessment (in our understanding of evidence assessment): formal and free (based on internal conviction). The formalistic way of knowledge presupposes a certain rule and a clear algorithm of actions and decision-making. It has a number of advantages, as it eliminates or minimizes errors, leaves no room for subjective and arbitrary discretion, is more economical. In our times of active technological development in all branches of human activity, there are numerous rules and strict algorithms of action in different

[4] Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. sciences: spec. 12.00.01. Stavropol: Stavropol. State University, 2000. P. 146.

situations (for example, in traffic, in health care, in construction, in various industries, etc.). And it is quite justified. Every driver, accountant, Builder knows: act according to the rules of the road, according to the laws and regulations governing the accounting and building regulations – and you will always be right[5].

The formal system of evaluation of evidence (and evidence in General) existed in the medieval detective criminal process. The essence of it is that each proof had a predetermined force and determined in advance their necessary sufficient aggregate. For example, the admission of guilt by the accused was considered perfect evidence-the Queen of evidence for the recognition of the accused guilty was enough testimony of two witnesses; testimony of one witness equated to the testimony of two interested; the testimony of the person occupying the highest class level had an advantage over the testimony of the one who was at the lowest level, etc. This system was based on certain life presumptions (for example, the admission of guilt such a presumption was that the person would not slander himself). However, as practice has shown, such a system was imperfect, unreliable in epistemological terms, led to numerous errors. After all, it can never be ruled out that both disinterested witnesses can give false or false testimony, and each case is unique and inimitable. Therefore, the formal system of evaluation of evidence as an epistemological tool has historically failed and has been replaced by its antipode – free evaluation of evidence.

Despite the fact that in recent years new opportunities have been created to formalize the process of proof at a different, higher quality level, there is no universal algorithm of actions and decision-making suitable for proving in all criminal trials, and, apparently, will never be created. Thus, today the free evaluation of evidence (on internal conviction) is the optimal evaluation system used (and "for lack of better") in the cognitive process in the implementation of criminal proceedings.

Free evaluation is carried out in accordance with certain logical and psychological laws. At the same time, it is regulated by the criminal procedural legislation. According to art. 94 CPC "the investigator, the Prosecutor, the investigating judge, the court on the internal belief which is based on comprehensive, full and impartial research of all circumstances of criminal proceedings, being guided by the law, estimate each proof from the point of view of accessory, admissibility, reliability, and set of the collected proofs – from the point of view of sufficiency and interrelation for adoption of the corresponding procedural decision. No evidence has a predetermined force".

[5] Shevchuk I. legal positions of Constitutional Court of Ukraine. Forum rights. 2012. No. 4. P. 1064–1069.

First of all, we note that the cited norm of the law should be interpreted broadly. After all, we will repeat, during criminal proceedings on internal beliefs are estimated not only proofs, but also other elements of a legal position of the subject of proof (and also those signs of the subjective party of proof causing a legal position (the purpose and motive)). In addition, as we have already stated above, other substantive elements of criminal procedural proof should be evaluated according to internal conviction: its object, all manifestations of the subjective and objective side of proof and all the features of the subjects who carry it out.

As we can see, the Central, defining element in the system of free evaluation of evidence is the category of internal belief, which, in our opinion, requires special attention in this study.

Inner conviction: urgency and function. Elucidation of the essence of inner belief, its content and mechanism of formation is of great scientific and practical importance. First of all, it is necessary to determine the urgency, in other words, to answer the question whether the term "internal conviction" Meets the requirements of the science of criminal procedure and legislative technology.

The system of free evaluation of evidence in criminal proceedings arose at the end of the XVIII century. And it was no accident, because at the heart of the worldview at that time were different philosophical schools of idealism, which linked the establishment of truth with the consciousness of man. Determinism, a materialist theory of knowledge in the XVIII century only began to be developed and has not gained wide popularity.

Consciousness was understood as a closed inner world, which reflects not the external being, but itself. Because of this, it was proclaimed that internal self-observation should be taken as the basis of any knowledge[6]. Through introspection, a person can study his feelings, thoughts, desires, without resorting to an objective analysis of the causes that cause them, and the mechanism of their formation.

It was in the works of famous philosophers of that time, who were supporters of these methods of research of the objective world, that the term "inner conviction" first appeared, which took its place among such terminology of the introspective school: "inner perception", "inner knowledge", "inner imitation", "inner experience".

The disclosure of the nature of the inner belief, in our opinion, requires the solution of the question of its functional purpose. In the criminal

[6] Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. sciences: spec. 12.00.01. Stavropol : Stavropol. State University, 2000. P. 146.

procedural literature on this issue expressed various, sometimes quite contradictory opinions. Without resorting to their analysis, we believe that it is possible to support those scientists who consider internal research as a method, as a result, and as a criterion (standard) for evaluating evidence (evidence). Let us consider the peculiarities of this understanding.

Internal persuasion as a method means an approach to the evaluation of evidence, which is characterized by the absence of any formal requirements of the law primarily with regard to the reliability and significance of evidence and evidence in General (although this may apply to other properties of the latter). This approach is based on the legal knowledge and professional experience of the subject of proof, on the knowledge gained in the process of proving certain circumstances of criminal proceedings, on personal moral qualities. As a method of evaluating evidence internal persuasion means meeting the following requirements:

– first – the content of part 1 of article 94 of the CPC is not bound by the subject of the assessment the views of other entities that forbid anyone to interfere in this activity. All subjects who carry out the assessment of evidence (own or other subject) are free in their value judgments, conclusions that they make on the basis of a comprehensive, complete and unbiased study of all the circumstances of criminal proceedings;

– the second – from the contents of part 2 of article 94 of the criminal procedure code-no evidence for the investigator, Prosecutor, investigating judge, court have a predetermined force. This means that criminal procedural rules do not contain prescriptions, what evidence should be determined by certain circumstances, and do not establish in advance the strength of evidence that does not give some of them priority over others.

Consequently, the law guarantees the subject both" external "freedom, whether it protects him from external influence, and "internal", without binding him with any formal requirements regarding the proof of a particular subject. Without these two characteristics, free evaluation (by inner conviction) ceases to be such, turns into its opposite.

Internal belief as a result of the evaluation of evidence can be considered in several aspects (as a rule, traditionally considered in the epistemological, logical and psychological sense[7]).

In the epistemological aspect, it is the result of reflection in the consciousness of the subject of proof of the object of research (circumstances of the subject of criminal procedural proof to be established).

[7] Shevchuk I. legal positions of Constitutional Court of Ukraine. Forum rights. 2012. No. 4. P. 1064–1069.

The logical nature of the internal belief is that it is made on the basis of compliance with the laws and rules of logic categorical and (in the opinion of a certain subject) reliable, meaningful and the only possible conclusion about the circumstances of the subject of proof.

In psychological terms, internal belief is "a certain state of the psyche of the individual, the property of the inner life of his consciousness. It is directly given to man as an act of experience". According to L. Petruchak, the psychological aspect of persuasion should be considered as a product of the interaction of the mind, feelings and will, because it is not just a thought, a correct view, but an emotionally colored inner force that regulates and directs human behavior.

The inner conviction reflects the originality and peculiarities of the mental warehouse of each subject of proof. The functional purpose of the psychological component of the belief is that it helps to overcome doubts arising in the process of knowledge, determines its active creative nature. It is the psychological aspect of internal conviction as a result of the evaluation of evidence is manifested in the requirement of the law on the motivation of the conclusions of a certain subject of criminal proceedings.

Inner conviction is fundamentally different from intuition. It is achieved in the course of objective knowledge of reality, based on comprehensive research and evaluated evidence and their sources. To decide by inner conviction means to realize the only correctness of what is affirmed or denied, to have a reasonable confidence in the truth of one's judgments and the objective material necessary for this[8].

Some scientists pay attention to the moral and ethical side of internal belief[9]. After all, internal belief as an ethical category is a rational basis for the moral activity of a person, allowing her to perform a particular act consciously, with an understanding of the necessity and expediency of a certain behavior[10]. Ethical elements in judicial persuasion convey the value orientation of the judge, his moral ideals and views. Their functional purpose is that they form the moral basis of conclusions on the merits of the criminal case under consideration.

In General, agreeing with the need to highlight this aspect, we believe that we should support N. Poplavska, who believes that it should be

[8] Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. sciences: spec. 12.00.01. Stavropol: Stavropol. State University, 2000. P. 146.

[9] Problems of formation of judicial conviction in criminal proceedings: Monogr. Kharkiv: Vishch. SHK. 1975 / in the book. Grosheva Y. Selected works / comp.: Kaplina O., Marinov V. Kharkiv: Pravo, 2011. P. 25.

[10] Moskalkova T. Ethics of criminal procedural proof (stage of preliminary investigation) / T. Moskalkova. Moscow: Spark, 1996. P. 88.

considered within the social nature of internal belief[11] (in other words, to highlight its social aspect, which includes the moral and ethical side). The social component of internal belief, as a broader concept, in addition to compliance with moral and ethical standards (as a variety of social norms), means that it must meet the goals and objectives of criminal proceedings, due to the interests of society (society) and the corresponding legal ideology that prevails in it.

Based on the analysis of the content of article 94 of the criminal procedure code, in our opinion, it is also necessary to highlight the legal aspect of internal conviction as a result of the evaluation of evidence. This side of the concept under consideration is the validity and motivation of the internal conviction to which the subject of proof has reached on the basis of a comprehensive, complete and impartial study of all the circumstances of the criminal proceedings and in the manner prescribed by law.

The content (structure) of the internal belief as a result of the evaluation of evidence. It is also important to focus on the content (structure) of the internal belief as a result of the evaluation of evidence in order to fully clarify the essence of this category, which will help to clarify the essential elements (signs) of the internal belief and formulate its concept. It is advisable to apply primarily to the analysis of scientific works devoted to the study beliefs, because, as noted by Y. Manishev, "conviction" is a General sociological category. This means that all its types (philosophical, political, religious, moral, judicial, etc.) have common features (or signs) that are repetitive and act as elements of belief. It is through the definition of these elements (features, traits) can reveal the contents of the internal beliefs[12].

Y. Manisheva identified five elements that form the mechanism of any belief: 1) knowledge about the subject matter; 2) attitude to the truth in the sense of ideal forms; 3) a sense of confidence or uncertainty; 4) objective attitude (positive or negative) to the phenomena of the external world; 5) subjective willingness to act[13]. We believe that such an approach can be taken as a basis for determining the elements (signs, traits) of the concept of internal conviction of the subject of criminal procedural evidence.

The first element of the content of conviction is knowledge about the circumstances of the subject of criminal procedural evidence in a particular criminal proceeding. Belief cannot exist without knowledge. However,

[11] Poplavskaya N. Freedom of evaluation of evidence in criminal proceedings of Russia: Monogr. Moscow: Yurlitinform Publishing house, 2009. P. 82–84.

[12] Koblikov A. Legal ethics: studies. Moscow: NORM Publishing house (Ed. gr. NORMA-INFRA M), 2000. P. 68, 69.

[13] Moskalkova T. Ethics of criminal procedural proof (stage of preliminary investigation) / T. Moskalkova. Moscow: Spark, 1996. P. 88.

knowledge and beliefs are not the same: knowledge may not translate into beliefs, and beliefs may not always be based on clear and complete knowledge. In addition, the concept of "belief" is broader than the concept of "knowledge". Knowledge expresses the relation of the epistemological character to reality, whereas belief is the relation of the subject already to the epistemological image. The latter is possible only through the comparison of knowledge with practice, public interests and goals facing the subject of proof.

This understanding of belief and its relationship with knowledge and meet the above point of view about the need to consider the epistemological essence of criminal procedural evidence from the standpoint of the classical theory of knowledge, and with the use of cognitive science, one of the components of which is epistemology as a science of knowledge.

The second element belief is the relation of the subject of proof to the content of knowledge to the proper, admissible, reliable, significant and sufficient. Certain knowledge, which, for example, does not relate to the circumstances of the subject of proof or obtained in violation of the procedure established by law, is excluded from the further process of forming the conviction of the subject of proof.

Thus, according to L. Petruchak, in the process of judicial proceedings, judges rhyme the necessary and sufficient amount of knowledge, but only a part of them is put into the basis of beliefs. The acquired knowledge goes through a complex process of emotional and intellectual assessment, as a result of which their reliability is established. The conclusion about the reliability of knowledge is the main prerequisite for their transition into a belief that is predetermined by the objectives and goals of justice. If the reliability of knowledge is not established, they cannot serve as a basis for judicial conviction[14].

Although, as noted above, reliability is not the only factor in the conversion of knowledge to judicial conviction. In the process of evaluation, the determination of their belonging, admissibility, significance and sufficiency is carried out. Therefore, before establishing the reliability of specific knowledge related to the subject of proof, obtained in the manner prescribed by law, have no value or are dealing with already acquired knowledge is not used in the formation of beliefs of the subject of proof.

The third element of the internal conviction of the subject of criminal procedural proof is the mental attitude to the essence of the knowledge

[14] Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. sciences: spec. 12.00.01. Stavropol : Stavropol. state University, 2000. P. 146.

obtained., which is expressed in a sense of confidence in them. Confidence is a state of the subject of proof, when he does not hesitate to express their attitude to the truth results of knowledge. Close to the mental state of confidence is the state of faith; sometimes they are regarded as identical. However, it is worth to support the position of the L. Petrochuk, which believes that between these States there are significant differences. Confidence is characterized by the validity and concreteness of the knowledge that causes it; the state of faith arises with respect to sensually not given objects, not mastered in the process of cognitive and practical activity. For faith is not necessarily the presence of a sufficient amount of evidence supporting the truth of its knowledge[15].

From the feelings of confidence, it is necessary to distinguish the sense of self-confidence, which can also lead to a conviction. However, sometimes as a result of overestimation of their capabilities and knowledge, unjustified failure to take into account certain factual data of criminal proceedings, self-confidence can lead to hasty, unfounded conclusions, that is, to a false belief.

The opposite of confidence is doubt. According to the explanatory dictionary of the Ukrainian language, doubt is uncertainty about the probability, the possibility of something; lack of firm confidence in someone, for some reason; complications, misunderstanding that arise when solving any question, a certain problem; a state of mental disorder, uncertainty, hesitation[16]. Doubt cannot lead to the formation of a conviction in the subject of proof. Criminal procedure law explicitly prohibits in case of doubt, i.e. in the absence of inner beliefs, to make decisions about a person's guilt in committing a criminal offence (article 62 of the Constitution of Ukraine, article 17 of the code). At the same time, the feeling of doubt has a positive role in criminal procedural proof. It always arises from the subject of proof, if there is insufficient knowledge about the circumstances of criminal proceedings or if the knowledge obtained is contradictory. Doubts encourage to take measures, commit actions aimed at obtaining new knowledge, which will make it possible to eliminate them and form a reasonable belief.

The fourth element of the content of the belief is the subjective (positive or negative) attitude to the investigated objective phenomena. It is formed in the subject of proof as a result of moral assessment, the essence of which is to compare the actions of the person (the accused, the victim, etc.) with the

[15] Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. sciences: spec. 12.00.01. Stavropol: Stavropol. state University, 2000. P. 146.

[16] Slinko T. Legal positions of the Constitutional Court of Ukraine on the activities of courts of General jurisdiction. Problems of legality. 2011. No. 117. P. 3–13.

interests of other people and society as a whole. This comparison takes place on the basis of the prevailing moral norms and values in society. Thus, the actions or behavior of certain persons in criminal proceedings that meet the interests of society, the state, individual citizens (for example, the suspect (accused) gave truthful testimony, appeared on call, etc.) cause a positive attitude. Opposite actions or behavior, on the contrary, generate a negative attitude among the subjects of proof.

The fifth element (which is highlighted by almost all researchers of the essence of the concept of "belief") is the volitional state of the subjects of proof, their willingness to act in accordance with the knowledge that underlies the belief. When the subject lacks the determination to act or make appropriate decisions (for example, the court doubts the conviction), it means that he has not yet formed a conviction. The state of readiness to act on their inner beliefs is an indicator of the strength of confidence of the subject of proof in the truth of their knowledge.

Summing up the stated concerning the content of internal belief, it is worth noting that its first element – knowledge, being the basis, the basis of belief, constitute its objective side. According to V. Bohan, true knowledge, which correctly reflects the objective reality, has a meaning that does not depend on the consciousness of judges. Having knowledge, the subject of proof must reckon with them, he cannot ignore them or change at will. That is why the process of forming a belief and its meaning acquire an objective character. The last four elements of the content of a belief Express its subjective side, which indicates that beliefs are the product of the mental activity of the subject of proof. It depends on his mental capacity, life experience, physiological and mental state, and the like.

Separately, each of the defined and analyzed elements does not cause the subject to prove the belief, its appearance is possible only as a result of their dialectical development and interaction.

In the philosophical literature, the process of forming a belief is described by the formula "recognized-understood – experienced-accepted as truth". As we can see, it lacks the fifth element of conviction-the willingness to act. V. Bohan transfers this formula to the formation of the judicial conviction, adding to it the specified element: "recognized-understood-experienced-taken for the truth – prepared decision".

Criticizing the given understanding of the mechanism of formation of belief, Y. Grosheva, noted that in such cases the role of the law, professional legal consciousness, the social position of the judge established in trial of set of proofs in the decision-making mechanism is belittled. In his opinion, these formulas separate cognitive elements from psychological and ethical

ones in the structure of judicial conviction, which always appear in dialectical interrelation and interdependence[17].

From our point of view, the proposed definition of the formula of the mechanism of formation of the conviction of the subject of criminal procedural evidence is still possible. Moreover, it seems that to determine its components, the above-analyzed elements of the content of belief can be taken as a basis (after all, they take into account the role of the law, professional legal consciousness, and other components named by Y. Groshev), as well as the approaches expressed in philosophy and procedural literature. On the basis of the stated we consider it possible to offer the author's formula of interrelation of elements of the mechanism of formation of internal belief of the subject of criminal procedural proof: "it is identified-analyzed on suitability – truth is determined-subjective attitude is formed-readiness to act is demonstrated".

Having considered the essence of internal belief, its structure and process of formation, we will try to define this concept. Inner conviction of a subject of criminal-procedural evidence (how assessment of evidence) is obtained in the manner prescribed by law, knowledge about the circumstances of the subject of criminal procedure evidence in specific criminal proceedings which, in the opinion of the subject evidence is credible, relevant and sufficient (that is suitable for proof), which is the feeling of certainty concerning the nature of this knowledge is manifested in the subjective (positive or negative) attitude to the study of objective phenomena, and makes a willful willingness to act.

CONCLUSIONS

1. The legal position of the subject of criminal procedural proof is his conscious conviction in the truth of his understanding of the problems of proof as a whole, and its specific manifestations (elements) in a particular criminal proceeding, in particular, with a clearly expressed desire to convince other persons of this, which is due to a certain motive and goal, formed on a separate evidentiary basis, and publicly expressed (demonstrated) in the form of his own legal assessment and assessment by other subjects of proof.

2. The content of the legal position of the subject of criminal procedure evidence includes: 1) the existence of the thesis of proof; 2) the evidentiary basis; 3) the assessment of the subject's own evidence and the legal position of other subjects.

[17] Problems of formation of judicial conviction in criminal proceedings: Monogr. Kharkiv: Vishch. SHK., 1975 / in the book. Grosheva Y. Selected works / comp.: Kaplina O., Marinov V. Kharkiv: Pravo, 2011. P. 25.

3. When describing the assessment as an integral element of the legal position of the subject of proof, it should be not only about the assessment of evidence, but also evidence as a whole. This means that all the constituent elements of the content of the proof must be evaluated: the object, the subjective side, certain features of the objective side of the proof and certain subjects that carry it out. In connection with the stated in the legislation, scientific and educational literature it will be more correct to operate with the concept not "assessment of proofs", and "assessment of proofs".

4. The category of "internal belief" is a Central defining element in the system of free evaluation of evidence. The term "internal" has its own meaning: it defines the mechanism of formation of a change in the subject of proof.

5. The essence of internal belief is that from the point of view of functional purpose, it can be considered as a method, and as a result, and as a criterion for evaluating evidence. As a method of assessment to use of either internal belief has the following essential characteristics: (a) the incompatibility of the subject of the assessment the views of other actors, that is, forbid anyone to interfere in such activities (the so-called "external" freedom (part 1 of article 94 of the CPC); (b) the absence of a predetermined strength of evidence for the investigator, Prosecutor, investigating judge, court (so-called "internal" freedom) (part 2 of article 94 of the CPC).

SUMMARY

The article discusses the concept, characteristics and types of legal position of the subject of proof, the legal position of the subject criminal procedure proof, the content of the legal position of the subject of proof, the availability of the thesis of proof, evidentiary-based assessment of their own evidence, the subject and other subjects of evidence evaluation of evidence in criminal proceedings

REFERENCES

1. Problems of formation of judicial conviction in criminal proceedings: Monogr. Kharkiv: Vishch. SHK., 1975 / in the book. Grosheva Y. Selected works / comp.: Kaplina O., Marinov V. Kharkiv: Pravo, 2011. P. 25.

2. Danilyuk I. Modern dictionary of foreign words for secondary and higher schools. Donetsk: LLC PKF "BAO", 2008. P. 383.

3. Campo V. Legal positions of the constitutional Court of Ukraine as a necessary element of judicial and legal reform. Bulletin of the KSU. 2010. No. 2. P. 112–122.

4. Koblikov A. Legal ethics: studies. Moscow: NORM Publishing house (Ed. gr. NORMA-INFRA M), 2000. P. 68, 69.

5. Moskalkova T. Ethics of criminal procedural proof (stage of preliminary investigation) / T. Moskalkova. Moscow: Spark, 1996. P. 88.

6. New explanatory dictionary of the Ukrainian language: 200 000 words: in 3 vols. [2nd ed., ISPR.] / way.: Yaremenko V., Slipushko O. Kiev: Akonit, 2008. Vol. 2: K-P. P. 757.

7. Novitsky, V., Theory of the Russian procedural evidence and practice: monograph. Stavropol: Publishing house of SSU, 2002. 584 p.

8. Petrusak L. Problem of the origin, development and formation of the rules of evaluation of evidence in criminal proceedings of Russia (historical and legal as – aspects): diss. ... cand. yuri. Sciences: spec. 12.00.01. Stavropol: Stavropol. state University, 2000. P. 146.

9. Poplavskaya N. Freedom of evaluation of evidence in criminal proceedings of Russia: Monogr. Moscow: Yurlitinform Publishing house, 2009. P. 82–84.

10. Slinko T. Legal positions of the Constitutional Court of Ukraine on the activities of courts of General jurisdiction. Problems of legality. 2011. No. 117. P. 3–13.

11. Stepankov V. Legal position: General theoretical and applied aspects: Diss. ... Cand. Yuri. Sciences: spec. 12.00.01. Nizhny Novgorod, 2003. 186 c.

12. Teslenko N. Legal force and value of legal positions of the constitutional Court of Ukraine. Bulletin of the KSU. 2003. No. 4. P. 36–41

13. Tkachuk P. Legal positions of the constitutional Court of Ukraine. Bulletin of the KSU. 2006. No. 1. P. 10–21.

14. Tsalin S. Logical dictionary-reference book / S. Tsalin. Kharkiv: Fact, 2006. P. 135, 253–255).

15. Shevchuk I. legal positions of Constitutional Court of Ukraine. Forum rights. 2012. No. 4. P. 1064–1069.

Information about the author:
Klyuev O. M.,
Doctor of Law, Professor,
Director of the Kharkiv Scientific Research Institute
of Forensic Examinations N.A. Prof. M. S. Bocarius
of the Ministry of Justice of Ukraine
8-A, 49 Zolochivska str., Kharkiv, 61177, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/104-120

REGIONAL LEGAL ORDER: INSTITUTIONALIZATION OF THE PHENOMENON AND CONCEPTUALIZATION OF THE CONCEPT

Kryzhanovskii A. F., Radzilevych D. A.

INTRODUCTION

If we try to define the word that was most often used in all forms of public discourse (scientific, political, philosophical, ideological, cultural, political, everyday, etc.) in the late twentieth and early twenty-FIRST centuries, and caused a huge range of (often diametrically opposed) opinions, arguments, emotions and feelings, then one of the unconditional nominees for the championship will be the category "globalization". During this period, it somewhat pushed the already well-known specialists another common category- "regionalization". However, the dominant trend, as always, quite unexpectedly transformed the processes of modern social development in a new direction, asserting the understanding that regionalization is also becoming "global". This convergence is due to the direct connection of "global regionalization" with the processes of universal forms of existence of human society and the resolution of global problems of our time. Trends of globalization, localization and regionalization reflect the dialectical unity of the main contradictions of social life that arise before humanity at the beginning of the XXI century, and according to experts, global problems are embodied at different levels of locality in accordance with the unique characteristics of each region. Therefore, our dependencies today, as rightly noted by S. Bauman, are completely global, however, our actions are still local[1]. This has become one of the causes of a kind of cognitive dissonance, which causes ideological, political, scientific contradictions and conflicts, and often generates destructive behavior of both individuals and human communities, large and small institutions regarding the perception of real or inspired risks of globalization, real or imaginary dangers.

Regionalization of various spheres of life of modern society has become a phenomenon that has established itself as a subject of understanding of a whole range of sciences-geography, history, economics, ethnography,

[1] Бауман З. Глокализация, или кому глобализация, а кому локализация. *Глобализация: Контуры XXI века: реф. сб.* Отв. ред. Ю.И. Игрицкий, П.В. Малиновский. М., 2002. С. 134.

philology, pedagogy, psychology, anthropology, political science and others. Against this background, the law looks quite paradoxical, in which regional studios are represented quite fragmentary: among Ukrainian lawyers, interest in this topic only recently began to detect criminologists. Representatives of other legal disciplines have so far avoided regional issues of law. Meanwhile, the legal identity of regions, which reflects the geographical, historical, economic, ethnographic, cultural, social or even political characteristics of different territories of the country, is approved as a self-sufficient factor of life not only regional, but also national (state) level, and acts as a system-forming factor of legal regulation of life of regions, individual countries and the world. In this sense, the legal order is not an "ideal" subject of regional scientific research, it puts it on the leading place also through the actualization of the problems of maintaining the legal order not only at the national but also at the international level.

1. Institutional foundations of the regional legal order

Regionalism, as a natural principle of territorial organization of social, political, economic and other processes of public life, has caused a huge impact on the perception of the world and the life of mankind. The same, it is not accidental that the study of various regions in which the life activity of people is concentrated, entered the scientific circle of consideration for a long time, and have become an important area of research throughout the history of science. Examples of legal differences between regions are given by the history of Ancient Rome, where the status of the occupied territories was different, leaving them with a wide autonomy, including with the sphere of private law. And, for example, during the tenure of Louis of Hungary on the Polish throne (1370–1384) in the face of the constant threat of rebellion of those in power, trying to ensure their loyalty, the king made significant concessions to local elites, which resulted in a kind of regional power. In Poland (in parallel with the Sejm) there were 60 local self-governing bodies-sejmiks, which decided not only the issues of local life, but also the participation of the region in the national. It in Parliament, the regional councils (and even cities) asked the king money to the Central control, foreign policy, known for the troops. To them he appeals and if necessary the formation of a militia for the conduct of a great war[2]. A striking example of legal regionalization is the practice of distribution in Europe (XIII–XVI centuries), including in Ukraine, Magdeburg rights,also called Magdeburg Law.

[2] Макарчук В.С. Загальна історія держави і права зарубіжних країн. К.: Атіка, 2000. С. 141.

It is no coincidence that a number of well-known lawyers directly emphasized the importance of territorial and regional factors for the legal sphere. Thus, A.V. Butkevich calls the regional criterion as an independent basis for the periodization of the history of international law, which is especially relevant for the international law of the ancient period, and for subsequent periods, up to the creation of the system of international law[3]. The periodization proposed by the famous historian of international law M. Taube is also based on the idea of regional development of international law in Europe[4]. And Hans Kelsen, characterizing the properties of legal positivism, noted that law is no longer seen as an eternal and absolute category; its content is recognized as historically changeable, namely, law, as a positive right, is recognized as a phenomenon caused by temporal and spatial factors[5]. Jean-Louis Bergel even more consistently defended this position: "First of all, it is necessary to talk about the geographical and natural factors that determine the different conditions and needs: they will really differ and depend on the island, sea or continental situation of a particular country, as well as on the terrain, vegetation type, hydrographic and climatic characteristics: the legal rules are partly dictated by nature... Influence of folk traditions, religion, linguistic realities, reaction of public opinion (on law) ... in General, it is quite obvious"[6].

Since ancient times and almost to the end of the XVII century. various descriptions of individual countries and peoples, parts of certain States by travelers, navigators, merchants, diplomats, missionaries, conquerors, characteristics of inhabited areas were valuable sources of historical, geographical, economic, political data on certain regions of the globe. Active development of other continents required special descriptions of the seas, ports, trade routes and centers of production and sale of various goods. A large array of such information was actively accumulated from the second half of the XV century). Although these unique data were non-systematic in nature, they became the basis of the birth of commercial geography. The emergence of Desk statistics, caused by the needs of the development of industrial production, trade and Finance, raised to a new level the collection and analysis of information about the regions. Gradually regions theoretically (and it reflected natural development of economic life) ceased

[3] Буткевич О.В. У истоков международного права. СПб: "Юридический центр Пресс", 2008. С. 74–75.

[4] Таубе М. История зарождения современного международного права (Средние века). Т.1 : Ведение и часть общая. СПб., 1894. 370 с.

[5] Kelsen H. Introduction to the Problems of Legal Theory. Oxford: Clarendon Press, 1992. P. 21.

[6] Бержель Ж.-Л. Общая теория права. Под общ. ред.. В.И.Даниленко. Пер. с фр. М.: Издательский дом NOTA BENE, 2000. С. 239.

to be simply “geographical place”, appeared any more not only objective economic system, but also a part of bigger system of national and world economy. This means that interregional interactions have become a natural part of the subject area. “Regional Economics” as a scientific discipline has expanded and become more universal due to the inclusion of interregional interactions in the subject of research[7].

Since the 50 – ies of the XX century, the development of regionalism has become one of the main directions of economic science. Finally he separated the science of distribution of productive forces, enhanced integrative processes with other disciplines (ecology, sociology, etc) used a new paradigm (modeling, system analysis, etc.), enriched with the methodological system (mathematical methods, GIS technology), there is a growing interest in applied regional studies (integrated learning of individual regions within the country and at the international level), there is a process of humanization and sociologization (studied lifestyle, behavior, adverse processes in the regional economy and society as a whole). Integrative scientific processes in regional studies are activated by the emergence of theoretical geography, geography of natural resources, Geoecology, etc.

Scientific achievements of regional development created the ground for the emergence of regionalism, which is sometimes called regionistikoyu. Modern regionalism is a complex system of knowledge about regions, which, in addition to economic, includes social, historical, environmental studies. The same essence of regionalism as an interdisciplinary science is in a complex (system) approach to solving all socio-economic, historical, natural-ecological and other aspects of regional development. Modern regionalism as a complex of Sciences combines regional Economics, political regionalism, regional ecology, regional statistics, etc. in Ukraine, the components of advanced regionology are represented by regional Economics, political regionology, historical regionalism, and fragmentary studies of regional ecology.

The interdisciplinary research that is carried out in regionalism is extremely useful for jurisprudence. For example, the results carried out by experts comparing the development of regions with the corresponding regions of the world are very instructive. Thus, the average global economic competitiveness of Ukraine’s regions in 2009 ranked 76th among 149 countries. Thus Kiev and Odessa and Zaporozhye regions took respectively 63rd, 64th and 58th places (level of Hungary, Turkey, Montenegro, Kazakhstan), Dnepropetrovsk, Sumy and Donetsk-respectively

[7] Минакир П.А., Демьяненко А.Н. Пространственная экономика: эволюция подходов и методологии. *Пространственная экономика*. 2010. № 2. С. 17.

74th, 79th and 89th (level of Vietnam, Philippines, Colombia, Uruguay, Bulgaria, Sri Lanka), Lviv, Poltava and Khmelnytsky-89th, 92nd and 96th (level of Honduras, Peru, Guatemala, Serbia, Trinidad and Kenya)[8]. Legal this example is useful in terms of using methodologies for assessing the level of legal development of the country in General and regions in comparison with the world level (the level of legal development of other countries).

In the system of modern knowledge, regionalism, in our opinion, is approved as a certain way oriented intellectual strategy, paradigm, which makes it possible to deploy the entire complex and deep layer (complex) of issues and aspects of the functioning of human society at the regional level. Availability of a wide range of special methods in the Arsenal of regionalism (descriptive, statistical, comparative-geographical methods, methods of field research, keys (typical objects), cartographic, territorial-industrial complexes, Kolosovsky cycles, the model "input-output". Leontiev, methods of system analysis, modeling of economic and mathematical modeling, the latest geosystem methods, etc.) turned this direction into a powerful methodological donor for other Sciences.

Jurisprudence should study its" own", that is, its inherent element of regional diversity (local legislation, legal space, lawful behavior, offenses and crime, legal order, etc.), identifying and investigating regional differences in these phenomena. The direction that aims to carry out such research can be called legal regionalism. It can be said that in the most General form the object of legal regionalism is law, legal phenomena and processes. The very possibility of regional analysis lies in the presence of the objects of this analysis of such properties as internal territorial differentiation. If this property is not observed in the legal phenomenon, or if it is insignificant, the object can not be included in the subject field of legal regionalism. Legal regionalism is focused on the comprehension of law and legal phenomena at the subnational level, which practically excludes from the study objects that have an international or national, but not differentiated at the subnational level, format. Therefore, each object studied by legal regionalism must have a spatial projection. For example, such properties have rulemaking, legal behavior, legal awareness, law enforcement, local taxes, crime, etc.

The legal order, which is an "integral" indicator of the state of the legal life of the country and its individual regions – is, in our opinion, in General, an "ideal" (although very complex) object of regional legal research. The possibility of studying the legal order in a particular region should include an

[8] Структурні зміни та економічний розвиток України: монографія. За ред. Л. В. Шинкарук. К., 2011. С. 559.

analysis of institutional components that are not "separated" from the General context of the region's life. However, it is necessary to understand that complex relations of the phenomena of a particular territory do not allow to consider the legal order in isolation from other – cultural, ethnic, economic, political, demographic and other processes. Moreover, these processes, in our opinion, should be perceived as conditions and factors that to varying degrees affect the state and development of the legal order in the region. Regional legal analysis makes possible a comprehensive study of the legal situation that has developed in a particular region, to compare it with the legal situation in another region or other regions. On the territory of a particular region, the effectiveness or inefficiency of state policy to maintain and ensure the legal order, and therefore the ability to adjust it both at the regional and national levels, can be clearly manifested.

Geographically, the term "region" refers to a particular area of the continent or part of the world in terms of General natural characteristics. Finally, a region is a part of one country, an administrative and political unit of a state with its geographical, economic and cultural characteristics[9]. At the same time, the region is a historically developed territorial and cultural community, a cell of the socio – cultural space of the country. The region, according to F. Tennis, is also understood as a "local community"[10].

Now it is quite obvious that the sphere of use of the term "region" and its derivatives in domestic jurisprudence tends to gradually expand, and this is observed in the law – making sphere-legislation and bylaws. The database " Legislation of Ukraine "(231836 documents) contains 1286 documents, the name of which uses the word region and its derivatives. And official documents, in texts which is used this the notion of and phrase in the composition of the with him-more 5,000 units. Therefore, the problem of defining this concept, using it in senses that meet scientific requirements and are correlated with established political and legal practices, becomes important.

Regions become stronger as a result of various factors and processes: it is known how geographical conditions, economic development, the formation of ethnographic features of different territories and the like led to their isolation from other territories for certain characteristics, legitimized their relative separateness and specificity in the public consciousness, and assigned their own name to them. Its original name of the region characterizes it as a certain

[9] Лапин Н. И., Беляева Л. А. Программа и типовой инструментарий "Социо-культурный портрет региона России". М., 2010. С. 8.

[10] Теннис Ф. Общность и общество. Основные понятия чистой социологии. Пер. с нем. Д. В. Скляднева. СПб.: Изд-во "Владимир Даль", 2002. С. 9.

territorial and social integrity within the country or its part. Stability of the name in public use, or its fixing for designation of a certain part of the country by the decision of the state power is an important argument of assignment of a certain territory to the category of regions.

The diversity of regions, their peculiarities and differences are the reasons why representatives of the Sciences in which this phenomenon was studied classified it into certain varieties. In Economics, Ethnography, linguistics, cultural studies, geography according to the subject area and tasks in theory and practice regions were divided.

Typologies of regions that attract attention to characteristics that can be interesting and useful for regional studies – primarily those that are based on subject and structural and functional characteristics. For these reasons Svetlichnaya E. D. divides regions into administrative-territorial, socio-economic, structural-functional, territorial-spatial, and systemic regions[11]. In this classification, the "legal section" is manifested in almost all varieties, because they represent all aspects of social life and the status of regions that somehow have a pre-relation to the legal sphere. The largest in terms of "legal context" is the region as the highest administrative and territorial unit of the state system, which has a certain level of independence and legal independence, elected power and its own budget. Here, the region acts as a relatively separate management system, which within the framework of relations between the subjects of state power is endowed with appropriate competence. It is possible to hypothesize that this regional level gives grounds for the work here of a" full-fledged " regional legal order. If this context is layered characteristics of the region as an area of political space, characterized by a special political organization, social unity of people, existing mechanisms of reproduction, group identity, legal norms and norms of behavior, lawyers have a wide range of aspects that can have direct or indirect legal relations, which obviously belongs to the subject field of jurisprudence.

The typology of regions in jurisprudence has its own specifics, because the legal characteristics of the region are enriched, expanded precisely due to the combination of different properties on the territory of the territorial unit – geographical, ethnic, economic, etc.This is determined by the fact that different subject areas (geography, economy, Ethnography, etc.) attract the necessary legal tools for regulating public relations in these areas. Even the geographical features of the coastal and border regions are reflected in their legal specificity-the extension only to them of a certain set of legal

[11] Світлична Д.О. Регіон – цілісна природно-соціально-економічна система. Вісник ОНУ. Серія: Географічні та геологічні науки. 2016. Т. 21. № 1(28). С. 142–151.

regulations. The integration of these properties creates a unique configuration (model) of legal regulation of the life of a particular region, its original legal image in the professional legal consciousness, and therefore – a kind of model of legal improvement of this territory and the real legal order on its territory.

The legal identity of the regions, which is an important component of the institutionalization of the regional legal order, is formed by a complex of various factors and reasons that determine the process of "crystallization" of law in these territories. Thus, the border regions bordering on other States are in the zone of influence of the policy and ideology of both their own state and that which is abroad. The border divides different economic systems, is a temptation for smuggling, other offenses and abuses. Often the border divides a single ethnic community, even close relatives. These, and many other things require special legal regulation, which is reflected in the legal status of these territories: for example, residents of these areas are allowed a simplified border crossing, set special rules for the movement of money and goods, etc. Life at the border (border) forms a specific regional identity of a large community of people that exists in this region. This identity is ambivalent because it is influenced by both national (state) and regional identity. Moreover, sometimes the national policy of identity formation can lose regional, and then such regions can be used by destructive forces to achieve their goals by weakening the attraction of the regional community to their country. The ambivalence of the frontier is generated by the fact that the borders separating territories and people simultaneously cause new interaction between people, generate new solidarity, and, accordingly, new social communities. Therefore, the border regions occupy a dual position in the socio-geographical space of the state, being both the center and the periphery. Being the periphery of the country, the border areas become the center of the region, whose life is determined by the rules that define the border. According to experts, in a sense, we can even talk about the regional cultural homogeneity of the border. According to Baud and Schendel, "borderland" should be understood not as two nearby regions on both sides of the border, but as a single social space; and in this sense, the concepts of common place and common people become operational[12]. Border regions are only one example that can be cited in the article, but other such socio-territorial entities give grounds for highlighting them as a subject of legal research.

[12] Baud, M., Schendel, W. Toward a Comparative History of Bordrlands. *Journal of World History*.1997. Vol. 8. No 2 . P. 216.

In scientific and practical aspects, this gives grounds for thinking about the special legal order, which consists in this territory under the influence of a complex of factors and conditions of the legal functioning of the border regions. For Ukraine, which borders with 7 countries, and the length of the state border is almost 7 thousand kilometers, the problem of the border will be relevant for a long time, especially given the fact that some of our neighbors are in relation to Ukraine is not always a good neighborly policy.

A great influence on the formation of the worldview of human communities, as is known, is the geographical environment, first of all, mountains, seas (oceans), as well as deserts, forests and steppes. Historical geography shows that life in the mountains, or near the sea (ocean), in the forest or steppe zone, as well as in the desert forms important distinctive characteristics of the psychotypes of human communities that historically live in these areas. This is due to the fact that the geographical features of life determine the need for human adaptation to natural conditions, the development of the necessary means of production, and the formation of social relations corresponding to this method of life, which require certain means of legal regulation.

A striking example of regional identity in Ukraine is the mountainous regions of The Ukrainian Carpathians, where more than 1, 3 million people live on an area of 56, 6 thousand square kilometers in 712 mountain settlements[13]. This region is unique in many characteristics: the presence of rare natural resources, unique ecological objects, recreational and healing balneological resources, the existence of a unique diversity of ethnic and cultural heritage, the preservation of original traditions of management in difficult natural and climatic conditions. The Carpathians are the source of 40% of water reserves, 22% of forest resources, 42% of unique rare deposits of underground mineral waters. There are almost 500 tourist and recreational facilities, most of which are rural estates of green tourism[14]. Without a doubt, the mountain regions of Ukraine have a huge potential-economic, social, recreational, and especially-natural. And it is in the latter that there are serious challenges for the application of modern legal means of nature protection: in the mountainous and foothill regions of the Carpathians and Crimea, as evidenced by the data of biologists, the main part of rare fauna is widespread. Here is concentrated the lion's share of rare and vulnerable species known in Ukraine and amphibians, and reptiles, and mammals. The

[13] Бугай С. Проблеми та шляхи вдосконалення державної політики розвитку гірських територій. *Світ фінансів*.2009. № 1(18). С. 158.

[14] Гірські території Закарпаття: соціально-економічні трансформації. Заг. ред. В.П. Мікловда. Ужгород, 2012. С. 9–10.

number of species of tetrapods for each territorial unit here reaches 5–6, and mammals-9–19 species. Such foci of their size and shape correspond to the boundaries of mountain regions[15]. The protection of these species and the provision of the necessary natural conditions for their habitat in the natural environment in modern conditions is an important legal problem that also needs to be addressed.

Another group of regions that stand out among others in Ukraine, and are characterized by certain features, there are seaside territories, which belong to the 6 regions of the country, where almost 9 million people live. Seaside regions of Ukraine have a significant natural resource potential, a powerful marine and port-industrial complex, transit potential. In addition, the seaside regions of Ukraine is a traditional place of rest and recreation of a significant part of the inhabitants of Ukraine, an integral element of the development of the tourism industry. Legal regulation of the functioning of enterprises of the sea-economic and port-industrial complex, rational use of marine resources, development of medical and recreational sphere and tourism is a feature of the legal space of these territories and their regional legal order.

A certain legal identity institutionalizes the legal order in the territories that have been called "historical regions". These are territories that, due to their connection with important historical events in the life of the people, are sacred to them. It is the regions on whose territory throughout the country's history was most significant for the fate of the country's historical events imprinted in the historical memory of the people, historic monuments and national history. The historical regions include the old cities (in Ukraine it is Kiev, Lviv, Lutsk, Pereyaslav-Khmelnitsky, Poltava, Feodosia, Chernihiv, etc.), which have a rich history of their own, and their own, bright, original style and originality. As a rule, a historical region is formed during a significant period of stay in the historical arena, and important factors in this process are its geographical location (crossroads of trade routes, transport importance, proximity of borders), favorable conditions for the development of agriculture or crafts. The complex of these conditions contributes to the formation of a unique image of the region and its own history, which acquire a certain value. Sometimes the historical region retains its identity and relative limits even when the state ceases to exist, which indicates the sustainability of this phenomenon. This is especially evident in the minds of the inhabitants of these regions, who identify themselves with the historical region, perceive it as a "primary" factor of their self-identification.

[15] Загороднюк І.В. Гірські регіони, як зони найвищого видового багатства наземних хребетних України. Ученые записки Таврического национального университета им. В.И. Вернадского. Серия "Биология и химия". Том 17 (56), 2014. № 2. С. 34.

In certain conditions, the institutionalization of regions acquires the status of a self-sufficient process of regionalization, which is determined by the whole complex of conditions for the development of society-economic, geographical, historical, social, political, etc. the law, at the same Time, can be a factor or a socially useful vector of development of regionalization, or preserves it, which leads to social conflicts and conflicts. Thus, the formality of the Soviet "Federation", the lack of real rights of its members and the declarative nature of local self-government were one of the factors of the collapse of the Soviet Union. The law is the main institution that "assimilates" the relations arising in society at the level of historical, economic, geographical, environmental, ethnic and other characteristics of specific regions, and reflects them in the legislation of the Central government (privileges, or features of regulation of certain activities, etc.), legal customs or decisions (precedents) of courts and legal acts (legislation) of local authorities. Thus, the corpus of regional law is formed, which in a complex form reflects the peculiarities of the legal status of this particular region in the system of national law. This corpus is complex, structured on different grounds, concerns different areas, which are emphasized by a certain regional identity, and are so important for society that they "deserve" legal mediation.

2. Regional legal order as a concept of general theoretical and applied jurisprudence

First of all, we consider it necessary to Express our views on the category of "legal order" itself, which, in our opinion, has its regional dimension. At this level, as well as at the national level, the legal order appears as an entity – that is, the legal reality (legal reality, legal life), which opposes, or rather acts as a continuation, implementation of the legal Due. For understanding of processes of formation of a legal order, including, and regional, comprehension of a real relation between existing and due has not only theoretical, methodological, but also huge practical value. Because the "distance" between them is not constant: being is not always "doomed" to lag behind the due, but the way they relate to each other at any given moment of public life, much can testify to the state of "public health", including in law.

Categories of due and existing, in our opinion, can carry out methodological and applied purpose at comprehension of regional legal reality as here due in the legal sphere (legal values, norms of law, principles of legal consciousness), and also existing (the behavior, legal activity, and, actually, the legal order is significant) are exposed to a certain correlation of territorial factors of legal existence of society. Therefore, the understanding

of the place and role of law in the value-normative system of society is extremely important for understanding the complex processes of formation of the legal order in society, including at the regional level.

Social regulation at the regional level, as in society as a whole, is developed by the society values, norms and regulations of various character – moral norms, religious ethics, corporate norms, customs, traditions, rituals, and law. These norms are therefore called social norms, since they regulate the various social relations that arise between people in public life. Since they all form a single system, closely related to each other, they all have influence not only on the sphere for which they are "directly responsible", but also on the adjacent spheres of social life. Thus, the law affects the morality of society, the functioning of religious and corporate spheres, even relations in everyday life, but there is also a reverse influence. The relations between people in the legal sphere, including the legal order, are influenced by morality, religion, customs, traditions, rituals, etc.

When studying the functioning of various value-normative systems (morality, religion, law, customs, traditions) at the regional level, such features of the relationship and interaction between them as their "convergence", convergence and complementarity (complementarity) are revealed. This is manifested in the interpenetration of customs and traditions of different ethnic groups. For example, in the Ananyiv district of Odessa region, where there are Moldavian settlements (for example, Gandrabury, Dolinskoye, etc.), both local folklore and customs, especially wedding ceremonies, have largely become the result of a kind of convergence of Moldavian and Ukrainian traditions. This can obviously be explained by the fact that at the regional level, the density of social (including inter-ethnic) communications is much higher, and the space in which they are carried out is quite limited.

Functioning at the regional level of a specific value-normative education, which can be called a regional value-normative system, includes morality, religion, traditions, customs, rituals, corporate, political and legal standards that have developed in the process of life and development of the region and reflect the historical, geographical, ethnic, economic and other features of human communities living in this territory and forming a certain value-normative integrity. It is obvious that law is the main component of the formation of the legal order in the region, but its influence on public life is supplemented and strengthened, and sometimes corrected by other components (religion, traditions, customs, morality, etc.). A striking example of the description of the importance for Ukrainians of the system of social norms is the story "Kaidasheva family" by I. C. Nechuy-Levitsky, where the author addressed the issues of eternal: good and evil, love, family relations,

relationships between parents and children, the problem of human dignity and freedom, faith in God, morality and authority in the community. It describes all the moments of social communication of future spouses and their relatives, which can be interesting for today's youth. Marriage Ukrainians have always attached great importance. Under customary law (unwritten laws that regulated life in the community and family) in Ukraine, a person was considered independent only after marriage: an unmarried person, no matter what age he was, was considered a guy[16]. A married man has always enjoyed more authority in the community than an old guy or girl. Disapproved of people who did not create a family in time. The legislation forbade the Church to marry minors (girls – up to 16 years, children – up to 20 years). The age difference between the brides, according to popular beliefs, should have been small – from 1 to 5 years. Brides, as a rule, were chosen from their village (city) and quite rarely – from neighboring ones. The reputation of the bride family was very important[17]. I.S. Nechuy-Levitsky cites a custom that existed among the Ukrainian youth of that time: if a guy was courting a girl from a foreign village, and was going to meet her, then he had to put magarych to the guys of that village. Since lavrin, semigorsky guy, wanted to go for a walk to Melashka, bievskoy girl, he had to "honor" the guys from Bievets[18]. The presence of such a custom, and following it introduced someone else's guy in the community of youth, and to a certain extent poperedzhuvalo conflicts and related offenses.

Conceptualization of the regional legal order should take into account the fact that its formation occurs, on the one hand, under the influence of the law itself, and on the other – factors that are associated with the behavior and social relations of people not only in the legal, but also in other related spheres of social life. Law, as a phenomenon, primarily producing the institutional components of the legal order, in itself is already a normative model of it, exactly the kind that determines the officially established parameters of the proper legal order in a particular society. That is why, sometimes this normative legal order is identified with the one that actually consists in society under the influence of all the factors that determine its formation. This perception of the rule of law, for example, was inherent in G. Kelsen, who believed that there is no reason to distinguish between two different normative law and order. This order is the right[19]. In practical

[16] Чайківська В., Шевчук А. Роде наш красний... Народознавство в школі. Житомир, 1995. С. 81.

[17] Столярчук О. А. Психологія сучасної сім'ї. Кременчук, 2015. С. 19.

[18] Нечуй-Левицький І. Твори: В 2 т. Т. 2. К.: Наукова думка, 1986. С. 205.

[19] Kelsen H. General Theory of Law and State. New Brunswick: Transaction Publishers, 2005. P. 182–183.

terms, this is quite justified, because the border between the "legal order in law" and "legal order in life" is quite ghostly – one constantly passes into the other and Vice versa. In the research discourse, there is a need to distinguish between different sides of this phenomenon-the legal order as a holistic, General model, which is the system of existing law, the image of the legal order in the minds of individuals, their groups and society, and, finally, the actual legal order, consisting in real legal life, which we observe (and feel)in the legal space surrounding us. The relationship between these hypostases of legal order is complex and nonlinear, because the normative model does not always precede the establishment of the actual legal order. The image of the legal order in the mind should always be ahead, however, it is corrected under the influence of changes in the normative model or the actual legal order in society. But thanks to this intellectual operation, it becomes possible to define such elements of the institutionality of the legal order, which have a normative, ideological and behavioral nature.

Legal order according to the methodology of A. M. Vasilyev[20] is a legal category, which in the structural and logical structure of General theoretical jurisprudence occupies the highest step together with law, legal culture[21], legal life, etc. the Relationship between law and legal order is characterized by the fact that these phenomena are inseparable from each other: law is a necessary, organically possible prerequisite for the existence of legal order, and legal order is the context against which only law can act.

CONCLUSIONS

The territorial nature of the regional legal order is its "attachment" to the relevant territory, which is defined formally (officially) or doctrinally with a certain degree of accuracy. Thus, the regional legal order unfolds on the territory of administrative-territorial entities (regions, districts), and at this level can be the subject of both scientific research and socio-cultural and power-organizational influence (regional programs to ensure legal order in administrative-territorial units, etc.). The doctrinal possibilities of regional construction of legal orders are perhaps unlimited, since the choice of the configuration of the region as a subject study of the legal order is determined by the scientific preferences of the researcher, this understanding of the relevance and importance of the relevant territorial section of this problem. So, news from the annexed Crimea or from the occupied part of Donbass actualize problems concerning what legal order is

[20] Васильев А.М. Правовые категории: Методологические аспекты разработки системы категорий теории права. М., 1976. 264 с.

[21] Крижанівський А.Ф. Сучасний правопорядок: доктринальне і прикладне бачення у вітчизняній юриспруденції. *Наукові праці Одеської національної юридичної академії*. 2008. С. 84.

formed in these regions. It is obvious that the study of regional order in the modern Crimea, and the territories SDDLR (Separate districts of Donetsk and Lugansk regions) not only has a "right to exist" as a scientific discipline, but is a very topical issue, which requires thorough research and thorough reflection, including for the attainment of the risks of "legal mutations" that become possible in the context of weak state institutions and civil society and an aggressive and explosive external influence.

Temporal institutionalization of the regional order means its binding to certain temporal parameters. In General, the actual legal order in society is an extremely dynamic phenomenon, it exists "here and now", and can be very changeable. The temporality of the regional legal order makes it possible not only to "grasp" ("photograph") it at a particular moment, period of time, but also creates an opportunity to understand the trends of its development in certain temporal parameters. For example, it is theoretically possible to compare the level of legal order in different regions of the country in comparable periods of time, to identify trends in the development of legal order in a particular region for a certain period.

The subjective characteristic of the regional legal order leads to the need for reconstruction of those social actors who create and maintain the legal order in the regional dimension. Spatial and temporal limitations associated with the need to regulate human behavior in society, cause the emergence of so-called. social subjects, United in a stable system of interacting individuals, for which the unity of some material interests is inherent. The activity of social actors is one of the main factors of the legal order, the regional "localization" of which, due to the high density of interactive communications at this level, leads to the need to correlate the forms and methods of its maintenance, taking into account the specifics of the social and legal situation in each region.

SUMMARY

So, the regional legal order occurs as a result of the steady development of society a geographical, historical, economic, ethnic, and associated legal identity of a particular territory (region), which manifests itself in certain characteristics of the legal ordering of life in the region, and institutionalizarea in the draft, proven public practice structure. The regional legal order is determined by the whole system of value-normative regulation of this socio-territorial space by religious, moral, traditional ideological, political and legal factors of both national and regional level. The complex nature of the relationships between the various components of this system affects its maintenance of a state of equilibrium, which depends on many factors and conditions.

At the regional level, the functioning of value-normative systems produced by society (moral, traditional, religious, political, legal, etc.), the formation of the legal order takes place in accordance with the parameters of regulation of social relations set by society and the specific conditions of existence that have developed in human communities of individual territories, localities, regions. This value-normative space ensures the ordering of social communications in the value-normative dimension and the result of these communications is a jointly created (constructed) public order (and its component – the legal order).

The regional level of legal order is a necessary element of the social life of the region and a relatively independent component of the universal legal order. The regional section of legal regulation reflects the picture of legal life that unfolds here, and is characterized by a specific way of legal regulation of public relations, features of legal behavior, legal culture and legal consciousness, and so on. Diversity in modern societies of established regions (geographical, coastal, mountain, border, historical), the identity of which is mediated by law, finds its expression in the legal reality and regional legal order.

REFERENCES

1. Бауман З. Глокализация, или кому глобализация, а кому локализация. *Глобализация: Контуры XXI века: Реф. сб.* Отв. ред. Ю.И. Игрицкий, П.В. Малиновский. М., 2002. С. 134.
2. Макарчук В.С. Загальна історія держави і права зарубіжних країн. К.: Атіка, 2000. 416 с.
3. Буткевич О.В. У истоков международного права. СПб: Изд-во Р. Асланова “Юридический центр Пресс”, 2008. 881 с.
4. Таубе М. История зарождения современного международного права (Средние века). Т.1 : Ведение и часть общая. СПб., 1894. 370 с.
5. Kelsen H. Introduction to the Problems of Legal Theory. Oxford: Clarendon Press, 1992. XLII, 171 p.
6. Бержель Ж.-Л. Общая теория права. Под общ. ред. В.И.Даниленко. Пер. с фр. М.: Издательский дом NOTA BENE, 2000. 576 с.
7. Минакир П.А., Демьяненко А.Н. Пространственная экономика: эволюция подходов и методологии. *Пространственная экономика*. 2010. № 2. С. 6–32.
8. Структурні зміни та економічний розвиток України: монографія. За ред. Л.В.Шинкарук. К., 2011. 696 с.: табл., рис.
9. Лапин Н. И., Беляева Л. А. Программа и типовой инструментарий “Социокультурный портрет региона России”. М., 2010. 135 с.

10. Теннис Ф. Общность и общество. Основные понятия чистой социологии. Пер. с нем. Д. В. Скляднева. СПб.: Изд-во “Владимир Даль”, 2002. 386 с.

11. Світлична Д.О. Регіон – цілісна природно-соціально-економічна система. *Вісник ОНУ. Серія: Географічні та геологічні науки.* 2016. Т. 21. № 1(28). С. 142–151.

12. Baud, M., Schendel, W. (1997) Toward a Comparative History of Bordrlands. *Journal of World History.* Vol. 8. No 2 . P. 211–242.

13. Бугай С. Проблеми та шляхи вдосконалення державної політики розвитку гірських територій. *Світ фінансів.* 2009. № 1(18). С. 158–163.

14. Гірські території Закарпаття: соціально-економічні трансформації : монографія. Заг. ред. В.П. Мікловда. Ужгород, 2012. 262 с.

15. Загороднюк І.В. Гірські регіони, як зони найвищого видового багатства наземних хребетних України. *Ученые записки Таврического национального университета им. В.И. Вернадского*. Серия “Биология и химия”. Том 17 (56). 2014. № 2. С. 33–38.

16. Чайківська В., Шевчук А. Роде наш красний... Народознавство в школі. Житомир, 1995. 112 с.

17. Столярчук О.А. Психологія сучасної сім’ї. Кременчук, 2015. 136 с.

18. Нечуй-Левицький І. Твори: В 2 т. Т. 2. К.: Наукова думка, 1986. 636 с.

19. Kelsen H. General Theory of Law and State. New Brunswick: Transaction Publishers, 2005. 516 p. + XL

20. Васильев А.М. Правовые категории: Методологические аспекты разработки системы категорий теории права. М., 1976. 264 с.

21. Крижанівський А.Ф. Сучасний правопорядок: доктринальне і прикладне бачення у вітчизняній юриспруденції. *Наукові праці Одеської національної юридичної академії*. 2008. С. 83–93.

Information about the authors:

Kryzhanovskii A. F.,
Doctor of Law, Professor,
Head of the Department of State and Legal Disciplines,
International Humanitarian University
33, Fontanskaya Road str., Odessa, Ukraine, 65009

Radzilevych D. A.,
Postgraduate Student at the Department
of Theory of State and Law,
33, Fontanskaya Road str., Odessa, Ukraine, 65009

DOI https://doi.org/10.36059/978-966-397-181-0/121-135

FEATURES OF LEGAL PROCEDURES OF LEGALIZATION BUSINESS PROCEDURES IN UKRAINE AND CHINA: LEGAL ANALYSIS

Manko D. G.

INTRODUCTION

Lawyers people always seek to find the components, which as a chain combine the different legal systems. The important thing is that, without regard to the type of such system's organization it points out the social significance of these procedures which manifestation is the confirmation of the needed existence by society. No doubt arises, that we can know the procedure of the legalization, by doing analysis, of any legal system of law.

Procedures, that put an emphasis on that legal algorithm in accordance to which the actions may have been taken and the result will be erecting certain entities in a state that is in compliance with applicable law. Legalizationprocedures are inherent in any legal system of the modern statedepending on the form of it: state-political regime – democratic oranti-democratic; forms of government – confederate,federal or unitary; forms of government – monarchy or republic. Legalization procedures are of particular importance to the organization effective cooperation between different states and is one of thethe most important mechanisms of qualitative development of globalization and integrationprocesses.

Therefore, in the context of the disclosure of the object of study, it arisesthe need for a thorough characterization of the legalization and legal procedurealgorithms for its implementation, establishing their role in legal regulationsocial relations in the legal systems of Ukraine and China.Issues related to the subject of study were reflected inworks of many scientists in particular: Zhurenok TV, Katkova TG, Koneva AN, Kresina OV, Stepanova TV, Tosunyan GA, Trofimchuk AP, Chirkina V.E., and others.Given the above, the main purpose of the study is to conductcomparative-legal analysis of features of legal algorithms of proceduresbusiness legalization in the legal systems of Ukraine and China.

1. General principles of interaction between the legal systems of Ukraine andPeople's Republic of China

For proper disclosure of features legalization of business in the legal systems of Ukraine and the People's Republic of China The Republic (hereinafter referred to as the PRC), it is necessary to analyze the general

principles of cooperation between our states, characterize their legal systems, determine the content legalization activities and analyze some types of legalization procedures, according to Ukrainian and Chinese law, thanks to which stakeholders will be able to engage in business.

Exploring the principles of cooperation between our countries, it should be noted that China is one of the few partners in Ukraine, deepening relations with which neither Russia, the EU, nor the United States. In addition, unlike European, Euro-Atlantic and Eurasian integration projects, Ukraine's rapprochement with China in no way aggravates the issue of its sovereignty. Therefore, China is viewed as an impartial partner guided by the principles of non-interference, respect for territorial integrity, cooperation and zero-sum play.

The countdown of Ukrainian-Chinese relations begins on December 27, 1991, when China officially recognized our country. The first high-level bilateral contact was marked by the visit of President of Ukraine Leonid Kravchuk to the People's Republic of China in 1992. The bilateral political dialogue between Ukraine and the People's Republic of China continued during the visit of the President of the People's Republic of China, Jiang Zemin, to 1994 and 2001, and the Prime Minister of the People's Republic of China. Li Peng in 1995 to Ukraine, President of Ukraine Leonid Kuchma in 1995, 2002 and 2003 and Prime Minister Valery Pustovoytenko in 1997 to China.

Despite the frequency of visits during that time, Ukraine and the People's Republic of China did not realize the potential of bilateral cooperation, and the declarations approved were rather protocol than substantive ones. The Ukrainian-Chinese relations have become a strategic partnership in 2010 and 2013. The Parties have realized the importance of bilateral relations as China's policy globalizes and Ukraine's desire to participate in these projects. The fruitful results of the bilateral meetings were reflected in the Joint Statement on the Comprehensive Enhancement of Ukrainian-Chinese Friendship and Cooperation Relations in 2010, the Joint Declaration on Establishing and Developing Strategic Partnership Relations between China and China in 2011, the Friendship and Cooperation Agreement between Ukraine and the PRC 2013 Joint Declaration on Further Deepening of Strategic Partnership Relations 2013 and the Program of Development of Strategic Partnership Relations between Ukraine and China for 2014–2018[1].

The mechanisms for regulating bilateral relations are the Commission for Cooperation between the Government of Ukraine and the Government of the

[1] Місце України в глобальних стратегіях Китаю Міжнародний центр перспективних досліджень. 2015 URL: http://www.icps.com.ua/assets/uploads/images/files/china_ mesto_s.pdf

PRC, the Parliamentary Group of the Verkhovna Rada of Ukraine for Inter-Parliamentary Relations with the PRC, and the China-Ukraine Friendship Group. The Confucius Institute and the Ukrainian House in Beijing play an important role in cultural and educational contacts.

In September and October 2013, during his visit to Central and Southeast Asian countries, Chinese President Xi Jinping put forward the idea of implementing the One Belt – One Way project – international trade development strategies to promote economic cooperation between countries along the Economic Belt Silk Road "and" Silk Road of the 21st Century". The project was designed to enhance the streamlining of the free flow of economic factors and the efficient allocation of resources, as well as to further integrate the market and accelerate regional economic cooperation, which should benefit all participants. The result may also be the emergence of a large-scale free trade zone from the northwestern provinces of China, Central Asia, to Central and Eastern Europe. About three billion people live along the project path, which gives reason to talk about the huge potential of the market that can reach the project[2].

The "One Belt and One Way" project is an active search for a new model of international cooperation, which will undoubtedly serve as a positive impetus and energy for world development. This project aims to build and strengthen interconnections on the continents of Asia, Europe and Africa, an interconnected partnership between neighboring countries in the interests of creating a multi-vector, integrated network of cooperation, comprehensive, independent, balanced and sustainable development. The five main goals of the project are: 1) strengthening political coordination – strengthening intergovernmental cooperation, deepening the integration of interests, promoting political mutual trust, reaching new consensus in cooperation; 2) intensification of construction of a single road network; 3) development of trade by eliminating trade barriers, reducing trade costs, improving the speed and quality of economic operations in the region; 4) financial integration, increase in currency flows due to the transition to settlements in national currencies; 5) strengthening of closeness between peoples – cultural and scientific exchanges, strengthening of cooperation in the field of media, tourism, education[3].

---

[2] Трофимчук А.П. Перспективи приєднання України до проекту "Один пояс, один шлях" / А.П. Трофимчук // Журнал "Міжнародні відносини" Інституту міжнародних відносин Київського національного університету імені Тараса Шевченка. Серія Економічні науки. 2016. № 9 / URL: http://journals.iir.kiev.ua/index.php/ec_n/article/view/3060.

[3] Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road / National Development and Reform Commission (NDRC), People´s Republic of China. URL: http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html

The project will enable the Silk Road countries to adjust their economic policies towards wider and deeper regional cooperation, jointly to form an open, tolerant, balanced and profitable regional economic cooperation structure, as well as to build a single transport infrastructure from the Pacific ocean to the Baltic Sea, deepening trade ties with the elimination of barriers, free trade, accelerating freight delivery times, increasing foreign exchange flows, expanding the practice of national currency payments, human contacts, facilitating the creation of a new algorithm for cooperation in the region[4].

The scale of investment in the "One Belt – One Way" project is estimated at trillions of dollars. Thus, according to the Asian Development Bank, it is necessary to invest in infrastructure in the Asia-Pacific region alone about 750 billion a year[5].

This way China's plans for the country by 2020 include the construction of 72 new airports, 43 thousand kilometers of highways, 22 thousand kilometers of railways.

Analyzing the legal system of the PRC, it should be noted that it is a "Chinese-specific" socialist legal system. Characterizing the legal system of the People's Republic of China, TV Stepanova emphasizes the need to distinguish the following features: the rule of socialist ideology; concentration of power in the hands of the ruling CCP; supervision and control of the CCP over other state authorities and society; planned economy; collectivism; high role of corporate rules in the system of sources of law; insufficient systematization of legislation, inaccessibility of regulatory materials for citizens, institutions and enterprises[6].

China's legal system belongs to the Far Eastern group of legal systems, characterized by ancient legal traditions and modern legislation. The prevailing norms of morality over the rules of law in the regulation of certain issues of public life is one of its features. Overall, the organization of the legal system in the PRC is close to the "standards" of the Romano-German legal family. The basic law of the state is the Constitution adopted in 1982,

[4] Кошовий С. А. Економічний пояс великого шовкового шляху: транспортний вимір / С. А. Кошовий // Китаєзнавчі дослідження. 2014. № 1–2. С. 52

[5] Yougang Chen Chinese infrastructure: The big picture / Chen Yougang // McKinsey Global Institute, McKinsey & Company. URL: http://www.mckinsey.com/global-themes/winning-in-emerging-markets/chinese-infrastructure-the-big-picture

[6] Степанова Т. В. Идентификация правовой системы Китайской Народной Республики: вопросы теории : автореф. дис. … канд. Юрид. Наук : спец. 12.00.01 "Теория и история государства и права; история политических и правовых учений" / Т. В. Степанова; Владимирский юридический институт Федеральной службы исполнения наказаний. Владимир, 2010. С. 14.

the next level is constitutional laws, then the normative acts of public authorities and management are located.

According to the provisions of the Law of the People's Republic of China on Lawmaking of 15.03.2000, the rule of law should be understood to mean established and / or sanctioned by the state and provided with mandatory, formal rules of conduct or principles[7].

At the same time, it is worth noting the very tangible influence of centuries-old traditions of Taoism and Confucianism, on the realms of understanding of law and its implementation. Also, a characteristic feature of the current period of existence of the PRC legal system is its gradual and qualitative modernization in accordance with the requirements of the development of public relations.In turn, the legal system of Ukraine, by its key features, is of Romano-German type. The main source of law is a legal act, the sources of law are also acts of national and international law. Ukraine is a country of codified law.

The hierarchy of normative legal acts is headed by the Constitution of Ukraine. The international treaties ratified by the Verkhovna Rada of Ukraine are an integral part of its legal system. Additional sources of law are legal practices, regulations, legal precedent.

According to NM Krestovskaya, "One of the tendencies in the development of the law of Ukraine is its close interaction with the principles and norms of international law. The process of approximation of the legal system of Ukraine and the countries of Europe implies the interdependence of international and national law"[8].

2. Legalization activities under the laws of Ukraine and China

By giving a general description of the legal system of Ukraine and the PRC, we can move to an analysis of the content of legalization activities and the identification of the main types of legal procedures.

Legalization is a type of legal activity carried out by an authorized entity to bring certain objects to the state in accordance with the current legislation, and its results and implementation procedures are formalized in written legal acts and have legal significance.

The content of the legalization activity is disclosed in legal procedures related to the erection of certain objects in a position in accordance with the law in force.

[7] Про правотворчість : Закон КНР від 15.03.2000 р. URL: http://chinalawinfo.ru/other/law_legislation

[8] Крестовська Н. М., Матвєєва Л. Г. Теорія держави і права. Підручник. Практикум. Тести : підручник / Н. М. Крестовська, Л. Г. Матвєєва. К.: Юрінком Інтер, 2015. С. 572.

The form of legalization activity consists of two elements: internal and external. Internal components include: subjects of legalization, the nature of the actions of these entities, the procedural mode of activity, ways of organizing the activity, causation. The external form includes both legal acts that are formed during the legalization activity and those in which the result of the legalization procedure is recorded.

The Subjects of legalization – public or private entities having the authority to carry out legalization activities. But along with the powers of such entities, a significant role is attached to the level of their professionalism and legal culture. Thus, the subject of legalization must not only be knowledgeable in law, legal and drafting technology, but also be a carrier of a high level of legal culture, and its behavior must correspond to the essence of socially active legal behavior.

Participants in the legalization activity are also individuals or their groups (witnesses, experts), who assist the activity of the subjects in the process of solving them issues related to the legalization of certain objects.

Participants should distinguish those interested in the results of legalization from persons who do not participate in the legalization activity. *The objects of legalization are certain actions or activities; material goods (p*roperty, funds); documents; certain conditions; personal, non-property related rights (intellectual property, copyright); subjects of law; state power. In the process of performing the legalization activity, legal actions are performed – external acts of behavior of the subjects of the legalization activity, through which the result of the legalization procedure is achieved. But to achieve such a result requires the implementation of certain operations – a set of interrelated actions aimed at achieving local goals. The means of legalization are legal norms, certain legal evidences, methods, objects of phenomena and actions that ensure the achievement of the necessary result of such activity. Methods of legalization are specific ways of achieving the intended result by the specific means stipulated a legal case. They are vowels, based on scientific knowledge, and are compulsory. Equally important is the high level of knowledge of the rules of legal technology and technology that is the subject of such legalization. The result of the legalization activity is the adoption of a written legal act, which is the result of the respective operations and actions achieved through certain methods and means by the subjects of the legalization activity. Classification of types of legalization activities can be performed by different criteria. Thus, if we take as a classification criterion the nature of the activity, it becomes possible to distinguish the following types: law-making – raising the position, which is enforced by the adoption of the law (for example, legalization of law, the Law on Amnesty of Funds, etc.), on the relevant

objective (current) law; enforceable – raising a position on the relevant objective (current) law, which is carried out due to the adoption of the act of application of the law (the procedure of state registration of legal entities). If we consider as a classification criterion the status of the subject of carrying out the legalization activity, then it becomes possible to distinguish the following types: public-legal – legalization activities carried out by entities that are endowed with state-power powers (for example, consular legalization);private law – the legalization activities carried out by entities that are endowed with private legal powers (for example, the director of a private enterprise). The most developed is the classification of types of legalization activities, where the degree of demand for certain legalization procedures in society is used as a classification criterion. According to this criterion, distinguish: procedures for legalization of traditional relations of society (for example, recognition of state power, legalization of funds, confirmation of validity of documents, issuance of permission to perform certain activities); procedures for the legalization of unconventional social relations (eg, euthanasia, prostitution, firearms, drugs, etc.)[9].

In the context of the organization of relations between Ukraine and the PRC, the procedures for legalizing business are of particular importance, namely: procedures for verifying the validity of documents and procedures for granting certain entities the right to engage in certain activities (especially in the business sector). Authentication of documents and signatures, seals, stamps affixing them, as the most important type of legalization activity, is the activity of competent bodies (private and public-legal), aimed at establishing, certifying, validation of the competent seals on the documents and signatures and compliance with the law of their country of origin[10].

This type of legalization activity is carried out in the following forms: Notarization. Notarization is an activity related to the system of bodies and officials entrusted with the obligation to certify rights as well as facts of legal value.

Notarial activities are linked to the system of bodies and officials charged with the obligation to disclose rights, as well as facts of legal value. Notarization is usually sufficient to produce documents within their country of origin. The originals of the registration and a number of other company documents are certified by the seal of the state registering authority, and notarized copies of the constituent documents, such as charter, constituent

[9] Манько Д. Г. Легалізація в механізмі дії права: монографія / Д. Г. Манько. Херсон: ОЛДІ-ПЛЮС, 2014. С. 119.

[10] Манько Д. Г. Легалізація в механізмі дії права: монографія / Д. Г. Манько. Херсон: ОЛДІ-ПЛЮС, 2014. С. 169.

agreement, etc., are usually notarized. It is also advisable notarization of documents defining ownership[11].

Apostillation – the procedure for verifying the validity of documents outside the country of origin by affixing an apostille, which is either a separate letter bearing the name "Apostille", which is attached to a document certifying it, or a stamp with the same name and set strictly defined content. In this case, the apostille should be understood as a simplified procedure for the legalization of documents produced (drawn up and notarized) in the territory of one of the signatories to the 1961 Hague Convention[12].

Countries that have acceded to the 1961 Hague Convention (Ukraine is one of the acceding countries) are considered to be valid documents bearing the Apostille stamp, which is the same as any other type of certificate, or a separate letter with the name " Apostille ", which is attached to a document that certifies whether a stamp with the same name and set strictly defined content. In particular, the apostilization of documents is necessary for opening an account with a bank, establishing a representative office or a subsidiary, as well as for other contacts with official bodies outside the country of origin of documents.

Consular law. It is a certificate of authenticity of the signature of the official, his status and, where appropriate, the seal of the authorized state body on the documents and acts, as well as compliance with their laws of the country of residence. In practice, foreign documents intended for use in the territory of Ukraine can be legalized in the territory of the country where these documents are issued, or directly in Ukraine.

Initially, the document is certified by the Ministry of Foreign Affairs or other authorized body of the state in whose territory it was issued, and then legalized at the consular office of Ukraine in that state. In the second case, the foreign document is first certified by the diplomatic mission or consular post of the country in whose territory the document was issued, and then legalized by the consular service of Ukraine. In both cases, notarized translation of the document in a specific language may be required[13].

International legal aid agreements – consularization and apostille are not required if the international treaty provides for the abolition or simplification of these procedures. An example is the Convention on Legal Assistance and

---

[11] Нотаріат в Україні [Текст] : підручник / В. В. Комаров, В. В. Баранкова ; Нац. ун-т "Юрид. акад. України ім. Я. Мудрого". Х. : Право, 2011. С. 27.

[12] Конвенція, що скасовує вимогу легалізації іноземних офіційних документів : Гаазька конференція з МПП; Конвенція, Міжнародний документ від 05.10.1961 URL: http://zakon0.rada.gov.ua/laws/show/995_082

[13] О порядке консульской легализации официальных документов в Украине и за рубежом : инструкция, утв. Приказом МИД Украины от 15 июля 1997 г. № 98-од // ВВР Украины. 1997. № 7. С. 17–36.

Legal Relations in Civil, Family and Criminal Matters, signed in Minsk on January 22, 1993, to which Ukraine is a party[14].

In addition, Ukraine has also signed legal aid agreements with the PRC, the Republic of Poland, the Republic of Lithuania, the Republic of Moldova, the Republic of Georgia, the Republic of Estonia, the Republic of Latvia, Mongolia, the Republic of Finland.

The significance of this type of legalization activity for Ukraine is determined by the influence of globalization and integration tendencies on the existence of modern states. The activities of the competent public authorities of the state aimed at establishing, certifying, validating the seals and signatures of competent officials on the documents and compliance with the requirements of the law of their country of origin, is an effective means of developing cooperation at the interstate level in the modern world.

Article 29 of the Agreement between Ukraine and the People's Republic of China on Legal Assistance in Civil and Criminal Matters states that documents produced or certified by a court or other competent authority of one Contracting Party (Ukraine – PRC – Aut.) Are valid if available. signature and official seal. In such form, they may be taken by a court or other competent authority of the other Contracting Party without legalization. Official documents drawn up in the territory of one Contracting Party shall have the force of proof of official documents in the territory of the other Contracting Party[15].

Along with confirming the validity of the documents, the procedures for organizing authorization for certain activities are equally important.

The granting of a permit to engage in certain activities is a kind of traditional legalization procedure, which is expressed in the admission of certain entities to perform certain activities and, in some cases, the legalization of the results of the activities for which the permit documents were to be obtained[16].

The subjects of this type of legalization can be both private and public entities. This type of legalization mainly reflects the legal relations in the business sphere and is carried out in the following forms: 1) State registration of business entities is recognition by the state of participants of economic turnover. Recognition consists of three basic procedures: a) state

[14] О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам : Конвенция от 22 января 1993 г. // ВВР Украины. 1993. № 1. С. 37.

[15] Про правову допомогу у цивільних та кримінальних справах : Договір між Україною і Китайською Народною Республікою від 31.10.1992 URL: http://zakon2.rada.gov.ua/laws/show/156_014

[16] Манько Д. Г. Легалізація в механізмі дії права: монографія / Д. Г. Манько. Херсон: ОЛДІ-ПЛЮС, 2014. С. 172.

accounting of business entities; b) collecting publicly reliable data on their legal, property and organizational status; c) control over the legality of the emergence, change and termination of the legal status of the entrepreneur; 2) Licensing and patenting of certain types of entrepreneurial activity as state-legal regulation of entrepreneurial activity in the interests of the state, business, personality, society; 3) Issuance of work permits for foreign nationals; 4) Issuance of permits for construction works (and in some cases legalization of self-employed construction); 5) Non-state registration of powers of participants of business activity.

Legalization of business entities in Ukraine may include: one element – state registration (for engaging in activities that do not require licensing or patenting); two elements – state registration and licensing (for engaging in activities requiring licensing); three elements are state registration, licensing and patenting (for pursuing activities requiring licensing and patenting).

The subject of legalization in this case is a person with public legal authority.

The state registrar (as the subject of legalization) is an official who, in accordance with the Law, performs state registration of legal entities and entrepreneurs.

A single state register is an automated system for collecting, accumulating, protecting, accounting and providing information on legal entities and entrepreneurs.

State registration of legal entities and natural persons – entrepreneurs is a certificate of the fact of creation or termination of a legal entity, a certificate of the fact of acquiring or withdrawing the status of an entrepreneur as an individual, as well as carrying out other registration actions stipulated by the Law, by entering relevant records in the Unified State Register.

It should be noted that the result of such actions is of legal importance and is drawn up in the form of a certain legal act – an extract from the Unified State Register of the SPD.

The procedure for conducting state registration of legal entities and natural persons – entrepreneurs includes: 1) verification of the completeness of documents submitted to the state registrar and completeness of the information specified in the registration card; 2) verification of documents submitted to the state registrar for the absence of grounds for refusal to hold state registration; 3) entering information about the legal entity or individual – entrepreneur in the Unified State Register; 4) registration of state registration and issuance of an extract from the Unified State Register[17].

[17] Про затвердження Порядку державної реєстрації юридичних осіб, фізичних осіб – підприємців та громадських формувань, що не мають статусу юридичної особи : Міністерство юстиції України. Наказ від 09.02.2016р. URL: http://zakon5.rada.gov.ua/laws/show/z0200–16

3. Legal algorithms for business legalization procedures in the PRC

The general algorithm for business legalization in the PRC consists of the following components: 1) legalization of the documents of the founders of the new company; 2) legalization of campaign documents; 3) obtaining a permit for the activity.

In turn, business legalization procedures in the PRC are contained in the PRC Law of 29.12.1993. This act fixes the requirements on the minimum amount of authorized capital, methods and terms of its payment, on the submission of a special report on verification of payment of authorized capital when registering a company.

By the company's creation, it is necessary to apply to the body of registration of companies in accordance with the procedure established by law with the application for registration. Subject to the provisions of this Law, the company registration authority shall register the company as a limited liability company or a joint-stock limited liability company; if the provisions of this Law are not respected, the registration shall not be conducted[18].

If the provisions of laws, by-laws provide for the need to approve the creation of a company, then before applying for registration should be in accordance with the procedure prescribed by law.

Interested persons may contact the company registration authority for information on company registration information. The company registration authority should provide an opportunity to get acquainted with such data.

The company registration authority issues a Certificate of Business Law to companies established in accordance with the procedure established by law. The date of issue of the Company Business Certificate is the date of creation of the company.

The Certificate of Business Law must include information on the name of the company, location, share capital, actually paid-up capital, sphere of business activity, as well as the name and surname of the legal representative.

If changes occur in the information contained in the Certificate of Business Activity, the company must, in accordance with the procedure established by law, go through the procedure of registration of changes to the information and the procedure of replacement of the Certificate of Business Activity.

A limited liability company set up under this Law shall bear in its name the designation "limited liability company" or "limited company".

[18] Про компанії : Закон КНР від 29.12.1993 р. URL: http://chinalawinfo.ru/economic_law/law_company/law_company_ch1

A joint-stock limited liability company created under this Law shall bear in its name the designation “limited liability company” or “joint-stock company”. When converting a limited liability company into a joint-stock limited liability company, the conditions for establishing a joint-stock limited liability company shall be observed. When converting a joint-stock limited liability company into a limited liability company, it is necessary to observe the conditions of creation of limited liability companies provided for by this Law.

If a limited liability company becomes a joint-stock limited liability company or a joint-stock limited liability company becomes a limited liability company, then all obligations and claims arising from the transformation of the company are transferred to the company after the transformation.

The location of the company is the location of its main office. When creating a company, it is necessary to develop a company charter in accordance with the law. The charter of the company is binding for the company, its members (shareholders), members of the board of directors, auditors, senior executives.

The sphere of business activity of the company is established by the charter and is registered in accordance with the procedure established by law. The company may amend the articles of association and change the scope of business activities, having undergone the procedure of making changes to the registration data. If the business scope of the company in accordance with the laws, by-laws refers to the approved, it is necessary to go through the approval procedure in accordance with the legislation.

The chairman of the board of directors, executive director or director of the company, in accordance with the charter, assumes the responsibilities of the legal representative of the company and is registered in accordance with the law. When changing the legal representative of the company, you must go through the process of making changes to the registration information.

The company can create affiliates. When creating branches, you must apply to the company registration company with the application for registration and obtain a Certificate of Business Conduct. Affiliates have no legal personality; the company is civilly responsible for their activities.

The company can create subsidiaries. Subsidiaries have the status of a legal entity and bear independent civil liability under the law.

The company may invest in other companies; it is forbidden to transform the company in relation to the enterprise-object of investment into a depositor, bears joint and several liabilities for the obligations of such enterprise.

It should be noted that the report on verification of payment of the authorized capital in China was issued after checking the accounting firm receipt of the company property from the founders in the payment of the authorized capital. This report is required to be issued at the creation of the company (to confirm payment of 20% of the authorized capital) and at each subsequent contribution.

On March 1, 2014, changes to the Companies Law came into force in China, which abolished the requirements for the preparation of the accounting report on the payment of authorized capital, the minimum amount of authorized capital for companies, the requirements for the obligatory payment of part of the authorized capital by cash and terms of payment of the authorized capital. These norms come into force unless other laws or by-laws provide specific requirements for the size of the authorized capital of companies that are created in certain types of activities, and the founders of the company have the right to independently determine any amount of the authorized capital[19].

CONCLUSIONS

It should also be borne in mind that legalization of business between Ukrainian and Chinese entrepreneurs is possible not only through the creation of new companies, but also through the opening of branches and representative offices of already existing companies. In this case, the documents in which the legal status of the companies (Charter, separate protocols and protocol decisions, certificates and statements of registration and registration, founders documents) are subject to legalization. Moreover, the first stage is the legalization of such documents in the country of origin and in the second stage, properly legalized in the country of origin documents are provided for their confirmation and use in the country where the business is planned (in our case, China). Important in these procedures is that China, although included in the list of States Parties to the Convention, abolishes the requirement of legalization of foreign official documents of 05.10.1961 (Apostille), but on special conditions, namely only its regions of Hong Kong and Macao. In turn, Ukraine acceded to the said Convention on December 22, 2003, though as of 2018, the Convention does not extend to the Crimea, as well as to the occupied territories of Donetsk and Luhansk regions.

Thus, the legalization of business by Ukrainian and Chinese entrepreneurs through the opening of branches and representative offices of existing companies is possible provided that the procedures of consular legalization and apostille are performed.

[19] Статьи о бизнесе в Китае. SBF URL: http://sbf-group.com/articles/china/company_law_amendments_2014/

SUMMARY

Summarizing the study, I would like to emphasize the great role and importance of legalization procedures in the organization of effective and useful partnerships between modern states. In addition, there are some problematic aspects, such as spending time on proper paperwork. In this context, the development of legalization mechanisms through the use of e-government systems is a promising trend.

REFERENCES

1. Нотаріат в Україні : підручник / В. В. Комаров, В. В. Баранкова ; Нац. ун-т "Юрид. акад. України ім. Я. Мудрого". Х. : Право, 2011. 384 с.

2. Про компанії : Закон КНР від 29.12.1993 р. URL: http://chinalawinfo.ru/economic_law/law_company/law_company_ch1

3. Про правову допомогу у цивільних та кримінальних справах : Договір між Україною і Китайською Народною Республікою від 31.10.1992 URL: http://zakon2.rada.gov.ua/laws/show/156_014

4. Про правотворчість : Закон КНР від 15.03.2000 р. URL: http://chinalawinfo.ru/other/law_legislation

5. Статьи о бизнесе в Китае. SBF URL: http://sbf-group.com/articles/china/company_law_amendments_2014/

6. Степанова Т. В. Идентификация правовой системы Китайской Народной Республики: вопросы теории : автореф. Дис… канд. Юрид. Наук : спец. 12.00.01 "Теория и история государства и права; история политических и правовых учений" / Т. В. Степанова; Владимирский юридический институт Федеральной службы исполнения наказаний. Владимир, 2010. 23 с.

7. Трофимчук А. П. Перспективи приєднання України до проекту "Один пояс, один шлях" / А. П. Трофимчук // *Журнал "Міжнародні відносини" Інституту міжнародних відносин Київського національного університету імені Тараса Шевченка. Серія Економічні науки.* 2016. № 9 / URL: http://journals.iir.kiev.ua/index.php/ec_n/article/view/3060.

8. Vision and Actions on Jointly Building Silk Road Economic Belt and 21st-Century Maritime Silk Road / National Development and Reform Commission (NDRC), People´s Republic of China. URL: http://en.ndrc.gov.cn/newsrelease/201503/t20150330_669367.html

9. Yougang Chen Chinese infrastructure: The big picture / Chen Yougang // McKinsey Global Institute, McKinsey & Company. URL: http://www.mckinsey.com/global-themes/winning-in-emerging-markets/chinese-infrastructure-the-big-picture

10. Конвенція, що скасовує вимогу легалізації іноземних офіційних документів : Гаазька конференція з МПП; Конвенція, Міжнародний документ від 05.10.1961 URL: http://zakon0.rada.gov.ua/laws/show/995_082
11. Кошовий С. А. Економічний пояс великого шовкового шляху: транспортний вимір / С. А. Кошовий // Китаєзнавчі дослідження. 2014. № 1–2. С. 51–60.
12. Крестовська Н. М., Матвєєва Л. Г. Теорія держави і права. Підручник. Практикум. Тести : підручник / Н. М. Крестовська, Л. Г. Матвєєва. К.: Юрінком Інтер, 2015. 584 с.
13. Манько Д. Г. Легалізація в механізмі дії права: монографія / Д. Г. Манько. Херсон: ОЛДІ-ПЛЮС, 2014. 232 с.
14. Місце України в глобальних стратегіях Китаю Міжнародний центр перспективних досліджень. 2015 URL: http://www.icps.com.ua/assets/uploads/images/files/china_mesto_s.pdf
15. О порядке консульской легализации официальных документов в Украине и за рубежом : инструкция, утв. Приказом МИД Украины от 15 июля 1997 г. № 98-од // ВВР Украины. 1997. № 7. С. 17–36.
16. О правовой помощи и правовых отношениях по гражданским, семейным и уголовным делам : Конвенция от 22 января 1993 г. // ВВР Украины. 1993. № 1. С. 37.
17. Про затвердження Порядку державної реєстрації юридичних осіб, фізичних осіб – підприємців та громадських формувань, що не мають статусу юридичної особи : Міністерство юстиції України. Наказ від 09.02.2016р. URL: http://zakon5.rada.gov.ua/laws/show/z0200–16

Information about the author:
Manko D. G.,
Candidate of Juridical Sciences,
Associate Professor at the Department of State and Law Disciplines,
International Humanitarian University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/136-153

SOME ASPECTS OF SECURING A PERSONAL NON-PROPRIETARY RIGHT TO HEALTH

Manzhosova O. V.

INTRODUCTION

The ideology of "human-centrism" enshrined in the current Constitution of Ukraine is a legal phenomenon of the European level, but it does not require declarative but real implementation of modern legal relations and norms of Ukrainian legislation.

Against this background, there is a need to rethink individual civil law institutions, in particular one of the types of personal non-property rights of an individual envisaged by the rules of the current Civil Code of Ukraine – right to health and medical care[1].

These rights belong to the group of personal non-property rights that ensure the natural existence of human beings, are inalienable, necessary and should be protected, because human health is the overriding social value of the modern state and the basis for future generations.

These rights individualize the persone and promote personal freedom, that is, the ability to freely choose different behaviors within social relationships. That is one of the conditions of active human life.

At the general legal level the rights of individuals in the sphere of health care are a set of fundamental, inalienable, natural rights that are individual in nature and enable a person to use the methods prescribed by law to ensure the proper functioning of his body as a whole.

In civil law, the idea of personal non-property rights of individuals in the sphere of health are personal civil rights.

These rights of origin are natural. Their contents contain the possibility of using certain means for the preservation, development, strengthening and restoration in case of violation of the human body condition, provided that such use does not violate the rights of others[2].

According to current researchers, the right to health care and medical care fall into the category of personal non-property rights of individuals arising in the field of medical relations, and can be defined as the rights of patients.

---

[1] Цивільний кодекс України від 16. 01. 2003р. № 435-IV. *Відомості Верховної Ради України.* 2003. № № 40–44. Ст. 356.

[2] Коротка Н.О. Особисті немайнові права фізичних осіб в сфері охорони здоров'я : автореф. дис. ... канд. юрид. наук : 12.00.03. Київ, 2015. 20 с.

Their content is, among other things, rights related to the provision of medical care (the right to provide medical care in conditions that meet the hygiene requirements; the right to respect and humane treatment by medical and care staff; the right to choose a doctor, treatment method and medical institution)[3].

The special, "exclusive" meaning of these rights is absolute, and just as unconditional is the mechanism of their realization in Ukraine.

Art. 49 of the Constitution of Ukraine establishes a mechanism for implementing the legal right of a person to health care and adequate medical care [4]. In addition, the decision of the Constitutional Court of Ukraine of May 29, 2002 made it compulsory to provide free medical assistance to all citizens in full, and not only "necessary medical assistance and social services"[5].

The specificity of securing and exercising certain rights lies in the current and legally enforceable health care system based on budgetary financing.

Negative manifestations of this situation are complaints about the lack of sufficient budget financing of the medicine industry. This is the declarative nature of the principle of free medical care, because its provided by state and municipal medical institutions at the actual "payment" of their services, low salaries of medical workers, etc.

1. Reforming medicine as an effective way of securing a non-material right to health care

Today, Ukraine is actively reforming the medical sector. One of the areas of reform is the ability of citizens to freely choose a primary care physician (family doctors, pediatricians) and sign direct agreements with them with a clearly spelled-out amount of services guaranteed and paid for by the state.

The Law of Ukraine "On State Financial Guarantees of Medical Services to the Population" defines issues of contractual relations in a somewhat different way[6]. Article 8 of the Law establishes the concept of "public health

[3] Стефанчук Р. О. Особисті немайнові права фізичних осіб у цивільному праві :автореф. дис. … докт. юрид. наук: 12.00.03. Київ, 2007. 40 с.

[4] Конституція України : офіц. текст. Київ : КМ, 2013. 96 с.

[5] Рішення Конституційного Суду України у справі за конституційним поданням 53 народних депутатів України щодо офіційного тлумачення положення частини третьої статті 49 Конституції України "у державних і комунальних закладах охорони здоров'я медична допомога надається безоплатно" (справа про безоплатну медичну допомогу) від 29.05.2002. URL: https://zakon.rada.gov.ua/laws/show/v010p710-02 (дата звернення 11.01.2020

[6] Про державні фінансові гарантії медичного обслуговування населення: Закон України від 19.10.2017р. № 2168-VIII. *Відомості Верховної Ради*. 2018. № 5. Ст. 31.

contract". This is an agreement between medical institutions of different ownership and physicians registered as natural persons-entrepreneurs and relevant state authorities in the sphere of health care. The contract on public health services is concluded in writing (including electronic) between the National Health Service of Ukraine and health care institutions of all forms of ownership and individuals-entrepreneurs who are licensed to conduct business activities in medical practice.

The contract of public health services regulates and determines the terms and scope of medical services and medicines. The contract establishes requirements for the quality of services, the procedure for payment of the coverage rate for medical services and medicines provided, the rights and obligations of the parties, as well as the responsibility for non-compliance or improper fulfillment of the terms of such contract. The public health contract is a contract for the benefit of third parties – patients in the provision of medical services and medicines to healthcare providers.

The essential conditions of the contract on medical care of the population due to the program of medical guarantees are:

– the list and volume of provision of medical services and medicines to patients under the medical guarantee program;
– conditions, procedure and terms of payment of the tariff;
– the actual address of the medical service;
– rights and duties;
– term of the contract; reporting of health care providers; responsibilities of the parties[7].

With regard to the issue of legal relationship between a particular health care provider and a patient, the aforementioned law operates with the concept of "declaration of choice of primary care physician", which must be submitted by the patient at the first request for medical services.

Considering the envisaged possibility of entering into a contract for the provision of medical services between the doctor (health care provider) and the patient (customer, consumer of the service), the following should be noted. The defined contract is a civil law category and belongs to a group of service contracts.

The Civil Code of Ukraine stipulates that under a service contract, one party (the executor) undertakes to provide a service that is consumed in the course of committing a certain act or carrying out a certain activity, and the client undertakes to pay the contractor specified service, unless otherwise

[7] Про державні фінансові гарантії медичного обслуговування населення: Закон України від 19.10.2017р. № 2168-VIII. *Відомості Верховної Ради*. 2018. № 5. Ст. 31.

stipulated in the contract (Article 901), but there is a possibility of providing services free of charge[8].

Under the agreement of medical services, health care institutions are contractors. There are legal entities of any form of ownership and legal form or their separate divisions. Their main task is to provide public health services on the basis of an appropriate license and professional activity of medical (pharmaceutical) workers[9].These are also individuals who could carry out private medical practice.

It should be noted that the network of state and communal healthcare institutions is formed taking into account the needs of the population in health care, the need to ensure the proper quality of such services, timeliness, accessibility for citizens, efficient use of material, labor and financial resources.

The establishment and operation of private health facilities is supported by the state. The need to create a private healthcare facility is determined not by the state but by the owner based on market research of the health care services market and at his own risk[10].

The doctor is invited to choose any legal form, namely to acquire the legal status of an individual entrepreneur or to work in a polyclinic, an outpatient clinic or a Center for primary health care. And if the ability of an individual entrepreneur to be a party to a contract for the provision of service issues does not arise, then the possibility of a doctor, who is a hired employee in the relevant legal entity, raises a number of questions regarding the legal status of the parties to the contract and the content of the contract itself.

Despite the fact that in accordance with the provisions of Art. 902 of the Civil Code of Ukraine the contractor must provide the service personally, the contracting party is a health care institution, not a specific health care provider, but the latter may, on the initiative of the Ministry of Health of Ukraine, be indicated in the contract as a direct provider of specific medical services. However, according to the provisions of the Civil Code of Ukraine, the medical institution remains fully responsible to the customer for breach of contract.

---

[8] Цивільний кодекс України від 16. 01. 2003р. № 435-IV. *Відомості Верховної Ради України.* 2003. № № 40–44. Ст. 356 .

[9] Основи законодавства України про охорону здоров'я 19 листопада 1992 року. *Відомості Верховної Ради України*. 1993. № 4. Ст. 19.

[10] Герц А. А. Класифікація договорів про надання медичних послуг *Науковий вісник Ужгородського національного університету.* Серія : Право. 2015. Вип. 32(2). С. 16–20. URL : http://nbuv.gov.ua/UJRN/nvuzhpr_2015_32%282%29__5 (дата звернення 12.01.2020)

It should be noted that the issue of the responsibility of medical professionals is also extremely important, because for the current stage of development of the health care system, there is a contradiction between the need to respect the individual rights of the patient in the provision of medical care and the real conditions for the exercise of these rights. Because, according to experts, medical practice is an activity characterized by frequent unpredictable results and high risk of harm to the patient.

The current legislation of Ukraine does not establish the peculiarities of civil liability of medical professionals for the harm to life and health caused in the course of their professional activity. The legal regulation of such relations is carried out in accordance with the general provisions of civil law in the tort area.

It should be noted that civil liability in the field of medical activity is a type of legal liability that arises as a result of violations in the field of property or personal non-property benefits of citizens in the field of health care and which consists mainly in the need for compensation for harm.

Personal non-pecuniary benefits of citizens, which are directly related to medical activity, are primarily life and health. For this reason, it can be argued that civil liability is a peculiar means of ensuring the protection of personal non-property rights (life and health) of patients in the provision of medical care[11]. According to the existing theoretical provisions of civil law, the main function of obligations for compensation of damages (torts) is a compensatory-restorative function, the realization of which should provide the injured person with the restoration of his property and personal non-pecuniary rights[12].

Most health care professionals carry out their professional activities while working with healthcare institutions. In accordance with Part 1 of Article 1172 of the Civil Code of Ukraine, a legal or natural person shall indemnify the damage caused by their employee in the course of performing their work (official) duties.

However, it should be noted that the legal or natural person – the employer has the right of recourse to the direct harm. As for healthcare providers providing private medical practice, they are solely responsible for the general principles of tort.

[11] Відповідальність медичних працівників : Лист Міністерства юстиції України від 20.06.2011. URL: http://zakon2.rada.gov.ua/laws/show/n0040323-11 (дата звернення 12.01.2020).

[12] Цивільне право України. Академічний курс. Підруч.: У двох томах. Т.2. Особлива частина. / За заг. ред Шевченко Я.М. К.: Концерн «Видавничий Дім “Ін Юре”», 2003. 408 с.

Damage caused by a healthcare professional is referred to civil law by a group of special torts, as liability for damage caused by injury, other damage to health or death. Such compensation has a number of features, namely:
1) damage to the life and health of the highest value person;
2) the impossibility of compensation for such damage in kind and its evaluation in monetary terms.

In this case, the harm is inflicted on the patient in the provision of medical services, characterized as property (real costs: loss of earnings, costs for treatment, prosthetics, nutrition, special care, etc.) and moral (physical pain and suffering)[13].

Therefore, it can be concluded that the responsibility for the harm to the patient is caused in the course of carrying out medical activity, the current legislation places personally on the medical professional.

This should take into account the number of people dissatisfied with the quality of medical services provided, whose claims, as a rule, are transformed into civil lawsuits – all this necessitates the need to improve the existing mechanism of compensation for the harm caused by introducing professional liability insurance for medical professionals.

Today, there are various forms in the world that allow healthcare professionals to protect themselves from the negative effects of medical errors.

First, the cost of the medical service can be used to provide a share that will form a guarantee fund in the event of a claim. Secondly, mutual insurance funds may be created through professional associations of health care providers. Thirdly, it is professional liability insurance by insurance organizations.

This form of protection of the interests of health care professionals and patients is fundamental in the world. The study of the existing international experience of professional liability insurance related to professional medical activity is developing in two directions: tort liability insurance and the system of liability insurance against damage that occurred without the fault of the insured[14].

The Law institute of insurance is aimed at protecting the property and personal non-property interests of a person, and its main function is compensatory, aimed at their restoration.

---

[13] Антонов В.С. Особливості відшкодування шкоди, заподіяної пацієнтові невдалим медичним втручанням *Управління закладом охорони здоров'я*. № 7. 2007 URL: http://www.medlawcenter. com.ua/ru/publications/76.html.

[14] Антонов В.С. Особливості відшкодування шкоди, заподіяної пацієнтові невдалим медичним втручанням *Управління закладом охорони здоров'я*. № 7, 2007 URL: http://www.medlawcenter. com.ua/ru/publications/76.html.

Therefore, in our opinion, the introduction of a statutory mechanism for the insurance of professional liability of medical professionals is now a pressing issue. In addition, the effectiveness of this mechanism will be greatly enhanced if it is implemented in the context of reforms in the health sector, in particular the introduction of a compulsory health insurance system and the improvement of the voluntary health insurance system.

2. Introduction of the compulsory health insurance system as one way to exercise the non-property right to health care

Finding new sources of financing for the industry, improving the efficiency of use of funds allocated for health care is possible in the case of introduction of compulsory health insurance in Ukraine as a necessary condition for reforming the health care industry. The problem of introduction of compulsory health insurance, which would be included in the social security system of the state, is not actively investigated today.

It should be noted that the effectiveness of health insurance depends primarily on how perfect is the concept of introduction and development of insurance medicine in the country.

Today, there are several fundamentally different health systems: mainly state-owned, such as in the UK; mainly insurance, which combines compulsory and voluntary insurance and is typical of most European countries (Germany, France, Austria, Switzerland, etc.) and predominantly a paid (private) system in the US.

Studying the experience of other countries that they have acquired in the process of introduction of the medical insurance system can certainly be useful in order to avoid their own mistakes in the law making process, but it is necessary to investigate the dynamics of the development of one or another health care system and use it best, adapting to the existing economic ones and social conditions in our country.

The compulsory insurance model appears to be the most effective and suitable for implementation in Ukraine, which is characterized by the following features:

1) compulsory insurance through non-profit insurance organizations;
2) solidarity building (insurance premiums depend on income, not age and health);
3) legislative regulation of necessary types of medical services;
4) protecting the interests of persons with disabilities, pensioners, the unemployed, by providing them with medical care at budgetary cost;
5) preferential insurance conditions for the underprivileged population and minors;

6) provision of compulsory voluntary insurance to cover the cost of additional costs (for example, the provision of medical services not listed in the required list), etc.

It is impossible to carry out any reform in the country without creating a proper legal basis that would determine the programmatic set of measures to reform the health care system, the concept and legal status of compulsory health insurance, the possibility of combining it with voluntary insurance and the system of budget financing.

At present, the norms of current legislation, in particular Art. 18 Fundamentals of health care legislation stipulate that health care financing is provided at the expense of the State Budget of Ukraine, the budget of the Autonomous Republic of Crimea, local and regional self-government budgets, health insurance funds, charitable foundations and any other sources not prohibited by law[15], and in Art. 4 Fundamentals of Ukrainian legislation on compulsory state social insurance[16] health insurance is available. In addition, the Decree of the Cabinet of Ministers of Ukraine No. 1013-p of November 30, 2016 approved the main conceptual directions of reforming the health care system and provided for the need to regulate at the legislative level the issue of the introduction of state solidarity health insurance[17].

At the moment, several draft laws on compulsory health insurance are under consideration in the Verkhovna Rada committees, in particular the draft Law of Ukraine "On compulsory state social insurance" No. 1040 of 27.11.2007, the draft Law of Ukraine "On compulsory health insurance State Social Insurance" No. 1040-1 of December 18, 2007, Draft Law "On Amendments to Some Laws of Ukraine (on Introduction of Compulsory State Social Health Insurance)" No. 1040-2 of January 25, 2008.

Among the provisions of these bills is defined the concept of compulsory health insurance as an integral part of the system of compulsory state social insurance and a form of protection of the population in the field of health care; formulated principles of health insurance, in particular the principle of solidarity and subsidization, the principle of providing state guarantees for

[15] Основи законодавства України про охорону здоров'я 19 листопада 1992 року *Відомості Верховної Ради України*. 1993. № 4. Ст. 19.

[16] Основи законодавства України про загальнообов'язкове державне соціальне страхування 14 січня 1998 року *Відомості Верховної Ради України*. 1998. № 23. Ст. 121.

[17] Концепція реформи фінансування системи охорони здоров'я : Розпорядження Кабінету Міністрів України від 30 листопада 2016 р. № 1013-р URL: https://zakon.rada.gov.ua/laws/show/1013-2016-%D1%80?find=1&text=%D1%81%D1%82%D1%80%D0%B0%D1%85%D1%83%D0%B2 (дата звернення 12.01.2020)

the realization by the insured persons of their rights to free medical care, the principle of purposeful use of health insurance funds, the principle of ensuring that the necessary medical assistance is sufficient in the event of an insured event, the principle of compulsory financing by the Health Insurance Fund of the costs associated with the provision of health care, the principle of ensuring the possibility of voluntary participation in the compulsory insurance scheme for persons for whom it is not provided.

The draft laws also outline the number of persons subject to insurance, namely working citizens of Ukraine, stateless persons and foreigners, unemployed, students, minors, etc. It is envisaged that the payers of insurance premiums, ie the insurers are employers, the state, the relevant funds of compulsory state social insurance (for pensioners, the disabled, the unemployed) and self-employed persons (for example, lawyers, notaries, private entrepreneurs).

A separate list of bills defines the list of medical services; the rights and obligations of the insured person, the insured person and the healthcare provider; the procedure for determining the amount, calculation and payment of insurance premiums; a health insurance management system with a leading position in the Health Insurance Fund (or Compulsory Social Health Insurance Fund), which is a non-profit self-government organization, etc.

It is determined that insured persons are issued a certificate of compulsory health insurance, which confirms their right to receive medical care and which is obligatory presented when seeking medical help.

Such certificates, in particular, may have the appearance of an electronic card, which will greatly facilitate the transfer and receipt of information. Compulsory health insurance is provided on the basis of a contract concluded between the Health Insurance Fund and the health care provider. This status may be granted to a medical institution that has received appropriate accreditation and licensing.

According to the analysis, certain bills, although different in content, but regulate the same range of public relations and considered alternative, and therefore developers are invited to take one of them as a basis or on the basis of all submitted projects to develop one – a generalization. The next step in the drafting was bill No. 4279 of March 30, 2009, "On Health Care Financing and Health Insurance", which was withdrawn on May 22, 2009. So, it can be noted that at present, there is no current regulatory framework for the introduction of insurance medicine in Ukraine.

However, among the many positive aspects of these bills, there are some disadvantages, which include the absence of a clearly defined concept of compulsory health insurance, the lack of determination of the possibility and conditions of combination of compulsory and voluntary insurance, certain

aspects of expert evaluation of the quality of medical services. In our opinion, the adoption of a single law that defines the general principles of compulsory health insurance in Ukraine will not solve the problem of financing the health care industry and will not ensure the proper exercise of the right of the individual to health care, requires complex, purposeful and coordinated law-making work. An urgent need is the adoption of a number of regulations that would determine the directions of structural reform of the health care industry, reveal the sources of its financing, methods of organization and remuneration, formulate requirements for the quality of health services and more.

3. Improvement of the voluntary health insurance system as an additional means of securing non-material right to health care

The system of compulsory state insurance, which is successfully operating in many developed countries, is currently undergoing legislative work in Ukraine and is unformed. Insufficient funding for national medicine requires finding ways to provide alternative and guarantee the right of a person to provide quality medical services. The solution to this problem may be the development of voluntary health insurance.

Voluntary health insurance, as well as compulsory health insurance, aims to secure the right to provide medical assistance on the basis of insurance funding, but the achievement of this goal is achieved by various means. Yes, voluntary insurance is commercially available, relates to personal insurance, and is an effective complement to budget financing or the compulsory health insurance system. Voluntary insurance operates on the basis of equivalence, that is, the volume of health care delivery depends on insurance premiums and is able to meet the individual needs of individuals.

The benefits of voluntary health insurance include: the ability to minimize the cost of medical care; the possibility of receiving more qualified medical care in more comfortable conditions; availability of independent expert control over the terms, quality and volumes of medical services provided by the insurer's representatives.

In the European Community, voluntary health insurance is divided into three types:

1. Insurance, which is a substitute for the state insurance system provided by the current legislation and provides insurance for persons not covered by this system.
2. Insurance, which enables additional coverage of those medical services that are not covered by the state insurance system.
3. Insurance that covers the cost of expedited access or a wider range of health care services.

As the analysis shows, the regulatory framework for voluntary health insurance is in the making. Existing legislation does not cover the whole range of public relations that arise in the course of voluntary health insurance. The place and compulsory health insurance in the system of insurance protection of citizens and the list of medical services provided within the guaranteed scope have not been determined; the composition of the subjects of voluntary health insurance with the fixing of their rights and obligations is not regulated. Such imperfection of the current legal framework governing relations in the field of health care provision and insurance puts the subjects of voluntary health insurance in unequal conditions.

Some provisions on voluntary health insurance are contained in the provisions of the Law of Ukraine "On Insurance" of 7 March 1996[18]. Article 6, which stipulates that voluntary insurance is insurance that is provided on the basis of a contract between the insured and the insurer, also defines health insurance (continuous health insurance) among other types of insurance.

The aforementioned law stipulates that the general conditions and procedure for the implementation of voluntary insurance shall be determined by the insurance rules established by the insurer independently, and the specific insurance conditions shall be determined when concluding the insurance contract.

From an economic point of view, health insurance is a mechanism to compensate individuals for the costs associated with the occurrence of an insured event (illness or accident) and treatment of the insured person for medical assistance. The subject of voluntary health insurance is the cost of necessary medical care for the insured person in the event of his or her illness or accident. As practice shows, insurance companies evaluate the level of modern medicine and analyze the needs of consumers of insurance services, develop the Insurance Rules and draw up specific programs of voluntary health insurance. The medical insurance program is an integral annex to the insurance contract, which defines a specific variant of medical care. The programs are different – depending on the list of medical services and medical institutions, the contingent of insured persons, and also differ in the cost, which is influenced by all the above factors[19]. The medical insurance program may be modified during the term of the insurance

[18] Про страхування: Закон України від 07.03.1996 р. № 85/96-ВР *Відомості Верховної Ради України.* 1996. № 18. Ст. 78.

[19] Внукова Н.М., Кузьминчук Н.В. Соціальне страхування: Кредитно-модульний курс. Навч посіб. К.: Центр учбової літератури, 2009. 412 с.

contract with the consent of the insurer, provided the insurer makes additional insurance payments.

Voluntary health insurance programs vary depending on the list of health care services (for example, inpatient care or a doctor's call home); circles of insured persons (services for children or adults); the list of medical institutions offered by the insurance organization for the implementation of the voluntary health insurance program; from the cost of services provided, etc.

The specific functions of voluntary health insurance include: compensation, preventive and incentive, which reflects the need for treatment facilities to have the greatest effect on adequate costs and incentives for the insured person not to create health risks.

Unlike compulsory health insurance, which is based on the principle of solidarity, voluntary health insurance is based on the principle of insurance equivalence, and therefore the insured person receives those types of health services and in such amounts for which the premiums were paid. The object of voluntary health insurance is the property interests of the insurer and the insured person related to the cost of obtaining medical assistance in the event of an insured event, which refers to the insured person's treatment of the medical care provided under the contract (insurance policy).

The subjects of voluntary health insurance are insurance companies, insurers, insured persons, health care establishments. The relationship between these persons is based on the concluded contracts: the contract between the insurer and the insured (the insured person) and the contract between the insurer and the health care institution.

The insurance contract is defined by the provisions of the Civil Code of Ukraine and the Law of Ukraine "On Insurance" as a written agreement between the insurer and the insurer, under which the insurer undertakes to pay the insurer or other person specified in the insurance contract in the event of an insured event the insurer in favor of which the insurance contract is concluded (to provide assistance, to perform the service, etc.), and the insurer undertakes to pay insurance payments within a specified period and to fulfill other the language of the contract.

Compulsory elements of the insurance contract are: the name of the document; the name and other details of the insurer; surname, first name, patronymic or name of the insured and the insured person, their address and date of birth; the surname, first name, patronymic, date of birth or name of the beneficiary and his address; the subject of the insurance contract; the amount of the insurance amount; list of insured events; the amount of insurance premiums (payments, premiums) and terms of their payment; insurance rate; term of the contract; the procedure for modification and termination of the contract; conditions of payment of insurance payment; reasons for refusal of insurance payment; the rights and obligations of the

parties and the liability for non-performance or improper performance of the contract; other terms with the consent of the parties.

Essential components of a voluntary health insurance contract should also be: medical insurance programs selected by insurers; a list of health care facilities to which the insured person should seek medical assistance; individual insurance rates for each insured person, determined either by the results before the insurance medical examination or otherwise under the terms of the insurance contract; calculation of insurance payments for each insured person, based on the composition of medical insurance programs[20].

The voluntary health insurance contract is concluded on the basis of an oral or written statement of the policyholder, and the fact of conclusion of the contract is certified by the insurance policy. As foreign experience shows, insurance companies can offer insurers universal and specialized health insurance policies. The universal policy, as an insurance policy, envisages those cases in which medical assistance in which does not require special treatment or consultation of doctors of narrow specialties. Cases requiring a district doctor's call home if ill, fever, acute respiratory illness may be considered as insurance.

The list of insured events may be unified and may be determined by agreement between the insurer and the insurer with the possible involvement of the clinical service base. Organizing a universal insurance policy may involve seeking the services of a family physician.

Specialized insurance policies make it possible to use the medical services of highly specialized medical specialists or to take only certain health conditions (pregnancy, childbirth, HIV / AIDS infection, etc.). Specialized health policies are mostly covered by people who are already ill or are prone to certain diseases. If universal insurance policies are targeted at individuals, specialized ones are often provided under collective insurance contracts, in cases where businesses and organizations insure their employees against the greatest possible professional risks[21].

The content of the health insurance contract is determined by the type and methods of necessary medical care and is determined by each insurer independently in accordance with the license obtained. Due to this, there are basic types of health insurance and additional (options). The main ones include the costs of outpatient and inpatient treatment, which means that the cost of basic treatment is guaranteed. Additional types cover the costs

[20] Яворська Т.В. Страхові послуги: навчальний посібник. Львівський ун-т ім. І.Франка. Економічний факультет. К.: Знання, 2008. 350 с.

[21] Безугла В.О., Загірняк Д.М., Шаповал Л.П. Соціальне страхування. навч. посіб. К.: Центр учбової літератури, 2011. 208 с.

associated with treatment and the cost of specialized medical care (prosthetics, dentistry, etc.).

Depending on the volume, there are: full insurance of medical expenses, which guarantees reimbursement of expenses for both outpatient and inpatient treatment; partial – guarantees the reimbursement of the costs of either outpatient or inpatient treatment or the provision of specialized treatment at the option of the insured person. There is also the possibility of insurance for only one risk.

Insurance indemnity under voluntary health insurance contracts may be determined by: a firm sum within which the insured person's annual medical expenses are paid; a list of insured events for which full reimbursement of the cost of treatment is guaranteed; the list of costs for the provision of medical services with the limited liability of the insurer for each type.

The voluntary health insurance contract usually includes a list of conditions under which the insurer is entitled to not fulfill its obligation to pay the sum insured. For example, the insurer may reimburse the medical institution for the cost of services provided to the insured in the event of his or her treatment in connection with an injury resulting from alcohol, narcotic or toxic intoxication as a result of a deliberate crime, attempted suicide, or intentional bodily harm. damage, etc.

General provisions of the Civil Code of Ukraine for service contracts apply to the contract for the provision of medical services.

A type of health insurance contract is an insurance contract for persons traveling abroad in case of illness, injuries – the so-called assistance contract. The main purpose of such contracts is to respond quickly to an emergency. The contract generally provides for the insurer's obligations to transport the insured person to a nearby or specialized hospital and to provide emergency medical care; transportation to the country of residence with medical support; emergency dental care and more[22].

At the same time, such contracts do not provide for the obligation of the insurer to reimburse the cost of targeted medical services abroad; reimbursement of the costs of treating diseases known at the time of contract and chronic diseases; reimbursement of expenses for treatment of diseases which are not urgent (eg dental prosthetics), etc.

[22] Безугла В.О., Загірняк Д.М., Шаповал Л.П. Соціальне страхування. навч. посіб. К.: Центр учбової літератури, 2011. 208 с.

Assistance companies are engaged in direct customer service abroad – these are organizations that carry out 24/7 coordination of assistance to insured persons in the event of an insured event.

Therefore, given that at present, due to lack of financial capacity, the Ukrainian state cannot fully ensure the realization of the citizens' constitutional right to health care and medical care, and the compulsory health insurance system is unregulated and does not provide a valid regulatory framework. The social importance of voluntary health insurance, which can be an additional source of funding, is growing.

CONCLUSIONS

Ensuring the exercise of the individual's non-proprietary right to health care and health care today largely depends on the effectiveness of health care reform, including changing the delivery of care at different levels and funding arrangements. Finding new sources of financing for the industry, improving the efficiency of use of the funds allocated for health care is possible in our opinion, if the introduction of compulsory health insurance in Ukraine, as a necessary condition for reforming the health care industry. Unfortunately, today the system of compulsory state insurance, which is successfully operating in many developed countries, in Ukraine is undergoing a stage of legislative work and is unformed. In addition, the lack of funding for the healthcare industry requires finding alternative ways of securing and guaranteeing a person's non-proprietary right to provide quality medical services. The solution to this problem may be the development of a voluntary health insurance system.

SUMMARY

The article analyzes certain types of personal non-property rights of an individual as defined by civil law, namely the rights to health care and medical care. These rights belong to the group of personal non-proprietary rights that ensure the natural existence of man, are inalienable, and are subject to protection, because human health is an overriding social value of the modern state and the basis for future generations. It is noted that the specificity of securing and exercising certain rights lies in the current and legally enforced health care system, which is based on budget financing, which is not without significant deficiencies today. In Ukraine, an active reform of the medical sector is underway. One of the directions of such reform is to change the principles of financing the provision of medical services and the basis for establishing contractual relations between patients and healthcare professionals. The contract on public health services regulates and

determines the terms and scope of the provision of medical services and medicines to insured persons. The article also analyzes the problems of liability of medical workers for failure to provide or improper provision of medical services, and notes that there is a need to improve the existing mechanism of compensation for harm caused by introducing professional liability insurance for medical professionals.

The article points out that securing non-property rights to health and medical care requires finding new sources of funding for the industry and increasing the efficiency of spending on health care. In our opinion, this is possible in the case of the introduction of compulsory health insurance in Ukraine as a necessary condition for reforming the healthcare sector. The effectiveness of health insurance depends first and foremost on how perfect the concept of introducing and developing insurance medicine in the country is. Against this background, the article analyzes current health care systems in the world and proposes the introduction of an optimal system, characterized by specific features.

Also, the article noted that the lack of funding for national medicine requires finding ways to provide alternatives and guarantee the right of a person to provide quality medical services. The solution of this problem may be the development of voluntary health insurance.

As a result, it should be noted that the adoption of separate laws defining the general principles of compulsory health insurance in Ukraine will not solve the problem of financing the health care industry and will not ensure the proper exercise of the individual's right to health care, since it requires a comprehensive, purposeful and coordinated lawmaking work.

REFERENCES

1. Цивільний кодекс України від 16. 01. 2003р. № 435-IV. *Відомості Верховної Ради України.* 2003. № № 40–44. Ст. 356 .

2. Коротка Н.О. Особисті немайнові права фізичних осіб в сфері охорони здоров'я : автореф. дис. ... канд. юрид. наук : 12.00.03. Київ, 2015. 20 с.

3. Стефанчук Р. О. Особисті немайнові права фізичних осіб у цивільному праві :автореф. дис. … докт. юрид. наук: 12.00.03. Київ, 2007. 40 с.

4. Конституція України : офіц. текст. Київ : КМ, 2013. 96 с.

5. Рішення Конституційного Суду України у справі за конституційним поданням 53 народних депутатів України щодо офіційного тлумачення положення частини третьої статті 49 Конституції України "у державних і комунальних закладах охорони здоров'я медична допомога надається безоплатно" (справа про безоплатну медичну

допомогу) від 29.05.2002. URL: https://zakon.rada.gov.ua/laws/show/v010p710-02 (дата звернення 11.01.2020).

6. Про державні фінансові гарантії медичного обслуговування населення: Закон України від 19.10.2017 р. № 2168-VIII. *Відомості Верховної Ради*. 2018. № 5. Ст. 31.

7. Про державні фінансові гарантії медичного обслуговування населення: Закон України від 19.10.2017 р. № 2168-VIII. *Відомості Верховної Ради*. 2018. № 5. Ст. 31.

8. Основи законодавства України про охорону здоров'я 19 листопада 1992 року. *Відомості Верховної Ради України*. 1993. № 4. Ст. 19.

9. Герц А. А. Класифікація договорів про надання медичних послуг *Науковий вісник Ужгородського національного університету.* Серія : Право. 2015. Вип. 32(2). С. 16–20. URL: http://nbuv.gov.ua/UJRN/nvuzhpr_2015_32%282%29__5 (дата звернення 12.01.2020).

10. Відповідальність медичних працівників : Лист Міністерства юстиції України від 20.06.2011. URL: http://zakon2.rada.gov.ua/laws/show/n0040323-11 (дата звернення 12.01.2020).

11. Цивільне право України. Академічний курс. Підруч.: У двох томах. Т. 2. Особлива частина. / За заг. ред Шевченко Я.М. К.: Концерн "Видавничий Дім "Ін Юре", 2003. 408 с.

12. Антонов В.С. Особливості відшкодування шкоди, заподіяної пацієнтові невдалим медичним втручанням *Управління закладом охорони здоров'я*. № 7. 2007 URL: http://www.medlawcenter.com.ua/ru/publications/76.html (дата звернення 12.01.2020).

13. Основи законодавства України про охорону здоров'я 19 листопада 1992 року *Відомості Верховної Ради України*. 1993. № 4. Ст. 19.

14. Основи законодавства України про загальнообов'язкове державне соціальне страхування 14 січня 1998 року *Відомості Верховної Ради України*. 1998. № 23. Ст. 121.

15. Концепція реформи фінансування системи охорони здоров'я : Розпорядження Кабінету Міністрів України від 30 листопада 2016 р. № 1013-р URL: https://zakon.rada.gov.ua/laws/show/1013-2016-%D1%80?find=1&text=%D1%81%D1%82%D1%80%D0%B0%D1%85%D1%83%D0%B2 (дата звернення 12.01.2020)

16. Про страхування: Закон України від 07.03.1996 р. № 85/96-ВР *Відомості Верховної Ради України.* 1996. № 18. Ст. 78.

17. Внукова Н.М., Кузьминчук Н.В. Соціальне страхування: Кредитно-модульний курс. Навч посіб. К.: Центр учбової літератури, 2009. 412 с.

18. Яворська Т.В. Страхові послуги: навчальний посібник. Львівський ун-т ім. І. Франка. Економічний факультет. К.: Знання, 2008. 350 с.

19. Безугла В.О., Загірняк Д.М., Шаповал Л.П. Соціальне страхування. навч. посіб. К.: Центр учбової літератури, 2011. 208 с.

Information about the author:
Manzhosova O. V.,
Head of the Department of Civil Law Disciplines,
Chernivtsi Law Institute,
National University "Odessa Law Academy"
7, Skovorode str., Chernivtsy, Ukraine
Chernivtsy, Skovorode str., 7
ORCID ID https://orcid.org/0000-0002-8873-4783

DOI https://doi.org/10.36059/978-966-397-181-0/154-175

PUBLIC ADMINISTRATION AS AN OBJECT OF ADMINISTRATIVE AND LEGAL REGULATION

Nenko S. S.

INTRODUCTION

Most of the rules of administrative law regulate public relations in the field, which in the doctrine of most foreign countries are defined as "public administration".

In Ukraine, until recently, this term was not widely used; the term "public administration" was more popular, which unnecessarily narrowed the content of the concept. After all, first of all, speaking about public administration, we consciously remove from it the activities of local governments, which always perform certain functions of the state. Second, and more importantly, the term governance does not reflect the underlying nature of the category being analyzed. Public administration by its very name implies its focus on the implementation of public, that is, people's interests.

As for the competition of the words administration-management, it is necessary to put an equal sign between them, only their etymology is distinctive, and the content is the same. Given the consideration in this guide of foreign doctrine, in which the Latin root of the word administration is used in most European languages, we consider it appropriate to use only this term. Moreover, its translation into Russian and Ukrainian resulted in a one-sided interpretation of the essence of the administration in the Soviet period. It is meant that in the majority of Ukrainian textbooks from administrative law only one of meanings of translation of the term administration – management, management is given, instead of other service is mentioned. After all, the idea of public administration serving the interests of the people is a "red thread" in the administrative law of many countries.

What is public administration? There is no definite answer to this question. In the next section we will find out that, not only representatives of the law, but also by economists, sociologists, political scientists and other scientists study public administration. However, even among lawyers there is no common approach, although certain generalizations can be made.

Public administration is considered mainly in two aspects: structural and procedural.

According to the structural approach, public administration is defined as a set of different organizations performing public functions. These

organizations, according to Ukrainian legal terminology, it is advisable to include executive authorities; Executive bodies of local self-government.

In the context of the structural approach, the term administration is used quite often in Ukraine. In particular, our legislation establishes the following names of organs such as State tax administration, regional state administrations, etc.

As for the procedural approach, its essence is illustrated by the definition of the well – known Polish expert in the field of administrative reform Michal Kules: "Public administration is a set of organizational actions, activities and activities that are carried out by various entities and institutions on the basis of the law and within the limits defined by law to achieve public interest. In the Ukrainian literature, the functional approach is also predominant. In particular, in the Academic course "Administrative law of Ukraine" Professor V. Averyanov defines public administration as "norm-making and administrative activity of Executive authorities for the purpose of power-organizing influence on the relevant public relations and processes in the economic, socio-cultural and administrative-political spheres, as well as internal organizational activity of the apparatus of all state bodies to ensure the proper implementation of their tasks, functions and powers" Despite the fact that this is a definition of the concept, which is only an integral part of public administration, however, the orientation of the definition seems obvious.

Both approaches have a right to life, because they consider the same category from different angles. That is, for a full understanding of the concept of "public administration" it is necessary to take into account both approaches to its understanding: structural and procedural. This position was embodied in the definition of the Russian administrativist N. Shtatinoy, which defines public administration as "the organization and activities of bodies and institutions that are devoted to political power, ensuring the implementation of the law, acting in the public interest and endowed with the prerogatives of public power"[1]. We believe that this definition is quite acceptable for determining the essence of public administration, especially since it reflects its main features: public administration is subject to political power (i.e., Parliament and the head of state); public administration ensures the implementation and application of laws (i.e., implements in practice the political decisions of Parliament); public administration acts (must act) in the public interest (which is appropriate to understand a reasonable combination

[1] Ozerska S., Polansky Y. System derzhavna service evropeiskih countries: Great Britain, Rosiyska Federation, Ukraine, Francuska Respublka. Naukovo-analtica dozen / S. Ozerska, J. Polansky. Kyiv : Staryi the UAD, 1999. P. 125–130.

of the interests of an individual and society as a whole); public administration is vested with the prerogatives of public authority (i.e., the powers of authority that allow the public to give mandatory instructions to individuals[2]).

Concluding a brief description of the basic concept for foreign administrative law, we note that both aspects of public administration-structural and procedural – will be covered in more detail in parts of this guide. In particular, its second section is devoted to the characteristics of structures related to public administration, and the fourth-forms and procedures of administrative activity[3].

1. Theory of public administration and its interaction with administrative law

A separate analysis of one, at least the most important concept for administrative law is due not only to its wide application in foreign administrative-legal doctrine and administrative legislation. A more significant reason is the significant influence of a separate science-the theory of public administration (which, again, we still call the theory of public administration on administrative law. This science, as already noted, has an interdisciplinary character and scientists from different spheres consider public administration from their own point of view.

Economists study public administration from the point of view of the ratio of the total costs of its maintenance for the society and the results that are achieved because of its activities. They try to suggest ways to increase productivity and efficiency, the social effect of administrative activities.

Sociologists consider public administration in the context of its influence on the ordering of social processes. It is the sociological concept of max Weber's "ideal" bureaucracy as a separate social position.

Political scientists study public administration as an object of influence of political power, and on the other hand can outline the forms of reverse influence of administrative structures on the bodies that form politics in the state.

Psychologists analyze public administration as a complex mechanism of psychological interaction of people. In particular, they note the significant impact of the nature of relations between public servants on the efficiency of

[2] Jean Charles Adre. Review of local government in France / Jean Charles Adre; Translation of the PSP. St. Petersburg, 1994. 148 p.

[3] General information on the administrative law of France. Moscow: publishing house of the Embassy of France in Moscow, 1993. 316 c.

administrative activities, justify ways of coordinating interests in conflict situations.

This list of the influence of individual Sciences on the development of the theory of public administration can be continued, but even in this volume it confirms a very broad subject of research, can be defined as the search for ways to improve the organization and activities of administrative structures. However, we, lawyers, are primarily interested in how knowledge of this interdisciplinary science affect the branch of law, which will be considered in this guide.

It can be generally argued that the theory of public administration reveals objectively existing patterns in the field of administrative activity and based on this formulates appropriate recommendations, and administrative law turns these recommendations into existing legal standards. Thus, despite the severity of the recognition of this by lawyers, administrative law performs a service function in relation to the science of public administration. The task of administrative law is to express the provisions of the science of public administration in a specific legal language in the form of legal norms. That is, we can consider the relationship of these disciplines as a matter of content and form.

One example is the use in legislation of the idea of one of the founders of the science of the administration of the American President and Professor Woodrow Wilson that the change of political leadership should not affect the activities of the permanent administrative apparatus. In Ukraine, this provision is enshrined, in particular, the norm of the article of the Law "on public service", according to which a change in the heads or composition of state bodies may not be the basis for termination of public service by a civil servant in his position on the initiative of newly appointed officials.

A number of theses of the mentioned model of "ideal bureaucracy" by max Weber today seem banal or self-evident "were also originally born in the science of public administration and only after that were fixed by legal norms. Let us name only a few of them: the hierarchy of the organization of administrative institutions; a clear assignment of competence to each institution and, accordingly, the division of competence between institutions; the appointment of civil servants on the basis of professional qualifications, education or examinations; control of employees and their subordination to the requirements of internal organizational discipline[4].

Obviously, there is no need to prove that these ideas are embodied in the current legislation of most countries.

[4] Bradley A., Ewing K. Constitutional and Administrative Law. 14th Ed. Pearson Education Limited, 2007. P. 657.

But here we turn to the opposite-the role of administrative law and its influence on public administration. Fixing in legal norms a certain order of the organization and activity of public administration, the right plays a positive role, establishing rigid frameworks of its functioning. But limitation by law is a positive to a certain limit.

As for administrative activity, its legal overregulation can lead (and leads in many cases) inflexibility of public administration in constantly changing public relations, and, as a consequence, decrease of its efficiency. To this may be added a purely formal application of legal norms by officials, resulting in suffering the interests of private persons, and, accordingly, not satisfied the public interest. To avoid this situation in recent years in foreign countries there is a reverse trend, which experts define as "slipping public administration out of the control of traditional administrative law... this does not mean that officials violate the law, but it is about finding other, more effective forms of public tasks".

This state, unfortunately, is not yet typical for Ukraine. In the national system of law, for example, administrative procedure law is still in its infancy. Administrative law as a whole, since about 1998 (when the Concept of reform of administrative law of Ukraine was developed) is in a state of permanent reform and rethinking of basic categories. A considerable achievement is the radical changes in the administrative and legal doctrine of the last time, but they should be clearly reflected in the existing legal acts and practice of administrative and legal relations.

Concluding a brief review of the relationship between the theory of public administration and administrative law, we note that under all conditions, the first of these Sciences has a significant impact on the majority of administrative and legal institutions. A significant exception is, however, the various types of external control over the public administration, but there are interdependencies[5].

On the other hand, without administrative law, the public administration of any country simply cannot function normally. As noted by the Professor of Ukrainian origin G. Atamanchuk, "the legal aspects of management are fundamental to the practice of management, because their ignorance (or ignoring) often turns management decisions and actions into negligible"[6]. With this thesis, we will proceed to the direct consideration of the foundations of the foreign doctrine of administrative law.

[5] Administrative law of foreign countries: Textbook / E. Kozyrin and M. Shmatova. Moscow; Spark, 2003. P. 288–289.

[6] Yankovsky N. Legal bases of functioning of municipal services in the European countries / N. Yankovsky. Vladivostok: Sphere of housing and communal services, 2007. 340 p.

2. Administrative law in modern legal systems

The historical development of administrative law confirms the above positions regarding the primacy of the science of public administration, which with one name or another and the volume of research preceded the formation of the legal discipline analyzed by us. However, at a certain historical stage, it was the legal aspects of public administration that began to be recognized as essential for its normal functioning.

On the other hand, the formation of administrative law was closely related to the evolution of the state, and, in particular, the form of state government and state (political) regime. After all, it was only with the restriction of the power of monarchs and its full or partial transfer to democratically elected representatives of the people that a detailed legal regulation of the activities of not only individuals, but also the administration was recognized as necessary[7].

The formation of administrative law as a set of legal norms can be divided into three stages:

The origin of administrative and legal regulation, justified by interdisciplinary science "cameralistics" (16–19 century).

The formation of a separate group of legal norms, which was called "police law" (18-early 20th century).

Transformation of police law" into "administrative law "(late 19^{th} – 20^{th} century).

As for the first stage, the science of cameralism can be safely called the forerunner of the modern science of public administration. The Latin term camera means Royal, that is, the state Treasury, and the corresponding science was intended to suggest ways to best fill this Treasury. In other words, research cameralistiv were aimed at the primary satisfaction of the interests of the state, which was associated in the period of absolutism Royal power (here it is worth remembering the famous saying of the French king Louis XIV "the state – it's me").

Cameralistics was an interdisciplinary science encompassing comprehensive knowledge of political, economic, financial, and legal issues. One of the leading Polish administrativists Y. Shrenyavski thus identifies three main areas of research cameralistiv 18–19 century: the first, under the influence of mercantilism, concentrated mainly on economic problems, the second, associated with the concept of natural law, analyzed the problems of state interventionism and protection of the interests of the rich Philistines, the third was associated with the dogmatic concept of law on the system of

[7] Maurer N. Allgemeines Verwaltungsrecht. Verlag C. Beck, Munchen, 2004. S. 115–185.

administrative Consequently, a certain amount of knowledge appears within the framework of cameralism, which according to today's classification can be called administrative and legal, because they concerned both the organization of public administration and the regulation of its relations with various segments of the population.

However, given the considerable and constantly growing volume, the legal aspects of Desk science at a certain stage stood out in a separate discipline called "police law". Its name comes from the Greek term police – city and is literally interpreted as a set of rules that ensure public administration in cities. At first, this industry had a very broad subject of legal regulation, which covered relations in all spheres of public administration: economic and financial activities, education, health, public order. However, over time, the subject of police law began to narrow and in the 19th century with various variations provided, in particular, the following groups of public relations: the protection of the security of the state; ensuring order in public places; activities to regulate public morality[8].

Police law was characterized by the priority application of prohibitions as methods of legal regulation and various forms of state coercion. In other words, the rules of this industry gave the public administration authorities broad powers over private individuals, and the latter were entrusted mainly with the duties of complying with the regulations of the administration. That is, the interests of the state were primary in the norms of police law, the interests of the person-derivatives.

The origin based on police administrative law should be attributed to the end of the 18th century or, more precisely, the period of the French revolution. It was then with the restriction of the power of absolute monarchs by popular representations that the ideas of legislative restriction of public administration developed. This process was also directly related to the adoption of the concept of the rule of law, one of the tenets of which is the observance of legal norms not only by citizens, but also by public authorities, including administrative structures.

Therefore, about the transformation of administrative law in the police can only speak when it sets in its rules, together with rights of public authorities and corresponding duties of individuals and the rights of citizens against the administration and the relevant obligations of the administration towards citizens. It is worth noting that in countries with a de facto totalitarian regime, under the name of administrative law often contained a

[8] Shishkin V. System of administrative jurisdiction in France. Law Of Ukraine. 1996. No. 7. P. 43–46.

set of legal norms; in their content and orientation meet mainly the characteristics of the law of the police.

The transition to administrative law was very aptly defined by the classic of Ukrainian administrative law Professor Y. Paneyko "Administrative law is not possible in those relations in which state bodies are guided solely by the expediency and interests of the state, and are not limited to legal norms, in such relations we can only talk about administrative technology. Deserve then, as the activities of administrative bodies will be normalized by law, when there will be a smooth restriction of ad-ministration and protection of the rights of units-only then can we talk about administrative law".

The recognition of the need to establish legal limits on the activities of the public administration also raised questions about the appropriateness of various forms of control over it. In France, which is considered the birthplace of administrative law, this manifested itself in a special way. Control over the organs of public administration was entrusted not to the ordinary courts, which the new bourgeoisie distrusted because of their bias in the pre-revolutionary period, but to a special system of judicial bodies, which were authorized to hear claims of private persons against the administration. That is, administrative law is formed as a branch that ensures legal equality of citizens and public administration before the bodies of independent judicial control[9].

In summary, we will try to outline the ratio of administrative and police law:

Police law regulates only part of public relations, which is provided by administrative law, that is, it can be argued that the police is under the administrative branch.

Police law is mainly aimed at protecting the interests of the state, the welfare of all, while administrative law, meanwhile, and is an effective way to protect human rights and citizens from illegal actions of administrative bodies.

Administrative law establishes a strict legal framework for the organization and activities of public administration; in police law, these aspects are not decisive.

Administrative law has developed very unevenly both in the temporal and in the territorial dimension. Significant differences have been and remain between the countries belonging to the two most common legal systems: continental (Romano-German) and Anglo-American (common law). Therefore, a more detailed consideration of administrative law will continue in accordance with this division.

[9] Yankovsky N. Legal bases of functioning of municipal services in the European countries / N. Yankovsky. Vladivostok: Sphere of housing and communal services, 2007. 340 p.

The subject of administrative law in the Anglo-American legal system

The history of the development of administrative law in the Anglo-American legal system differs significantly from the continental one. Therefore, the subject of administrative and legal regulation in the countries belonging to this system was formed with certain differences.

If we turn to the authoritative in the United States of America legal dictionary "black's law dictionary", the definition of administrative law in it is quite unusual for us: "Administrative law is a part of the law created by administrative agencies in the form of rules, instructions, regulations and decisions of these agencies" 11. This definition, obviously, is not complete, since it does not take into account the legislative component of the administrative-legal array, but only the Bylaw, but focuses on the key concept for American administrative law "administrative Agency". It is with this concept that the formation of the analyzed industry in the United States is connected.

As you know, the American Constitution of 1787 provided for a clear division of state power into legislative (Congress), Executive (President) and judicial and a certain period of constitutional norms were observed very clearly. However, the need for economic development has led to the need for state intervention in economic processes and the feasibility of creating separate administrative bodies that would not only implement the decisions of the Congress and the President, but also independently regulate the activities of business structures. Formally, this contradicted the principle of separation of powers, because administrative bodies began to perform a legislative function, but practice has proven the effectiveness of this model. The first administrative Agency, the Interstate Commerce Commission, was created one hundred years after the Constitution was approved in 1887, and this year is considered the time of the birth of American administrative law.

Since the creation of administrative agencies did not conform to the constitutional and legal principle of separation of powers, and at one time they were even called the fourth power, which directly interferes with the rights and freedoms of citizens and corporations, the administrative law of the United States emerged as a means of protecting the rights of individuals from the new public authorities. The most important, from the point of view of American lawyers, are the procedural rules that regulate in detail the relations of administrative agencies and individuals. At the same time, administrative law regulates the forms of influence of administrative agencies on citizens and corporations, as well as feedback-the ways of influence of the latter on the decisions taken by the Agency established by the legislation. Defining the subject of us administrative law, there are three main groups of legal norms:

– the norms defining the procedure for adoption by administrative agencies of normative-legal acts(rulemaking);

– the norms establishing the procedure for consideration by agencies of individual administrative cases (adjudication);

– the norms providing judicial review of decisions of administrative agencies (judicial review).

The listed groups of legal norms are undoubtedly administrative and procedural and are characterized by an external direction. This allowed some American authors to argue that the organization of the administrative system and the structure of individual institutions are not subject to the regulation of this industry. This position does not fully reflect the reality. As the American Professor Peter Schuck observes, the course of administrative law usually begins with a consideration of the questions: how and why administrative agencies were created; how they differ from the legislative and judicial authorities; how, in light of these differences and the lack of a constitutional definition of the legal status of agencies, can there be a reasonable delegation of legislative, judicial and Executive power to agencies; formal and informal mechanisms through which the legislative and Executive power control agencies[10].

That is, despite the fact that the internal organization of the administrative agencies do not consider the impact of the object of administrative law, certain aspects of public administration cannot be excluded from the scope of regulation of administrative law, and, especially, the science of administrative law. This is confirmed, in particular, by the content of textbooks on administrative law, in which certain aspects of the organization of administrative agencies (creation and liquidation, appointment and dismissal of managers) are covered in sections on the control of the legislative and Executive authorities by administrative discretion[11].

Despite the above, the prevailing administrative law of the United States is undoubtedly the administrative procedural rules that provide mechanisms for the implementation and protection of the rights of individuals in their relations with public administration. After all, administrative agencies during the 20th century received significant powers, in the implementation of which human rights are often violated. And it is Administrative law as a set of legal norms that acts as a means of limiting the abuses of the administration and protecting the rights of citizens and corporations.

In the UK, the expediency of the existence of administrative law was not recognized for the longest time-until the mid-20th century, when the number of administrative bodies began to grow steadily and, accordingly, began to appear the first comprehensive studies in this area. Taking into account the

[10] Administrative law of foreign countries: Textbook / E. Kozyrin and M. Shmatova. Moscow; Spark, 2003. P. 288–289.

[11] Melnik R. System of administrative law Nimechchini. Publci right. 2011. No. 3. P. 50.

peculiarities of the historical development of this state, the organization of British administrative structures, their forms and the order of judicial and other types of control have significant differences. The administrative law regulating these issues only acquires signs of system.

As the modern British Professor Denis Galligan notes, administrative law, being a set of rules on the ways of exercising government power, answers such questions: what bodies and institutions form the administration and what powers they are endowed with; what is the origin (justification for the existence) of the rules that apply these bodies and institutions; to what extent these rules are implemented in daily practice; to which limits administrative-legal rules and procedures ensure fair treatment of administration to individuals[12].

Considering the administrative-legal doctrine of this country, it is necessary to agree with the thesis that the British administrativists consider the main task of administrative law to maintain a balance between the need to have an effective administrative power and the protection of individuals and society as a whole from the abuse of this power. According to these legal norms, the boundaries of administrative power, its subjects and the procedures for their activities should be established[13].

Summing up a brief overview of the subject of administrative law in the Anglo-American legal system, we note such features that are common to both the United States of America and the United Kingdom, and for other States that use their doctrine (primarily the British Commonwealth): the practical orientation of administrative and legal re-regulation; provision of administrative and legal norms in the vast majority of external relations between public administration and individuals; special emphasis is placed on administrative procedural norms associated with administrative law; protection of interests of citizens and corporations from abuse of power by public administration bodies and their employees is considered as the main purpose of administrative law.

The subject of administrative law in the continental legal system

Administrative law in continental Europe developed more and faster in two countries – France and Germany. Accordingly, all other States to some extent borrowed the achievements of these countries in the analyzed area. In particular, it is possible to find much in common in administrative law of Italy, Spain, Belgium with French, or Austria, Poland, Czech Republic,

[12] O. Mayer, Deutsches Verwaltungsrecht. – Verlag von Duncker & Humbold. Berlin, 1924. S. 69–70.

[13] Maurer N. Allgemeines Verwaltungsrecht. Verlag C. Beck, Munchen, 2004. S. 115–185.

Latvia-with German. Therefore, we will focus on the experience of the two countries that have most led to the formation of modern administrative law.

Like the countries of the Anglo-American legal system, in France of the 19th century, administrative and legal regulation also focused on the procedural aspects of the relations of public administration with private individuals and, especially, the resolution of disputes between them. However, as the French economist Breban notes, in the 20th century such a methodological approach was abandoned, because conceptually it is better to first study the schematic diagram of the management mechanism, and then find out the reasons leading to failures in its work.

Professor Weil, saying that the time will come when before investigating pathology, it is necessary to thoroughly study anatomy, figuratively expressed this idea.

In other words, the issues of the system of public administration bodies, their relations with each other both vertically and horizontally, as well as the internal structure are now considered an integral part of the subject of administrative and legal regulation. In addition, unlike the countries of the Anglo-American legal system, French administrative law traditionally has a special place in the consideration of public service issues.

As already mentioned, the control of public administration in this country has been entrusted to specially create specialized courts, whose activities are also provided mainly by administrative and legal norms.

Consequently, the subject of administrative law in France includes public relations on the organization of administrative structures and their status as subjects of public law; the principles of administrative structures; the legal status of public servants; the organization and functioning of administrative courts, which consider disputes with administrative structures.

In General, administrative law as a set of existing legal norms in France is considered a very positive phenomenon for citizens and the state stabilizes public relations. Believe that it has helped to ensure a proper balance between the rights of the administrative bodies and their responsibilities; between the exclusive prerogatives of the administration and the constraints contained in the General principles of administrative law (on which we will concentrate); between the operational activities of the administration and administrative justice that watching her[14].

German scholars made a particularly significant contribution to the development of administrative law. In this country, the subject of legal

[14] Administrativni proceduri I administrativne sudochinstvo in Nimechchini. Zbirnik Materialiv. Nimetsky Fund of the people's legal spivrobitnitstva in Ukraine. Stephanolithion. Kiev / Bonn, 2006. P. 111–170.

regulation of this industry is closely associated with the public administration (management). As noted by Professor Peter Lehmann, management and administrative law are in a state of mutual independence: on the one hand, according to current views, administrative law binds administrative activities, and, on the other hand, the very existence and content of administrative law depends on what place is occupied and what tasks are solved by administrative bodies according to the Constitution of the state[15].

The analyzed branch in Germany is as clearly structured as possible and consists of two parts: General and special administrative law. General administrative law contains rules that ensure the activities of all administrative bodies, regardless of the scope of competence. Special administrative law regulates certain spheres of functioning of administrative structures. In particular, administrative law in Germany includes: public service law; municipal law; police law; economic administrative law; social assistance law; construction law; environmental law; law of roads and communications; educational law, etc.

The administrative-legal doctrine of Poland concerning the internal division of administrative law is also interesting. In most Polish textbooks we find the thesis that administrative law is conditionally divided into three parts: the law of "organization" (structural and organizational), material law and procedural law. Such a division should answer the questions: who does, what does, how does.

The structural and organizational part includes the norms regulating intra-organizational relations in public administration: it defines the system of bodies, the internal structure of individual bodies, tasks, forms and methods of activity.

The substantive administrative law includes the norms establishing mutual rights and obligations of public administration bodies with private persons (both legal and physical).

Procedural (procedural) administrative law in Poland can be divided into two groups of rules: General (procedures for the functioning of all public administration bodies, as well as the process of judicial control over their activities) and special (features of the implementation of administrative procedures in individual bodies, for example, tax).

As already noted, this division is conditional, but it forms a holistic picture of administrative and legal regulation.

[15] Garner D. Great Britain: Central and local government: TRANS. / D. garner; ed., ed. Preface. G. Barabashev, N. Shulzhenko, V. Entin. Moscow: Progress, 1984. P. 23.

Summarizing this review, we note that the administrative law of the States of the continental (or Romano-German) legal system is a set of rules that regulate two groups of public relations: internal (the system of public administration bodies, their relations, internal structure and legal status) and external (legal relations between administrative bodies on the one hand and citizens and legal entities on the other). Although, according to many leading scientists, internal-organizational relations still play a supporting role in relation to external.

Correlation of administrative law with other branches of law

Administrative law is a classical branch of public law. However, the rules of this branch are closely related to other branches of public law, as well as to private law.

Already quoted French Professor Breban noted that administrative law regulates the organization and functioning of the state administration apparatus, its relationship with individual citizens, but does not regulate:

- part of the activities of administrative structures, which is provided by the norms of civil law (for example, the conclusion of a contract with a private firm for the repair of the administration building);
- policy-making is considered the prerogative of Parliament, government or head of state and falls under the regime of constitutional law. On the other hand, it is often very difficult to distinguish between political decisions directed to public administration bodies and the actual administrative activities by which these decisions are implemented;
- judicial activity to resolve disputes between citizens (civil procedural law) and to bring to justice persons who have committed crimes or misdemeanors (criminal procedural law). However, there are two very important exceptions where regulation is carried out by administrative law: the administration of justice and administrative justice.

Let's try to analyze the correlation of administrative law with the branches that are considered basic in any legal system.

– Constitutional and administrative law.

The Constitution of each country is the main normative source of the structure and activities of the administration, as well as the legal basis for a non-stop process of weighing the General and individual interests, which is the legal content of the implementation of the administration of the duties entrusted to it.23 Consequently, constitutional law establishes the basic principles of the organization of public administration, the place of its subjects in the state mechanism, the legal basis for their creation and relations with the subjects of other branches of government, as well as determines the rights and freedoms of citizens, which are implemented in this area.

Administrative law details and concretizes the norms of constitutional law, while defining the competence of various parts of the system of public administration, forms and procedures of its activities, legal mechanisms for the implementation and protection of the rights and freedoms of citizens and legal entities in administrative relations. According to the above-mentioned division of administrative law array into three conditional parts, video gothicist constitutional and administrative law there is only a relatively structurally-or-hansating law, procedural and substantive law – is the exclusive area we analyze is the industry[16].

– Civil and administrative law.

Civil law regulates mainly property relations, administrative law can regulate them, but with the participation of a mandatory subject-a public administration body (or another authorized subject) or between such subjects. The difference lies in the fact based on what forms of law relations are settled: 'a civil contract with its dispositivity or an administrative act (imperative) or an administrative contract.

In addition, the rules of administrative law actually limit the action of civil law. For example, the government or a state Agency establishes a methodology for calculating the rent for state property, and thus the parties to the contract (a private person and a state-authorized body) cannot set the price in the lease of state property arbitrarily, as is the case in civil law.

– Labor and administrative law.

Labor law, together with administrative law, regulates public service relations. It is considered that the legal regulation of labor in public administration bodies and other employees (for example, drivers or other technical workers) is the exclusive prerogative of labor law. However, in relation to persons who are called public servants, we observe a complex impact of the norms of both industries.

Administrative law establishes a special legal status for public servants, which provides for the following features: recruitment; career; rights and obligations of employees; responsibility of employees; termination of service.

At the same time, public servants are subject to labor law norms common to all employees, for example, which set the time of work and rest.

[16] Bogdanovskaya I. Sources of law at the present stage of development of "Common law": abstract of the thesis for the degree of doctor of law. Specialty 12.00.01 – Theory and history of law and state; History of legal doctrines. Institute of state and law of the Russian Academy of Sciences. Moscow, 2007. P. 40.

It is worth noting that this section applies mainly to the countries of the continental legal system, but in the Anglo-American law of public service as a separate institution of administrative law is not allocated.

– Financial and administrative law.

Financial law in many countries is considered a special part of administrative law, but given the wide scope of regulation it is almost universally singled out separately. The efficiency of both industries is manifested in the joint regulation of the functioning of the financial authorities of the state (state banks, the Ministry of Finance or the tax service). However, if financial law regulates the financial relations on mobilization, distribution and use of state funds, then administrative law regulates the procedure of formation of financial bodies, organization of their work, registration and licensing of commercial banks.

– Criminal and administrative law.

In Ukraine and other CIS countries, administrative law is very close to criminal law due to the existence of a separate institution of administrative responsibility. In most countries of both the continental and Anglo-American legal systems, the rules establishing liability for minor offenses are referred either to a separate branch (the law of law) or to criminal law. After all, this type of legal liability for minor offenses is directed mainly against private individuals, which contradicts the basic idea of administrative and legal regulation on the legal status of public administration.

– Sources of administrative law.

Theorists understand the source of law as a form of external expression of legal norms. In other words, considering the sources, we make an overview of the" location" of the right.

The source base of administrative law is rather specific, and in this context, it is possible to designate such its characteristics:

Variety and large volume of sources of administrative law. They can be acts of all branches of government: legislative (Constitution and ordinary laws), Executive (government, ministries, and local administrations) and judicial (decision of General or administrative courts). In one country, the number of administrative and legal sources cannot be accurately accounted for, but it can be argued that we are talking about at least tens of thousands of documents. The lack of a General codification of acts. Unlike criminal or civil law, where the basic legal norms are summarized in General codified acts, administrative law is not subject to such codification. This is primarily due to the very broad subject of legal regulation and its diversity. However, the codification of certain administrative and legal institutions, such as administrative procedures, is possible and exists in many foreign countries.

The special place of subordinate legal acts issued by public administration bodies in the system of sources of administrative law. Despite the General recognition of the need and priority of regulating public administration by laws, the role of de facto by-laws is very large.

The hierarchy of sources of administrative law is a matter of Convention, and above all it concerns the countries of the Anglo-American legal system, where judicial precedents are essential. However, even in this case, it is necessary to make a generalization of sources, in which each subsequent level is not necessarily lower than the previous ones. So, the sources of administrative law include:

1) Constitutions and constitutional acts[17].

As noted by German scientist X. Penchenier, the Constitution does not contain rules of administrative law in the narrow sense of the word, but forms the basis of activity of administrative bodies defines the important principles which administrative authorities are obliged to follow.

Thus, the ideas laid down in the constitutions of foreign countries become the basis for further administrative and legal regulation. This can be illustrated by the example of the Constitution of the Italian Republic of 1947, a number of provisions which directly affected this branch, establishing in particular: the principle of decentralization of the public administration (article 5); legal liability of the state and its servants for acts the Commission of which violates the rights of others (article 28); the ability to delegate legislative functions of the government: for a limited time and against a specific range of issues (article 76); legislative regulation of education and activity of state institutions (article 97); replacement of positions in public administration according to competition, except for the cases established by the law (article 97); existence of the State Council and other bodies of administrative justice exercising jurisdiction on protection of legal interests concerning actions of state bodies (article SW).

In the United States Constitution of 1787, the rules that can be considered sources of administrative law are much smaller, but they are also the basis for administrative law doctrine, legislation, and enforcement. Given the protective nature of administrative law in this country, let us first recall the provisions of section 2 of article 3 of the American Constitution, which States, "the judicial power shall extend to disputes to which the United States is a party". 26 This rule is a prerequisite for judicial control of the activities of the public administration.

[17] Hilgendorf, Eric: dtv-Atlas Recht / Eric Hilgendorf. – Munchen: Dt. ludschen-buch-Verl. 2. Verwaltungsrecht, Zivilrecht, 2008. S. 265.

As you know, in the UK, there is no written Constitution in the form of a single document, and a number of historical documents that can be conditionally called constitutional acts plays its role. In the context of administrative law, it is appropriate to highlight the bill of rights of 1689, which obliges the authorities to respect and observe the rights of citizens, that is, delineate the boundaries of public administration.

2) Laws and other legislative acts.

The next step on the constitutions – laws. Administrative structures cannot act as they please, but only within the limits defined by law. The legislator makes the most important decisions concerning the state and each individual citizen applying the law.

For example, in the UK, the most important sources of administrative law include: the acts of delegated legislation Act 1946, which established the procedure for the adoption and publication of administrative regulations issued by the authority of the Parliament; the tribunals and investigations Act 1958, regulating the organization and activities of the British administrative justice-administrative tribunals and Ministerial investigations (inspections); The crown claims act 1947, which summed up the practice of the courts in cases of liability of the administration for damage caused by its services[18].

In continental Europe, codes occupy a special place among legislative acts. In particular, here it is possible to name the Code on administrative justice of the French Republic; the Code of administrative proceedings of 1960 of the Polish Republic.

These and other codified acts will be analyzed in more detail in the following sections.

3) Acts of public administration, equivalent to laws.

Given the inability of modern parliaments to fully meet the needs of society in the legislative regulation, in some countries practiced equating acts of public administration (especially governments) laws. For example, in the Italian Republic, it is possible to adopt two types of acts that are equivalent to laws: legislative decrees and decree-laws.

Legislative decrees are issued by the Council of Ministers (the government of Italy) based on a special act on the delegation of relevant powers adopted by Parliament. At the same time, the government may adopt legislative decrees only for a limited time, on specific issues and taking into account the criteria established by law.

[18] Bradley A., Ewing K. Constitutional and Administrative Law. 14th Ed. Pearson Education Limited, 2007. P. 657.

Decrees-laws, unlike legislative decrees, the government adopts on its own initiative, but only in necessary and urgent cases. However, these acts are subject to mandatory subsequent approval by Parliament within two months, if this is not done, the decrees-laws lose their force from the moment of adoption.

These acts, which are equated with laws, often refer to reforms in public administration, thus acting as sources of administrative law.

Interestingly, the borrowing of this institution by other countries has not always stood the test of time. For example, in 1992–1997, such a possibility of adopting acts that are equivalent to laws existed in the Polish Republic, but has never been applied in practice. According to the current Constitution of Poland of 1997, the President on the proposal of the Council of Ministers can issue orders with the force of law only in the case of martial law, if the Sejm (Parliament) cannot hold a meeting.

– International treaty.

This type of source of law is also equated with laws and is considered part of national legislation and in many cases can even be found in the hierarchy of sources a step higher. For example, according to article 55 of the Constitution of the French Republic of 1958, international treaties or agreements duly approved or ratified shall, from the moment of their publication, have a force exceeding that of domestic laws, subject to the application of such Treaty or agreement by the other party. Similarly, article 25 of the Basic Law of the Federal Republic of Germany establishes that the rules of international law are an integral part of the law of the Federation, have precedence over the laws and directly give rise to rights and obligations for the inhabitants of the Federal territory.

– Decision of the constitutional court bodies.

Constitutional courts in countries where they are established and functioning may terminate acts of parliaments, heads of state and government contrary to the provisions of the Constitution. Consequently, the decisions of these courts affect the operation of administrative law and can be considered as sources of administrative law.

– Regulations of governments and Central public administration bodies.

This group is the largest among our list of sources. At the same time, each country has its own peculiarities regarding the form and content of these acts. For example, the President of the United States of America issues Executive orders; Federal departments and agencies issue orders, instructions, rules of procedure; other administrative agencies issue policies, standards, and the like.

– Normative acts of local public administration bodies[19].

This group of sources of administrative law should include normative acts of public administration in the regions and in the field; normative acts of local self-government (for example, statutes of territorial communities). Decisions of the General and administrative courts.

CONCLUSIONS

The article deals with the theory of public administration and its interaction with administrative law, administrative law in modern legal systems: the history of the formation of administrative law in foreign countries, the subject of administrative law in the Anglo-American legal system, the subject of administrative law in the continental legal system, the ratio of administrative law with other branches of law, sources of administrative law.

SUMMARY

As you know, in the countries of the Anglo-American legal system, the decisions of the courts in individual cases can acquire a binding character for subsequent decisions on such issues. Such decisions – judicial precedents are an important source of law, including administrative.

In countries of the continental legal system, judicial precedents are usually not listed among the sources of law. However, in fact, the decisions of administrative courts in continental Europe have a significant impact not only on the practice of resolving the following public law disputes, but also on the legislation and decisions of public administration bodies. Therefore, decisions of administrative (or general) courts are ranked in the following group with the name: Informal sources of administrative law.

Here, in addition to court decisions, include: customs (for example, regarding the right of courts to finally decide all controversial issues of law, traditional for the countries of the Anglo-American legal system); individual decisions of public administration (resonant administrative acts can also have an impact on law enforcement); administrative and legal doctrine (in particular, if the expertise of representatives of the science of administrative law rely on the basis of judicial decisions); posayuridichni norms (social, moral, technical).

[19] Bradley A., Ewing K. Constitutional and Administrative Law. 14th Ed. Pearson Education Limited, 2007. P. 657

The informality of these sources of law means that despite their real impact on the creation and application of administrative law, they cannot be a formal legal basis for the adoption of a specific administrative decision.

REFERENCES

1. Constitution of the French Republic http://zakoni.ucoz.ru/news/konstitucija_francii/2012–03–26–94
2. General information on the administrative law of France. Moscow: publishing house of the Embassy of France in Moscow, 1993. 316 c.
3. Vedel J. Administrative law of France. Moscow: Progress, 1973. 512 p.
4. Ozerska S., Polansky Y. System derzhavna service evropeiskih countries: Great Britain, Rosiyska Federation, Ukraine, Francuska Respublka. Naukovo-analtica dozen / Ozerska S., J. Polansky. Kyiv: Staryi the UAD, 1999. P. 125–130.
5. Jean Charles Adre. Review of local government in France / Jean Charles Adre; Translation of the PSP. St. Petersburg, 1994. 148 p.
6. Code administratif: National government publication: French : 21e. Paris: Dalloz, 1990. 1564 p.
7. Giants N. French experience of housing and communal services. UTILITIES SECTOR. 2008. No. 5. P. 14–18.
8. Yankovsky N. Legal bases of functioning of municipal services in the European countries / N. Yankovsky. Vladivostok: Sphere of housing and communal services, 2007. 340 p.
9. Shishkin V. System of administrative jurisdiction in France. Law Of Ukraine. 1996. No. 7. P. 43–46.
10. Ardan F. France: the state system / L.M. Entin (Rel.ed.), L.S. Filippova (TRANS.). Moscow: Yuridicheskaya Literatura, 1994. 176 p.
11. Control over the activities of the public administration in France. – Moscow: Embassy of France in Moscow, MFA, 1994. 106 p. (Russian-French series of educational and information materials).
12. Legal and material means of administrative activity in France / Bieyi Z. – Verpo M., Lashom Z.-F. Moscow: Ed. FR. Org. Tech. Cooperation, 1994. 150 c.
13. Administrative law of foreign countries: Textbook / E. Kozyrin and M. Shmatova. Moscow; Spark, 2003. P. 288–289.
14. Melnik R. System of administrative law Nimechchini. Publci right. 2011. No. 3. P. 50.
15. Mayer O., Deutsches Verwaltungsrecht. – Verlag von Duncker & Humbold. Berlin, 1924. S. 69–70.

16. Maurer N. Allgemeines Verwaltungsrecht. Verlag C. Beck, Munchen, 2004. S. 115–185.

17. Hilgendorf, Eric: dtv-Atlas Recht / Eric Hilgendorf. – Munchen : Dt. ludschen-buch-Verl. 2. Verwaltungsrecht, Zivilrecht, 2008. S. 265.

18. Administrativni proceduri I administrativne sudochinstvo in Nimechchini. Zbirnik Materialiv. Nimetsky Fund of the people's legal spivrobitnitstva in Ukraine. Stephanolithion. Kiev / Bonn, 2006. P. 111–170.

19. Garner D. Great Britain: Central and local government: TRANS. / D. garner; ed., ed. Preface. G. Barabashev, N. Shulzhenko, V. Entin. Moscow: Progress, 1984. P. 23.

20. Bradley A., Ewing K. Constitutional and Administrative Law. 14th Ed. Pearson Education Limited, 2007. P. 657.

21. Bogdanovskaya I. Sources of law at the present stage of development of "Common law": abstract of the thesis for the degree of doctor of law. Specialty 12.00.01 – Theory and history of law and state; History of legal doctrines. Institute of state and law of the Russian Academy of Sciences. Moscow, 2007. P. 40.

Information about the author:
Nenko S. S.,
Candidate of Law, Associate Professor,
Professor at the Department of Administrative,
Criminal Law and Procedure,
International University of Business and Law
37-A, 49 HGD str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/176-193

SYNERGY OF OPERATIONAL-SEARCHACTIVITIE AND PRE-TRIAL INVESTIGATION

Podobnyi O. O.

INTRODUCTION

In legal science, it is generally recognized that criminal procedural legislation is an important element of the legal and organizational foundations of operative-investigate activities (hereinafter referred to as OSA). Problems of correlation of criminal procedural and operative-investigative legislation were investigated in the works of V. K. Antonov, A. M. Bandurka, V. P. Bakhin, D. I. Bedniakov, R. S. Belkin, M. P. Vodko, V. I. Halagan, V. V. Gevko, M. A. Gromov, Y. M. Groshovy, E. O. Didorenko, A. F. Dolzhenkov, G. O. Dusheyko, E. A. Doly, V. I. Zazytskyy, V. M. Zaykovsky, V. S. Zelenetsky, V. K. Znikin, A. V. Ishchenko, I. P. Kozachenko, V. A. Kolesnik, Ya. Y. Kondratiev, V. S. Kuzmichov, V. A. Lukashov, E. D. Lukyanchikov, M. A. Pogoretsky, M. P. Polyakov, V. L. Regulsky, B. G. RoseVskogo, M. V. Saltyevsky, V. G. Samoilov, O. P. Snigirev, S. M. Stakhovsky, V. M. Tertyshnik, S. A. Schaefer, M. E. Shumilo, O. Yu. Shumilov and others.

In the 1980s, Professor V. G. Samoilov wrote about the need to improve the criminal procedural legislation in order to ensure the effectiveness of the criminal justice system in the fight against criminal crime. In addition to requiring the detection of the crime and the perpetrators by means of operative-investigative measures (hereinafter – OSM), he proposed to supplement the criminal procedural legislation with the provisions on the duty of the body of inquiry to work on the discovery of factual data contributing to the investigation of the subject of evidence and to establish the truth of the case, that is, to solve the problems of criminal justice[1].

In this connection, it is necessary to give the point of view of V. A. Lukashov, who emphasized that the inextricable link between the operative-search and procedural activity is determined by: a) the unity of tasks of the operative-investigative and procedural activity (detection, prevention, termination and investigation of crimes); b) a direct indication in the procedural legislation of the duty of the bodies of the inquiry to carry out the necessary OSA for the detection of crimes and the perpetrators of

[1] Самойлов В. Г. Документирование по делам оперативной разработки : учеб. пособие. Горький: Горьковская ВШ МВД СССР, 1978. С. 9–11.

them, with the aim of preventing and stopping the crimes; c) OSA focus on information support of criminal procedure activities of the bodies of inquiry, pre-trial investigation and judicial authorities; d) the criminal-procedural nature of the grounds for carrying out an OSA; e) established by the law on investigative law the right of judges to authorize the implementation of investigative measures related to the restriction of citizens' rights; f) establishing in the operational-search legislation the procedure for using the results of OSA for the preparation and carrying out of investigative and judicial actions; g) the legislative institution of judicial control over the observance of human and citizen's rights and freedoms in the conduct of OSA; h) the legislative body of prosecutorial supervision and departmental control over the accurate and steady implementation of laws by bodies and officials in carrying out OSA[2].

1. The ratio of operative-investigate and criminal-processual activity

The tasks of criminal justice and OSA as functions of criminal justice, the objective connection of criminal-procedural and operative-investigative activity are conditioned by the following regularities: 1) operative-investigative and criminal-procedural activity is carried out only in connection with violation of norms of criminal law, they are two forms of implementation of the criminal law; 2) the unifying link is criminal law, which is why operational investigative and criminal proceedings have basically common goals and objectives.

Summarizing the available points of view, M. P. Vodko formulated the provisions that stipulate the commonality of OSA and criminal proceedings: first, he and other activities are state-legal means of purposefully protecting the rights and interests of man and society from criminal encroachment ; secondly, the OSA largely borrows in the criminal process a procedural form to establish its own operative-investigative proceedings at a silent level; third, the fact that some provisions of the OSA are contained in the criminal procedure law; fourth, the commonality of both types of state-legal activity, which is the unity of their purpose, purpose and objectives[3]. At the same time, the scientist concludes that criminal procedural norms remain a benchmark, paramount with respect to OSA. The correlation of OSA and criminal process can take the form of dependence of the results of OSA on criminal procedural procedures, which provide access to search and

[2] Лукашов В. А. Проблемы оперативно-розыскной деятельности. Москва: ВНИИ МВД России, 2000. С. 11–12.

[3] Водько Н. П. Федеральный закон "Об оперативно-розыскной деятельности" в системе Российского законодательства: проблемы и решения : монография. Москва: Издательский дом Шумиловой И. И., 2007. С. 61.

intelligence information in the criminal procedural sphere. On the contrary, the efficiency and quality of OSA are adequately reflected in the outcome of the proceedings.

Among the Ukrainian scientists who researched this problem at the monographic level, it is necessary to note, first of all, the achievements of Professor M. A. Pogoretsky, who, due to its genesis in domestic practice, on the basis of the analysis of foreign experience, as well as by investigating the relationship between operational and search activities and criminal activity. process as activity systems, defining the unity of their epistemological nature and the relationship of legal relations in these areas of law enforcement activities, revealed the functional purpose of the OSA in the criminal process[4]. In particular, they have been shown that the interrelationship between OSA and criminal proceedings is the relation of their dependence on each other, which is manifested in the object of their direction, in the purpose and tasks, the means of implementation, in the interaction of their subjects and the results obtained. Each of these activities is a coherent socio-legal entity, which naturally has its own individual internal structure that specifies the general structure inherent in any activity. In the practical work of OSA, the criminal process is, as a rule, a prerequisite for one another to investigate crimes. Operational search activity also performs the information and support function of the criminal process. The epistemological unity of OSA and the criminal process lies in the fact that they are directed to the knowledge of crime through its traces, which is its result, the process of cognition of which is carried out according to the general laws of epistemology through universal methods of cognition, the application of which in each of these activities has its specificity. OSA is one of the means of criminal procedural cognition that enhances the cognitive capacity of the latter.

It should be noted that at the time of substantiation of this thesis, the connection between the operative-search and criminal-procedural legislation was most clearly reflected in the provisions of Art. 65 of the CPC of Ukraine (1960), according to which the protocols with the relevant annexes, drawn up by the authorized bodies according to the results of the OSA, were recognized. A similar law at that time was contained in Part 2 of Art. 8 of the Law "On OSA", which stated that the results of such OSA such as tacit penetration into the dwelling or other possession of a person, removal of information from communication channels, control of correspondence, telephone conversations, telegraph and other correspondence, the use of other technical means the receipt of information, which is decided by the

[4]Погорецький М. А. Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі : монографія. Харків: Арсіс, ЛТД, 2007. 576 с.

court, is drawn up with a protocol with appropriate annexes, which is to be used as a source of evidence in criminal proceedings. However, notwithstanding the progressive provisions of the Law on OSA and the CPC of Ukraine (1960), the requirements that must be laid down in the protocol on conducting an operative-search measure, and that must be properly understood by the relevant annexes to such protocols, specified. Based on this legal situation, two possible directions for further harmonization of the operative-search and criminal-procedural legislation were quite logical. One of these areas envisaged fixing the requirements for the protocol in the operational-search legislation. Proponents of the other – suggested the introduction of amendments to the legal rules of the CPC of Ukraine (1960) on the legislative regulation of the content and requirements of the said protocol[5].

In this legal situation, we maintained the following view: given that the CPC of Ukraine (1960) in Art. 65 gave the operative units the right to carry out RBMs, and the Law "On OSA" lists them in Art. 8 did not contain, but only formulated as the rights of the operational units, offered to consolidate in the operative-search law the list and concepts of all OSA, to determine which of them should be formalized by the protocol, and to prescribe requirements for the protocol and the relevant annexes thereto[6].

Another approach was the idea implemented in the new CPC of Ukraine in the development of legal ideas declared by the Criminal Justice Reform Concept of Ukraine. The last document set out the task of creating a new system of pre-trial investigation with the transformation of the current one from a mechanism of persecution and repression into an institute of protection and restoration of violated human rights, introduction of new standards of activity of the criminal justice system, elimination of duplication, streamlining of functions and creation of a new system of law enforcement. The idea ofthe CCP was to revolutionize the main part of the operative-search activity in the criminal-procedural relations.

It should be noted that the implementation of this legal idea in the criminal procedural legislation, Ukraine actually implemented the concept of "proactive" investigation and for the first time in its history introduced the OSA as an integral element in criminal justice.

The concept of "proactive" investigation is being applied by US police and some Western countries. The model of the pre-trial investigation of

[5]Грошевий Ю., Дідоренко Е., Розовський Б. Кримінально-процесуальні аспекти оперативно-розшукової діяльності. *Право України*. 2003. № 1. С. 73–78.

[6]Подобний О. О. Кримінально-процесуальні основи оперативно-розшукової діяльності органів внутрішніх справ України. *Південноукраїнський правничий часопис*. 2010. № 2. С. 47–50.

undercover, conspiracy-related criminal activity there includes the following elements: b) the stage of operative-investigative investigation, when conducting preliminary inquiry, full investigation, intelligence investigation involves the use of methods constituting both OSAand investigative (criminal-procedural) actions, ie the so-called "intrusive" methods of investigation.

Ukraine has already implemented a number of recommendations of the United Nations Convention Against Transnational Organized Crime before its adoption in 2012 (2012), in particular with respect to such "special investigative methods" provided for in Art. 20 as controlled delivery, "electronic surveillance or other forms of surveillance", "agent operations". It has been implemented in national legislation and a number of other recommendations of the Convention on the Protection of Witnesses (Article 24), mutual legal assistance (Article 18), criminalization of such phenomena as participation in an organized crime group (Article 5), and the laundering of proceeds of crime (Art. 6), corruption (Article 8), etc.

This approach to the improvement of national legislation, based on the recommendations of international legal instruments ratified by Ukraine, was considered acceptable and effective by scientists. At the same time, they warned against the mechanical transfer of models of foreign legal systems to the domestic realities. Scientists in the field of criminal proceedings have noted that the norms of the use of OSA materials in the criminal process of foreign countries are in other models (types) of the criminal process, each of which for centuries has produced its own "restraints" and "balances", which are harmoniously interwoven in all stages of the judiciary taking into account its form, principles, legal status of subjects, etc. These models, including the institute for the use of intelligence and search information in the criminal process of each of the studied countries, have their disadvantages, which are criticized in scientific and practical sources of foreign countries. In view of the above, as well as national traditions, the level of scientific development of this problem, the corruption of the domestic law enforcement and judicial bodies, the mentality, the economic conditions in which our country is located, the level of crime, as well as the state of scientific development of the legal reform of Ukraine, expressed the view that none of the foreign countries can be an ideal model for us today. Therefore, scientists have emphasized that the mechanical transfer to the domestic criminal procedural legislation of the norms of any institute of these countries without coordination with the respective legal institutions of the domestic legislation and their separate norms and taking into account

domestic realities can lead to imbalance: or weakening of human rights measures., or to reduce the effectiveness of the fight against crime[7].

Unfortunately, at this time we have to state that the above forecast of the situation development was justified, and in the second direction – to the greatest extent.

At the present stage of development of Ukraine, criminality activates unlawful activity, and criminal policy and the state at a critical level cannot cope with it. The current criminal situation requires adjustments to the policy of countering criminal offenses[8].

Today, Chapter 21 of Section III of the current CPC of Ukraine is entitled "Covert investigative (detective) actions" (hereinafter – CI(D)A) and provides for their classification into two main groups. The first group is organized in § 2, which is entitled "Interference with Private Communication". The unspoken investigative actions of the aforementioned group include: audio and video control of a person (Article 260); arrest of correspondence (Article 261); review and withdrawal of correspondence (Article 262); removal of information from transport telecommunications networks (Article 263); removal of information from electronic information systems (Article 264); the recording and storage of information obtained from telecommunications networks by technical means and as a result of the removal of information from electronic information systems (265); study of information obtained from the application of technical means (266). The second group is regulated by § 3, entitled "Other types of unspoken investigative (investigative) actions" and combines the following types: survey of publicly inaccessible places, housing or other possession of a person (Article 267); establishing the location of a radio electronic device (Article 268); observation of a person, thing or place (p. 269); monitoring of bank accounts (Article 269–1); audio-video control of the place (Art. 270); control over the commission of a crime (Article 271); performing a specific task of disclosing the criminal activity of an organized group or criminal organization (Article 272); the means used in conducting unspoken investigative (search) actions (Article 273); unspoken receipt of samples required for comparative study (Article 274) the use of confidential cooperation (Article 275).

At the same time, in Part 1 of Art. 256 of the CPC of Ukraine (2012) "Use of results of unspoken investigative (investigative) actions in evidence"

---

[7] Погорецький М. А.Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі : монографія. Харків: Арсіс, ЛТД, 2007. С. 148.

[8] Водько Н. П. Формирование политики противодействия уголовным правонарушениям в Украине (оперативно-розыскной аспект) : монография. Одесса : Фенікс, 2015. С. 561.

states that protocols on conducting of unspoken investigative (investigative) actions, audio or video recordings, photographs, other results obtained through the use of technical means, seized items and documents or copies thereof during their conduct may be used in proving on the same grounds as the results of other investigative (investigative) actions during the pre-trial investigation. Part 2 of the said article states that persons who conducted the CI(D)A or were involved in their conduct may be questioned as witnesses. The interrogation of these persons may be conducted with the secrecy of the information about these persons and with the application of the relevant security measures prescribed by law. Finally, Part 3 establishes a law according to which, in the case of use to prove the results of unspoken investigative (search) actions, the persons whose actions or contacts were carried out may be questioned. Such persons shall be notified of conducting unspoken investigative (search) actions only against them within the period stipulated by Art. 253 of this Code, and to the extent that it affects their rights, freedoms or interests.

These CI(D)A, which in fact previously corresponded to similar OSA, are implemented after criminal proceedings have commenced. The subjects of their conduct of the CPC of Ukraine in 2012 have appointed an investigator and a prosecutor, and the examination of the petitions and the approval of the permission for these actions is carried out by the investigating judge. According to Art. 41 of the CPC of Ukraine operational units carry out both investigative (investigative) actions and CI(D)Ain criminal proceedings on the written order of the investigator, the prosecutor. During the execution of the investigator's instructions, the prosecutor employees of the operational unit use the powers of the investigator. Employees of operational units are not allowed to conduct criminal proceedings on their own initiative or to apply to the investigating judge or prosecutor. The orders of the investigator, the prosecutor to carry out investigative (search) actions and unspoken investigative (search) actions are mandatory for the execution of operational units.

Regarding the previously raised question about the use of the results of OSA (materials on illegal activity collected before the start of criminal proceedings) in the criminal process, the answer is provided by Part 2 of Art. 99 of the CPC of Ukraine "Documents", which states that the materials, which record factual data on illegal activities of individuals and groups of persons, collected by operational units in compliance with the requirements of the Law on OSA, are documents and can be used in criminal proceedings as evidence.

The above-mentioned opinions of scientists and the provisions of modern legislation give reason to claim that in the conditions of legislative

consolidation of the legal structure of the maximum combination of operative-investigative and criminal-procedural types of activity, nevertheless, these state-legal functions remain integral social and legal entities having their individual internal structure. In practical terms, on the basis of the tasks and grounds for conducting it, the OSA will continue to be a prerequisite for criminal proceedings in the investigation of crimes, and will therefore serve as an information and support function of the criminal process. At the same time, joining the structure of the CPC of Ukraine Chapter 21 "Unofficial Investigative (Investigative) Actions" in fact provided for a procedure of investigating crimes in an unofficial form and significantly expanded the cognitive capabilities of the criminal process through the tools of OSA, which will continue to be objectively qualified by the operative division. At the same time, the proposal to consolidate an unspoken investigation into the CPC of Ukraine as an independent form of pre-trial investigation was first introduced by Professor M. P. Vodko[9].

These theoretical provisions allow us to draw some preliminary conclusions about the ratio of operative-investigative and criminal-procedural activities in the current conditions of criminal justice reform. Their common features are: the focus of criminal-procedural and operational-search activities on the protection of human rights and interests; unity of the ultimate tasks of operative-investigative and criminal-procedural law enforcement functions; criminal-procedural regulation of the legal status of operational units and investigative bodies; the focus of operational investigative measures and investigative actions on information and procedural support of criminal justice; unity of guarantees of lawfulness of carrying out unspoken actions in OSA and criminal process. At the same time, the distinctive features of these activities include the independent nature of the legal basis for their functioning, the differences between the beginning and the limits of the proceedings, the subordination of criminal investigative activity to the purpose of the operative-search activity.

2. Theoretical and legal issues of OSA

General theoretical problems of operational development as a separate organizational and tactical form of OSA were laid mainly in the 80's – in the early 90's of the last century in the works of V. G. Bobrov, B. E. Bogdanov, Yu. I. Veselov, A. F. Vozny, E. O. Didorenko, S. S. Ovchinsky and others. Among the Ukrainian scientists who later dealt with this issue in detail, it is

[9] Водько Н. П. О соотношении негласных следственных (розыскных) действий и оперативно-розыскных мероприятий в Украине. *Оперативник (сыщик)*. № 1(34). 20013. С. 6–12.

necessary to distinguish the achievements of O. M. Bandurka, O. F. Dolzhenkov, I. P. Kozachenko. However, most theoretically, at the level of doctoral dissertation, this problem was investigated by V. G. Bobrov, who justified the operative development as a form of OSA. In particular, it allows concentrated use of the whole arsenal of means and methods, to capture all useful information in the fight against crime and to conspicuously carry out the process of "uncovering" the crimes and the search of the perpetrators. With the help of rapid development, it becomes possible to penetrate the mysteries of criminals, establish the facts and circumstances necessary for their disclosure, obtain information, the generalization of which contributes to a more effective placement of silent employees and improve the operational and search tactics[10].

Professor V. G. Samoilov defined operational development as the process of carrying out operative-search measures against a person or group of persons who are reasonably suspected of committing crimes, in order to prevent them, if otherwise impossible or difficult to achieve[11]. B. I. Bogdanov substantially supplemented this definition by proposing an approach according to which it is a process of implicit realization of a set of coordinated, interrelated, prepared on the basis of the best practices, achievements of scientific and technological progress and provisions of the science of management of the OSA in relation to a person or group of persons. Who are reasonably suspected of committing unlawful acts, with a view to preventing or "uncovering" crimes, or in relation to criminals who are being hijacked, with a view to finding them when it is impossible or otherwise possible to achieve the intended purpose it is difficult[12].

Such consideration of the evolution of views on the essence of operational development led to its understanding, which was undoubtedly perceived before the adoption of the CPC of Ukraine in 2012. According to this understanding under operational development was defined as a comprehensive system of authority's carried out by operational units within the established operational investigations (hereinafter – OIC) in respect of a person or group of persons reasonably suspected of preparing or committing crimes for the purpose of preventing or "disclosing" them, as well as in

[10] Бобров В. Г. Правовые и организационные основы оперативной разработки, пути и меры ее совершенствования (вопросы теории и практики): дис. ... д-ра юрид. наук: 21.00.06. Москва: Академия МВД СССР, 1990. С. 3.

[11] Самойлов В. Г. Реализация материалов агентурной разработки : учебное пособие. Минск: МССШМ МВД СССР, 1988. 84 с.

[12] Богданов Б. Е. Организация и тактика оперативной разработки аппаратами БХСС лиц, занимающихся замаскированной преступной деятельностью. М.: Академия МВД СССР, 1983. С. 4.

relation to criminals hiding from an investigation, a court or o serving a criminal sentence, searching for and detaining them, or finding the whereabouts of a missing person if these results are not possible or too difficult to achieve otherwise.

In the conditions of today, with the adoption of the CPC of Ukraine (2012) and amending the Law on OSA, there was a maximum convergence of operative-investigative and criminal-procedural law enforcement functions, which led, as we have already noted, to actual implementation in criminal justice. Or in the form of NA (P) D, provided for in Chapter 21 of the said Code. Regarding the problems of operative development, the grounds for carrying out the OSA in accordance with the mentioned legislative changes remained "the availability of sufficient information that needs to be verified by means of operative-investigative measures and means", only "about the crimes being prepared and the persons preparing crimes". Grounds for information on serious and particularly grave crimes committed by unidentified persons, on persons who committed such crimes, if information on crimes and persons who committed them cannot be obtained in another way, in accordance with the provisions of the CPC of Ukraine (2012) automatically stipulate the initiation of a pre-trial investigation, which, at the same time, according to the decision of the investigator, prosecutor, investigating judge, may be carried out by conducting the CI(D)A, the period of which is traditional for the OSA – six months with the possibility of extending up to twelve and eighteen months. The investigator conducting the pre-trial investigation of a crime, or on his behalf – authorized operational units (Article 246) has the right to conduct the CI(D)A. Moreover, the publicity of such an investigation is ensured in accordance with Part 2 of Art. 253 and Art. 254 of the CPC, which in particular provide for the procedure according to which the specific time of notification to a person that he or she has been subjected to CI(D)A is determined taking into account the presence or absence of threats to the goal of pre-trial investigation, public safety, life or health of persons involved in the conduct of the CI(D)A. The relevant notification of the fact and the results of the CI(D)A must be made within twelve months from the date of termination of such actions, but not later than in the court of indictment.

Obviously, under such conditions, the almost complete identity of the categories "operative development" and "silent investigation" taking into account the expansion of its subjects, operative development (silent investigation) can be defined as a complex system of OSA and CI(D)A, which is carried out in the conditions of impossibility of reaching its tasks otherwise: (a) by operational units within the established for a person or group of persons who are reasonably suspected of serious or particularly

serious crime, with a view to preventing or suspending them in relation to suspects (defendants) hiding from the investigation, the court, serving a criminal sentence, for their search and detention, for establishing the whereabouts of the person who disappeared unknowingly; (b) investigators, prosecutors, on their behalf, operational units, in criminal proceedings against a person or group of persons who are reasonably suspected of committing such crimes, as well as to ensure the safety of court and law enforcement officials, persons involved in criminal proceedings judicial proceedings, their families and close relatives, in order to create the necessary conditions for the proper administration of justice[13]. There are a number of conclusions to be drawn from the above legislative provisions, the formulated definition, the analysis of the practice of OSA and the criminal process.

First, operational development as an organizationally-tactical form of OSA and unspoken investigation unites a complex of OSA and CI(D)A aimed at identifying and recording data on the circumstances of preparation, commission and concealment of crimes, on the composition and role functions of participants in criminal activities., their location, the sequence of the crime (s), the means of counteracting the criminal environment to establish the truth in the case, and the like.

Second, the complexity of the use of OSA and CI(D)Adetermines the priority of their combination in the solution of various tactical tasks in order to achieve the possibility at an early stage of the termination of criminal acts, or to gather complete, sufficient information for the investigation of committed or committed crimes.

Third, operational development, as the highest and sufficiently complex organizational and tactical form of OSA, as well as unspoken investigation, contain the entire arsenal of operational and search activities and are not used in the termination and investigation of any crime, but only of those types and forms, which are of high public danger, are complex in nature in their timely detection and full investigation.

Starting from the above, as well as from the views expressed in the specialized literature, it is possible to formulate tasks that are solved in the framework of operational development (unspoken investigation).

Main tasks: 1) prevention or cessation of serious or especially serious crimes that are being prepared; 2) the establishment of all members of the

[13] Подобный А. А.О единой концепции оперативной разработки и негласного расследования в условиях реформирования оперативно-розыскного и уголовного процессуального законодательства Украины. *Оперативник (сыщик)*. № 2(35). 2013. С. 58–61.

group, the functions of each; 3) documenting specific facts (episodes) of criminal acts; 4) preventing the possibility of the developed to evade the investigation and the court, to counteract the establishment of truth; 5) ensuring the safety of participants in operational search activities, criminal proceedings, court employees and law enforcement agencies, their relatives.

Other tasks include: identifying ways to engage new members, corrupt relationships, creating your own security system and counteracting the law enforcement system; establishment of the fact of existence of "common law", the system of distribution of criminal proceeds, their legalization; ensuring compensation for material damages caused by the actions of the developers and their accomplices; detention of wanted criminals; identifying and eliminating conditions conducive to crime.

From this list of tasks of operational development and unspoken investigation, it follows that in their content they are aimed at solving in general the problems of criminal justice provided for in Art. 2 of the CPC of Ukraine.

Prompt development and unspoken investigation fulfill the complex function of creating optimal conditions for the effective implementation of criminal procedural evidence at all stages of the investigation of crimes and thus ensure the implementation of the principle of inevitability of punishment for the crime. This approach further confirms the objectivity and validity of the concept of OSA theory, supported in the theory of criminal proceedings[14], that they are independent state-legal functions of combating crime and together constitute the unity of criminal justice.

In the conditions of the Criminal Procedure Code of Ukraine in 1960, dogmas about proving as an exclusively criminal procedural function adversely affected practical activity. Due to the dispersion of the subjects of the OSA and the criminal process, the principles of completeness and objectivity of the process of proving were often violated, which was mainly realized not because of their combined efforts, but by the weakened capabilities of the investigator. Therefore, prompt development and tacit investigation as a complex form of complex application of OSA and Emergency Situations should be used in cases where it is impossible to suspend or investigate complex, socially dangerous acts solely by means of RIAs and vigorous criminal-procedural actions.

Central to the theoretical and legal issues of rapid development is undoubtedly the general theoretical issues of operational investigative evidence.

[14] Погорецький М. А. Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі : монографія. Харків: Арсіс, ЛТД, 2007. С. 269–270.

The problem of operational-search documentation was and will continue to be central to the practice of ARDs and, accordingly, unspoken investigations. V. G. Bobrov, B. V. Boytsov, V. M. Burikin, A. F. Vozniy, V. I. Medushevsky, V. G. Samoilov, G. K. Sinilov and others have distinguished themselves with the researches of this subject.

As early as the early 1970s, A. F. Voznyi noted that documentation was closely linked to evidence in criminal proceedings, since both the first and the second had the sole purpose of "uncovering" a crime[15]. In this regard, they also note the unity of documentation and evidence, which consists not only in the fact that they use the same cognitive methods, but also in a single cognitive process for them – gathering, fixing, researching, evaluating information, common purpose, adhering to the criterion of belonging, ensuring its authenticity. In fact, search and search information on the content must meet the same requirements as the evidence. Until recently, before the adoption of the CPC of Ukraine in 2012, the difference between them was the means and methods of collecting and investigating information (actual data), as well as the significance of the results obtained.

Unfortunately, the operative-investigative legislation of Ukraine does not specify the term "documentation". Another approach is demonstrated by the legislators of the Russian Federation, who in Art. 10 of the Federal Law "On search operations" define the documentation as the process of collecting and organizing information, checking and evaluating the results of OSA, as well as the adoption of appropriate decisions by the operational search units, based on the materials of operational accounting. In domestic law, the term in question was applied only in the Law of Ukraine "On Information", which specifies that information about a person is a set of documented or publicly disclosed information about a person, and sources of documented information about a person are issued in his name documents signed it documents, as well as information about the person, collected by state and local self-government bodies within the limits of their powers. Obviously, there is a need to consolidate such a central category as "documentation" and in the domestic law "On OSA".

In the theory of OSA, documentation is usually understood to mean: a) the process of knowing, that is, collecting (detecting), studying (checking), assessing and recording in the documents the actual data about the circumstances of the crime; b) activities enabling the use of information obtained by means of search and search in criminal proceedings[16]. Thus,

[15] Возный А. Ф. Основные положения оперативной разработки : обзорная лекция. Киев: КВШ МВД СССР, 1973. С. 26.

[16] Теория оперативно-розыскной деятельности : учебник / [под ред. К. К. Горяинова, В. С. Овчинского, Г. К. Синилова]. Москва: ИНФРА-М, 2008. С. 422.

documentation forms the basis of proof in criminal proceedings. In the course of documentary evidence, it performs the function of fixing in the procedural documents information which is then used in the evidence in criminal proceedings. Documentation in OSA is not only intended to capture information obtained from the implementation of OSA. It provides for the process of collecting documented information, verifying, evaluating and using it in solving problems of OSA, regulated by departmental normative acts, and in criminal proceedings – in accordance with the procedure established by the CCP.

Therefore, documentation in the OSA can be considered as a process of reflecting in the official documentation of the actual data obtained as a result of the OSA, as well as a process of cognition that has a specific legal nature and is carried out to solve the tasks of this activity, in particular such a central task as the recording of actual data on unlawful acts of individuals and groups, for which the Criminal Code of Ukraine is responsible. Particularly relevant in this connection is the issue of establishing objective truth in documenting. The content of this category is determined by the circle of all circumstances, the establishment of which ensures the fulfillment of the tasks assigned to the OSA. Due to the knowledge of the occurrence of any crime, including those that are elements of organized crime, the content of objective truth is determined by the range of circumstances to be proven in criminal proceedings.

The Criminal Procedure Code of Ukraine in Art. 91 sets out the following circumstances, which are subject to proving in criminal proceedings: 1) the event of the criminal offense (time, place, method and other circumstances of committing the criminal offense); 2) the guilt of the accused in committing a criminal offense, the form of guilt, motive and purpose of committing the criminal offense; 3) the type and amount of the damage caused by the criminal offense, as well as the amount of the procedural costs; 4) circumstances affecting the severity of the criminal offense characterize the person of the accused, aggravate or mitigate punishments which exclude criminal liability or are grounds for closing criminal proceedings; 5) circumstances which are grounds for dismissal from criminal responsibility or punishment; 6) Circumstances confirming that the money, valuables and other property subject to special confiscation were obtained as a result of the criminal offense and / or are the proceeds of such property, or were intended (used) to persuade the person to commit the criminal offense, financing and / or the provision of a criminal offense or compensation for its commission, or is the subject of a criminal offense, including those related to their illicit trafficking, or searched, manufactured, adapted and either used as a means or instrument of a criminal offense;

7) circumstances that are grounds for applying to legal persons measures of criminal nature.

At the same time, according to experts, in separate methods should be reflected and auxiliary circumstances (evidential facts), typical for this category of crimes, by means of which and through clarification of which the main circumstances of the crime – the subject of proof are established[17].

Successful discovery and consolidation of factual data by conducting unspoken investigative (investigative) actions is determined, first of all, by compliance with the requirements that put forward for documentation: legality, timeliness, completeness, and confidentiality.

CONCLUSIONS

Therefore, despite some differences in the individual formulations of documentation, for the time being the specified category is defined as a complex of OSA, mostly silent, aimed at establishing the actual data on the event of the crime and the persons involved in committing it, verifying their accuracy and ensuring their further use. as evidence in criminal proceedings.

In contrast to criminal procedural evidence, documentation in an OSA provides knowledge of both past and present events, as well as those that may occur in the future. At the same time, participants in the ongoing and ongoing processes have the opportunity to directly observe the very fact of the crime, becoming an eyewitness and as a result being questioned as witnesses in criminal proceedings. In this case, direct observation by the participants of the documentation of the investigated event becomes a way of knowing the circumstances of the objective reality. In other cases, the crime is known as an event of the past. Documentation provides knowledge of the event under investigation by recording the actual data reflected in the memory of victims, eyewitnesses, as well as traces left on objects and other material media[18].

The last thesis is sufficiently developed in the theory of OSA at the level of three main areas of documentation of criminal activity developed: 1) identification of persons who are aware of factual data about criminal activity, and ensuring that they can continue to participate in criminal proceedings as witnesses; 2) unspecified identification of objects, documents, substances that may contain information about illegal activities,

[17] Танасевич В. Г. Теоретические основы методики расследования преступлений. *Советское государство и право*. 1976. № 6 С. 91–92; Стрельцов Е. Л. Обстоятельства, подлежащие доказыванию по делам о корыстно-насильственных преступлениях. *Криминалистика и судебная экспертиза*. К.: Киев. НИИСЭ, 1995. Вып. 47. С. 67–69.

[18] Теория оперативно-розыскной деятельности : учебник / [под ред. К. К. Горяинова, В. С. Овчинского, Г. К. Синилова]. Москва: ИНФРА-М, 2008. С. 424.

and ensuring that they can be used after the start of pre-trial investigation as physical evidence; 3) unspoken fixation of the actions of the developed persons with the use of technical means for the subsequent use of the obtained data in the investigation.

During the documentation of organized criminal activity, operational units and pre-trial investigation bodies have to act in two main operational-tactical situations: firstly, in relation to persons for whom there are data on participation in the preparation of a crime (under the scheme "from person to crime"); secondly, about the unidentified perpetrators of the crime (under the scheme "from crime to person").

Working in these areas in certain tactical situations, operative units and pre-trial investigation bodies, as we have already noted, now use almost a single system of unspoken investigative (investigative) actions.

SUMMARY

The article deals with the ratio of operative-search and criminal-procedural activity, as well as theoretical and legal aspects of operational development.

It is proved that in terms of legislative consolidation of the legal doctrine of the maximum combination of operative-investigative and criminal-procedural activities, based on the tasks and grounds for implementation, operative-investigative activity remains a prerequisite and becomes a component of the criminal process in the investigation of crimes. Obtaining, within the framework of criminal proceedings, the authority to conduct unspoken investigative (investigative) actions has greatly expanded the latter's cognitive capabilities through the tools of operational and search activities, which will be used by the operational units in a qualified manner.

The concept of unity (synergy) of operational development and unspoken investigation as a complex system of operative-investigative measures and silent investigative (investigative) actions carried out under conditions of impossibility to achieve otherwise the objectives of criminal proceedings and operative-investigative activity is substantiated: (a) by operational units within the framework of a criminal investigation into a person or group of persons who are reasonably suspected of committing serious or particularly serious crimes, with a view to preventing or terminating them, in dnosno suspect (accused) who are fleeing from the investigation, trial, serving criminal punishment for their investigation and detention; (b) investigators, prosecutors, on their behalf, operational units, in criminal proceedings for the purpose of establishing the perpetrators, as well as for a person or group of persons who are reasonably suspected of committing such crimes, to ensure the safety of participants in criminal proceedings and the necessary conditions for proper the administration of justice.

REFERENCES

1. Бобров В. Г. Правовые и организационные основы оперативной разработки, пути и меры ее совершенствования (вопросы теории и практики): дис. ... д-ра юрид. наук: 21.00.06. Москва: Академия МВД СССР, 1990. 286 с.
2. Богданов Б. Е. Организация и тактика оперативной разработки аппаратами БХСС лиц, занимающихся замаскированной преступной деятельностью. М.: Академия МВД СССР, 1983. 36 с.
3. Водько Н. П.О соотношении негласных следственных (розыскных) действий и оперативно-розыскных мероприятий в Украине. *Оперативник (сыщик)*. № 1(34). 20013. С. 6–12.
4. Водько Н. П. Федеральный закон “Об оперативно-розыскной деятельности” в системе Российского законодательства: проблемы и решения : монография. Москва: Издательский дом Шумиловой И. И., 2007. 131 с.
5. Водько Н. П. Формирование политики противодействия уголовным правонарушениям в Украине (оперативно-розыскной аспект) : монография. Одесса : Фенікс, 2015. 580 с.
6. Возный А. Ф. Основные положения оперативной разработки : обзорная лекция. Киев: КВШ МВД СССР, 1973. 40 с.
7. Грошевий Ю., Дідоренко Е., Розовський Б. Кримінально-процесуальні аспекти оперативно-розшукової діяльності. *Право України*. 2003. № 1. С. 73–78.
8. Лукашов В. А. Проблемы оперативно-розыскной деятельности. Москва: ВНИИ МВД России, 2000. 149 с.
9. Погорецький М. А. Функціональне призначення оперативно-розшукової діяльності у кримінальному процесі : монографія. Харків: Арсіс, ЛТД, 2007. 576 с.
10. Подобний О. О. Кримінально-процесуальні основи оперативно-розшукової діяльності органів внутрішніх справ України. *Південно-український правничий часопис*. 2010. № 2. С. 47–50.
11. Подобный А. А. О единой концепции оперативной разработки и негласного расследования в условиях реформирования оперативно-розыскного и уголовного процессуального законодательства Украины. *Оперативник (сыщик)*. № 2(35). 2013. С. 58–61.
12. Самойлов В. Г. Документирование по делам оперативной разработки : учеб. пособие. Горький: Горьковская ВШ МВД СССР, 1978. 140 с.
13. Самойлов В. Г. Реализация материалов агентурной разработки : учебное пособие. Минск: МССШМ МВД СССР, 1988. 84 с.

14. Стрельцов Е. Л. Обстоятельства, подлежащие доказыванию по делам о корыстно-насильственных преступлениях. *Криминалистика и судебная экспертиза*. К.: Киев. НИИСЭ, 1995. Вып. 47. С. 67–69.

15. Танасевич В. Г. Теоретические основы методики расследования преступлений. *Советское государство и право*. 1976. № 6. С. 91–92.

16. Теория оперативно-розыскной деятельности : учебник / [под ред. К. К. Горяинова, В. С. Овчинского, Г. К. Синилова]. Москва: ИНФРА-М, 2008. 832 с.

Information about the author:
Podobnyi O. O.,
Doctor of Laws, Professor,
Head of the Department of Criminal Law,
Process and Criminalistics,
International Humanities University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/194-216

THEORETICAL AND LEGAL FOUNDATIONS OF ROAD SAFETY

Popovich Ye. M.

INTRODUCTION

Ensuring road safety (hereinafter-ERS) is one of the leading tasks of the state, which is designed to protect the life and health of citizens, economic development, and integration into the global road transport system. The main negative factor of road traffic injuries (hereinafter-RTI) is the death and injury of people.

1. Road Safety as an object of administrative and legal regulation in Ukraine

Today in the world, many factors and factors affect the security of existence and life of humanity. Civil law considers the vehicle (hereinafter-the vehicle) as a source of increased danger (Art. 1187 of the civil code of Ukraine). The state standard of Ukraine 2293–99 provides the following definition of the term danger is a potential source of harm (that is, physical damage and (or) losses caused to human health and (or) property or the environment), so safety is a state of protection of the individual and society from the risk of suffering such damage[1]. The main problem for ERS is road traffic injuries.

ERS is a major global health problem that requires concerted efforts to prevent it effectively and sustainably.

The problems of deterministic ERS a wide range of factors that represent different manifestations of individual-social life: business, Economics, management, psychology, education, law enforcement etc. T. Gurzhiy said that the condition of ERS indirectly affect most areas (fields, sectors), which defines the conditions of human existence, and, thus, largely determines the economic situation, welfare state, welfare of the population. As a social phenomenon, ERS combines a number of components, namely social, legal, institutional, technical, economic, delict and scientific components. The absence of even one of them, according to J. Collier eliminates the content of this phenomenon. So, the problem of ERS is multifaceted and extremely complex. The variety of causes and conditions of an accident requires the

[1] Koller Y. road Safety: the main components. Road safety: legal and organizational aspects: proceedings of IX international. sciences'.- pract. Conf. (M. Kiev, 12 listop. 2014). K., 2014. P. 40–45.

development and implementation of a whole range of measures for the organization of traffic (hereinafter – ERS), improvement of road conditions, technical condition of the vehicle, etc[2]. Soviet-era scientists such as. V. Lukyanov, Y. Shelkov believed that a prerequisite for effective influence on the process of traffic in order to ensure its safety is to identify patterns that determine the impact of various factors on the occurrence of accidents and the severity of their consequences. Before all experts, one way or another associated with urban traffic, there is a difficult problem of creating optimal conditions for the coexistence of transport and urban residents. V. Polukarov and O. Shalatov the solution to the problem of ensuring ERS in cities, as well as increasing the capacity of street networks, was seen in improving the ERS at street intersections.

V. Domashenko at the forefront of the definition of "road traffic" puts such a sign as regulatory regulation. Back in the 70s of the last century, a leading scientist in the field of ERS V. Lukyanov noted that the actions of participants in the process of movement of the vehicle on the roads (road traffic) are determined by special rules[3]. In our previous studies, we have also repeatedly noted the legal component of the road traffic process[4]. Finally, R. Mikhailov defines road traffic as a regulated activity that has a social character.

So, in the simplest sense, traffic is the process of mechanical movement of an individual vehicle. TS is like a small molecule- "a particle of a simple or complex substance capable of independent existence, having its basic properties, which are determined by its composition and structure", which must move according to certain General rules. In the absence of movement at least one moving vehicle will not be an accident (it can be any other incident, but not an accident). However, in the expanded definition of the term "road traffic" we already mean not only the movement of an individual physical or mechanical body (be it a pedestrian or a car), but the totality of all components of the system "driver (person) – car-road-environment" (hereinafter CRE) in their interaction. In this case, the traffic will be two integral components, call them: a) static (material) component-the objects of the material world – the same elements of the system "CRE"; b) dynamic

[2] Beschastny V. Public administration in the field of road safety: Monogr. D.: DUI ldos of them. E. Didorenko, 2011.473 p.: tab., rice.

[3] Mutsko V. Administrative and legal regulation of road safety in Ukraine: dis. ... Cand. Yuri. Sciences: 12.00.07 / NATs. Univ of life and environmental Sciences of Ukraine. K., 2011. 198 sec.

[4] Ryabko A. Social control and its legal forms (questions of theory): dis. ... cand. yuri. sciences: 12.00.01 / In-t legislator. and compare. lawyer. under Rules. RF. Moscow, 1995. 187 p.

(formal) component-relations, in other words, social relations arising from the formation, existence and interaction of these components. In this sense, the organization and process of road traffic does not depend only on the movement of its individual participant, but exists before, during and after its completion, and has a regulated, more or less predictable nature. The regulatory impact is aimed at ensuring all the criteria that we indicated earlier (efficiency, convenience, safety). But, taking into account today the consequences for society of such a negative factor of traffic as accidents, it is safety that should take the first place among other priorities.

Material and non-material goods, about which there are legal relations are the object of legal regulation (law). Types and volume of material and non-material benefits, which constitute the object of legal regulation, are determined by the legislator and are fixed in laws and other normative-legal acts. A. Soldatov supports the opinion that public relations constitute the object of legal regulation[5]. Thus, public relations that are associated with traffic, as well as with its safety is the object of legal regulation. The peculiarity of the sphere of ensuring ERS, as noted by V. Beschastny, is that it is governed mainly by the rules of administrative law, if the issues of settlement of internal and external relations in the process of ensuring ERS are considered. Under the object of administrative and legal regulation, it is necessary to consider the range of public relations arising in connection with the use of material and intangible benefits, as well as the state-power influence of authorized bodies in order to ensure the legal protection of these benefits[6]. In our case, the boon is the ERS and the associated expected outcomes (some of which we listed in the previous paragraph of this unit).

The state ensures the vital activity of society as a system through the use of power, and the law – through regulatory regulation. A. Skakun under legal regulation proposes to understand carried out by the state with the help of law and a set of legal means the ordering of public relations, their legal consolidation, protection and development. Legal regulation covers various aspects of public life, and legal forms acquire the main and most important types of public relations in various spheres of human activity, which require not just a legislative form, but its substantive legal content. In this regard, special legal knowledge about the features and manifestations of law, legal regulation and provision, achieved by jurisprudence, allow us to better

[5] Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-ra yurid. sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

[6] Mutsko V. Administrative and legal regulation of road safety in Ukraine: dis. ... cand. yuri. sciences: 12.00.07 / NATs. Univ of life and environmental Sciences of Ukraine. K., 2011. 198 sec.

understand those social processes that are subject to legal influence from the state and require their legal ordering with simultaneous filling of its legal content.

Administrative and legal relations in the vast majority of cases provide for the subordination of the will of managed objects to the dominant will of the managing entity, which the state in accordance with the established procedure confers the appropriate regulatory powers. Thus, the administrative and legal regulation of the ERS contains the same General features that were given above. We can still talk a lot about the content and some aspects of administrative and legal regulation in General, in order to find out as fully as possible the features of this legal phenomenon in the field of ERS. However, in the administrative-legal theory such works already exist and correspond, in our opinion, to those necessary requirements which are put forward by science today. Given the fact that the object of influence in our case is ERS, we propose to take the author's definition as the basic one. The muck, which is under administrative-legal regulation of road safety believes the process of applying the public authorities of special methods of influence on the functioning of public relations concerning the movement of people and goods by vehicle to minimize risk of harm to the life, health, property and other rights of the members of the movement, as well as reducing the number and severity of accidents. The definition proposed By Y. Kogut deserves attention. Considering the peculiarities of administrative legal regulation of activities of local police, the scientist concludes that the impact of law on social relations in the sphere of administrative activity of its bodies through legal means, through a system which ensures the development of relations in the framework and areas of law. Considering the views given by scholars, we can assume that administrative-legal regulation of road safety the effect of law on social relations in this area (which actually are the subject of such regulation) by legal means, through a system which ensures predictable (expected) the development of relations in the framework and areas of law (functioning of the road with a minimized risk of fatal or other serious consequences).

Therefore, V. Donenko assigns the right (legal regulation) the main place in the regulation of relations in the field of ERS[7]. We also believe that legal regulation is a fundamental condition of relations in the field we are exploring. However, the format in which such regulation should be implemented today in Ukraine needs to be transformed. V. Kovalev sees the definition of the term "transport security" as a state of protection of vital interests of a person and a

[7] Donenko V. Public administration of traffic safety: dis... d-RA yurid. Sciences: 12.00.07 / Dnipropetrovsk. state University EXT. cases'. Dyne., 2012. 436 p.

citizen, society and the state, objects and subjects of transport infrastructure, which ensures its sustainable development, timely identification, prevention and neutralization of real and potential threats to national interests. In The End V. Mutsko proposes the following definition of ERS – is the state of functioning of public relations regarding the movement of people and goods by means of the vehicle, in which the risk of harm to life, health, property and other rights of participants of such a movement is minimized[8]. Suitable is the expression of M. Dolgopolova about the fact that the accident rate is an indicator of the effectiveness of public administration in the organization of activities to ensure ERS. This activity brings together Executive authorities of all levels, law enforcement agencies and individual sectors of the national economy (automotive, road construction, utilities, education, health care, mass media) into a single social system. The legal definition of the term "national security" draws attention to the fact that the legislator sees " the protection of vital interests of man and citizen, society and the state through the provision of this state by the state (article 1 of the Law of Ukraine "on the basis of national security of Ukraine").

In our opinion, the predictability of road safety will depend on the effectiveness and balance of the regulatory impact of the competent subjects of state administration in the field of road traffic. Thus, in 1997, the Swedish Parliament passed a law on road safety, which fixed the so-called "Concept of zero mortality". The law envisioned the launch of a project that brought together a large number of companies engaged in road construction, automotive, safety, services; as well as the introduction of measures to eliminate road deaths and injuries in road accidents in General. The result proved the authors of the concept right-today only three out of 100 thousand Swedes die as a result of an accident. Due to the implementation of the State target program to increase the level of ERS in Ukraine for the period up to 2016 (expired on the basis Of the resolution of the Cabinet of Ministers No. 71 of 05.03.2014), its authors predicted "reduction of accident rates relative to social risk – from 10.6 to 7.5; transport risk-from 33.2 to 18". In other words, subject to the implementation of the planned organizational, legal, engineering and other socio-economic measures, the Government and the public of the country expected positive tangible and intangible results: reducing the number of deaths, economic losses from road accidents, improving transport culture and discipline, confidence of road users in their safety (minimizing risks), reducing social tension in society through large losses from road traffic accidents, and so on.

[8] Mutsko V. Administrative and legal regulation of road safety in Ukraine: dis. ... cand. yuri. sciences: 12.00.07 / NATs. Univ of life and environmental Sciences of Ukraine. K., 2011. 198 sec.

In the draft law of Ukraine "on road traffic and its safety" (in early 2018, the bill was returned for revision to the initiator of the introduction), its drafters offer the following definition of the term " road safety"

– this is the state of the process (system) of road traffic, which determines the degree (level) of protection of road users from accidents and their consequences[9]. Based on the available research of other scientists and specialists, we will try to outline the defining features of ERS. First, it is the level of security – a formal indicator (absolute or relative statistics) of the state of traffic. Secondly, it is a real feeling of society, the population of the country, each individual participant of traffic of protection from threat to become a victim of road accident. Thirdly, it is the defining principle of the organization of traffic as public relations (for example, a person may not always be comfortable to use seat belts while driving in the vehicle, but it is safer, or reducing capital costs by reducing the activities in the design of roads, streets, affecting the ERS, is prohibited). Fourth, it is a systematic activity of authorized entities, which is aimed at identifying and eliminating or leveling (minimizing) the possible risk from negative factors. The latter feature is missing in the definition of the concept of ERS, which is proposed by the authors of the new bill "On road traffic and its safety". But we are sure that this trait is decisive in the end, because the effectiveness of this activity depends on the result of countering RTI[10].

Earlier, we stressed that the effectiveness of the state's influence on the level of ERS is as sufficient as the state applies the tools of influence. At the same time, it is clear that an infinite increase in the volume of such "tools" is impossible. Under such conditions, the most important direction of the current stage of political and legal reforms in Ukraine is the creation of an effective administrative and legal mechanism to combat accidents in transport. The effectiveness of the legal impact on public relations in the field of public administration in the field of transport depends not only on the nature and characteristics of these relations, not only on the correctly found method of legal regulation, but also on the successful use of all elements of such a mechanism by which the state-normative will is translated into the actual behavior of subjects of public relations[11].

[9] Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.

[10] Koller Y. road Safety: the main components. Road safety: legal and organizational aspects: proceedings of IX international. sciences'.- pract. conf. (M. Kiev, 12 listop. 2014). K., 2014. P. 40–45.

[11] Veselov N. Administrative and legal prevention of children's road traffic injuries in Ukraine: monograph. E. Didorenko. Donetsk.: Nord-Press, 2011. 219 p.

Thus, we observe a trend in which the level of protection of road users from dangerous factors (as the main element of the ERS) is a consequence of the activities of a wide range of authorized entities in this area. From the point of view of materialistic philosophy, causation is objective, that is, it exists independently of the consciousness and will of man, and is recognizable. Philosophical category "cause" and "effect" reflect objectively existing causal relationships of the real world. These links are universal. In them, one phenomenon (event, process) is the cause of another phenomenon (effect) – the first precedes the second in time and is a necessary condition or basis for the emergence or change and development of another, i.e., the cause generates an effect. On these philosophical positions the theory of causality (casualness) in criminal law is under construction behind which vision under causal connection it is necessary to understand objectively existing connection between act-action or inaction (the reason) – and socially dangerous consequences (consequence) when action or inaction causes (generates) approach of socially dangerous consequence[12].

If from the position of the theory of causality to look at traffic, it can be taken as a hypothesis that its safety, as organized and regulated by legal norms phenomenon (public relations) are the result of effective or ineffective activities of authorized subjects of public administration in this area, which are the reason on which its condition depends. This interpretation of the ERS phenomenon clearly demonstrates the dependence of its state on the activities of the state, which should take effective measures in this area through the system of public administration. This critical perception of the conditionality of the state and extent of ERS on the performance of ERS actors increases their responsibility for performance.

The analysis of normative legal acts, state programs, strategies, reports, various publications of scientists and specialists in this field of knowledge allowed us to outline the main activities and activities that constitute, relatively speaking, the ERS system. These include:

1) creation of a unified system of accounting for road traffic and its safety;

2) accounting and analysis of information about accidents and their consequences;

3) carrying out examination of road accident, identification of the reasons and the conditions promoting accident rate;

[12] Budnik S. Administrative and legal support of counteraction to offenses in the sphere of traffic safety: dis. ... Cand. Yuri. Sciences: 12.00.07 / Mirage. Acad. UPR. staff. K., 2013. 225 p.

4) standardization and rationing in the field of traffic;

5) organization and management of traffic;

6) clear definition of requirements to road users, their rights and obligations;

7) training of road users;

8) informing road users about the order and conditions of traffic;

9) determination of requirements for admission to the management of the vehicle;

10) increasing the level of structural safety of the vehicle;

11) revision of operational safety requirements to the technical condition of the vehicle;

12) revision of safety requirements for elements of the road network (hereinafter-WDM);

13) establishment of traffic safety requirements at the opening of bus routes, and during the movement of the vehicle carrying out the transportation of organized groups of people, children, persons in respect of which the state protection, dangerous, heavy and oversized cargo;

14) organization of medical support of road safety;

15) the establishment of legal responsibility for violations in the sphere of road traffic;

16) control and supervision in the field of traffic; preventive work among the population to prevent accidents and the like.

The main directions of improving the mechanisms of state management of transport security should be:

– improvement of the regulatory framework and methods of state regulation aimed at minimizing, preventing and preventing risks in the transport industry; implementation of state standards to control the safety of passenger transportation and the state of the vehicle and infrastructure;

– monitoring of compliance with the rules of operation of the vehicle and infrastructure; prevention of terrorist and sabotage activities;

– elimination, as well as forecasting, prevention and minimization of the consequences of man-made and natural disasters;

– improvement of economic and financial mechanisms for ensuring transport security: public-private partnership; promotion of investments in the development of transport infrastructure;

– development of mechanisms of state regulation of motivation of transport carriers to improve the quality and safety of passenger and freight transport services;

The development of a national ERS strategy that provides clear targets and funding for interventions is a key element of sustainable efforts to prevent ERS. Each country should have a ERS strategy that is multispectral

– that is, bringing together agencies responsible for transport, health, law enforcement, education and other important sectors, as well as multidisciplinary-that is, integrating both governmental and non-governmental actors (players). The government should provide sufficient resources for the effective development, implementation and monitoring of the activities included in the national strategy in the field of ERS[13].

Summing up stated in division, we will place accents on key aspects of administrative and legal regulation of ERS in Ukraine at the present stage: first, despite formal decrease in indicators of ERS the situation on roads of Ukraine cannot be considered satisfactory. This requires drawing attention from the society itself to the problems of traffic safety;

secondly, in the author's vision, the administrative and legal regulation of ERS is the impact of law on public relations in this area through legal means, through the system of which the predicted functioning (within the framework and directions defined by the law) of road traffic with a minimized risk of fatal or other severe consequences is provided;

thirdly, today the administrative and legal regulation of ERS should be carried out in the format of priority of public interest and consolidation of efforts of state authorities, local self-government and the whole society on the institutional principles of parity;

fourth, the quintessence in ensuring ERS should be not formal, but real effectiveness of the activities of authorized subjects of public administration in this area[14].

2. Subjects of public administration in the field of road traffic and its safety in Ukraine

According to American experts, transport infrastructure is an important component of maintaining national security, ensuring competitiveness in the world market, as well as economic growth. These experts take a categorical position that the economic importance of land transport cannot be underestimated. Thus, ensuring the safety and effectiveness of this infrastructure and eliminating deficiencies in the maintenance of roads, bridges, timely overcoming of other obstacles in the transit capacity of the system require commitments from the us Congress on the long-term reform of public transport programs, redistribution of powers, as well as building

[13] Peftiev A. Administrative and legal bases of functioning of motor transport: dis. ... Cand. Yuri. Sciences: 12.00.07 / Donets. Yuri. in-t LUVS them. E. O. Didorenko. Donetsk, 2011. 244 p.

[14] Beschastny V. Public administration in the field of road safety: Monogr. D.: DUI ldos of them. E. Didorenko, 2011.473 p.: tab., rice.

partnerships between all levels of government and the private sector of the economy[15].

Thus, road traffic must meet the needs of convenience, comfort, stability (minimally dependent on adverse climatic conditions, landscape features of the terrain), speed and the like. However, the safety of road transport, given the high level of risks that carry the threat of uncontrolled traffic, is the priority component that must be taken into account and ensured in the pursuit of all other benefits (mentioned earlier). The above explains that measures to ensure ERS are inseparably linked with other (in this case, conditionally they can be called basic) relationships that are generated in connection with the process of spatial movement of material objects and people using the vehicle. Given the basic vectors of human progress-profit-making, satisfaction of needs, benefits and benefits, the conditions of ERS actually have a secondary role. This is most noticeable at the individual level (for example, an individual road carrier in many cases tends to neglect additional conditions for the safety of passengers for personal cost savings, etc.). This leads to the fact that the issues of ERS should be provided primarily in the public sector of legal relations. Therefore, the mechanism of ensuring ERS and guarantees of its functioning are determined by the level of development of the legal system and economic stability of a particular country.

Thus, the state policy in the field of road traffic and its safety is mainly administrative and legal in nature and is usually implemented through legislation, policy acts and strategic concepts. But, as V. Beschastny notes, no less important role is also played by the subjects of ensuring ERS, on whose coordinated actions the state of accident rate, the level of transport service of the population, the quality of provision of motor transport services, etc.

In Ukraine, a large number of different ministries and departments are involved in ensuring road safety, each of which practically carries out various activities for the prevention of road accidents, develops internal departmental standards related to the solution of this problem and monitors their implementation. However, the process of road traffic is unique, it cannot be organized, if there is no uniformity of sufficiently high requirements to the state of the vehicle (regardless of ownership, departmental affiliation, territory) and to road users. From here, the system of ensuring ERS receives the national character which essence consists that all state and public organizations, their officials have to provide observance of the national standards directed on

[15] Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-ra yurid. sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

prevention of accident and its consequences, and citizens who act as drivers and pedestrians, to observe the established rules[16].

In the previous paragraph, we found that the effectiveness of these actors determines the state of ERS. The need to improve the existing management system in the field of relations, which is the object of our study has repeatedly become the subject of attention of many Ukrainian experts and scientists. As T. Gurzhiy notes, "a prerequisite for the formation of an effective ERS policy is to determine the range of participants in this process…", subjects of public authority play a pivotal role in shaping the state policy of the ERS[17]. It is the creation of an institutionally separate system of ERS bodies that will help to solve the problems arising in this area.

The basis of motor transport activity, road traffic and its safety is a multifaceted system of public relations. Such relations are intertwined organic web to a number of areas that provide social life of the population, serve the ever-growing needs of humanity, namely: the transport system, urban planning, education, medicine. In addition, these relationships are not permanent. They may continue for a certain period, retain some characteristics as a result of transformation, but constantly experience organizational and other changes. Similar views are expressed by F. Pronevich: "the System of traffic safety management ... it is dynamic because the focus on preventing accidents on roads and minimizing socio-economic damage from road accidents predetermines its continuous improvement and the search for innovative approaches to solving urgent problems"[18]. However, there are certain difficulties regarding the clear definition of the subject composition of the institutional mechanism of the transport system, since it goes beyond the range of state bodies, whose functions include the formation, implementation or control of the execution of state policy in a particular sector of transport, as defined in the regulatory acts defining the status of such bodies (approx. – authors').

The existence of state management in the sphere of ensuring road safety has always existed and must exist in the corresponding relationship in the future, because without it is impossible to achieve the required coordination between a large number of subjects, the main purpose of which is not always

[16] Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-RA yurid.Sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

[17] Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.

[18] On the formation of territorial bodies for the provision of services of the Ministry of internal Affairs: resolution of the KAB. Ministers of Ukraine from 28.10.2015 № 889. Official journal of Ukraine. 2015. 20 listop. No. 90. P. 41.

true of ERS. The vast majority of legal entities (state, municipal and private ownership) is not related to the material and (or) legal responsibility of the state of ERS, so they are not always economically interested in investing in those areas of their activities, which act as components of the ERS. This determines the mandatory participation in these legal relations of public authorities (subjects of management in the field of ERS). Summarizing the views of scientists from different branches of law, there is. The Hetman defines that the state power in Ukraine is a special kind of the power which in an exceptional order solves all-social problems through system of specially created state bodies allocated with the corresponding powers according to their distribution on legislative, judicial and Executive branches of power.

General features inherent in the subjects of management are described in detail in the work of V. Razvadovsky. Among them it is possible to allocate existence of a certain organizational-legal form and state-power powers[19]. In legal science, there are many views on the definition of the subject of management. The variability of such definitions increases if we consider such definitions of the subject in a particular specific area. Thus, A. Stakhov tries to clarify the concept of the security body[20]. Other authors interpret the concepts of subjects of transport management[21]. V. Razvadovsky in his study calls the subjects of state regulation of the transport system[22]. L. Sopilnik proves that the system of subjects of management in the field of ensuring ERS is formed by state (regional, branch) and public (local governments, public organizations) subjects of management[23]. M. Mikityuk formulated the concept of "subject of power relations in the sphere of ERS". B. Burbelo definition of the subject of ensuring ERS carries out thanks to the transfer of more or less general or specific measures (functions) in which

[19] Filippov G. Subjects of public administration in the field of road traffic and its safety (in the conditions of administrative reform in Ukraine in 2014–2016). Legal scientific electronic journal. 2016. No. 2. P. 76–80. URL: http://lsej.org.ua/2_2016/23.pdf (date accessed: 01.06.2017).

[20] Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-ra yurid. sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

[21] On the formation of territorial bodies for the provision of services of the Ministry of internal Affairs: resolution of the KAB. Ministers of Ukraine from 28.10.2015 № 889. Official journal of Ukraine. 2015. 20 listop. No. 90. P. 41. Razvadovsky V. State regulation of the transport system of Ukraine (administrative and legal problems and their solutions): dis. ... d-ra yurid. Sciences: 12.00.07 / NATs. UN-t EXT. cases'. H., 2004. 508 p.

[22] Filippov G. Classification of subjects of public administration in the field of traffic and its safety in Ukraine. Administrative law and process: history, modernity, prospects of development: materials of all-Ukrainian. sciences'.- pract. Conf. (M. Krivoy Rog, 25 birches. 2016). Kryvyi Rih: DEWI Ministry of internal Affairs of Ukraine 2016. P. 178–184.

[23] Donenko V. Public administration of traffic safety: dis. ... d-ra yurid. Sciences: 12.00.07 / Dnipropetrovsk. state University EXT. cases'. Dyne., 2012. 436 p.

this subject realizes its administrative and legal status. Of course, the above list of scientist's vision of this issue is not limited.

In determining the subject of administrative and legal prevention of children's road traffic injuries (one of the directions of ensuring ERS), we focused on the following features: a) they can be state and non-state structures; b) the nature of relations between them-interaction or subordination. From this we can draw certain conclusions: the nature of the activities of these entities somewhat goes beyond purely administrative. We have focused our attention on this with good reason. It should be said that today in Ukraine, in the scientific and legal community, the use of the definition of "public administration" or other terms related to this concept (for example, "public security" in the Law of Ukraine "on National police"). Public administration in the administrative law of European countries is defined as a set of bodies and institutions that exercise public power through the implementation of laws, bylaws and other acts in the public interest[24]. Y. Fomin draws attention to the fact that this understanding is relevant for the Ukrainian legal system, of course, taking into account certain national characteristics. Public administration, as a legal category, has two dimensions: functional and organizational-structural. With a functional approach – this is the activity of the relevant structural entities to perform functions aimed at the implementation of the public interest. Such interest in Ukrainian law recognizes the interest of the social community that is legalized and satisfied with the state. Thus, for example, the performance of a law enforcement function by a public administration means the systemic activity of all structural entities that have such a function. V. Kolpakov believes that it is expedient to designate such activity by the term "public administration". In the organizational-structural approach, public administration is a set of bodies that are created for the implementation (realization) of public power. V. Donenko holds the same position in his research[25].

In Ukrainian law, public power is recognized: a) the power of the people, as a direct democracy; b) state power – legislative, Executive, judicial; c) local self-government[26]. From the above, V. Kolpakov concludes that public power in Ukraine is exercised by such bodies: first, the Verkhovna

[24] Koller Y. road Safety: the main components. Road safety: legal and organizational aspects: proceedings of IX international. sciences'.- pract. Conf. (M. Kiev, 12 listop. 2014). K., 2014. P. 40–45.

[25] Donenko V. Public administration of traffic safety: dis... d-ra yurid. sciences: 12.00.07 / Dnipropetrovsk. state University EXT. cases'. Dyne., 2012. 436 p.

[26] Filippov G. Subjects of public administration in the field of road traffic and its safety (in the conditions of administrative reform in Ukraine in 2014–2016). Legal scientific electronic journal. 2016. No. 2. P. 76–80. URL: http://lsej.org.ua/2_2016/23.pdf (date accessed: 01.06.2017).

Rada of Ukraine (Parliament), the President of Ukraine (as a power institution), local councils; secondly, all bodies and institutions implementing state power (for example, Executive authorities, courts and others); thirdly, all bodies and institutions implementing local self-government. Thus, the public administration is a system of organizational and structural entities that have legally acquired authority for their implementation in the public interest. L. Shevchenko gives more details about the fact that in a broad sense the "public administration", in addition to public authorities, include those bodies that are not part of it organizationally, but perform functions delegated to them (independent public enterprises and individuals during the exercise of their powers of official bodies). In order to form a complete idea of public administration in General, it is appropriate to give some thoughts on this matter to O. Kuzmenko. The scientist says that the modern legal system tends to a generalized term that would cover the content, nature and features of public administration. In classical administrative and legal science, the term "administration", which means Providence, organization, execution, disposal and control (in this part, the author refers to the already existing views of other scientists)[27]. Within the framework of public administration, the priorities of goals and objectives are changing, the technical system is constantly improving, the dominant role is assigned to the achievement of the goal. Thus, public administration is the activity of public administration to satisfy the General public interests of society.

It is the subjects of public authorities in the field of road traffic as official institutions of power that act as the main conductor in ensuring its (traffic) safety, since they are directly responsible for this sphere, determine its directions, develop and activate mechanisms for its implementation. We prefer to support T. Gurzhiy's views that public administration in the field of road safety should be considered as a single institutional and functional mechanism, United by the General goal-to ensure non-stop reduction of accidents and injuries in road transport[28]. Taking into account the above, we propose to consider the subjects of public administration in this industry as a set of bodies and institutions that exercise public power (within their own or delegated competence) by

[27] Budnik S. Administrative and legal support of counteraction to offenses in the sphere of traffic safety: dis. ... cand. yuri. sciences: 12.00.07 / Mirage. Acad. UPR. staff. K., 2013. 225 p.

[28] Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.

implementing laws, regulations and other actions to meet the public interests of society in a convenient, economical and safe traffic.

Based on the analysis of the current legislation, it can be argued that these entities are a branched, multi-level system and, on the one hand, are consolidated around the solution of common tasks, and on the other – carry out specific activities, according to their functions, status, and competence. It is very difficult to make an exhaustive description of all subjects of public administration in this industry, because given the versatility and diversity of legal relations arising in the process of traffic – and in addition – its provision, in addition, related administrative and tort relations-the list of such bodies and institutions may be too detailed.

Attempts to determine the list of the main subjects of ensuring ERS we observe in the works Of V. Beschastny[29], I. Budnik[30], B. Burbel[31], T. Gurzhiya[32], S. Gusarov[33], V. Donenko[34], Y. Koller[35], V. Mutska[36], A. Peftieva[37], V. Razvadovsky[38], L. Sopilnik[39], and the like. Such attempts

[29] Beschastny V. Public administration in the field of road safety: Monogr. D.: DUI ldos of them. E. Didorenko, 2011.473 p.: tab., rice.

[30] Budnik S. Administrative and legal support of counteraction to offenses in the sphere of traffic safety: dis. ... Cand. Yuri. Sciences: 12.00.07 / Mirage. Acad. UPR. staff. K., 2013. 225 p.

[31] Burbelo Y. Organizational and legal bases of interaction of subjects of ensuring traffic safety: dis... Cand. Yuri. Sciences: 12.00.07 / Lugansk. state University EXT. cases to them. E. Didorenko-Lugansk, 2011. 229 p.

[32] Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.

[33] Gusarov S. Administrative and legal bases of administrative activity of the State automobile inspection of Ukraine on ensuring traffic safety: dis... Cand. Yuri. Sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. Kharkiv, 2002. 169 p.

[34] Donenko V. Formation of public administration in the field of road safety. Sciences'. Visn. Dnepropetrovsk. State University EXT. cases'. 2012. No. 1. P. 33–41.

[35] Koller Y. road Safety: the main components. Road safety: legal and organizational aspects: proceedings of IX international. sciences'.- pract. Conf. (M. Kiev, 12 listop. 2014). K., 2014. P. 40–45.

[36] Mutsko V. Administrative and legal regulation of road safety in Ukraine: dis. ... Cand. Yuri. Sciences: 12.00.07 / NATs. Univ of life and environmental Sciences of Ukraine. K., 2011. 198 sec.

[37] Peftiev A. Administrative and legal bases of functioning of motor transport: dis. ... Cand. Yuri. Sciences: 12.00.07 / Donets. Yuri. in-t LUVS them. E. O. Didorenko. Donetsk, 2011. 244 p.

[38] Razvadovsky V. State regulation of the transport system of Ukraine (administrative and legal problems and their solutions): dis. ... d-RA yurid. Sciences: 12.00.07 / NATs. UN-t EXT. cases'. H., 2004. 508 p.

[39] Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-ra yurid. sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

were made by us, as evidenced by previous publications. However, despite the completeness and thoroughness, generality or detail of such variants of systematization of subjects of ensuring ERS, even the last of them, for today, are not completely objective. This situation is taking place in connection with radical changes in the current legislation, the reform of the Ministry of internal Affairs of Ukraine, the Prosecutor's office, local self-government and territorial organization of power in Ukraine.

Summarized the list of entities of public administration in the field of road traffic and its safety can be put in the form that was proposed by B. Burbelo: a) the Verkhovna Rada of Ukraine; b) President; c) CMU; g) the Central state Executive bodies, having authority in the sphere of ensuring road safety, and their territorial divisions; d) local state administrations, their departments and divisions; e) Prosecutor's office; g) the courts of General jurisdiction; c) local authorities. This list of subjects is mainly based on the norms of the Law of Ukraine "on road traffic". However, even this example of systematization of subjects having public authority in the field of traffic can be subjected to constructive criticism. For example, in the wording of the Law of Ukraine "on the Prosecutor's office", which came into force in 2015, article 2 excluded the function of "General supervision" of compliance with the laws... therefore, the role of its bodies in ensuring ERS (in terms of administrative and legal relations), in our opinion, no longer has a direct expression, as before.

The next step in determining the system of subjects of any relationship is their grouping by certain criteria. We believe that this way certainly enriches the knowledge about the subjects, their specific characteristics, but also gives an idea of the system more or less in General terms.

We are inclined to support the position of T. Gurzhiy in this matter[40], but with some corrections of our own. Our modern vision of the classification of subjects of public administration in the field of traffic and its safety is based on the following positions: there are subjects that determine the conditions of traffic and the boundaries of the transport system-institutional; there are entities that ensure the implementation or formation of the state policy of ERS at the national (ensuring ERS is the main or one of the main tasks of such entities) and inter-sectoral levels (such entities affect the state of ERS through the administration of related spheres of public relations), as well as local governments on the implementation of delegated powers (in the future

[40] Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.

– implementation of own extended powers of the community) – as a separate group.

The first group includes the Verkhovna Rada of Ukraine, the President of Ukraine, and the Cabinet of Ministers. In the future, we believe that a special state body should be included in this group – The national Bureau of road safety, which will be entrusted with the main state function of improving and adjusting the unified state policy, as well as unified state target programs in the field of road traffic and its safety by coordinating the activities of ministries, other Central Executive bodies, local governments, enterprises, institutions and public organizations in this matter, and working out relevant legislative changes aimed at improving road traffic and improving its safety.

The second group includes the Ministry of internal Affairs of Ukraine, the national police of Ukraine, the Central Executive authorities that ensure the formation of state policy in the field of transport, road management and management of roads, safety on land transport, education and science, health.

The third group includes such subjects as the Central Executive authorities implementing state policy in the field of supervision (control) in the agro-industrial complex, railway transport, construction, architecture, urban planning and housing and communal services, military administration, which is subordinate to the Armed Forces of Ukraine. The fourth group consists of local governments and their Executive bodies[41].

According to the authors of the new draft law of Ukraine "on road traffic and its safety – the existing system of improving ERS is unsatisfactory, primitive, slow and inaccurate; the relationship between authorities in the field of ERS is far from clear, responsibility and resources are distributed inefficiently[42]. The presence of these obstacles make it impossible to solve other problems, such as: violation by drivers or other participants of traffic rules (speed, drunk driver, ignoring the requirements of road signs, etc.); non-compliance of roads or technical means of traffic regulation with technical norms and rules; rescue and medical services for victims of road accidents are not sufficiently developed, and their solution will facilitate the implementation of a significant part of the knowledge available to date on effective countermeasures to ensure ERS. This is confirmed by the

[41] Filippov G. Classification of subjects of public administration in the field of traffic and its safety in Ukraine. Administrative law and process: history, modernity, prospects of development: materials of all-Ukrainian. sciences'.- pract. Conf. (M. Krivoy Rog, 25 birches. 2016). Kryvyi Rih: DEWI Ministry of internal Affairs of Ukraine 2016. P. 178–184.

[42] Justification of the need to adopt the Law of Ukraine "on road traffic and its safety" / website UPR. ERS MVD of Ukraine; Segalen. the ERS forum. URL: http://www.sai.gov.ua/uploads/filemanager/file/redakc%D1%96ya-zakonu-pro-dorozhn%D1%96i-ruh-ta-iogo-bezpeku-16.12.15-%D1%801.rtf (date accessed: 10.10.2016).

Document of the European conference of Ministers of transport, held on 26.04.2002[43].

CONCLUSIONS

The problems of deterministic ERS a wide range of factors that represent different manifestations of individual-social life: business, Economics, management, psychology, education, law enforcement etc. The condition of ERS indirectly affect most areas (fields, sectors), which defines the conditions of human existence, and, thus, largely determines the economic situation, welfare state, welfare of the population. As a social phenomenon, ERS combines a number of components, namely social, legal, institutional, technical, economic, delict and scientific components. The absence of even one of them eliminates the content of this phenomenon. So, the problem of ERS is multifaceted and extremely complex. The variety of causes and conditions of an accident requires the development and implementation of a whole range of measures for the organization of traffic, improvement of road conditions, technical condition of the vehicle, etc. Before all experts, one way or another associated with urban traffic, there is a difficult problem of creating optimal conditions for the coexistence of transport and urban residents.

The existence of state management in the sphere of ensuring road safety has always existed and must exist in the corresponding relationship in the future, because without it is impossible to achieve the required coordination between a large number of subjects, the main purpose of which is not always true of ERS. The vast majority of legal entities (state, municipal and private ownership) is not related to the material and (or) legal responsibility of the state of ERS, so they are not always economically interested in investing in those areas of their activities, which act as components of the ERS. This determines the mandatory participation in these legal relations of public authorities (subjects of management in the field of ERS). Summarizing the views of scientists from different branches of law, there is. The Hetman defines that the state power in Ukraine is a special kind of the power which in an exceptional order solves all-social problems through system of specially created state bodies allocated with the corresponding powers according to their distribution on legislative, judicial and Executive branches of power.

[43] Road transport past, present and future road safety work in ECMT: Doc. according to item 4 "Road transport" of the draft agenda of the Council of Ministers in Bucharest 26.04.2002 / podgotov. Kare Rumar; (neofits. translated from the English.). Bucharest: Europe. Conf. Council of Ministers, 2002. 35 p.

SUMMARY

We see improvement of functioning of subjects of public administration in the sphere of ERS in the following.

First, the leading subject of the state policy of road safety is the public administration. In our opinion, this successful statement manages to emphasize the leading role of subjects of public administration in the organization and maintenance of ERS.

Secondly, the multilevel and multifunctional nature of the construction, as well as the tendency to transform the system of public administration in a certain area of social and legal relations requires the formulation of some generalized, formulaic model, in particular in the development of General terms, which is of great importance for the unification of legislative and other regulatory acts. Useful in this should be the definition of the main subjects of public administration in the field of road traffic and its safety At the same time, given the frequent changes in the names of ministries, other Executive authorities, their reorganization, it is reasonable to use the generalized lexical formula " Central Executive authority, which ensures the formation (implementation) of state policy in the field…".

Thirdly, it is necessary to clearly delineate the boundaries of the competence of each of the subjects ERS to determine, relatively speaking, the zone of contact between them, with the aim of eliminating duplication and competition, the implementation of unnecessary functions, the formation of additional extra relations, both on a horizontal level between subjects and on the vertical level, in relations with legal entities and individuals in the private sector.

Fourth, the feasibility of harmonization of certain issues and the introduction of permissive nature in the relations between subjects and between subjects of the object of regulation should be based on the principles of ergonomics and saving financial and material resources, categorically excluding manifestations of making money on the issues of road safety and excessive red tape. Recently, in this direction there were positive trends (changes that were due to the adoption of the Law of Ukraine from 05.07.2011 "About modification to some legislative acts of Ukraine concerning elimination of excessive state regulation in the sphere of motor transportations"; formation at the end of 2015 (instead of registration and examination divisions of SAI) as legal entities of public law of territorial bodies on providing services of the Ministry of internal Affairs and so forth).

Fifthly, the need to improve and adjust the unified state policy, as well as unified state target programs in the field of road traffic and its safety requires effective measures to create a Central public administration body (like European countries), which would coordinate the activities of other subjects

of ensuring ERS (Central Executive authorities, local governments, enterprises, institutions and public organizations in this matter).

Sixth, in order to create proper competition and improve the quality of relevant services and performance of work, it is necessary to create conditions for attracting and combining the efforts of a large number of companies, research institutions engaged in road construction, automotive, services. To this end, as called for. V. Donenko needs to strengthen the status of private persons in relations with public administration bodies by fair legal regulation of administrative procedure, introduction of new organizational forms and standards of quality of administrative services, improvement of the mechanism of protection of the rights of private persons in relations with public administration.

Seventh, taking into account the processes of European integration and the implementation of Ukraine's legal framework and international experience not only at the level of legislation, but also the activities of public administration bodies, we consider it appropriate to review and redistribute certain functions in the field of road traffic and its safety between the Central Executive authorities. In particular, against the background of the reform of the Ministry of internal Affairs of Ukraine, the formation of the National police in our country, a number of functions that have traditionally been assigned to the police (traffic police units) over time should be delegated to other subjects of public administration in the field of ERS.

Eighth, as part of the reform of local self-government and territorial organization of power in Ukraine in order to improve the efficiency of ODA and its security in the relevant territory, the approximation of administrative and regulatory impact to meet the transport needs of society, it is necessary to review the volume and balance (compliance with the needs and material capabilities, staffing) redistribution of certain powers from the Central Executive authorities (their territorial divisions) of local governments[44].

It can be stated that significant changes in the way of administrative reform have been taking place in the country recently. The reform of individual power structures-subjects of public administration has a direct impact on relations in the field of road traffic and its safety. What kind of impact this will have on these legal relations in the socio-economic sense will depend on the constant monitoring of the processes that will occur in the state, society, economy, and organizational and legal response to

[44] Filippov G. Subjects of public administration in the field of road traffic and its safety (in the conditions of administrative reform in Ukraine in 2014–2016). Legal scientific electronic journal. 2016. No. 2. P. 76–80. URL: http://lsej.org.ua/2_2016/23.pdf (date accessed: 01.06.2017).

negative factors. Thus, the scientific community still faces the task of studying the problems of ERS, which is to transform the achievements that affect the creation of a new doctrine of administrative law, the formation of the category of "public administration", which in a generalized form can be represented in the form of an updated institutional system in the field of ERS.

Given that the subject of our study is the work of patrol police in ensuring traffic safety, we wish to emphasize that the quintessence of this paragraph are: a) determination of the place of the specified service in an updated system of entities of public administration in the field of road safety in the National police and the interior Ministry in the General division of the patrol police is one of the major providers of implementation or the shaping of public policy road safety at the national level; b) taking into account the processes of European integration, we set the task of reviewing the functions and competence of patrol police units in this area (as noted in the paragraph above).

REFERENCES

1. Road transport past, present and future road safety work in ECMT: Doc. according to item 4 "Road transport" of the draft agenda of the Council of Ministers in Bucharest 26.04.2002 / podgotov. Kare Rumar; (neofits. translated from the English.). Bucharest: Europe. Conf. Council of Ministers, 2002. 35 p.
2. Beschastny V. Public administration in the field of road safety: Monogr. D.: DUI ldos of them. E. Didorenko, 2011.473 p.: tab., rice.
3. Budnik S. Administrative and legal support of counteraction to offenses in the sphere of traffic safety: dis. ... Cand. Yuri. Sciences: 12.00.07 / Mirage. Acad. UPR. staff. K., 2013. 225 p.
4. Burbelo Y. Organizational and legal bases of interaction of subjects of ensuring traffic safety: dis... Cand. Yuri. Sciences: 12.00.07 / Lugansk. state University EXT. cases to them. E. Didorenko-Lugansk, 2011. 229 p.
5. Veselov N. Administrative and legal prevention of children's road traffic injuries in Ukraine: monograph. E. Didorenko. Donetsk.: Nord-Press, 2011. 219 p.
6. Gurzhiy T. state policy of road traffic safety-theoretical, legal and organizational bases: dis. ... doctor. Yuri. Sciences: 12.00.07 / Department of science and innovation of the Ministry of interior of Ukraine. Kiev, 2011. 551 p.
7. Gusarov S. Administrative and legal bases of administrative activity of the State automobile inspection of Ukraine on ensuring traffic safety:

dis... Cand. Yuri. Sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. Kharkiv, 2002. 169 p.

8. Donenko V. Public administration of traffic safety: dis... d-ra yurid. Sciences: 12.00.07 / Dnipropetrovsk. state University EXT. cases'. Dyne., 2012. 436 p.

9. Donenko V. Formation of public administration in the field of road safety. Sciences'. *Visn. Dnepropetrovsk. State University* EXT. cases'. 2012. No. 1. P. 33–41.

10. Koller Y. road Safety: the main components. Road safety: legal and organizational aspects: proceedings of IX international. sciences'.- pract. Conf. (M. Kiev, 12 listop. 2014). K., 2014. P. 40–45.

11. Mutsko V. Administrative and legal regulation of road safety in Ukraine: dis. ... Cand. Yuri. Sciences: 12.00.07 / NATs. Univ of life and environmental Sciences of Ukraine. K., 2011. 198 sec.

12. Justification of the need to adopt the Law of Ukraine "on road traffic and its safety" / website UPR. ERS MVD of Ukraine; Segalen. the ERS forum. URL: http://www.sai.gov.ua/uploads/filemanager/file/redakc%D1%96ya-zakonu-pro-dorozhn%D1%96i-ruh-ta-iogo-bezpeku-16.12.15-%D1%801.rtf (date accessed: 10.10.2016).

13. Peftiev A. Administrative and legal bases of functioning of motor transport: dis. ... Cand. Yuri. Sciences: 12.00.07 / Donets. Yuri. in-t LUVS them. E. O. Didorenko. Donetsk, 2011. 244 p.

14. Filippov G. Classification of subjects of public administration in the field of traffic and its safety in Ukraine. Administrative law and process: history, modernity, prospects of development: materials of all-Ukrainian. sciences'.- pract. Conf. (M. Krivoy Rog, 25 birches. 2016). Kryvyi Rih: DEWI Ministry of internal Affairs of Ukraine 2016. P. 178–184.

15. Filippov G. Subjects of public administration in the field of road traffic and its safety (in the conditions of administrative reform in Ukraine in 2014–2016). *Legal scientific electronic journal.* 2016. No. 2. P. 76–80. URL: http://lsej.org.ua/2_2016/23.pdf (date accessed: 01.06.2017).

16. About modification to some legislative acts of Ukraine concerning elimination of excessive state regulation in the sphere of road transport: the Law of Ukraine of 05.07.2011 No. 3565-VI. *Sheets Of The Verkhovna Rada Of Ukraine.* 2012. No. 5. P. 245.

17. On the formation of territorial bodies for the provision of services of the Ministry of internal Affairs: resolution of the KAB. Ministers of Ukraine from 28.10.2015 № 889. *Official journal of Ukraine.* 2015. 20 listop. No. 90. P. 41.

18. Razvadovsky V. State regulation of the transport system of Ukraine (administrative and legal problems and their solutions): dis. ... d-ra yurid. Sciences: 12.00.07 / NATs. UN-t EXT. cases'. H., 2004. 508 p.

19. Ryabko A. Social control and its legal forms (questions of theory): dis.... Cand. Yuri. Sciences: 12.00.01 / In-t legislator. and compare. lawyer. under Rules. RF. Moscow, 1995. 187 p.

20. Sopilnik L. Theory and practice of administrative and legal regulation of road safety in Ukraine: dis. ... d-ra yurid.Sciences: 12.00.07 / Kharkiv. NATs. UN-t EXT. cases'. H., 2012. 422 p.

Information about the author:
Popovich Ye. M.,
Doctor of Law, Professor,
Professor at the Department of Administrative,
Criminal Law and Procedure,
International University of Business and Law
37-A, 49 HGD str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/217-233

QUALIFYING FEATURES OF THE COMPOSITION OF EVASION FROM PAYMENT OF SINGLE FEE FOR OBLIGATORY STATE SOCIAL INSURANCE AND INSURANCE CONTRIBUTIONS FOR OBLIGATORY STATE PENSION INSURANCE AND DELIMITATION FROM RELATED OFFENCES

Predmestnikov O. G.

INTRODUCTION

The qualifying signs of a crime in criminal law are those that indicate an increased public danger of the act, in comparison with the signs described in the main part of the crime.

1. Qualifying features of the composition of evasion from payment of the single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance

It should be noted that qualifying signs of evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance (part 2 of article 2121 of the criminal code of Ukraine) take place when: first, the same acts are committed by prior agreement by a group of persons; secondly, if they (the same actions) lead to the actual non-receipt of funds in large amounts in the funds of compulsory state social insurance.

The Commission of a crime by prior conspiracy by a group of persons is a form of complicity. The content of this form of complicity by the legislator is defined in part 2 of article 28 of the criminal code of Ukraine. A crime is recognized as committed by a group of persons by prior agreement, if it was jointly committed by several persons (two or more), who in advance, that is, before the beginning of the crime, agreed on its joint Commission. Thus complicity in Art. 26 of the criminal code is defined as deliberate joint participation of several subjects of a crime in Commission of an intentional crime.

In the resolution of the Plenum of the Supreme Court of Ukraine dated 08.10.2004 No. 15 "on some issues of application of the legislation on liability for evasion of taxes, fees and other mandatory payments"[1] it is noted

[1] Kurash Y. Criminal liability for evasion of taxes, fees and other mandatory payments (analysis of the crime): abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences: spec. 12.00.08 "Criminal law and criminology; criminal Executive law". Kharkov, 1998. 18 p.

that such a qualifying sign of intentional evasion of taxes, fees and other mandatory payments (including and for obligatory state social insurance and pensions) as this crime on preliminary arrangement by group of persons, applies only in the case when it participated as coauthors two or more persons who previously to the act, have agreed not to pay taxes, charges, other obligatory payments to the budgets or state trust funds or to pay them in full. On this basis can be qualified, in particular, the actions of officials of the same enterprise, institution, organization, which is responsible for the correctness of the calculation and payment of taxes, fees, other mandatory payments and for the reliability of the relevant reporting (for example, the head and chief accountant of the legal entity-the payer of the insurance premium on compulsory state pension insurance, who sign documents submitted to the social insurance funds).

Analysis p. 9 the foregoing resolution gives reason to conclude that the actions of the heads of enterprises, institutions, organizations, who gave a subordinate official persons order, a command, an order to sign or submit to the bodies of PFCs false (falsified) reports, balances, declarations, payments or to pay insurance premiums for obligatory state pension insurance or to pay them in full, as well as the actions of officials that performed such an illegal order, instruction or order, must qualify according to art. 2121 of the criminal code as the actions of the perpetrators of this crime, committed by prior agreement by a group of persons. Whereas the actions of employees of enterprises, institutions, organizations that are not officials (and therefore are not the subjects of the crime under art. 2121 of the criminal code of Ukraine) and by orders, instructions, orders of officials responsible for the correctness of calculation and timeliness of payment of insurance premiums for compulsory state pension insurance, made false information in the documents of primary accounting or in reports, balances, declarations, calculations, shall be qualified as aiding deliberate evasion of payment of these payments for part 5 of article 27 and for that part of article 2121 of the criminal code of Ukraine, which qualified the actions of an official who gave an illegal order, instruction, order. It is necessary to take into account the provisions of art. 41 of the criminal code of Ukraine concerning legal consequences of execution of the order or the order.

Therefore, we can conclude that the highest court characterizes this aggravating circumstance as the Commission of evasion from payment of single fee for obligatory state social insurance and insurance contributions for obligatory state pension insurance on preliminary arrangement by group of persons the following interrelated factors: a) evasion from payment of single fee for obligatory state social insurance and insurance contributions for obligatory state pension insurance, committed by two or more persons,

b) the existence of a preliminary agreement not to pay insurance premiums for compulsory state social and pension insurance, achieved by them before committing the crime; c) persons involved in the Commission of evasion of payment of insurance premiums for compulsory state social and pension insurance, have all the signs of the subject of this crime.

With observance of the above requirements Lisichansk city court of the Luhansk region was brought to criminal responsibility of the acting Director and the chief accountant of separate division "named G. Kapustina "JSC "Lisichanskugol", which by prior agreement among themselves, in order to evade payment of insurance premiums for compulsory state pension insurance, with full and timely accrual and retention of mandatory insurance premiums, did not ensure timely transfer of mandatory insurance premiums in full to the Pension Fund of Ukraine In the city of Lisichansk[2].

V. Lysenko, P. Melnik, P. Andrushko, Y. Sukhov, Y. Kurash, V. Ostanin express a bit similar to Commission of a crime on preliminary arrangement by a group of persons in the context of evasion from payment of obligatory contributions to the state. Thus, P. Andrushko, commenting on the specified qualifying sign, notes that, as a rule, subjects of this qualified structure of a crime will be the head and the chief accountant of the legal entity-the payer of obligatory contributions to the state, which signed the documents, submitted to state bodies. Thus, the scientist denies possibility of Commission of evasion from payment of obligatory contributions to the state on preliminary arrangement by group of persons physical persons to whom the law is assigned to pay such contributions, including the persons who are engaged in business activity. According to P. Andrushko, individuals who are legally obliged to pay mandatory contributions to the state, and private entrepreneurs pay taxes, fees, other mandatory payments, including on obligatory state social insurance individually, from own incomes, for this reason they cannot be executors (co – executors) evasion from payment of obligatory payments made by other payer of obligatory payments[3].

It seems that the above position is not quite correct, given the following: in accordance with the legislation on compulsory state social insurance, the obligation to pay mandatory payments, keep records of income and expenses, report to the authorized bodies is imposed not only on payers – individuals and private entrepreneurs, but also on their representatives: auditors, relatives, accountants, other authorized persons, and the like.

[2] Lesniewski-Kostareva T. Differentiation of criminal responsibility. Theory and legislative practice. Moscow: NORMA, 2016. P. 230.

[3] Leykina N. Personality of the criminal and criminal responsibility. L.: Publishing house University press, 1968. P. 129.

Evasion of the specified payers of obligatory contributions from their payment on preliminary arrangement with the representatives, in our opinion, it is necessary to qualify as made on preliminary arrangement by group of persons.

As it was noted earlier, the legislator clearly defined that the previous is considered a conspiracy that was achieved by the accomplices of the crime in advance, that is, before the crime began. Y. Kurash does not agree with this position, who believes that the collusion on joint evasion of mandatory payments can be achieved in the process of attempted murder.

The crime, and not only before the beginning of the Commission of the crime. [4] This issue was the object of a rather long scientific discussion at the stage of reforming the legislation on criminal responsibility, which with the adoption of the current criminal code of Ukraine was correctly solved by the legislator.

Deliberate joint participation of several subjects of a crime in Commission of an intentional crime considerably increases public danger of the committed act as at mutual and in advance stipulated help each other criminals have much more opportunities in realization of the criminal intentions, and in some cases only Association of efforts of several criminals gives the chance to make this or that crime as the criminal result is unattainable for each of them separately.

As N. Melnik notes, "the main feature of the community of actions (without-activity) of accomplices is that the actions (inaction) of each of them are an integral part of the overall activity of committing a crime. They act together, contributing to the Commission of the crime. The actions (inaction) of each accomplice under specific circumstances are a necessary condition for the Commission of criminal actions (inaction) by another accomplice, and, in the end, – a necessary condition for the occurrence of the overall criminal result"[5].

In addition to the community of actions (inaction), complicity is characterized by a subjective relationship between the accomplices, namely the General attitude to the act committed by them and the consequences of such an act. The feature of smart time the intent of the partners is to get to know each of them socially dangerous character as their personal acts and the acts of all other partners. At the same time, the accomplices must

[4] Ostanin V. Qualification of evasion from payment of taxes, fees, other obligatory payments: autoref. dis. for the Sciences. The degree candidate. Yuri. Sciences: spec. 12.00.08 "Criminal law and criminology; criminal Executive law". Kiev, 2004. 20 s.

[5] Leykina N. Personality of the criminal and criminal responsibility. L.: Publishing house University press, 1968. P. 129.

consciously foresee the onset or possibility of socially dangerous consequences as the result they desired.

The volitional moment of intent of accomplices is characterized by the desire or conscious assumption of a single criminal result for all accomplices. At the same time, the motives and goals of all accomplices do not necessarily have to be the same.

In the domestic criminal law science and judicial practice, the qualifying sign "the Commission of a crime by prior agreement by a group of persons" is usually understood as coop, that is, when all the accomplices are directly involved in the implementation of the objective side of the evil. This understanding of the specified aggravating circumstance were established by the Soviet criminal law doctrine. Yes, F. Burchak, R. Galiakbarov, P. Telnov justified the position that increasing the degree of public danger of the crime on preliminary arrangement by group of persons is carried out primarily through a combination of the location and the time the efforts of several persons who directly perform the steps described in the article of the criminal code, i.e. act as co-executors. This combination of efforts of several co-perpetrators, according to the authors of this position, significantly increases the effectiveness of the Commission of evil, reduces the possibility of resistance on the part of victims or other persons, contains a threat of causing greater harm to protected interests. On the basis of this aggravating circumstance "committing a crime on preliminary arrangement by group of persons" were asked to define as a crime, which co-involves two or more persons who in advance of the act, have agreed to jointly committed.

A different position is taken by the authors of one of the scientific and practical comments of the criminal code of Ukraine, who note that members of a group of persons by prior collusion can be both perpetrators and accomplices of various types (organizers, instigators, accomplices).

N. Gutorova believes that the approach to understanding "the Commission of evil by prior collusion by a group of persons" as co-execution is insufficiently justified. In her opinion, significant improvements in the degree of public danger of the crimes committed are directly involved a few people, you can only talk about the violent crimes, because in such cases the combined efforts of subcontractors at the place and time facilitates the implementation of the infringement, including by reducing possibilities for resistance by the victim or other persons When committing the same non-violent crimes, including and against the public finances, the presence of several perpetrators cannot be a factor of significant increase in public danger compared to the Commission of an act in complicity with the distribution of roles. For example, the head of the company that avoids taxes, duties and other mandatory payments, participation in the crime accomplice, which will

provide information on “effective schemes of tax evasion” and to encourage their use (creation of fictitious business entities, using Bank accounts located in offshore zones, etc.) is much “healthier” than participation as co-executor of the chief accountant of the enterprise.

In our opinion, this perception is considered aggravating circumstance is the most reasonable, and consequently evasion a single fee for obligatory state social insurance and insurance contributions for obligatory state pension insurance, committed on preliminary arrangement by group of persons, should be understood as such that was committed on a preliminary agreement reached prior to the Commission of the crime two or more persons who are endowed with characteristics of a subject of this crime and acted as on pugilist and roles.

Another qualifying sign of evasion from payment of the single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance is the Commission of the same acts, if they led to the actual non-receipt of funds in large amounts to the funds of compulsory state social insurance.

In accordance with the note to article 2121 of the criminal code of Ukraine, a large amount of funds should be understood as the amount of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance, which are three thousand times or more high than the non-taxable minimum income of citizens established by legislation.

An example of the Commission of the crime we are considering on a large scale is the following. PERSON_2, realizing the criminal intention directed on evasion from payment of insurance premiums on obligatory state pension insurance in Pension Fund of Ukraine, holding a position of the chief accountant of zgp “Radiopribor”, acting intentionally, during the period from February 01, 2013 to August 31, 2013, in violation of requirements of item 1 h. 1 art. 4 of the Law of Ukraine “on collection and accounting of a single contribution to compulsory state social insurance” No. 2464-VI of July 08, 2010 “...the payers of the single contribution are employers-enterprises, institutions, organizations established in accordance with the legislation of Ukraine, regardless of ownership, type of activity and management...”, in violation of the requirements of paragraph 1, part 2 of article 6 of the said Law “... the single contribution payer is obliged to pay the single contribution in full and on time..”.and in violation of the requirements of part 12 of art. 9 of the same Law. “a single contribution is payable regardless of the financial condition of the payer “and”... obligations to pay a single contribution are performed first and have priority over all other obligations, except for obligations regarding the payment of wages (income)..”., being aware of the actual financial condition of the enterprise

and having a real opportunity to pay the debt on payment of insurance premiums for compulsory state pension insurance to the Pension Fund of Ukraine, evaded their payment, by transferring funds to the current accounts of counterparties, re- considered funds for the needs of a commercial nature, which led to the actual non-receipt of funds in the Pension Fund for a total of 2497672,96 UAH.

Thus, as a result of criminal acts PERSON_2 in the Pension Fund of Ukraine actually did not receive funds in large amounts totaling 2497672,96 UAH, which is more than 3000 times higher than the statutory tax-free minimum income of citizens.

Their illegal intentional actions PERSON_2 committed a criminal offense under part 2 of article 2121 of the criminal code of Ukraine, which is qualified as intentional evasion of payment of insurance premiums on compulsory state pension insurance, committed by an official of the enterprise, which led to the actual non-receipt of funds in large amounts to the Pension Fund of Ukraine[6].

In our opinion, the definition of the qualifying feature of the crime under consideration by us with the help of the minimum income of citizens is not quite successful, at least given the fact that this indicator is not stable and is subject to frequent changes, which can lead to confusion and improper application of criminal law.

Criminal consequences and evaluative concepts in them have been studied by different scientists (in particular, P. Berzin, M. Panov, V. Pitetsky, S. Shapchenko), but have not been solved until now. Thus, since 2005-in addition to the criminal code of Ukraine Art. 2121, the tax-free minimum income of citizens (in terms of qualification of crimes or administrative offenses) has changed annually, which was due to economic processes that occurred in the country and the world as a whole. It should be noted that earlier the legislation for all cases applied the tax-free minimum income of citizens, the size of which was 17 UAH. Subsequently, the legislator made the binding of the tax-free minimum income of citizens (in terms of qualification of crimes or administrative offenses) to the minimum wage, and then this indicator began to be calculated on the basis of the subsistence minimum. For all other cases not connected with application of norms of the criminal and administrative legislation regarding qualification of crimes or administrative offenses, the tax-free minimum of the income of citizens remains invariably stable and, as earlier, makes 17 UAH.

[6] Kurash Y. Criminal liability for evasion of taxes, fees and other mandatory payments (analysis of the crime): abstract. dis. for the Sciences. the degree candidate. Yuri. Sciences: spec. 12.00.08 “Criminal law and criminology; criminal Executive law”. Kharkov, 1998. 18 p.

As you can see, during the existence of article 2121 of the criminal code of Ukraine, the concept of a large size when evading the payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance was determined by various criteria and repeatedly changed. The change in the concept of "large size" when evading the payment of mandatory contributions to the state can be traced since the introduction of the legislation of Ukraine on criminal liability of such a feature. For the first time the concept of "large size" was used by the legislator in the text of the disposition of art. 1482 "Evasion from payment of taxes from the enterprises and the organizations" UK of Ukraine of 1960 in edition of the Law of Ukraine of 26.01.1993 for determination of the material size of consequences of a crime. This version of the article did not contain criteria for determining the large amount of damage caused to the state, since at that time this concept was estimated.

In a note to article 1482 "tax Evasion" of the criminal code of Ukraine 1960 in the second edition of 28.01.1994, the legislator determined that a large amount should be understood as the amount of tax, which is a hundred times or more high than the minimum wage, but does not exceed this amount a thousand times. Note to this article in the third edition of 05.02.1997 the large amount of funds that have not been received by the budgets and state trust funds, determined the amount of taxes, fees and other mandatory payments, which is two hundred and fifty times or more higher than the statutory tax-free minimum income of citizens, but, at the same time, did not exceed it a thousand times. This edition of Art. 1482 of the criminal code of Ukraine of 1960 for the first time defined the large size as the qualifying sign of this crime.

After the adoption of the new criminal code, a large amount of evasion of mandatory contributions to the state was contained in a note to article 212 "Evasion of taxes, fees and other mandatory payments", according to which a large amount of funds was understood as the amount of taxes, fees and other mandatory payments, which are three thousand or more times higher than the minimum income of citizens, which is not taxed by legislation. It is this edition and was taken as a basis for determining the large size of the crime under part 2 of article 2121 of the criminal code of Ukraine.

As we can see, since the introduction of the concept of "large scale" in the legislation of Ukraine on criminal liability to determine the amount of damage caused to the state by evasion of mandatory contributions, its quantitative index has increased significantly. From the amount of money, which is one hundred and more times higher than the minimum wage in 1994, to the amount, which is three thousand and more times higher than the statutory non-taxable minimum income of citizens in 2016.

An interesting proposal was once made by V. Vereskov, who proposed to establish, along with the absolute criterion for determining the evaluation concepts (significant, large and especially large sizes), also a relative criterion that would be determined depending on the part of unpaid mandatory contributions, which would make it possible to overcome the existing inequality of conditions of large and small enterprises[7]. With proper economic justification, this approach to deepening the differentiation of responsibility is quite acceptable. Another area of differentiation of liability may be the difference between the payers of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance or methods of evasion. Also, when reforming the legislation on criminal liability in this direction, it is necessary to pay due attention to the discrepancy between the punishment and the losses inflicted.

In addition to aggravating circumstances, article 2121 of the criminal code of Ukraine contains and particularly aggravating circumstances, namely Commission of this crime by a person previously convicted of evasion from payment of single fee for obligatory state social insurance or of insurance premiums on obligatory state pension insurance, as well as evasion, which led to the actual shortfall in funds of obligatory state social insurance funds in especially large sizes, that is, in size, in five thousand times and more exceed statutory non-taxable minimum incomes of citizens (CH. 3 Art. 2121 of the criminal code of Ukraine).

This is particularly aggravating feature of the crimes as "acts stipulated by the first or second part of this article, teach a person previously convicted of evasion from payment of single fee for obligatory state social insurance or of insurance premiums for obligatory state pension insurance", evidence of recidivism in the act of the perpetrator. At the same time, according to art. 34 criminal code of Ukraine recidivism shall be Commission of new intentional crime by a person who has been convicted for a deliberate crime, i.e. a person who already has a conviction for a previous intentional crime and again commits a deliberate crime.

It should be noted that in part 3 of article 2121 of the criminal code of Ukraine we are talking about the so-called special relapse, which occurs when a person, having a criminal record for a certain intentional crime, again commits a deliberate evil-rank, which by its legal nature is identical or, in cases provided by law, homogeneous, that is, in both cases, it encroaches on

[7] Sukhov Y. Evasion of taxes, fees, other mandatory payments: problems of differentiation from related crimes and qualification in aggregate: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences: spec. 12.00.08 "Criminal law and criminology; criminal Executive law". Kiev, 2000. P. 16.

the same object. The increased public danger of a special relapse, due to which it acts as a particularly qualifying sign of evil-rank is that a new act in the form of evasion of payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance, a person commits again after her conviction, prosecution and sentencing for a similar evil-rank.

According to Art. 88 of the criminal code, a person is recognized as having a criminal record from the date of entry into force of the conviction and until the repayment or removal of the criminal record. At qualification of evasion from payment of the uniform contribution on obligatory state social insurance and insurance contributions on obligatory state pension insurance for part 3 of Art. 2121 of the criminal code of Ukraine made by the person earlier judged for such crime, it is necessary to establish the following conditions: a) a conviction for a first offense, not withdrawn and not repaid in accordance with the law, along; b) for a first offense the person is convicted with sentencing and was not exempted from punishment; c) the criminality and punishability of the acts for which we convicted person is not fixed by law. Failure to comply with these conditions allows to qualify the actions of a person under part 3 of article 2121 of the criminal code of Ukraine.

2. Delineation of the composition of evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance from related crimes

The analysis of objective and subjective signs of structure of evasion from payment of insurance premiums on obligatory state pension insurance allows passing to questions of differentiation of this crime from adjacent structures of crimes.

According to the structure of the crime under article 2121 “Evasion of payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance” of the criminal code of Ukraine, such a crime under article 212 “Evasion of taxes, fees (mandatory payments)” of the Code. Such a situation. Marin explains the presence in the criminal legislation of two norms, one of which is General (defines a certain range of acts as crimes), the other-special (distinguishes from this circle of certain actions as independent crimes, providing criminal law regulation), according to which in the criminal law assessment of one socially dangerous act, both these norms claim to be applied. The competition of General and special criminal law norms in the qualification of an act arises through the desire of the legislator to differentiate criminal responsibility, distinguishing from the General norm a

special norm (norms), which provides for a more strict or more lenient responsibility in comparison with the General norm[8].

A somewhat similar differentiation of responsibility for the payment of mandatory payments to the state when evading their payment took place in the case of articles 212 and 2121 of the criminal code of Ukraine. So, the legislator at first allocated from tax relations the relations on obligatory state pension insurance, and subsequently-and all relations on obligatory social insurance and for their criminal legal protection added UK of Ukraine Art. 2121.

Comparison of General and special norms shows that the General norm is large in scope, that is, it covers a larger range of acts than the special one, but the latter contains more features, due to which it stands out from the General one. In cases of competition between General and special norms, the law of the inverse relationship between the object and the content of the concept is clearly manifested. In particular, the concept of a special criminal law norm: with the increase in the number of features enshrined in the law on criminal responsibility, respectively, the range of public relations that are amenable to criminal law protection decreases, and thus-the volume of regulation (impact) of a special criminal law norm.

It is necessary to agree with A. Marin that for the correct resolution of competition of the General and special norms the classification of special norms and, as a consequence, – classification of types of competition within a ratio of the General and special norms is important. Also suitable in the context of the competition of criminal law is the position of M. Svidlov, who proposed three bases for the classification of the following norms: the subject of criminal law regulation, its borders and the object of protection. For the subject, he distinguishes such rules: absolutely special, which include special rules providing for responsibility for attacks, homogeneous with the provided General rule and relatively special, distinguished from several General, as well as those that, although they were isolated from one General rule, but provide for responsibility for behavior that was not previously regulated by criminal law. The object of protection, he highlighted the two types of rules: special rules, has the same General basic object (a single), and special, different in object from the respective total, that is having the primary and secondary object[9].

---

[8] Resolution of the Plenum of the Supreme Court of Ukraine dated 08.10.2004 No. 15 "on certain issues of application of legislation on liability for evasion of taxes, fees and other mandatory payments". URL: http://zakono.rada.gov.ua/cgi-bino./laws/maino.cgi?regno.= v0015700–04.

[9] Sukhov Y. Evasion of taxes, fees, other mandatory payments: problems of differentiation from related crimes and qualification in aggregate: abstract. dis. for the Sciences. the degree candidate. Yuri. Sciences: spec. 12.00.08 "Criminal law and criminology; criminal Executive law". Kiev, 2000. P. 16.

In the criminal law literature, it is unanimously proposed to apply only a special norm in the competition of General and special rules. The correctness of this statement is not in doubt, since the decision of this type of competition is based on the will of the legislator, who, highlighting a special rule, pointed out that in the presence of signs provided for by a special rule, it is a special rule that should be applied. However, if there is no special norm in the act, the General norm is applied instead. Simultaneous qualification under the General and special rules is possible only in the case of a real set of crimes.

When comparing the elements of the composition of the investigated crime with the elements of the crime under article 212 of the criminal code of Ukraine, the main differences can be traced in such elements of the crime, as the direct object and object of the crime[10]. These elements of the specified structures of crimes essentially differ in the contents and properties and are those signs on which it is necessary to distinguish the specified structures of crimes from each other.

The direct object of the crime under article 2121 of the criminal code of Ukraine is the procedure for payment of insurance premiums established by law, which ensures the formation of funds of compulsory state social insurance funds. The direct object of the crime, pre – saw the article 212 of the criminal code of Ukraine is established by the legislation order of taxation of physical and legal entities Subject to avoidance of evil, the rite, under the article. 2121 of the criminal code of Ukraine, there are funds that have been paid as a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance. The subject of the crime under article 212 of the criminal code of Ukraine is money that must be paid to the budgets of various types as taxes, fees (mandatory payments).

The above indicates that article 212 and article 2121 of the criminal code of Ukraine are not in competition with the General and special rules, because they have different objects and subject. However, on the other hand, considering the classification according to subject of legal regulation M. Swallowe, article 2121 of the criminal code of Ukraine under article 212 of this Code is relatively special, that is, one that was separated from General (article 212 of the criminal code) and provides for liability for conduct not previously regulated by the criminal law. So, we come to the conclusion that article 2121 of the criminal code of Ukraine is a relatively

[10] Kurash Y. Criminal liability for evasion of taxes, fees and other mandatory payments (analysis of the crime): abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences: spec. 12.00.08 “Criminal law and criminology; criminal Executive law”. Kharkov, 1998. 18 p.

special article 212 of the criminal code of Ukraine and the qualification is in competition with her. Simultaneous qualification under articles 212 and 2121 of the criminal code of Ukraine is possible only in the case of a real set of crimes.

Evasion from payment of the single contribution on obligatory state social insurance and insurance contributions on obligatory state pension insurance made by the official of the state- state enterprise, institution, organization, intentionally, for the purpose of obtaining any unlawful benefit for itself or another natural or legal person using official position contrary to the interests of the service, causing significant harm or causing serious consequences to the interests of the state protected by law, should be qualified, in our opinion, on the totality of crimes under articles 2121 and 364 of the criminal code of Ukraine. If such actions were committed by an official of a legal entity of private law, regardless of the organizational and legal form, they must be qualified under articles 2121 and 3641 of the criminal code of Ukraine.

In addition, one of the ways to avoid paying a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance is to commit it by forging the relevant documents (reporting, accounting or primary).

One of the ways of evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance is described in the dispositions of articles 358 and 366 of the criminal code of Ukraine. On the other hand, in V. 2121.

The criminal code of Ukraine legislator has not placed any indication on the methods of committing this crime, which are both independent crimes, so the rules of overcoming the competition of part and whole in this case do not apply.

From the content item 14 of the Resolution of Plenum of the Supreme Court of Ukraine of 08.10.2004, No. 15 “On some issues of application of legislation on liability for evasion of taxes, duties and other obligatory payments”, it follows that in the case when the evasion of taxes, duties (mandatory payments) or concealment committed by forgery, the actions of the guilty person must also be qualified under Art. 366 of the criminal code of Ukraine. Thus forgery of documents by the official can be qualified under art. 366 of the criminal code of Ukraine regardless of what responsibility (criminal or administrative) it will be brought for evasion of taxes, fees (mandatory payments). However the Information letter of the Supreme specialized court of Ukraine on consideration of civil and criminal cases no 223-286/0/4-13 from 12.02.2013 g. “About practice of application by courts of separate regulations of the substantive law regarding the

qualification of evasion of tax committed by forgery" contains the following clarification: if the person with the purpose of evasion of taxes, duties (mandatory payments) commits forgery, which is one of the ways for such evasion, the consequences that led to the actual shortfall in the budget or state targeted funds of funds in the relevant dimensions are covered by the provisions of a specific part of the article 212 of the criminal code of Ukraine cannot simultaneously (doubly) be regarded as serious consequences in the understanding of part 2 of article 366 criminal code of Ukraine. In our opinion, a similar approach can be applied in case of evasion of payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance due to the mentioned circumstances.

In addition, when delineating the crime under article 2121 of the criminal code of Ukraine from related encroachments, attention should be paid to the ratio of the investigated crime with the crime under article 192 "Causing major damage by deception or abuse of trust" of the criminal code of Ukraine. M. Panov notes that evasion from payment of obligatory contributions to the state is one of the ways of causing property damage to the state by deception or abuse of trust3. At the same time Y. Sukhov believes that the infliction of property damage by deception or abuse of trust and evasion of mandatory contributions are correlated as General and special rules, but this competition is partial or incomplete. In his opinion, for causing property damage by deception should be involved citizens-entrepreneurs and persons equated to them (auditors, lawyers, private notaries) in the case of non-transfer to the budgets of the amounts of income tax from citizens, since such persons are not officials (office)[11]. According to V. Lysenko and P. Causing property damage by fraud or abuse of trust and evasion of mandatory contributions, do not compete with each other, but only have some similarities [6].

Undoubtedly, insurance premiums for compulsory state social and pension insurance is one of the types of mandatory contributions to the state. And it is money that must be paid as insurance premiums for compulsory state social and pension insurance, is the subject of a crime under article 2121 of the criminal code of Ukraine. The subject of the crime under article. 192 of the criminal code of Ukraine, there are other means to be paid (for services provided, use of property). In addition, the object of causing

[11] Sukhov Y. Evasion of taxes, fees, other mandatory payments: problems of differentiation from related crimes and qualification in aggregate: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences: spec. 12.00.08 "Criminal law and criminology; criminal Executive law". Kiev, 2000. P. 16.

property damage by deception or abuse of trust may be the property from which the illegally obtained benefit.

Significant differences between articles 2121 and 192 of the criminal code of Ukraine can be traced in other elements of the crime (in particular, the object and the objective side), which indicates the correctness and validity of the position. V. Lysenko and P. Melnik concerning the ratio of these compositions of crimes.

Therefore, the crimes provided by articles 192 and 2121 of the criminal code of Ukraine are not in competition. In aggregate, they can be qualified only if an individual-payer of insurance premiums for compulsory state pension insurance simultaneously deceives the state and does not pay other payments, for example, for electric energy, utilities, etc. The main criterion for distinguishing the crimes provided for in these articles is the signs that are directly indicated in the dispositions of criminal law.

CONCLUSIONS

The article is devoted to a comprehensive and systematic study of the issues of criminal and legal protection of social and pension insurance. The paper considers the Genesis and foreign experience of criminal liability for evasion of payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance, as well as analyzes the elements of the composition of this act (article 2121 of the Criminal code of Ukraine). The author analyzes the qualifying features of the composition of evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state-not pension insurance, as well as its delimitation from related crimes. According to the results of the study, a number of proposals were developed to improve criminal liability for a crime under article 2121 of the Criminal code of Ukraine.

SUMMARY

1. Qualifying signs of the crime provided by Art. 2121 of the criminal code of Ukraine, is the Commission of intentional evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance, committed by prior agreement by a group of persons or, if the same acts have led to the actual non-receipt of funds in large amounts to compulsory state social insurance funds (part 2). Under the Commission of this crime on preliminary arrangement by group of persons should understand that that was committed on a preliminary agreement reached prior to the Commission of the crime

two or more persons, made provided by the features of the subject of this crime, and who acted as pavilast and roles.

Especially qualifying signs of the crime provided by Art. 2121.

The criminal code of Ukraine, is the Commission of this act by a person previously convicted for evasion of payment of a single contribution to compulsory state social insurance or insurance contributions to compulsory state pension insurance, as well as evasion, which led to the actual non-receipt in the funds of compulsory state social insurance funds in particularly large amounts (part 3). At qualification of relapse evasion from payment of the uniform contribution on obligatory state social insurance and insurance contributions on obligatory state pension insurance transferred by part 3 of Art. 2121 UK of Ukraine, it is necessary to consider the outstanding criminal record of the person for this crime.

Subject to the adoption by the legislator out of offers on formation of structure of the crime provided part 1 of article 2121 of the criminal code of Ukraine, the formal definitions of the notes to this article for the future should be associated only with the Commission of evasion from payment of single fee for obligatory state social insurance and insurance contributions for obligatory state pension insurance in large and extra-large sizes.

2. Having studied questions of competition of norms at qualification, and also having analyzed such type of competition of criminal law norms as competition of the General and special norm, we can claim that article 2121 of the criminal code of Ukraine is a special article 212 of the criminal code of Ukraine. At the same time, article 364 and article 2121 of the criminal code of Ukraine do not correspond as a General norm and a special one, and are not in competition. Certain features have the qualification of evasion from payment of a single contribution to compulsory state social insurance and insurance contributions to compulsory state pension insurance by means of forgery.

Crimes under articles 192 and article 2121 of the criminal code of Ukraine are not in competition. In aggregate, they can be qualified only if an individual-payer of insurance premiums for compulsory state pension insurance simultaneously deceives the state and does not pay other payments, for example, for electric energy, utilities and the like.

REFERENCES

1. Andrushko P. Criminal law of Ukraine; edited By S. Matishevsky, S. Yatsenko, P. Andrushko. Kyiv: Yurinkom Inter 2015. P. 512.

2. Kozachenko I., Kostareva T., Kruglikov L. Crimes with qualified structures and their criminal-legal assessment. Yekaterinburg: publishing house of the Ural state University. Academy, 2014. P. 9.

3. Kurash Y. Criminal liability for evasion of taxes, fees and other mandatory payments (analysis of the crime): abstract. dis. for the Sciences. the degree candidate. Yuri. Sciences: spec. 12.00.08 “Criminal law and criminology; criminal Executive law”. Kharkov, 1998. 18 p.

4. Lesniewski-Kostareva T. Differentiation of criminal responsibility. Theory and legislative practice. Moscow: NORMA, 2016. P. 230.

5. Leykina N. Personality of the criminal and criminal responsibility. L.: Publishing house University press, 1968. P. 129.

6. Resolution of the Plenum of the Supreme Court of Ukraine dated 08.10.2004 No. 15 “on certain issues of application of legislation on liability for evasion of taxes, fees and other mandatory payments”. URL: http://zakono.rada.gov.ua/cgi-bino./laws/maino.cgi?regno.=v0015700–04.

7. Ostanin V. Qualification of evasion from payment of taxes, fees, other obligatory payments: autoref. dis. for the Sciences. the degree candidate. Yuri. Sciences: spec. 12.00.08 “Criminal law and criminology; criminal Executive law”. Kiev, 2004. 20 s.

8. Sukhov Y. Evasion of taxes, fees, other mandatory payments: problems of differentiation from related crimes and qualification in aggregate: abstract. dis. for the Sciences. the degree candidate. Yuri. Sciences: spec. 12.00.08 “Criminal law and criminology; criminal Executive law”. Kiev, 2000. P. 16.

Information about the author:
Predmestnikov O. G.,
Doctor of Law, Professor,
First Deputy Head of the Main Territorial Department,
Justice in the Kherson Region
42/14, Potiomkinska str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/234-254

THE OBJECT OF THE CRIMINAL PROCEDURE PROOF

Rachinska I. M.

INTRODUCTION

The Ukrainian criminal process is going through difficult, but very interesting times. Reform of criminal procedural legislation, which was marked by the adoption in 2012 of the new criminal procedure code of Ukraine and which does not stop now, requires not only reflection, but also fundamental changes in the legal consciousness of scientists, law enforcement and society as a whole. The new legal reality that is emerging in the state, in our opinion, requires a revision of many ideas about the essence of individual criminal procedural institutions that impede their effective implementation. First, this applies to criminal procedural proof, because the problems of evidentiary law occupy one of the Central places in the criminal procedural theory. However, unfortunately, the current level of their development does not take into account many of the latest legislative approaches to the procedure of criminal proceedings, in particular, with regard to: the expansion of adversarial principles; strengthening of legal guarantees of the rights, freedoms and legitimate interests of participants in criminal proceedings; the introduction of international legal standards; optimization of the system of bodies that carry out pre-trial investigation and administer justice, etc. Single conceptually new approaches to the traditional ideas of criminal procedural evidence (in particular, its methodological foundations and the order of implementation), as a rule, are ignored and do not find their continuation.

In this work, the author proposes the concept of criminal procedural proof, in which, based on the analysis of modern and previous legislation, critical research of both domestic and legislation of some foreign countries, as well as the understanding of the opinions and positions expressed in the scientific literature on many problems of evidentiary activities in criminal proceedings, formulated his own vision of proof in the criminal process of Ukraine and proposed approaches to solving a number of topical theoretical and practical problems, which arise in the implementation of criminal procedural evidentiary activities.

1. The concept of "object of proof" and its relation to the subject of proof

The term "object" is usually understood as a phenomenon, object, person, which is directed to a certain activity, attention[1]. In philosophy, it is "what the cognitive and other activities of the subject are aimed at"[2]. This approach to understanding the direction of human activity is generally recognized and, in our opinion applies to criminal procedural proceedings, in particular, criminal procedural evidence, since the evidentiary activities of the subjects who carry it out also has a certain direction. Therefore, we consider it quite legitimate and necessary in the study of the essence and content of criminal procedural evidence as a system of allocation of such a category as "the object of criminal procedural evidence".

In the science and practice of criminal proceedings, the concept of "object of proof" has not been previously investigated[3]. The term "object of proof" was used (and is used now) to name what the evidentiary activity is aimed at[4]. However, such approach, in our opinion, is rather doubtful as contradicts philosophical and General theoretical legal representations concerning the nature of any activity. After all, the concepts of "object" and "object" have their own distinct essence. Therefore, the definition and clarification of the features of the relationship of these concepts is important as (a) theoretical value, because: first, will contribute to bringing criminal procedural knowledge of evidence in line with the latest achievements of philosophical science regarding the ontological and epistemological essence of evidence; secondly, the allocation of the subject without the object is not methodologically correct, because the subject is always derived, secondary to the object of knowledge), and (b) practical value (because the correct understanding of what is the object and subject of proof will contribute to the proper implementation of each subject of proof of its evidentiary activity, and as a consequence, the assertion of the actual adversarial criminal proceedings).

In the scientific literature on the relationship between the concepts of "object" and "object" has not developed a clear opinion. Based on

---

[1] Novy tlumachny slovnik ukrainskoi movi: 42 000 sliv [in 4 t.] / way.: V. V. Yaremenko, N. M. Slipushko. Kyiv: Akonit, 2008. Vol. 2: ADVISER-ABOUT IT. P. 392.

[2] A. Dimov. State-legal regularities (V. Theory of introduction) / boilers and land rent. A. Ryzhenkov. Elista: JSC " NCE "DZHANGAR"", 2006. P. 109.

[3] V. Brintseva. New dokazuvannya problemie kriminalnomu processi: navch. posib. / V. D. Brintseva, T. M. Miroshnichenko. Harkiv: NAT. the faculty of law. it looks like. Ukraine, 1998. P. 40.

[4] M. Groshoviy Criminal law of Ukraine. City Of Harkiv: Right, 2013. P. 191.

generalization of various positions it is possible to allocate two approaches to this question.

The first is that under the object as a piece of objective reality (reality), which directed cognitive activity, under the subject – specific aspects of an object, its properties and condition, which, under certain conditions and circumstances, considering the cognitive demand of the subject are the purpose of these activities. That is, in this approach, in fact, the subject and the object differ as part and whole. To illustrate this approach, the example suggested in one of the works is often used. I. Lenin, where we are talking about a faceted glass (granchak) (the object is a multifaceted glass; the object is a certain face of it)[5].

The essence of the second approach is that the subject is not an integral part of the object, but its special vision, a special problem approach to it (with respect to scientific knowledge-this is what is first hidden and what science plans to reveal with the help of this knowledge). The need for such an understanding of the relationship between the object and the object of knowledge is one of the fundamental ideas Of S. Detodology. According to P. Shchedrovitsky, the object is the object of operation, and the subject is associated with the direction of formation of knowledge, which is selected. When we have a complex object X, then applying to it this or that procedure or operation, we will get this or that object projection of this object. At the same time, we can apply a different procedure to object X and obtain a different knowledge – a different object projection. In each case, this knowledge will cover only a certain layer of life and existence of the object and Express the applied procedure in a symbolic form, therefore, in the knowledge of a special type.

V. Wachstein, being a supporter of this approach and considering the correlation of these concepts in sociological research, emphasizes the possibilities and means of his knowledge, which, in his opinion, is the language of description belonging to a particular subject, and another system of distinction. In his view, the object is the thing in itself; the object is what we can know about it. Such knowledge depends on the specifics of the description language used by a particular researcher; the procedure for its creation is called the conceptualization procedure. Thus, the author concludes, the language of its description makes an object an object[6].

[5] A. Dimov. State-legal regularities (V. Theory of introduction) / boilers and land rent. A. Ryzhenkov. Elista: JSC " NCE "DZHANGAR"", 2006. P. 109.

[6] A. Dimov. State-legal regularities (V. Theory of introduction) / boilers and land rent. A. Ryzhenkov. Elista: JSC " NCE "DZHANGAR"", 2006. P. 109.

If we consider both approaches in terms of a methodological basis, we can assume that the first is based naturalistic representation about the object and the subject, when the knowledge about a particular object get regardless of the conditions and means of production; the basis of the second approach is to determine the activity methodological approach in which the requirement to distinguish the object as a cognitive reality and the subject as posed by the defined research means the theoretical model of this reality is fundamental. In this sense, the object is what exists, and the subject is what is formed in the process of cognitive activity depending on certain worldviews, epistemological attitudes and research tools.

Summing up in this part, we note that, in our opinion, the concepts of "object" and "object" really cannot be considered as a whole and a part. An object is a part of objective reality (that which actually exists). In Criminal procedural evidence, they can define a criminal or procedural offense (or any circumstances of a criminal or procedural offense – both committed and such that can be committed (for example, in the case of evidence regarding the election of measures in accordance with part 1 of article 177 of the criminal procedure code) – which can be directed to evidentiary activities). The object of proof (criminal or procedural offense (circumstances of their Commission)) exists independently of the proof and before its appearance.

This understanding, in our opinion, is quite legitimate. It can also be used to justify the possibility of separating the proposed systemic approach (interpretation) to criminal procedural proof, along with, for example, cognitive, activity and complex. After all, really different languages of the description (systems of distinction) which are used by these or those scientists give the chance to investigate such phenomenon as criminal procedural proofs from the different parties (from the point of view of cognitive, activity system aspects). In addition, as noted above, the system analysis of any phenomenon (including evidence) can also be carried out using different forms of description (historical, subject (morphological) and functional) and thus makes it possible to determine the various references (subject) of a particular phenomenon (object).

The object of proof is always formed by him. As G. Shchedrovitsky rightly notes in this regard, starting to study or simply "including" in the activity (in our case, in the activity of proving) some object, we take it from one or more sides. These singled out parties become "substitutes" or "representatives" of the whole multilateral object; they are fixed in the sign form of knowledge. Since it is knowledge of the objectively existing, it is always objectified by us and as such forms an "object". In special scientific analysis we always regard it as adequate to the object. That's right. But at the same time it is always necessary to remember – and in methodological

research this position becomes the main one – that the object is not identical with the object: it is a product of human cognitive activity and is subject to special laws that do not coincide with the laws of the object itself[7].

One and the same object of proof may correspond to several of its subjects. This is due to the use of one or another subject of different forms of description of an object (a great interpretation of the circumstances of the criminal or procedural violations that are predicated of different functional purpose of subjects, different challenges they face, using different means of proof).

Therefore, the object of proof is not an integral part of the object, but its special vision, a special approach to it, its certain projection, and conceptualization. This is the interpretation of certain circumstances of a criminal offense, which is based on the legal positions, knowledge, and experience of a certain subject. That is, the subject of proof of certain subjects is their positional interpretation of certain circumstances of a criminal or procedural offense (the object of proof). This explains the fact that in a particular criminal proceeding with respect to the circumstances of a criminal offense in the interests of different parties may have different interpretations. In addition, it is quite normal. After all, in this case, the adversarial nature of the parties in the criminal process is possible.

In other words, extrapolating from the previous analysis, the opinion of V. The vakhshtein, if the subject of proof, on the basis of its own system of discernment, its description language, which is predetermined as the prescriptions of the law (for example, the performance of a particular criminal procedural functions, authority) and their own discretion, depending on his legal position (as a belief regarding the perfect criminal offense, due to some purpose and motive and such, is based on a certain evidence-based), knowledge, experience, the criminal production characterizes certain circumstances a criminal or legal offense (the object of proof), then we can state the transformation of the object of proof into its subject (or in other words the appearance of the object of proof of a certain subject). Hence, it follows quite logical conclusion that the object of proof is predetermined by the object of proof and is always formed by its subject.

As noted, the object of proof is any circumstances of a criminal or procedural offense. However, not all of them can be included in the subject of proof of a particular subject. With regard to some-the law contains a mandatory requirement of the need to prove them, others can be defined as requiring proof (inclusion in the subject of proof), independently determined by the subject.

[7] Loboyko L. Kriminalna-combed right: course of lectures. [view. 2 so, for change. I dopov.] / L. Loboiko. Kyiv: Istina, 2008. P. 136.

2. Gradation of the subject of proof and general characteristics of its types

For a better understanding of the nature of the circumstances that are subject to proof in criminal proceedings (the subject of proof), it will be advisable to make their gradation and give a General description of their types. The criterion of such gradation of the subject of proof is the degree of generality (degree of concretization) of the circumstances of the criminal offense, which are determined depending on a certain material and legal basis in the form of provisions of the General or Special parts of the criminal law (in particular, those that define the concept of "criminal offense", elements of its composition, certain types of offenses, aggravating or mitigating circumstances, and the like). Such division (gradation) of the subject of proof is carried out on the principle of the ratio of General and separate (special) and special. According to the above criterion and the principle of separation, it is possible to distinguish the subject of proof: General, generic, special and direct (individual). Each level of concretization of certain circumstances corresponds to a certain level of generalization of the characteristics of the subject.

The General subject of proof is a set of the circumstances fixed in the law to which criminal procedural proof should be directed (the structure and content of these circumstances are regulated in Art. 91 of the criminal procedure code and in the norms of the General part of the criminal law). At first glance, the list of circumstances provided for by the CPC of Ukraine is quite definite, but all of them have only a model, indicative nature. In addition, they are all common, since: first, they are subject to proof at the stage of both pre-trial investigation and trial; secondly, they form the basis not only of the indictment, but also of the sentence, the decision (determination) on the closure of criminal proceedings; thirdly, they are subject to proof in each criminal proceeding regardless of the qualification of the committed criminal offense and specific factual circumstances. This level of generalization is important for the General arrangement drawings evidentiary purposes, as well as compliance with requirements of law the comprehensiveness and completeness of research of circumstances of criminal proceedings.

In the legal literature on the circumstances of the General subject of evidence actively debated the question of their functional purpose. Some scientists (even under the previous criminal procedural legislation) expressed the opinion that their purpose is to establish only information that indicated the fact of committing a crime by a certain person[8]. This conclusion was not

[8] Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.

influenced by the fact that the law, along with aggravating circumstances, also provided for the obligation to establish mitigating factors, since, as it was believed, the latter had to be objectively investigated for conviction.

It is clear that this approach is one-sided. Perhaps that is why the legislator in the current CPC of Ukraine, trying to avoid this understanding of the functional purpose (from our point of view, it is legitimate), supplemented with article 91 of the criminal procedure code circumstances, which exclude criminal responsibility or constitute grounds for termination of criminal proceedings or for excluding criminal responsibility or punishment (paragraphs 4 and 5). Such legislative novelties, in our opinion, give grounds for the assertion that the functional purpose of the subject of criminal procedural evidence is a comprehensive, complete and impartial study of the circumstances of criminal proceedings, which both confirm and deny the existence of the main fact.

The generic subject of proof is a set of circumstances of Commission of the same or similar criminal offenses. It is defined at the level of the norms of the Special part of the criminal law, which formulate specific legal features of committed criminal offenses (object, objective side, subjective side, and subject). It is at this level of gradation of the subject of proof and developed guidelines and forensic techniques of investigation of an offense, as well as explanations of the higher courts.

The special subject of proof is a certain part of circumstances of Commission of criminal offenses which character depends on a certain production. It is determined at the level of the norms of the Special part of the criminal law, which contain specific legal features of committed criminal offenses, and the norms of art. 91 code of criminal procedure and its separate chapters regulating the procedure of the so-called special industries (especially it concerns proceedings against minors and the use of coercive measures of a medical nature, as in the current criminal procedure code, which regulates the procedure for their implementation, there are special rules lead the list of circumstances to be determined in these proceedings (articles 485 and 505 of the CCP). Despite the fact that the current code of criminal procedure of Ukraine in section VI regulates other special proceedings, it seems quite legitimate (despite the absence of articles specifically devoted to this) to allocate such items of evidence and in respect of them. The circumstances included in such items of evidence are due to the legal nature of a particular special production)[9].

In essence, the circumstances of the special subject of proof are not any special, they only detail (concretize) the requirements of the General subject.

[9] M. Groshoviy Criminal law of Ukraine. City Of Harkiv: Right, 2013. P. 191.

This can be most clearly seen based on a comparative analysis of the content of article 91 and articles 485 and 505 of the criminal procedure code of Ukraine. In particular, the circumstance provided for in paragraph 1 part 1 of article 485 of the CPC is the concretization of paragraph 4 part 1 of article 91 of the CPC; in paragraph 3 part 1 of article 485 of the CPC is the detail of paragraphs 2 and 4 part 1 of article 91 of the CPC; in paragraphs 1 and 2 part 1 of article 505 of the CPC is a repetition with the concretization of paragraphs 1 and 2 part 1 of article 91 of the CPC (respectively), etc.

An example of the possible allocation of special items of evidence in proceedings for which the law does not contain separate rules that would regulate their content is the production based on agreements. Despite its essence and the requirements regulated by the law to the content of transactions and the procedure for their conclusion and approval, the circumstances of the special subject of proof include the following: a) provided for in part 7 of article 474 of the CPC (which may be grounds for refusal to certify the agreement); b) provided for in parts 4 and 5 474 CPC (concerning the correct understanding by the parties of the agreement of the essence of the charge, certain rights and consequences of its conclusion and approval of the transaction)[10].

The direct (individual) subject of proof is a set of circumstances that must be established in a particular criminal proceeding, depending on the actual circumstances inherent in the Commission of a particular criminal offense. At this level, the requirements of the law regarding the General circumstances to be proved (article 91 of the criminal procedure code), as well as the circumstances of theft, murder and the like, so to speak, "projected" on the circumstances of a particular criminal offense, acquiring unique, individual (hence the name) figures.

The circumstances that constitute the General, generic or special subject of proof are specified and supplemented in accordance with the criminal law qualification of the offense, that is, the subject of proof in a particular criminal proceeding due to the specific features of the Commission of a criminal offense and the process of its proof is individual (direct). On this in its time drew attention L. Vladimirov, who noted that the question of what is subject to proof (quid probandium), one way or another, is solved in a separate case because the criminal law requires for the composition of the relevant crime, what circumstances are taken into account when individualizing the guilt of the defendant. So, quid probandium is a question of this or that separate criminal case which one way or another is defined in the Code. In addition, the exact definition of quid probandium occurs based

[10] Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.

on substantive criminal law. Legal proceedings, as a method of research, executes the program outlined by the criminal law[11]. In other words, in each subject of proof in a particular criminal proceeding, so to speak, "substituted" real circumstances, and each of the subjects of proof is trying to "substitute" their constants.

Such a vision seems to be quite justified, given the understanding of the essence of proof in General (as a cognitive and design-implementation activity), and its epistemological nature, in particular, from the standpoint of the need to apply a cognitive approach).

In accordance with the requirements of the law, individual (non-final) procedural decisions taken in criminal proceedings at all its stages also have their individual subject of proof (in particular, regarding: the beginning of pre-trial investigation, notification of suspicion, application of security measures, stopping of criminal proceedings, decision of recusals, etc.). They do not require the establishment of all the circumstances specified in article 91 of the CPC, but require the installation of a certain amount of other, which, as a rule, are the grounds or conditions for making certain decisions. In the legal literature, such a direct object of proof is proposed to be called a "local object"[12]. Thus, in particular, such a local subject of proof can be distinguished:

– for the beginning of pre – trial investigation (entering of data into the Unified register of pre-trial investigations (ERDR)) – the circumstances testifying to Commission of a criminal offense (part 1 of Art. 214 of the CPC) shall be established. They must first of all confirm the presence of such elements of the criminal offense as its object and objective side (that is, the circumstance provided for in paragraph 1 of part 1 of article 91 of the CPC must be established). Information about other elements of the criminal offense is not mandatory (although, for some of them, it must be (for example, information about the subjects of crimes under articles 393 and 394 of the criminal code), that is, it must be established and provided for in paragraph 2 of part 1 of article 91 of the criminal procedure code));

– for messages to the person about suspicion – it is necessary to establish that a particular person has committed a criminal offence (it is expressly provided in the third mandatory case notification on suspicion (paragraph 3 of part 1 of article 276 of the CPC) follows from the analysis of the norms regulating the grounds of a person's detention and election

[11] A. Dimov. State-legal regularities (V. Theory of introduction) / boilers and land rent. A. Ryzhenkov. Elista: JSC " NCE "DZHANGAR"", 2006. P. 109.

[12] V. Brintseva. New dokazuvannya problemie kriminalnomu processi: navch. posib. / V. D. Brintseva, T. M. Miroshnichenko. Harkiv: NAT. the faculty of law. it looks like. Ukraine, 1998. P. 40.

concerning it measures (part 2, article 177, part 1 of article 208 of the CCP)). This means that such circumstances must be established as: the event of a criminal offense (time, place, method and other circumstances of committing a criminal offense); the guilt of a person in committing a criminal offense; absence of the circumstances excluding criminal liability or being the basis of closing of criminal proceedings. Other circumstances specified in Art. 91 of the criminal procedure code may be established at the next stage of pre-trial investigation.

The circumstances of criminal proceedings, which constitute the content of the subject of criminal procedural evidence (both General, generic, special and individual), are cross-cutting, that is, they must be established both during the pre-trial investigation and in court. However, for the adoption of individual decisions, individual circumstances may sometimes not be investigated, that is, not be the subject of criminal procedural proof (in this case, the so-called truncated subject of proof may take place). For example, the decision on closing of criminal proceedings or acquittal establishment of all circumstances of subject of proof is not required; it is enough to install only some of them, but super equivalent form. In this regard, there is a problem of so-called negative facts.

Negative facts mean the absence of any facts, events, and actions. Indeed, the elements of the subject of proof can be established in both affirmative and negative form. However, this does not give grounds to talk about any special proof of negative facts. The law does require that the circumstances included in the subject of proof be established, but in what form this will be done – affirmative or negative-is a matter of specific criminal proceedings.

However, the establishment of the absence of certain elements of the subject of proof may lead to certain legal consequences, for example, to the closure of criminal proceedings. The object of proof in such cases has a truncated form, all its elements are not proved, but only a part; the need for proving others disappears. By the way, the circumstances (elements) of the subject of proof are placed in the law in such a sequence that non-confirmation of the first automatically eliminates the need to study the following. If it is established that there was no criminal offense, it is unnecessary to look for the guilty person; if the innocence of the person is established, there is no need to establish mitigating or aggravating circumstances, etc.

Another problem that concerns the subject of proof (the circumstances of a criminal offense) and which for many years has caused quite sharp discussions among processualists is the problem of the so-called evidentiary (intermediate), auxiliary and main facts.

By evidentiary (intermediate) are understood facts that in themselves do not have legal value, but serve only to establish other, final facts that have such a value. These, in particular, include: the facts of hostile relations between the suspect and the victim, the threat of violence, the discovery of stolen items from the suspect, the presence at the scene of a criminal offense traces left by the suspect, the presence or absence of an alibi. Evidentiary (intermediate) facts can be used both to confirm a suspicion (accusation) and to refute it. The specificity of evidentiary (intermediate) facts, which fundamentally distinguishes them from the circumstances to be proved (that is, included in the General subject of proof), is that they: (a) do not have and should not have a normative consolidation, since (b) are neither common nor the same for all criminal proceedings, but are specific for each production for a specific criminal offense[13]. Despite this, evidentiary (intermediate) facts are subject to proof, since by virtue of their connection with the circumstances provided for by the law as such, they must be proved, and they act as its evidence. Thus, as rightly pointed out by Y. Boronenkov, final and intermediate facts are related as ends and means of its achievement. At the same time, situations are not excluded when certain circumstances act simultaneously in one and in another capacity, since certain elements of the subject of proof, being established, can be used to prove others (for example, the method of committing a criminal offense may indicate the presence of a suspect's intent).

In connection with the above differences between the circumstances provided by the law for proof and evidentiary (intermediate) facts in the legal literature, the opinion is expressed about both the impossibility and the need to include the latter to the subject of proof. There are also proposals for the introduction of such a new category in the legal treatment as "the object of knowledge" (in our understanding "the object of knowledge"), which should include both the circumstances included in the subject of proof and evidentiary facts[14].

Next to the evidentiary (intermediate) in the theory, there are also auxiliary facts, which are usually understood as circumstances that are means of identifying and verifying other circumstances (including evidentiary (intermediate) facts). These circumstances are also important for criminal proceedings, and themselves must be proved. To subsidiary facts are circumstances showing the procedure of a separate investigative (search) actions (e.g., the testimony of individuals involved in the inspection as witnesses about where they were during the conduct of investigative (search)

[13] Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.
[14] Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.

actions), the ownership of the entity engaged to conduct a specific action (for example, about the qualifications of the specialist or expert) and the like.

Another important point on which it is advisable to stop when analyzing the subject of criminal procedural evidence is the problem of the so-called main fact. In the legal literature, opinions are expressed about the objections to the allocation and in General the need for the existence of the concept of "main fact". Proponents of this position believe that all the circumstances included in the subject of proof, in fact, are considered the main, which are equally subject to proof. The division of the circumstances that are to be proved into the main and other facts does not benefit either the theory or the practice of criminal proceedings and is superfluous. In addition, if we accept the "main fact", we can assume that there are facts and "non-main", which do not require careful installation.

This approach seems to be erroneous, because (as already noted) the circumstances included in the subject of proof (it is precisely the General subject of criminal procedural proof) are not equivalent, because among them there are determining and secondary. However, this does not mean that the latter should not be fully and comprehensively established. In support of this position, we cite the opinion Of N. Deev, who believes that to understand the role and place of the main fact in the subject of proof can help categories of content and essence. As you know, the content of any phenomenon consists not only of the main (essence), but also from the non-main, secondary. So same to subject evidence along with the main fact (essence) includes and other circumstances. However, only their unity constitutes the entire content of the subject of proof. Note: it is not about the greater value of circumstances that are included in the main fact and not about the inferiority of circumstances that are not included in the main fact. It is a question of the priority of circumstances, which are included in the main fact, that they are "first among equals".

Moreover, we believe that the main essential reason for denying the need to highlight the main fact is the understanding by supporters of this approach of proof as a cognitive activity aimed at a full, comprehensive and objective establishment of all the circumstances of criminal proceedings and rejection of the understanding of proof as a design and implementation activity (in particular, the ability to justify their own legal position by the subject of proof (primarily with respect to the circumstances included in the main fact)[15].

[15] Criminal process of Ukraine: pidruchnik / [air. M. Penny, W. It. Today, A. R. Tumanyants you in.]; land rent. Deputy: V. Today. That., Penny Air. M., Not Kaplino. V., Not Awl. City Of Harkiv : Right, 2013. P. 193.

There is a lack of consensus among proponents of the need to single out this concept as to its content. The main fact is usually understood as a set of the most important circumstances to be proved. Among legal scholars, there are numerous more or less broad interpretations of this concept. Some scientists under the main fact understand all (or almost all) elements of the subject of proof (the circumstances of the General object of proof), in contrast to the evidentiary facts, others define it as the presence of the corpus delict in all its four elements "the object, the objective side, the subjective side and the subject". There is little in fact different from such an interpretation and definition of the main fact as a set of circumstances of the event, action (inaction) and the consequences that have occurred and which indicate the guilt of the person or her innocence.

With regard to these two approaches, it is worth noting that there is no significant difference between them, since their content is almost identical, only in the first the main fact is determined using procedural terminology, and in the second – criminal law.

Based on our own understanding of the most essential, defining, basic elements of the subject of proof, we consider it appropriate on the content of the main fact to support the point of view of Y. Orlov, who by the latter implies the fact of committing a criminal offense by a certain person,. A similar thought was expressed by V. Kurilov, who from the subject of proof (which he considered the main fact) singled out the "Central fact" – the Commission of a socially dangerous act by a person, which must be proven absolutely reliably. The defining role of the main fact in this interpretation and its specificity in comparison with other elements of the proof process is that:

a) all other elements are established only in relation to the main fact. Thus, the form of guilt, the motive and purpose of committing a criminal offense, the circumstances that characterize the personality of the accused, aggravate or mitigate the punishment, shall be established only in respect of a particular person who committed a criminal offense. Without establishing the main fact of knowledge of all other circumstances loses meaning;

b) establishment of the main fact means that the criminal offense remained unsolved, and tasks of criminal proceedings unfulfilled. Failure to establish other circumstances, although it reduces the effectiveness of criminal proceedings, but does not completely exclude its effective completion, the tasks that face it. Thus, if aggravating circumstances are not proved, a person may be convicted of committing a criminal offence without aggravating circumstances;

c) the establishment of the main fact in the negative form means that there is no need to know all the other elements of the subject of proof.

Regulatory consolidation the main facts reflected in paragraphs 1 and 2 of part 1 of article 91 of the code (where we are talking about the event of criminal offences and culpability in the Commission of the offense (note the use of the legislator that is the term "guilt", which, with our abs cover, and is committing a criminal offence by a certain person).

Summing up the above considerations, we believe that the main fact is that part of the subject of proof, which gives the latter a competitive character. Its allocation allows us to make a proposal about the need for legislative regulation of the expression by the parties at the beginning of the process of their own main thesis of proof, which will indicate the adversarial nature of the trial. For example, at the beginning of the trial, the Prosecutor notes that the person in the dock committed a certain criminal offense, which will be proved during the trial; and the defender declares that his client is innocent of committing a criminal offense, which will be proved in court.

It should also be noted that the subject of proof (this applies to such a variety of it as individual or direct), along with the material and legal facts (circumstances) also include facts of procedural importance. In particular, the consequence of non-establishment or ignoring of the facts of procedural character testifying to existence of the bases for a stop, closing of criminal proceedings, abandonment of the appeal or cassation complaint without movement or their return, etc.is acceptance of illegal or non-acceptance of the lawful decision. In such a case, the purpose of the evidence will not be fulfilled, since the court has not established the facts relevant to the criminal proceedings. Examples of other facts of procedural importance, and which are also subject to establishment in a particular criminal proceeding, are: the validity of the reason for the absence of a person who did not appear on call; the absence of circumstances precluding participation in criminal proceedings of a certain subject of criminal proceedings, etc.

3. Limits of criminal procedural evidence

One of the most debatable concepts in the theory of proof "limits of proof" has a significant scientific value and practical significance. In the scientific procedural literature for quite a long time, there was an opinion that "the subject of proof" and "limits of proof" are identical concepts[16], which, in turn, restrained the scientific development of the latter.

Today, however, there is no doubt that these concepts are unequal, although they are close and interrelated.

[16] L. Glukharev. Criteria of scientific knowledge of legal two subjects. Jurisprudence. 2010. Vol. No. 2. T. 18. P. 20–28.

In the scientific literature, there are various interpretations and interpretations of the concept of "limits of proof". So, in particular:

– some authors understand them as a set of evidence (or a certain amount of evidence), which provide the establishment of circumstances relevant to the case, the adoption of legal, reasonable and fair decisions (note that this point of view with certain variations, perhaps, is the most common);

– other scientists believe that the limits of proof should be understood not only the amount of evidence, but also the necessary investigative and judicial actions to obtain them, providing a complete, comprehensive and objective establishment of all components of the subject of proof in each particular criminal case[17];

– it is also suggested that the concept of "limits of proof" covers the circumstances included in the subject of proof and evidentiary (intermediate) facts. The subject of proof reflects the category common to all cases of this category, the scope of proof is an expression of the category of a single case for each particular case [5]. Almost a similar point of view was expressed by V. Zelenetsky, who believed that in any case it is impossible to talk about the totality of evidence, defining the concept of "limits of proof", since it is necessary to prove not the totality of evidence, but the circumstances included in the subject of proof[18].

We will express our opinion on the first two approaches later. As for the third, we believe that there is a confusion of concepts "subject" and "limits of proof". Indeed, it is necessary to specify the circumstances to be proved, but here it is necessary to talk about the gradation of the subject of proof to certain levels, and not about the "limits of proof" (more about this was mentioned earlier);

– some scientists see the limits of proof in the restrictions that the law establishes for the collection, verification and evaluation of evidence at certain stages of the process (for example, in preparatory proceedings)[19]. With regard to the above position, we note that here we should not talk about the boundaries, but about the features of the regime of proof at different stages or in different processes, which are determined by the tasks that are solved in them. Moreover, we emphasize that in different criminal proceedings (criminal cases) at the same stage or in the same proceedings,

[17] M. Dieu. Pitannya kriminalnomu processi dokazuvannya in DotA mezhi drill. Ship reform in Ukraine: Matera. science.-practice. Conf. Kyiv: Yurinkom Inter, 2002. P. 262.

[18] Karneeva L. Attracting criminal liability. Legality of validity of the year / L. Karneeva. Moscow: Yurid. there is., 1971. P. 104.

[19] Kovalenko. G. New theory of criminal process in Ukraine: pid. / G. Kovalenko. Kyiv: Yurinkom Inter, 2006. P. 118.

the limits of proof may be different and depend on the specific circumstances of certain criminal offenses;

– almost all scientists (including supporters of the above approaches) reveal the essence of the concept of "limits of proof", resorting to certain comparative illustrations. Thus, the following opinions are expressed: (a) if the object of proof is its purpose, the limits of proof-the means to achieve it; (b) if the concept of "subject of proof" means that it must be clarified, established in criminal proceedings, the concept of "limits of proof" reflects the scope and depth of the study of all significant circumstances in the proceedings; (c) if the item of evidence to be considered as the scope of the study the circumstances of the case horizontally, the limits of proof, which determine the depth of their research can be roughly defined as the frame vertically; d) the ratio of the subject and limits of proving can be represented in a coordinate system, one axis of which is the subject, and on the other – the limits of proof.

– there are also views that the concept of "limits of proof" is multifaceted (multidimensional), which, in turn, predetermines the combination of different approaches. According to supporters of this position, the limits of proof are such limits of evidentiary procedural activity, which state: a) the completeness of the versions that are checked; b) the "depth" of the study of the circumstances to be established; c) the volume of evidence and their sources, mandatory for the recognition of the presence or absence of these circumstances; d) the sufficiency of substantiation of conclusions in criminal proceedings[20].

Without resorting to a detailed critical analysis (neither positive nor negative) of the above approaches (some of which we have already expressed our own opinion), we believe that for a proper understanding of the concept of "limits of proof" it is necessary to distinguish between two aspects: the first-the essence of this concept and the second-the criteria for determining the moment of reaching the

With regard to the first aspect, the essence of this concept is that the limits of proof are the limits of evidentiary activity, providing a certain amount of knowledge of the subject of proof about the circumstances of the criminal offense, about which criminal proceedings are carried out, and which is sufficient for the completion of criminal procedural proof in General or for making a certain procedural decision or committing a certain procedural action, in particular. Here we are not talking about the boundaries of what is to be proved, but the boundaries of the activity that forms the content of the process of proof.

[20] V. Lazarev. Criminal dokazyvaet processit V.: ucheba.-practical. to posobiyami / V. A. Lazarev. Moscow: At The Height. education., 2009. P. 140.

The second aspect of the boundaries of evidence is that to clarify the moment of achievement of the above boundaries of evidence can be used a variety of criteria, which can be separate above approaches scientists to understand the boundaries of evidence. This, in particular:

– a certain set of evidence sufficient to conclude that the study of all the circumstances of the subject of proof-here the criterion for achieving the limits of proof is a quantitative indicator of evidentiary activity. It is clear that this indicator does not and cannot have any numerical value; it is defined through the term "body of evidence". And it means that any separate proof (for example, indications about recognition by the person of the guilt) is not sufficient for a conclusion about proofs of this or that circumstance because only their set can be sufficient;

– research of all possible versions; carrying out necessary investigative (search) and judicial actions, – here again it is possible to speak about certain quantitative character of proof, however the emphasis is placed not on the received results (proofs), and on ways which lead to them;

– the degree of accuracy of knowledge about the circumstances to be proved, their reliability or probability-here the basis for determining the moment of reaching the limits of proof is assigned a qualitative indicator. Such knowledge should not contradict each other and should be in interrelation and give the chance for formulation of unambiguous conclusions. As long as there is conflicting knowledge about certain circumstances, the conclusion about their proof is doubtful, which means that the necessary limits of proof are not reached and that it is necessary to continue its implementation.

Thus, it can be stated that the "limits of proof" – the concept is quite subjective, because their definition depends on a particular subject of proof, the circumstances that need to be established in a particular criminal proceeding at a particular stage. However, a proper understanding of the nature of the boundaries of proof and the moment of their achievement is important for the characterization of the evidentiary activity of the subjects of proof. The practical importance of the study of the boundaries of proof is explained by the need to understand its subjects the importance of their correct definition. After all, groundless narrowing of these boundaries in criminal proceedings may lead to the fact that some circumstances of the subject of proof will be investigated insufficiently. Groundless expansion of borders of proof can testify to unjustified redundancy of the evidentiary information.

Another issue concerning the concept of "evidence boundaries" and requiring attention is the relationship of these boundaries at the stages of pre-trial investigation and trial. Thus, O. Larin believes that the expansion of the

boundaries of evidence reached during the investigation is a natural and necessary condition of the trial[21]. However, most scientists defend the position that as the subject of proof and the requirement of the law on a comprehensive, complete and objective investigation of all the circumstances of criminal proceedings (part 2 of art. 9 CPC) are the same for both these stages, and the limits of proof are the same both in the pre-trial investigation and during the trial. However, through search, research character of procedural activity in these stages, and wrong or inaccurate definition of borders of proof, these limits in them actually can and not coincide. They can be wider at the pre-trial investigation than in court, and vice versa[22].

CONCLUSIONS

1. In the study of the essence and content of criminal procedural evidence from the standpoint of a systematic approach, it is quite legitimate and necessary to allocate such a category as "the object of criminal procedural evidence".

The object of criminal procedural proof is what the evidentiary activity is aimed at, and this is a criminal or procedural offense (or any circumstances of a criminal or procedural offense – both committed and such that can be committed (for example, in the case of evidence regarding the election of measures in accordance with part 1 of article 177 of the criminal procedure code) – to which the evidentiary activity can be directed). The object of proof (criminal or procedural offense (circumstances of their Commission)) exists independently of the proof and before its appearance.

The object of proof is not an integral part of the object, but its special vision, a special approach to it, its specific projection, and conceptualization. This is the interpretation of certain circumstances of a criminal offense, which is based on the legal positions, knowledge, and experience of a certain subject. That is, the subject of proof of certain subjects is their positional interpretation of certain circumstances of a criminal or procedural offense (the object of proof). This explains the fact that in a particular criminal proceeding with respect to the circumstances of a criminal offense in the interests of different parties may have different interpretations. In addition, it is quite normal. After all, in this case, the adversarial nature of the parties in the criminal process is possible.

[21] Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.

[22] A. Luchina Subject: however based panana: monograph / Y. Lashchuk. Kiev: and palivo.V., 2011. P. 44–50.

In other words, if the subject of proof, on the basis of its own system of discernment, its description language, which is predetermined as the prescriptions of the law (for example, the performance of a particular criminal procedural functions, authority) and their own discretion, depending on his legal position (as a belief regarding the perfect criminal offense, due to some purpose and motive and such, is based on a certain evidence-based), knowledge, experience, when carrying out criminal proceedings characterizes certain circumstances of a criminal or procedural offense (the object of proof), we can state the transformation of the object of proof in its subject (or in other words the appearance of the object of proof of a certain subject). Hence, it follows quite logical conclusion that the object of proof is predetermined by the object of proof and is always formed by its subject.

2. Depending on the degree of concretization of the circumstances of the criminal offense and using the principle of the ratio of General and separate (special) and special, it is possible to gradate the concept of the subject of proof into: General, generic, special and direct (individual).

3. In view of the fact that the circumstances of the General subject of proof are not equivalent, that among them there are determinants and derivatives, it is quite legitimate and expedient, both from theoretical and practical considerations, to highlight the main fact, under which it is necessary to understand the fact of committing a specific criminal offense by a certain person. Allocation of the main fact allows to suggest necessity of legislative regulation of expression by the parties at the beginning of process of own main thesis of proof that will promote expansion of competitiveness of criminal proceedings.

4. For a proper understanding of the concept of "limits of proof", we must distinguish its two aspects: the first is his essence and, second, the criteria for determining the moment of reaching the necessary evidence. The essence of this concept is that the limits of proof are the limits of evidentiary activity, providing a certain amount of knowledge of the subject of proof about the circumstances of the criminal case to be proved, and which is sufficient for the end of the criminal procedural proof in General, or for the adoption of the appropriate procedural decision or the Commission of a certain procedural action, in particular. It is not the boundary of what is to be proved (this is covered by the concept of "object of proof"), but the activity that is aimed at establishing the circumstances of the object of proof.

As for the second aspect of the boundaries of evidence highlighted by us, a variety of criteria can be used to determine the moment of achievement of the above boundaries of evidentiary activity. This, in particular: a) a certain set of evidence, which should be sufficient to conclude the study of all the circumstances of the subject of proof-here the criterion for achieving the

limits of proof is a quantitative indicator of evidentiary activity; b) the study of all possible versions; carrying out the necessary investigative and judicial actions-here again we can talk about the quantitative nature of the evidence, but the emphasis is not on the results (evidence), but on the ways that lead to them; c) the degree of accuracy of knowledge about the circumstances to be proved, their reliability or probability-here the basis for determining the moment of reaching the limits of proof is assigned a qualitative indicator.

SUMMARY

The article deals with topical issues of the theory and practice of criminal procedural proof, which are the subject of acute discussions in the science of criminal procedure, in particular: the very essence of proof, its philosophical and methodological basis, the object and subject of proof, the purpose, motives and standards of proof, methods and means of proof, the subjects of proof and the distribution between them of the burden of its implementation.

REFERENCE

1. V. Brintseva. New dokazuvannya problemie kriminalnomu processi: navch. posib. / V. D. Brintseva, T. M. Miroshnichenko. Harkiv: NAT. the faculty of law. it looks like. Ukraine, 1998. P. 40.

2. A. Dimov. State-legal regularities (V. Theory of introduction) / boilers and land rent. A. Ryzhenkov. Elista: JSC “NCE “DZHANGAR””, 2006. P. 109.

3. L. Glukharev. Criteria of scientific knowledge of legal two subjects. Jurisprudence. 2010. Vol. No. 2. T. 18. P. 20–28.

4. M. Groshoviy Criminal law of Ukraine. City Of Harkiv: Right, 2013. P. 191.

5. M. Dieu. Pitannya kriminalnomu processi dokazuvannya in DotA mezhi drill. Ship reform in Ukraine: Matera. Science.-practice. Conf. Kyiv: Yurinkom Inter, 2002. P. 262.

6. Karneeva L. Attracting criminal liability. Legality of validity of the year / L. Karneeva. Moscow: Yurid. There is., 1971. P. 104.

7. Kovalenko. G. New theory of criminal process in Ukraine: pid. / G. Kovalenko. Kyiv: Yurinkom Inter, 2006. P. 118.

8. Criminal process of Ukraine: pidruchnik / [air. M. Penny, W. It. Today, A. R. Tumanyants you in.]; land rent. Deputy: V. Today. That., Penny Air. M., Not Kaplino. V., Not Awl. City Of Harkiv : Right, 2013. P. 193.

9. Lazarev V. Criminal dokazyvaet processit V.: ucheba.-practical. to posobiyami / V. A. Lazarev. Moscow: At The Height. education., 2009. P. 140.

10. Larina. M. Correlation limits of proof. Modern justice. 1979. No. 15. P. 9, 10.
11. Loboyko L. Criminally-combed law: a course of lectures [vid. 2 so, for change. I dopov.] / L. Loboiko. Kyiv: Istina, 2008. P. 138.
12. Loboyko L. Kriminalna-combed right: course of lectures. [view. 2 so, for change. I dopov.] / L. Loboiko. Kyiv: Istina, 2008. P. 136.
13. Mikheenko M. Sovetsk proofs V. criminal proceedings: Monogr. / M. Mikheenko. Kyiv: Vishch. self., 1984. P. 106.
14. Luchina A. Subject: however based panana: monograph / Y. Lashchuk. Kiev: and palivo.V., 2011. P. 44–50;
15. Novy tlumachny slovnik ukrainskoi movi: 42 000 sliv [in 4 t.] / way.: V. V. Yaremenko, No.M. Slipushko. Kyiv: Akonit, 2008. Vol. 2: ADVISER-ABOUT IT. P. 392.

Information about the author:
Rachinska I. M.,
Candidate of Law, Associate Professor,
Associate Professor at the Department of Administrative,
Criminal Law and Procedure,
International University of Business and Law
37-A, 49 HGD str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/255-270

PRINCIPAL OBJECTIVE AND SUBJECTIVE FACTORS THAT DETERMINE CORRUPTION

Tsilmak O. M.

INTRODUCTION

Nowadays, on the stage of democratic state development the counterstand and prevention of corruption have great significance. To provide it, Ukraine holds on the course of implementation of anticorruption policy, the chief fundaments of which are legislated in The Constitution of Ukraine and in the Law of Ukraine "On Prevention of Corruption" and in the international treaties that are obligatory according to the consent of Verknovna Rada of Ukraine and in another regulatory legal acts.

Scientific foundation of directions, means and methods of corruption prevention is represented in numerous treatises. Thus, there were widely covered by the scientists: modern problems of fight against corruption (Kulakovskiy R., 2005); issues of state and legal mechanism of corruption counterstand (Besdolniy M., 2009); instruments of corruption counterstand in community arsenal – from fight against corruption to prevention of corruption (Khmara O., 2010) etc.

There were also represented by scientists the issues concerning: peculiarities of corruption's factors influence on economical development of state (Andrei Shleifer, Robert W. Vishny., 1993); causes and factors of corruption and its influence on economy (Verstiuk S., 2001); causes and factors of corruption origin and fight against it (Didenko D., 2010); causes and factors of extension and mechanisms of fight against it (Driomov S., Kalnish Y., 2010) etc.

Scientists distinguished objective and subjective factors are lied at the root of the causes of corruption and it's a condition for corruption activities (Yatskiv I., 2008; Shediy M., 2012 etc.). The group of objective factors consists of: political, economical, legal, organizational and administrative, social and psychological, historical ones (Beliaev N., Volgareva I., Kropachev N., 1992[1]; Andrei Shleifer, Robert W. Vishny., 1993[2]; Christos

[1] Криминология: учебник / Н.А. Беляев, И.В. Волгарева, Н.М. Кропачев и др.; под ред. В.В. Орехова. СПб.: Издательство С.-П.б ун-та, 1992. 216 с.

[2] Andrei Shleifer, Robert W. Vishny. Corruption. The Quarterly Journal of Economics, Volume 108, Issue 3, August 1993, Pages 599–617,

Pantzalisa, Jung Chul Parkb., NinonSuttona., 2008[3]; Yatskiv I., 2008[4]; Driomov S., Kalnish Y., 2010[5] etc.). Subjectives factors include moral and spiritual values, moral degradation, deviant behavior, legal nihilism. (Didenko D., 2010[6]; Yeriomina O., 2017[7] etc.).

There is scientific opinion that inclination to corruption behavior is determined by individual corruptional directivity of a person. M. Danchuk supposes that inclination to corruption behavior "…is reflected by characterological features: inability to separate ideal and real purposes, naivety and frankness that don't correspond to age; egocentrism; formal attitude to the process of fulfilment of official duties and rules of subordination; unwillingness and incapability to predict the possibility of future negative consequences; excessive touchiness, inclination to abrupt mood swing; lack of spiritual development; priority of material values; necessity in pleasure; energy; aspiration for authority and money; inclination to risk; aggressiveness; callousness, indifference, jealousness, touchiness, vindictiveness, ambitiousness, avarice, absence of self-criticism, careerism…"[8] (Danchuk M.D., 2007).

There are scientists that distinguish certain types of corruptionists, for example O. Shostko[9] describes such types as: "minor corruptionst" (situated type), ordinary corruptionist (representative of corruption system), initiative

[3] Christos Pantzalisa,Jung Chul Parkb. Corruption and valuation of multinational corporations/ Christos Pantzalisa, Jung Chul Parkb., NinonSuttona., Journal of Empirical Finance. Volume 15, Issue 3, June 2008, Pages 387–417 https://doi.org/10.1016/j.jempfin.2007.09.004

[4] Яцків І. І. Механізм, причини та заходи протидії корупції: загальна характеристика / І. І. Яцків // *Держава і закон: теорія, практика, методика* : зб. наук. пр. Івано-Франківськ : ПЮІ ЛьвДУВС, 2008. Вип. 3. С. 155–163.

[5] Дрьомов С. В. Корупція в Україні : причини поширення та механізми протидії / С. В. Дрьомов, Ю. Г. Кальниш; за ред. Ю. Г. Кальниша. К.: ДП "НВЦ "Пріоритети", 2010. 88 с.

[6] Диденко Д.А. Причины возникновения коррупции и борьба с ней. // *Международный журнал прикладных и фундаментальных исследований*. 2010. № 3. С. 55–55. URL: https://applied-research.ru/ru/article/view?id=430 (дата обращения: 14.08.2019).

[7] Еремина О.С. Коррупция: источники, причины, социально-негативные последствия. Т. 18., URL: http://www.pglu.ru/upload/iblock/674/pages-from-chast-9_18.pdf

[8] Данчук М.Д. Психологічні особливості виникнення і подолання корупційного делікту правоохоронців. // автореф. дисертації на здобуття наукового ступеня кан-та психол. наук за спеціальністю 19.00.09 "Психологія діяльності в особливих умовах". Національна академія Прикордонної служби України імені Богдана Хмельницького. Хмельницький, 2007. 21 с.

[9] Шостко О. Типологія осіб, які вчиняють корупційні злочини Транскордонна співпраця: проблеми та шляхи їх вирішення: матеріали Т 65 ІІ Регіонального круглого столу (28–29 вересня 2017 року). К.: Національна академія прокуратури України, 2017. С. 203–205.

corruptionist (malicious), peculiarly malicious (political) corruptionist (Shostko O., 2017). O. Litvinova[10] – usual bribetaker and bribetaker of non-persistence type (Litvinova O., 2015).

So, it is possible to conclude, that there are many scientific works that contain the investigation of general fundaments of corruption, the mechanisms of its development, cause and factors. Nevertheless, the most significant for us are objective and subjective factors, that exist in Ukrainian community and upon the whole may determine corruption.

1. Methodological basis of scientific research

The purpose of our scientific research is to establish the level of involvement of principal objective factors of the process of development and existence such negative phenomenon as corruption in Ukrainian community and also to determine and to concretize subjective factors (psychological characteristics), that are supposed to be indicators of personal corruption behavior and determine certain corruptionists' type.

To achieve mentioned purpose there were formulated such tasks as to:

– establish scientifically the level of principal objective factors involvement on the process of development and existence of corruption;

– establish if there any differences in opinions of police officers and civil people about the level of involvement of principal objective factors on corruption;

– concretize principal subjective factors (psychological characteristics) that are supposed to be indicators of person's corruption behavior and determine certain corruptionist's type;

– classify the types of corruptionist.

The object of our scientific research were social relations. The subject of investigation are objective and subjective factors, that determine the process of development and existence such negative phenomenon as corruption in Ukrainian society.

We have used a complex of the following methods in our scientific research: general-scientific (general-logical and general-theoretical), polling, mathematical and empirical methods. By means of general-logical (analysis, synthesis, induction, deduction, scientific abstraction, generalization, analogy, modelling, classification) and general-theoretical (formalization, axiomatic, hypothetic-deductive) methods there were: а) concretized objective and subjective factors of corruption; в) classified the types of corruptionists and specialized their psychological characteristics.

[10] Кримінологія: питання та відповіді / за заг. ред. О. М. Литвинова. Харків : Золота миля, 2015. 324 с.

Thus, by means of the worked out questionnaire (about objective factors, that exist in Ukrainian society and determine corruption phenomena) there were questioned police officers of National police of Ukraine and citizens (hereinafter – respondents). There were 651 respondents that took part in the questioning, among them – 368 respondents were police officers of Chief office of National police of Ukraine in Odesa region (Odesa city, Ukraine) and 283 respondents were citizens (individuals).

Applying mathematical methods (calculation, registration, scaling,) there were: a) calculated the results of respondents questioning; в) carried out the ranging of basic indexes; c) established the types of corruptionists; d) determined the level of involvement of objective factors on corruption. By means of empirical methods (comparison and description), there were represented basic results of scientific research.

Having analyzed scientific resources we were determined that there are different principal and secondary objective and subjective factors of corruption. We have chosen only principal factors for our research and we have grouped them together in such way:

1) objective – political, economical, legislative, organization and managerial, social and psychological;

2) subjective (psychological characteristics) – motivational, volitional, moral, emotional, features of character.

The scientific research was carried out in several stages, that is to say we have:

1) proposed the respondents to complete anonymous questionnaire about the impact level of objective factors (that exist in Ukrainian society) on the process of development and existence of corruption (according to three criteria – high impact level, middle and low);

2) questioned the respondents about types of corruptionists and inherent psychological characteristics;

3) processed statistically the results of scientific research and determined tendencies and peculiarities;

4) proved principal scientific fundaments about groups of principal objective and subjective factors of corruption.

2. The results of empirical research

Thus, there were determined during empirical research, the impact level of principal objective factors (political, economical, legislative, organization and managerial, social and psychological) on the process of development and existence in Ukrainian society such negative phenomena as corruption.

So, concerning existence in Ukrainian society ***principal political factors*** and the level of its influence on corruption. According to the respondents' opinions:

1) complexity of governmental structure of bureaucracy procedure has:
- high level impact – 80% of police officers and 90% of citizens;
- middle level impact – 20% of police officers and 10% of citizens;

2) superficiality in process of carrying out anticorruption policy has:
- high level impact – 69% of police officers and 90% of citizens;
- middle level impact –31% of police officers and 10% of citizens;

3) unwillingness of political elite to provide non-corruptive style of behavior in authoritative activity has:
- high level impact– 97% of police officers and 100% of citizens;
- middle level impact – 3% of police officers;

4) incoherence during the process of social transformations has:
- high level impact – for all of the respondents;

5) lack of efficient parliament and public control for chief executive officers including directors of law-enforcement agencies has:
- high level impact – 87% of police officers and 100% of citizens;
- middle level impact – 13% of police officers;

6) lack of proper political volition about resolute delimitation political activity from business has:
- high level impact – for all of the respondents;

As we may observe, according to the result of the questioning, the respondents unanimously confirm such factors as: "incoherence during the process of social transformations" and "lack of proper political volition about resolute delimitation political activity from business" have high level impact on development of corruption in Ukrainian society. As for another factors, we may conclude that there are differences between opinions of police officers and citizens, but the majority of them approve the indexes to have high level impact. Thus, according to the results of research it was determined, that certain peculiarities of political situation in Ukrainian society influence in direct proportion to the existence of corruption in state.

Talking about ***principal economic factors of corruption.*** All respondents (either police officers or citizens are one hundred percent confident, that in Ukrainian society there are such factors as: "lack of transparency of different economical processes", "underdevelopment of small and medium business", "lack of conductive regime for proper activity of enterprises and entrepreneurs, especially about taxes payment, allotments, getting state support, credits etc"., "decrease of living standards, that corresponds with unemployment", "low level of payment for labor", "wage non-payment", "deprivation of social benefits", "increase the quantity of wealthy and rich

people", "unstable economical situation", – these factors exist and have high level impact on the process of development and existence of corruption.

As for such factor as "lack of transparency of processes of property privatization, decision of different economic issues, evaluation of incomes, amount of taxes, getting benefits etc"., respondents' opinions are different, but the majority of them are confident, that cited factor exists in Ukrainian society and it also has high level impact on the process of development and existence of corruption (87% police officers and 99% citizens).

So, the process of corruption overcoming in Ukrainian society depends in direct proportion to economic welfare of state.

As for the principal legal factors of corruption. There were concluded, that opinions of respondents about high level impact on the process of development and existence of corruption totally coincide about: "lack of integral system of anti corruption means" and "inefficiency of anticorruption means' system". As for such factor as "imperfection of laws in corruption counterwork field" there were determined differences in opinions of police officers and citizens. Citizens one hundred percent confident, that cited factor exists in the state and has a high level impact on corruption phenomena existence, but only 22% police officers support this point of view.

100% of citizens are one hundred percent confident, that in Ukrainian society there is such factor as – "lack of legal mechanism of prevention and resolving the conflict of interests", that also has high level of impact on development and existence of corruption, but only 27% police officers support this opinion. An explanation of this lies in legal awareness about statutory and regulatory maintenance of state policy in corruption counterwork field.

Principal organization and managerial factors of corruption. Respondents are one hundred persent confident, that such factors as "possibility for officials to make decisions in their absolute discretion", "inequitable separation national income among different population stratums", "poor level of social services provision", "existence of bureaucratic institutions of soviet type", "lack of control for personnel policy" and "poor quality and groundlessness of managerial decisions" exist in Ukrainian society and have high influence on the process of development and existence of corruption.

The results of police and citizens questioning contain differences. Thus, there is one hundred percent confidence of citizens, that, high level of impact on corruption have such factors as: "existence in personnel policy cases of filing state servants positions by means of using personal relation (but only 63% police officers support this opinion)", "lack of real influence of non-governmental organizations on the state of affairs in corruption counterwork

field" (but only 97% police officers support this opinion) and "impaired control for fulfilment by civil servants the laws and other legal acts and executives orders" (only 6% of police officers – an explanation of this lies in low indexes according to this factor, that indicates police officers activity to be sharply defined and controlled).

Principal social and psychological corruption factors. Respondents are one hundred percent confident, that in Ukrainian society there are such factors as: "spreading of society demoralization", "devaluation of moral values", "mentality of people" (readiness to pay additional money to solve their problems), "capability to solve any issue without any efforts and waste of time", "distorted mentality" and "transformation of corruption relations into social norm (rule of behavior)" – have a great level of impact on existence of corruption.

As for another factors, it is worth mentioning those results to be different. So, citizens are one hundred percent confident, that in Ukrainian society exist and have a great level of impact such principal social and psychological factors as: " lack of efficient public control for the activity of public authorities and agencies of local self-government, their officials, political and public figures" (whereas only 12% of police officers support this opinion an explanation of this lies in police officers activity to be sharply defined and controlled) "positive attitude of publicity towards existence of corruption" (whereas only 84% of police officers support this opinion), "rejection of corruption as social evil" (whereas only 56% of police officers support this opinion), "mercenary purposefulness of public servants", (whereas only 82% of police officers support this opinion), "avoidance of objective cross-light of corruption issues" (whereas only 49% of police officers support this opinion) and "professional and moral distortion of certain supervisors, that appears in incentive attitude towards corruption" (whereas only 54% of police officers support this opinion).

As for another social and psychological factors, that exist in Ukrainian society and determine corruption phenomena, respondents opinions tend to be different. Thus, according to their opinion such factor as:

1) Underdevelopment of civic awareness has:
- high level impact – 100% of police officers and 54% of citizens;
- medium level impact – 24% of citizens;
- low level impact – 22% of citizens.

Such indexes tell us that certain citizens tend to accuse others in corruption relations, that to affirm about underdevelopment of civic awareness.

2) Double-sided corruption interest:
- high level impact – 100% of police officers and 32% of citizens;
- medium level impact – 68% of questioned citizens.

An explanation of this lies in that police officers have to work with group of people, that on the one hand don't want to be responsible for their own acts, and on the other one – they tend to solve their issues by means of improper advantage. That's why, according to the opinion of police officers, there is double-sided corruption interest. Citizens tend to suppose them to be the victims of corruption relations, without recognizing them to belong to such relations.

3) Slackening of society immune against corruption (that is loyalty and toleration to it) has:

- high level impact – 24% of police officers and 25% of citizens;
- medium level impact – 46% of police officers and 58% of citizens;
- low level impact – 30% of police officers and 17% of citizens.

These indexes tell about constant struggle corruptionists in agencies and departments of National police. Citizens don't want to accept their own loyalty to corruption, although they sometimes have to solve different issues by means of improper advantage.

4) Disillusionment of a major part of population in seriousness of measures to struggle against corruption and of possibility of tangible positive changes in this area, has:

- high level impact – 28% of police officers and 97% of citizens;
- medium level impact – 45% of police officers and 3% of citizens;
- low level impact – 27% of police officers.

These indexes tell us that police officers are more knowledgeable about the issues of corruption counterwork state policy.

To sum it up, it should be noted, that principal objective factors in general have high impact level on the process on development and existence of corruption in Ukrainian society. The process of corruption overcoming depends on in direct proportion to economic welfare of the state, political volition, legal initiatives, organizational and managerial measures, social and psychological conditions.

It is understandable, that objective factors, that determine corruption are interrelated with subjective ones. It is necessary to emphasize, that subjective factors are briefly described by scientists. That's why there were questioned respondents about the types of corruptionists and their principal psychological characteristics (subjective factors of corruption). Having analyzed, systematized and generalized the results of our scientific research, there were distinguished by us seven types of corruptionists, they are – needy, forced, due to situation, "merchant", "player", mercantilist and cleptocratic. Let's consider their characteristics.

Needy corruptionist type – he is incited to corruption by difficult life circumstances and he would have never risked to accept improper advantage

for his services being in other situation. There are such psychological characteristics for this type:

1) *motivational* – desire to overcome material difficulties, ambition to solve the most significant material issues etc.;

2) *volitional* – incapability to resist of seducing to get improper advantage for service etc.;

3) *emotional* – feeling of uncertainty in future, disappointment about better future, experience of frustration, desperation etc.;

4) *character trait* – depend on circumstances and other individuals.

Forced corruptionist type, according to typology of O. Shostko, − it is an ordinary corruptionist (representative of corruption system). He is also as needy type doesn't become corruptionist due to his own initiative. "…He just keeps "rules of the game", that were established in certain organization or agency. He displays, by means of his acts, loyalty to the system, that is also called "corporative culture". He is a conformist. These subjects usually share their incomes with their director (directors)…"[11].

There are such psychological characteristics for this type, as:

1) *motivational* – intention to fulfill the demand of administration, desire to stay at work, to solve certain material issues, to please and to move up the career ladder etc.;

2) volitional – incapability to resist the requirements of certain significant person or certain circumstances; incapability;

3) *emotional* – retorted feeling of debt, obligation, feeling of instability and etc.;

4) *moral* – high executive discipline about fulfillment of directors orders or demands of relatives, retorted responsibility for consigned job area, moral and psychological unwillingness to resist corruption and etc.;

5) *character traits*– obedience, conformity, dependence on other people and circumstances and etc.

As for the *corruptionist type due to situation*, it should be noted that according to the typology of O. Shostko – he is "small corruptionist" (situational type). This type during certain period of his life couldn't resist of seducing improper advantage for his services. These individuals don't require bribe for their services, they are satisfied with episodic remunerations, as symbols of gratitude for their job. They sometimes receive improper advantage "…in minor amounts (besides money there are may be

[11] Шостко О. Типологія осіб, які вчиняють корупційні злочини Транскордонна співпраця: проблеми та шляхи їх вирішення: матеріали Т 65 II Регіонального круглого столу (28–29 вересня 2017 року). К.: Національна академія прокуратури України, 2017. С. 203–205.

goods or products) in case to solve daily living problem of members of the public…"[12]. There are such psychological characteristics for this type, as:

1) *motivational* – intention to make better life, desire to improve economic condition and etc.;

2) *volitional* – situation capability to resist seducing to get improper advantage for proper services and etc.;

3) *emotional* – feeling of uncertainty in the future and etc.;

4) *moral* – moral and psychological unwillingness to resist corruption, moral control is not developed enough and etc.

"*Merchant*" – this type of corruptionist, on the one hand like earning additional money and he intends to have such income, but from the other hand he is afraid of so called "fast bucks". These individuals are adventurous and creative. So, there are such psychological characteristics for this type, as:

1) *motivational* – willing to live better, desire to improve economic condition and etc.;

2) *volitional* – situation capability to resist seducing to get improper advantage for proper services and tendency to risk;

3) *emotional* – feeling of uncertainty in the future, tendency to adrenaline buzz and etc.;

4) *moral* – low level of legal conciseness, moral and psychological unwillingness to resist corruption, moral control is not developed enough and etc.;

5) *character traits* – adventurism, pragmatism, rationality, pushfullness and creativity and etc.

"*Player*" – he tends to risk analyzing different combinations. Getting of improper advantage is peculiar play, where are winners and losers. They enjoy the process of this "game". Among these types there so called "clean fighters" and unfair players (swindlers or sharpers). There are such psychological characteristics for this type, as:

1) *motivational* – aspiration to play, to risk, desire to live better and etc.;

2) *volitional* – tendency to risk and to adrenaline buzz, courage, decisiveness, purposefulness, initiativity;

3) *emotional* – feeling of drive from the risk and etc.;

4) *moral* – low level of legal conciseness, moral self-control is weakly developed, dishonesty and etc.;

[12] Шостко О. Типологія осіб, які вчиняють корупційні злочини Транскордонна співпраця: проблеми та шляхи їх вирішення: матеріали Т. 65. ІІ Регіонального круглого столу (28–29 вересня 2017 року). К.: Національна академія прокуратури України, 2017. С. 203–205.

5) *character traits* – adventurism, pushfullness and creativity and etc.

Mercantilist corruptionist type – he has become corruptionist due to his own desire and according to surrounding he attitudes with mercantile. This type constantly generates and realize different corruption schemes, he is looking for his own advantage. There are such psychological characteristics for this type, as:

1) *motivational* – aspiration to improve economic condition using money of others, desire to live better; to become rich, intention to get power and money, necessity for pleasure and etc.;

2) *volitional* – incapability to resist of seducing to get improper advantage, incapability to resist of seducing of own enrichment, tendency to risk, courage, purposefulness, initiativity and etc.;

3) emotional – feeling of corruption impunity, arrogance, mistrust in efficiency of supremacy of law principle and etc.;

4) *moral characteristics* – poor moral values, low level of legal consciousness, legal nihilism, improper responsibility for quality and results of activity, weakly developed moral self-control of behavior, impudence, arrogance, cowardice and etc.;

5) *character traits* – mercantilism, avarice, egocentrism, ambitiousness, careerism, pushfullness, creativity, unreliability and etc.

Cleptocratic (greek κλέπτειν – steal, greek. κράτος – authority) corruptionist type belongs to certain authority link and use official position for personal enrichment, there is passionate thirst for enrichment and for getting a profit, he seems to be possessed of "thirst for enrichment". There are such psychological characteristics for this type, as:

1) *motivational* – passionate desire to become rich, aspiration to become wealthy (mean is not important); passionate thirst to authority and money, pleasures and etc.;

2) *volitional*– tendency to risk and to adrenaline buzz, incapability to resist of seducing to get improper advantage, passionate money addiction, courage, purposefulness, initiativity and etc.;

3) emotive – feeling of corruption impunity, arrogance, personal advantage, omnipotence, permissiveness and etc.;

4) *moral characteristics* – immoral values, priority of material values, legal nihilism, impudence, insolence, heartlessness, indifferent to problems of others and etc.;

5) *character traits* – impudence, insolence, mercantilism, omnipotence, avarice, egocentrism, aggressiveness, jealousness, ambitiousness, adventurism, pushfullness, unreliability and etc.

So, the subjective factors (psychological characteristics) are the indicators of personal corruption behavior and determine certain type of

corruptionist. Disclosing of principal psychological characteristics of certain corruptionists types will provide extension and concretization diagnostic criteria to recommend candidate on the position (especially governing).

According to our research, types of corruptionists that were distinguished by us should be added by two types, that were determined O. Shostko[13], that is – initiative (uncharitable type) of corruptionist and especially uncharitable (political) corruptionist (Shostko O., 2017). We should mention, that types of corruptionists that were described by us are not final. Nevertheless, they add another typologies and extent the boarders for further scientific and practical researches.

Research scientific novelty. According to empirical research applied methodological instruments there were: a) classified corruptionists' types (needy, forced, corruptionist type due to situation, "merchant", "player", mercantilist and cleptocratic) and determined their principal pschylogical characteristics (motivational, volitional, moral, emotive, character traits); b) there was carried out empirical research of impact level of exited in Ukrainian society objective factors (political, economical, legislative, organization and managerial, social and psychological), that in general determine corruption.

Thanks to our scientific research there have got the further development: a) impact level of objective factors on the process of development and existence of corruption; b) subjective factors (motivational, volitional, moral, emotive, character traits), that are indicators of personal corruption behavior.

CONCLUSIONS

1. During the process of empirical research there was determined, that there are political, economical, legislative, organization and managerial, social and psychological factors in Ukrainian society and that generally have high impact level on the process of development and existence such negative phenomena as corruption.

2. There were emphasized certain differences in opinions of police officers and citizens about impact level of objective factors on the process of development and existence of corruption. An explanation of this lies in such directions: a) police officers are more knowledgeable about the issues of corruption counterwork state policy and about laws, that regulate anti

[13] Шостко О. Типологія осіб, які вчиняють корупційні злочини Транскордонна співпраця: проблеми та шляхи їх вирішення: матеріали Т 65 ІІ Регіонального круглого столу (28–29 вересня 2017 року). К.: Національна академія прокуратури України, 2017. С. 203–205.

corruption policy of Ukraine; police officers activity to be sharply defined and controlled; b) citizens – tend to accuse others in corruption activities (although there is double-sided corruption characteristic) and considers them being victims of corruption relations, that their participants.

3. Based on results of respondents questioning there were classified such type of corruptionists as: a) needy (he is incited to corruption by difficult life circumstances); в) forced (he is incited to corruption by "corporate culture", or a significant person (director or relatives); c) corruptionist type due to situation (these individuals don't require bribe for their services, they are satisfied with episodic remunerations, as symbols of gratitude for their job); d) "merchant" (on the one hand he likes earning additional money and he intends to have such income, but from the other hand he is afraid of so called "fast bucks", but at the ends he risks); e) "player" (he tends to risk, analyzing different combinations, getting of improper advantage is peculiar play. Among these types there so called "clean fighters" and unfair players (swindlers or sharpers); f) mercantilist (express his mercantile attitude, generate and realize different corruption schemes); g) cleptocratic (belongs to certain authority link and use official position for personal enrichment, there is passionate thirst for enrichment and for getting a profit).

4. It was specialized principal subjective factors, that are indicators of corruption behavior of a person and determine certain type of corruptionist. They contain such psychological characteristics as: motivational, volitional, moral, emotive, character traits. Disclosing of principal psychological characteristics of certain corruptionists types will provide extension and concretization diagnostic criteria to recommend candidate on the position (especially governing).

5. It was emphasized, that the process of corruption overcoming depends on in direct proportion to economic welfare of the state, political volition, legal initiatives, organizational and managerial measures, social and psychological conditions and the quality of professional and psychological selection of applicants on proper position (especially governing).

SUMMARY

Nowadays, on the stage of democratic state development the counterstand and prevention of corruption have great significance. To provide it, Ukraine holds on the course of implementation of anticorruption changes.

The purpose of our scientific research is to establish the impact level of principal objective factors of the process of development and existence such negative phenomenon as corruption in Ukrainian community and also to

determine and to concretize subjective factors (psychological characteristics), that are supposed to be indicators of personal corruption behavior and determine certain corruptionists' type.

During the process of empirical research there was determined, that there are political, economical, legislative, organization and managerial, social and psychological factors in Ukrainian society and that generally have high impact level on the process of development and existence of corruption.

There were emphasized certain differences in opinions of police officers and citizens about impact level of objective factors on the process of development and existence of corruption. An explanation of this lies in such directions: a) police officers are more knowledgeable about the issues of corruption counterwork state policy and about laws, that regulate anti corruption policy of Ukraine; police officers activity tends to be sharply defined and controlled. Citizens – tend to accuse others in corruption activities (although there is double-sided corruption characteristic) and considers them being victims of corruption relations, that their participants.

Based on results of respondents questioning there were classified seven types of corruptionists as: a) needy; в) forced; c) corruptionist type due to situation; d) "merchant"; e) "player"; f) mercantilist; g) cleptocratic and for each type there were specialized their principal psychological characteristics: motivational, volitional, moral, emotive, character traits.

It was emphasized, that the process of corruption overcoming depends on in direct proportion to economic welfare of the state, political volition, legal initiatives, organizational and managerial measures, social and psychological conditions and the quality of professional and psychological selection of applicants on proper position (especially governing).

REFERENCES

1. Бездольний М. Ю. Державно-правовий механізм протидії корупції / М. Ю. Бездольний // *Форум права*. 2009. № 2. С. 38–43. URL: http://www.nbuv.gov.ua/e-journals/FP/2009- 2/09bmympk.pdf 7

2. Верстюк С. Корупція: визначення, причини появи, вплив на економіку / С. Верстюк // *Економіка України*. 2001. № 3. С. 66–74.

3. Данчук М.Д. Психологічні особливості виникнення і подолання корупційного делікту правоохоронців. // автореф. дисертації на здобуття наукового ступеня кан-та психол. наук за спеціальністю 19.00.09 „Психологія діяльності в особливих умовах". Національна академія Прикордонної служби України імені Богдана Хмельницького. Хмельницький, 2007. 21 с.

4. Диденко Д.А. Причины возникновения коррупции и борьба с ней. // *Международный журнал прикладных и фундаментальных*

исследований. 2010. № 3. С. 55–55. URL: https://applied-research.ru/ru/article/view?id=430 (дата обращения: 14.11.2019).

5. Доля Л. М. Причини корупції в Україні та її наслідки для суспільства / Л. М. Доля // Боротьба з організованою злочинністю та корупцією : матеріали наук.-практ. конф., 4–5 квіт. 2000 р., Київ. К. : Ред.-вид. відділ МВС України, 2001. С. 104–111.

6. Дрьомов С. В. Корупція в Україні : причини поширення та механізми протидії / С. В. Дрьомов, Ю. Г. Кальниш; за ред. Ю. Г. Кальниша. К.: ДП "НВЦ "Пріоритети", 2010. 88 с.

7. Еремина О. С. Коррупция: источники, причины, социально-негативные последствия. Т. 18., URL: http://www.pglu.ru/upload/iblock/674/pages-from-chast-9_18.pdf

8. Камлик М. І. Корупція в Україні / М. І. Камлик, Є. В. Невмержицький. К. : Знання, 1998. 179 с.

9. Криминология: *учебник* / Н. А. Беляев, И. В. Волгарева, Н. М. Кропачев и др.; под ред. В. В. Орехова. СПб.: Издательство С.-П.б ун-та, 1992. 216 с.

10. Кримінологія : *підручник* / за ред. В. В. Голіни, Б. М. Головкіна. Харків : Право, 2014. 440 с.

11. Кулаковський Р. Сучасні проблеми боротьби з організованою злочинністю та корупцією / Р. Кулаковський // *Юридичний журнал*. 2005. № 6. URL: http://www.justinian.com.ua/article.php?id=1777

12. Хмара О. Нові інструменти протидії корупції в арсеналі громадськості – від боротьби з корупціонерами до запобігання корупції / О. Хмара // *Громадянське суспільство*. 2010. № 2 (13). URL: http://www.ucipr.kiev.ua/modules.php?op=modload&name=News&file=article&sid= 603277232&mode=thread&order=0&thold=0

13. Шостко О. Типологія осіб, які вчиняють корупційні злочини. // Транскордонна співпраця: проблеми та шляхи їх вирішення: матеріали Т 65 ІІ Регіонального круглого столу (28–29 вересня 2017 року). К.: Національна академія прокуратури України, 2017. С. 203–205.

14. Яцків І. І. Механізм, причини та заходи протидії корупції: загальна характеристика / І. І. Яцків // *Держава і закон: теорія, практика, методика* : зб. наук. пр. Івано-Франківськ : ПЮІ ЛьвДУВС, 2008. Вип. 3. С. 155–163.

15. Шедий М. В. Социальные детерминанты коррупции в Российском обществе. Орел :Изд-во ОФ РАНХиГС, 2012. С. 13.

16. Andrei Shleifer, Robert W. Vishny. Corruption. *The Quarterly Journal of Economics*. Volume 108, Issue 3, August 1993, Pages 599–617. https://doi.org/10.2307/2118402

17. Christos Pantzalisa,Jung Chul Parkb. Corruption and valuation of multinational corporations/ Christos Pantzalisa, Jung Chul Parkb., NinonSuttona., *Journal of Empirical Finance*. Volume 15, Issue 3, June 2008. Pages 387–417 https://doi.org/10.1016/j.jempfin.2007.09.004

Information about the author:
Tsilmak O. M.,
Doctor of Juridical Sciences, Professor,
Professor at the Department of Sociology and Psychology,
National university "Odessa Law Academy"
17, Armiys'ka str., Odesa, 65058, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/271-279

ACADEMIC INTEGRITY AS AN ELEMENT OF THE SYSTEM OF EDUCATION QUALITY ASSURANCE

Tytska Ya. O.

INTRODUCTION

In the modern context of education reforming as a multicomponent phenomenon, adoption of updated legislation including the regulations related to the independent functioning of the education system, the priority belongs to the education quality insurance; generating public confidence in the system and educational institutions, education authorities; constant and consistent improvement of education quality; assistance to education establishments and other actors of educational activities in enhancing education quality. The task may be accomplished on the basis of effective and expedient use of all elements of the system of education quality assurance. Academic integrity is a newish concept for the legal framework, but it is not new for the use and practice of the educational institutions and applicants of different grade levels.

It stands to mention the recent raising interest of scholars in the clarification of the essence of academic integrity as well as individual aspects of its application, for examples, a collective paper "Academic integrity as a basis for the sustainable university development" (Kyiv, 2016)[1], a collective monograph "Academic integrity: compliance challenges and priorities of extension among young researchers" (Dnipro, 2017)[2], proceedings of III International scientific-practical conference of students and young researchers "Academic integrity of a student as a factor for civil society formation" (Chernivtsi, 2018)[3] etc.

The relevance of the topic is due to the sound importance of academic integrity to guarantee and improve the education quality as well as the need to study the very legal aspect of establishing the general principles of academic integrity for their effective application.

---

[1] Академічна чесність як основа сталого розвитку університету / Міжнарод. благод. Фонд "Міжнарод. фонд. дослідж. освіт. Політики"; за заг. ред. Т. В. Фінікова, А. Є. Артюхова. Київ : Таксон, 2016. 234 с.

[2] Академічна доброчесність: проблеми дотримання та пріоритети поширення серед молодих вчених : колект. монографія / Артюхов А. та ін. ; за заг. ред. Н. Г. Сорокіної, А. Є. Артюхова, І. О. Дегтярьової. Дніпро : ДРІДУ НАДУ, 2017. 168 с.

[3] Академічна доброчесність студента як чинник формування громадянського суспільства : матеріали ІІІ Міжнар. наук.-практ. конф. студентів та молодих учених, 1-2 берез. 2018 р. / Вищ. держ. навч. закл. України

The article aims to analyse the essence of the concept "academic integrity" with reference to the current legislation (in particular, the Law of Ukraine dated 05.09.2017 "On Education") and to find out the features of statutory regulation of academic integrity as one of the elements of the system of education quality assurance.

1. Statutory definition and etymology of the concept "academic integrity"

It is worth pointing out that the Law of Ukraine dated 05.09.2017 "On Education"[4] consolidated the concept "academic integrity" at the statutory level for the first time, because the Law of Ukraine dated 23.05.1991 "On Education"[5] (repealed) had not included such a concept at all. Thus, according to the legal definition, academic integrity is a set of ethical principles and rules defined by the law, which should be followed by the actors of an educational process during studying, teaching and carrying out scholarly (creative) endeavor to ensure the confidence in the outcomes of learning and/or scientific (creative) achievements. The Law of Ukraine dated 01.07.2014 "On Education"[6] also fixes the similar definition – the Law was amended in the light of the adoption of the Law of Ukraine "On Education". T. Finikov emphasizes that current classic definition of "academic integrity" is based on the combination of the following fundamental virtues: honesty, trust, fairness, respect, responsibility, and in 2013, it was amended by new sixth virtue – courage[7]. Etymologically, the concept "academic integrity" is composed of the combination of two words: "academic", which dictionaries render as 1) related to academy; performed by it; 2) educational; 3) purely theoretical, abstract; one without practical value, book-learned; 4) one which adheres to established traditions in the arts[8], and "integrity" – property in the terms of "virtuous"; who lives honestly, follows all moral rules; the manifestation of honesty, morality[9]. V. Khmarskyi, studying American

[4] Про освіту : Закон України від 05.09.2017 р. Відомості Верховної Ради (ВВР). 2017. № 38–39. Ст. 380.

[5] Про освіту : Закон України від 23.05.1991 р. (втратив чинність на підставі Закону № 2145-VIII від 05.09.2017 р.). Відомості Верховної Ради УРСР (ВВР). 1991. № 34. Ст. 451.

[6] Про вищу освіту : Закон України від 01.07.2014 р. Відомості Верховної Ради (ВВР). 2014. № 37–38. Ст. 2004.

[7] Академічна чесність як основа сталого розвитку університету / Міжнарод. благод. Фонд "Міжнарод. фонд. дослідж. освіт. Політики"; за заг. ред. Т. В. Фінікова, А. Є. Артюхова. Київ : Таксон, 2016. С. 11.

[8] Словник української мови в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. Київ : Наукова думка, 1970–1980. Т. 1, 1970. С. 25.

[9] Словник української мови в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. Київ : Наукова думка, 1970–1980. Т. 2, 1971. С. 326.

experience of academic integrity, also pays attention to the essence of conceptual equivalent – "academic integrity". He notes that "academic" derives from "Academia", known since antiquity as the name of a school where Plato gave lectures in IV century BC. A corresponding adjective is used to denote one that relates to the top level in the realm of sciences or arts – academic level, academic theater etc. as well as a synonym for the concept "educational" – academic group, academic leave, etc.; "integrity" derives from the Late Latin "integer" (whole number), "integrare" (to complete) or "integritas" (integrality). The vast majority of words with this root refer to mathematics, and only the term "integrity" is an exception since it puts "moral purity", "honesty" first from three interpretations, and then – "integrality, completeness" and "quality or state of inviolacy"[10]. Thus, one can take up the position that "academic integrity" is connected with "educational and scientific integrity" etymologically.

Taking into account the regulatory definition of academic integrity as well as its etymological content, it is possible to formulate a range of characteristic features peculiar to such a concept; they are as follows:

– a complex nature – a specific combination of the moral and legal fundamentals that is expressed in a set of ethical principles and statutory rules;

– availability of the special actor – participants of the educational process (they are represented by the degree-seeking students; academic and research staff; parents of degree-seeking students; individuals conducting educational activities; other individuals which are stipulated by the special laws and involved in the educational process under the procedure outlined in the education institution);

– well-defined application scope – in the process of training, teaching and carrying out educational (creative) activities;

– a special aim, namely – supporting confidence in the training outcomes and/or scientific (creative) achievements.

I. Dehtiarova, studying the influence of academic integrity on the institutional practice of Ukrainian higher education, marks that academic integrity may be discussed within four dimensions:

– individual – at the level of a specific individual – a student, lecturer, researcher, senior, when the emphasis is placed on personal and professional ethics of an individual and his/her values, observance of moral principles and professional code of conduct, building of reputation and respect in the academic environment;

[10] Академічна чесність як основа сталого розвитку університету / Міжнарод. благод. Фонд "Міжнарод. фонд. дослідж. освіт. Політики"; за заг. ред. Т. В. Фінікова, А. Є. Артюхова. Київ : Таксон, 2016. С. 54–55.

– institutional – tolerating/non-tolerating of such phenomena at the level of a particular higher education institution or the scientific establishment, creation of some regulatory preconditions to cultivate academic integrity at the institutional level, introduce these principles in the process of training, evaluating and rating of academic staff, as well as in personnel policy;

– system-based – consolidation of the principles of academic integrity within the system of higher education and science, in particular, through the legitimization of relevant points in statutory acts which are a legal framework for its functioning;

– collegiate – at the level of a broadly defined academic environment as a formal/non-formal union of participants of educational and scientific activity (students, postgraduates, researchers, lecturers, administrators et al.)[11]. Thus, it can be argued that simultaneous observance of academic integrity at all these levels (at the level of the individual, institution, academic environment and the legislation) will make it possible to suggest about multilevel assurance of education quality and its improvement.

2. Academic integrity as an inherent element of education quality

Considering academic integrity as an inherent element of education quality, it stands to mention that education quality should be comprehended as a correspondence of training outcomes with the statutory requirements, a relevant education standard and/or an agreement for the provision of educational services. In accordance with the statutory provisions, the system of education quality assurance has three components at the structural level:

1) quality assurance system in the educational establishments (internal system of education quality assurance);

2) system of external assurance of education quality;

3) quality assurance system in the activities of control bodies and establishments which carry out an external assurance of education quality.

In view of the set of the above three components, the system and mechanisms ensuring academic integrity is an element of the first component of the system of education quality assurance (internal).

The legislation envisages the list of measures which are designed to adhere to academic integrity. In other words, there is a statutory set of actions which indicate an appropriate use of the principles of academic integrity. The following measures are grouped according to the subjects that

[11] Академічна чесність як основа сталого розвитку університету / Міжнарод. благод. Фонд "Міжнарод. фонд. дослідж. освіт. Політики"; за заг. ред. Т. В. Фінікова, А. Є. Артюхова. Київ : Таксон, 2016. С. 199–200.

apply them – individually for academic and research staff and degree-seeking students:

Measures which are designed to adhere to academic integrity	
for academic and research staff	*for degree-seeking students*
– references to data sources in case of the use of ideas, developments, statements, information; – compliance with copyright law and related rights; – provision of reliable information on methods and research findings, references and own teaching (academic, creative) activities; – control over the observance of academic integrity by the degree-seeking students; – an impartial assessment of training results.	– an independent exercise of academic assignments, tasks of the current and final assessment of training results (this requirement is applied for individuals with special educational needs taking into account their individual needs and capabilities); – references to data sources in case of the use of ideas, developments, statements, information; – compliance with copyright law and related rights; – provision of reliable information on the results of their learning (academic, creative) activities, research methods and references.

A feature of legislative consolidation of the provisions on academic integrity is the regulatory determination of a detailed list of violations of academic integrity with defining the content of each of them, in particular:

– academic plagiarism – a publication (partially or in full) of scientific (creative) results obtained by others as the results of own research (creativity) and / or reproduction of published texts (published art pieces) of other authors without affiliation;

– self-plagiarism – a publication (partially or in full) of own previously published scientific findings as new ones;

– fake – the fabrication of data or facts used in the educational process or research;

– counterfeit – conscious alteration or modification of available data relating to the educational process or research;

– copying – execution of paperwork involving external sources of information, expect ones permitted for use, in particular, when evaluating learning outcomes;

– dishonesty – provision of deliberately false information about own educational (scientific, creative) activity or organization of the educational

process; the forms of cheat include, in particular, academic plagiarism, self-plagiarism, fake, counterfeit and copying;

– corrupt practices – provision (reception) of a participant of the educational process, or a proposal of provision (reception), with money, property, services, benefits or any other rewards of a tangible or intangible nature to score an unlawful advantage in the educational process;

– biased assessment – intended overestimation or under-estimation of assessment of degree-seeking students.

It is worthwhile noting that the Law of Ukraine dated 05.09.2017 "On Education" introduced one more innovation in the form of responsibility – academic one. However, the Law didn't define the content of the concept "academic responsibility" but some aspects and general rules of its application were regulated.

Thus, the legislation provides for the general rule that types of academic responsibility (including additional and/or detailed) of the participants of the educational process for specific violations of academic integrity are defined by the special laws and/or internal provisions of the educational establishment, which should be approved (agreed) by the head collegiate authority of educational establishment in the context of their responsibility. The procedure for detection and determination of the acts infringing academic dignity is also defined by the authorized administrative collegiate body of the educational establishment. For example, N. Maslova, analyzing academic freedom and academic responsibility, considers the essence of academic responsibility through a broader lens crossing the line of legal one and names it as "a kind of social responsibility" which includes three levels: 1) responsibility to yourself; 2) responsibility to other actors of academic community 3) responsibility to the state and society; at the same time, the first level of academic responsibility has exclusively moral nature; the second level can have a moral, collegiate or legal nature, and the third level is purely legal[12].

The legislation stipulates the forms and types of academic responsibility depending on a violator: the special laws (among which there are the Laws of Ukraine "On Preschool Education", "On General Secondary Education", "On Non-Formal Education", On Vocational Education", "On Higher Education") define them for higher education institutions; the Law of Ukraine dated 05.09.2017 "On Education" – for academic and research staff, degree-seeking students, in particular:

[12] Маслова Н. Г. Академічна свобода і академічна відповідальність. Науковий вісник Ужгородського національного університету. Серія право. 2017. Вип. 43. Т. 1. С. 75–76.

Consequences of the application of academic responsibility	
for academic and research staff	*for degree-seeking students*
– rejection of conferring an academic degree or academic rank; – deprivation of the awarded academic degree (educative-creative) degree or academic rank; – rejection of conferring or deprivation of pedagogical degree, qualification category; – deprivation of the right to take part in the activities or hold posts ascertained by the law.	– repeated grading (module test, exam, final test); – repeated completion of a relevant educational component of the academic program; – expulsion from the educational establishment (expect individuals who are gaining second-level education); – deprivation of an academic scholarship; – deprivation of tuition benefits provided by the educational establishment.

Taking into account seriousness of the consequences for a person, who has violated the principles of academic integrity, it is worth emphasizing the need for full, comprehensive, impartial proceedings in a case against the person who is held to academic responsibility. Moreover, in-depth consolidation of all procedural aspects of bringing to academic responsibility (with terms, stages, actors, appeal procedures, etc.) at the regulatory level is urgent. The Law of Ukraine dated 05.09.2017 "On Education" attaches the rights of individuals who are under investigation concerning academic integrity violation, specifically:

– to have a look at verification materials on the finding of the violation of academic integrity, to comment on them;

– to provide oral and written pleadings personally or by proxy or to refuse to give any explanations, to participate in the study of evidence of academic integrity violation;

– to have notice of the date, time and place and be present when considering the issue of determination of academic integrity violation and bringing him/her to academic responsibility;

– to appeal against the decision to bring to academic responsibility to the body authorized to consider appeals or to court.

It also should be noted that academic integrity violation is not only a reason for bringing a person to academic responsibility but also for other types of liability on the grounds and in the manner prescribed by law. Put that in context, violation of academic integrity may be a reason for bringing

the person to disciplinary responsibility (Arts. 147–152 of the Labour Code of Ukraine), civil responsibility (general rules of compensation of damage are defined by Section 82 of the Civil Code of Ukraine), administrative responsibility (for example, Art. 51–2 of the Code on Administrative Offences of Ukraine "Infringement of the rights to intellectual property"), criminal responsibility (for example, Art. 176 of the Criminal Code of Ukraine "Infringement of copyright and related rights").

CONCLUSIONS

Therefore, it should be marked positively that there is a necessary regulatory basis for defining the concept of academic integrity and the general principles of its application at the legal level. Features which characterize academic integrity include: a complex nature (specific combination of the moral and legal fundamentals that is expressed in a set of ethical principles and statutory rules); availability of a special actor – participants of the educational process (degree-seeking students; academic and research staff; parents of degree-seeking students; individuals conducting educational activities; other individuals which are stipulated by the special laws and involved in the educational process under the procedure outlined in the education institution; well-defined application scope – in the process of training, teaching and carrying out educational (creative) activities; a special aim, namely – achieving confidence in the training outcomes and/or scientific (creative) achievements. A person may be brought to disciplinary, civil, administrative or criminal responsibility for the violation of rules of academic integrity. Moreover, there are measures of a new type of responsibility ascertained by the law – academic.

SUMMARY

The article is devoted to the determination of the essence of the concept "academic integrity" based on the current legislation and clarification of the peculiarities of statutory regulation of academic integrity as one of the elements of the system of education quality assurance. The author's list of features peculiar to academic integrity is proposed. The list of measures which are designed to adhere to academic integrity is determined. A new type of responsibility for breaking the principles of academic integrity is analyzed.

REFERENCES

1. Академічна чесність як основа сталого розвитку університету / Міжнарод. благод. Фонд "Міжнарод. фонд. дослідж. освіт. Політики"; за заг. ред. Т.В.Фінікова, А.Є.Артюхова. Київ : Таксон, 2016. 234 с.

2. Академічна доброчесність: проблеми дотримання та пріоритети поширення серед молодих вчених : колект. монографія / Артюхов А. та ін. ; за заг. ред. Н. Г. Сорокіної, А. Є. Артюхова, І. О. Дегтярьової. Дніпро : ДРІДУ НАДУ, 2017. 168 с.

3. Академічна доброчесність студента як чинник формування громадянського суспільства : матеріали ІІІ Міжнар. наук.-практ. конф. студентів та молодих учених, 1–2 берез. 2018 р. / Вищ. держ. навч. закл. України "Буковин. держ. мед. ун-т", Студент. рада БДМУ ; [відп. ред. Н. І. Зорій]. Чернівці : БДМУ, 2018. 239 с.

4. Про освіту : Закон України від 05.09.2017 р. Відомості Верховної Ради (ВВР). 2017. № 38–39. Ст. 380.

5. Про освіту : Закон України від 23.05.1991 р. (втратив чинність на підставі Закону № 2145-VIII від 05.09.2017 р.). Відомості Верховної Ради УРСР (ВВР). 1991. № 34. Ст. 451.

6. Про вищу освіту : Закон України від 01.07.2014 р. Відомості Верховної Ради (ВВР). 2014. № 37–38. Ст. 2004.

7. Словник української мови в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. Київ : Наукова думка, 1970–1980. Т. 1, 1970. 799 с.

8. Словник української мови в 11 тт. / АН УРСР. Інститут мовознавства; за ред. І. К. Білодіда. Київ : Наукова думка, 1970–1980. Т. 2, 1971. 550 с.

9. Маслова Н. Г. Академічна свобода і академічна відповідальність. Науковий вісник Ужгородського національного університету. Серія право. 2017. Вип. 43. Т. 1. С. 72–76.

Information about the author:
Tytska Ya. O.,
Senior Lecturer at the Department of Theory
and History of State and Law,
International Humanitarian University
33, Fontanska Road str., Odessa, 65009, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/280-303

PROCEEDINGS IN THE COURT OF FIRST INSTANCE

Voronin Ya. G.

INTRODUCTION

Recall that the structural administrative process consists of the following elements: process-production-stage-stage-action.

Conventionally, the manufacture consists of the following stages: Proceedings in the court of first instance: 1) initiation of an administrative case; 2) pre-trial consideration of an administrative case; 3) trial of an administrative case; Proceedings in the court of appeal: 1) initiation of an administrative case; 2) pre-trial consideration of an administrative case; 3) trial of an administrative case; Proceedings in the court of cassation instance: 1) initiation of an administrative case; 2) pre-trial consideration of an administrative case; 3) trial of an administrative case; Proceedings for review of judgments in exceptional circumstances. Proceedings on review of judicial decisions of administrative courts after their review in cassation order. Enforcement proceeding.

However, despite the fact that the execution of court decisions in administrative cases is entrusted to the Executive authority-the State Executive service of the Ministry of justice of Ukraine, is a form of implementation of Executive power, then, accordingly, it is unacceptable to recognize the point of view on the recognition of this production as a classical stage of the administrative process. Therefore, enforcement proceedings mainly, with some exceptions, remains outside the regulatory impact of the norms of administrative procedural law, enshrined in the CAO of Ukraine. This is a completely independent type of production, regulated by administrative and procedural rules, which is part of the structure of administrative law.

Oral or written proceedings. Consideration of administrative cases by the court of any instance may be carried out in the form of oral or written proceedings. Oral proceedings are the consideration of an administrative case in a court session with the hearing of the parties and other persons involved in the case. However, to simplify the judicial procedure, to reduce court costs, when there is no need to hear the persons involved in the case, the CAO of Ukraine provides for the possibility of written proceedings. Written production – consideration and the decision of administrative case in court of the first, appellate or cassation instance without a call of the persons

participating in business, and carrying out court session on the basis of materials available at court in the cases established by CAO of Ukraine[1].

In the first and appellate instances, written proceedings may be conducted provided that all persons who take part in the case have filed a petition for consideration of the case in their absence (part 3 of article 122, article 197 of the CAO of Ukraine). For example, in the first instance, the court may consider simple cases where documents from the parties and written evidence are sufficient to make a court decision on the merits. However, if the court comes to the conclusion that the administrative case must be considered at the hearing, it appoints it to trial and may recognize the mandatory personal participation of the parties or third parties in the hearing.

In the appellate instance, it is advisable to consider the case in writing, for example, if the decision of the court of first instance is appealed only on the grounds of improper application of substantive or procedural law and there is no need to re-examine the evidence or study new evidence. However, this does not exclude oral proceedings in the appellate instance, if the court needs to strengthen the evidence base or clarify the circumstances with the help of the "human factor", i.e. through explanations or testimony of participants in the administrative process.

In the cassation instance, a different rule applies – the court may consider an administrative case in writing, if none of the persons involved in the case, has not filed a petition for resolution of the case with its participation in the court session (article 222 CAO Ukraine). This rule is explained by the fact that the court does not examine the evidence in the cassation instance, so it is not necessary to hear the parties, in principle.

1. Initiation of administrative proceedings

The judge after receiving the claim finds: 1) filed a statement of claim by a person who has administrative procedural legal capacity; 2) the representative of the appropriate authority (if the statement of claim filed by the representative); 3) whether the statement of claim requirements established by article 106 of this Code; 4) belongs to the statement of claim to consider in administrative proceedings; 5) filed an administrative lawsuit within the period prescribed by law (if the administrative claim is submitted with the passing of the statutory period of appeal to the court, or sufficient grounds for the recognition of the reasons for the missed deadline appeal to the court respectfully); 6) there are other grounds for returning the statement

[1] Shemshuchenko Y. administrative justice. Legal encyclopedia. Vol. Kiev: Ukr. ENCYCLOPAEDIA., 1998. P. 47–48.

of claim or refusing to open proceedings in the administrative case, established by this Code.

The judge opens proceedings in an administrative case based on a statement of claim, if there are no grounds for filing a statement of claim or refusal to open proceedings in the case[2].

If the defendant in the statement of claim, in respect of which there are no grounds for his return, leaving without consideration, or refusal to open proceedings, provided the natural person without the status of entrepreneur, a judge not later than two days from the date of receipt of the complaint the court turns to the relevant registration authority of the place of stay and place of residence of the person concerning the provision of information on registered place of residence (stay) of such physical entity.

Information on the place of residence (stay) of an individual must be provided within three days from the date of receipt by the relevant body of registration of the place of residence and stay of the person of the relevant court appeal.

If, because of the information received by the court, it is established that the case is not within the jurisdiction of this court, the court returns the statement of claim to the plaintiff.

If the court has received information does not allow to install was in accordance with the law of the place of residence (stay) of physical persons, the court decides about opening of the proceedings. The summons of such a person as a defendant in the case shall be carried out in the manner prescribed by article 39 of this Code.

The question of open proceedings in the administrative case, a judge decides within three days from the date of receipt of the complaint to the administrative court or the expiration of the term for elimination of deficiencies in the claim that in the case of abandonment of the claim without movement, and no later than the next day from the date of receipt by the court in the manner provided by part three of this article, information about the place of residence (stay) of physical entity[3].

On the abandonment of the statement of claim without consideration, the opening of proceedings in the case or refusal to open proceedings in the case, the judge decides to determine. In the resolution on opening of proceedings shall contain: 1) name of the administrative of the court, surname and initials of the judge who opened proceedings in an

[2] Rykov V. Some questions of creation of administrative justice in Ukraine. Legal state. 1999. Vol. 9. P. 171–175.

[3] Fundamentals of administrative justice and administrative law: studies. no. / for zag. ed. G. Kuibida, V. Shishkina Kyiv: Old world, 2006. 576 p.

administrative case, the case number; 2) by whom and to whom filed an administrative lawsuit; 3) the content of the claim; 4) the date, time and place of the preliminary hearing, if the court believes his conduct is necessary; 5) the offer to the Respondent to submit in the specified term written objections to the claim and proofs which it has (for the subject of powers – the Respondent it is specified about its obligation to provide in the term defined by court in case of the objection to the claim all materials which were or had to be accepted by it in.

A copy of the decision to open proceedings in an administrative case immediately after the decision is sent to persons participating in the case, together with information about their procedural rights and obligations. The defendants are also sent copies of the statement of claim and attached documents.

Leaving the statement of claim without movement, return of the statement of claim.

The judge, finding that the statement of claim filed without complying with the requirements established by article 106 of this Code, should pass a ruling on leaving the claim without movement, in which the author shows the shortcomings of the claim, the remedy and the period sufficient to address deficiencies. A copy of the ruling on the abandonment of the statement of claim without movement shall be immediately sent to the person who filed the statement of claim.

If the plaintiff has eliminated the shortcomings of the statement of claim within the period established by the court, it is considered filed on the day of its initial submission to the administrative court.

The statement of claim returned to the claimant if:

1) the plaintiff has not eliminated the shortcomings of the claim, which left without movement;

2) the plaintiff before the commencement of proceedings on the administrative case filed its opinion;

3) the statement of claim filed by a person that does not have administrative procedural legal capacity;

4) the statement of claim on behalf of the plaintiff is filed by a person without the authority of the proceedings;

5) in the production of that or of the other administrative court there is a dispute between the same parties on the same subject and on the same grounds;

6) it is not the jurisdiction this administrative court;

7) if the statement of claim demanding the recovery of funds, which is based on the basis of the decision of the authority filed with the authority

prior to the expiration of the term, provided by part fifth of article 99 of the code of Ukraine[4].

A copy of the ruling on the return of the statement of claim shall be immediately sent to the person who filed it, together with the statement of claim and all materials attached thereto.

The decision to leave the statement of claim without motion or to return the statement of claim may be appealed by the person who filed the statement of claim.

Leaving the claim without motion or return the claim not being denied the right to re-appeal to the administrative court in the manner prescribed by law.

Refusal to open proceedings in an administrative case

The judge refuses to open proceedings in an administrative case only if: 1) the application is not to be considered in administrative proceedings; 2) in a dispute between the same parties, on the same subject and on the same grounds, there is a valid: a court decision or a court decision on refusal to open proceedings in an administrative case, on termination of proceedings in such a case in connection with the refusal of the plaintiff from the administrative claim or reconciliation of the parties; 3) the death of a natural person or the termination of a legal person who filed a claim or to whom an administrative claim is filed, if the disputed legal relationship does not allow succession.

On the refusal to open proceedings in an administrative case, the judge decides to determine[5].

A copy of the decision to refuse to open proceedings in an administrative case shall be immediately sent to the person who filed the statement of claim, together with the statement of claim and all materials attached thereto.

The decision to refuse to open proceedings in an administrative case may be appealed by the person who filed the claim.

Repeated appeal of the same person to the administrative court with the same administrative claim, which issued a decision to refuse to open proceedings, is not allowed.

2. Abandonment of the claim without consideration

The court reserves its ruling the statement of claim without consideration if:

1) the statement of claim filed by a person that does not have administrative procedural legal capacity;

[4] Ponomarenko G., Kosyk A., Miller R. Bevzenko V., Administrative justice in Ukraine: textbook / under the General editorship of A. Kosyk. Moscow: Precedent, 2009. 198 p.

[5] Kivalov S. Administrative procedural law: subject, sources, legal relations. Sciences'. Odessa Ave. NATs. Yuri. Acad. 2005. No. 4. C. 3–9.

2) the statement of claim on behalf of the plaintiff is filed by a person without the authority of the proceedings;

3) in the production of that or of the other administrative court administrative proceedings concerning a dispute between the same parties on the same subject and on the same grounds;

4) re plaintiff arrived at the hearing without a valid reason or without a message to them about the reasons for the no-show, if not received statements on the proceedings in his absence;

5) a person who has administrative procedural capacity and for the protection of the rights, freedoms or interests of which in cases established by law, a body or another person has appealed, objects to an administrative claim and a corresponding statement has been received from him;

6) the proceedings in an administrative case were opened on the statement of claim, does not meet the requirements of article 106 of this Code, and the plaintiff has not eliminated these shortcomings within the term established by the court;

7) the plaintiff before the end of the trial left the hearing without good reason and did not apply to the court for judicial review in his absence.

On leaving the statement of claim without consideration, the court makes a determination. The court's decision to leave the statement of claim without consideration may be appealed[6].

A person, whose statement of claim is left without consideration, after the elimination of the grounds on which the application was left without consideration, has the right to appeal to the administrative court in a General manner.

Suspension and resumption of proceedings

The court shall suspend the proceedings if:

1) death or announcement in accordance with the law of the deceased person who was a party to the case, if the disputed relationships permit succession and the elimination of the authority of a merger, accession, division, transformation of the legal entity that was a party to the proceedings – until a successor is identified;

2) the need to appoint or replace a legal representative of the party or of a third party – before joining the business legal representative;

3) impossibility of consideration of this case to resolve other cases in accordance with constitutional, administrative, civil, commercial or criminal proceedings, until the entry into legal force of a court decision in another case;

[6] Osadchy A. Organizational and legal support of citizens ' appeal against illegal actions of Executive authorities in courts: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences'. Kharkiv, 2003.19 p.

4) treatment of both parties with a petition to allow time for reconciliation – until the expiry of which the parties stated in the petition.

The court has the right to suspend proceedings in the case of:

1) illness of the person participating in the case, confirmed by a medical certificate, which prevents the arrival in court, if his personal participation will be recognized by the court mandatory, – until his recovery;

2) finding the person participating in the case, on a business trip, if his personal participation will be recognized by the court mandatory, – before returning from a business trip;

3) appointment by the court of expertise-until its results are received;

4) the presence of other reasons at the reasonable request of a party or a third party claiming independent claims on the subject of the dispute-before the term established by the court.

The court shall not stop the proceedings in the cases established by paragraphs 1, 2 of the second part of this article, if there is no party or a third person conducts the case through his representative.

On the suspension of proceedings in the case, the court makes a determination. The decision of the court to suspend the proceedings may be appealed.

The proceedings resumed on the request of the persons involved in the case, or by the court if there is no circumstances that were the basis for suspension of the proceeding. On the resumption of proceedings in the case, the court makes a determination. From the date of resumption of proceedings in the case, the procedural terms continue. The proceedings continue from the stage at which they were stopped[7].

3. The closure of the proceedings

The court closes the proceedings:

1) if the case is not subject to consideration in administrative proceedings;

2) if the plaintiff refused the administrative claim and the refusal is accepted by the court;

3) if the parties have reached reconciliation;

4) if there is a valid ruling or determination of the court from the same dispute and between the same parties;

5) in the event of death or Declaration in accordance with the law of the deceased person who was a party to the case, if the disputed legal

[7] Administrative law of Ukraine: textbook / under the General editorship of academician S. Kivalov. Odessa: The Faculty Of Law. l-ra., 2003. 892 p.

relationship does not allow succession, or liquidation of the enterprise, institution, organization that were a party to the case.

If the proceedings are closed on the basis established by paragraph 1 of the first part of this article, the court must explain to the plaintiff, to the jurisdiction of which court the consideration of such cases is referred.

On the closure of the proceedings, the court makes a determination. The decision of the court to close the proceedings in the case may be appealed. Repeated appeal with the same statement of claim is not allowed.

4. Preparation of the case for trial

The judge of the administrative court, who opened proceedings in the administrative case, carries out preparation of the case for trial.

The court before the trial of an administrative case shall take measures for a comprehensive and objective consideration and decision of the case in one court session within a reasonable time. For this purpose the court can:

1) make the decision on demand of documents and other materials; to make necessary inquiries; to carry out survey of written and material proofs on a place if they cannot be delivered to court; to appoint examination, to solve a question of need of attraction of witnesses, the expert, the translator;

2) take a decision on mandatory personal participation of the persons participating in business, court hearing, about the involvement of third parties to the case;

3) to call for trial of the administrative case witnesses, experts, specialists, interpreters;

4) decide on holding of preliminary hearing.

At the reasonable request of the plaintiff, the judge shall take measures for the immediate consideration and resolution of the case. In this case, the call of the persons involved in the case, notification of the court decisions are carried out by courier, telephone, Fax, e-mail or other technical means.

A preliminary hearing is held to determine the possibility of settling the dispute before the judicial review of the case or to ensure a comprehensive and objective solution of the case within a reasonable time.

Preliminary court session is conducted by the judge who is carrying out preparation of business for trial, with participation of the parties and other persons participating in business.

To settle the dispute, the court finds out whether the plaintiff refuses the administrative claim, whether the defendant does not recognize the administrative claim, and explains to the parties the possibility of reconciliation.

If the dispute is not settled in the procedure established by part three of this article, the court shall:

1) specify the claims and objections of the defendant against administrative action;

2) clarifies the question of the composition of the persons participating in the case;

3) determine the facts that need to be installed to resolve the dispute and which of them are acknowledged by the parties, and what to prove;

4) finds out what evidence the parties can justify their arguments or objections, and sets deadlines for their provision;

5) commit other actions necessary to prepare the case for trial.

According to the statement of one of the parties about impossibility of arrival to court, preliminary court session can be postponed if the reasons of non-arrival are recognized by court valid.

Refusal of the administrative claim and recognition of the administrative claim during the preparatory proceedings

The plaintiff may waive the administrative claim in completely or in part, and the defendant may recognize the administrative claim in completely or in part. Refusal of the administrative claim or recognition of the administrative claim during preparatory proceedings shall be stated in the written statement addressed to court, which is attached to business.

About acceptance of refusal of the administrative claim, the court takes out definition by which closes production on business. In case of partial refusal of the claimant from the administrative claim, the court decides definition by which closes production on business about a part of claim requirements.

In case of partial recognition of the administrative claim by the Respondent and its acceptance by court the court decision on satisfaction of the claims recognized by the Respondent according to article 164 of this Code can be accepted. In case of full recognition by the Respondent of the administrative claim and its acceptance by court the resolution of court on satisfaction of the administrative claim is accepted.

The court does not accept the refusal of the administrative claim, recognition of the administrative claim and continues consideration of the administrative case if these actions of the plaintiff or the defendant contradict the law or violate someone's rights, freedoms or interests.

Reconciliation of the parties during the preparatory proceedings

The parties may settle the dispute in whole or in part based on mutual concessions. Reconciliation of the parties can concern only the rights and obligations of the parties and the subject of the administrative claim.

At the request of the parties, the court suspends the proceedings for the time necessary for reconciliation.

In the case of reconciliation of the parties, the court issues a ruling on the termination of the proceedings in which the conditions of reconciliation are fixed. The terms of reconciliation shall not be contrary to the law or violate anyone's rights, freedoms or interests[8].

In case of failure to comply with the terms of reconciliation of one of the parties, the court at the request of the other party shall resume the proceedings.

Proposal of the court for additional evidence and explanations.

The court may propose to the persons participating in the case to Supplement or explain certain circumstances, as well as to provide the court with additional evidence within the period established by the court.

The question of acceptance of the proofs provided with violation of the term established by court is solved by court taking into account respectability of the reasons of untimely providing proofs.

The court considering the case, if it is necessary to collect evidence outside its territorial jurisdiction, instructs the relevant administrative court to carry out certain procedural actions.

The ruling on the court order briefly indicates the content of the case under consideration, indicates the circumstances to be clarified, and the evidence that should be collected by the court performing the order. The decision on the court order is immediately sent to the administrative court, which will perform it, and is mandatory for it.

A court order shall be executed immediately by the court in accordance with the rules of this Code, which establish the procedure for performing the relevant procedural actions.

Persons participating in the case shall be notified of the date, time and place of the court session. Failure to attend the court session of persons, who have been duly notified, does not interfere with the execution of the court order.

If the person participating in business, the witness who gave explanations or indications to court, which carried out the separate, assignment, appear in the court considering business, they give explanations and indications in the General order.

Administrative courts of Ukraine may apply to foreign courts with an order to conduct certain procedural actions, as well as execute orders of foreign courts based on international treaties, the consent to be bound by the Verkhovna Rada of Ukraine.

[8] Pedko Y. Formation and legal regulation of administrative justice: abstract. dis. for the Sciences. the degree candidate. Yuri. sciences'. Kiev, 2003. 17 sec.

5. Merging and separation of cases

The court may, by its determination, combine for joint consideration and resolution several administrative cases on homogeneous claims of the same plaintiff to the same defendant or to different defendants or on claims of different plaintiffs to the same defendant, as well as separate one or more claims United in one production into independent proceedings, if their joint consideration complicates or slows down the decision of the case.

The court at the request of the plaintiff or on its own initiative, may decide the definition of measures to ensure administrative claim, if there is a clear risk of harm to the rights, freedoms and interests of the plaintiff before the decision in the administrative case, or the protection of those rights, freedoms and interests becomes impossible without the adoption of such measures, or to restore them you will need to make considerable efforts and costs, and if there are obvious signs of unlawfulness of decisions, actions or inaction of the authority.

The decision to take measures to ensure the administrative claim is made by the court of first instance, and if appeal proceedings are initiated, such a decision may be made by the court of appeal.

The submission of an administrative claim and the commencement of proceedings in the administrative case do not suspend the contested decision of the authority, but the court in order to ensure that administrative action may be an appropriate definition to suspend the decision of the authority or its separate provisions that are appealed. The determination is immediately sent to the subject of authority, made a decision, and is binding[9].

An administrative action, except in the manner prescribed by part three of this article, may be secured by a prohibition to perform certain actions.

It is not allowed to secure a claim by suspending the decisions of the National Bank of Ukraine regarding the appointment and implementation of the interim administration or liquidation of the Bank, prohibiting the temporary administrator, the liquidator of the Bank or the National Bank of Ukraine from carrying out certain actions during the interim administration or liquidation of the Bank.

6. Procedure for securing an administrative claim

An application for securing an administrative claim shall be considered no later than the next day after its receipt and, if justified and urgent, shall be resolved by a resolution immediately without notice to the defendant and other persons involved in the case.

[9] Rudenko A. Administrative proceedings: formation and implementation: abstract. Dis. for the Sciences. The degree candidate. Yuri. sciences'. Kharkiv, 2016. 19 sec.

The defendant or other person participating in the case, at any time has the right to apply for the replacement of one method of securing an administrative claim by another or the abolition of measures to secure an administrative claim. Such an application shall be considered not later than the next day after its receipt and, if justified and urgent, shall be resolved by a resolution immediately without notice to the plaintiff and other persons involved in the case.

The question of the administrative claim, to replace one modality for the other administrative claim or cancellation of the measures for the administrative action, except in cases established by parts one and two of this article, is solved in the court session with notification of persons participating in the case. Failure to attend the hearing of persons who have been duly notified shall not preclude the consideration of such matters.

If satisfaction of requirements to the claimant will be refused, the taken measures of maintenance of the administrative claim remain before the entry of the judgment into force. However, the court may, simultaneously with the adoption of the decision or after that, order the abolition of measures to secure an administrative claim or the replacement of one method of securing an administrative claim by another.

The execution of decisions on the issues of ensuring an administrative claim shall be carried out immediately in the manner prescribed by law for the execution of court decisions.

The determination on the issues of securing an administrative claim may be appealed. Appeal of the decision does not stop its implementation, and does not prevent further consideration of the case.

The persons participating in business, during preparatory production can get acquainted with materials of administrative case, to do from them extracts and copies.

The persons participating in business, during preparatory production can order and receive at the expense in court the certified copies of documents and extracts from them.

The court may decide on the obligation of personal participation of the parties or third parties in the court session. It is also possible to call a party or a third party for personal explanations when their representatives are involved in the proceedings.

The results of the preparatory proceedings, the court decides the definition of: 1) leaving the claim without consideration; 2) the suspension of the proceedings; 3) closure of the proceedings; 4) the completion of the preparatory proceedings and assigning the case for trial.

In order to terminate the preparatory proceedings and assigning the case for trial indicate which preparatory actions are done, and sets the date, time and place of the hearing.

If during the previous court session to which all persons participating in business arrived, the questions necessary for its consideration are solved, then by the written consent of these persons trial can be begun in the same day.

If, during the pre-trial proceedings, the defendant acknowledged the claim, the court may decide to satisfy the administrative claim.

Copies of the court decision on the results of the preparatory proceedings shall be sent to persons participating in the case, except for the case provided for by part three of this article.

7. Preparatory part of the trial

An administrative case must be considered and resolved within a reasonable time, but not more than two months from the date of commencement of proceedings, unless otherwise established by this Code.

The trial of an administrative case is carried out in a court session with the summons of the persons participating in the case, after the end of the preparatory proceedings.

A person participating in the case has the right to file a petition for consideration of the case in her absence. If all persons participating in the case made such a request, the trial shall be carried out in writing.

The court session is held in a specially equipped room-the courtroom. Separate procedural actions in case of need can be made outside of the premises of court (written production-consideration and the decision of administrative case in court of appeal or cassation instance without a call of the persons participating in business, and carrying out court session on the basis of materials available at court).

At consideration of the case by court of the first instance the judge who carried out preparatory production is presiding in judicial session.

Presiding in court session directs the course of the hearing, ensures compliance with the sequence and order of the Commission proceedings, the implementation by parties of the administrative process their procedural rights and execution of duties directs the trial to ensure full, comprehensive and objective clarification of circumstances of the case, eliminating from the trial all that is irrelevant to resolution of the case[10].

[10] Administrative proceedings of Ukraine: textbook / Ed. O. Pasenyuk. Kyiv: Yurinkom Inter, 2009. 700 p.

The Chairman of the court session shall take the necessary measures to ensure proper order in the court session.

At the appointed time for the consideration of the case, the presiding judge opens the court session and announces which case is being considered.

The court clerk shall report to the court, who called and notified the parties arrived in court, handed a court summons and message to those who arrived, and reported the reasons for their non-arrival, if known.

The court establishes the identity of those who arrived at the hearing, as well as checks the powers of officials and officials, representatives.

Explanation to the translator of his rights and duties, oath of the translator.

The Chairman of the court session shall explain to the translator his rights and obligations established by article 68 of this Code, and shall warn him on receipt of criminal liability for knowingly incorrect translation and for refusal without valid reasons to perform the duties assigned to him.

The presiding officer shall take the interpreter under such oath:

"I, (surname, name, patronymic), swear to faithfully perform the duties of an interpreter, using all my professional capabilities".

The interpreter pronounces the oath orally, after which he signs the text of the oath. Signed by the translator, the text of the oath and the receipt are attached to the case.

The message on full fixing of trial by technical means:

1. The court clerk announces the implementation of a complete recording of court proceedings, as well as on the conditions of recording of court proceedings (the location of microphones and the need for the speaker to speak into the microphone, the inadmissibility of simultaneous speeches by participants in the administrative process, the observance of silence in the courtroom).

Announcement of the composition of the court and explanation of the right of challenge

The Chairman in court session declares structure of court, and also names of the expert, the translator, the expert, the Secretary of court session and explains to the persons participating in business and arrived in court session, their right to declare challenges.

The court postpones consideration of the case in the case of: 1) non-arrival at the hearing of the party (parties) or any of the other persons involved in the case, about which there is no information that they were handed a summons; 2) non-arrival at the hearing of the plaintiff, duly notified of the date, time and place of the trial, if; 3) non-arrival at the hearing of the defendant, who is not a subject of authority, duly notified of the date, time and place of the trial, if he did not receive an application for

consideration of the case in his absence; 4) if the court recognized mandatory personal participation of the person involved in the case in the trial, and she did not

Failure to attend the court session without valid reasons of the representative of the party or a third party who arrived at the court session or failure to notify them of the reasons for non-attendance is not an obstacle to the consideration of the case. However, at the request of the party and taking into account the circumstances of the case, the court may postpone its consideration.

In the case of repeated no-show of the plaintiff, duly notified about the date, time and place of trial, without a valid reason or without a message to them about the reasons of non-arrival, if not received statements on the proceedings in his absence, the court leaves the claim without consideration.

In case of non-arrival of the Respondent-the subject of powers duly notified of date, time and a place of trial, without valid reasons or without the message to them about the reasons of non-arrival consideration of business is not postponed and business can be solved on the basis of the proofs available in it.

The consequences defined by parts two to four of this article shall also apply if a party leaves the courtroom without valid reasons.

If at the hearing did not profit witness, expert, specialist, court hears opinion of the persons participating in business, about the possibility of continuing the trial in the absence of a witness, expert, specialist, not profit, and makes a decision about continuing the trial or declaring a break. At the same time, the court may decide to bring a witness, an expert, a specialist who did not arrive.

The Chairman of the court session shall explain to the parties and other persons participating in the case their rights and obligations established by this Code. At the same time, persons participating in the case shall be issued a memo on their rights and obligations established by this Code.

The Chairman of the court session shall explain to the expert his rights and obligations established by article 66 of the present Code, and shall warn him on receipt of criminal liability for knowingly false conclusion and for refusal without valid reasons to perform the duties assigned to him.

The presiding judge leads the expert to such an oath: “I, (surname, name, patronymic), swear to faithfully perform the duties of the expert, using all my professional capabilities”.

The expert declares the oath orally, after which he signs the text of the oath. The oath also applies to those cases where the conclusion was drawn up before its proclamation. The text of the oath signed by the expert and the receipt are attached to the case.

If the examination is appointed during the trial, the presiding officer explains the rights, duties of the expert and his responsibility immediately after his involvement in the administrative process.

To experts who work in the state expert institutions, explanation of the rights and duties of the expert and its sworn in are carried out by the head of expert institution at appointment of the person to a position and assignment of qualification of the judicial expert. Stamped by the expert institution copies of the text of the oath and receipt of familiarization with the rights and duties of the expert about criminal liability for false imprisonment, refusal without valid reason from the performance of his duties on request of the court.

The Chairman of the court session shall explain to the specialist his rights and obligations established by article 67 of this Code.

The petition of the persons participating in business, are solved by court immediately after the opinion of other persons present in court session participating in business about what the resolution is resolved will be heard. The court's decision to refuse to satisfy the petition does not prevent its repeated application during the judicial review of the case.

Persons present in the courtroom, at the entrance to the court and at the exit of the court must stand up. The persons participating in business, witnesses, experts, experts give explanations, indications, answer questions and ask questions standing and only after giving them the floor presiding in court session. The decision of the court persons present in the hall, hear standing. Deviation from these rules is allowed with the permission of the presiding officer at the hearing.

Participants of administrative process, and also other persons present in a hall of judicial session, are obliged to observe in judicial session an order and implicitly to obey the corresponding orders presiding in judicial session.

Participants of administrative process address to the judge "Your honor".

Documents and other materials are transferred to the presiding judge in court session through the court administrator.

8. Judicial review of the case on the merits

Judicial consideration of the merits begins with a report of the presiding officer at the hearing or the judge-Rapporteur on the contents of the claims, recognition by parties of certain circumstances during the preparatory proceedings, after which he finds out: does the plaintiff's administrative claim, whether it recognizes the defendant and whether the parties are willing to reconcile.

When considering the case in the absence of a person participating in the case, the Chairman of the court session shall report on his position regarding the claims, if it is set out in written explanations.

Refusal of the administrative claim, recognition of the administrative claim, reconciliation of the parties during the trial

The plaintiff can refuse the administrative claim, and the defendant-to recognize the administrative claim during all time of judicial consideration, having made the oral statement. If the refusal of the administrative claim or the recognition of the administrative claim is stated in a written statement addressed to the court, this statement shall be attached to the case.

The parties may reconcile during the whole time of the trial, or apply for time for reconciliation.

The court decision in connection with refusal of the administrative claim, recognition of the administrative claim or reconciliation of the parties is accepted according to the rules established by articles 112, 113 of this Code.

The plaintiff can change the claims throughout the trial by filing a written statement that joins the case.

The court at the request of the defendant declares a break in the court session and provides the defendant with a period sufficient for its preparation for the case in connection with the change of the plaintiff's claims.

The subject of proof are the circumstances that justify the claims or objections or that have other significance for the decision of the case (reasons for missing the deadline for appeal to the court, etc.) and which are to be established when making a judicial decision on the case.

Explanations of the persons participating in business, indications of witnesses are heard, written and material proofs, including information carriers with the information written down on them, conclusions of experts are investigated.

After the report of the case the court shall hear the explanation of the plaintiff and a third person, not declaring independent requirements on the subject of the dispute is involved on the part of the claimant, the Respondent and the third party, not declaring independent claims on the subject of the dispute is involved on the side of the defendant, as well as explanations of third parties with independent claims on the subject of the dispute.

If along with the party, the third person their representatives take part in business, the court after explanations of the party, the third person hears explanations of their representatives and on their petition, only the representative can give explanations.

If several claims are filed in the case, the court may oblige the parties and other persons participating in the case to give separate explanations for each of them.

If the parties and other persons participating in the case are unclear or it is impossible to conclude from their words that they recognize the circumstances or object to them, the court may require from these persons a specific answer – "Yes" or "no".

The parties and other persons participating in business, ask questions to each other in the order established by the Chairman.

If in business there are written explanations of the parties and other persons participating in business, the Chairman announces the maintenance of these explanations.

The court, having heard explanations of the parties and other persons participating in business, establishes an order of research of proofs by which they justify the requirements and objections.

The procedure for examining evidence is determined by the court depending on the nature of the disputed legal relationship and, if necessary, can be changed.

Each witness is questioned separately.

Witnesses who have not yet testified may not be present in the courtroom during the trial. The bailiff shall ensure that witnesses who have been questioned do not communicate with those who have not been questioned by the court.

Before questioning a witness, the presiding judge shall establish his / her identity, age, occupation, place of residence, attitude to the case and relations with the parties and other persons participating in the case, explain his / her rights and obligations established by article 65 of this Code, find out whether he / she refuses to testify on the grounds established by law, and on receipt warn him / her of criminal liability for knowingly false testimony and refusal to testify.

If obstacles for interrogation of the witness are not established, presiding in court session leads it to the following oath:

"I, (surname, name, patronymic), swear to tell the truth, hiding nothing and not distorting".

The witness proclaims the oath orally, after which he signs the text of the oath. Signed by the witness the text of the oath and the receipt are attached to the case.

The interrogation of the witness begins with the proposal of the presiding judge to tell all that he knows about the case, after which the first person asks him a question, at whose request the witness is called, and then other persons involved in the case.

A witness, when giving evidence, can use the records if his testimony is associated with any calculations and other data that are difficult to store in memory. After interrogation these records are shown to court and the persons participating in business, and can be attached to business by definition of court.

The presiding judge and other judges may question the witness at any time during the interrogation.

The interrogated witness remains in the courtroom until the end of the case. The court may allow such a witness to leave the courtroom until the end of the case.

A witness may be questioned again in the same or the next court session at his request, at the request of persons participating in the case, or at the initiative of the court. During the examination of other evidence, witnesses may be asked questions by the parties, other persons involved in the case, as well as the court.

The court may order the simultaneous examination of two or more witnesses to determine the causes of discrepancies in their testimony.

Interrogation of juvenile witnesses and, at the discretion of the court, juvenile witnesses is carried out in the presence of the teacher or parents, adoptive parents, guardians, Trustees, if they are not interested in the case.

Witnesses under the age of sixteen, the presiding officer explains the obligation to give truthful testimony, without warning about the responsibility for refusing to testify and for knowingly false testimony, and does not lead them to the oath.

The persons referred to in part one of this article may, with the permission of the court, ask the witness questions, as well as Express their opinion on the person of the witness, the content of his testimony.

In exceptional cases when it is necessary for objective clarification of circumstances of business, for the period of interrogation of the persons who have not reached eighteen years of age, this or that person participating in business can be removed from a hall of judicial session by definition of court. After the person returns to the courtroom, the presiding judge informs him of the testimony of the witness and gives him the opportunity to ask him a question.

Written evidence, including the minutes of their examination, drawn up on behalf of the court or in order to provide evidence, shall be announced at the hearing and presented for review to persons participating in the case, and if necessary – also to witnesses, experts, specialists or translators.

Persons participating in the case may ask questions to witnesses, experts, specialists about written evidence.

If the document attached to the case, provided to the court by the person participating in the case for familiarization raises doubts about its reliability, or is false, the person participating in the case may ask the court to exclude it

from the evidence and decide the case based on other evidence or require an examination.

Investigation of the contents of personal papers, letters, telephone records, telegrams and other types of correspondence

The content of personal papers, letters, telephone records, telegrams and other correspondence of individuals may be disclosed and investigated in open court only with the consent of persons defined by the Civil code of Ukraine.

Investigation of physical evidence.

Material evidence is examined by the court, and served for review to persons participating in the case, and if necessary-also to experts, specialists and witnesses. The persons, to whom material evidences are presented for acquaintance, can draw attention of court to those or other circumstances connected with the proof and its inspection.

Protocols of inspection of material evidences made in the order of providing proofs, execution of the judicial instruction or by results of inspection of proofs on a place, are announced in court session. The persons involved in the case can give their explanations about these protocols.

The persons participating in business, can ask questions concerning material evidences to experts, experts, witnesses who examined them.

Research of sound and video recordings.

Playback and recording demonstration videos are held in the courtroom or in another specially equipped room appear in the journal of the hearing of the main technical characteristics of equipment and storage media and indicating the playback time (demo). After that, the court hears the explanations of the persons involved in the case.

If necessary, the playback of the sound recording and demonstration of the video recording can be repeated in full or in a certain part.

For the purpose of clarification of the data containing in sound and video records, the court can involve the expert or examination is appointed.

The court considers the statement on falsity of sound and video records in the order established for consideration of statements on forgery of written proofs.

During the study of sound or video recordings of a personal nature, the rules of this Code for the study of the contents of personal papers, letters, telephone records, telegrams and other types of correspondence shall apply.

Written and material evidence that cannot be delivered to the court shall be examined at their location. About carrying out inspection of proofs on a place the court takes out definition.

Examination of proofs on a place is made by court with the notice of the persons participating in business, and in case of need-with a call of experts, experts, translators and witnesses.

At examination of proofs on a place the Protocol in the order established by articles 45, 46 of this Code is made.

To clarify and Supplement the expert's opinion, persons participating in the case, as well as the court may ask the expert questions. The first to ask questions to the expert is the person on whose application the examination is appointed, and his representative, and then other persons involved in the case. If the examination is appointed at the request of both parties, the first to ask questions to the expert plaintiff and his representative. The presiding judge and other judges may ask the expert questions at any time after the expert's opinion.

During the examination of evidence, the court may use oral advice or written explanations of a specialist.

The specialist may be asked questions on the merits of the oral advice provided or written explanations. The first to ask questions is the person at whose request the specialist is involved, and his representative, and then other persons involved in the case. If a specialist is involved at the request of both parties, the first to ask questions specialist plaintiff and his representative. The presiding judge and other judges may ask the expert questions at any time of the examination of evidence.

The explanations stated in writing and signed by the specialist are attached to the case.

Adjournment of consideration of the case or announcement of a break in its consideration.

The court shall postpone consideration of the case in cases established by this Code, as well as in case of impossibility of consideration of the case due to the need to replace the judge (because of satisfaction of the application for challenge or for other reasons) or involvement of other persons in the case.

The court shall adjourn in connection with the need to obtain new evidence or in other necessary cases. The duration of the break is established by the court depending on the circumstances of the case[11].

The court, postponing consideration of business or declaring a break in its consideration, establishes date and time of new court session about what reports under the receipt of the persons participating in business, witnesses, experts, experts, translators who were present at court session. Persons participating in the case, witnesses, experts, specialists, translators who have not arrived or whom the court for the first time attracts to participate in the administrative process, are summoned to the hearing by subpoenas.

If the case is adjourned, the court must question the witnesses who arrived. Only in exceptional cases, by court order, are witnesses not questioned and called again.

If the case has been adjourned, a new trial begins again. If the parties do not insist on repeating the explanations provided earlier by the persons

[11] Pedko Y. Formation and legal regulation of administrative justice: abstract. dis. for the Sciences. the degree candidate. Yuri. sciences'. Kiev, 2003. 17 p.

participating in the case, if the composition of the court has not changed and third parties have not been involved in the case, claiming independent claims on the subject of the dispute, the court continues the proceedings from the stage at which the case was postponed.

If a break has been declared in the consideration of the case, the proceedings after its termination shall continue from the stage at which it was interrupted.

The end of the clarification of the circumstances and verification of their evidence.

After clarification of all circumstances on business and check of their proofs the Chairman in court session gives to the parties and other persons participating in business, opportunity to give additional explanations or to provide additional proofs.

In connection with additional explanations of the persons participating in business, the court can ask questions to other persons participating in business, witnesses, experts, experts.

After hearing additional explanations and examining additional evidence, the court makes a determination on the end of clarification of the circumstances in the case and verification of their evidence and proceeds to the judicial debate.

9. Judicial debate

Judicial debate consists of speeches of persons involved in the case. In these speeches, it is possible to refer only to circumstances and proofs which are investigated in court session.

In the debate, the plaintiff, his representative, is the first to speak, and then the defendant, his representative.

The third person who has declared independent claims on the subject of the dispute, his representative act after the parties in the case.

Third parties who do not make independent claims on the subject of the dispute, their representatives act in the debate after the person on whose side they participate.

At the request of the parties or third parties, only their representatives may participate in the debate.

The court may not limit the length of the debate to a certain time. The presiding judge of the court session may stop the speaker only when he goes beyond the limits of the case under consideration. With the permission of the court at the end of the judicial debate, speakers can exchange remarks.

If during judicial debate there is a necessity of clarification of the new circumstances having value for business, or researches of new proofs, the court takes out determination about return to clarification of circumstances

on business. After the end of clarification of circumstances on business and check of their proofs, judicial debates are carried out in the General order.

10. Adoption and proclamation of the judgment in the case

After the judicial debate, the court goes to the deliberative room (a room specifically designed for the adoption of judicial decisions) to decide on the case, announcing the approximate time of its proclamation.

If at decision-making there is a necessity to find out any circumstance by repeated interrogation of witnesses or other procedural action, the court takes out a determination on resumption of judicial proceedings. Consideration of the case in this case is made within the limits necessary for clarification of the circumstances demanding additional check.

CONCLUSIONS

After the end of the resumed proceedings of the case, the court opens judicial debates about the additionally investigated circumstances and goes to the Advisory room to make a decision or, if the necessary procedural actions in this court session were impossible, decides to postpone the consideration of the case or to declare a break.

During the adoption of a court decision, no one has the right to be in the deliberative room, except for the composition of the court, which considers the case.

During the stay in the deliberative room, the judge has no right to consider other court cases.

Judges have no right to disclose the course of discussion and decision-making in the Advisory room.

SUMMARY

The opening of the proceedings. Leaving the statement of claim without movement, return of the statement of claim. Preparatory production. Settlement of the dispute with the participation of a judge. Refusal of the plaintiff from the claim. Reconciliation of the parties. Consideration of the case on the merits. Suspension and closure of proceedings. Abandonment of the claim without consideration.

Consideration of cases under the rules of simplified claim proceedings.

REFERENCES

1. Administrative proceedings of Ukraine: textbook / Ed. O. Pasenyuk. Kyiv: Yurinkom Inter, 2009. 700 p.

2. Administrative law of Ukraine: textbook / under the General editorship of academician S. Kivalov. Odessa: The Faculty Of Law. l-ra., 2003. 892 p.

3. Kivalov S. Administrative procedural law: subject, sources, legal relations. Sciences'. *Odessa Ave. NATs.* Yuri. Acad. 2005. No. 4. C. 3–9.

4. Osadchy A. Organizational and legal support of citizens ' appeal against illegal actions of Executive authorities in courts: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences'. Kharkiv, 2003.19 p.

5. Fundamentals of administrative justice and administrative law: studies. No. / For zag. Ed. G. Kuibida, V. Shishkina Kyiv: Old world, 2006. 576 p.

6. Pedko Y. Formation and legal regulation of administrative justice: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences'. Kiev, 2003. 17 p.

7. Ponomarenko G., Kosyk A., Miller R. Bevzenko V., Administrative justice in Ukraine: textbook / under the General editorship of A. Kosyk. Moscow: Precedent, 2009. 198 p.

8. Rykov V. Some questions of creation of administrative justice in Ukraine. Legal state. 1999. Vol. 9. P. 171–175.

9. Rudenko A. Administrative proceedings: formation and implementation: abstract. Dis. for the Sciences. The degree candidate. Yuri. Sciences'. Kharkiv, 2016. 19 sec.

10. Starilov Y. Administrative justice. Moscow: Norma, 2011. 274 p.

11. Pedko Y. Formation and legal regulation of administrative justice: abstract. Dis. for the Sciences. the degree candidate. Yuri. Sciences. Kiev, 2003. 17 sec.

12. Rykov V. Some questions of creation of administrative justice in Ukraine. Legal state. 1999. Vol. 9. P. 171–175.

13. Code of administrative procedure of Ukraine. URL: http://zakon5.rada.gov.ua/laws/show/2747–15/print1509551785369965

14. Fundamentals of administrative proceedings and administrative law / Scientific. Allowance / per zag. Edited by Kuibida R., Shishkina V. Kiev: Old World, 2006. 526 p.

15. Shemshuchenko Y. administrative justice. Legal encyclopedia. Vol. Kiev: Ukr. ENCYCLOPAEDIA. 1998. P. 47–48.

Information about the author:
Voronin Ya. G.,
Doctor of Law, Professor,
Professor at the Department of Administrative,
Criminal Law and Procedure,
International University of Business and Law
37-A, 49 HGD str., Kherson, 73040, Ukraine

DOI https://doi.org/10.36059/978-966-397-181-0/304-322

LEGAL REGULATION OF ACTIVITIES RELATING TO THE CIRCULATION OF DRUGS, PSYCHOTROPIC SUBSTANCES, THEIR ANALOGS AND PRECURSORS IN THE TERRITORY OF UKRAINE

Sokolenko O. L.

INTRODUCTION

Activities related to the circulation of narcotic, psychotropic substances, their analogues and precursors in Ukraine are conducted in Ukraine, so it is necessary to get acquainted with certain features, namely – to find out what requirements at the legislative level certain types of activities in this field should meet.

According to item 10, 22 h. 1 Art. 7 of the Law of Ukraine "On Licensing of Economic Activities"[1] the following types of economic activity are subject to licensing:

1) manufacture of medicines, wholesale and retail trade of medicines, import of medicines (except for active pharmaceutical ingredients) – taking into account the specifics defined by the Law of Ukraine "On Medicines"[2];

2) cultivation of plants included in Table I of the List of narcotic drugs, psychotropic substances and precursors[3] approved by the Cabinet of Ministers of Ukraine, development, production, manufacture, storage, transportation, acquisition, sale, import to the territory of Ukraine, export from the territory of Ukraine, use, destruction of narcotic drugs, psychotropic substances and precursors included in the above List,

[1] Закон України "Про ліцензування видів господарської діяльності" від 02.03.2015 № 222-VIII (у ред. від 05.07.2017). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/222-19. (ст. 7).

[2] Закон України "Про лікарські засоби" від 04.04.1996 № 123/96-ВР (у редакції від 19.06.2016): [Електронний ресурс]. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/123/96-вр.

[3] Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу/Таблиця 1/ Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

taking into account the features defined by the Law of Ukraine "On Narcotic Drugs, Psychotropic Substances and Precursors[4].

1. Procedure for issuing a permit for the use of objects and premises, removal from Ukraine of funds intended for activities related to drug trafficking

Licensing is conducted by a specially licensed licensing body and an expert-licensing board.

The license applicant submits to the licensing authority an application for a license under the defined license conditions form.

The licensing authority shall, within three working days of receipt of the license application, establish the existence or absence of grounds for leaving it without consideration and, if so, make the appropriate decision. The term for making a decision on the issue of a license is ten working days from the date of receipt by the subject of licensing of the license application. The acquisition by the licensee of the right to pursue the type of economic activity subject to licensing takes place from the moment of the decision of the licensing authority to issue the license to the Unified State Register of Legal Entities, Individual Entrepreneurs and Public Formations. In the decision to grant a license, the licensing authority specifies the payment details for the payment of the license. The license for conducting by the licensee of a certain type of economic activity subject to licensing shall be formalized by the licensing authority in electronic form (record of the decision of the licensing authority to issue a license to the entity in the Unified State Register of legal entities, natural persons – entrepreneurs and public entities) is displayed on the extract from the Unified State Register of Legal Entities, Entrepreneurs and Public Formations, which is issued to the licensee free of charge and is subject to obligatory compulsory disclosure of a portal for e-services in the manner prescribed by the Ministry of Justice of Ukraine in accordance provide information from the Unified State Register of Legal Entities and individuals – entrepreneurs and community groups. The license is issued for an unlimited period.

One-time minimum subsistence payment shall be charged for the issue of a license, based on the subsistence minimum for able-bodied persons, effective on the day the licensing authority makes a decision to

[4] Закон України "Про наркотичні засоби, психотропні речовини і прекурсори" від 15.02.1995№ 60/95-ВР (у редакції 28.12.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/60/95-вр.

issue a license, unless another amount of payment is established by law. The license fee issued by the Council of Ministers of the Autonomous Republic of Crimea or a local executive body is 10 percent of the subsistence level for able-bodied persons effective on the day the license is issued. License renewal is free of charge.

For conducting licensed economic activity without a license or performing such economic activities in violation of licensing conditions, the officials of economic entities bear the administrative responsibility provided for by the Code of Administrative Offenses[5].

In the absence of licensing conditions for conducting an appropriate type of economic activity subject to licensing under the law, the responsibility for conducting such economic activities without a license shall not apply.

Officials of the licensing authority bear administrative, material or disciplinary responsibility for violation of the legislation in the sphere of licensing.

According to the resolution of the CMU "Some Issues of Issuance of Permit for the Use of Objects and Premises for the Purpose of Activities Related to the Circulation of Narcotic Drugs, Psychotropic Substances and Precursors" of April 13, 2011, No. 469[6] Authorization for the Use of Objects and Premises, intended for carrying out activities related to the circulation of drugs, psychotropic substances and precursors is issued to a legal entity by the head offices of the National Police in the Autonomous Republic of Crimea and the city of Sevastopol, the regions and the city of Kiev and according to the location of a legal entity, and in cases where activities related to narcotic drugs, psychotropic substances and precursors, shall not at the location of a legal entity – at the place of such activities[7].

[5] Кодекс України про адміністративні правопорушення (статті 1–212-21) від 07.12.1984 № 8073-X (у редакції 16.04.2017): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/80731-10;

[6] Постанова Кабінету Міністрів України "Деякі питання видачі дозволу на використання об'єктів і приміщень, призначених для провадження діяльності, пов'язаної з обігом наркотичних засобів, психотропних речовин і прекурсорів" від 13.04.2011 № 469 (у ред. від 11.04.2017). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/469-2011-п. ст. 2-17.

[7] Закон України "Про Національну поліцію" від 2.07.2015р. № 580-19 (в ред. від 12.07.2017 р.). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/580-19/page

Permission is granted based on the results of the compliance check facilities and premises established by the Ministry of Internal Affairs requirements.

To obtain a permit, the legal entity submits in person or through an authorized body or person to a public administrator or a representative of a structural unit of a territorial authority National Police on Drugs Crime Statement for the form approved by the resolution of the Cabinet of Ministers of Ukraine dated 7.

December 2005 No.1176 "On Approval of the Form of Application for Obtaining by a Business Entity or Authorized Documents of a Permit Character"[8] to which accompanying documents are attached.

Legal entity whose activities are related to cultivation, transportation, storage and destruction of plants included in table I of the list, in addition to those specified in paragraph 4 of this Order of Documents, shall also submit copies:

– a document confirming the right at the time of application ownership of a land plot or permanent use or lease of a land plot;

– a document confirming the fact of purchase from the subjects of seed and nursery, entered in the State Register of producers of seeds and planting material, seeds for cultivation of plants included in the list (for poppy – the first reproduction, for hemp – the first or second reproduction);

– extraction from the map-scheme of the land plot with indication of the area of sowing, distance to settlements, forest lands, railways and highways of local importance;

– the agreement on the protection of the places of cultivation, storage and destruction of plants included in the list No. 3 of table I of the list, their crop residues and an annex, which specifies information on the location of forces and means of protection units.

In the case of transportation of parts of plants included in list N 3 of table I[9] of the list, or their seeds, which do not meet the requirements of GOST 12094-76 or GOST 9158-76 as a percentage of trash, or their crop

[8] Постанова Кабінету Міністрів України "Про затвердження форми заяви на одержання суб'єктом господарювання або уповноваженою ним собою документів дозвільного характеру" від 7.12.2005 р. N 1176 (в ред. від 11.02.2015 – втратив силу). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/ru/1176-2005-п.

[9] Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу / Таблиця 1 / Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

residues for further processing (purification), except These documents shall also include a copy of the contract for the protection of such parts of plants and seeds during carriage and the scheme of the carriage route.

Copies of documents are certified in due course. The application, submitted to the structural unit of the territorial authority of the National Police for the Fight against Drugs, is registered in the register of applications for permission to use the facilities or premises in the form approved by the Ministry of Internal Affairs.

In case of submission of the application to the state administrator and documents, he submits the following statement and documents to the structural unit of the territorial authority of the National Police on the fight against drug crime on the day of their submission or during the next business day, the statement registered.

For the purpose of checking the conformity of objects or premises established by the Ministry of Internal Affairs requirements are inspected by employees' structural subdivision of the territorial authority of the National the Police on Drugs and Police protection in the Autonomous Republic of Crimea and Sevastopol, regions and Kyiv. Objects or premises are inspected on time, which does not exceed three business days from the date of submission of the structural a subdivision of a territorial body of the National Police combating drug crime by a legal entity or a state the administrator of the application and documents. Inspection of objects or premises is carried out in the presence of representatives of the legal entity. According to the results of the inspection of the objects or premises, the survey acts are prepared according to the forms approved by the Ministry of Internal Affairs in agreement with the Ministry of Health, which states the possibility or impossibility of using the objects or premises for the activity related to the circulation of narcotic drugs, psychotropic substances and precursors.

Inspection acts are drawn up in duplicate and signed by employees of the structural unit of the territorial body of the National Police on Drugs and the Police in the Autonomous Republic of Crimea and Sevastopol, regions and Kyiv, a legal entity or an authorized national and territorial entity police. One copy of the survey act shall be issued to the legal entity or its authorized person, which shall be entered register of the acts of inspection of objects and premises, which shall be kept in the form approved by the Ministry of Internal Affairs in agreement with the Ministry of Health, and the second shall be kept in the relevant case of the territorial subdivision drug police.

Decision to grant or refuse to grant it is accepted within 10 calendar days from the date of submission of the application and documents.

The legal person shall be issued a permit within three calendar days from the date of making the respective decision or a written notice of refusal of its issuance shall be given, stating the reasons for the refusal.

A permit or a written notice of refusal to issue a permit shall be issued in two copies, each of which shall be certified by the signature of the head of the territorial authority of the National Police, and in the absence thereof – by the deputy head or the person performing his duties, and shall be affixed with the seal of such authority.

The structural subdivision of the territorial authority of the National Police for the Suppression of Drug Crime issues one copy of the permit to the head of the legal entity or his representative in the presence of a duly issued power of attorney for obtaining a permit and a document certifying the identity, or to the state administrator for the transfer of the authorization to the legal entity in the order.

The permit of the structural unit of the territorial body of the National Police for Combating Drug Crime makes a note in the log of applications for obtaining permission for the use of objects or premises. The second copy of the permit, together with the documents, remains in the structural subdivision of the territorial authority of the National Police for the Suppression of Drug Crime and remains for the whole period of validity of the license for conducting activities related to the circulation of narcotic drugs, psychotropic substances and precursors, and for three years after the expiration of the term its actions. Permission is not allowed to be mailed. The period of validity of a permit may not exceed the period of validity of a license to engage in activities related to the circulation of narcotic drugs, psychotropic substances and precursors.

In case of refusal of the permit, the legal person has the right to apply again to the structural subdivision of the territorial body of the National Police for the fight against drug crime only on condition of elimination of the reasons which gave rise to the refusal. The decision to refuse the permit may be appealed in accordance with the procedure established by law.

Issuance of permits for the right to import into the territory of Ukraine the export of narcotic drugs, psychotropic substances and precursors from the territory of Ukraine by enterprises, institutions and organizations if they have licenses to carry out relevant activities in the sphere of narcotic drugs, psychotropic substances and precursors

circulation, as well as the procedure for issuance permits for the right to transit narcotic drugs, psychotropic substances and precursors through the territory of Ukraine are determined in the order of issuing permits for the right to import into the territory of Ukraine, export from Ukraine or transit through the territory of Ukraine of narcotics, psychotropic substances and precursors approved by CMU from 02.03.1997[10].

Imports and exports of drugs, psychotropic substances and precursors are carried out by enterprises, subject to obtaining a permit for each individual operation issued by the State Service. The permit is issued in agreement with the SBU. Issuance (refusal of issue, re-registration, issue of duplicate, cancellation) of the permit is carried out in accordance with the Law of Ukraine "On the Permitting System in the Field of Economic Activity[11]".

To obtain a permit for import into Ukraine for registration in the Ministry of Health of samples of narcotic drugs, psychotropic substances and precursors included in the list of controlled substances, in the form of medicines, as well as medicinal products, which include the controlled substances included in the list, the enterprise submits such documents :

1) statement on the letterhead of the enterprise addressed to the Head of the State Service, stating:

– the purpose with which the importation is made;

– full names, exact addresses, phone numbers (faxes) of the enterprise – importer (consignee);

– the international non-proprietary name of the imported product, if any, and (or) the first name under which it was issued and (or) the name under which it is produced in the importing country;

– quantity of narcotic drugs, psychotropic substances and precursors included in the list of controlled substances imported;

– the number of medicines that include controlled substances included in the list;

[10] Постанова Кабінету Міністрів України "Порядок видачі дозволів на право ввезення на територію України, вивезення з території України або транзиту через територію України наркотичних засобів, психотропних речовин і прекурсорів" від 03.02.1997 № 146. [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/146-97-п.

[11] Закон України "Про дозвільну систему у сфері господарської діяльності" від 06.09.2005 № 2806-IV (у ред. від 05.07.2017). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/2806-15.

– dosage form of narcotic drugs, psychotropic substances, precursors and medicines, which include controlled substances included in the list;

– type of transport for delivery;

– delivery time;

– the name of the crossing point on the state border of Ukraine through which the importation will be made;

2) a letter of request from the Ministry of Health confirming the need to import a specified number of samples of drugs, psychotropic substances and precursors, included in the list of controlled substances, in the form of drugs, as well as medicines, which include included controlled substances, for registration in Ukraine and the guarantee of their storage, indicating the name of the person responsible for it;

3) the undertaking of the importing company to use narcotic drugs, psychotropic substances, precursors and medicines only for the stated purposes.

4) quality certificates for imported medicinal products.

To obtain a permit for the importation as a humanitarian aid of narcotic drugs, psychotropic substances and precursors included in the list of controlled substances in the form of medicinal products, as well as medicinal products that include controlled substances included in the list, an enterprise authorized to carry out activities in the sphere of circulation of these substances, submits the following documents:

1) a statement on the letterhead of the enterprise addressed to the Head of the State Service, stating:

– purpose for which importation is carried out:

– full names, addresses and telephone numbers of the exporter, the importer (consignee) company and the exporter;

– the international non-proprietary name of the imported product, if any, and (or) the first name under which it was issued and (or) the name under which it is produced in the importing and exporting countries;

– the amount of narcotic drugs, psychotropic substances and precursors included in the list of controlled substances in the form of medicinal products to be imported;

– the number of medicines that are included

controlled substances to be imported;

– dosage form of narcotic drug, psychotropic substance, precursor and drug;

– name of the manufacturer;

– type of transport for delivery;

– delivery time;

– the name of the crossing point on the state border of Ukraine, through to be imported;

– the obligation of the enterprise to use humanitarian aid only on purpose and to inform the State Service within two months about its distribution;

2) the invoice, the freight declaration, the freight, customs, transport documents containing information on the amount of narcotic drugs, psychotropic substances, precursors and medicines, which include the controlled substances included in the list;

3) a notarized copy of the charter of the enterprise (consignee);

4) registration certificates for medicinal products imported into Ukraine (in the absence of such a certificate an act on the possibility of medical use of medicinal products is filed);

5) certificate of quality of narcotic drug or psychotropic substance with indication of expiration date (quality passport is added for precursors).

The import permit for narcotics, psychotropic substances and precursors shall specify:

– his registration number;

– name and address of the importer;

– name and address of the exporter;

– the name (including the international non-proprietary name) and the amount of narcotic drugs, psychotropic substances, precursors and drugs that include the controlled substances to be imported under the contract;

– name (including international non-proprietary name) and quantity

– narcotics, psychotropic substances and precursors included in the list of controlled substances to be imported under the contract;

– type of container and its quantity – for narcotic drugs, psychotropic substances and precursors in the form of a substance used for the manufacture of medicines;

– mode of transport;

– the name of the customs office and the name of the checkpoint at the state border of Ukraine, through which the importation and customs clearance of drugs, psychotropic substances, precursors and medicines will be carried out;

– date of issue;

– validity.

The permit is signed by the head of the State Service and is affixed stamp of the State Service. To obtain a permit for export of narcotic drugs, psychotropic substances and recursors from Ukraine the following documents are submitted to the enterprise:

1) statement on the letterhead of the enterprise addressed to the Head of the State Service, stating:

– the purpose for which the export is carried out;

– full names, exact addresses, phone numbers (faxes) of the exporter, importer and consignee;

– the international non-proprietary name of the exported product, if any, and (or) the first name under which it was issued and (or) the name under which it is produced in the countries of export and import;

– name and quantity of narcotic drugs, psychotropic substances and precursors to be exported;

– dosage form of narcotic drug, psychotropic substance and precursor;

– name and quantity of narcotic drugs, psychotropic substances and precursors included in the list of controlled substances to be exported under the contract;

– name of the manufacturer:

– Delivery contract number;

– the cost of the delivery contract;

– name and number of packaging units for narcotic drugs, psychotropic substances and precursors in the form of a substance used for the manufacture of medicines;

– type of transport for delivery;

– delivery time;

– the name of the checkpoint at the state border of Ukraine through which the export will be made;

2) an invoice or pro forma invoice confirming information on the amount of drugs, psychotropic substances and precursors to be exported;

3) a notarized copy of the company's charter;

4) a notarized copy of the contract under which the export of narcotic drugs, psychotropic substances and precursors is carried out;

5) registration certificates for medicinal products exported from Ukraine;

6) Certificate of quality of a narcotic drug, psychotropic substance or precursor included in the list No. 1 of table IV[12], stating their expiration date, the manufacturer's quality passport or technical documentation showing the chemical composition of the product is added).

During the export of narcotic drugs, psychotropic substances and precursors included in List 4 of Table 4 of the controlled substances list, the exporter must, in each case, supply an import certificate (national certificate) issued by the competent authority of the importing country.

If there is no national certificate procedure in the importing country or guarantees are not provided, the counterpart of the importing country shall draw up an equivalent. The export of narcotic drugs, psychotropic substances and precursors by consignment to a prescriptive customs warehouse is prohibited, except where the government of the exporting country makes a mark on the placement of the imported consignment in the prescriptive customs warehouse.

In the permit for export of narcotic drugs, psychotropic substances and precursors are indicated:

– his registration number;

– name and address of the exporter;

– name and address of the importer;

– name (including international non-proprietary name) and quantity narcotic drugs, psychotropic substances and precursors and drugs, which include controlled substances;

– type of container and its quantity – for narcotic drugs, psychotropic substances and precursors in the form of a substance used for the manufacture of medicines;

– name (including international non-proprietary name) and quantity of narcotic drugs, psychotropic substances and precursors included in the List of controlled substances to be exported;

– national import authorization number, date of issue, by whom issued;

– mode of transport;

– the name of the customs office and the name of the border crossing point Ukraine through which export will be made;

– date of issue;

– validity.

[12] Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу / Таблиця 1 / Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

The permit is signed by the head of the State Service and is affixed stamp of the State Service. To obtain a permit for transit through the territory of the country of narcotic drugs, psychotropic substances and precursors the following documents are submitted to the enterprise:

1) statement on the letterhead of the enterprise addressed to the Head of the State Service, stating:

– full names, exact addresses, telephone and fax numbers of the exporter and importer;

– name and quantity of narcotic drugs, psychotropic substances and precursors to be transited;

– dosage form of narcotic drug, psychotropic substance and the precursor or the name of the product containing the precursors included in list No. 2 of table IV;

– Delivery contract number;

– type of transport for delivery;

– the name of the border crossing points through which the import and export will be carried out;

2) a copy of the contract certified by the company seals (if any) according to which the delivery is made;

3) Certificate of quality of narcotic drug, psychotropic substance or precursor included in the list No.1 of Table IV[13], indicating their expiry date, the manufacturer's quality passport or technical documentation showing the chemical composition of the product is added.

The company must deliver in each case provide a certificate (national certificate) of the importing and exporting countries on export-import operations. If there is no national certificate procedure in the importing country or guarantees are not provided, the counterpart of the importing country's authority shall draw up an equivalent.

2. Regulation of the procedure for storage of narcotic drugs, psychotropic substances and precursors removed from illicit trafficking. Legislative provision of the order of transportation of narcotic drugs on the territory of Ukraine

Features of storage of narcotic drugs, psychotropic substances and precursors withdrawn from illicit trafficking are regulated by the

[13] Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу / Таблиця 1 / Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

procedure of storage of narcotic drugs, psychotropic substances and precursors withdrawn from illicit trafficking by the approved CMU resolution of May 7, 2008 No. 422[14].

The storage of narcotics, psychotropic substances and precursors by the National Police, the Security Service of Ukraine and the State Customs Service is carried out without a corresponding license. For the storage of narcotic drugs, psychotropic substances and precursors, the National Police, the Security Service of Ukraine and the State Customs Service allocate premises that meet the requirements established by the Ministry of Internal Affairs. Permission to use the premises is not required. The head of the authority of the National Police, the Security Service of Ukraine and the State Customs Service appoints a person who is responsible for the storage and maintenance of narcotics, psychotropic substances and precursors.

The responsible person shall make an appropriate entry in the journal of the account of narcotic drugs, psychotropic substances and precursors, which is attached to the materials of criminal proceedings, about the taking for storage of narcotic drugs, psychotropic substances and precursors.

Drugs, psychotropic substances and precursors accepted for storage must be packed and sealed. Each package is affixed with a tag stating the accounting journal number and order number.

When taking drugs, psychotropic substances and precursors for storage, the responsible person checks the compliance of the data specified in the documents on the withdrawal and investigation of such drugs, substances and precursors with their actual status. Narcotic drugs, psychotropic substances and precursors, which cannot be stored in one room by volume, shall be transferred on the basis of a storage agreement concluded in accordance with the law to an entity holding a license.

The premises and the safes and metal cabinets in which narcotics, psychotropic substances and precursors are stored shall be sealed by the responsible person. Entrance to the premises is carried out in the presence of the responsible person. Drugs, psychotropic substances and precursors may be issued on the basis of a written reasoned request from an investigator, prosecutor, investigating judge or court conducting

[14] Постанова Кабінету Міністрів України "Порядок перевезення наркотичних засобів, психотропних речовин і прекурсорів на території України та оформлення необхідних документів" від 17.04.2008 № 366 (у ред. від 18.03.2016). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/laws/show/366-2008-п.

criminal proceedings, as the responsible person makes an appropriate entry in the accounting log. Issued drugs, psychotropic substances and precursors are stored in a safe or metal cabinet.

The transportation of narcotics, psychotropic substances and precursors is carried out by the authorities of the National Police, the Security Service of Ukraine and the State Customs Service, provided their security and safety are ensured. The responsible person shall make an appropriate entry in the accounting log of the return of the indicated organs of drugs, psychotropic substances and precursors. The accounting log is laced and stamped by the authority, its pages are numbered. Records in the accounting log are made by the responsible person in the order of receipt of narcotics, psychotropic substances and precursors on the basis of documents on their withdrawal and research, which indicate the date of their receipt for storage, name, quantity, number of criminal proceedings, place of actual storage, as well as information on the dispensing of these agents, substances and precursors for the purposes prescribed by law.

Control over storage and accounting of narcotic drugs, psychotropic substances and precursors is carried out by a commission, which consists of the head of a body of the National Police, the Security Service of Ukraine and the State Customs Service, representatives of the unit responsible for record keeping, the expert-criminalistic unit and the unit on counter-narcotics, and precursors. The Commission shall review at least once a month the status and conditions of storage of narcotic drugs, psychotropic substances and precursors and the procedure for keeping them. As a result of the audit, an act is signed, signed by the members of the commission, transferred to the unit responsible for paperwork, and kept in the file. During the conduct of routine inspections of subordinate bodies by the authorities of the National Police, the Security Service of Ukraine and the State Customs Service, the state of storage and the procedure of keeping records of narcotics, psychotropic substances and precursors are compulsorily checked. In the case of improper storage and accounting of narcotics, psychotropic substances and precursors, an investigation is conducted.

Transportation of narcotic drugs across the territory of Ukraine is legally regulated and fixed in the order of transportation of narcotic drugs, psychotropic substances and precursors in the territory of Ukraine

and registration of the necessary documents by the approved CMU resolution of April 17, 2008 No. 366[15].

The transportation of drugs, psychotropic substances and precursors included in the list is carried out by economic entities on the basis of an appropriate license. Transportation of narcotic drugs, psychotropic substances and precursors, seized from the illegal traffic by the authorities of the National Police, SBU, State Border Guard Service and other units carrying out activities in accordance with the Law of Ukraine "On Operational and Investigative Activity[16]", as well as by the State Customs Service, within the limits of their powers and in the manner prescribed by the said authorities.

Transportation of narcotics, psychotropic substances and precursors is carried out by health care institutions, economic entities that carry out activities for their production, manufacture, as well as by road carriers, provided the cargo is safe. The transportation of these facilities, substances and precursors on the territory of Ukraine is carried out by road, air or water. The transport of narcotic drugs, psychotropic substances and precursors, with the exception of precursors included in list No. 2 of table IV[17] of the list, is prohibited by rail and mail. Drugs, psychotropic substances and precursors are transported by motor vehicle, the technical condition of which meets the requirements of the Traffic Rules, approved by the Decree of the Cabinet of Ministers of Ukraine of October 10, 2001 No. 1306[18], and the conditions of their safe transportation. The motor vehicle is completed, in addition to the equipment specified in the Road Traffic Rules, with a set of tools for minor repairs, a powder or carbon dioxide extinguisher with a capacity of not less than five liters and anti-recoil stops.

---

[15] Постанова Кабінету Міністрів України "Порядок перевезення наркотичних засобів, психотропних речовин і прекурсорів на території України та оформлення необхідних документів" від 17.04.2008 № 366 (у ред. від 18.03.2016). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/366-2008-п.

[16] Закон України "Про оперативно-розшукову діяльність" від 18.02.1992 № 2135-XII (у редакції 12.04.2017): [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/2135-12.

[17] Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу/Таблиця 1/ Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

[18] Постанова Кабінету Міністрів України "Правила дорожнього руху" від 10 жовтня 2001 р. № 1306 (у ред. від 05.04.2017). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/1306-2001-п.

The transportation of narcotic drugs, psychotropic substances and precursors is carried out with the support of a responsible person appointed by the head of a health care institution or an economic entity that carries out activities for their production, manufacture. The fact of receipt of narcotic drugs, psychotropic substances and precursors is confirmed by a signed invoice signed by the responsible person stating the state number of the respective motor vehicle.

The transportation of these facilities, substances and precursors within the city or district shall be carried out without a permit issued by the National Police. The issue of cargo protection on the road is decided by the head of the health care institution or economic entity on the basis of specific circumstances. Transport of narcotic drugs, psychotropic substance of precursors, with the exception of precursors included in list IV of table IV of the list in the amount of 200 or more kilograms is carried out by a motor vehicle accompanied by a vehicle of special purpose patrol police or security police. The head of a healthcare facility or business entity is personally responsible for ensuring the safety of cargo and the confidentiality of transportation information.

The procedure for dispensing drugs, psychotropic substances and precursors, with the exception of precursors included in list No. 2 of table IV of the list, health care institutions and economic entities shall be established by the Ministry of Health. The leave for the transportation of precursors included in list No. 2 of table IV of the list is made by the person, determined by the order of the head of the health care institution or economic entity, who makes the release of such precursors, after acquaintance with it. The authorized person keeps a record of the precursors included in list No. 2 of table IV of the list, indicating in the special journal the total mass, the number of places, the destination, the number and the date of signing of the consignment note. The entry in the special journal shall be certified by the signature of the authorized person. During the leave (acceptance) for the transportation of narcotic drugs, psychotropic substances and precursors, the authorized person is obliged to check his / her validity and correspondence of the quantity of the mentioned drugs, substances and precursors to the information given in the accompanying documents, their correct marking and packaging and to sign the corresponding documents.

The transportation of narcotic drugs, psychotropic substances and precursors by economic entities is carried out on the basis of the goods waybill accompanied by the responsible person (representative of the

consignor or consignee, who is familiar with the properties of these agents, substances and precursors and rules of safe handling).

The responsibilities of the responsible person include:

– escort and protection of narcotics, psychotropic substances and precursors during their transportation to their destination;

– instructing the driver who carries out narcotics transportation drugs, psychotropic substances and precursors;

– inspection of the motor vehicle and provision in case of need for its repair;

– verification of the correct labeling and packaging of drugs, psychotropic substances and precursors and their acceptance;

– monitoring of loading and fixing of cargo;

– transfer of narcotics, psychotropic substances and precursors upon arrival at the destination;

– personal security.

The transportation of precursors included in list N 2 of table IV of the list, including non-resident carriers, is carried out in accordance with the established requirements of the Ministry of Internal Affairs.

CONCLUSIONS

Knowledge of the peculiarities of the activities related to the circulation of narcotic, psychotropic substances, their analogues and precursors in the territory of Ukraine will allow to objectively observe the due observance of the legislation by economic entities and persons directly involved in committing certain actions related to narcotic drugs, psychotropic substances, their analogues and precursors in the territory of Ukraine.

SUMMARY

The paper outlines the requirements to be met by certain types of business activities related to the circulation of narcotic, psychotropic substances, their analogues and precursors in Ukraine. It is established that manufacture of medicines, wholesale and retail trade in medicines, import of medicines; cultivation of plants included in Table I of the List of narcotic drugs, psychotropic substances and precursors, development, production, production, storage, transportation, purchase, sale (vacation), import to the territory of Ukraine, export from the territory of Ukraine, use, destruction of narcotic drugs are subject to licensing . This paper examines the licensing procedure and describes the procedure for issuing permits for the use of facilities and premises, the removal of funds from

Ukraine for activities related to drug trafficking. The key stages of licensing and the mechanism of its implementation are described. The peculiarities of storage of narcotic drugs, psychotropic substances and precursors removed from illicit trafficking are investigated. The analysis of the legislative support of the order of transportation of narcotic drugs, psychotropic substances and precursors in the territory of Ukraine is conducted. The responsibilities of the responsible persons for the transportation procedure are established.

REFERENCES

1. Закон України "Про ліцензування видів господарської діяльності" від 02.03.2015 № 222-VIII (у ред. від 05.07.2017). [Електронний ресурс]: Режим доступу: http://zakon2.rada.gov.ua/ laws/show/222-19.

2. Закон України "Про лікарські засоби" від 04.04.1996 № 123/96-ВР (у редакції від 19.06.2016): [Електронний ресурс]. – Режим доступу: http://zakon0.rada.gov.ua/laws/show/ 123/96-вр.

3. Невеликі, великі та особливо великі розміри наркотичних засобів, що знаходяться у незаконному обігу / Таблиця 1 / Затверджена наказом Міністерства охорони здоров'я України 01.08.2000 N 188 (у редакції 19.06.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/z0512-00.

4. Закон України "Про наркотичні засоби, психотропні речовини і прекурсори" від 15.02.1995№ 60/95-ВР (у редакції 28.12.2015): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/60/95-вр.

5. Кодекс України про адміністративні правопорушення (статті 1 – 212-21) від 07.12.1984 № 8073-Х (у редакції 16.04.2017): [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/ laws/show/80731-10;

6. Постанова Кабінету Міністрів України "Деякі питання видачі дозволу на використання об'єктів і приміщень, призначених для провадження діяльності, пов'язаної з обігом наркотичних засобів, психотропних речовин і прекурсорів" від 13.04.2011 № 469 (у ред. від 11.04.2017). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/ laws/show/469-2011-п.

7. Закон України "Про Національну поліцію" від 2.07.2015 р. № 580-19 (в ред. від 12.07.2017р.). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/580-19/page;

8. Постанова Кабінету Міністрів України “Про затвердження форми заяви на одержання суб’єктом господарювання або уповноваженою ним собою документів дозвільного характеру” від 7.12.2005 р. N 1176 (в ред. від 11.02.2015 – втратив силу). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/ laws/show/ru/1176-2005-п.

9. Постанова Кабінету Міністрів України “Порядок видачі дозволів на право ввезення на територію України, вивезення з території України або транзиту через територію України наркотичних засобів, психотропних речовин і прекурсорів” від 03.02.1997 № 146. [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/ laws/show/146-97-п.

10. Закон України “Про дозвільну систему у сфері господарської діяльності” від 06.09.2005 № 2806-IV (у ред. від 05.07.2017). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/2806-15.

11. Постанова Кабінету Міністрів України “Порядок перевезення наркотичних засобів, психотропних речовин і прекурсорів на території України та оформлення необхідних документів” від 17.04.2008 № 366 (у ред. від 18.03.2016). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/ laws/show/366-2008-п.

12. Закон України “Про оперативно-розшукову діяльність” від 18.02.1992 № 2135-XII (у редакції 12.04.2017): [Електронний ресурс]. – Режим доступу: http://zakon3.rada.gov.ua/laws/show/ 2135-12.

13. Постанова Кабінету Міністрів України “Правила дорожнього руху” від 10 жовтня 2001 р. № 1306 (у ред. від 05.04.2017). [Електронний ресурс]. – Режим доступу: http://zakon2.rada.gov.ua/laws/show/1306-2001-п.

Information about the author:
Sokolenko O. L.,
Doctor of Laws, Professor,
Dean of the Law Faculty,
Oles Honchar Dnipro National University
72, Gagarin Ave., Dnipro, 49000, Ukraine

NOTES

Publishing house “Liha-Pres”
9 Kastelivka str., Lviv, 79012, Ukraine
44 Lubicka str., Toruń, 87-100, Poland

Printed by the publishing house “Liha-Pres”
Passed for printing: October 25, 2019.
A run of 150 copies.