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CUESTIONES POLÍTICAS

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de la Facultad de Ciencias Jurídicas y Políticas de la Universidad del Zulia
Maracaibo, Venezuela

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Cuestiones Políticas

La revista **Cuestiones Políticas,** es una publicación auspiciada por el Instituto de Estudios Políticos y Derecho Público "Dr. Humberto J. La Roche" (IEPDP) de la Facultad de Cienhcias Jurídicas y Políticas de la Universidad del Zulia.

Entre sus objetivos figuran: contribuir con el progreso científico de las Ciencias Humanas y Sociales, a través de la divulgación de los resultados logrados por sus investigadores; estimular la investigación en estas áreas del saber; y propiciar la presentación, discución y confrontación de las ideas y avances científicos con compromiso social.

Cuestiones Políticas aparece dos veces al año y publica trabajos originales con avances o resultados de investigación en las áreas de Ciencia Política y Derecho Público, los cuales son sometidos a la consideración de árbitros calificados.

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Tiempos difíciles: Crisis políticas y esperanza en las dimensiones individual y colectiva

DOI: https://doi.org/10.46398/cuestpol.4179.00

Jorge J. Villasmil Espinoza *

Resumen

Las crisis son fenómenos individuales y colectivos constantes en la historia humana y, por lo tanto, tienen implicaciones profundas en la vida de las personas y sus comunidades de referencia. Cuando se habla de una crisis política se quiere significar a los problemas que se originan, de forma directa o indirecta, en las esferas de dirección de un sistema político determinado y pueden derivar también en crisis económicas, sociales o medioambientales, entre otras. El propósito de esta editorial es, por un lado, servir de presentación a la edición de octubre-diciembre de Cuestiones Políticas, Vol. 41 No. 79 del año 2023, por el otro, desarrollar una editorial de un tema de interés general. Las reflexiones desarrolladas permiten concluir que, al menos en algunas crisis, la sociedad civil organizada, sin la participación de actores o agencias estatales, pude construir formas de capital social que, si bien es cierto no son suficientes para resolver los problemas sistémicos, mejoran la situación de muchas personas al resolver problemas cotidianos mediante prácticas de organización comunitaria, emergencia de liderazgos no partidistas y relaciones intersubjetivas de solidaridad que fortalecen el tejido social.

Palabras clave: crisis políticas; esperanza; tiempos difíciles; cuestiones políticas; sensibilidad social.

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Difficult times: Political crises and hope in individual and collective dimensions

Abstract

Crises are constant individual and collective phenomena in human history and, therefore, have profound implications in the lives of individuals and their communities of reference. When we speak of a political crisis we mean the problems that originate, directly or indirectly, in the spheres of management of a given political system and can also derive in economic, social or environmental crises, among others. The purpose of this editorial is, on the one hand, to serve as a presentation for the October-December issue of Cuestiones Políticas, Vol. 41 No. 79 of the year 2023, on the other hand, to develop an editorial on a topic of general interest. The reflections developed allow us to conclude that, at least in some crises, organized civil society, without the participation of state actors or agencies, can build forms of social capital that, although they are not enough to solve systemic problems, improve the situation of many people by solving everyday problems through community organization practices, the emergence of non-partisan leadership and intersubjective relationships of solidarity that strengthen the social fabric.

Keywords: political crises; hope; difficult times; political issues; social sensitivity.

Editorial

Según Torres (2018) las crisis son momentos de perturbación que alteran de forma parcial o total un orden de cosas y pueden tener causas diversas como: guerras, conflictos internos y catástrofes naturales. No obstante, no todo problema relevante puede ser considerado trivialmente como una crisis; para que haya una crisis propiamente dicha, la problemática material o simbólica que la genera debe suceder en la dimensión estructural del ser, alterando la esencia y existencia particular de los entes. De hecho, según Caballero (2007) el filósofo decimonónico Jacob Burckhardt de origen suizo, explico en su momento cuales son las cinco condiciones básicas que permiten identificar a una crisis estructural-sistemática:

1. Se trata de un momento crucial para la vida de una sociedad, de modo que su impronta ocasiona un antes y un después.
2. Significa el tránsito de una situación de normalidad o relativa normalidad a una de anormalidad.
3. Para que una crisis sea valorada como tal, las transformaciones que genera deben ser irreversibles.

4. Las crisis tienen un origen cronológico claro que puede ser ubicado históricamente para efectos de la investigación científica de sus causas y consecuencia.

5. Las crisis pueden ser parciales o totales para la vida de un sistema político o un orden social (Caballero, 2007).

Bajo esta perspectiva propia de la filosofía de la historia, en el mundo de hoy, en pleno siglo XXI, están sucediendo un conjunto de acontecimientos que permiten predecir el desarrollo de un conjunto de crisis que, llegado el momento, tienen la fuerza para erosionar la vida de algunos y países y del orden mundial vigente (Arbeláez-Campillo y Villasmil, 2020). Mas concretamente nos referimos a: La invasión rusa a Ucrania; la guerra del Estado de Israel con las milicias del grupo Hamas en Palestina; la guerra civil en Siria y en Irak; el conflicto bélico en Nagorno-Karabaj, sucedido entre Azerbaiyán y Armenia; la guerra civil en Sudan del sur; la guerra civil yemení; la guerra Tigray en Etiopía y, en menor medida, el conflicto venezolano entre oficialismo y oposición que ha generado la migración más de cinco millones de personas.

Tal como sostiene Stiglitz (2002), en un mundo interconectado por las redes de la globalización, los acontecimientos políticos, económicos y sociales que afectan la vida de una país particular, tienen además, un impacto regional e internacional de carácter inusitado que debe ser valorado en su justa medida, mucho más cuando las grandes potencias del mundo de hoy (EE. UU., China, La Unión Europea y la Federación rusa), como parte de su agenda de poder, toman decisiones geopolíticas y geoestratégicas para preservar sus intereses, objetivos y aspiraciones en todo el mundo, al calor de cada suceso relevante, sin importar, muchas veces, el impacto que sus acciones tienen en la soberanía nacional de los países del llamado Sur global, otrora países en vías de desarrollo o "países del tercer mundo".

Desde nuestro punto de vista, los análisis geopolíticos, económicos y sociológicos, entre otros, suelen olvidar la dimensión subjetiva y personal de cada crisis, bien sea porque a diferencia de la psicología, las ciencias sociales y humanas se han preocupado más por el carácter estructural y sistemático de estos fenómenos o, también, porque la concepción empirista lógica de las ciencias a privilegiado el estudio colectivo de los fenómenos en desmedro de su impacto individual. De cualquier modo, los científicos con sensibilidad social no debemos olvidar que las guerras, crisis y demás problemáticas sistémicas destruyen los proyectos de vidas y hasta lateralmente la vida de personas concretas, muchas veces signadas por la vulnerabilidad y por escenarios de emergencia social.

Por estas razones, y como un intento de revindicar la vida y las subjetividades de las personas comunes urgen el desarrollo de líneas de investigación que puedan conectar las relaciones individuales y colectivas

que se gestan en cada crisis, como condición de posibilidad para valorar de forma cualitativa el rostro humano de estos fenómenos y proponer, en la medida de lo posible, soluciones y alternativas para mitigar el sufrimiento de las personas y sus comunidades de referencia. Sin suda se trata de una epistemología al servicio de las necesidades de las personas y seres que sufren.

Por último, conviene recordar tal como sostiene Nussbaum (2012), que no todo es negativo en las crisis, a veces estas situaciones, permiten a las personas mejorar su situación de base y salir fortalecidos de la calamidad, porque la crisis como realidad ontológica siempre pone a prueba las capacidades humanas para ser resilientes, inteligentes y adaptarse a las nuevas dinámicas políticas, económicas y sociales en las que les toca vivir a las personas comunes, no solo como actores pasivos, sino también, como posibles protagonistas de la construcción intersubjetiva de sus espacios de convivencia, más allá de los grandes desafíos que esto significa.

De hecho, en mi experiencia personal en la que viví en carne propia las crisis humanitaria compleja de Venezuela, sucedida entre 2015-2020, pude ver como la sociedad civil organizada, sin la participación de actores o agencias estatales, pudo construir formas de capital social que, si bien es cierto no son suficientes para resolver los problemas sistémicos, han mejorado la situación de muchas personas al resolver y gestionar problemas cotidianos de tipo colectivo, mediante prácticas de organización comunitaria, emergencia de liderazgos no partidistas y prácticas intersubjetivas de solidaridad que fortalecen en parte al tejido social. Ante esta situación tienen sentido tener esperanza, en las capacidades de las personas para construir un mundo mejor a contravía incluso de los poderes hegemónicos.

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Derecho Público

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Predicate offense in money laundering cycle

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Abstract

The article is devoted to the specific topic of the study of the concept, essence, types and meaning of the crime underlying money laundering. Special attention is paid to the topical issues of judicial review under Article 209 of the Criminal Code of Ukraine on legalization (laundering) of criminally obtained property. The authors use general, intersectoral and special (sectoral) methods. The analysis of the judicial practice of Ukrainian courts, carried out by the authors, allows to state that the majority of cases of demanding criminal liability for money laundering occur either in case of existence of a conviction for an underlying offense or with simultaneous prosecution for both an underlying offense and money laundering. It is concluded that, the study of best practices in several countries gives grounds to suggest the possibility of prosecuting asset laundering as a separate criminal offense. Under such conditions, there will be no need to prosecute an underlying offense, especially if it is impossible to prove guilt for its commission.

Keywords: judicial review; judicial practice; predicate crime; legalization (laundering) of property; money laundering.

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Delito principal en el ciclo del blanqueo de capitales

Resumen

El artículo está dedicado al tema concreto del estudio del concepto, la esencia, los tipos y el significado del delito subyacente en el blanqueo de capitales. Se presta especial atención a las cuestiones de actualidad de la revisión judicial en virtud del artículo 209 del Código Penal de Ucrania sobre la legalización (blanqueo) de bienes obtenidos por medios delictivos. Los autores utilizan métodos generales, intersectoriales y especiales (sectoriales). El análisis de la práctica judicial de los tribunales de Ucrania, llevado a cabo por los autores, permite afirmar que la mayoría de los casos de exigencia de responsabilidad penal por blanqueo de capitales se producen o bien en caso de existencia de una condena por un delito subyacente o bien con un procesamiento simultáneo tanto por un delito subyacente como por blanqueo de capitales. Se concluye que, el estudio de las mejores prácticas de varios países da pie a sugerir la posibilidad de perseguir el blanqueo de bienes como un delito penal independiente. En tales condiciones, no habrá necesidad de enjuiciar un delito subyacente, especialmente si es imposible demostrar la culpabilidad por su comisión.

Palabras clave: revisión judicial; práctica judicial; delito subyacente; legalización (blanqueo) de bienes; blanqueo de dinero.

Introduction

Current globalization processes require a constant search for effective regulation of constantly new public relations, which is the main task of state policy. One of the main such tasks is criminal law policy in the fight against crime. To solve this problem, state institutions are being created, the law enforcement and judicial systems are being reformed, and Ukrainian legislation on criminal liability is constantly being improved (Vorobey *et al.,* 2022).

The current economic sphere of public life in Ukraine and its constant focus on European standards is met with some resistance by a part of the population that uses illegal ways of enrichment, which is why there is a negative trend of increasing the level of economic crime. Money laundering has become quite common due to its connection with the business environment. This phenomenon is used in illegal operations involving the trade in weapons, drugs, the financing of terrorism, the proliferation of weapons of mass destruction, etc.

The purpose of countering money laundering is to make this crime unprofitable (Mbila, 2019). The world community recognizes that money

laundering resulting from criminal or other illegal activities has become a global threat to economic security. Laundering of "dirty" money negatively affects the investment attractiveness of the country, contributes to increasing the level of the shadow economy, reduces the effectiveness of tax policy, undermines work financial sector of the economy (Zhyvko *et al.*, 2021).

However, money laundering is a very complex process by which proceeds of crime are transformed into "legitimate funds" (Korejo *et al.*, 2021).

The issue of countering money laundering in Ukraine is very relevant. This is confirmed by the existence of a broad regulatory framework to prevent this act, identify it, and bring the perpetrators to liability. New challenges and threats contribute to the development of appropriate mechanisms for responding to them.

Under the conditions of globalization, international and national financial and banking systems begin to function according to new principles, the development of information technology contributes to the emergence of new ways of legalizing income received in the shadow sector or from criminal activities. Subsequently, such trends contribute to the active spread of illegal activities leading to the receipt of dubious income, which can be used to finance criminal projects and international terrorism.

The issue of countering money laundering and the content of such criminal activities is given much attention in scientific research. This is due to the complexity of organizing the activities of law enforcement and judicial bodies to identify and investigate this criminal offense, the constant change in money laundering methods, and the problems of proving the commission of such criminal offenses and bringing perpetrators to justice.

The analysis of judicial practice will make it possible to identify the current state of the spread of this type of criminal offense, characterize the content of criminal activity in this area, and the difficulties that arise during the trial.

1. Methodology

The structure of the research methodology of legal phenomena is a multi-level system and consists of scientific principles cognition, dominant worldview, scientific type thinking, philosophical foundations, scientific paradigms, methodological approaches, and scientific methods (Tikhomirov, 2019). The key place in the complex structure of the methodology is occupied by the methods of scientific research. The correct combination of methods ensures the objectivity of scientific research.

The reliability of the obtained scientific results is ensured by the extensive use of methods of scientific knowledge. The normative-dogmatic method served as a methodological basis for studying domestic mechanism for judicial review of property laundering cases, which allowed to conduct a study of topical issues of judicial review under Article 209 of the Criminal Code of Ukraine regarding on legalization (laundering) of property obtained by criminal means.

The critical analysis made it possible to form conclusions and proposals for improving legal regulation based on the analysis of legislative sources. In our opinion, analyzing the provisions Article 209 of the Criminal Code of Ukraine, it is currently possible to consider court cases on legalization (laundering) of funds as a separate crime. Analytical and statistical methods allowed for analyzing court sentences and identifying trends in the context of predicate acts in the criminal cycle of money laundering. This article mainly relies on and court cases as the main sources of information.

In addition to choosing specific methods of scientific research, the methodology of legal research needs one more thing - finding the optimal ratio of empirical and theoretical. Until recently, legal science has shown increased attention to empirical research in the development and evaluation of law. However, one must agree with the special value of using not only empirical research methods in the evaluation of judicial practice, but also theories of social sciences (Kopcha, 2020).

2. Results and Discussion

• The Concept of a Predicate Offense

The effectiveness of developing criminological plans to counter crime in general and counter money laundering significantly depends on a qualitative quantitative and qualitative analysis of factors of criminal behavior. In the context of the study of money laundering, a special place is occupied by the predicate offense, which in fact is the initial stage in the cycle of criminal behavior. Money laundering becomes a kind of continuation of the first criminal act. Therefore, it is much more difficult to counteract money laundering. It is necessary to take into account both the first (predicate) offense and the second one. The range of such acts can be very wide. In the context of the theoretical analysis of the conceptual apparatus, it is necessary to explain the concept of “predicate offense”.

Money laundering is preceded by any criminal actions that directly or indirectly lead to its illegal acquisition. Honcharuk (2020) defines the definition of “predicate offense” under this construction. The lack of a legislative definition of this concept causes pluralism of scientific views.

As for the regulation, today there is a single regulatory approach to the definition of the concept of "predicate offense", which means any criminal offense, as a result of which income has appeared, which may become in the future the subject of criminal offenses related to money laundering, the list of which is specified in Article 6 of the Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime and on the Financing of Terrorism (Council of Europe, 1990).

Regarding the approach of the judicial authorities, in the resolution of the plenum of the Supreme Court of Ukraine No. 5 dated April 15, 2005, which provisions are intended for the correct and unanimous application by the courts of legislation on liability for money laundering and due to issues, that appeared during the consideration of this category of cases. Even though the resolution was adopted in 2005, it can be stated that its provisions are still relevant in terms of general approaches to the interpretation of the "predicate offense" (On the practice of application by courts of the legislation on criminal liability for legalization (laundering) of proceeds from crime, 2005).

The previous version of Article 209 of the Criminal Code of Ukraine, which provides for liability for money laundering, contained a note to the article, paragraph 1 of which contained the definition of a predicate offense. The article contained the following provision: A socially dangerous illegal act that preceded money laundering, according to this article, is an act for which the Criminal Code of Ukraine provides for the main penalty in the form of imprisonment or a fine of more than three thousand non-taxable minimum incomes of citizens, or an act committed outside of Ukraine if it is recognized as a socially dangerous illegal act that preceded money laundering, according to the criminal law of the state where it was committed, and is a crime under the Criminal Code of Ukraine and as a result of the commission of which income was illegally obtained.

The current version of Article 209 of the Criminal Code of Ukraine does not describe a predicate offense. Still, the disposition indicates "property in respect of which factual circumstances indicate its receipt by criminal means." (The Criminal Code of Ukraine, 2001: part 1 of Article 209). Analysis of the latest version of the article makes it possible to determine the features of predicate offenses:

(1) a predicate offense is no longer necessarily a socially dangerous crime. Now it can be any offense. However, in our opinion, this approach is not justified. We are convinced that if the predicate offense was not a crime, the person could not be subject to criminal liability in the future. One of the main features of property that is the subject of a crime under Art. 209 of the Criminal Code, its immediate origin from another socially dangerous act that preceded legalization itself. That is, the subject of the crime is directly related to a certain predicate unlawful socially dangerous

act, its obligatory feature is criminal origin. In the legal theory of Ukrainian science, administrative offenses differ from criminal ones in the severity of the harm they cause. Thus, administrative offenses are socially harmful, and crimes are socially dangerous. A systematic interpretation of the legal theory allows refuting the approach about the possibility of recognizing an administrative offense as a predicate offense in money laundering.

(2) it is clarified that there is no need to prove a predicate offense. The illegal origin of property can be proved based on factual circumstances. Thus, the legislator once again emphasizes the need for strict compliance with the principles of belonging and admissibility of evidence during their collection and registration.

- **Procedural significance of the fact of committing a predicate offense**

In addition to the material significance and essence of the predicate offense, the procedural one also plays an important role. The first point of view is because "pre-trial investigation of money laundering is justified when a predicate offense is already being investigated" (Klepytskyy, 2002: 15).

Another argument is the opinion that from the moment of committing a crime under Article 209 of the Criminal Code of Ukraine until the entry into force of a guilty verdict for a predicate offense, a significant period may pass, which makes it impossible to withdraw income obtained by illegal means. It is also suggested that one of the mandatory conditions for qualifying an act on the grounds of committing a crime under Article 209 of the Criminal Code of Ukraine is the criminal origin of the income received. Thus, the author considers it expedient to investigate the main crime and the circumstances of money laundering (Pavlyutin, 2015).

The second point of view is that criminal prosecution for money laundering should be preceded by a court conviction for the main (predicate) offense. In confirmation of this, we will consider the provisions of scientists' research:

(1) it is essential to start proceedings under Article 209 of the Criminal Code of Ukraine only if a court verdict of guilty for a predicate offense comes into force, i.e., money laundering must be fully legally recognized for each specific case (Popovych, 2001: 397);

(2) a decision to prosecute for money laundering is not possible in the absence of a conviction for "predicate" offenses that have become a source of income intended for laundering because it is contrary to the principle of presumption of innocence (Arkusha, 2010);

(3) if it is sufficient for the perpetrators of a criminal offense to realize that they are carrying out actions with property obtained by illegal means, then "the person investigating such criminal activity for money laundering needs a legal basis (in this case, a guilty verdict) to bring the perpetrator to criminal liability under Article 209 of the Criminal Code of Ukraine".

On this occasion, the Resolution of the Plenum of the Supreme Court Of Ukraine No. 5 of April 15, 2005, notes that bringing a person to criminal liability under Article 209 of the Criminal Code is possible both if the fact of receiving funds or other property as a result of committing a predicate offense is established by the court in the relevant procedural documents (verdict or decisions, decisions on the exemption from criminal liability, on closing the case on non-rehabilitating grounds, etc.), and in the case when the person was not brought to criminal liability for the predicate offense.

In the latter case, a person is simultaneously brought to criminal liability for a predicate offense and for laundering of funds or other property obtained as a result of its commission, i.e., for the totality of these crimes, since the person is aware of laundering such funds (property) (On the practice of application by courts of the legislation on criminal liability for legalization (laundering) of proceeds from crime, 2005).

In the international judicial arena, there is a general practice where prosecutors focus on the criminal prosecution of a predicate offense and ignore the money laundering associated with it or do not consider it dominant at all (Netherlands, Belgium). This phenomenon occurs for various reasons. In some criminal cases, it is easier to satisfy a conviction for a predicate offense, for example, when the prosecutor has gathered enough evidence to bring charges for a predicate offense, but the financial evidence base, which is essential for bringing charges of money laundering, is insufficiently prepared.

Pre-trial investigation of money laundering and a predicate offense usually requires a lot of resources and time. In some jurisdictions, there is no incentive to bring money laundering charges because, in the end, the sentence will be nearly the same if the accused is charged with a "predicate offense" (Richardson and De Lucas Martín, 2021).

Such a simplified approach and the desire to improve success statistics in Ukraine is unacceptable in the international arena. After all, international standards provide for the possibility of investigating and bringing to criminal liability for money laundering as a separate crime. Based on the facts of unexplained enrichment or inconsistency in tax reporting, investigators can initiate an investigation into money laundering even if there is no direct evidence of a particular predicate offense.

In most foreign countries, the competent authorities care not only about the positive dynamics of statistics on "winning cases" but also about countering crime. This is confirmed by a ruling by the Supreme Court of the Netherlands, which clearly stated that in money laundering cases, it is not necessary to prove who, where, and when committed the predicate offense. The Amsterdam Court of Appeal issued a decision in 2013 (known as the "6-Step decision") that provides a brief description of the procedure for assessing at the national level the facts of money laundering when the predicate offense is unknown (Court of Appeal of Amsterdam: 11-01-2013, ECLI: NL: GHAMS: 2013: BY8481, 2013).

The Belgian Supreme Court ruled that the burden of the proof requirement of criminal and illegal origin is met if any legal origin is definitely excluded. Thus, the illegality of the origin of assets should be established there. Still, to make a decision, the criminal court does not have to know precisely which criminal act led to financial gain. It is sufficient for the court to exclude any legal origin with the help of the case file.

The Spanish Supreme Court ruled on the validity of indirect or indirect evidence in money laundering proceedings, provided that three requirements were met: there was unproven enrichment or financial transactions involving large amounts of money; no legitimate economic or business activity to explain such an increase; and the existence of a link to illegal activities (Richardson and De Lucas Martín, 2021).

Thus, from the results mentioned above of the study of the procedural significance of the fact of committing a predicate offense for bringing those responsible to justice for money laundering, with the passage of time and the introduction of appropriate changes to the disposition of this article there is no need to prove the commission of a predicate offense. Today, this issue requires additional research and the adoption of a new resolution of the plenum of the Supreme Court of Ukraine on the practice of applying the legislation on criminal liability by courts under Article 209 of the Criminal Code of Ukraine. The adoption of this decision will contribute to an adequate trial and the adoption of fair punishment for this offense.

- **Analysis of judicial practice on the commission of a predicate offense for bringing to criminal liability for money laundering**

The peculiarity of the crime, which is provided for in Article 209 of the Criminal Code of Ukraine, in the presence of previous criminal activity, which is a source of obtaining property (income), and various actions (acquisition, possession, use, disposal of property, carrying out a financial transaction, making a transaction with such property, etc.).

The analysis of judicial practice will allow identifying criminal activity that become elements of official statistics and will help to reveal the content of common predicate offenses and peculiarities of actions aimed at money laundering (Lysenko, 2021).

Analysis of judicial practice, mainly for 2019-2021 (more than 100 sentences from all regions of Ukraine), made it possible to state a fairly wide variety of criminal activities in the field of money laundering – from the simplest use of funds obtained by criminal actions for their own needs to special ways of hiding the source of monetary income using banking services, multiple transfers of funds to special accounts of enterprises, individual entrepreneurs created for this purpose.

The considered judicial materials made it possible to identify the most common predicate offenses that were presented by us in Table 1 (Predicate offenses in money laundering). The analysis of court cases shows that one of the "main" predicate offenses in judicial practice is crimes against property.

In the sphere of official and professional activities related to the provision of public services, criminal offenses are also frequent in the structure of predicate offenses. They are a source of funds for their laundering. In this case, the person was offered intermediary services to facilitate the receipt of a foreign passport by employees of the Krasnolymanskyi State Migration Service of Ukraine in the Donetsk region. As a result of the "assistance" provided, 16 thousand UAH was received. The court qualified these actions under Part 2 of Article 369-2 and Part 1 of Article 209 of the Criminal Code of Ukraine. These funds were later used for their own needs through the purchase of goods, etc (Slavyansk City District Court of Donetsk Region: 31-10-2019, sentence in the case № 1-кп/243/947/2019, 2019).

Among the most common cases, there are also cases of using third-party assistance to commit predicate offenses and then launder money. Such persons agree to be nominally the founder and director of the business entity, perform measures to open current accounts and receive funds for remote management of them (Pechersk District Court of Kyiv: 24-12-2020, sentence in the case № 757/12515/20-к, 2020). The same occurred in other court cases, where other persons performed financial and economic activities (Pechersk District Court of Kyiv: 29-03-2019, sentences in the case № 757/9882/19-к, 2019; Kherson City Court of Kherson Region: 05-06-2019, sentences in the case № 766/6200/19, 2019).

The analyzed court cases make it possible to show that among the ways of money laundering were both simple and complex financial ones, with the help of which it was possible to hide the criminal origin of funds (property), giving them the appearance of legal through receiving them from the sale of property, business activities, etc. Managers and direct organizers of money laundering schemes most often were not established by the pre-trial

investigation bodies. Only persons who directly performed actions aimed at money laundering were brought to criminal liability. In all the cases considered, the "performers" agreed to perform these actions for a certain monetary reward.

It is also important to note such a common method of money laundering as using bank accounts opened by individuals to conduct business (individual entrepreneurs). Such a scheme provides that for a certain monetary reward, a person is invited to open a bank account in a banking institution.

Among the court cases, some cases involve using third parties to commit a predicate offense and money laundering on the territory of other states. In the materials of a similar case, it is noted that in February 2019, a citizen of Ukraine, to improve his financial situation, was invited to participate in criminal activities involving money laundering. For this purpose, it was necessary to travel to the Czech Republic and open a current account in a banking institution. Funds were credited to the account under the guise of prepayment for the purchase of a truck. The money received fraudulently was cashed out and transferred to the persons who committed the predicate offense (Lipovets district court of Vinnytsia Region: 26-10-2020, sentence in the case № 136/947/20, 2020).

Conclusions

Summing up the above, we would like to note that the complex legal nature of money laundering complicates its detection and investigation. In addition, there are several objective and subjective reasons that hinder this process. Objective legislation includes imperfect and not unambiguous legislation, in particular, in the context of the interpretation of the concept of "predicate offense". Subjective reasons include the desire of law enforcement agencies, both those directly involved in investigations and employees of the prosecutor's office, to improve their performance indicators and therefore slow down the study.

The analysis of criminal court cases carried out by the authors has shown various money laundering methods – from simple to relatively complex financial schemes to conceal the illicit origin of money. To commit predicate offenses and direct actions to launder money, the organizers of criminal activity involve unauthorized persons, usually the perpetrators, who are brought to criminal liability.

Unlike the previous version of Article 209 of the Criminal Code of Ukraine, its current version does not contain the concept of a predicate offense. The involvement of the "predicate factor" in the elements of the

forensic characteristics of this category of crimes demonstrates that money laundering is an integral part of specific methods of illicit enrichment, which provide for a set of interrelated criminal actions, where laundering itself is the last part in this illegal activity.

In our opinion, analyzing the provisions of Article 209 of the Criminal Code of Ukraine, it is now possible to consider court cases on money laundering as a separate offense. This issue requires further research for an effective trial.

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Legal grounds for implementing the institution of recourse to the mediation procedure and the use of other alternative methods of resolving tax and customs disputes

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Abstract

In the research it is emphasized that, in some states of the European Union EU, tax mediation is already used and considered not only as an alternative method of dispute resolution, but also as a method used to prevent the occurrence of a tax dispute in the future. Thus, on the basis of legal methods of scientific knowledge, such as: dialectical, logical-formal, comparative-legal, etc., the article examined modern approaches to the characterization of mediation as a procedure for peaceful settlement of disputes, paying attention to its characteristic features and differences from other forms of alternative dispute resolution. The state of legal regulation of the mediation procedure in public disputes in general, and in tax disputes in particular, using the example of Latvia and Ukraine, is highlighted. It is concluded that the necessary condition for carrying out mediation in public disputes should be enshrined in the administrative procedural legislation, not only the powers of state and municipal authorities to initiate mediation should be, in addition, to recognize such a decision in the form of an administrative contract, from which legal consequences with the character of public law are derived.

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Bases legales para implementar la institución del recurso al procedimiento de mediación y el uso de otros métodos alternativos para resolver disputas tributarias y aduaneras

Resumen

En la investigación se enfatiza que, en algunos Estados de la Unión europea UE, la mediación fiscal ya se usa y se considera no solo como un método alternativo de resolución de disputas, sino también, como un método utilizado para prevenir la ocurrencia de una disputa fiscal en el futuro. Así, sobre la base de métodos jurídicos del conocimiento científico, tales como: el dialéctico, el lógico-formal, el jurídico-comparativo, etc., el artículo examin**ó** los enfoques modernos de la caracterización de la mediación como un procedimiento para la resolución pacífica de controversias, atendiendo sus rasgos característicos y diferencias con otras formas de resolución alternativa de conflictos. Se destaca el estado de la regulación jurídica del procedimiento de mediación en los litigios públicos en general, y en los litigios fiscales en particular, utilizando el ejemplo de Letonia y Ucrania. Se concluye que la condición necesaria para llevar a cabo la mediación en los conflictos públicos se debe consagrar en la legislación procesal administrativa, no sólo las facultades de las autoridades estatales y municipales para iniciar la mediación se debe, además, reconocer tal decisión en forma de contrato administrativo, del que se derivan consecuencias jurídicas con carácter de derecho público.

Palabras clave: disputas públicas; disputas fiscales; formas alternativas de resolución de conflictos fiscales; mediación en litigios fiscales; contrato administrativo.

Introduction

The construction of a fair tax system and a modern innovative taxation mechanism, which ensured the equality of all taxpayers before the law, are necessary conditions for simultaneously achieving such UN sustainable development goals as “Decent work and economic growth” and “Industry,

innovation and infrastructure". However, this is impossible without establishing an effective mechanism for resolving conflicts that inevitably arise in this area of taxation, both in the form of a fair trial and alternative ways of resolving public disputes.

Today, neither the administrative extrajudicial nor the judicial form of resolving tax disputes is free of certain problems during their implementation, which does not contribute to the establishment of fair justice and necessitates the search for ways and directions to improve their organizational and legal regulation. Therefore, the article aims to determine the legal grounds for implementing the institution of recourse to the mediation procedure and the use of other alternative methods of resolving tax and customs disputes.

1. Methodology of the study

The general design of the research is based on the universal general scientific and especially legal methods of scientific cognition: dialectical, formal-logical, formal-legal, historical-legal, comparative-legal, analysis and synthesis, logico-semantic, and method of legal modeling. Thus, the comparative legal method made it possible to reveal the peculiarities of the legal regulation of tax mediation in different countries. The application of the method of analysis and synthesis made it possible to determine the concept of "tax mediation" and its features, as well as problematic aspects. The formal-logical method and the method of legal modeling were used to determine the prospects for improving the tax mediation institute.

2. Results and Discussion

2.1. The place of mediation in the system of alternative ways of settling public disputes and the international principles of its conduct

Alternative methods of dispute resolution (settlement) developed due to dissatisfaction with the activity of the judicial system, and the formality of administrative appeal procedures that led to their transformation into an independent, additional form of dispute resolution, which is gaining wider distribution in the world.

Alternative resolution of public disputes is primarily based on a compromise, an agreement, rather than a power-coercive method of resolving a dispute, and therefore the use of such procedures meets the needs of subordinate subjects to a greater extent. In such a procedure, the

administrative body acts as a party to the dispute, and not as a jurisdiction to which a private entity applies for its settlement.

Consolidation of the concept of mediation made it possible to clearly distinguish it from other alternative means, and to perceive it not as a separate body, but only as a tool for facilitating the implementation by the parties of those rights and powers that are fixed for them in the legislation.

The ECHR determined that a non-judicial body under national law can be considered a court if it performs judicial functions and provides procedural guarantees provided for in Article 6 of the ECHR, such as impartiality and independence (European Court of Human Rights, 2013), otherwise, the extrajudicial body must be subject to supervision by a judicial body that has full jurisdiction and meets the requirements of Article 6 of the CE Convention on the Protection of Human Rights and Fundamental Freedoms (European Court of Human Rights, 1993). And therefore, mediation is subject to supervision by the court. The EU also encourages the use of mediation as an alternative measure.

Thus, the Mediation Directive (2008/52/EC) allows the use of mediation in cross-border disputes in certain civil and commercial matters, but it does not extend to questions of fees, customs, administrative matters, or disputes concerning the responsibility of the state (European Parliament and the Council, 2008). According to EU law mediation is described as a structured process in which disputing parties voluntarily attempt to settle with the help of a mediator.

The growing popularity of mediation as a potentially cost- and time-saving mechanism is prompting some states to introduce mandatory mechanisms (Lohvyn, 2020). The Council's recommendations are part of EU law, and therefore its members actively implement mediation, including administrative mediation. Ukraine is actively implementing the use of alternative means, including mediation in legal practice under Ukraine's obligations in the field of European integration (Lohvyn, 2020).

2.2. Mediation in tax disputes: the experience of European countries and the basis of its legal consolidation in Latvia and Ukraine

Mediation is gaining recognition and popularity in Ukraine and Latvia, where it is regulated. However, there is a pressing need for the development of legal provisions and the practice of administrative mediation, as well as the implementation of tax mediation.

In Latvia, legislation on mediation developed under the influence of European Union law. First, the concept of integration of mediation in the settlement of civil disputes was approved by the Resolution of the Cabinet

of Ministers of 18.09.2009 № 121 (Cabinet of Ministers of Latvia, 2009). Additionally, an action plan was formulated to implement this concept. On May 22, 2014, Latvia adopted the "Law on Mediation," which defined the parameters of mediation within the country (Saeima of Latvia, 2014).

This law provides a general framework for mediation that applies to disputes, not only in civil law but also in other areas. In Latvia, mediation (conciliation) is allowed in civil matters (Kaspars Freimanis Law Firm «VARUL», 2013), labor, administrative and criminal cases (Saeima of Latvia, 2005).

However, neither the law on mediation nor any other regulations directly provide for the possibility of mediation in an administrative process. But the researchers point out that such an additional legal framework is necessary since private legislation is based on the principle of private autonomy of individuals. Though, in public law, the legislator has a wider discretion to establish mediation rules, and they must be established in regulatory acts (Committee of Ministers of the Council of Europe, 1998).

In Latvia, the Law "On Mediation" includes the main principles of the mediation process (voluntary participation, confidentiality, equality and cooperation among parties, impartiality, and objectivity of the mediator).

It also covers the organization of the mediation process, types of agreements made for the mediation process and as a result of this process certification, and requirements for mediators, their rights and obligations, the activities of the Mediation Council, the influence of mediation on the statute of limitations, court actions based on mediation recommendations within the civil process and the procedural consequences of applying the mediation procedure (Kaspars Freimanis Law Firm "VARUL", 2013). Based on the Law of the Cabinet of Ministers, the rules for the certification of intermediaries and the certification procedure dated August 5, 2014, № 433 were approved.

In 2012, the Law of Latvia "On Administrative Procedure" was significantly amended, introducing a new tool in administrative cases - settlement, which, in particular, can be achieved with the help of mediation (Saeima of Latvia, 2001). It was a completely new concept of settlement in administrative processes. When examining a statement of dispute related to the Administrative Law, the institution (public administration body) must take into account the possibility of entering into a settlement before making any decision (Tvaronavičienė *et al.*, 2022).

If the institution agrees that a settlement is possible, it must inform the individual of the settlement process and agree on a friendly arrangement to allow the individual to express his or her views on the possibility of settlement (Saeima of Latvia, 2001). In addition, in the administrative procedure, if the Court examines the dispute, and the presiding judge considers that a

settlement may be possible, the court may explain to the participants in the case the possibility of entering into a settlement (administrative agreement), as well as offer possible conditions of any settlement. The court may explain the possibility of entering into a settlement in writing and at a court session and may convene a hearing only to discuss this issue (part 1 of Art. 107 of the Administrative Procedure Law, 2001).

In Ukraine, the parties usually turn to alternative ways of resolving public legal disputes both within the scope of pre-trial and court appeals. According to the general rule provided for in clause 56.1 of Art. 56 of the Tax Code of Ukraine, decisions made by the controlling body may be appealed in the order of administrative appeal or the procedure of administrative proceedings. The administrative appeal procedure is considered a pre-trial procedure for resolving a tax and customs dispute.

With its entry into force on January 15, 2017, the Code of Administrative Proceedings of Ukraine in the new version introduced the updated institution of reconciliation of the parties, aimed at settling the dispute based on mutual concessions and reaching an agreement between the parties to the dispute, in whole or in part, which is possible before the start of the consideration of the case on its merits, that is, before the completion of the preparatory proceedings.

According to Art. 190 of the Code of Administrative Procedure of Ukraine, the reconciliation of the parties may concern only their rights and obligations. The parties can reconcile on terms that go beyond the scope of the dispute if such terms of reconciliation do not violate the rights or legally protected interests of third parties. The terms of reconciliation cannot contradict the law or go beyond the competence of the subject of power.

In Ukraine, only on November 16, 2021, the Law of Ukraine "On Mediation" was adopted, which defines the legal principles and procedure for conducting mediation as an out-of-court conflict (dispute) settlement procedure. Adoption of this law normatively regulated the out-of-court dispute settlement procedure, which can be resolved in civil, economic, or administrative proceedings, also the provisions of the law can be applied in cases of administrative violations and criminal proceedings to reconcile the victim with the suspect (accused).

The Code of Administrative Procedure of Ukraine has been modified to allow for the resolution of public-law disputes, such as tax, customs, and disputes relating to the allocation and utilization of budget grants, as well as the payment of state social insurance funds, through mediation procedures. Thus, Article 47 of The Code of Administrative Proceedings of Ukraine (CAP of Ukraine) enshrines the right of the parties to reach reconciliation, including through mediation, at any stage of the court process, which is the basis for closing proceedings in an administrative case. However, the

practice of conciliation and mediation in the administrative justice system of Ukraine remains isolated.

Administrative appeals against decisions of controlling (tax and customs) bodies are carried out according to the rules of tax legislation, the composition of which is defined in Art. 3 of the Tax Code of Ukraine. Regarding the possibility of using alternative methods of resolving tax and customs disputes, certain provisions have already been established in the legislation.

Thus, Clause 1 of Subsection 9-2 of Chapter XX of the Tax Code of Ukraine establishes the possibility of clarifying tax obligations for corporate income tax and value-added tax during the application of the tax compromise - the regime of exemption from legal liability of taxpayers and/or their officials (officials) for underestimating tax liabilities from corporate income tax and/or value-added tax for any tax periods up to April 1, 2014, and the grounds for concluding a settlement agreement are set out in clause 17 of Subchapter 4 of Chapter XX of the Tax Code of Ukraine on issues of write-off of deferred payment of tax liabilities under the procedure regulated by the legislation on bankruptcy.

In turn, in Part 1 of Art. 521 of the Customs Code of Ukraine, which regulates public relations in the sphere of reaching a compromise in the case of a violation of customs rules, provides that "in the absence of signs of a criminal offense in the actions of a person who has violated customs rules, the proceedings in the case of this offense may be terminated using a compromise.

The compromise refers to concluding a peace agreement between the specified person and the customs body whose official conducts proceedings in the case". Also in part 5 of Art. 521 of the Customs Code of Ukraine stipulates that a person who has violated customs rules applies to the head of the customs authority with a statement of an arbitrary form with a request to terminate the case about this violation of customs rules using a compromise. The fact of submitting such an application is recorded following the procedure defined by parts three and four of Article 264 of the Customs Code of Ukraine.

Tax disputes have several features characteristic of public legal disputes (administrative, tax, customs, budgetary, etc.), one of the main ones of which is that the party endowed with authoritative powers is obliged to act only on the basis, within the limits of the powers and in a manner, provided by the Constitution and laws of Ukraine (Article 19 of the Constitution of Ukraine). Accordingly, tax mediation is conditioned by the specifics of tax disputes, the legal status of its parties and requires proper competence of the mediator, and states striving to minimize the occurrence of tax disputes should promote the practice of addressing them.

2.3. Features and legal limitations of tax mediation

Tax mediation involves neutrality and impartiality, voluntariness, joint fact-finding, confidentiality, self-determination, integrity, and, of course, compliance with applicable tax legislation. Tax mediation is recognized by most researchers as a civilized mechanism for out-of-court conflict resolution, and has prospects for application in Ukraine (Yasynovskyi, 2016).

In "tax and customs mediation", to achieve a compromise and balance interests, it is necessary to determine the public interest of the state and society, the role of the subject of authority in the implementation of tax control by the state, the initiative of the tax and customs authority in ensuring law and order, taking into account the State of the standard of mediation (mediation) social service, which stipulates that in the event of non-fulfillment of the obligations assumed by the party under the agreement, as a result of the mediation, the other party has the right to apply to the court following the procedure established by law for the protection of violated rights and legitimate interests.

To conduct mediation in public disputes, a necessary condition is to enshrine in the administrative procedural legislation not only the powers of state authorities and municipal bodies to initiate mediation and agree to participate in it as a party, to make a decision based on the results of its conduct, but also to recognize such a decision as a form administrative contract, based on which legal consequences of a public-law nature arise. In addition, the mediator must be able to help settle a public-law dispute, therefore the scope of his special knowledge in the field of public legal relations must correspond to the content of the public-law dispute, which should be enshrined in legislation (Ustinova-Boichenko and Nesterenko, 2022).

The peculiarity of tax mediation is that the agreement is concluded by the parties to the dispute themselves and is binding for them, and the following aspects are important for it: conducting mediation cannot be the reason for non-fulfillment by the taxpayer and the authority subject of the duties or powers (functions) assigned to them by law; the authority to sign such contracts should also belong to the competence of officials who conclude contracts based on the results of mediation (Sarpekova, 2018).

An important issue is the suitability of a tax dispute for mediation - its mediability. Thus, according to the law of the Netherlands, not all tax disputes are mediable - the main obstacle to mediation is the criminal punishment of the act, as well as the obstacle to mediation, are complex cases related to which there have not yet been court decisions in favor of one or the other party, i.e., unprecedented disputes, and as well as disputes regarding which the taxpayer (Podik, 2019b).

A. Lisko insists that mediation in cases where there are: 1) disputes between the subjects of power on the exercise of their competence in the sphere of management, delegated powers (Part 3 of Article 17 of the Code of Administrative Proceedings (CAP) of Ukraine); 2) disputes in cases regarding legal relations related to the electoral process or the referendum process (Part 5 of Article 17 of the CAP of Ukraine) (Krasylovska, 2015).

Instead, the media-apart proposes to consider the envisaged Part 1 of Art. 17 of the CAP of Ukraine disputes of individuals and legal entities with the subject of power to challenge its decisions (especially in the case of legal acts of individual action), actions or omissions, and provided for in Part 2 of Art. 17 CAP of Ukraine disputes over the acceptance of citizens for public service, its passage, dismissal from public service (Krasylovska, 2015).

N. Mazeraki proposes to consider the absolute criteria of the uniformity of the dispute: 1) the existence of a direct legislative prohibition on resolving a certain type of legal dispute in the order of mediation; 2) the contradiction of the subject and content of the dispute regarding moral principles and public order; 3) the presence in the dispute of the interests of third parties who do not participate in the mediation; 4) the impossibility of concluding a settlement agreement in accordance with the law; 5) the incapacity of the parties to mediation or lack of authority of their representatives to conclude a mediation agreement (Mazaraki, 2018).

A. Bortnikova distinguishes the following criteria for the mediability of the public-law dispute: 1) legitimacy-the lack of a direct prohibition on mediation. 2) legality-all rights and obligations, as well as actions (omissions) that underpin the mediation agreement as a result of the resolution of a public-law dispute must comply with legislation provided by the Verkhovna Rada of Ukraine; 3) special legal personality-the ability to be a participant in legal relations on the use of mediation as a way of resolving a public-legal dispute, that is, the presence of a person who has expressed a desire to participate in the mediation, authority to make decisions on the merits of the dispute, as well as for the appeal; 4) the presence of discretionary powers (administrative discretion) in the subject of power; 5) competence boundaries (framework); 6) the dispute does not affect the interests of persons who do not participate in the mediation; 7) the prospect of registration of the results of mediation in accordance with the rules of substantive and procedural law (the so -called criterion of effectiveness (execution) of the mediation agreement); 8) the goodwill of the sides (Bortnikova, 2017).

In the Netherlands, the main obstacles to mediation are criminal punishment of action and unprecedented disputes, for which there were no court decisions in favor of one or the other (Podik, 2019). These restrictions also apply to the field of tax mediation. The risks of tax mediation also include the general concern expressed in CEPEJ documents about the risk

of unequal treatment of taxpayers: resorting to mediation in a tax case can lead to a reduction in tax where simply following the rules would not (European Commission for the Efficiency of Justice, 2007).

The following conclusion is that mediation in "legally comprehensible cases" is not what should be done (European Commission for the Efficiency of Justice, 2007), and therefore such cases should not be recognized as mediatable. However, a tax dispute cannot be recognized as mediated if: the offense may result in a criminal penalty; the conflict can be resolved only through the evidentiary procedure; the purpose of the judicial process is directed exclusively to the solution of a certain legal problem (Muza, 2011).

Therefore, except for non-mediable tax disputes, tax mediation is permissible and its conduct is justified if: 1) there are difficulties in reducing the main points of disagreement between the parties; 2) uncertainty about the facts, or about which facts are relevant to the dispute; 3) there is a lack of clarity/understanding of the respective technical positions of the parties; 4) narrowing/clarification of the facts or issues in the dispute is required (Deloitte LLP, 2019).

Conclusions

Tax mediation is a promising civilized mechanism for out-of-court peaceful settlement of tax disputes, the introduction of which ensures the achievement of such a Global Goal of Sustainable Development as: "Contributing to the building of a peaceful and inclusive society for sustainable development, providing everyone with access to justice and creating effective, accountable and inclusive institutions at all levels", and also corresponds to the "good government" management model in the context of the widespread activity of non-governmental organizations and its features such as consensus, efficiency, and effectiveness, will strengthen the function of tax administrations to provide better tax service.

A necessary requirement for the recognition of the legality of mediation in tax disputes is a clear definition in the legislation of the main criteria and types of disputes subject to mediation, with the aim of avoiding cases of corruption and discrimination of individual taxpayers, an expanded interpretation of the norms of tax law, it also requires a clear delineation of the limits of the implementation of discrete powers of tax authorities and their officials.

Therefore, in the tax legislation of Ukraine, in particular in Art. 19-1 and 20 of the Tax Code of Ukraine, the functions and powers of tax and customs authorities as parties to tax mediation should be clearly established, the tax legislation of Latvia in this area needs similar adjustments.

The ability of a tax authority to initiate or agree to enter into a tax mediation procedure to settle a tax dispute, such a dispute must be free of corruption risks, and limits, and the method of exercising its powers in this area must be clearly defined and enshrined in legislation, and settlement agreements and tax treaties concluded according to the results of mediation should acquire signs of legal force and binding performance for both parties.

The introduction of the institute of tax mediation will relieve administrative courts of cases that can be resolved by the parties to the dispute, will save not only them, but also budget funds that are currently spent on ensuring the activities of the courts, will improve the relationship between public administration bodies and the private sector, will contribute to legal education and promotion legal culture of the population, and, ultimately, will create the basis for stabilizing the legal order in Ukrainian society.

Tax mediation needs institutionalization, establishment of competence requirements that a mediator must meet, tools for taxpayers' access to the mediator register, and the procedure itself.

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Psychological Portrait of a Contemporary Political Leader

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Abstract

The aim of the research was to analyze the psychological portrait of a contemporary political leader, using the examples of U.S. Presidents J. Biden and D. Trump. All indications are that J. Biden is characterized by logic, moderation and a focus on cooperation with others. D. Trump is driven by emotions and is an impulsive leader. J. Biden is pedantic with details and motivates to cooperate. D. Trump actively used social networks, especially X, to communicate with the public. He is characterized by emotion-colored statements that echo and attract public attention. The following methods were used in the research: biographical source analysis, content analysis, comparative analysis of documents and policy decisions, meta-analysis and case studies. By way of conclusion the research revealed important differences in the personal characteristics and leadership style of J. Biden and D. Trump. J. Biden is shown as a leader capable of achieving consensus, willing to compromise and cooperate with different stakeholders. On the other hand, D. Trump is characterized by a more individualistic approach focused on strengthening and legitimizing his own position of power.

Keywords: international leadership experience; psychological portrait; psychological types; political psychology; contemporary political leader.

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Retrato psicológico de una líder política contemporánea

Resumen

El objetivo de la investigación fue el análisis del retrato psicológico de un líder político contemporáneo, utilizando los ejemplos de los presidentes estadounidenses J. Biden y D. Trump. Todo indica que J. Biden se caracteriza por la lógica, la moderación y un enfoque en la cooperación con los demás. D. Trump se deja llevar por las emociones y es un líder impulsivo. J. Biden es pedante con los detalles y motiva a cooperar. D. Trump utilizó activamente las redes sociales, especialmente X, para comunicarse con el público. Se caracteriza por declaraciones coloreadas de emoción que hacen eco y atraen la atención del público. En la investigación se utilizaron los siguientes métodos: análisis de fuentes biográficas, análisis de contenido, análisis comparativo de documentos y decisiones políticas, metaanálisis y estudios de casos. A manera de conclusión la investigación revelo diferencias importantes en las características personales y el estilo de liderazgo de J. Biden y D. Trump. J. Biden se muestra como un líder capaz de lograr consensos, dispuesto a hacer compromisos y a cooperar con las distintas partes interesadas. Por su parte, D. Trump se caracteriza por un enfoque más individualista centrado en fortalecer y legitimar su propia posición de poder.

Palabras clave: experiencia de liderazgo internacional; retrato psicológico; tipos psicológicos; psicología política; líder político contemporáneo.

Introduction

The relevance of this topic is determined by rapid changes in the political environment, which have a great impact on society and citizens. The contemporary world requires new approaches from leaders, their ability to adapt to complex conditions and effectively influence global challenges. This article is aimed at improved understanding of features determining the psychological profile of political leaders, as well as at expanding knowledge about how psychological characteristics affect success of political leaders in politics.

A political leader is a personality, who influences events and processes in the society, is able to exercise power and lead the masses. A leader's ability to effectively communicate with citizens, gain support, and motivate them to change these are key characteristics that determine success of his/her political activity. In connection with constant development of society

and change of political context, there is a need for constant rethinking and analysis of the psychological aspects of political leadership. In this connection, the set of psychological traits (psychological portrait) inherent to this or that political leader are of particular interest.

Psychological portraits of political leaders are a subject of active interest for psychologists, journalists and the public. Analyzing their personality, character, determination and leadership style can help to better understand political decisions and actions of these leaders, as well as predict possible consequences of their actions.

An interesting situation has arisen in American politics in the last few years: J. Biden and D. Trump, as presidents of the United States of America, reflect different psychological types and management styles. In addition, the most likely situation may be the one when either J. Biden or D. Trump can become the next American president again. . . Analyzing their psychological portraits can help to better understand how a political leader affects the country and its citizens.

The problem of the research consists in revealing personal traits, leadership styles and psychological features of two different US presidents: J. Biden and D. Trump. They represent two opposing views of politics, or perhaps just reflect different aspects of political discourse. One of the most relevant aspects of the research is establishing relationship between the character and leadership style of these leaders and their political decisions, particularly in the context of global problems such as crises, conflicts, pandemics and economic challenges.

The situation at the time of the research is that the political decisions and actions of American leaders have a great influence on the world politics, economy and other areas. History has already shown that some presidents changed the course of history, while others went down in history as less successful leaders. Therefore, analysis of psychological portraits of presidents, in particular, those of J. Biden and D. Trump, becomes especially important in the light of the geopolitical situation being transformed and the need to forecast events.

Previous research on the psychological aspect of politics has focused on various aspects of behavior and motivation of political actors. There are several publications that have analyzed characteristics of individual presidents or highlighted their mental peculiarities. However, some important aspects, such as influence of psychological characteristics on strategic decision-making, remain under researched.

The purpose of this article is to conduct a comparative analysis of psychological portraits of J. Biden and D. Trump using current data and publications in order to highlight the role of their personality and leadership style in political decision-making. The article aims to fill the

gaps in previous research and increase understanding of how psychological characteristics of presidents can influence political actions, especially at important moments for the nation and the world community.

Therefore, this study will open new horizons in understanding psychological portraits of contemporary political leaders on the example of J. Biden and D. Trump.

1. Literature review

Psychological aspects of political leaders and their influence on strategic decision-making have always attracted attention of psychologists, political analysts and the public. A comparative analysis of psychological portraits of such presidents as Joe Biden and Donald Trump is particularly important, as they represent different approaches and styles of governing the country.

Research on the psychology of politics and personality traits of political leaders gained particular importance in the second half of the 20th century, when psychology began to significantly influence areas related to politics and leadership.

J. Michel, D. Wallace, R. Rawlings concluded in their research that charismatic leaders evoke certain emotions (for example, admiration) in their followers, and this emotional arousal inspires them to act on behalf of the leader. However, this relationship only holds when people are motivated to accept change. Charisma is important when people have actualized motives for change, but it may be less important when people are motivated by stability (Michel *et al.*, 2013).

M. Baba and M. Siddiqui believe that emotions have a significant impact on leadership and quality of decision-making. Leaders with developed emotional intelligence contribute to the consistent success of organization/ structure in any sphere of life (Baba and Siddiqi, 2018). A. Griebie and A. Immelman emphasize that such individuals as J. Biden, feel the need to seek approval; they seek to be loved and regarded as friends or allies (Griebie and Immelman, 2021). K. Roose (2020) analyzes to what extent J. Biden's loss of influence in the global network will affect the upcoming presidential elections in the USA in 2024. J. Rubin notes that J. Biden is guided by the principle of sympathy in choosing his allies (Rubin, 2020). K. Tumulty Tumulty views J. Biden as a tactile politician: considering cases of manifestation of this feature of a politician, and how it affects public opinion about a politician (Tumulty, 2019).

A. Immelman, and A. Griebie established that the main personal characteristics of D. Trump are ambition/attempt to gain benefits (which almost amounts to exploitation), dominance/control (which almost

amounts to aggression) and evasiveness/communicativeness (which almost amounts to impulsiveness). These traits interact with the secondary traits of fearlessness/intransigence and form a special pattern of D.Trump's behavior (Immelman and Griebie, 2020). The magazine "Psychology Today" claims that D. Trump has radically changed the standard ideas about leadership and politics. At the same time, he has generated great psychological interest - from his character traits to the emotions he evokes in the public, up to the moment when mental health becomes a matter of national security. In his work, T. Lewis describes the unhealthy attractiveness of D. Trump and ways to secure people against this influence (Lewis, 2021).

In his article Y. Hughes analyzes in his how D. Trump's aspiration for personal satisfaction leads to catastrophic consequences (Hughes, 2020). Caballo concludes that D. Trump has a narcissistic disorder of personality (Caballo, 2017).

D. McAdams characterizes D. Trump, as a person who exists in the present moment, lacks an internal history that would connect his life according to time. Therefore, According to D. McAdams, Trump is an episodic person (McAdams, 2020). L. Leonard, G. Mass are confident that D. Trump has always avoided apologizing, never admitting mistakes, and he never cares about his part in creating the ongoing difficulties (Glass and Mass, 2023). J. Greenfield notes that there is no sign of equality between J. Biden's words and the constant flow of lies and open lies of D. Trump (Greenfield, 2020).

In general, research on the psychology of politics has laid the foundations for further understanding of the role of psychological characteristics of political leaders in the process of decision-making and formation of politics. However, the issue of comparative analysis of psychological portraits of such two different American presidents as J. Biden and D. Trump remains insufficiently described in the literature. This creates a need for further research aimed at analyzing psychological characteristics and leadership styles of these leaders.

2. Materials and methods

To carry out a comparative analysis of psychological portraits of J. Biden and D. Trump, a combination of research methods was used, and these methods made it possible to collect and analyze information from various sources. The main goal was to understand the psychological characteristics of each of the presidents, their leadership style and influence on strategic decision-making.

Analysis of biographical sources. In order to obtain comprehensive information about J. Biden and D. Trump, biographies, autobiographies, memoirs and other sources related to their life, political career and interaction with the environment were used. This method made it possible to form a psychological portrait of each of the presidents based on their actions and decisions in various life situations.

Content analysis. For performing a systematic review of public speeches, statements, interviews and tweets of J. Biden and D. Trump, content analysis was applied. The analysis was carried out taking into account peculiarities of speech, emotional coloring and public statements of the presidents. This method made it possible to find out peculiarities of communication and communication style of each of the presidents.

Comparative analysis of documents and political decisions. By means of analyzing official documents and political decisions of the presidents peculiarities of their approach to leadership of the country and decisions in important areas were revealed. This method made it possible to compare approaches of J. Biden and D. Trump to solving the same problems, etc.

3. Results and discussion

Analysis of biographical sources confirmed different personal traits and life circumstances of J. Biden and D. Trump, which influenced formation of their psychological portraits. J. Biden is characterized as an experienced and balanced politician with a penchant for interpersonal relationships and the ability to think strategically. D. Trump is noted for his distinct extroversion, tendency to refute traditional approaches and demonstrate leadership qualities. His leadership style is characterized by emotionality and accelerated decision-making.

Collection and analysis of biographical data showed that J. Biden has significant experience in politics and in various public positions. He worked in the field of legislation and served as a US senator and vice president. His life path influenced formation of his leadership qualities and leadership style. D. Trump, as an entrepreneur and TV host, had less experience in politics before becoming the president. He is noted as a leader who is able to demonstrate emotionally colored reactions and react to situations impulsively.

Content analysis demonstrated that in his public speeches J. Biden uses restrained language aimed at cooperation and unification of citizens. He is focused on problems of the country and does not seek personal achievements. D. Trump actively uses social media to communicate with the public and often expresses his thoughts emotionally and makes public

statements that attract the attention of the mass media. Application of content analysis to public speeches, statements, interviews and tweets of J. Biden and D. Trump made it possible to consider peculiarities of their communication style.

The Content analysis was performed by systematically categorizing and quantitatively measuring contents of public speeches, statements, interviews and tweets of J. Biden and D. Trump. The following categories and units of analysis were used to present results of the content analysis: public speeches during the presidency, statements in public speeches, tweets published on official accounts of presidents, distribution of emotional expressions in public speeches, questions and topics that were raised most often in speeches.

Table 1: Content analysis of psychological portraits of J. Biden and D. Trump

Characteristics	J. Biden	D. Trump
Number of public speeches	350	400
Total number of statements made in public speeches	1200	1800
Number of tweets	1200	2800
Distribution of emotional expressions in public speeches		
Positive	35%	20 %
Neutral	50%	30 %
Negative	15 %	50 %
Questions and topics that were most often discussed in speeches		
Economics	25%	30 %
Foreign affairs	20%	15 %
Social policy	15 %	10 %
Climatic changes	10%	5 %
Immigration	10%	20 %
Other	20%	20 %

Source: Prepared by the authors.

Number of public speeches: D. Trump made more public appearances (400) than Joseph Biden (350) during their respective presidencies. Total number of statements made in public speeches: D. Trump also had more statements in public speeches (1,800) compared to J. Biden (1,200). D. Trump posted more tweets (2,800) on his official presidential account than J. Biden (1,200). Distribution of emotional expressions in public speeches.

J. Biden and D. Trump have a different distribution in their emotional statements. J. Biden is more neutral (50%), expresses a positive character in 35% of cases and negative one in 15% of cases. D. Trump expresses positive emotions in 20% of cases, neutral ones in 30% of cases, and negative ones - in 50% of cases.

Questions and topics of speeches. The main topics and questions in their speeches were similar, but with different emphasis. In J. Biden's speeches, the most attention was paid to the economy (25%), foreign affairs (20%) and social policy (15%). D. Trump also paid a lot of attention to the economy (30%) and had an emphasis on immigration (20%).

Results of the content analysis showed that J. Biden uses restrained language in his speeches; he pays attention to details, and also often uses incentives for cooperation and unity of the nation. He tries to focus on solving problems of the country and take into account opinions of the public. In turn, D. Trump actively uses social networks to communicate with the public. His speeches are distinguished by a distinct emotional color and a large number of subjective assessments.

So, D. Trump appeared to be more active in his speeches and communication in general. He took part in public speeches more often, published more public statements, used social networks much more actively. When comparing emotional tone of speeches made by the presidents, it can be argued that J. Biden mainly maintained a neutral and positive tone. In turn, D. Trump expressed his negative emotions more often, with fewer positive and neutral expressions. This indicates a difference in communication styles and perception of problems. The both presidents paid the most attention to the economy, but J. Biden emphasized two more topics: foreign affairs and social policy. In turn, D. Trump paid more attention to immigration issues. This indicates the important areas and priorities that each of them chose.

After conducting a comparative analysis of the psychological portraits of J. Biden and D. Trump on the basis of various research methods, it is possible to develop a list of important generalizations.

Different psychological types and leadership styles.

As a result of the research, it was found that J. Biden and D. Trump represent different psychological types that influence their political decisions and leadership style. J. Biden is more logical, reserved and able to cooperate with others. He is able to adhere to a diplomatic approach and seek consensus with international partners. D. Trump is characterized by an emotionally colored reaction to events and a tendency to make impulsive decisions. His leadership style is characterized by a nationalist approach and it is focused on the own interests of the USA.

Communication strategies.

Results of the content analysis showed that J. Biden and D. Trump use different communication strategies. In his speeches J. Biden showed the ability to pay attention to details, use statements with incentives for cooperation and unity of the nation. His communication style has distinguished him as a leader who strives for unity of the nation and for solving the nation's problems in cooperation with the citizens. D. Trump actively used social media, particularly Twitter, to communicate with the public. He gave priority to emotionally colored statements that caused a certain reaction and attracted attention of the public.

Political decisions.

Comparison of documents and political decisions of J. Biden and D. Trump made it possible to find out that their approaches to leading the country and solving problems are different. J. Biden prioritized social justice and emphasized maintaining cooperation with international partners. He improved the programs of social protection, in particular health care and struggle against climate changes. D. Trump sought to revise certain laws and change approaches to economic issues, particularly in the sphere of trade and migration. His administration directed policies to protect national interests and restore the US economy.

Previous research confirms that different presidents have different leadership styles and psychological characteristics that influence their policy decisions. Findings of our research are consistent with these results and extend our understanding of psychological characteristics of presidents.

J. Biden and D. Trump represent two very different psychological portraits of political leaders. Their leadership styles, characters and personality traits differ, and this is reflected in their political actions and interactions with the public.

Results of the research are consistent in content with the study of D. McAdams, who claims that D. Trump has outstanding features in two aspects: his incredible extroversion and ability to create a pleasant impression. D. Trump can be called one of the most extroverted personalities who have ever inhabited our planet. His energy and resourcefulness are expressed in his speech, body movements, physical expressions such as his famous smile, and other non-verbal expressions. This enthusiasm affects others and causes positive emotions; Trump's energy affects the crowd of spectators who become his supporters during the election campaign regardless of the specific content of his statements. D. Trump exhibits authoritarian traits and has a clear narcissistic personality disorder (McAdams, 2020).

Results of this research and the scientific discourse of A. Griebie and A. Immelman are also in many aspects analogous. Thus, the authors claim that D. Trump's leadership style during his tenure as the President was bold, competitive and full of confidence (i.e., ambitious); rigid and directive (i.e. dominant); impulsive and not very disciplined (i.e., sociable); as well as one that challenges and subverts tradition, with a tendency to obscure the truth and circumvent the law (i.e. fearless). D.Trump spent a lot of effort on being more popular than others; he had confidence in his social skills, was prone to impulsiveness and had little respect for discipline and routine tasks (Griebie and Immelman, 2020).

Results of this research and the scientific investigations carried out by A. Griebie and A. Grybi and A. Immelman regarding J. Biden's personality look similar in content. In order to achieve his motivational goal, J. Biden often uses compliments, praises or flatters others, creates an image of benevolence. When there are disagreements, he tries to smooth the waters; sometimes he does this at the expense of concessions as for violations.

Leaders with a personality profile similar to that of J. Biden's will demonstrate an interpersonal leadership style characterized by flexibility, compromise, and an emphasis on teamwork; they tend to avoid conflict and risk. J. Biden is a leader who respects the social environment, is open to information, and is motivated first of all by a relationship orientation — this encourages a collegial, adaptive leadership style with an emphasis on resolving differences and building consensus (Griebie and Immelman, 2021).

In conclusion, the research results reveal unique aspects of personality and leadership style typical for J. Biden and D. Trump. Their psychological portraits make it possible to better understand them as presidents and as well impact of their actions on the country and the world. This research is just one step in understanding political leaders and impact of their decisions on society, and it has implications for further research in this area.

Conclusion

Therefore, the research revealed various personal traits and leadership styles of J. Biden and D. Trump. J. Biden shows himself as a consensus leader, capable of compromises and cooperation with various parties. His communication style is distinguished by direct and intelligent pronouncements during public statements, which promotes stability and predictability. D. Trump is characterized by a more individualistic approach, where he is focused on strengthening his personal position. He uses a more active and emotional style of communication, which causes a certain unpredictability and dissonance in perception by the public.

In addition, the research confirmed influence caused by psychological characteristics of the presidents on their decisions and actions. For example, J. Biden demonstrates a higher level of emotional intelligence, which contributes to the ability to understand other points of view and find compromise solutions. In turn, D. Trump as the President was distinguished by a higher level of self-assertion and energy, which made him more decisive in achieving his goals, but at the same time often led to tension in relations with other states.

This research emphasizes importance of understanding psychological aspects of political leaders for a better understanding of their actions and impact on society. Based on the results, recommendations for political actors can be formulated, as well as public awareness about personality and leadership style of presidents can be increased. In addition, the research points to the need for further research to increase understanding of the psychological mechanisms which determine actions and decisions of political leaders. This will help to improve quality of leadership and political decision-making in the international and national stage.

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Implementation of innovations in Ukraine during martial state

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Abstract

This scientific article is devoted to the identification of current problems of legislative regulation of priority areas of innovative activity in Ukraine and development of proposals for their solution. It emphasized the need for rapid development of the state program of objectives for forecasting the scientific, technological and innovative development of Ukraine for 2023-2032, which will contribute to the formation of financial opportunities for the development of the national innovation system. Arguments are given that increasing the level of innovative development of Ukraine in the war and post-war period will contribute to: simplification of review and agreement procedures; aligning the content of legislative acts regulating the determination of priority areas of innovative activity; operational development of the state target program, which would determine the most promising directions for the development of scientific, technological and innovative activities. The obtained results allow us to conclude on the expediency of deploying a single national strategy for the development of innovative activity, which would allow clearly defining its objectives, priorities, resources, mechanisms of implementation and control, etc., as

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well as the «Strategic plan for overcoming the economic crisis in Ukraine for 2023-2025».

Keywords: martial law; conditions for innovations; innovative policy; innovative development; legislative regulation.

Implementación de innovaciones en Ucrania durante el estado marcial: Regulación legislativa

Resumen

Este artículo científico está dedicado a la identificación de problemas actuales de regulación legislativa de áreas prioritarias de actividad innovadora en Ucrania y al desarrollo de propuestas para su solución. Se enfatizó la necesidad de un rápido desarrollo del programa estatal de objetivos para pronosticar el desarrollo científico, tecnológico e innovador de Ucrania para 2023-2032, lo que contribuirá a la formación de oportunidades financieras para el desarrollo del sistema nacional de innovación. Se dan argumentos de que aumentar el nivel de desarrollo innovador de Ucrania en el período de guerra y posguerra contribuirá a: la simplificación de los procedimientos de revisión y acuerdo; alinear el contenido de los actos legislativos que regulan la determinación de áreas prioritarias de actividad innovadora; desarrollo operativo del programa estatal de objetivos, que determinaría las direcciones más prometedoras para el desarrollo de actividades científicas, tecnológicas e innovadoras. Los resultados obtenidos permiten concluir sobre la conveniencia de desplegar una estrategia nacional única para el desarrollo de la actividad innovadora, que permita definir claramente sus objetivos, prioridades, recursos, mecanismos de implementación y control, etc., así como el «Plan estratégico para superar la crisis económica en Ucrania para 2023-2025».

Palabras clave: ley marcial; condiciones para las innovaciones; política innovadora; desarrollo innovador; regulación legislativa.

Introduction

The growth of the economic role of innovations, acceleration of pace, directions and changes in the mechanisms of development of innovative processes became one of the key factors that led to radical structural changes in the economies of the countries of the world. Investments in education

and science increased, technological and organizational innovations spread, and new types of activities appeared. The changes that took place in the economic development of the leading countries proved their transition to an innovative model of development.

Innovative improvement of production, the ability to offer the consumer goods and services of a new, previously unknown type, have become the general law of modern competition. At the same time, the available theoretical approaches and methods and tools for implementing the innovation process were not always adequate to the growing needs and expected results of innovative development (Honcharenko, 2015).

Today, the development strategies of any enterprises should include not only ensuring a sufficient level of solvency, liquidity and profitability, but also ensuring a high level of scientific and technical developments and innovations, which will significantly increase the level of functioning of the business entity. One of the tools that will contribute to the effective implementation of the chosen strategies is investments, which will make it possible to carry out activities in a coordinated and phased manner and guarantee an appropriate level of financial and economic security.

Based on world experience, external and internal investment support forms a large part of aggregate investments in the innovative development of national economies to stimulate economic growth and ensure the sustainability of enterprises. Accordingly, investment support is a stimulator of innovative processes in Ukraine, which allows the country to develop faster and stabilize all industries and sectors of the economy.

The results of many studies of the state of regulatory and legal regulation of innovative activity in Ukraine confirm the presence of problems due to the lack of consolidation at the legislative level of the system of innovation law itself, the imperfect coordination of the efforts of state bodies involved in this process, the ineffectiveness of the system of monitoring compliance and the implementation of prescriptions contained in numerous normative legal acts, as well as inconsistency in the disclosure of the basic concepts contained in them.

Thus, during the years of independence in Ukraine, in addition to special laws, state authorities in one form or another adopted (approved) about two hundred programs, concepts, strategies, the majority of which are aimed at adapting national legislation to European integration processes and laying guidelines for the innovative development of industry and the sphere services, as well as the creation of prerequisites for the implementation into national legislation of law enforcement evidenced by practice in advanced world democracies.

Today Ukraine is going through difficult times due to the full-scale invasion of the Russian Federation on the territory of a sovereign state.

From the point of view of the chosen topic, this situation is new and requires a transition to a new innovative model for the functioning of the economy in the war and post-war periods.

The introduction of martial state involves the functioning of the economy mainly in the direction of meeting the needs of the armed forces of Ukraine, which does not diminish the role of investment resources in the economic system, since in the post-war period it will be important to rebuild critical infrastructure enterprises, restore the work of the socio-economic sphere with the introduction of the latest technologies. Accordingly, the chosen research topic is extremely relevant and is characterized by the absence of previous research in the chosen direction.

1. Methodology of the study

The theoretical and methodological basis of the research is its methodology, as a teaching about the system of methods, principles, special means and methods of studying general regularities, emergence, functioning and legal support of the development of innovations, as well as an institutional-evolutionary approach to the study of the problems of legal support of the development of innovations, a systematic approach to the substantiation of strategic prospects for the innovative development of the national economy. A three-level structure of research methods of legal support for the introduction of innovations in Ukraine under martial state is applied – philosophical, general scientific and special scientific.

Methodological approaches that determined the general research paradigm are as follows. A synergistic approach was used during the study of the evolution of the formation of state policy in the field of innovative activity.

The comprehensive approach involves the analysis of the subject of research within the framework of a combination of different scientific schools, concepts and methods and is implemented through the vision of the object from the most diverse positions, by combining the knowledge of different methods. The use of the humanistic method contributed to the formation of proposals for the implementation of measures of innovative activity in the conditions of special legal regimes.

2. Analysis of recent research

General and specific issues of legal policy in the field of innovation were considered in the works of many scientists (Georgievskyy, 2021; Haustova and Reshetnyak, 2019; Honcharenko, 2015; Levchuk, 2023; Malets, 2020;

Shumilo, 2008; Yakovlev, 2018). Despite the significant contribution of the mentioned scientists to the development of legal regulation problems, in the conditions of martial state imposed on the territory of Ukraine and the adaptation of national legislation to the requirements of the European Union, a number of issues of the mentioned topic remain debatable. However, many issues regarding the normative and legal regulation of innovative activity remain debatable.

In addition, despite the fact that a significant number of regulatory and legal acts have been approved over many years of the history of innovative activity, one of the most important problems for Ukrainian innovations in the conditions of martial state remains the lack of effective legal regulation. This state of affairs does not meet the requirements of the transition of the Ukrainian economy to an innovation-oriented model and restrains the development of innovative activities.

The purpose of this research is the analysis of the current legislation of Ukraine in the field of innovative activity, a critical analysis of the definition of individual categories in normative legal acts, the determination of the effectiveness of the current legislation for the needs of the modern economy, and the identification of problems in practical application.

3. Results and discussion

Clarifying the priority ways of improving the legal support for the introduction of innovations during martial state in Ukraine requires the definition of a categorical research apparatus, in particular, such terms as «innovations», «innovative activity» and «martial state».

In accordance with the Law of Ukraine «On Innovative Activity», innovations are newly created (applied) and (or) improved competitive technologies, products or services, as well as organizational and technical solutions of production, administration, commerce or other that significantly improve the structure and quality of production and (or) social sphere (On Innovative Activity. Law Of Ukraine, 2002).

At the same time, international standards consider innovation as the introduction of a new or significantly improved product (good or service), or process, a new marketing method or a new organizational method in business practice, workplace organization or external relations (Innovation Economics: The Economic Doctrine for the 21st Century).

The Law of Ukraine «On Innovative Activities» defines innovations as «newly created (applied) and (or) improved competitive technologies, products or services, as well as organizational and technical solutions of a production, administrative, commercial or other nature that significantly

improve the structure and quality of production and (or) social sphere». «Innovative activity» means activity aimed at the use and commercialization of the results of scientific research and development and leads to the release of new competitive goods and services to the market (On Innovative Activity. Law Of Ukraine, 2002).

There is no doubt about the importance of a precise legal definition of innovative activity, since whether a specific activity is recognized as innovative depends on the application of a special regime of legal regulation and the possibility of entities receiving state support.

In connection with the sufficiently widespread point of view about the need for a broad understanding of the meaning of the concept of «innovation», as a priority measure, there is a need to overcome the existing legal uncertainty and first in the new concept, and then in the relevant laws to clearly prescribe the scope of application of this term.

The given analysis gives reasons to propose two ways. The first – a classic term – applies in the field of economics. The second is broad, as an innovation in any sphere of social and political life, not only in the economy.

Effective innovative activity is one of the priority directions of the state's development, it is a component of socio-economic and legal policy and is aimed at stimulating intellectual activity, creating prerequisites for the effective development of the state's innovative system. Law is a tool for regulating social, in particular, economic relations. The effectiveness of law in regulating economic relations also depends on how fully it reflects the economic needs of society. This, in turn, makes it possible to form an effective legal policy in the specified area.

State innovation policy mostly consists of various plans, strategies and programs. This provision is explained by the fact that the legal regulation of innovative activity is based on the modeling of future social relations, rather than cementing already formed relations. The specified feature of this type of legal relationship determines a closer connection between legal regulation and legal policy in the field of intellectual activity and innovation (Malets, 2020).

Legal policy in the field of innovation is proposed to be understood as scientifically based, consistent, systematic and coordinated work of state structures and institutions of civil society, aimed at forming legal prerequisites for effective innovative activity through the adoption of relevant normative legal acts, building an effective law enforcement mechanism in the field of protection and protection intellectual property, training of qualified personnel for work in the innovation field.

The modern legal framework (laws, presidential decrees, by-laws in the form of Government resolutions, orders of central executive bodies,

etc.) regarding scientific, technical and innovative activities includes an extremely large number of documents.

Among them, the following groups can be distinguished: documents of a program nature (strategies, concepts, programs) of the national, branch and regional levels; laws of Ukraine, which provide for the competence of local bodies of executive power and local self-government in the field of innovative activity; by-laws of the Cabinet of Ministers of Ukraine, ministries and agencies, which regulate specific issues of implementation of regional innovation projects, creation of local innovation infrastructure, reporting, etc.; decisions and orders of local bodies of executive power and local self-government in the field of innovative activity (Shumilo, 2008).

The innovative process in the doctrine is defined as the process of successive transformation of ideas into products, which passes the stage of fundamental, applied research, design development, marketing, production, sales, and commercialization. It is a set of scientific and technical, technological and organizational changes, innovations, and its main feature is the mandatory completion of innovations, that is, obtaining a result suitable for practical implementation (Honcharenko, 2015).

The development of the national innovation system, i.e., «a set of legislative, structural and functional components (institutions) that are involved in the process of creating and applying scientific knowledge and technologies and determine the legal, economic, organizational and social conditions for ensuring the innovation process» (Decree Of The Cabinet Of Ministers Of Ukraine No. 680-r, 2009), is an indisputable priority of the state policy of modern countries in the conditions of development of innovative economies and global technological competition.

It is this criterion that is key in the formation of global competitiveness ratings (Resolution Of The Cabinet Of Ministers Of Ukraine No. 526-r, 2019), therefore, the legislative regulation of innovative activity planning must be modern, perfect and mobile, corresponding to the dynamic nature of innovations. We see the existence of a direct dependence of the shortcomings of innovative development of Ukraine on the level of efficiency of state administration.

At the same time, modern scientists have repeatedly emphasized the need to improve the national legislation regulating the implementation of innovative activities. In particular, A. Yakovlev, analyzing ways to improve the state of innovative activity in Ukraine, singles out the existence of a number of problems in the legislative sphere, such as: lack of tax incentives for innovation and investment activity, a system of preferential lending for developers and distributors of innovations, insufficient state insurance and guarantees for investors (Yakovlev, 2018).

Sharing the position of the researcher, we note that the given list of problems determines to a greater extent the prospect of introducing the given directions at the legislative level. At the same time, it is no less urgent to carry out a systematic analysis of the current Ukrainian legislation in order to identify existing gaps and conflicts in the legal regulation of the development of the national innovation system.

In our opinion, it is necessary to clearly define the state priorities of innovative activity in Ukraine and to develop a comprehensive set of measures for their promotion in order to build an innovative economy. This emphasis is not accidental, because the determination of the legal, economic and organizational foundations of the formation of a coherent system of priority areas of innovative activity was laid down by the legislator in the definition of the purpose of the Law of Ukraine «On priority areas of innovative activity in Ukraine» (On Priority Areas Of Innovative Activity In Ukraine, 2011).

The specified normative legal act is of particular importance for the activation of innovative activity and the development of the national innovation system, as it provides for measures to be implemented by the state in priority areas of innovative activity, including mechanisms for direct budget financing, loans from the state budget, subventions, reimbursement of interest rates for loans, etc.

Martial state is a special legal regime introduced in the country or in some of its localities in case of armed aggression or threat of attack, danger to state independence, its territorial integrity. Martial state provides for the provision of the relevant state authorities, military command and local self-government bodies with the powers necessary to avert a threat and ensure national security, as well as a temporary, threat-induced, restriction of the constitutional rights and freedoms of a person and a citizen, and the rights and legitimate interests of legal entities, with the indication the validity period of these restrictions (Levchuk, 2023).

On February 5, 2023, Law of Ukraine No. 2859-IX entered into force, amending the laws of Ukraine «On priority areas of development of science and technology» and «On priority areas of innovative activity in Ukraine» regarding the extension of the priority areas approved by these laws for 2023.

Implementation of the act will make it possible to continue financing in 2023 scientific research and scientific and technical developments started in previous years, as well as make it possible to conduct competitive selections of new research and scientific and technical developments in accordance with the approved priority areas of development of science and technology and innovative activities in Ukraine (On Priority Areas Of Development Of Science And Technology, 2023).

Art. 4 of the Law of Ukraine defines the following strategic priority areas of innovative activity in Ukraine for 2011-2023: development of new energy transportation technologies, implementation of energy-efficient, resource-saving technologies, development of alternative energy sources; mastering new technologies of high-tech development of the transport system, rocket and space industry, aircraft and shipbuilding, weapons and military equipment; development of new technologies for the production of materials, their processing and joining, creation of the industry of nanomaterials and nanotechnologies; technological renewal and development of the agro-industrial complex; introduction of new technologies and equipment for high-quality medical care, treatment, pharmaceuticals; wide application of cleaner production and environmental protection technologies; development of modern information, communication technologies, robotics (On Priority Areas Of Innovative Activity In Ukraine, 2011).

At the legislative level, two types of priority directions of innovative activity in Ukraine, which have a dialectical connection, have been introduced. According to Art. 2 of the Law, the priority areas of innovative activity in Ukraine are divided into strategic, i.e., those determined for a period of up to 10 years, and medium-term, i.e., those determined for a period of up to 5 years (On Priority Areas Of Innovative Activity In Ukraine, 2011).

As we can see, the current mechanism of legislative regulation of the formation and determination of priority areas of innovative activity provides for consistent actions of authorized public authorities. It is, in particular, about the development of proposals with the involvement of the scientific community, their approval in the form of draft normative acts and the approval of these acts by public authorities within the limits of their competence within the prescribed time limits.

As stated in Part 2 of Art. 3 of Law No. 3715-VI, the preparation of proposals regarding strategic priority areas and their predictive and analytical justification should be carried out with the involvement of the National Academy of Sciences of Ukraine, national branch academies of sciences of Ukraine, higher educational institutions and scientific research institutes within the framework of state target programs of scientific and technical forecasting and innovative development of Ukraine in accordance with the laws of Ukraine «On priority areas of development of science and technology» (On The Priority Directions Of Innovation Activity In Ukraine, 2011) and «On state targeted programs» (On State Target Programs, 2004).

Also in Art. 4 of the Law of Ukraine «On Priority Areas of Development of Science and Technology» states that such a state target program is developed and implemented by the Government on the basis of the recommendations of the National Council of Ukraine on Science and Technology Development with the involvement of the National Academy of Sciences of Ukraine,

national branch academies of sciences, central executive bodies authorities in accordance with the Law of Ukraine «On State Targeted Programs» (On Priority Directions Of Science And Technology Development In Ukraine, 2001).

Therefore, the analysis of the above-mentioned normative legal acts leads to the conclusion that the Government must submit to the Parliament for each of the strategic priority areas of innovative activity: the justification of the need to adopt the priority area, the expected results and their impact on the economy of Ukraine; assessment of the scientific and technical potential and scientific schools that will be involved in the implementation of the priority direction, assessment of existing objects of intellectual property law and scientific results that will be the basis for the implementation of the priority direction; proposals for priority thematic directions of scientific research and scientific and technical developments, identification of specialists and basic scientific institutions that should provide scientific and technical support of the priority direction; the concept of implementation of the priority direction and the assessment of financial, material and technical resources that must be involved for its implementation (On The Priority Directions Of Innovation Activity In Ukraine, 2011).

We believe that, on the one hand, this order of development of priority areas of innovative activity contributes to the systematic processing of relevant proposals, and on the other hand, the mechanism of legislative determination of these areas, which involves multi-stage preparation and levels of coordination, is extremely complex and bureaucratically overloaded, which causes the appearance of other problems of legislative regulation of the specified area. In particular, he caused a violation of the procedure and deadlines for the formation of priority areas of innovative activity for the period after 2021.

A separate problem of legislative regulation of priority areas of innovative activity is the current lack of a state target program in Ukraine that would determine the most promising directions, options and measures for the development of scientific, technological and innovative activities in Ukraine. This, in turn, makes it impossible to obtain budget funding for the development of relevant priority areas due to the application of the program method.

Therefore, we consider it necessary for the Ministry of Education and Science to quickly develop and approve the State target program for forecasting the scientific, technological and innovative development of Ukraine for 2023-2032, which will contribute to the formation of financial opportunities for the development of the national innovation system.

Another problem of the legislative regulation of priority areas of innovative activity is the internal inconsistency of regulatory acts, in

particular, the inconsistency of the content of the Procedure for the formation, examination and discussion of priority areas of innovative activity (Resolution of the Cabinet of Ministers of Ukraine, No. 1094, 2003) with the provisions of the Law of Ukraine «On Priority Areas of Innovative Activity in Ukraine» (On The Priority Directions Of Innovation Activity In Ukraine, 2011).

The specified Procedure was adopted to implement the previous Law of Ukraine «On Priority Areas of Innovative Activity in Ukraine» No. 433-IV dated January 16, 2003, which became invalid due to the adoption of the current Law dated September 8, 2011. However, the updated Procedure in accordance with the requirements of Part 3 of Art. 3 of the Law was never approved.

In the project «Strategies for the development of high-tech industries until 2025» of the Cabinet of Ministers of Ukraine from 2016, the purpose of which is the formation of a new model of economic development – an innovative economy, increasing technological efficiency, increasing competitiveness and increasing the efficiency of existing production, it is noted as one of the main components «the need systematic combination of science and production» and «operational implementation, use and commercialization of the results of scientific activity» (On the approval of the strategy for the development of high-tech industries until 2025 and the approval of the plan of measures for its implementation. Draft order of the Cabinet of Ministers of Ukraine, 2016).

Thus, taking into account the fact that the development of innovative activity in the world is considered as the most important and irreplaceable resource in ensuring the sustainable development of modern society, ensuring the competitiveness and economic security of countries, innovative activity in Ukraine should also ensure the production of a high-quality scientific product aimed at solving development problems countries taking into account the challenges of global problems of humanity. We share the point of view of some scientists that innovative activity should be focused on the practical use of its results in various spheres of life in modern society, taking into account the demands of business, ensuring high-quality training of personnel with appropriate qualifications (Haustova and Reshetnyak, 2019).

Approved on 10.07.2019, the «Strategy for the development of the sphere of innovative activity for the period until 2030» is fundamental and multifaceted, and its attachment to budget funding casts doubt on the realism of most of its provisions. That is why the «Concept of Improving the System of Innovative Law», which is small in scope and subject of legal regulation, which should fulfill the role of a perspective plan in the process of systematizing the current legislation, inspires more confidence.

The introduction of martial state in Ukraine proved the need to receive services remotely, which is associated with convenience and comfort, safety and security of the lives of both customers and employees of companies and institutions. The use of such innovative technologies as blockchain, crowdfunding, sharing, artificial intelligence, cloud technologies, etc., is the key to effective implementation and successful functioning of the remote customer service system. They provide an opportunity to bring the quality of service provision to a new level and simplify interaction with consumers (Romanovska and Skladanyuk, 2022).

At the same time, the absence of a definition of freelancing in national legislation, which is often equated with remote work, causes numerous disputes in the understanding and legal regulation of related relations. Yes, in accordance with the changes made to the Code of Labor Laws by the Law of Ukraine «On Amendments to Certain Legislative Acts of Ukraine Regarding the Improvement of Legal Regulation of Remote, Homework and Work Using Flexible Working Hours», Remote and Homework the work is performed by an employee outside the workplace or production premises.

At the same time, a remote worker independently chooses a workplace, creates safe and harmless working conditions and uses information and communication technologies, while a home worker performs work at his place of residence or in another fixed premises and uses technical means to produce products or provide services, while the employer is responsible for proper and safe working conditions (On Amendments To Certain Legislative Acts Of Ukraine On Improving The Legal Regulation Of Remote, Home-Based Work And Work Using Flexible Working Hours, 2021).

A typical example of conceptual uncertainty in Ukraine in the innovation sphere and related issues is the Law of Ukraine «On Stimulating the Development of the Digital Economy in Ukraine» (On Stimulating The Development Of The Digital Economy In Ukraine, 2021), the concept of which is to stimulate the development of the digital economy in Ukraine by creating favorable conditions for the development of innovative and technological business, attracting investments, building digital infrastructure and attracting talented employees.

In fact, the specified normative legal document is a rather meaningful attempt to create a certain virtual free economic zone with simplified rules for conducting business in the field of information technologies, but there is no question at all about the digitalization of certain areas of the national economy.

Also, the project of the Law of Ukraine «On support and development of innovative activity» proposed by the Ministry of Education and Science of Ukraine dated 13.10.2021 proposed: to improve legislative regulation in the field of innovative activity; to update the institutional structure

of management in the field of innovative activity; remove bureaucratic restrictions during the state registration of innovative projects; determine the goal and objectives of the state policy in the field of innovative activity; create favorable conditions for the implementation of innovative activities; to update the list of forms of state support for innovative activity and the conditions for its provision; identify providers of state support; stimulate an increase in the volume of implemented innovative products, the number of introduced new technological processes and new types of products; promote the development of the state's innovative potential and increase the competitiveness of the economy, ensure the implementation of modern innovative environmentally friendly, safe, energy- and resource-saving technologies, the production and sale of innovative products (Public discussion: draft law on the support and development of innovative activities, 2021).

Analysis of the content of the draft Law of Ukraine «On Support and Development of Innovative Activities» indicates that it has shortcomings and needs to be revised and improved. In particular, in our opinion, its provisions should contain specific economic and legal measures of state stimulation of innovative activity, such as the provision of state support to subjects of innovative activity (for a period of at least five years) that will implement innovative projects in the form of tax exemption on the profit of enterprises and value added tax.

In general, we consider it indisputable that in the sphere of state interests, the adoption of the corresponding updated regulatory legal act will allow organizing a systematic approach to the formation of policy in the field of innovation activity and ensure the development and effective interaction of the elements of the national innovation ecosystem, which can become a driver of accelerated economic growth.

Conclusions

The study of current problems of legislative regulation of priority areas of innovative activity in Ukraine proved the presence of a number of problems related to both the content of legislative norms and their proper implementation: insufficient terminological clarity in revealing the meaning of the concept of «innovation»; overburdening the system of legal regulation with normative acts of a doctrinal nature and local normative acts; their inconsistency with individual provisions of special laws as well as individual prescriptions among themselves; the absence of a state target program that would determine the most promising directions, options and measures for the development of scientific, technological and innovative activities in Ukraine.

The mechanism of legislative determination of strategic directions of innovative activity in Ukraine, which involves multi-stage preparation and degrees of coordination, is extremely complex and overloaded, which causes the appearance of other problems of legislative regulation of the studied area. It is necessary for the Ministry of Education and Science to quickly develop and approve the State target program for forecasting the scientific, technological and innovative development of Ukraine for 2023-2032, which will contribute to the formation of financial opportunities for the development of the national innovation system.

The risks of defining inappropriate strategic priority areas of innovative activity that have lost their relevance in the world. Ignoring the above risks, lack of prompt response and coordinated interaction of central executive authorities with the scientific community, responsible work of the Government and Parliament in conditions complicated by the war can lead to untargeted spending of state and local budgets.

Simplification of review and agreement procedures will help increase the level of innovative development of Ukraine and its competitiveness in the world; aligning the content of legislative acts regulating the determination of priority areas of innovative activity, and the operational development of a state target program that would determine the most promising areas, options and measures for the development of scientific, technological and innovative activities in Ukraine.

Increasing requirements for the scientific and technical development of Ukraine to ensure its sustainable development, economic security and competitiveness in the conditions of modern global challenges, as well as the presence of a large number of problems in the development of innovative activity require the development of a unified national strategy for its development, which will allow clearly defining the goals and priorities of innovative activity, as well as resources, implementation and control mechanisms, etc.

State strategies and programs for the development of innovations should be based on a perspective legal policy in this field, determine development goals and priorities, stimulate the development and implementation of innovative technologies, which, among other things, requires the development of an appropriate categorical apparatus, in particular such concepts as «innovation», «innovative activity», «innovation policy» and others.

Among the priority measures of innovative activity should be the development and approval at the state level of the «Strategic Plan for overcoming the economic crisis in Ukraine for 2023-2025», which will be based on the provisions of the «National Economic Strategy-2030, taking into account the war and post-war situation in the country and provide for:

definition priority industries of priority development; the list of enterprises of priority financing and creation of favorable conditions for international investors; measures to activate the privatization process; ensuring the operation of the principle of freedom of business in combination with mechanisms of preferential taxation of priority development vectors; economically justified (financial) compensators for the costs of industry, small and medium-sized businesses for wartime requirements. Only such a comprehensive approach will make it possible to realize the achievements of economic and legal science and lay the foundation for increasing the efficiency of innovative activity in Ukraine.

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Institute of appeal in the mechanism of protection and restoration of rights and legitimate interests

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Abstract

In this research article, based on the analysis of procedural legislation and the practice of its application, with the help of general and special scientific methods, the question of the functioning of the institute of appeal in the mechanism of protection and renewal of rights is addressed and, at the same time, the legitimate interests of the individual in Ukraine are investigated. It is noted that the appeal is an independent interdisciplinary institution, and the realization of the right of appeal in criminal, administrative, civil and economic proceedings has material-legal and procedural-legal expression. Among the contributions of the work, the peculiarities of legal relations during the appeals and cassation appeals are determined. It is concluded that the proposals to the procedural legislation are reasonable in order to make it impossible for the participant in the criminal process to abuse the right to appeal any decision or action of the investigating body.

Keywords: judicial power; individual rights; complaint; institute of appeal; preliminary investigation.

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Instituto de apelación en el mecanismo de protección y restauración de derechos e intereses legítimos

Resumen

En este artículo de investigacion, basado en el análisis de la legislación procesal y en la práctica de su aplicación, con la ayuda de métodos cientificos generales y especiales, se abordo la cuestión del funcionamiento del instituto de apelación en el mecanismo de protección y renovación de los derechos y, al mismo tiempo, se investigan los intereses legítimos de la persona en Ucrania. Se advierte que la apelación es una institución interdisciplinaria independiente, y la realización del derecho de apelación en los procesos penales, administrativos, civiles y económicos, tiene expresión material-jurídica y procesal-jurídica. Entre los aportes del trabajo, se determinan las peculiaridades de las relaciones jurídicas durante los recursos de apelación y casación. Se concluye que son razonable las propuestas a la legislación procesal con el objetivo de imposibilitar que el participante en el proceso penal, abuse del derecho a apelar cualquier decisión o actuación del órgano de instrucción.

Palabras clave: poder judicial; derechos individuales; denuncia; instituto de apelación; instrucción previa.

Introduction

In a modern democratic society, human rights are an important institution that regulates the legal status of a person, determines the ways and means of influencing him, the limits of interference in the sphere of personal life, and establishes legal and other guarantees for the protection and realization of rights and freedoms. Article 3 of the Constitution of Ukraine declares that a person, his life and health, honor and dignity, inviolability and security are recognized as the highest social value, and the establishment and provision of his rights and freedoms are the main duties of the state. The state is responsible to the people for its activities. Affirmation and provision of human rights and freedoms is the main duty of the state (Constitution Of Ukraine, 1996). The course to build such a state in Ukraine involves determining the effective mechanisms of this process (Kulyanda, 2021).

The protection of the rights and freedoms of a person and a citizen is a defining constitutional function of the judicial power, and therefore is one of the prerequisites for ensuring the state of compliance with the rule of law and legality. At the same time, according to Article 55 of the Basic Law, the rights and freedoms of a person and a citizen are protected by the court.

Everyone is guaranteed the right to appeal in court decisions, actions or inaction of state authorities, local self-government bodies, officials and officials. At the same time, Article 124 of the Constitution of Ukraine establishes that justice in Ukraine is administered exclusively by courts, and Article 129 enshrines, in particular, provisions on ensuring the right to an appellate review of the case and, in cases specified by law, to a cassation appeal of a court decision (Constitution Of Ukraine, 1996).

Improvement of legislation in the context of Article 55 of the Constitution of Ukraine should be a gradual trend aimed at expanding judicial protection of human rights and freedoms, in particular judicial control over the legality and reasonableness of decisions, actions and inaction of authorized subjects during judicial proceedings. It should be understood that the Constitution of Ukraine enshrines not only the absolute right to appeal, but also establishes the duties of a person not to violate the rights and freedoms of other persons, not to abuse the corresponding rights. The balance between rights and duties must be unshakable, as an increase in the scope of rights requires the legislator to increase the scope of duties to ensure them.

1. Methodology of the study

The methodological basis of the scientific article was made up of the provisions of dialectics as a general scientific method of learning the phenomena of objective reality, other general scientific and special methods. Their application is determined by a systematic approach, which makes it possible to investigate problems in the unity of their social content and legal form, to analyze the institution of appeal in the criminal civil, economic and administrative process.

Thus, the dialectical method of learning the processes that take place during the implementation of an appeal in criminal proceedings, in the resolution of civil and economic disputes, cases of administrative offenses, helped to consider it in its development and interrelationship, to identify established trends and regularities in general. The formal-logical method was used in the analysis of the concepts of «appeal», «complaint», «subject of appeal», determining the content of the constitutional right to appeal, the characteristics of the structural elements of the appeal process, formulating proposals for improving legislation in this area.

2. Analysis of recent research

The effectiveness and quality of judicial proceedings directly depend on the proper regulation of appeal procedures, including decisions, actions or inaction of bodies and officials who conduct judicial proceedings.

The presence of a relevant interdisciplinary institute, on the one hand, is a guarantee of the realization of the rights and legitimate interests of individuals and legal entities, on the other hand, it should not create unnecessary obstacles to the completeness and speed of resolution of disputes on the merits of criminal, civil, economic and administrative proceedings. Therefore, consideration of urgent problems regarding its development and improvement should remain in the field of view of scientists and practitioners.

In the article, based on the analysis of regulatory acts, scientific literature, investigative and judicial practice, we aim to determine the characteristic features of the formation of the appeal institution within the framework of the Ukrainian judiciary, outline the procedural measures that ensure consideration of the complaint, determine directions for optimizing the protection of the rights and legitimate interests of participants in pre-trial criminal proceedings proceedings, as well as court proceedings in the courts of the first, appeal and cassation instances.

3. Results and discussion

In the modern conditions of reforming the judicial system in Ukraine, the problem of judicial control over the observance of the constitutional rights, freedoms and interests of individuals, especially in the field of criminal procedural law, is becoming increasingly important, the implementation of which tasks is impossible without a system of measures and actions that provide for their limitations. The right to appeal is an absolute subjective right, the grounds for its implementation arise in the presence of certain legal facts with which the emergence of legal relations is connected.

The appeals institution acts not only as an important tool for protecting the personal rights of participants in criminal proceedings, observing public, state and private interests, but also as a guarantee of the effective operation of the entire criminal justice system (Klepka, 2019). Guaranteeing judicial protection of rights and freedoms requires the legislator to introduce an effective appeal mechanism into the law.

In the Ukrainian criminal process, Article 24 of the Criminal Procedure Code of Ukraine guarantees everyone the right to appeal the procedural decisions of the court in the manner prescribed by law (Criminal Procedure Code Of Ukraine, 2012). Guided by the principle of ensuring access to justice, the only criterion that makes it possible to determine which court decisions can be appealed to the court and who exactly has the right to such an appeal should be the restriction of the constitutional rights and freedoms of citizens (Yanovskaya, 2013). For example, consideration of relevant complaints at the pre-trial investigation stage is entrusted by the

criminal procedural legislation of Ukraine to the investigating judge as the authorized person to exercise judicial control over the protection of the rights, freedoms and legitimate interests of the participants in criminal proceedings.

The Criminal Procedure Code of Ukraine defines the procedure and conditions for consideration of individual complaints in Chapter 26 «Appeal of decisions, actions or inaction during pre-trial investigation» regulates the powers of the investigating judge, which can be exercised by him based on the results of such a review (Criminal Procedure Code Of Ukraine, 2012). A complaint against the decision, actions or inaction of an investigator or prosecutor during a pre-trial investigation must be in writing, contain all the necessary details and be presented in the sequence in which the complainant considers it necessary, but with a mandatory statement of justification in accordance with the law.

In Part 1 of Art. 303 of the Criminal Procedure Code of Ukraine defines a list of cases in which the decisions, actions or inaction of an investigator or prosecutor may be challenged during pre-trial proceedings – such as the inaction of an investigator or prosecutor, which consists in not entering information about a criminal offense into the Unified Register of Pre-Trial Investigations after receiving a statement or notification of criminal offence, failure to return temporarily seized property in accordance with the requirements of Art. 169 of the Criminal Procedure Code of Ukraine, as well as in failure to perform other procedural actions, which he is obliged to perform within the period specified by the Criminal Procedure Code of Ukraine; the decision of the investigator, the prosecutor to stop the pre-trial investigation; the investigator's decision to close the criminal proceedings; prosecutor's decision to close criminal proceedings and / or proceedings against a legal entity, etc., (Criminal procedure code of Ukraine, 2012).

Also in accordance with Part 2 of Art. 303 of the Criminal Code of Ukraine, complaints about other decisions, actions or inaction of the investigator or prosecutor are not considered during the pre-trial investigation and may be considered during the preparatory proceedings in court (Criminal procedure code of Ukraine, 2012).

Recently, there have been frequent proposals to improve the legislative regulation of criminal proceedings in terms of challenging the decisions and actions of the investigator and prosecutor at the pre-trial investigation stage. To date, the Criminal Procedure Code does not establish a proper and clear procedure for challenging the decisions, actions and inactions of investigators and prosecutors at the pre-trial investigation stage.

The stage of the pre-trial investigation of criminal proceedings consists of several stages, in particular, entering information into the Unified register of pre-trial investigations, notifying the person of suspicion, completion

and termination of the pre-trial investigation. Each of these stages, in turn, requires the pre-trial investigation body to fulfill its tasks by conducting separate procedural actions and making procedural decisions.

Any procedural action or set of actions during criminal proceedings must be performed by the investigator and the prosecutor without undue delay and in any case no later than the time limit determined by the relevant provision of this Code (Part 2 of Article 113 of the Criminal Procedure Code of Ukraine). Article 219 of the Criminal Procedure Code of Ukraine establishes the terms of a pre-trial investigation for making one of the following decisions in a case - an appeal to the court with an indictment, a request for the application of coercive measures of a medical or educational nature, a request for the release of a person from criminal responsibility or a decision to close (Criminal procedural code of Ukraine, 2012).

Due to their legal nature, procedural terms act as temporal conditions for the realization of subjective rights and legal obligations of participants in criminal procedural legal relations. Unjustified appeal by the participants of the criminal proceedings of the decisions and actions of the pre-trial investigation body leads to the prolongation of the process and violation of reasonable terms.

According to the current judicial practice, the defense party usually initiates the filing of complaints of the specified category in order to delay the process, with the aim of avoiding criminal liability for the suspect.

In addition, by groundlessly challenging the decisions and actions of the pre-trial investigation body, the participants in the proceedings create artificial obstacles to make it impossible for the pre-trial investigation body to fulfill the tasks of the criminal proceedings - to properly protect the person, society and the state from criminal offenses, protect the rights, freedoms and legitimate interests of the participants in the criminal proceedings, and to ensure a prompt, full and impartial investigation and trial so that everyone who commits a criminal offense is held accountable to the extent of his guilt, no innocent person is charged or convicted, no person is subjected to unreasonable procedural coercion and that due process of law was applied to each participant in the criminal proceedings.

The European Court of Human Rights in its decisions, in particular in the case of «Union Alimentaria v. Spain» dated July 7, 1989, indicates the inadmissibility of disobeying the key principle – the rule of law in cases where the behavior of the participants in the court session indicates the deliberate nature of their actions, aimed at unjustified delay of the process or abuse of his procedural right» (ECtHR decision in the case «Union Alimentaria Sanders v. Spain», 1989).

Along with this, the Criminal Court of Cassation of the Supreme Court in the ruling dated 09.04.2019 in case No. 306/1602/16-k notes that the

procedural law ensures compliance with the rights of individuals, and not their use for abuse (Decision of the Criminal Court of Cassation of the Supreme Court No. 306/1602/16-k, 2019).

It should be emphasized that to date, the Criminal Code of Ukraine does not provide for a general provision on the prohibition of the abuse of procedural rights of a party and does not define the mechanism of responsibility for the violation of the obligations defined by the criminal procedural law, therefore granting a party the right to an absolute appeal against any decision or action of a pre-trial investigation body will lead to the violation of the rights of other participants in the process (the victim, witnesses, translators, representatives).

In our opinion, when deciding on the list and scope of the right of participants to appeal the decisions and actions of the pre-trial investigation body, one should proceed from the balance of the state's positive obligations to the person and without appeal accept for consideration the statement that the pre-trial investigation body violated conventional and/or constitutional rights and human freedom – torture and inhumane treatment (Article 3 of the Convention, Part 1 of Article 28 of the Constitution of Ukraine), the rights of the suspect, the accused to protection, including professional legal assistance (paragraph «c» of Part 3 of Article 6 of the Convention , Article 59 of the Constitution of Ukraine), to participate in the examination of witnesses (clause «d» part 3 of Article 6 of the Convention) (Convention for the protection of human rights and fundamental freedoms, 1950), human rights to respect for one's private life, inviolability housing (Article 8 of the Convention), on refusal to testify about oneself, one's family members and close relatives (Part 1 of Article 63 of the Constitution of Ukraine) (Constitution of Ukraine, 1996).

In view of the above, we consider it necessary to add paragraph 11, part 1 of Article 303 of the Criminal Procedure Code of Ukraine with the following content: «decisions, actions or inaction of the investigator or prosecutor during the pre-trial investigation, which violate the essential rights of the participant in the proceedings, are subject to appeal to the investigating judge.»

The exercise of the right to appeal the decisions, actions or inaction of the specified subjects must meet the requirement of access to justice in the form of an appeal. In this regard, S. Slynko gives enough arguments that the provisions of the Criminal Procedure Code of Ukraine regarding the appeal not only of the decisions, actions or inaction of the investigator and prosecutor, but also of the investigating judge are fully democratic. The peculiarity of this procedure is that it is carried out only on appeal (Slynko, 2014).

In this case, we consider the addition of articles 307 and 309 of the Criminal Procedure Code of Ukraine to be fully justified with the following

content: «the decision of the investigating judge based on the results of the review of complaints against the decision, actions or inaction of the investigator or prosecutor, which violate the essential rights of the participant in the proceedings, may be appealed in the court of appeal».

At the same time, in order to minimize abuse by the participant of the right granted to him to challenge the decisions and actions of the investigator and the prosecutor, it is necessary to establish at the legislative level the obligation for him to bear responsibility for the incurred expenses to the state budget.

It is worth noting that in the practice of the ECtHR, consideration of complaints regarding violations of the rights of individuals during criminal proceedings prevails. In international law, a complaint is generally considered the most common means of legal protection (Korobko, 2016). In particular, the case «Amann v. Switzerland» states that the Convention for the Protection of Human Rights requires that anyone who considers himself aggrieved by a measure which, in his opinion, contravenes the Convention, has the right to a remedy before the appropriate national authority to resolve his grievance. dispute, and in the case of a positive decision – to receive damages (ECtHR decision in the case «Amannv. Switzerland», 2000).

Adoption of legal and substantiated judicial acts is ensured by valid economic procedural legislation, the procedure for organizing the activity of economic courts and a high level of professional training of judges. A special place in the implementation of this right is provided by the economic procedural legislation, the possibility of individuals and legal entities to appeal the decisions made by the courts of the first instance.

Appealing the decisions of the court of first instance ensures the renewal of the violated procedural rights and interests of the participants in the court process. This is one of the conditions for a fair, impartial and timely resolution of a legal dispute.

In accordance with Part 1 of Art. 254 of the Economic Procedural Code of Ukraine, participants in the case, persons who did not take part in the case, if the court decided the issue of their rights, interests and (or) obligations, have the right to file an appeal against the decision of the court of first instance (Economic procedure code of Ukraine, 1991). O. Solovyov notes that the appellate court reviews the case based on the evidence available in it and additionally submitted and checks the legality and reasonableness of the decision of the court of first instance within the limits of the arguments and requirements of the appeal (Soloviev, 2020).

On the basis of the above, it can be argued that the stage of review of economic cases by the appellate court is an important guarantee of compliance with the rights of the participants in the process to an objective,

comprehensive and legal trial. The presence of appellate proceedings indicates the development of economic procedural legislation, which was reflected in the current legislation.

Based on the results of the case review, the appellate court, after listening to the explanations of the participants in the court process, examining the case materials, makes a decision in the form of resolutions in accordance with the requirements established by Art. 34 and Chapter 9 of Chapter III of the Economic Procedural Code of Ukraine (Economic procedural code of Ukraine, 1991).

Summing up, we note that one of the positive features of the interdisciplinary institute of appeal, regardless of the field of judicial proceedings, is its psychological role. The vast majority of decisions of the court of first instance are not final and can be reviewed by experienced and qualified judges within the framework of appeal and cassation proceedings.

The presence of such a legally defined procedure has a calming effect both on the persons involved in the case and on society in general.The right to appeal the decision of the court of first instance by filing an appeal and submitting a submission to it by the prosecutor is an opportunity provided by law to disrupt the functional activity of the court of appeal for a new (re) consideration of a civil case and to check the decisions and resolutions passed on it for compliance with the requirements of legality and validity.

The right to file an appeal is granted to the parties and other persons who participated in the consideration of the case, and the right to file an appeal is granted to the prosecutor who participated in the consideration of the case (Article 290 of the Civil Procedure Code of Ukraine).

According to Art. 292 of the Civil Procedure Code of Ukraine, parties and other persons participating in the case, as well as persons who did not participate in the case, if the court decided the issue of their rights and obligations, have the right to appeal the decision of the first instance court fully or partially (Civil procedure code of Ukraine, 2004).

The issue of renewing the missed deadline for appealing a court decision is problematic in civil proceedings. Parts 3 of Art. 297 of the Civil Procedure Code of Ukraine establishes that an appeal remains inactive if it is filed after the deadline. But the person who submitted it can raise the issue of renewing this term. If the reasons specified by the person in the application are found to be invalid, the appellate court also issues a decision to leave the application without movement. On the basis of Part 3 of Art. 297 of the Civil Procedure Code of Ukraine, it is possible to resolve the issue of the validity of the reasons for missing the deadline for an appeal and the opening of appeal proceedings in the case only when the appeal is filed.

However, the person is given a «second chance», and within 30 days from the date of receipt of the decision, he has the right to apply to the Court of Appeals for an extension of the terms or to indicate other reasons for the extension of the term. If the application is not submitted by the person within the specified period or the reasons given by him for the renewal of the appeal period are deemed invalid, the reporting judge refuses to open the appeal proceedings. At the same time, regardless of the seriousness of the reason for missing the appeal period, the appeal court refuses to open appeal proceedings if the appeal of the prosecutor, state authority or local self-government body is filed after one year has passed since the announcement of the contested court decision (Civil Procedure Code Of Ukraine, 2004).

Cassation proceedings in civil proceedings should be understood as the procedural and procedural activity of the court of cassation, which is carried out in the order and manner prescribed by law, by checking the decisions of lower courts for violations of substantive and procedural law, identifying and eliminating such violations for the purpose of protection and renewal rights of the parties.

The subject of a cassation appeal is a court decision, which is appealed by the plaintiff in connection with the presence in its content, in the opinion of the plaintiff, of signs of incorrect application of the norms of substantive law by the court or violation of the norms of procedural law, which violates his rights and legitimate interests (or rights and legitimate interests the person on whose behalf the cassation appeal is filed), on the basis of which the cassation instance court conducts a cassation review of the relevant cassation appeal (Pomazanov, 2019).

Therefore, taking into account the above classifications of appeal methods in civil proceedings, we can conclude that an appeal is a common (ordinary) reformation method of appeal and review of court decisions that have not entered into legal force, which causes a devolution effect on the court case (transfer of powers to consider the case from a lower to a higher court) and a suspensive effect (stops the execution of contested court decisions) on the contested court decision.

Cassation in a civil process is an extraordinary extraordinary way of appeal and review of court decisions that have entered into legal force, which causes a devolving effect on the court case and, as a general rule, does not cause a suspensive effect on the court decision under appeal. Similar conclusions can be drawn regarding other types of judicial proceedings.

The proper implementation of the right to appeal decisions, actions or inaction in relations between public authorities and private individuals becomes important. It is through the appeal mechanism that private individuals who are or may be in legal relations with state authorities and

local self-government bodies, their officials, other subjects of authority, are able to achieve the cancellation or recognition of illegality of a certain decision, action or inaction.

In turn, the influence exerted by private individuals on the subjects of public authorities through the appeal mechanism has a wider significance. In particular, with its help, there is a «reverse» relationship between society and the state, certain decisions of subjects of public authorities are corrected, their law enforcement practice, which contributes to ensuring the rule of law and democracy in the country.

The right to appeal decisions, actions or inaction of subjects of public authority as an element of the appeal mechanism – is a human right and, at the same time, a subjective right of a participant in the relevant legal relationship. Characteristic features of the right to appeal within the framework of administrative proceedings are naturalness, inalienability and inalienability, the obligation of the state to guarantee such a right within the limits of international standards, etc. The subjective right, the right to appeal, consists of a number of powers. Such a right corresponds to legal obligations, compliance with which enables the exercise of the right and prevents abuse of the latter (Luchenko, 2017).

In our opinion, the state's obligations in the field of guaranteeing the right to appeal decisions, actions or inaction of subjects of public authority include: creation of the necessary legislation, as well as institutions necessary for the exercise of the right to appeal; ensuring timely consideration of complaints and administrative lawsuits; ensuring the implementation of decisions made as a result of the appeal; ensuring, in necessary cases, the prosecution of subjects of public authorities whose decisions, actions or inaction were successfully challenged; informing together with civil society institutions of citizens about the methods and procedure of exercising the right to appeal.

It should also be emphasized that the right to appeal is one of the channels of communication between private individuals and bearers of public authority, the state as a whole. As D. Luchenko rightly points out, thanks to the appeal, not only the rights and legitimate interests of private individuals are protected, but also the rule-making and law-enforcement practice of the subjects of public-authority powers are corrected for the future, the subjective and inconsistent with the content of the legal norms of the interpretation of the latter are eliminated, as well as issuance of individual legal acts that contradict the legislation, attempts at sub-legal rule-making aimed at leveling the meaning of the law or ignoring its provisions are stopped and prevented. As a result, the appeal serves as a factor to ensure the democratic nature of rulemaking, control and accountability of public authorities (Luchenko, 2017).

Analyzing the peculiarities of the implementation and provision of the right to appeal in the relations between subjects of public authority and private persons, we note that the functions of appealing decisions, actions or inaction of subjects of public authority should be connected with three basic European legal values, which determine the essence of European legal systems: human rights, rule of law and democracy. The appeal is a way to ensure the implementation of the mentioned values in real legal (normative, law enforcement, control, etc.) practice. Without an appeal, the rule of law cannot be ensured, and in the absence of the right to appeal, the democratic character of the state itself looks doubtful.

Taking into account the strengthening of Ukraine's position in the international arena, the development of mechanisms for ensuring the realization of the rights of a person involved in the administrative-delict sphere, during the proceedings of which everyone can evaluate the activity of an administrative body (official) and the court in terms of its legality and effectiveness, is of particular relevance. The evolution of the legal system in Ukraine and in foreign countries proves that the consideration and resolution of a jurisdictional case by one body (official) - one instance leaves room for mistakes, which leads to the inefficiency of the judiciary and, as a result, a decrease in trust in state authorities, faith in justice.

It is worth noting that the administrative-delict process in Ukraine remains a complex phenomenon due to its contradictory legal nature and the presence of different scientific views on the understanding of its institutions. However, it is indisputable that the institution of appeal in cases of administrative offenses is an important guarantee of ensuring compliance with the constitutional rights of a person, a manifestation of essential features of a democratic legal state, especially in areas related to the use of coercion.

In general, the institution of an appeal in an administrative-delict process must be considered as a completed process consisting of certain stages that develop over time: drawing up a complaint; its presentation; registration; preliminary examination; verification of the circumstances stated in the complaint; consideration on the merits, decision-making on the complaint; implementation of this decision.

The essence of the appeal can be seen in the dialectical unity of the stages of its implementation and functions. they are characterized by normative-legal consolidation, prevalence in the administrative-legal sphere, being determined by the legal status of the subject of the appeal, limited by the tasks of administrative-delict proceedings. The results of the study of scientific approaches to the classification of appeal functions gave grounds to assert that their varieties in the administrative-tort process are: social, regulatory, rights-restoring, rights-enforcing, control (control-supervisory), preventive (warning).

If we talk about the consequences of appealing a resolution, they depend on the stage of the appeal: the filing of a complaint leads to the suspension of the implementation of the resolution (except for cases specified by law); making a decision on a complaint results in leaving the resolution unchanged, canceling it, closing the case, drawing up a new resolution, sending the case for a new consideration, changing the administrative fine, compensation for property damage; announcing the decision on the complaint and sending its copies to the interested persons ensures the implementation of the complaint.

Conclusions

Based on the results of the study of the functioning of the appeal institute in Ukraine in the mechanism of protection and renewal of the rights and legitimate interests of individuals, we can formulate the following conclusions.

The right to appeal is an absolute subjective right of every person and represents an opportunity given by the state to a participant in the proceedings at his discretion to satisfy the interests provided for by objective law. This approach in Ukrainian legislation reflects world standards in the field of protection of the rights, freedoms and legitimate interests of individuals in a democratic society. Appeal is a multifaceted phenomenon with social and legal content and an independent interdisciplinary institution.

This is a set of legal norms that regulate social relations, which arise due to the subjective right of a person to appeal and are characterized by specific rights and obligations of the parties to such legal relations. The implementation of the right to appeal in criminal, administrative, civil and economic proceedings has material-legal and procedural-legal expression. Thanks to the appeal, the right to protection of the person is realized, the right to access to justice is ensured.

The analysis of the methods of appeal in criminal, civil, economic and administrative proceedings led to the conclusion that the appeal is a common ordinary method of appeal and review of court decisions that have not entered into legal force, which causes a devolving effect on the court case and a suspensive effect on the contested court decision. Cassation in procedural law is an extraordinary way of appeal and review of court decisions that have entered into legal force, which causes a devolving effect on the court case and usually does not cause a suspensive effect on the court decision under appeal.

Currently, the criminal procedural legislation of Ukraine does not contain a general provision on the prohibition of the abuse of procedural

rights of a party and does not define the mechanism of responsibility for the violation of obligations defined by the criminal procedural law, therefore granting a party the right to an absolute appeal against any decision or action of a pre-trial investigation body will lead to a violation of the rights of such participants in the process, such as the victim, witnesses, interpreters, representatives.

When resolving questions regarding the list and scope of the right of participants to appeal the decisions and actions of the pre-trial investigation body, one should proceed from the balance of the state's positive obligations to the person and accept without appeal the application for consideration of the pre-trial investigation body's violation of conventional and/or constitutional human rights and freedoms. In view of the above, it is proposed to make appropriate changes to Part 1 of Art. 303, Articles 307 and 309 of the Criminal Procedure Code of Ukraine.

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The impact of the war on food security in Ukraine in the current conditions of socio-economic development

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Abstract

The main objective of the article was to study the characteristics of the impact of the war on food security in Ukraine. Ensuring food security is one of the most important aspects of promoting global security, as food consumption is basic in satisfying human needs and underlies the formation of a high level of quality of life of the population. The research methodology involved the use of the documentary method and the application of the dialectical approach. According to the results of the study, it was found that the war has a significant impact on food security in Ukraine. However, the study was limited to analyzing only the food security component. Further research should be devoted to study legal security and the underlying relationship between food security, sovereignty and legal security. It is concluded that the situation with the blockade of Ukrainian food exports indicates that, in the modern globalized world, an aggressor country can use both energy carriers and seizure of nuclear facilities, as well as food, to blackmail the world community, bringing individual countries to the brink of starvation.

Keywords: food security; socioeconomic development; impact of war; national sovereignty; current geopolitical conditions.

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El impacto de la guerra en la seguridad alimentaria de Ucrania en las condiciones actuales de desarrollo socioeconómico

Resumen

El objetivo principal del artículo fue estudiar las características del impacto de la guerra en la seguridad alimentaria de Ucrania. Garantizar la seguridad alimentaria es uno de los aspectos más importantes para promover la seguridad mundial, ya que el consumo de alimentos es básico en la satisfacción de necesidades humanas y subyace en la formación de un alto nivel de calidad de vida de la población. La metodología de investigación implico el uso del método documental y la aplicación del enfoque dialectico. De acuerdo con los resultados del estudio, se encontró que la guerra tiene un impacto significativo en la seguridad alimentaria de Ucrania. No obstante, el estudio se limitó a analizar únicamente el componente de seguridad alimentaria. Debería dedicarse otras investigaciones a estudiar la seguridad jurídica y la relación subyacente entre seguridad alimentaria, soberanía y seguridad jurídica. Se concluye que la situación con el bloqueo de las exportaciones ucranianas de alimentos indica que, en el mundo globalizado moderno, un país agresor puede utilizar tanto los vectores energéticos y la incautación de instalaciones nucleares, como los alimentos, para chantajear a la comunidad mundial, llevando a países individuales al límite de la inanición.

Palabras clave: seguridad alimentaria; desarrollo socioeconómico; impacto de la guerra; soberanía nacional; condiciones geopolíticas actuales.

Introduction

Food is the most important life resource, since the quality of life of people can be objectively assessed by the provision of it to the population. It is the level and quality of nutrition of the population that characterize the degree of socio-economic development of any country and determine the health and life expectancy of a person, his physical existence. The availability of food is a basic indicator of human life, which in many respects is an influencing factor on the health of future generations. With global population growth, climate crises, the economic impact of COVID-19 and military conflicts, the demand for food is increasing.

Accordingly, the number of people on the verge of poverty is growing. Every year there are more of them, and the increase in food production is less. Therefore, the food security of millions of people in many parts of

the world is under constant threat. The unjustified military aggression of the Russian Federation against Ukraine has significantly aggravated the situation. It could cause a global food crisis. If the war is not stopped and appropriate measures are not taken, the consequences for the poorest sections of the population will be catastrophic.

Food is the most important fund of the vital functions of mankind. Its deficiency is usually perceived as a disaster, and its absence as a catastrophe. Scarcity and lack of food undermine food security and lead to various forms of food crisis: malnutrition, malnutrition or hunger. Food security is the degree to which a person is provided with environmentally friendly and healthy food products. Some definitions of food security state that food security must be sufficient to lead a healthy and active life.

The problem of ensuring food security today is quite acute for our country, despite the significant potential of the agricultural sector. Military operations, low purchasing power of the population, technological backwardness of agricultural enterprises, irrational use of land resources, the growth of imported food products and other factors require activation and scientific substantiation of ways to achieve a sufficient amount of food, ensuring food availability for all segments of the population; mechanisms for controlling the composition and quality of products, as well as the stability of their supply.

It is important to emphasize that in the current conditions, food security should be interpreted as a guarantee of independence, and its provision depends both on the pace of agricultural development and the stability of the national economy. The complexity and importance of the problem under study requires further focus on the consideration of strategic and mechanisms for the implementation of state policy in the field of food security.

The main purpose of the article is to study the features of the impact of war on food security in the context of ensuring its socio-economic development.

1. Materials and methods

The research methodology is based on dialectical, systemic and institutional approaches, according to which the food security of the state is considered as inextricably linked and causal. In the course of the study, general scientific and special scientific methods were used to ensure the food security of the state. The interpretation of the main categories and concepts is based on the use of methods of analysis and synthesis, induction and deduction, abstraction, analogy, theoretical generalization and modeling to

ensure the food security of the state. All this allows us to achieve the goal set in the article.

2. Literature review

Most scientists (Kovaleva, 2015; Pogorelova, 1993; Shpykuliak and Tyvonchuk, 2012) note that in a broad sense, food security is understood as the level of national food production, which makes it possible to implement the principle of self-sufficiency of citizens with high-quality food and the creation of state reserves in accordance with scientifically based standards. The solution to the food problem depends on many components, including the main state policy. Macroeconomic, trade, fiscal and government policies to support the agricultural sector affect not only the development of the food industry, but also the development of the food distribution system as a whole, which affects both the supply of food and the level of their consumption.

A group of scientists (Mazneva, 2015; Sylkin *et al.*, 2020) notes that the micro-level of food security is the ability to satisfy a person's nutritional needs for productive activities. But, proceeding primarily from the social function of the individual, in our opinion, it is advisable to consider this level of food security in relation to a particular community (family), that is, at the household level.

It should be noted that the state of food crisis in the scientific literature (Lopushnyak, 2021) is a state in which violations of the physical condition of a person occur. The state of a food threat is the existence of negative factors that have a destabilizing effect on the functioning of the food sector, violating its stability and meeting the needs of the population in rational nutrition.

The state of food risk of the population is the probability of an unfavorable situation in the food sector, which provokes an imbalance in the diet. It should also be noted that when a threat is ignored, it inevitably develops into a risk, and then into a crisis. To successfully address food security, timely recognition of the factors that cause food threat and food risk is necessary.

Scientific literature (Kryshtanovych *et al.*, 2022; Kovalchuk, 2020; Tislenko, 2012) demonstrates that the state of food security of the state is characterized by two criteria: the first is the availability of food in the country's food market in sufficient quantities to maintain an active and healthy life of the entire population; the second - the criterion is the economic availability of food for all segments of the population. Moreover, according to some authors, the basis of food security is the availability of

the market, in contrast to outdated considerations regarding the stability of production and stocks.

3. Research Results and Discussions

The war of the Russian Federation against Ukraine, which began in a hybrid form in 2014 and continued in the form of an active war in 2022, has significantly affected the food security of Ukraine, the countries of Eastern Europe and the world as a whole. The aggression of the Russian Federation has increased the socio-economic tension on the European continent caused by the COVID-19 pandemic and the global economic crisis. Against the backdrop of these events in the world, the food crisis is aggravated. In addition, the course of the war outlined a number of negative phenomena for the state, in particular: strikes by the Russian Federation on critical infrastructure facilities, «energy blackmail», the destruction of the industrial and agricultural potential of the state, the destruction of agricultural land, the theft of agricultural equipment and the infliction of significant environmental damage.

Such actions of the enemy have a negative impact on the food security of the state. Since Ukraine is a significant supplier of agricultural products on the world market, this situation threatens other countries as well. Therefore, an important direction of modern scientific research is the study of the state and forecasting of trends in Ukraine's food security against the background of the war.

Food security is extremely important for a country, especially if that country is at war. The food security status of a country can be assessed using the food security index. The algorithm for calculating this index involves the calculation of its four components and the total value of the index. The first component is economic affordability – it contains the following indicators: change in average food costs, proportion of the population below the global poverty line, inequality adjusted by the actual human development index (human development index adjusted for social inequality), agricultural trade, food safety programs.

The second component is physical accessibility - it involves the definition of such indicators: access to agricultural resources, research and development in the field of agriculture, agricultural infrastructure, price volatility for agricultural products, a sufficient level of supply of agricultural products, political and social barriers to access to agricultural products, government obligations on food security and market access policy. The third component is considered quality and safety - it occupies the following indicators: diet diversity, nutritional standards, micronutrient availability, protein quality, food safety.

The main threats to food security are shown in Figure 1.

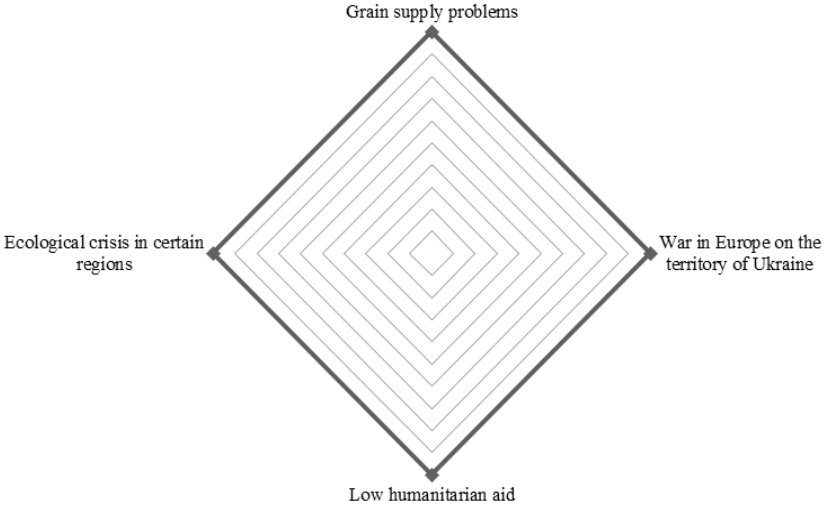

Figure 1. The main threats to food security. Source: prepared by the authors.

In the modern world, the food security of a large number of the population is one of the main program goals of each state and the subject of discussion of the world community. In the context of the global permanent financial and economic crisis and political and military instability, when the level of economic development of many countries has reached a critical state, the problem of food security of the population has become aggravated and needs to be addressed immediately. This is due to the fact that the availability of food resources is the main condition for the existence and reproduction of the modern world, their qualitative and quantitative characteristics determine the state of health and satisfaction of a civil information-oriented society.

Today, in the context of the war in Ukraine, one of the main global problems in the world economy is food. Consequently, the problem of food security is one of the most significant in the modern socio-economic development of the state. It affects the interests of different groups of countries, socio-political forces, becoming increasingly important as the international political and economic crisis deepens, the development of world trade in agricultural products and food, and the acceleration of globalization processes. At the same time, at the current stage of development, it is impossible to create a strong food security of the country

without the integrated use of information and communication technologies at all stages of creation and sale of an agricultural product.

The main model for ensuring food security in the context of socio-economic development is shown in Figure 2.

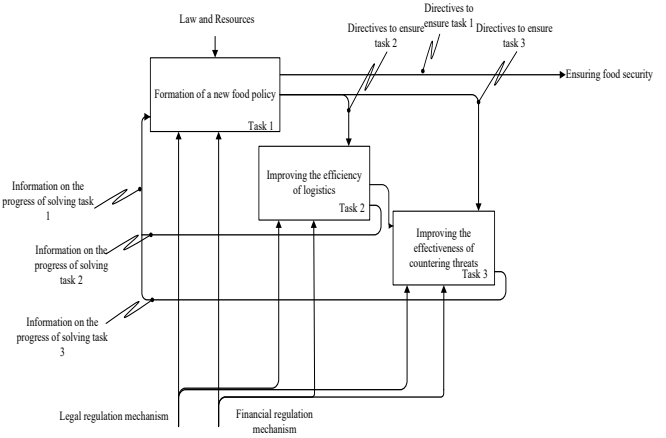

Figure 2. The main model for ensuring food security in the context of socio-economic development. Source: prepared by the authors.

There are different points of view regarding the factors that are a potential threat to conductive safety. Thus, in particular, the point of view is expressed that the most dangerous threats to the economic security of Ukraine include: lack of own model of reforms and their ideological support; deformed structure of production; lack of scientifically substantiated restructuring of the economy; inefficiency of the tax system; massive tax evasion; inefficient management of the public sector of the economy; high level of material and energy intensity of production; corruption in the administrative sphere; imperfection of national legislation related to the regulation of economic processes; the dominance of extractive and basic industries with a low degree of processing of raw materials; unsatisfactory orientation towards the production of end-use products; outdated technologies in most industries.

In general, global food security in the context of climate change contributes to the emergence of new threats and at the same time affects the growth of individual vulnerability of people, society and states as a whole. The accelerated degradation of natural resources, combined with extremely high and low temperatures, floods and droughts caused by global

climate change, will lead to the depletion of the planet's natural resources and the inability to ensure full food security. Thus, the problem of global food security in the context of climate change is becoming increasingly important for a variety of reasons.

Ensuring world food security should become the top priority of state policy, including a wide range of national, economic, social, demographic and environmental factors. But, as studies show, one of the main factors is the environmental factor, namely climate change, leading to loss of crops throughout the planet, due to abnormally high and low temperatures, kept in regions where it is not characteristic of them, a common phenomenon of droughts and floods. causing devastating damage to agriculture and animal husbandry. It is the factor of climate change that really threatens food security in the global dimension and requires an immediate solution.

Due to an increase in the world population, climate crises, the economic consequences of COVID-19 and military conflicts, the demand for food is growing. The food security of millions of people in many parts of the world is under threat. The Russian-Ukrainian war aggravates the situation. It could cause a global food crisis. If the war is not stopped and appropriate measures are not taken, the consequences for the poorest sections of the population will be catastrophic.

The study determined that global food security is under threat caused by the Russian-Ukrainian war. Due to the fact that its parties are the largest exporters of grain in the world, there is a risk of deepening the global food crisis. In order to avoid the catastrophic consequences of this crisis for Ukraine and the world, countries need to take a number of measures: ensure the transparency of the agricultural market and global financing of food imports; refrain from imposing export restrictions; find alternative suppliers for states that depend on Ukrainian and Russian agricultural products; take measures to prevent the spread of African plague and other diseases of farm animals. In order to stabilize the situation inside the country, Ukraine should focus on adapting the logistics system to restore export supplies of agricultural products, support Ukrainian agricultural producers and continue cooperation with countries that support its territorial integrity and independence, provide financial and humanitarian assistance.

Conclusions

The conducted research gives grounds to assert that the modern world is becoming extremely vulnerable to the consequences of any crisis situations, since, regardless of their scale, they have an extraordinary impact on both national and global food security, and overcoming their consequences is

possible only through the joint efforts of the world. communities. This applies both to the fight against large-scale pandemics and countering the armed aggression of the Russian Federation with the help of sanctions and comprehensive support for Ukraine in protecting its sovereignty and territorial integrity.

To ensure national food security, the Government of Ukraine has prepared an action plan to ensure food security under martial law and created the National Food Security Platform. To reduce the negative impact of the war on global food security, the joint efforts of the world community have prepared and concluded the Initiative for the safe transportation of grain and food from Ukrainian ports in the context of the ongoing armed aggression of the Russian Federation against Ukraine.

However, the situation with the blocking of Ukrainian food exports indicates that in the modern globalized world, an aggressor country can use both energy carriers and the seizure of nuclear facilities, as well as food to blackmail the world community, pushing individual countries to the limit of starvation. Therefore, in the near future, the world community needs to resolve the issue of preventing crises in the early stages of their inception in order to prevent blackmail in the future, because it is indisputable that it is cheaper to prevent any crisis than to eliminate its consequences later.

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Competencies in education through the development of the individual's legal awareness in the conditions of a modern society

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Abstract

The main objective of the article is the study of competence formation in higher education through the development of the individual's legal awareness. The process of the research involved the use of methods of analysis of the main aspects of competence formation in an institution of higher education. Legal consciousness is one of the most important forms of a person's consciousness, along with political consciousness, morality, art, religion, science and philosophy. For sustainable existence and development, it is not enough to expect everyone to behave correctly. There must be trust, which is created by the legal system, consisting of binding laws, rules and principles in force, which regulate the rights and obligations of citizens. As a result, the key aspects of competence formation in higher education through the development of legal awareness were characterized. The authors conclude that the ability to comply with the requirements of law and morality, should be considered as

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a product of the conscious attitude of adolescents towards the recognition of their civic duty and compliance with legal norms.

Keywords: competencies in education; legal consciousness; modern society; legal order; studies of legal subjectivities.

Competencias en educación a través del desarrollo de la conciencia jurídica del individuo en las condiciones de una sociedad moderna

Resumen

El objetivo principal del artículo es el estudio de la formación de competencias en la educación superior a través del desarrollo de la conciencia jurídica del individuo. El proceso de la investigación implicó el uso de métodos de análisis de los principales aspectos de la formación de competencias en una institución de educación superior. La conciencia jurídica es una de las formas más importantes de conciencia de una persona, junto con la conciencia política, la moral, el arte, la religión, la ciencia y la filosofía. Para una existencia y un desarrollo sostenibles, no basta esperar que todas las personas se comporten correctamente. Debe existir la confianza, que es creada por el ordenamiento jurídico, constituido por leyes vinculantes, normas y principios vigentes, que regulan los derechos y obligaciones de los ciudadanos. Como resultado, se caracterizaron los aspectos clave de la formación de competencias en la educación superior a través del desarrollo de la conciencia jurídica. Los autores concluyen que la capacidad de cumplir con los requisitos de la ley y la moral, deben ser considerados como un producto de la actitud consciente de los adolescentes hacia el reconocimiento de su deber cívico y el cumplimiento de las normas legales.

Palabras clave: competencias en educación; conciencia jurídica; sociedad moderna; ordenamiento legal; estudios de las subjetividades jurídicas.

Introduction

One of the structural elements of law is legal consciousness, which can be defined as a system of knowledge, assessments and ideas that express people's attitudes towards positive and ideal law. Since legal consciousness is a component of the ability of moral judgment, its germs are inherent in

man from birth. This should be understood in such a way that a person is able to intuitively distinguish between good and evil, legal and illegal, just and unjust. However, intuition alone is not enough. A developed legal consciousness has a complex structure and is formed, in part, with the help of the volitional efforts of the individual, but to a large extent due to external influence in the process of socialization.

In our opinion, it is in adolescence, which is a period of spiritual and moral formation, that the foundation of life values, self-projection of the personality is laid. We believe that the educational work of the public association is the platform for working with adolescent children. At present, the problem of educating adolescents is becoming increasingly important and relevant, since the development of youth and the country as a whole depends on its solution.

The content of legal consciousness is determined by the conditions for the formation of the idea of social reality as legal, the perception of the phenomenon of law in society as such. This process is significantly influenced by legal ideas, covering the awareness of law, the sense of law, the legal ideal and legal reality. A system of legal concepts produced by a particular society has a significant impact on the content of legal consciousness.

Legal consciousness is a set of views, ideas, ideas, as well as feelings, emotions and experiences that express people's attitude to the current or desired law and other legal phenomena. We are talking about how people understand and perceive the law, how they understand it and how they want to see it ideally.

The problem of the formation of the legal consciousness of young people is that involvement in the criminal world, its illegal norms in modern conditions occurs at a very early age, which leads to a very stable pattern: the earlier a person embarks on a criminal path, the faster he reaches the level of a dangerous recidivist.

Legal education is a purposeful, everyday and systematic influence of the state and its bodies, public associations and organizations on the minds of people in order to educate them in an appropriate level of legal consciousness, legal culture and exemplary lawful behavior.

The main purpose of the article is the formation of competence in higher education through the development of the legal consciousness of the individual in the conditions of a modern civilized society.

1. Materials and methods

The research methodology is based on dialectical, systemic and institutional approaches, according to which the formation of competence in

a higher education institution through the development of legal awareness of a person in the conditions of a modern civilized society is considered as inextricably linked and cause-and-effect. In the course of the study, general scientific and special scientific methods of competence formation were used in the institution of higher education through the development of legal awareness of a person in the conditions of a modern civilized society.

The interpretation of the main categories and concepts is based on the use of methods of analysis and synthesis, induction and deduction, abstraction, analogy, theoretical generalization and modeling for the formation of competence in a higher education institution through the development of legal awareness of a person in the conditions of a modern civilized society. All this allows you to achieve the goal set in the article.

2. Literature review

As most authors point out, legal consciousness is a system of ideas, ideas, emotions and feelings that express the attitude of an individual, a group, society to the current, past and desired law, as well as towards law-related activities. The key point of legal consciousness is people's awareness of the values of natural law, human rights and freedoms and evaluation of the existing law in terms of its conformity with universal human values, which are enshrined in international documents on human rights. Legal consciousness is an important element of law enforcement, little studied in modern science, and therefore requires further study to overcome its ideological nature and to further explain its impact on the essence of the principles of Ukrainian law and modern jurisprudence. (Kryshtanovych *et al*., 2022; Leheza, 2022).

According to most scientists, the legal culture of a society is a qualitative criterion for its development. The formation of a democratic legal culture determines the successful solution of important processes of the state. Finding out the essence of legal culture, it is important to analyze its main characteristics, represented by numerous definitions of this concept. The phenomenality of political culture, its role and functions in political life are clearly manifested in the study of this issue.

It is necessary to reveal the structure and characterize the structural components of political culture, in particular, such as political knowledge, assessment of political phenomena, political behavior and political actions, etc. It is also important to analyze the criteria and types of political culture proposed by scientists, the conditions for their formation and signs (Nikonova, 2020; Querci, 2021).

In literature (Matviichuk, 2022; Pohosian, 2021), law is a fundamental category, because it is it that acts as a means of streamlining the social environment, the basis of the rule of law. Law is of great importance for societies at all stages of its development. The paradox is that both in the past and in the present, humanity is in a special state, it balances between good and evil, between justice and injustice, between truth and falsehood.

Under these conditions, law is an important tool that ensures the ability to maintain a balance of these characteristics. The problem of studying law is one of the eternal ones, since law is a very complex and multifaceted phenomenon and, unfortunately, legal scholars have not been able to unambiguously investigate its essence. There are still white spots that need to be explored. One of them is the establishment of the role of law in ensuring human life.

3. Research Results and Discussions

Student youth as a separate social, age and socio-professional group is an independent subject of group (collective) legal consciousness. In the structure of legal consciousness, the legal consciousness of the student youth of Ukraine, in our opinion, occupies a special place, since the young educated generation is the basis and future of our state. It is up to him to solve the main tasks of public development in the coming decades. After all, it is people with higher education who will objectively occupy command positions in all branches of economic activity, the humanitarian, cultural sphere, etc. in the future. The deformation of the legal consciousness of the students is one of its estates.

At the same time, it is important to pay attention to the fact that the deformed legal consciousness of students is opposite to the positive legal consciousness. Under the concept of "deformation of legal consciousness", scientists understand "a social and legal phenomenon characterized by a change in its state, in which the carriers form certain ideas, ideas, views, knowledge, sensations, moods, experiences and emotions that distort the legal reality and express a negative attitude to existing law, law and order» (Van rooij, 2021; Shobonova, 2020; Reems, 2021).

The effectiveness of transformations in the socio-economic and socio-political spheres of society's life depends largely on how consciously and, accordingly, how actively all social strata will participate in this process, including students as the most dynamic and energetic part of society.

The dynamics of the development of legal culture and legal awareness and the development of young people's legal thinking, adequate to social changes, are associated with the solution of many problems, one of which, in

our opinion, is the acquisition by young people of relevant knowledge about the social and spiritual values of law as phenomena of world civilization, as well as their awareness of the inseparable connection of civil rights and duties.

Most people do not yet possess the necessary minimum of legal knowledge. In addition, seeing non-legal ways in which government agencies and individuals apply laws makes people feel cheated and powerless to change anything. Alienation from imperfect law is compensated by the desire to circumvent the law. As a result, legal nihilism is becoming widespread, covering both the activities of the central administrative apparatus, and the initiative of local authorities, and everyday relations of people. Other manifestations of defective legal consciousness are legal infantilism, legal idealism and the "rebirth" of legal consciousness, etc. Legal idealism is an exaggeration of the real regulatory possibilities of a legal norm.

The main reasons for legal idealism are a lack of understanding of the laws of social development, ignorance of how social factors (including laws) interact in society. The most severe form of deformation of legal consciousness is the phenomenon of its rebirth. From legal nihilism, the reborn legal consciousness differs not only in the degree of social danger, but also in motivation. It is based on the conscious denial of the law on the grounds of benefit, greed.

The tripartite scheme for ensuring the development of the legal consciousness of the individual, presented in Fig.01.

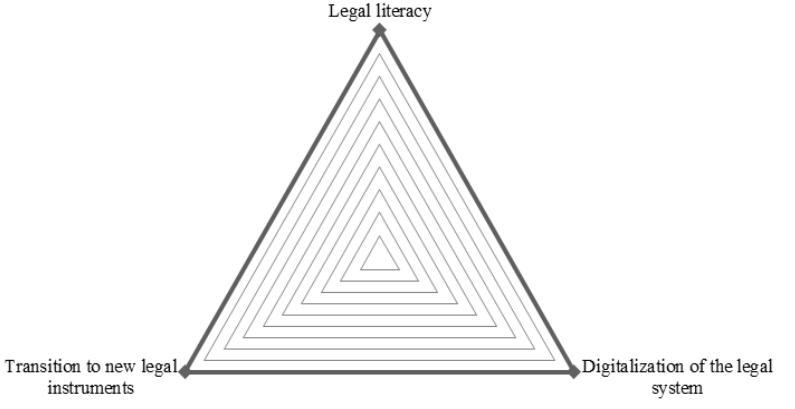

Figure No. 01. The tripartite scheme for ensuring the development of the legal consciousness of the individual. Source: prepared by the authors.

So, the objective need for the formation of legal consciousness and legal culture of students is explained by the following:

1. The process of formation and development of legal consciousness and legal culture of students is influenced by the current state of Ukrainian society - social tension, economic problems, disintegration, moral and psychological instability of society as a whole, etc.
2. Let us note that in our time, contradictions arise more and more sharply between: the amount of legal knowledge necessary for future specialists to work effectively in various areas of the growing socio-economic life and the real legal training of higher education graduates called to carry out this activity; new legislation and low level of legal awareness; the need of society for the legal preparation of each person for life in the new conditions and the lack of purposeful work in the higher education system in order to form the legal culture of students; an objectively existing need for the formation of a legal culture among students and insufficient awareness of this need at all levels of the education system (ministry, universities, teachers, parents).
3. Elements of a legal counterculture are rapidly developing among young people - legal nihilism and crime. Ignoring these phenomena, the delay on the part of the state and society with the development and adoption of measures aimed at correcting this situation, create quite big problems for the development of the state and civil society.

The tripartite scheme of the main threats to the development of the legal consciousness of the individual, presented in Fig. 02.

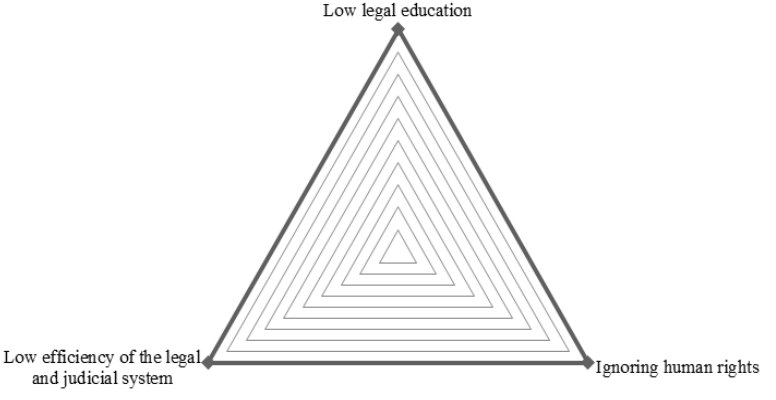

Figure No. 02. The tripartite scheme of the main threats to the development of the legal consciousness of the individual. Source: prepared by the authors.

Legal awareness is an integral phenomenon that illustrates the results of the processes of mass legal socialization of citizens, the state of law and order in society, regulatory requirements of a formal legal and non-legal nature, the need to change individual elements or the entire system of established law, acting as the most important criterion in lawmaking and law enforcement. The structure of a person's legal consciousness includes ideological (value), behavioral (rational) and psychological (emotional) components, each of which can be artificially changed if there are effective mechanisms of formative influence.

This creates an objective opportunity to change and improve the legal culture of Ukrainian citizens by directing influence on all components of legal consciousness in order to stimulate the self-conditioning of lawful behavior. The legal culture and the content of the legal consciousness of the individual mainly depend on the knowledge of law, except for which they cannot be endowed with specific legal certainty. However, knowledge of the law is not a decisive factor in the lawful behavior of people, a comprehensive criterion for a high level of development of legal awareness and legal education. Therefore, the mechanisms for stimulating lawful behavior should include not only negative sanctions, legal education, but also an ideology that influences the formation of the legal attitudes of the individual.

Legal socialization is considered as a process and result of assimilation and active reproduction of social and cultural experience by a person, mastering the necessary skills of lawful behavior, and one of the main means is the legal education of the population. Filling with the content of the above-mentioned three stages of legal socialization takes place in Ukraine through the implementation of continuous legal education for the population, the mechanism of which is made up of domestic educational institutions (preschool, general secondary, higher and out-of-school education). An analysis of numerous legal indicators and socio-psychological aspects makes it possible to substantiate the definition of the legal behavior of a person realized in our society as socially significant from the point of view of the goals of social development, the conscious behavior of individual or collective subjects, which is provided for by the rule of law and entails legal consequences.

Conclusions

Summing up, it should be noted that in the context of the development of legal awareness, the education of adolescents and the formation of their legal consciousness in the process of the work of a public association, it provides for: the study of laws by young people, increasing their legal

awareness, systematic informing about topical issues of law, because legal knowledge is the basis on which legal consciousness. Public associations help teenagers correlate their actions and the behavior of their comrades not only with well-known moral norms, but also with the requirements of laws, correct, change it in the right direction.

A significant part of adolescents, although they do not know specific legal norms, do not commit offenses. In our opinion, one of the main elements of the system of legal education is a public association. Its purpose is to address issues involving the acquisition by adolescents of the skills and abilities of lawful behavior. The habit and ability to comply with the requirements of law and morality should be considered as a product of the conscious attitude of adolescents to the recognition of their civic duty, compliance with legal norms.

Both rightful and wrongful behavior depend on certain motives. Some adolescents follow the law out of deep conviction; the second - because they are under the constant control of adults or fear possible punishment; still others try to achieve their selfish goals by decent behavior. Often this behavior is due to the habit of observing the rules of cohabitation. Any attempts to isolate adolescents from the negative, to keep silent and hide from them life's problems do not instill in them an irreconcilable attitude towards these phenomena, do not mobilize them to fight against them, do not produce immunity against their influence.

We believe that legal views should be based on general legal knowledge and ideas about the state and law, legal relations between people, constitutional rights and duties of citizens. It is important that this knowledge and ideas correctly reflect certain legal norms, otherwise legal views will be false. One of the most important components of legal consciousness is conviction - a person's awareness of the truth of worldview and moral concepts and his personal readiness to act in accordance with these rules and concepts. In the process of legal education, it is important to educate adolescents in higher legal feelings that would regulate their behavior (responsibility, justice, etc.), otherwise simple emotions (anger, fear, etc.) that entail situational behavior will become its main regulator.

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Requirements for Contract's Form According to Ukrainian and EU Laws

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Abstract

The purpose of the article was to determine the peculiarities of the legal norms concerning the form of the contract in the law of the European Union EU. For this purpose, the following methods were used: special-legal, analysis and synthesis, inductive, systemic, generalization, forecasting and comparative. The authors insist on the need to rethink conventional law through the prism of European contract law. Attention was paid to the desirability of refusing to regulate issues related to the form of the contract, without dividing into certain requirements for the form of contracts. It is emphasized that "soft law" acts themselves require in some cases a certain formality (for example, a written form on a durable medium) for a specific legal act, and national laws often require a written form or other formalities. Especially with regard to specific objects, in particular land and other real estate. Unilateral gift obligations and consumer contracts are cited as examples of restrictions to the requirements for the free choice of the form of the contract. It concludes by arguing for the importance of rethinking national approaches to understanding contract form and its legal simplification.

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Keywords: conventional law; recodification; form of contract; adequacy of legislation; private law.

Requisitos para la forma del contrato de acuerdo con las leyes de Ucrania y la Unión Europea

Resumen

El objeto del artículo fue determinar las peculiaridades de las normas jurídicas relativas a la forma del contrato en el derecho de la Unión Europea UE. Para este fin se emplearon los métodos: especial-jurídico, análisis y síntesis, inductivo, sistémico, generalización, previsión y comparado. Los autores insisten en la necesidad de repensar el derecho convencional a través del prisma del derecho contractual europeo. Se presto atención a la conveniencia de negarse a la regulación de cuestiones relacionadas con la forma del contrato, sin dividir en ciertos requisitos para la forma de los contratos. Se enfatiza que los propios actos de "derecho indicativo" requieren en algunos casos una cierta formalidad (por ejemplo, una forma escrita en un soporte duradero) para un acto jurídico específico, y las leyes nacionales a menudo requieren una forma escrita u otras formalidades. Especialmente en lo que respecta a objetos específicos, en particular, terrenos y otros bienes inmuebles. Se citan las obligaciones de donación unilateral y los contratos celebrados con los consumidores como ejemplos de restricciones a los requisitos para la libre elección de la forma del contrato. Se concluye argumentando la importancia de repensar los enfoques nacionales para comprender la forma del contrato y su simplificación jurídica.

Palabras clave: derecho convencional; recodificación; forma de contrato; adecuación de la legislación; derecho privado.

Introduction

Despite the long history of development and legal traditions of domestic private law, one should admit the dynamism of historical experience of legal regulation. Modern tendencies of Europeanization of Ukrainian private law, in particular conventional law, require constant rethinking and clarification. Such a need was actualized with the granting to Ukraine of the status of a candidate country for joining the EU and the deepening of cooperation within the framework of economic relations, the strengthening of requirements for the national legal system in the context of the rapprochement of the legal systems of Ukraine and the EU.

We must admit the fact of revolutionary amendments in the Ukrainian private legal system after the adoption of the Civil Code of Ukraine in 2003. The new idea of civil legislation required changes in the way of thinking, understanding the role of law and justice in society. However, such changes were based on close cooperation with the countries of the post-Soviet space and therefore did not fully take into account the tradition and democratization of conventional law, which already prevailed in European countries at that time.

The content of the Civil Code of Ukraine of 2003 mostly did not include the norms of conventional law recognized in the EU even taking into account that the Partnership and Cooperation Agreement with the EU was concluded back in 1994 and despite the fact that the developers considered the traditions of German and French civil legislation.

As a result, there is the fact of the Civil Code of Ukraine, which, on the one hand, determined the basic principles of private law regulation, but could not deviate from the legal tradition that placed relations between subjects of contractual relations on a certain regulated level (especially with regard to such subjects as legal entities under private and public law).

Considering the above, the national conventional law within the modern European integration vector should be reformed. The issues of the contract's form are of particular importance, since modern private law gives the form an important meaning for establishing the actual fact of the obligation itself, as well as its validity.

Part of the legal community still supports the importance and value of a written contract's form, especially in relation to b2b contracts. However, it is necessary to state that the coordination of national policy and EU standards on the form of the contract is the basis for the harmonization of conventional law. The current legislation of the EU Member States, the EU in the whole, and Ukraine, contains a sufficient number of differences regarding the regulatory requirements for the contract's form (Harmonization of contract law, 2015: Article 142).

It is worth noting that the Concept of Recodification of Civil Legislation of Ukraine began to be implemented at the level of legislation only in 2020. The authors of the Concept of Updating the Civil Code of Ukraine claim that the need for recodification stems from the logic of further systematic transformation of society, including the formation of a real and effective market economy as an integral component of civil society and the European integration orientation of all components of society (The concept of Updating the Civil Code of Ukraine, 2020: Article 5).

The study of the requirements for the contract's form becomes relevant also by the reason of spreading the practice of concluding electronic transactions and the need to simplify the procedure for concluding the

contract itself due to the lack of time, the impracticality of using the written form of contracts for counterparties who have many years of effective business practice (especially in case when we are talking about international counterparties under the contract), including the currently available admonition from the national legislation regarding the form of purchase and sale agreements in accordance with the content of the United Nations Convention on Contracts for the International Sale of Goods.

The purpose of the article is to determine the peculiarities of legal norms regarding the contract's form in the law of the EU and certain EU countries, the problems of legalization of strict requirements within the civil legislation of Ukraine in regard to the contract's form and the consequences of its non-compliance through the prism of bringing the legislation of Ukraine into the compliance with the EU legislation. To reveal the purpose is possible by solving the following objectives: to provide general characteristics of the contract's form under the law of the EU and EU Member States, to analyze the current situation of Ukrainian civil legislation regulating the issue of the contract's form, to determine the development directions for the national legislation in this area.

1. Methodology of the study

The article is based on the study of international legal acts, acts of the European Union and Ukraine in terms of setting requirements in regard to the contract's form. The solution of the set objectives was made possible due to the processing of materials published in the legal literature by national researchers and comments on the "soft law" acts of the EU. The principles of the research were regulatory legal acts of Ukraine, of certain European countries, the "soft law" of the EU and international legal acts in the sphere of regulating contractual relations.

Solution of the set objectives is possible by using the system of general scientific and special methods of scientific cognition by the authors of the article. Thus, the use of the dialectical method made it possible to reveal understanding of the contract's form and approaches to its norming. The methods of analysis and synthesis contributed to reveal the current situation of civil regulation of the contract's form under the legislation of Ukraine and the EU, to identify the archaic nature of the national legal system and the need for its modernization.

The axiological method assisted to reveal the meaning of the contract's form for its validity. The formal and logical method made it possible to identify the system of building directions for improving the civil legislation of Ukraine in the researched area.

2. Analysis of recent research

The contract's form has repeatedly become the subject matter of domestic and foreign research. The article by Maryna Velikanova "Theoretical issues of concluding civil law contracts" should be the focus of attention among the modern scientific works on the specified issue, which defines the general procedure for concluding civil contracts, methods of their conclusion, as well as considers the forms of civil contracts (Velikanova, 2011).

The scientific achievements of the scientist were used by the authors of this research to establish specific features of written documents that confirm the written form of the contract or are accompanying documents for the execution of the contract. Serhii Tenkov in his scientific article defined the specifics of the written form of the contract, the moment when the contract becomes effective, and outlined the types of documents that can confirm the fact of the written form of the contract (Tenkov, 2004).

The authors of this publication also used the definition of the written form of the contract, which was offered by Anna Chuchkovska within her dissertation research "Legal regulation of business contracts made through telecommunication networks" (Chuchkovska, 2004, 35). One of the authors of this article (Cherniak Olena) also repeatedly pointed out in other publications the need to rethink the national system of legal regulation of the contract's form according to the European legal tradition (Dyminska, 2016; Cherniak and Abrosimov, 2020). The authors of the article also agree with the conclusions made in the publication by Iryna Davydova regarding the importance of regulating electronic contracts, the role of written and electronic forms of contracts (Davydova, 2020).

Analysis of scientific research, as well as direct legal regulation regarding the form of contracts, emphasizes the constant interest of scholars in this problematic. This provision is due to the fact that unequal requirements for the contract's form within the Ukrainian legal system and in the EU may suspend or complicate commercial and other relations under various contracts, when its participants are residents of different countries. The current domestic international private law follows the path of mandatory written form for certain types of contracts, since it follows the United Nations Convention on Contracts for the International Sale of Goods.

3. Results and discussion

3.1. Requirements for the contract's form within the law of the EU and certain European countries

Conventional law is a dynamic legal institution. Therefore, taking into account the expansion of the scope of EU law to an increasing number of

national legal systems, partial regulation in this area, which provides for the possibility of establishing additional contractual mechanisms within certain countries, is insufficient in our opinion. However, it should be noted that these warnings were not an obstacle to systematic work within the EU on the creation of informal unifications or acts of harmonization in the field of conventional law.

It is also possible to state the fact that the work in this direction has been suspended for the last few years. It can be explained by the EU's reluctance to legalize acts offered by various working groups. For example, we can name the Principles of European Contract Law (PECL) (1995-2002), Acquis Principles (2005), Draft Common Framework of Reference (DCFR) (2009), etc.

Thus, the idea of a single EU Civil Code has been relegated to the background, taking into account the withdrawal of Great Britain from the EU, the general "crisis" of the EU as a political and legal entity, the definition of additional powers of the EU in regard to the possibility of establishing unified rules within private and legal sphere in general and in the sphere of conventional law, in particular. However, those norms of soft law, which have already been developed for several decades, demonstrate an example of maximum consideration of the legal systems of the EU Member States, international acts, the development of contractual relations between residents of different countries, including within electronic communications.

The issue of the contract's form within the framework of EU law is mostly considered through the interpretation of the content of the principle of freedom of contract. There are several aspects of freedom as a fundamental principle in private law. As a rule, freedom of contract includes the freedom to choose the counterparty, the content and form of the contract (Dyminska, 2016).

These are the main ideas defined in DCFR and PECL. Freedom of contract has the same meaning in the UNIDROIT Principles. Besides, the parties can agree on the possibility of changing the terms of the contract in any form that will differ from the form of the contract itself, or its termination at any time.

> European legislation and "soft law" act currently make exceptions only for a limited range of contracts (the written form is mandatory for the safety conditions of using products for consumers, for gift contracts, etc.), which is due to the need to protect the interests of the participants of such contracts (Cherniak and Abrosimov, 2020: 50).

The complexity of the formation of European conventional law is caused, first of all, by the types of legal systems. Despite the fact that the continental and general systems have common features regarding the

conclusion of contracts through the traditional division into two expressions of will (offer and acceptance), there are also differences that, at first glance, seem impossible to correlate, which, among other things, concern the very understanding of the contract and its form. As a result, a set of rules balanced between different legal systems has been achieved within PECL and DCFR, based on the United Nations Convention on Contracts for the International Sale of Goods and the UNIDROIT Principles.

It does not mean that the contract's formation rules set out in the PECL and DCFR or their entire text have been created on the basis of combination or dominance by selecting the most appropriate norms or rules that are common to different legal systems.

On the contrary, the specified acts testify to their specific system, they are built on the basis of ensuring commercial relations between the EU Member States under the influence of developed trade practices and on the basis of providing own autonomous interpretation of the rules of international trade in accordance with the principles of uniformity and good faith. The principle of freedom of the form in this context provides that the offer and acceptance do not necessarily have to be in writing.

Besides, the Art. 2:101 of the PECL reduces the formal requirements for concluding a contract so that a contract is considered concluded, if the parties intend to be legally bound and reach a sufficient agreement without any additional requirements. It means that a contract can be concluded without the presence of formal and typical requirements of the common law system (negotiation and custom). Such freedom is also in line with the general principle embodied in the UNIDROIT Principles.

As a general rule, contracts regulated by the PECL and DCFR are not subject to any form or evidentiary requirements to determine their validity, effectiveness, or contractual intent. The contract can be concluded orally or in writing, including by e-mail correspondence.

The Article 2:101 of the PECL makes it clear in this regard that a contract should not be concluded or certified in writing, nor it is subject to any other requirement regarding the form. The contract can be confirmed by any means, including witnesses (Principles of European Contract Law, 1995-2002). Accordingly, the Art. II.-1:106 of the DCFR indicates that a written form is not required for concluding, drawing up or confirming a contract or other legal act, if no requirements are established regarding the form (Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference, 2009).

In some cases, the model rules themselves require a certain formality (e.g. written form or written form on a durable medium) for a particular legal act, and national laws often require written form or other formalities, especially in relation to particular objects, namely land plots and other immovable property.

However, according to the drafters, the indication of such exceptions is not justified within the scope of the studied acts, since it follows from the general principle that special provisions prevail over more general ones (Draft Common Framework of Reference, 2009: Art. I.–1:102). Any legislator using model rules is surely entitled to determine the obligation of a written form or any other formality in relation to the conclusion of any type of contract. However, it is important to establish the basic general rule, according to which there are no formal requirements, unless otherwise provided by law.

Thus, the principle of freedom of the form is widespread in the countries of the continental system, although the common law systems have become less strict with regard to the requirements for concluding contracts in written. Writing or other formalities are not required for the validity of the contract in most EU countries. It is applied, in particular, to France, Denmark, Sweden, Finland, Greece, Germany, etc.

Polish legislation defines the principle of freedom of the contract, according to which the contract must not be concluded or certified in writing, and it is not subject to any other form requirement. However, there are legal requirements regarding the form of certain contracts. Such forms are: written, written with official certification of the date, written with notarized signatures, notarial deed. The form requirement can perform various legal functions, for example, to justify an action, to prove an action, or to cause specific consequences of an action. Other restrictions may also be established by the parties themselves (Act of 23 April 1964 Civil Code: Article 76).

Certain reservations regarding the form are also found in the legislation of EU countries. For example, if the defendant is not a commercial entity, courts in France will not recognize proof of a contract for more than €1,500 unless it is in writing. According to the Art. L.110-3 of the French Commercial Code oral certification of contracts concluded between business entities is allowed. Belgium and Luxembourg have similar rules regarding the confirmation of the fact of the conclusion of the contract in relation to its price (Act of 23 April 1964 Civil Code).

It is not admissible in the Italian legal system, with some exceptions, to justify the conclusion of the contract by witnesses for contracts for a specified amount. Besides, the Art. 2724 of the Civil Code of Italy provides that witness evidence is admissible in all cases where there is prima facie written evidence; if it was morally or materially impossible for the party under the contract to provide any written evidence; when the contracting party accidentally lost the documentary evidence (Italian Codice Civile, 1942).

One of the cases, when a formal requirement regarding the form of the contract may arise is certain unilateral donation obligations. A number of legal systems establish formal requirements in such cases in order to provide evidence that the promise was actually fulfilled ("the function of evidence") was to be legally binding and at the same time such regulation is aimed at additional consideration by the parties regarding the conclusion of such contracts and taking on obligations that may turn out to be burdensome or impossible to fulfill. Such norming is defined in the DCFR within the Book IV, Part H related to donation.

The importance of the written form within the scope of the researched acts is also established for contracts concluded with consumers (Draft Common Framework of Reference, 2009: Art. IV.G.–4:104). At the same time, the requirement for a mandatory written form for pre-contractual relations has already been established for a part of such relations at the EU level.

Similar requirements are contained in the European Contract Code (ECC) in regard to the form of the contract. In particular, the Art. 34 of the ECC indicates the consequences of non-compliance with the form of the contract, which is provided by law. The Article 37 provides for the freedom of the contract's form, where the parties who previously agreed on a certain form of the contract, if it does not contradict the norms of the national legal system, must adhere to this form while concluding the contract. Some norms of the ECC also define the specifics of the written form for contracts regarding real estate, donations, etc.

However, the ECC is an act of private and legal unification, which currently imposes the strictest requirements regarding the contract's form (compared to the DCFR norms). The principles of contractual freedom regarding the contract's form are not so comprehensively defined and establish that the restrictions are subject to purchase and sale contracts for real estate, donation contracts and other contracts that are of special importance and the form of the contract contributes to the additional protection of the interests of the parties under such contracts (European Contract Code, 2003: Article 34).

However, the Art. 185 of the ECC indicates that there are no special requirements regarding the form of the contract for the purchase and sale of movable property. Accordingly, the Art. 37 of the ECC indicates the obligation to conclude a contract in writing only if it has been agreed by the parties. In other cases, the principle of freedom of the form is applied to purchase and sale contracts, where it is not mandatory to express the contract in a special form. Except for the cases and for the purposes that are directly provided by the rules of the ECC. Essentially, identical requirements are contained in the Art. 11 of the United Nations Convention on Contracts for the International Sale of Goods and the Art. 6 of Common European sales law (CESL).

However, there is a stipulation in the Article 36 of the ECC regarding the purpose of proving the fact of the conclusion of the contract. This norm establishes the requirements for the value of such a contract (5,000 euros) or the legally established form of the act to confirm the conclusion of the contract.

Thus, formal approaches in essence (with certain very narrow exceptions) to determining the form of the contract are contained in the legislation of most Member States in the sense that there are no general requirements for a written or other form. However, the typical rules established by the PECL and DCFR generally require formality in fewer specific cases than many statutes. In our opinion, formal requirements can hinder the quality of economic relations and can allow the parties to avoid obligations without good reasons. Obviously, most systems have developed mechanisms to limit unjustified deviations from the written form of the contract, but a better approach is to direct such formal requirements to cases, when they are really necessary, giving the priority and importance to the principles of freedom and safety of the contract.

3.2. Problems of determining the contract's form in the civil legislation of Ukraine

Legal regulation of the contract's form in the Ukrainian legal system mainly consists in its established requirements and the consequences of their violation. The task of the relevant requirements is the fact that they should be able to more precisely record the relations of the counterparties, remove all possible grounds for disputes in the future regarding the very fact of concluding the contract and the content of its terms.

If there are additional requirements, contracts can be concluded only in a certain form (forms). Strict legal regulation of the form of contracts is undoubtedly of great importance both for the parties themselves and for the entire civil turnover. The legal requirements in regard to the contract's form make it possible to more accurately and objectively record the relations of the parties according to its terms, which is intended to facilitate the real and proper execution of the contract in the future avoiding uncertainties regarding certain terms of the contract and even the very fact of concluding the contract.

Some legal norms provide a public nature to the act of recording a contract. It is related to the state control over its execution for the benefit of third parties, assistance to the parties in clarifying the legal consequences of their legal actions, as well as information to concerned parties about concluded contracts.

However, it is worth talking about the tendency of expanding the freedom of the form of contracts within the modern conditions of Ukraine, according

to which minimal formal requirements are imposed on the parties while forming their legal relations. The reason for the need of such an extension is that any additional requirement in regard to the contract's form objectively leads to the complication and slowing down of the contract conclusion procedure. Obviously, when it comes to the transfer of ownership of real estate or other contracts complicated by the object or party, we will not assert the expediency of simplifying the form of such a contract. Within the scope of the research, we just stated the expediency of simplifying the form of contracts with the participation of individuals and legal entities, which by their nature can be confirmed by the cost, accompanying documents or actions that indicate the fact of concluding and executing such a contract.

The main provisions on the contract's form are contained in the Civil Code of Ukraine dated from January 16, 2003 (Civil Code of Ukraine, 2003), which is significantly updated compared to the Civil Code of the Ukrainian SSR of 1963 (Civil Code of the Ukrainian SSR, 1963). However, it did not solve the existing problems, but laid the grounds for creating new ones.

Thus, the legislator removed the reference to the division of the written form into simple and notarial from the special Article concerning the form of the transaction, by indicating in Part 1 of the Art. 205 of the Civil Code of Ukraine that "the transaction may be executed orally or in written (electronic) form".

Anna Chuchkovska notes that the written form of the contract is a method of objectification of thoughts with the help of writing and conventional signs on different carriers, the content of which is determined by the mutual rights and obligations of the parties in the field of economic activity (Chuchkovska, 2004).

The requirements for the written form are established in the Art. 207 of the Civil Code of Ukraine. At the same time, there are two methods of written transactions: 1) recording the content of the transaction in one document; 2) recording the content of the transaction in several documents, letters, telegrams exchanged between the parties.

We should agree with Serhii Tenkov that all documents accompanying the contract are divided into two groups: 1) documents related to the fact of concluding the contract, i.e. confirming its written form; 2) documents related to the execution of already concluded agreement. In this regard, it is necessary to distinguish between written (or electronic) documents, which are themselves the written form of the contract, and documents that are written evidence of the fact of the existence of the disputed contract in oral form (Tenkov, 2004).

The main feature, which assists to assign certain documents to the first or second group is their ability to exist independently. Maryna Velykanova explains, if a specific document mediates a certain operation arising from a

specific contract, in this case it will be the document of the second group. If this document reflects all the essential terms of the contract, it will be the document of the first group (Velikanova, 2011).

In order to consider some documents as a written form of the contract, they must contain all the essential terms of such a contract and they should conclude that the parties have agreed to those terms. In this context, we face another outdated domestic concept of the essential terms of the contract, which is inherent in national legal proceedings and is absent in European acts.

Part 4 of the Art. 639 of the Civil Code of Ukraine titled "Form of Contracts" contains provisions that regulate the issue of mandatory notarization of a contract in cases when the parties have previously agreed on such certification. Besides, Part 1 of the Art. 54 of the Law of Ukraine "On Notary" still has a reference to "mandatory notarial form". Such inconsistency of the legislator led to a wide discussion among scholars and practitioners regarding the existence of the division of the written form of contracts into simple and notarial in the current legislation.

Besides, in accordance with Part 3 of the Art. 640 of the Civil Code of Ukraine "A contract subject to notarial certification is concluded from the date of such certification".

Clarifications and alterations to the Civil Code of Ukraine, which took place in 2015 and are related to the use of information technologies while preparing and concluding transactions, also attract attention, since the practice analysis indicates noticeable shifts in the direction of simplifying the conclusion of transactions.

In particular, it became possible to conclude contracts and execute other transactions in electronic form, which provides for recording the terms of the agreement not on paper, but with the help of electronic documents, the familiarization of which must necessarily be accompanied by the use of special equipment. Therefore, the electronic form of transactions arises, which led to the introduction of amendments to the Articles 205 and 207 of the Civil Code of Ukraine. The Law of Ukraine "On Electronic Commerce" also introduced such concepts as "electronic trade", "electronic transaction", "electronic contract", etc.

However, it is necessary to talk not only about the electronic form of the transaction, but about the formation of a new category, which is a consequence of the formation of the informatization of society. This possibility to perform transactions in electronic form without concluding paper contracts, the presence of the parties during their conclusion, etc. is only a "transitional" stage and provides the grounds (basis) for the formation of transactions of a "new type" (so-called "smart" agreements, which are more often denoted the term "smart contracts").

Iryna Davydova rightly points out:

> Customary (traditional) transactions, as a result of the spread of information technologies, are transformed into electronic transactions, smart contracts, etc., which can be concluded by legal entities without personal contact, paper texts of contracts, personal (handwritten) signatures, etc. It is a new phase of the development, a turning point that should take place not only in the field of technical support for the possibility of concluding such transactions, but also in the consciousness of every person (Davydova, 2020: 19).

According to the Concept of Recodification of Civil Legislation, it is necessary to rethink the provisions on the forms of transactions, because it is impossible to ignore the scientific and technical development that contributed to the emergence of internet banking, smart contracts, e-commerce, etc. In this aspect, attention will be paid to formulating modern approaches to understanding and regulating the forms, which may contain transactions. Given this, "it is suggested to pay attention to the provisions on the written form and signature contained in the Articles I.-1:106, I.-1:107; as well as on the calculation of terms (Art. I.-1:110) of Book I "General Provisions" DCFR" (The Concept of Updating the Civil Code of Ukraine, 2020: Articles 113-114).

Understanding the complexity of proving the fact of the contract's conclusion, as well as executive discipline, which takes place in Ukraine in contrast to European law and the European contractual tradition, the authors of this research insist that the requirements for the contract's form should be simplified in the sense that the parties independently have to resolve the issue of such a form. Nowadays, those realities that exist in Ukraine in regard to electronic digital signatures and electronic documents circulation only indicate that it is difficult for the parties to certain contracts having different jurisdictions or locations to conclude contracts quickly and efficiently and accordingly to fulfill them taking into account the requirements regarding the contract's form.

Conclusions

The expansion of the sphere of private and legal contractual regulation of social relations, including due to the increase in the role of the contract as an important regulator of such relations, currently requires rethinking of the concept of domestic conventional law. Such changes are also caused by the Europeanization of domestic private law. The specified processes will definitely be complex and long-term, taking into account the approaches suggested at the EU level in regard to understanding the principles of conventional law, the general principles of regulation related to the definition of its form.

However, such changes are not so much a tribute to cooperation with the EU, but an urgent need at the present time, because without large-scale and in-depth work on the conventional law system, there will be the moment when effective private legal cooperation of business and private individuals with counterparties from other countries becomes impossible. In addition, the number of opportunities and formations of written counterparts of contracts, which is currently provided by the development of the Internet, should only accelerate the formation and operation of the contractual concept, and not slow it down due to the need to comply with formalized written forms with the seals and other requirements.

Therefore, it is currently important to move away from the regulation of issues related to the contract's form, without dividing it into separate requirements for the form of contracts for different types of participants in civil relations.

It is also necessary to talk about changing the essence of contractual relations considering the principles of maximum protection of the contractual relationships participants from its non-fulfillment or improper fulfillment, to the formation of such a legal concept and consciousness that will adjust to contractual hygiene and responsibility, when the counterparty concluding the contract directs all real opportunities for the fulfillment of own obligations, and not looking for options, how not to fulfill such contractual obligations.

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Combating the financing of terrorism in the conditions of military aggression on the territory of Ukraine

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Abstract

The article analyzes modern terrorist threats in the context of military operations on the territory of Ukraine, which are associated not only with terrorist attacks on critical infrastructure facilities, but also with the active use of financial assets, the latest technologies and innovative financial instruments. An analysis of the concepts of «military terrorism», «financing of terrorism», as well as of the Ukrainian system of combating the legalization of proceeds of crime, financing of terrorism, was carried out, which allowed to identify and assess the main trends and directions of development of such countermeasures, to indicate the existing shortcomings and develop mechanisms for improving the analyzed system at the local and international level. A conclusion was reached on the need to strengthen interdepartmental and interstate cooperation, to establish links between regional anti-terrorist structures of law enforcement and special services, and to use units and units of the armed forces in the fight against military terrorism.

Keywords: terrorist financing; military terrorism; legalization of funds; counterterrorism; armed forces units.

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Lucha contra la financiación del terrorismo en las condiciones de agresión militar en el territorio de Ucrania

Resumen

El artículo analiza las amenazas terroristas modernas en el contexto de las operaciones militares en el territorio de Ucrania, que están asociadas no solo con ataques terroristas en instalaciones de infraestructura crítica, sino también con el uso activo de activos financieros, las últimas tecnologías e instrumentos financieros innovadores. Se llevó a cabo un análisis de los conceptos de «terrorismo militar», «financiamiento del terrorismo», así como del sistema ucraniano de lucha contra la legalización del producto del delito, el financiamiento del terrorismo, que permitió determinar y evaluar la principales tendencias y direcciones de desarrollo de tales contramedidas, para indicar las deficiencias existentes y desarrollar mecanismos para mejorar el sistema analizado a nivel local e internacional. Se llegó a una conclusión sobre la necesidad de fortalecer la cooperación interdepartamental e interestatal, establecer vínculos entre las estructuras antiterroristas regionales de las fuerzas del orden y los servicios especiales, y utilizar unidades y unidades de las fuerzas armadas en la lucha contra el terrorismo militar.

Palabras clave: financiamiento del terrorismo; terrorismo militar; legalización de fondos; contraterrorismo; unidades de las fuerzas armadas.

Introduction

Terrorism is one of the most threatening socio-political and socio-economic phenomena of the modern world. Global world security, as well as the security environment of individual regions, not to mention even individual countries – all this is the object and actual sphere of manifestation of terrorist activity of the relevant associations, groups, troops (forces). Its extreme form of manifestation – acts of military aggression, terrorist attacks on critical infrastructure facilities and harmful industrial productions not only cause damage by the very fact of committing attacks, but have negative socio-economic consequences of large and long-term scales. Globalization and transnationalization of production, movement of capital and labor reserves, informatization and digitization of social and economic processes – all this creates new opportunities for the development of terrorist groups.

According to the conclusions of the vast majority of the world's leading experts, and this is obvious in our opinion, the real and potential threats

caused by international state terrorism on the part of the Russian Federation (hereinafter – the RF)are currently the most likely and most dangerous for Ukraine. Since the beginning of the Russian aggression and annexation of Crimea, as well as the direct participation of the armed forces of the RF in terrorist activities, the direct leadership of illegal armed forces in the Donbas, the large-scale arming and training of terrorists, the situation in Ukraine has fundamentally changed (Grynenko *et al.*, 2015).

Terrorist activity in Ukraine has its own characteristics. On the one hand, it contains signs of international terrorism that threatens European and global security, and on the other hand, it is one of the means of waging a hybrid war of the RF against Ukraine. At the beginning of the anti-terrorist operation in 2014, terrorist activities were mostly expressed in the commission of explosions, shelling, killings, hostage-taking, obstruction of the Organization for Security and Cooperation in Europe (hereinafter – the OSCE) monitoring mission. Recently, it has become open, comprehensive and massive, combined with special information operations, cyberattacks and cyber incidents, as well as encroachments against critical infrastructure.

The mentioned circumstances create a need to change the approaches to combating and fighting international terrorism, placing new emphasis on preventive measures, wider application of modern technologies in the field of detection and monitoring of potential terrorists.

1. Methodology of the study

In scientific work, in accordance with its purpose, tasks, object and subject, general scientific and special methods of cognition are used. An active methodological approach is used to learn the essence of international terrorism, terrorist financing, the subject, object, mechanism and results of combating the financing of terrorist activities. The use of the historical method contributed to the analysis of individual stages of combating the financing of terrorism in some countries.

The logical-dogmatic method was used in the interpretation of the categorical parastatus used in the study. The comparative legal method is applied to the study of foreign and international experience in combating the financing of terrorism. The system-structural method of knowledge made it possible to reveal the directions of combating the financing of terrorist activities, to assess its role in the strategy of waging a hybrid war of the RF against Ukraine, to analyze the quantitative and qualitative indicators of terrorist crimes, to develop measures to combat terrorist activities.

2. Analysis of recent research

Considerable attention was paid to the study of various aspects of manifestations of terrorism (terrorist activity) and counteraction to this phenomenon by domestic and foreign scientists and practitioners (Tkach, 2013; Malyy, 2016; Tierney, 2018; Zharovska, 2019; Morse, 2019; Wall, 2020). However, their research in this area does not exhaust all aspects of international legal countermeasures to the financing of terrorism, in particular military terrorism, as a certain system of war crimes and military practices connected with it, the manifestations of which are extremely relevant at the current stage of Ukrainian resistance to Russian terror.

Thus, it is obvious that there is an urgent need for a comprehensive analysis of such phenomena as: «military terrorism» as a key legal phenomenon and determination of its role and place in the system of international legal order and peace security, «financing of terrorism», counter-terrorism». The problematic nature of this issue is also due to the fact that the RF constantly tries to export terror and spreads this strain, the strain of «wars» throughout the world.

3. Results and discussion

3.1. The essence of military terrorism and terrorist financing

Today, the problem of ensuring peace and international security is almost the most urgent for every country in the world. Terrorism is a socially dangerous activity that consists in the deliberate, purposeful use of violence by taking hostages, arson, murder, torture, intimidation of the population and authorities or committing other attacks on the life or health of innocent people or threatening to commit criminal acts with with the aim of achieving criminal goals (On The Fight Against Terrorism, 2005).

Separating the issue of military terrorism from the general system of the international legal definition of «terrorism», it should be noted that the famous Israeli journalist and public figure A. Entova once noted that: «Terror is the war of the fourth generation... And in war, people must behave morally, and in war there are things that are permissible, there are things that are necessary, and there are things that are unacceptable that you can do without, and if you can do without, you have to do without» (Asya Entova in the 2nd part of the program «With capital letters» explains what Herzl is guilty of and whether « democracy is organized blackmail», 2016).

The «International Convention on the Suppression of the Financing of Terrorism» emphasizes that it is about harming people who do not take

an active part in hostilities. It follows that terrorism is armed violence, but not that in which the state participates. The battle is not conducted by a regular army and the object of attack in it is not the military, but the civilian population, and today it is usually the masses, not the elite. The goal of the terrorist war is territorial conquest, with the goal of changing society itself. It is in such cases that «war» can take the form of terrorism.

Considering «military terror» through the prism of «war», it should be noted that on the one hand, modern terror is indeed a war, since modern terrorists use armed violence using their regular armed forces – on the other hand, terrorists operate in conditions of formal peace between states , but their main calculation is not based on the power factor, which they do not have much of, but on the creation of public pressure or an anti-moral civil position.

At the same time, one should understand the difference between the concepts of «terror» and «terrorism»: terror is the subject of a crime, the state, the object of encroachment is the population; terrorism - the subject of the crime is a person, a group of persons, the object of the attack – the state, state institutions.

Thus, «military terrorism» is armed violence by military formations (private military formations) of the regular army of the aggressor state against the civilian population, which is carried out for the purpose of waging a war of aggression and involves the annexation of territory using terrorist methods.

It is undeniable that international military terrorism and its financing is a threat not only to human rights, the rule of law and democracy, but to all internal and international security. Therefore, such threats require their study and analysis, as well as the strengthening of international determination and multilateral cooperation at all levels.

The intensification of terrorism and separatism in Ukraine, which is taking place against the background of active military operations caused by the aggression of the RF, formulates the task of combating their financing in a new way and requires the adoption of strict measures to control financial flows. Therefore, the activity of identifying and effectively blocking the channels of financial support of terrorist and separatist organizations should be one of the key areas of the long-term strategy of state institutions.

The main external factors that increase the threat of terrorism include: Ukraine's geopolitical position at the intersection of the spheres of influence of the RF, Western countries, the USA, Turkey, and the countries of the Muslim world; the existence of migration flows through Ukraine from terrorist-dangerous regions; terrorist activities of RF mercenaries and sabotage and intelligence groups; large-scale illegal supplies of almost all types of weapons from the RF to some areas of the Donetsk and Luhansk

regions occupied by it; powerful information war of the RF against Ukraine, etc.

Among the internal factors of heterogeneity, the following should be singled out: a combination of criminal and terrorist activity, which is manifested in the involvement of representatives of criminality as perpetrators of terrorist attacks and mercenaries during the military aggression of the RF; corruption of certain sectors of society; spread of illegal weapons circulation in Ukraine; low efficiency of law enforcement and judicial systems of government; heating up «separatist sentiments» (Shamara *et al*., 2011).

Terrorist activities require financial support. At the same time, the practice of combating the financing of terrorism by the international community shows the fact that terrorist organizations seek to use the simplest, most accessible and understandable methods of transferring funds.

A specific feature of the formation of financial resources by terrorist organizations is that the sources of funding can have both legal and illegal origins – criminal activity, drug trafficking, human trafficking, smuggling, corruption. Therefore, the concepts of «money laundering» and «terrorist financing» are often related to each other, because individuals and organizations that finance terrorism carefully disguise the real origin and direction of funds, which makes it difficult to identify them. However, unlike money laundering, which is mostly aimed at concealing the source of income, the main goal of individuals involved in the financing of terrorism is primarily to conceal the nature of the financed activity (Combating the Financing of Terrorism: Investopedia, 2020). Sources of funds that move through the financial sector can also have a completely legal nature. Typically, terrorist financing includes not only the financing of terrorist acts as such, but also the support of criminal infrastructure.

Thus, the financing of terrorism involves not only the preparation and execution of terrorist acts, but also the provision of their organizations, propaganda of ideology, recruitment, training and training of new members of the organization, payment of bribes, movement between cities or countries. In addition, part of the funds can be used to create the appearance of legal activity, in particular controlled structures engaged in commercial or credit-financing activities (Financing of terrorism, 2020).

Financial support for terrorist and separatist activities can occur both through the direct transfer of assets, funds and weapons, and remotely, that is, using the services of the financial system (State Financial Monitoring, 2014).

It is possible that terrorist organizations and separatist movements independently ensure their existence in places of particularly active presence

by exploiting the local population, mining, processing and production facilities in the region of presence. So, for example, in the temporarily occupied regions of Ukraine, enterprises, in particular, from coal mining, are captured and exploited. Other businesses and the population are forced to pay so-called «taxes» collected by representatives of the occupiers, terrorist organizations and separatist movements.

Criminals can use a number of methods that involve the use of financial infrastructure in order to cover up the financing of terrorism. Banks, non-banking institutions, charitable organizations, non-profit organizations, and alternative money transfer systems may be involved in the financing of terrorist activities.

The movement of funds can be carried out both through international funds transfer systems and through small regional payment systems. The development of the latest payment technologies, the ease and speed of financial transactions on a global scale, combined with a large number of unofficial (or semi-official) money transfer systems create prerequisites for the growing risks of using the financial system for terrorist financing purposes (Combating the Financing of Terrorism: Investopedia, 2020).

RF's military invasion of Ukraine, which was transformed into a full-scale war, became a catalyst for the functioning of terrorist organizations, which re-formulates the task of combating their financing and requires effective preventive measures to control financial flows.

Although financial support in today's conditions comes mostly from outside, the probability of movement of funds through financial institutions within the country is also high, which is caused by more effective mechanisms for identifying and verifying clients of banking institutions, more established cooperation with specially authorized bodies. The foregoing led to the conclusion that the procedures of the non-banking sector to combat money laundering and the financing of terrorism are inferior in their effectiveness to banking ones and need to be improved.

In the context of compliance with the requirements of the law, financial institutions should focus their activities on the use of a risk-oriented approach in the process of identifying and verifying customers, monitoring their transactions, timely identifying and blocking financial transactions for which there is a suspicion that they may be related to the financing of terrorism. Important for the establishment of barriers to the movement of funds to terrorist organizations is the prompt exchange of information between the financial sector and law enforcement agencies, as well as cooperation with the authorities responsible for the fight against terrorism of other countries.

In-depth research on countering the financing of terrorism and the proliferation of weapons of mass destruction will require funding

schemes for terrorist organizations, the financial instruments they use, and mechanisms to counter the attraction of funds from abroad by such organizations. At the same time, special attention is paid to the peculiarities of using innovative financial instruments, in particular cryptocurrencies, for which there is currently no proper regulation and supervision, to attract funds from terrorist organizations.

Evaluation of legislative initiatives and practical measures in the context of the implementation of the best world practices in the field of cooperation with manifestations of terrorism indicates that counteraction to the financing of terrorism is characterized by the adoption of regulations that should take into account not only the need to criminalize all socially dangerous manifestations of terrorist activity, but also be accompanied by strengthening international and interdepartmental cooperation between special services and law enforcement agencies, strengthening control over crossing state borders and countering the financing of terrorism.

It is worth emphasizing that the methods of financing terrorist organizations evolve in parallel with the development of the capabilities of the financial sector in the field of money movement, therefore, along with typical, established instruments, those that involve complex cross-border multi-channel schemes, the detection of which can become a difficult task for financial institutions, may well be used. Often, financial institutions, primarily banks, act as the main mediators of financial transactions.

It is natural that in the case when such a significant share of financial flows in the country moves through banks, the risk of carrying out terrorist financing operations using the banking sector should be considered quite high. Synergy of efforts and interaction of banks and non-bank financial institutions, the State Financial Monitoring Service, as well as law enforcement agencies is of great importance for effective countermeasures against the financing of terrorism.

Ensuring the prompt exchange of information between the public and private sectors, between the financial sector and law enforcement agencies should become an integral element in building a strategy to combat the financing of terrorism (Thony, 2001).

We share V. Rysin's point of view that special emphasis should be placed in such cases on the procedure for investigating criminal offenses related to the financing of terrorist activities and the effectiveness of law enforcement agencies, because informing banks about suspicious financial transactions and stopping such transactions is insufficient in the event , when in the future their initiators or beneficiaries are not brought to criminal responsibility (Rysin, 2020).

Special attention should be paid, among other things, to the identification of those persons in terrorist organizations who are engaged in the collection

and accounting of financial funds. For this, law enforcement agencies need, among other things, to concentrate their efforts on conducting investigations into the final recipients of funds in terrorist organizations, not only on finding out the sources of funds.

Consequently, the relevance of challenges and potential threats caused by international terrorism is increasing for Ukraine, which is caused by the terrorist activities of mostly Russian terrorist mercenaries and sabotage and intelligence groups, and less often by the expansion of Ukraine's political, economic, humanitarian and cultural ties with the countries of the world where armed conflicts, the participation of the Ukrainian military contingent in peacekeeping operations. The foregoing encourages the further development of the anti-terrorist security system, which would meet the standards of developed countries, in order to create an effective mechanism for preventing, responding and countering terrorist threats.

3.2. International mechanisms for combating military terrorism and its financing

According to V. Rysin and A. Stepanova, the tools for countering the financing of terrorism are the most effective means in the system of countering such manifestations and their spread in the global dimension (Rysin and Stepanova, 2020). We agree with this point of view, although we consider an alternative vision to be acceptable. proposed by A. Bergeneva. Thus, the researcher points out that the policy and methods of the EU's fight against terrorism have a utilitarian character only when they acquire the necessary spread or recognition outside the EU (Bergeneva, 2022).

This thesis is relevant due to the fact that terrorism is increasingly becoming a global phenomenon, and therefore its support, dissemination and financing do not necessarily have sources that can be combated or destroyed with the help of the EU legal system or that are within the jurisdiction of the EU.

Currently, the institutional support of the process of combating money laundering and terrorism financing in Ukraine remains a weak link of the national countermeasures system and has certain shortcomings.

The most significant ones include; lack of effective control by state regulators over the implementation by the subjects of primary financial monitoring of the provisions of national legislation; frequent disregard of established procedures in the banking system and, as a result, large-scale use of banks in criminal money laundering schemes; lack of established interdepartmental cooperation by the interstate financial monitoring service and law enforcement agencies; lack of cooperation between law enforcement agencies and the judiciary; the absence of a procedure for the return of proceeds obtained through criminal means, as a result of the

legalization of funds or the financing of terrorism, which were exported abroad.

The transnational and international nature of terrorist activity makes the efforts of one country or groups of countries insufficient. For its effective counteraction, and in particular in the context of the destruction of sources of funding, the EU simply cannot do without international support, as well as in matters of the use of armed forces or police missions to fight against its most radical manifestations, if only due to the fact that it is the military the contingent, unlike police missions, has a corresponding UN mandate.

Therefore, during the development of the Directive of the European Parliament and the Council of the EU No. 2005/60/EU «On the prevention of the use of the financial system for the purpose of money laundering and financing of terrorism» and the Directive of the European Parliament and the European Council of 20.05.2015 No. EU 2015/849 was it is recognized that money laundering and terrorist financing are usually carried out in an international context. Measures taken exclusively at the national level or even at the level of the EU only, without international coordination and cooperation, will have very limited results.

Measures approved by the EU in this area should be coordinated with other measures taken in the framework of other international initiatives. Community measures should continue to take into account the Recommendations of the Group for the Development of Financial Measures to Combat Money Laundering, which is the main international institution in the field of combating money laundering and terrorist financing (On Preventing The Use Of The Financial System For The Purpose Of Money Laundering And Terrorist Financing: Directive Of The European Parliament And Council Of The EU, 2005). Thus, at the level of its own legal documents, the EU recognizes the need for international cooperation in countering terrorism.

It should be noted that with regard to the investigation of the financing of terrorism, in July 2018 the European Parliament adopted a directive to the 5th Anti-Money Laundering Directorate, which is aimed at increasing transparency by establishing publicly accessible registers for companies; expanding the powers of EU financial intelligence units; restrictions on anonymity, users of virtual currencies and wallets, as well as prepaid payment cards; expanding the criteria for evaluating third countries with a high level of risk and improving the guarantees of financial transactions. The introduction of this directive was a reaction of the EU countries to the growing threat of terrorism and an attempt to establish the strictest possible control over financial transactions and instruments that can be used to finance terrorist activities. Ukraine's reaction to AMLD5 was the adoption of a new version of the basic law on combating money laundering and terrorist financing, as well as the implementation of certain projects (Kolesnik, 2019).

In this regard, Z. Gbur and S. Koshova draw attention to the aspect that international counterterrorism with the use of armed forces requires, in addition to destroying the channels of financing terrorist organizations, also disrupting the ways and channels of coordination of their activities (Gbur and Koshova, 2021).

The recognition of the RF as a terrorist state on October 13, 2022 in the resolution of the Parliamentary Assembly of the Council of Europe (PACE) is one of the most important historical diplomatic decisions (This is a political signal: Zelenskyi on the PACE decision to recognize Russia as a terrorist, 2022). At the fall session in Strasbourg, the PACE considered a resolution condemning RF's actions in Ukraine as a war crime, a violation of international law, and a threat to international peace and security.

In general, it should be noted that the international legal system of countering and fighting terrorism currently gravitates towards solving the issues of countering and preventing terrorist manifestations, destroying the financing channels of the relevant organizations, but pays little attention to the coordination and consolidation of efforts to use armed forces in the fight against such manifestations. including in the context of the expansion of such cooperation and the involvement of police structures and formations that would solve the issue of bringing to international criminal responsibility persons guilty of terrorism.

There is no doubt that Ukraine's use of the scientific material and practical experience accumulated by the world community in the further improvement of the national system of combating international military terrorism, legalization of proceeds obtained through crime and financing of terrorism is of crucial importance, as it significantly accelerates the integration process of the state into the international system of cooperation and mutual assistance. in the fight against this negative higher, one of the varieties of transnational criminal activity.

Finally, we note that the problem of combating terrorism is multi-level, the solution of which must be sought in a multilateral partnership with state structures. Despite all international efforts, terrorism not only does not weaken its position, but on the contrary expands its influence. Terrorists, drawing up a plan of operations, even provide for its coverage in the mass media. Such activity is similar to sabotage and reconnaissance, and therefore once again justifies the expediency of using parts and combinations of armed forces for their neutralization.

Conclusions

The functioning of terrorist organizations in the conditions of war formulates the task of combating military terrorism and financing in a new way and requires effective preventive measures to control financial flows. In conditions where financial support comes mostly from outside, the non-banking sector's anti-money laundering and terrorist financing procedures are less effective than banking ones and need improvement.

Financial institutions should focus their activities on the application of a risk-oriented approach in the process of identifying and verifying clients, monitoring their transactions, timely identifying and blocking financial transactions that are suspected to be related to the financing of terrorism.

In the aspect of combating the financing of terrorism and the proliferation of weapons of mass destruction, special attention needs to be paid to the financing schemes of terrorist organizations, the financial instruments they use, in particular cryptocurrencies, in respect of which there is currently no proper regulation and supervision, in order to develop effective mechanisms to counter the attraction of funds from abroad. Effective exchange of information between the financial sector and law enforcement agencies, as well as cooperation with other countries' counter-terrorism agencies, is important for establishing barriers to the flow of funds to terrorist organizations.

The international legal system of combating and combating terrorism should focus on coordinating and consolidating efforts to use units and units of the armed forces in the fight against such manifestations, expanding cooperation and involving police structures and formations that would solve the issue of attracting international criminal liability of persons guilty of terrorism and its financing.

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Prevention of domestic violence as one of the priority areas of preventive policing: Legal regulations and international experience

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Abstract

The aim of the research was to study the norms of the current Ukrainian and international legislation, the positions of scientists, educational and reference literature, as well as statistical data, to determine the legal position of the National Police as a subject of prevention and countermeasures against families' victims of violence. In its basic content the article discloses the legal position of the National Police as a subject of prevention and action against domestic violence, performing preventive, police and human rights protection functions. In this context, it was determined that the National Police, as a public authority, implements special measures to prevent and counteract domestic violence, applying, if necessary, administrative coercive measures against offenders. The methodological basis of the research was the comparative legal and systemic analysis, the formal legal method, the method of interpretation, the hermeneutic method, as well as the methods of analysis and synthesis. As a conclusion it is noted that an important aspect of improving the activities of the National Police in Ukraine is to build confidence in the affected families, who are afraid to report the facts of domestic violence for fear of condemnation from the society.

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Keywords: international experience; domestic violence; legal regulation; preventive tasks; police units of preventive activities.

Prevención de la violencia doméstica como una de las áreas prioritarias de la actividad policial preventiva: Normativa legal y experiencia internacional

Resumen

El objetivo de la investigación fue estudiar las normas de la legislación ucraniana e internacional vigente, las posiciones de los científicos, literatura educativa y de referencia, así como datos estadísticos, para determinar la posición jurídica de la Policía Nacional como sujeto de prevención y contramedidas contra familias victimas de violencia. En su contenido básico el artículo da a conocer la posición jurídica de la Policía Nacional como sujeto de prevención y acción contra la violencia doméstica, desempeñando funciones preventivas, policiales y de protección de los derechos humanos. En este contexto, se determinó que la Policía Nacional, como autoridad pública, implementa medidas especiales para prevenir y contrarrestar la violencia doméstica, aplicando, de ser necesario, medidas de coerción administrativa contra los infractores. La base metodológica de la investigación fue el análisis jurídico y sistémico comparativo, el método jurídico formal, el método de interpretación, el método hermenéutico, así como los métodos de análisis y síntesis. Como conclusión se observa que un aspecto importante para mejorar las actividades de la Policía Nacional en Ucrania es generar confianza en las familias afectadas, que temen denunciar los hechos de violencia doméstica por temor a la condena de la sociedad.

Palabras clave: experiencia internacional; violencia doméstica; regulación legal; tareas preventivas; unidades policiales de actividades preventivas.

Introduction

Bringing the standards of professional training and official activities for the prevention of domestic violence by the police units carrying out preventive activities of the National Police of Ukraine in line with the generally recognized norms and standards in international relations, as well as the relevant standards of European and other countries is one of the main directions of reforming the law enforcement system of Ukraine.

According to the new administrative and territorial structure, the Resolution of the Verkhovna Rada of Ukraine dated July 17, 2020. No. 807-IX "On the Formation and Liquidation of Districts" (Law of Ukraine, 2020) has introduced new organizational and staff changes in the structure of territorial bodies, police units that determines the development and definition of the following categories: goals, objectives of activities, structural and organizational, and competence elements aimed at ensuring human rights and freedoms, the interests of society and the state, and domestic violence prevention.

1. Literature review

The works of administrative scientists are devoted to the general theoretical aspects of the organizational and legal basis of the police of Ukraine. As for the study of the goals, objectives, forms and methods of activity of the units of the preventive service of the National Police of Ukraine for the prevention of domestic violence in the modern Ukrainian administrative legislation and in the context of reforming the system of the Ministry of Internal Affairs (hereinafter referred to as the Ministry of Internal Affairs) of Ukraine, there are only isolated scientific developments (*Nehodchenko,* 2003).

The goal of the article is to define the powers of preventive police units to prevent domestic violence, as well as to disclose the main organizational and legal forms, methods and measures in the field of preventing domestic violence.

2. Materials and methods

The study is based on the works of foreign and Ukrainian researchers on methodological approaches to understanding the preventive activities of the National Police of Ukraine in countering domestic violence under the current scenario.

The application of the epistemological method has enabled to clarify the essence of the preventive activity of the National Police of Ukraine on countering domestic violence, the logical and semantic method - to deepen the conceptual apparatus and to determine the essence of the preventive activity of the National Police of Ukraine on countering domestic violence in the present settings.

To get an idea of the specifics of the preventive activities of the National Police of Ukraine in countering domestic violence in the present settings over the past five years, we have analyzed statistical data, which, unfortunately,

are not based on all the canons of statistical generalization, since we have not had access to all blocks of information, but thanks to the available data, we have managed to analyze the preventive activities of the National Police of Ukraine in countering domestic violence in the present.

3. Results and discussion

In accordance with paragraph 5 of Article 1 of the Law of Ukraine "On Prevention and Counteraction to Domestic Violence", prevention of domestic violence means the system of measures implemented by executive authorities, local self-government bodies, enterprises, institutions and organizations, as well as citizens of Ukraine, foreigners and stateless persons who are in Ukraine legally, and aimed at raising public awareness of the forms, causes and consequences of domestic violence, forming an intolerant attitude to violent behavior in private relations, caring attitude to affected persons, primarily to affected children, eliminate discriminatory attitudes about the social roles and responsibilities of women and men, as well as any customs and traditions based on them.

The powers of the preventive units of the National Police of Ukraine in the field of preventing and countering domestic violence include:

1. identification of facts of domestic violence and timely response to them;
2. receiving and reviewing applications and reports of domestic violence, including consideration of reports received by the call center for preventing and countering domestic violence, gender-based violence and violence against children, taking measures to stop it and provide assistance to affected persons, taking into account the results of risk assessment in accordance with the procedure determined by the Central Executive Authority that ensures the formation of state policy in the field of preventing and countering domestic violence, together with the National Police of Ukraine;
3. informing affected persons about their rights, measures and social services that they may use;
4. issuing urgent restraining orders against abusers;
5. taking abusers for preventive registration and conducting preventive work with them in accordance with the procedure established by law;
6. monitoring the implementation of special measures to counteract domestic violence by abusers during their validity period;

7. cancellation of permits for the right to purchase, store, carry weapons and ammunition to their owners in the event of domestic violence, as well as the seizure of weapons and ammunition in accordance with the procedure established by law;
8. interaction with other bodies that carry out measures in the field of preventing and countering domestic violence, in accordance with Article 15 of this Law;
9. reporting to the Central Executive Authority, implementing the state policy in the field of preventing and countering domestic violence, on the results of the exercise of powers in this area in accordance with the procedure determined by the Central Executive Authority that ensures the formation of state policy in the field of preventing and countering domestic violence (Law of Ukraine, 2015).

Of particular note is that in accordance with the Order of the Ministry of Internal Affairs dated December 19, 2017 No. 1044 "On Approval of Instructions for Organizing the Work of Juvenile Prevention Units of the National Police of Ukraine" (Law of Ukraine, 2017), the main tasks are as follows:

- preventive activities aimed at preventing children from committing criminal and administrative offenses, identifying the causes and conditions that contribute to this, and taking measures within their competence to eliminate them;
- keeping preventive records of children who are prone to committing offenses, and conducting individual prevention measures with them;
- participation in establishing the location of the child in the event of his/her unknown disappearance or obtaining data for this purpose in the criminal proceedings opened on the fact of the child's unknown disappearance;
- taking measures to prevent and counteract domestic violence committed by and against children, as well as child abuse;
- taking measures to prevent child neglect, including the implementation of police custody of minors;
- carrying out activities related to the protection of the child's right to general secondary education.

Special measures to combat domestic violence include:

1. an emergency prohibition order against the abuser;
2. a prohibitory injunction order against the abuser;
3. taking the abuser on preventive registration, conducting preventive work with the abuser;

4. referral of the abuser to the abuser program.

In accordance with paragraph 16 of Article 1 of the Law of Ukraine "On Preventing and Countering Domestic Violence", an emergency prohibition order is a special measure to counteract domestic violence, which is used by authorized units of the National Police of Ukraine as a response to the fact of domestic violence and is aimed at immediately stopping domestic violence, eliminating the danger to the life and health of victims and preventing the continuation or repetition of such violence (Law of Ukraine, 2017).

This emergency prohibition order is issued if there is an immediate threat to the life or health of the injured person in order to immediately stop domestic violence, prevent its continuation or recommission. This legal instrument is regulated in more detail in Article 25 of this Law.

Measures that may be applied on the basis of an emergency prohibition order include: an obligation for the abuser (the person who has committed domestic violence) to leave the place of residence (stay) of the injured person; a ban on the abuser to enter and stay in the place of residence (stay) of the injured person; a ban on the abuser in any way to contact the injured person. In relation to minor abusers who have a common place of residence (stay) with the injured person, these first two measures are not subject to application.

It should be noted that the Law of Ukraine "On Preventing and Countering Domestic Violence" gives the safety of the affected person priority even over the property rights of persons to housing (Law of Ukraine, 2017). Therefore, part 3 of Article 25 of this Law provides for the possibility of issuing an emergency prohibition order in relation to residential premises that belong exclusively to the offender, provided that such housing is the place of joint residence (stay) of the injured person and the offender.

At the same time, the police are empowered to evict the offender from such residential premises, if the emergency prohibition order provides for an obligation to leave the place of residence (stay) of the injured person, and the offender refuses to voluntarily leave it. The urgency and out-of-court nature of the adoption determine the validity period of an emergency prohibition order, which is not more than ten days.

Consequently, an emergency prohibition order is applied by the police if there is a threat to the injured person and for the purpose of immediately countering an act of domestic violence. That is, at the time of issuing this order, the person in respect of whom it is issued has not been found guilty of committing domestic violence in criminal proceedings or an administrative offense.

In general, this approach is somewhat similar to the detention of a suspected person during the commission of a crime or after its commission,

if the set of signs indicates that this particular person has committed a crime (Article 208 of the Criminal Procedure Code), which takes place before the commencement of a pre-trial investigation (in other words, before the opening of criminal proceedings).

By this analogy, in our opinion, the issuance of an emergency prohibition order should be accompanied by other procedural actions of the police, namely, drawing up a protocol on an administrative offense (Article 173-2 of the Code of Ukraine on Administrative Offenses) or entering information on the relevant criminal offense in the Unified Register of Pre-Trial Investigations.

Unlike an emergency prohibition order, a prohibitory injunction order is issued by the court on the basis of an appeal from interested parties, and therefore allows for a much wider range of possible restrictions on the rights of the offender, longer periods. In particular, the measures that may be applied to the abuser on the basis of a prohibitory injunction order are:

1. prohibition to stay in a place of cohabitation (stay) with the injured person;
2. removal of obstacles in the use of property that is the object of the right of common joint ownership or personal private property of the injured person; (3) restriction of communication with the injured child; (4) prohibition to approach a certain distance to the place of residence (stay), study, work, other places of frequent visit of the injured person; (5) prohibition to personally and through third parties search for the injured person if he/she is at his/her own request in a place unknown to the offender, pursue him/her and communicate with him/her in any way; (6) prohibition to conduct correspondence, telephone conversations with the affected person or to contact him/her through other means of communication in person and through third parties. It is worth noting that the prohibitory injunction order may provide for the application of several of these measures at once.

Similarly, to an emergency prohibition order, a prohibitory injunction order may not contain measures that restrict the right of residence or stay of a minor abuser in the place of his/her permanent residence (stay). The issuance of a prohibitory injunction order is carried out by making a court decision in a separate proceeding, for the purposes of which Section IV of the Civil Procedure Code (hereinafter referred to as the CPC) is supplemented with a new Chapter 13. In addition, the issuance of a prohibitory injunction order in a separate proceeding is based on the provision that this proceeding is intended to create conditions for a person to exercise personal non-property or property rights (part 7 of Article 19 of the CPC). The prohibitory injunction order is issued for a period of one to six months and may be

extended by the court for a period of no more than six months (Fomenko, 2018).

The Law of Ukraine "On Preventing and Countering Domestic Violence" and the Civil Procedure Code do not provide for the possibility of revoking the prohibitory injunction order, in particular if a person is found not guilty of committing a crime or administrative offense. It appears that a possible way to resolve this issue would be to quash the judgment on newly discovered circumstances.

In addition, all facts of domestic violence, information on the abuser (regardless of his/her consent), as well as about victims (with their consent) are entered in the Unified State Register of Domestic and Gender-Based Violence Cases. Such information is stored in the database: 1 year - in the absence of open criminal proceedings, a court decision on a prohibitory injunction order or administrative penalty, a court verdict of guilty; 3 years – in the presence of a court decision on a prohibitory injunction order or administrative penalty; 10 years - if there is a conviction that has entered into force.

In addition, the abuser may be taken on preventive registration, work with him/her by the police, and sent to undergo a corrections programme for a period of three months to one year.

The next measure is the taking of abusers by a division of the National Police of Ukraine for preventive registration, conducting preventive work with them, which occurs from the moment of detection of the fact of committing domestic violence by them, for the period established by law.

Removal of the offender from the preventive register is carried out by the authorized division of the National Police of Ukraine, which has ensured the preventive registration, automatically after the completion of the established period, unless otherwise provided by law. The procedure for taking on preventive registration, carrying out preventive work and removing the offender from preventive registration is approved by the Ministry of Internal Affairs of Ukraine (Volokitenko, 2017).

In turn, intervention programs for abusive behavior are available as well. The bodies responsible for implementing intervention programs for abusive behavior are local state administrations and local self-government bodies that organize and ensure that abusers complete such programs. The implementation of intervention programs for abusive behavior in relation to abusers is carried out taking into account the age and psychological characteristics of children.

In order to prevent repeated domestic violence and ensure the implementation of the intervention program for abusive behavior, the abuser's child may be temporarily placed with relatives, in the family of

a foster carer or in an institution for children, regardless of the form of ownership and subordination, in which appropriate conditions are created for living, upbringing, training and rehabilitation of the child in accordance with his/her needs. The implementation of intervention programs for abusive behavior is provided by specialists who have received appropriate training.

The abuser may be sent by the court to complete the intervention program for abusive behavior for a period of three months to one year in cases stipulated for by law. The abuser should be able to attend the intervention programs for abusive behavior on his/her own initiative on a voluntary basis. In case of failure of the abuser to complete the intervention program for abusive behavior or evasion from completing the program without valid reasons, the bodies responsible for the implementation of intervention programs for abusive behavior shall provide within three working days a written notification about this to the authorized unit of the National Police of Ukraine for taking action.

Bringing the abuser to justice for failure to complete the intervention program for abusive behavior does not release the abuser from the obligation to complete such a program. If an abuser, in particular a child abuser, is brought to criminal responsibility by the court, he/she may be required to complete a probation program in accordance with paragraph 4 of part 2 of Article 76 of the Criminal Code of Ukraine (Fomenko, 2018).

It should be noted that all these measures are preventive measures that enable state bodies to quickly respond to the facts of domestic violence, stop its commission, and eliminate the threat of repeated violence. However, the application of such measures does not mean that the offender will not be brought to administrative or criminal responsibility if there are grounds.

In order to respect human rights and freedoms, to comply with guarantees for the protection of the rights and interests of persons affected by domestic violence, gender-based violence, as well as to ensure an appropriate response to cases of such violence, to provide assistance to affected persons, to create conditions for each child to exercise the right to grow up in a safe family environment, taking into account the growing challenges associated with the commission of domestic violence, due to the reduction of latency of such offenses, great public response and in order to effectively implement the Decree of the President of Ukraine dated September 21, 2020, No. 398/2020 “On Urgent Measures to Prevent and Counteract Domestic and Gender-based Violence, and Protect the Rights of Persons Affected by Such Violence”, we propose to create sectors of countering domestic violence in the cluster police units created on the basis of regional centers and cities of Severodonetsk and Mariupol, in the prevention departments, which, in particular, will include police officers involved in working in mobile groups to respond to the facts of committing

such offenses, which are now successfully operating in the implementation of the relevant project.

We suggest that the staffing table of the specified sector should consist of 10 positions per mobile group (depending on the quantitative load of calls about the facts of domestic violence) at the rate of: 1 - Head of the Sector, 1 - Senior Inspector and Inspectors.

Given that not every territorial (separate) police unit according to the staffing table has the position of Juvenile Prevention Inspector or only one such position, we propose that the prevention department of district (cluster) departments with the corresponding new administrative and territorial structure of districts create juvenile prevention sectors at the expense of regular positions of juvenile prevention police units (departments) of the police serving the territory of these districts (Onishchenko, 2010).

At the same time, some of the powers of juvenile prevention at the level of these police units will be performed by district police officers, community police officers (as amended by the Order of the Ministry of Internal Affairs No. 650 dated July 28, 2017 "On Approval of the Instruction for Arrngement of the Activities of District Police Officers") and, as an exception, inspectors of the Patrol Police Response Group, in particular:

- taking measures to establish the identity of the child, his/her place of residence, information on parents or persons who replace them, other relatives, their place of residence (stay), in case of notification of a child left without parental care (in cases that do not require the opening of a criminal investigation and the establishment of intelligence surveillance "Search");
- taking measures to take the child away from his/her parents and temporarily accomodate the child in accordance with the current legislation in the event of an immediate threat to the child's life or health;
- carrying out work to prevent the commission of offences.

This distribution of powers will enable to unload juvenile prevention police officers in non-critical cases, taking measures for high-quality preventive work, implementing the best international experience of the police in working with children, searching for missing children who may become victims of crimes, identifying offenses against children and documenting them. The juvenile prevention sector provides methodological assistance and coordinates the implementation of tasks between the sectors of district police officers, community police officers and Patrol Police Response Teams.

The Patrol Police Response Division organizes the work of Patrol Police Response Teams (hereinafter referred to as the PPRT) within the district

service area. It provides them with practical and methodological assistance in improving the efficiency of work, interacts in solving these issues with the Patrol Police Response Division of other district units (departments) of the Main Directorate of the National Police in the region, other structural divisions of the National Police, local self-government bodies, enterprises, institutions, organizations of all forms of ownership, citizens. The Patrol Police Response Division should coordinate the PPRTs - teams consisting of at least two police officers who will serve in two shifts of 12 hours a day in the service area of the entire District Administration (Department).

Moreover, the territorial police units (hereinafter – the TPU) of the District Police Department (Division), which are located within more than 25 km from the district administration and which provide for service and more PPRTs in one shift, should create the Patrol Police Response Sector (hereinafter-the PPRS) consisting of the Head of the Sector, Senior Inspector and Inspectors (Police Officers) of the PPRT. The PPRS will be based on the TPU territory, where their service firearms, special equipment, service vehicles, fuel and lubricants, and service documentation are stored.

At the same time, the PPRS will be removed from the subordination of the TPU and directly report to the Patrol Police Response Division of the District Administration (Department). Control over their official activities will be directly carried out by the Head of the PPRS and authorized inspectors of the administrative practice sector (*Husariev, 2005*).

Under similar conditions, subject to the service for only 1 PPRT in one shift, direct subordination will be carried out to the Head of the PPRS of the nearest territoriality, within the service area.

In the TPUs of the District Police Department (Division), which are located within 50 km from the District Administration and which provide for the service of the PPRT in one shift, the Patrol Police Response Sector is not created. The PPRT is based on the territory of TPU, where their service firearms, special equipment, service vehicles and service documentation are stored. At the same time, the PPRT will no longer be subordinated to the TPU and will directly report to the Patrol Police Response Division of the District Administration (Department).

The territory of the police station will be serviced by the police officers of the Patrol Police Response Division and/or the Patrol Police Response Sector closest in terms of territoriality. The load on one police officer of the territorial preventive units and on one patrol police response squad is calculated from the number of people in a certain service area, the number of settlements, the length of the road network, the area of the service area and the state of the criminal situation. It is proposed to move away from the methodology of calculating 1 PPRT squad per 25 thousand population and, as an example, introduce the calculation of one squad per area in square kilometers.

It is proposed to move away from the methodology of calculating 1 PPRT squad per 25 thousand population and, as an example, to introduce the calculation of one squad per area in square kilometers.

We propose to expand the functional areas of work of the administrative practice sector, namely on the prevention of domestic violence: ensuring interaction with the duty services of territorial police department (divisions); providing methodological support for the activities of PPRT squads, district police officers, community police officers (hereinafter referred to as squads); ensuring round-the-clock monitoring and control over the official activities of squads, as well as their performance of official tasks, including those created independently; sending, in coordination with the operations duty officer of the district department, orders of electronic official tasks and monitoring their implementation; monitoring the state of administrative activities of both the District Police Department (Division) and its territorial divisions; within the scope of competence to coordinate with district courts in cases of administrative offences, in view of the fact that the judicial system in practice may not always coincide with the newly formed administrative-territorial structure, this gives grounds to believe that local courts continue to examine cases within previously defined areas (Bilous, 2019).

Conclusion

Prevention of domestic violence is one of the priority areas of preventive police station, which includes departments of district police officers, juvenile prevention units, patrol police, etc. Ensuring the effectiveness of such activities should be accompanied by a noticeable increase in the technical security of the police, increasing the efficiency of work, implementing a number of other organizational measures, improving the legal regulation of activities aimed at countering and preventing domestic violence, which determine the competence and place of preventive units as part of the National Police of Ukraine.

When considering the allocation of office space for a police station, the possibility of placing juvenile prevention inspectors, district police officers, community police officers, their assistants, police response departments in it for joint work and providing them with appropriate conditions for performing their official tasks should be taken into account.

The official activity of these structural divisions is organized in accordance with the requirements of the current legislation of Ukraine and departmental regulatory legal acts that regulate the activities of police officers, assign them to police stations and service areas of response units within the amalgamated territorial community.

Authorized units of the National Police of Ukraine exercise their powers in the field of preventing and countering domestic violence, taking into account international standards for the response of law enforcement agencies to cases of domestic violence and risk assessment. Police officers may enter a person's home without a reasoned court decision in urgent cases related to the cessation of an act of domestic violence committed, in case of an immediate danger to the life or health of the injured person.

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Breach of obligations under contracts for the sale of goods and supply of digital content in European Union and Ukrainian law

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Abstract

The content of the research lies in an analysis of the legal prescriptions of the legislation of the European Union and Ukraine, which determine the liability of the parties for breach or improper performance of obligations under contracts for the sale and purchase of goods and supply of digital content. With the help of general and special philosophical methods, the possibility and legal consequences of applying the liability provisions of the relevant articles of the Civil Code of Ukraine, to the contractual relations of purchase and sale of goods and the supply of digital content (violation of the contract of sale by the seller and the lessee, copyright infringement, etc. are discussed.) It is concluded that in order to harmonize the Ukrainian legislation with the legislation of the European Union, the provisions of individual drafts and Directives of the European Parliament and the Council, which regulate the specific sphere of legal relations, were analyzed. Special attention was paid to the implementation of the draft Law on Digital Content and Services and its

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compliance with the basic principles of private law in this area, established on the basis of the values of the European Union.

Keywords: contractual liability; digital content; purchase and sale of digital content; digital content provider; consumer.

Incumplimiento de las obligaciones derivadas de los contratos de compraventa de bienes y suministro de contenidos digitales en la legislación de la Unión Europea y de Ucrania

Resumen

El contenido de la investigación radica en un análisis de las prescripciones legales de la legislación de la Unión Europea y Ucrania, que determinan la responsabilidad de las partes por el incumplimiento o cumplimiento indebido de las obligaciones derivadas de los contratos de compraventa de bienes y suministro de contenido digital. Con la ayuda de métodos filosóficos generales y especiales, se discute la posibilidad y las consecuencias jurídicas de aplicar las disposiciones sobre responsabilidad de los artículos pertinentes del Código Civil de Ucrania, a las relaciones contractuales de compra y venta de bienes y el suministro de contenido digital (violación del contrato de compraventa por parte del vendedor y el arrendatario, violación de los derechos de autor, etc.) Se concluye que, para armonizar la legislación ucraniana con la legislación de la Unión Europea, se analizaron las disposiciones de proyectos individuales y Directivas del Parlamento Europeo y el Consejo, que regulan la esfera específica de las relaciones jurídicas. Se presto especial atención a la implementación del proyecto de Ley de Contenidos y Servicios Digitales y su cumplimiento de los principios básicos del derecho privado en esta materia, establecidos en base a los valores de la Unión Europea.

Palabras clave: responsabilidad contractual; contenido digital; compra y venta de contenidos digitales; proveedor de contenido digital; consumidor.

Introduction

The emergence of the global Internet, new technologies and the latest methods of communication have largely influenced changes in law. The domestic legislator faced an urgent need for both the introduction of legal

norms for the regulation of emerging relations and the adaptation of existing legislative provisions to new realities (Savanets and Stakhira, 2020).

Ukraine's intention to become a member of the European Union (hereinafter – EU) necessitates bringing its legislation into line with the requirements of EU legislation. The relevant obligation is defined in the Association Agreement between Ukraine, on the one hand, and the EU, the European Atomic Energy Community and their member states, on the other hand. Thus, the preamble states that the parties «undertake to ensure the gradual adaptation of Ukrainian legislation to the EU acquis in accordance with the directions specified in this Agreement and to ensure its effective implementation».

One of the directions of cooperation and adaptation of legislation is to ensure the gradual adaptation of Ukrainian legislation to the EU acquis. Therefore, Ukraine has expressed its readiness to implement into national legislation the existing acts of the EU institutions in accordance with the directions defined in the agreement, one of which is the strengthening of economic and trade relations, through the creation of an in-depth and comprehensive free trade zone, including intangible objects, which include digital content.

It should be emphasized that the market of digital content and digital services in Ukraine is not developing as quickly as compared to European countries. One of the defining reasons for the slow development of this sector of the market is the lack of legal regulation of the provision of digital content and (or) digital services to consumers. The presence of the mentioned problems prompted an analysis of the legislation of the European Union and Ukraine in terms of legal regulation of breach of obligations under contracts for the sale of goods and the supply of digital content.

1. Methodology of the study

The basis of the research methodology was: the dialectical method of legal knowledge, the application of which made it possible to single out the contractual construction of the supply of digital content and highlight its features; a comparative-legal method of knowledge, with the help of which the analysis of the provisions of the EU secondary law on contracts for the purchase and sale of goods and the supply of digital content was carried out and their comparison with the relevant norms of the civil legislation of Ukraine, as well as the system-functional method in the interpretation of legal categories, as a result of which deepened and the conceptual and categorical apparatus of civil law regulation of relations of purchase and sale of goods and supply of digital content was clarified.

2. Analysis of recent research

Separate organizational and legal aspects of the regulation of public relations in the sphere of buying and selling goods and supplying digital content have been the subject of research by many scholars of civil contract law. We do not deny that the conducted scientific research has great theoretical and practical significance. At the same time, the modern contractual law of the European Union is undergoing transformations caused by the challenges of the digital revolution, standardization and digitization of private legal relations of a contractual nature, which requires a detailed scientific analysis of the possibilities and legal consequences of applying to contractual relations from the circulation of digital content the general provisions on liability for breach of contractual obligations and special norms of the Civil Code of Ukraine.

In addition, taking into account the desire to harmonize Ukrainian legislation with the legislation of the EU, the research also requires the provisions of the relevant Directives of the European Parliament and the Council, which regulate the contractual relations of the purchase and sale of goods and the supply of digital content, and establish the responsibilities of the parties to the contract.

The purpose of this article is a comprehensive analysis of the regulatory regulation by the European Union and Ukraine of responsibility for breach of obligations arising from contracts for the purchase and sale of goods and the supply of digital content.

3. Results and discussion

3.1. Peculiarities of the legislative regulation of breach of obligations under contracts of sale of goods and supply of digital content in Ukraine

The Civil Code of Ukraine contains a number of provisions establishing general principles of liability for breach of contractual obligations. The legislator defines that a violation of an obligation is its non-fulfillment or fulfillment in violation of the conditions determined by the content of the obligation (improper fulfillment) (Article 610 of the Civil Code of Ukraine) (Civil Code Of Ukraine, 2003).

The doctrine has repeatedly emphasized that improper performance involves an obligation that is fulfilled, but with existing violations of certain terms of the contract, for example, regarding the quality of the transferred goods, their quantity, the deadline for the fulfillment of the obligation, volume, etc.

Instead, it is customary to consider non-performance as the inaction of the debtor. It is quite logical that such a differentiation gives rise to a number of practical problems. In particular, in the case of the application of the provisions of the law regulating liability for non-fulfillment of an obligation, reasonable doubts arise regarding the ability of the creditor to simultaneously demand both the fulfillment of the obligation in kind and compensation for damages (in case of improper performance of the contract).

Considering the fact that the market of digital goods and services, which includes digital content, is rapidly displacing the market of tangible goods that have an identical purpose (for example, e-books, watching videos in online format, as well as in streaming format, etc. instead of the usual paper books, videos and music stored on material media CDs, DVDs), calls for a scientific analysis of the responsibility of the parties for breach of obligations in contracts for the supply of digital content.

First of all, we note that the Central Committee of Ukraine does not define the concept of digital content and does not regulate the legal relationship of its circulation. However, the mixed legal nature of digital content, as well as the nature of the relationships that arise in the process of its circulation, makes it possible to apply the most similar contractual constructions on the basis of legal analogy (Kalaur and Stakhira, 2019).

Liability on the basis of the general provisions of Chapter 51 of the Civil Code of Ukraine is based on the restoration of the equality of the parties in binding legal relations by granting one of the parties the right to: terminate the obligation due to unilateral refusal of the obligation, if this is established by a contract or law, or termination of the contract ; changing the terms of the obligation; penalty payment; compensation for damages and moral damage (Civil Code Of Ukraine, 2003).

At the same time, the application of such responsibility is impossible without the existence of the obligation itself, that is, a legal relationship in which one party (the debtor) is obliged to perform a certain action for the benefit of the other party (the creditor) (transfer property, perform work, provide a service, pay money, etc.) or refrain from committing a certain action (negative obligation), and the creditor has the right to demand from the debtor the fulfillment of his obligation. At the same time, the application of the general rule on the right to terminate the obligation by unilateral refusal may be limited, provided that the digital content is provided to the user free of charge, that is, the debtor in this legal relationship is not obliged to take any actions in favor of the creditor, and therefore, does not enjoy the right to terminate the obligation due to unilateral refusal.

Particular attention needs to be paid to clarifying the responsibility of the parties under the contract for the supply of digital content, applying

by analogy the contractual structure of purchase and sale. In particular, it seems interesting to study the possibility of applying the provisions of Art. 673 of the Civil Code of Ukraine regarding the quality of goods to a special object of civil legal relations - digital content. The obligation of the seller, established in the legislation, is to transfer to the buyer the goods of proper quality, that is, their suitability to achieve the corresponding purpose (Civil Code Of Ukraine, 2003).

In case of violation of quality obligations, the buyer has the right, regardless of the possibility of using the product for its intended purpose, to demand from the seller, at his choice: a proportional price reduction; free elimination of product defects within a reasonable period of time; reimbursement of expenses for the elimination of product defects. In the event that the digital content was purchased according to a sample or description (for example, the buyer was previously provided with a demo version of software or an online game), the application of part 3 of Art. 673 of the Civil Code of Ukraine, which establishes requirements for compliance of the quality of the goods with the previously provided sample or description, will provide an additional opportunity to protect the expected expectations of the buyer.

Consumer contracts require additional analysis regarding liability for breach of contractual obligation to supply digital content. Applying the provisions of the Law of Ukraine «On the Protection of Consumer Rights» to contracts for the supply of digital content, in the event that a deficiency in the digital content is discovered by the consumer, in accordance with part 1 of Art. 8, the right to demand: 1) a proportional price reduction is guaranteed; 2) free of charge elimination of product defects within a reasonable period of time; 3) reimbursement of expenses for elimination of product defects (Consumer Rights Protection, Law Of Ukraine, 1991).

The specified norm gives the consumer the right to terminate the contract and the right to demand the replacement of the product in the event of a significant defect only if the seller (manufacturer) of the product is at fault. In this context, the question of the possibility of protecting one's own rights by the consumer in the event of the existence of a significant defect without the fault of the manufacturer (seller) arises. There is no doubt that the issue of defective goods is a type of improper performance of an obligation.

However, the legal consequences of the transfer of defective goods are based on other grounds than those arising from general principles of liability. First of all, the reason is the defect of the product, not the damage caused. In the event of the existence of a defect, the structure of responsibility acquires the character of the responsibility of the seller regardless of fault, as well as his awareness (knowledge), and therefore this responsibility is based on the principle of «risk». The above gives reason to understand such responsibility as a means of protecting buyers (Savanets, 2017).

Taking into account the specifics of digital content and taking into account the fact that, although it is not a thing (in the interpretation of Article 179 of the Civil Code of Ukraine), as a subject exclusively of the material world, it nevertheless has a combined legal nature, the lack of legislative consolidation of the concept of digital content makes it possible to apply by analogy the provisions of Chapter 58 of the Civil Code of Ukraine on digital content hire (lease) contracts.

As evidenced by the analysis of the content of the Civil Code of Ukraine, the construction of the lessor's responsibility is similar in construction to the seller's responsibility in sales contracts, the subject of which is digital content. Yes, the lessor is responsible for the timely transfer of digital content to the lessee (immediately or within the period specified in the contract). In addition, the legislator especially protects the lessee's rights in case of inconsistency in the quality of the digital content, both as stated in the contract and as guaranteed by the lessor to the lessee during the entire period of use of the digital content.

Such a quality guarantee and liability provided for non-compliance with warranty obligations regarding the quality of digital content is the main way to protect the tenant in case of destruction or damage to his property. In particular, the lessor is responsible for the destruction, damage, distribution on the network without the lessee's consent of his personal files stored on the lessor's server. At the same time, in Art. 768 of the Civil Code of Ukraine defines the right of the tenant to demand from the landlord: 1) replacement of digital content, if possible; 2) a corresponding reduction in the fee for using the content; 3) free of charge elimination of defects in digital content or reimbursement of expenses for their elimination; 4) termination of the contract and compensation for damages caused to him (Civil Code Of Ukraine, 2003).

At the same time, for the use of digital content under the employment contract, it is worth paying attention to the provisions of clause 3 of Art. 767 of the Civil Code of Ukraine, which obliges the lessee to check the condition of the thing (Civil Code Of Ukraine, 2003). At first glance, such a rule should protect the rights of the lessor and the lessee, but given the mixed legal nature of digital content rental contracts, we consider the possibility of conducting such an inspection «in the presence of the lessor» burdensome for the lessee and does not contribute to ensuring the equality of the parties in civil legal relations.

Also, in view of the spread of copyright on digital content, the author may be held liable for the non-compliance of digital content provided for by the Law of Ukraine «On Copyright and Related Rights», but only in the case of concluding an author's contract.

It is certain that at the current stage of the development of the market of digital goods and services there is an urgent need for effective unified regulation of relations related to the circulation of digital content. In the national doctrine, an opinion was expressed regarding taking as a basis the draft Directive of the European Parliament and the Council on certain aspects relating to contracts for the supply of digital content dated December 9, 2015 No. 2015/0287 (Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, 2015), which established the maximum form of harmonization, in particular with regard to provisions relating to liability for non-fulfillment or improper fulfillment of the service provider's obligations.

According to Art. 10 of the draft of this Directive, the provider of digital content services is responsible for: violation of the obligation to supply goods and services that are digital content; any inconsistency of the digital content with the terms of the contract existing at the time the consumer receives such content; in case, according to the terms of the contract, digital content must be provided to the consumer during a certain period - for each non-compliance of the digital content with the terms of the contract during the entire period of its consumption. Limitation of the liability of the supplier of digital content under the contract takes place only at the stage of applying the appropriate means of legal protection of the consumer and is established on the basis of the proportionality of the degree of responsibility with the offense committed (Proposal for a Directive of the European Parliament and the Council on certain aspects concerning contracts for the supply of digital content 2015/0287, 2015).

At the same time, the final adoption of Directive 2019/770 and Directive 2019/771 (Directive (EU) 2019/770 Of The European Parliament And Of The Council, 2019; Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019) means that the EU member states cannot define either a stricter or a softer form of liability, but only undertake to introduce into their legislation norms that are identical to the provisions of the aforementioned Directives on the liability of the service provider, according to which the circulation of digital content is carried out (Kalaur and Stakhira, 2019).

3.2. Problematic issues of the implementation of the European Union Directives aimed at regulating the circulation of digital content and liability for breach of contractual obligations

It is worth noting that the legislation of the EU member states did not immediately adopt the position of the need to develop a separate regulatory regulation of digital content circulation relations. In order to implement into national legislation the provisions of Directive 2011/83/EU of the

European Parliament and of the Council on consumer rights dated October 25, 2011 (Directive 2011/83/Eu Of The European Parliament And Of The Council, 2011), a number of draft laws were developed.

Many scholars pointed out the impossibility of appropriate application of the sales provisions to the legal relationship of circulation of digital content in the case when the Civil Code itself does not contain its definition. It was also pointed out the ineffectiveness of enshrining the contractual construction of the supply of digital content exclusively in the legislation on consumer rights, which will significantly narrow the application of legal norms exclusively to the regulation of consumer relations in the field of digital content circulation (Targosz and Wyrwiński, 2015). We share this point of view, since the differences between tangible goods, energy and other resources and digital content are so significant that joint legal regulation of the sale of goods and the supply of digital content will be ineffective.

A number of doubts and comments arose when clarifying the need to apply regulatory provisions in the field of purchase and sale of goods to the legal relationship of the supply of digital content (Schmidt-Kessel, 2012; Nowacka, 2017; Wendehorst, 2012, p. 44).

Ambiguity in the positions of both scientists and the European Commission regarding the application of common European regulation of sales contracts contributed to the development of a new approach to the regulation of contractual relations in this area, which ended with the adoption of Directive 2019/771 of the European Parliament and of the Council on some aspects of sales contracts of goods dated May 20, 2019, which determined the extension of legal regulation of purchase and sale to legal relations, the subject of which are goods with digital elements (Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019).

Taking into account the above, we consider it necessary to apply the approach of separate regulatory regulation of the purchase and sale of goods and the supply of digital content in the development of legal regulation of the circulation of digital content. It is expedient to introduce into domestic legislation a separate contractual structure for the supply of digital content, and the extension of the norms of Chapter 54 of the Civil Code of Ukraine to the legal relations of the circulation of digital content is justified in the case of concluding a contract, the subject of which will be goods with digital elements, the separation of which is not possible without such goods losing their properties (Savanets and Stakhira, 2020).

It is important to establish the possibility of applying the provisions of Directive 2019/770 and Directive 2019/771 to legal relationships in which the proper use of the purchased product is prevented by the lack of a digital service provided by a third party, and not by the seller of the

product (Directive (EU) 2019/770 Of The European Parliament And Of The Council, 2019; Directive (Eu) 2019/771 Of The European Parliament And Of The Council, 2019). It is also problematic to define the concept of a shortage of goods, taking into account the characteristics of goods with digital content and artificial intelligence, which require regular updates.

The question of bringing the seller to justice in the event of a lack of software that supports the functioning of goods with digital elements purchased by the consumer (for example, fitness trackers, connected cars with a built-in navigation system), and the proper quality of the main material object is important. In such cases, clarification requires the possibility of covering the lack of digital service (software) that supports the functionality of the smart device with the concept of product non-conformity (Kalamees and Sein, 2019).

This issue is partially resolved in Part 3 of Art. 3 of Directive 2019/771, which applies to goods with digital elements, that is, any tangible movable things that include digital content (digital service) or are related to it (it) in such a way that their absence affects the functionality of the product (point «b» part 5 of article 2 of Directive 2019/771) (Directive (EU) 2019/771 Of The European Parliament And Of The Council, 2019).

However, the most difficult of these challenges relate to the purchase of goods with ancillary digital services (eg, smart TVs with Netflix and Youtube apps, smart cars with app-controlled digital navigation systems). The consumer concludes with the seller a contract for the sale of material goods and an additional license contract with the provider of digital content for the use of digital services. This raises the issue of the consumer's right to demand termination of the sales contract or a reduction in the price of a new smart TV in case of problems with Netflix. A similar situation occurs with the improper operation of smartphone programs, the navigation system of a smart car (Sein and Karin, 2020).

In the case of goods with digital elements, it is quite difficult to determine the cause of their non-conformity and establish the moment of occurrence, which is of great importance when the risk of product non-conformity passes. An interesting situation is the impossibility of synchronizing a fitness tracker with a corresponding application or a smart car with navigation maps due to the lack of compatibility of pre-installed software and its update if the application has completely stopped working (Kalamees and Sein, 2019).

The seller, as a rule, is not obliged under the sales contract to provide the consumer with a digital service that supports the functioning of the product, therefore the doctrine proposes to establish at the legal level the warranty obligation of the seller to ensure the provision of relevant services to the consumer even after the transfer of risk to the buyer or conclude an

additional contract for the provision of services between the seller and the buyer (consumer) to the sales contract. We share the point of view of some scientists that in such cases the seller will be liable in case of incompatibility of the product with digital elements with the application, if he is also the manufacturer of this program.

Directive 2019/771 does not contain rules regulating contractual relations involving the assistant (intelligent assistant) of the buyer, for example, Amazon Alexa, Google Assistant or Apple Siri (Busch, 2018). We share the point of view of J. M. Carvalho (Carvalho, 2019) that such a gap will complicate the modern development of contractual relations, because the actions of the buyer's assistant (intelligent assistant) by mutual consent of the parties should be considered as obligations under the sales contract.

Also, one of the problematic issues of both directives is the use of a large number of evaluative concepts (Vanherpe, 2020), such as «normal», «reasonable», «long-lasting», «serious», «functional», «informed». Their interpretation in practice can be controversial and will lead to a significant increase in the number of decisions of the EU Court regarding the observance of justice. This can directly affect the consumer's decision to enter into a contract.

The purpose of the draft Law on Digital Content and Digital Services dated January 31, 2022 No. 6576 (Draft Law No. 6576, 2022) is the objectively determined need to model the legal regulation of civil-law relations between the performer and the consumer regarding the provision of digital content on the basis of a contract and (or) a digital service, as well as the legislative establishment of an effective legal instrument for the protection of the rights of consumers who are provided with digital content and (or) a digital service (Explanatory note to the draft Law No. 6576, 2022).

The draft law defines the sphere of civil legal relations to which its provisions apply, distinguishes subjective and objective criteria for compliance of digital content and (or) digital service with the terms of the concluded contract, establishes the legal consequences of failure to provide digital content and (or) digital service under the contract, and as well as non-compliance of the provided digital content and (or) digital service with the requirements stipulated by this Law, the grounds and legal consequences of the refusal of the contract under which the digital content and (or) digital service is provided are determined (Explanatory note to the draft Law No. 6576, 2022).

As evidenced by the analysis of the said draft law, there is a certain inconsistency in it with other normative legal acts, inaccuracy in the wording of certain terms. In particular, in Art. 3 of the project defines relations that are not covered by this Law. At the same time, the Law of Ukraine «On the

Peculiarities of Providing Public (Electronic Public) Services» defines the principles of providing electronic public services, public services, complex electronic public services, and the automatic mode of providing electronic public services.

In addition, Art. 2 of the said draft offers a definition of terms, in particular the term «digital content». It is worth noting that this term is already contained in the Law of Ukraine «On Payment Services» (On Payment Services. Law Of Ukraine, 2023). The sphere of regulation of relations defined by this law is precisely digital services and digital content, therefore, the developers are invited to provide definitions for «digital content» and «digital services» with further alignment with other regulatory legal acts operating with the specified concepts. Also, in the provisions of Art. 4 of this project, in contrast to the provisions of Art. 6 of Directive 2019/770, there is no reference to the article on the rights of third parties.

In the conclusion of the Committee on Digital Transformation of the Verkhovna Rada of Ukraine, it is noted that in order to distinguish such concepts as digital content and digital service, to ensure the operation of these concepts in regulatory and legal acts, to avoid collisions and the lack of settlement of discrepancies between electronic and digital forms, as well as to establish such elements as objects of civil rights, we recommend that the specified law define what exactly is the «digital form» of this or that object (Conclusion of the Committee on Digital Transformation of the Verkhovna Rada of Ukraine to the draft Law on Digital Content and Digital Services, 2022).

The legislative initiative, in the event of final approval, will regulate such legal relationships in which the performer on the basis of the contract provides or undertakes to provide digital content and (or) a digital service to the consumer, and the consumer provides or undertakes to provide his personal data, except when their transfer is necessary exclusively for the provision of digital content and (or) a digital service, without the intention of their further use to achieve any other goals; relations in which the performer on the basis of the contract provides or undertakes to provide digital content and (or) a digital service developed in accordance with the consumer's specification; relations in which the performer, on the basis of the contract, provides or undertakes to provide digital content on a tangible medium, which is intended exclusively for the storage of such digital content.

In general, we can conclude that Draft Law No. 6576 in its purpose does not contradict Ukraine's international legal obligations in the field of European integration, but needs to be revised in order to bring it into line with Directive 2019/770.

Conclusions

The contract for the supply of goods and digital content is a new type of contractual obligation that needs to be enshrined in current civil legislation. In order to harmonize Ukrainian legislation with the legal requirements of the European Union, it is expedient to bring the draft Law on Digital Content and Digital Services into compliance, as well as to develop and enshrine in the Civil Code of Ukraine provisions that will regulate the legal relationship of the purchase and sale of goods and the supply of digital content, in particular, determine liability for violation of relevant obligations in this area.

One of the key novelties of European contract law was the provisions of Directive 2019/770 and 2019/771, which establish the concept of product conformity, digital content, digital service, subjective and objective criteria for determining product conformity and have a consolidated impact on consumer protection and trade in the EU in general.

Incorporation of these Directives into national legislation will contribute to uniform legal regulation of contractual relations in the field of purchase and sale of goods, related in particular to digital content, and will facilitate cross-border transactions, increasing their number. Despite the fact that the Court of Justice of the EU is competent in solving issues of prosecution for breach of obligations under contracts for the sale of goods and the supply of digital content, more specific instructions from the EU legislator could increase legal certainty in the process of implementing these norms.

Chapter 51 of the Civil Code of Ukraine transfers the responsibility of the parties arising on the basis, and, among other things, gives the right to unilateral waiver of the obligation, can be applied only in the case when the parties concluded a contract for the supply of digital content. The difficulty of fully applying the provisions governing the purchase and sale to the legal relationship of the circulation of digital content is associated with: the transfer of the thing to the ownership of the buyer, which is characteristic of the purchase and sale, which practically does not apply in the case of digital content; specific requirements for the quality of digital content, which in the understanding of the doctrine can be ambiguously interpreted and applied only to physical media on which digital content is placed; as a way to protect the rights of the consumer of digital content in the context of his obligation to prove the fault of the supplier in case of detection of defects or significant defects of digital content during the warranty period.

Liability for contracts for the supply of digital content in Ukraine is not unified, which creates ambiguity in the choice of methods of protection of violated rights. The implementation of the provisions of Directives 2019/770 and 2019/771 into the legislation of Ukraine should be a significant step towards ensuring the protection of the rights of Ukrainian consumers and

providers of digital content services, as well as confirmation of Ukraine's fulfillment of the obligations assumed in the Association Agreement with the EU.

To this end, the project of Law No. 6576, which by its purpose does not contradict Ukraine's international legal obligations in the field of European integration, needs to be finalized as soon as possible in order to bring it into line with EU requirements and adopt it as a basis at the national level for regulating contractual relations of purchase and sale of goods and supply of digital content.

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Russian policy of discrimination and assimilation regarding ethnic Ukrainians in Crimea after 2014

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Abstract

The article analyzes the Russian policy of discrimination and assimilation of the Ukrainian community in occupied Crimea. Having analyzed a large amount of information and using the methods and principles of historical, sociological and political sciences, the authors came to the conclusion that the actions of the Russian Federation towards the Ukrainians of Crimea are discriminatory in nature, because they consist in the elimination of Ukrainian national identity. It has been established that in Crimea there have been registered numerous violations of Ukrainians' rights to freedom of conscience, Ukrainian public and political organizations, educational system for Ukrainian-speaking inhabitants of Crimea, media infrastructure, Ukrainian centers and monuments have been illegally liquidated. In addition, culture and religious institutions are being destroyed. In the conclusions, it is stated that the state of the Ukrainian community in Crimea is deteriorating. The authors propose as one of the important components of the state policy of the future de-occupation and reintegration of Crimea, the protection of the Ukrainian identity of the inhabitants of Crimea and full support of the Crimean Ukrainian.

Keywords: Crimea; Ukrainians; rights; discrimination; assimilation.

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Política rusa de discriminación y asimilación hacia los ucranianos étnicos en Crimea después de 2014

Resumen

El artículo analiza la política rusa de discriminación y asimilación de la comunidad ucraniana en la Crimea ocupada. Habiendo analizado una gran cantidad de información y utilizando los métodos y principios de las ciencias históricas, sociológicas y políticas, los autores llegaron a la conclusión de que las acciones de la Federación Rusa hacia los ucranianos de Crimea son de naturaleza discriminatoria, porque consisten en la eliminación de identidad nacional de Ucrania. Se ha establecido que en Crimea se han registrado numerosas violaciones de los derechos de los ucranianos a la libertad de conciencia, se han liquidado ilegalmente organizaciones públicas y políticas ucranianas, el sistema educativo para los habitantes de Crimea de habla ucraniana, la infraestructura de los medios de comunicación, los centros y los monumentos de Ucrania. Además, la cultura y las instituciones religiosas están siendo destruidas. En las conclusiones, se afirma que el Estado de la comunidad ucraniana en Crimea se está deteriorando. Los autores proponen como uno de los componentes importantes de la política estatal de la futura desocupación y reintegración de Crimea, la protección de la identidad ucraniana de los habitantes de Crimea y el apoyo total a la ucraniana de Crimea.

Palabras clave: Crimea; ucranianos; derechos; discriminación; asimilación.

Introduction

In February 2014, using its regular army and special military formations, the Russian Federation illegally occupied the Autonomous Republic of Crimea and the city of Sevastopol. This has violated the existing system of environmental, energy, and economic security in the Azov-Black Sea region, which threatens general world security.

Since the occupation, the Ukrainian ethnic community in Crimea has found itself in a difficult, even critical situation, having turned into one of the discriminated communities of the peninsula, experiencing systematic and brutal oppression. Today, it is dangerous to be a Ukrainian in Crimea. Russia pursues a policy of suppressing everything Ukrainian, including the Ukrainian language, culture, art, religion, and education. A system of oppression and persecution has been created to fight against the residents of Crimea who have not supported the occupation. Ukrainians in Crimea, who are under Russian occupation, are almost deprived of effective international protection mechanisms.

Currently, there is a real threat of assimilation of the large, second largest Ukrainian community in Crimea, and the destruction of not only the civil Ukrainian identity in Crimea, but also the ethnic one. The peculiarity of the current situation is also that the aggression is taking place against Ukraine, which, under pressure from Western countries, voluntarily handed over the third-largest arsenal of nuclear weapons to the aggressor state. Therefore, the situation of Crimean Ukrainians, Russian manipulation of the size of the Ukrainian community in Crimea, violation of a number of their rights is very acute, urgent and requires a thorough scientific analysis.

1. Materials and methods

Our research is prepared using a variety of both special and interdisciplinary scientific methods, principles and approaches. In particular, principles of our research are the principles of objectivity, systematicity, social approach, methods of analysis, synthesis, systematization, observation, logical and historical. The use of such methodological tools has allowed us to compare different views on certain aspects of the discrimination and assimilation policy of the Russian Federation in relation to the Ukrainian community in Crimea after its annexation of the peninsula in 2014, to study and analyze carefully the stated issue in all its integrity and multidimensional nature.

2. Literature Review

There are no fundamental scientific works on this issue since we are analyzing the situation of the Ukrainian community of Crimea in 2014–2022, which has become one of the most discriminatory ethnic communities in the region under the temporary occupation of Crimea by Russia. We can state that there are general works on the illegal annexation of Crimea, in particular on the course of the occupation itself, its international legal aspects and consequences. This is stated in the studies of Ukrainian scientists, such as: Pavlo Hai-Nyzhnyk, Myroslav Mamchak, Serhii Hromenko, Oleksandr Zadorozhnyi, Taras Berezovets, Nataliia Vlashchenko, and others (Hay-Nizhnyk *et al.*, 2015; Gromenko, 2017; Zadorozhnyi, 2015), as well as in the foreign works of Robin Geiß (2015), Anton Bebler (2014), Austin Charron (2016), Agnia Grigas (2016), Paul D'Anieri (2019), Zoran Oklopcic (2015), Jorge Emilio Núñez (2017), Juan Francisco Escudero Espinosa (2018), Thomas Grant (2015), Christian Marxsen (2014), Amandine Catala (2015), Jure Vidmar (2015) and others.

The authors consider the issue of the status of Crimea after 1991 and the legality of its change in 2014, legal consequences and various options for the future resolution of the conflict. They have come to the conclusion

that the annexation of Crimea was illegal with violated basic principles of international law enshrined in the UN Charter, the Declaration on the Principles of International Law of 1970, the Helsinki Final Act of the OSCE of 1975, which the modern world order is based on (Zadorozhnyi, 2015).

Russia quickly seized the territory of the neighboring state. This was facilitated by a number of very favorable circumstances, including political, historical, geographical, linguistic and military advantages in the region, which have only partial counterparts in other former Soviet republics. The limited geography of the peninsula, the proximity of Crimea to Russia and its existence as a separate autonomous republic within Ukraine gave Russia the opportunity to influence the Crimean socio-political processes. Russia's Black Sea Fleet was based in Sevastopol close to internationally designated sea routes used for covert operation (Kofman *et al*., 2014).

In recent years, several works by well-known journalists Nataliia Humeniuk, Anna Andriievska, Olena Khalimon, Nataliia Vlashchenko have appeared, which contain memories and testimonies of Crimean Ukrainians of various professions (military, public activists, students, pensioners, entrepreneurs, human rights defenders), social and ethnic origin, political views, whose lives have changed dramatically after 2014. The authors try to show the process of changing their material, economic, social life and the transformation of memory, highlight the human rights activities of pro-Ukrainian activists who remained in their homeland despite the repression of the collaborating administration and Russian security forces (Humeniuk, 2020; Book of testimonies: Anatomy of the Russian annexation of Crimea, 2019).

Serhii Hromenko in his work "KrymNash" (Eng.: Crimea is ours) (2017) gives answers to important questions: Has Crimea always belonged to Russia, and is Sevastopol the "city of Russian glory"? Does the peninsula really have nothing to do with Ukraine and has become part of Ukraine illegally? And what were the events of February – March 2014 – the occupation of Crimea or the "restoration of historical justice"? (Gromenko, 2017).

Kostiantyn Palshkov's article analyzes the dynamics of public opinion regarding the de-occupation of Crimea (Palshkov, 2023). Pavlo Hai-Nyzhnyk, Leonid Chuprii and Oleh Batrymenko reveal the formation factors of the Crimean regional pro-Russian identity and outline the ways of the Crimea reintegration in the context of the national security policy of Ukraine (Hay-Nizhnyk *et al.*, 2015).

One of the first scientific studies that directly analyzes the state of the Ukrainian community in Crimea in the occupied Crimea is the analytical report by Andrii Ivanets. The author therein deals with certain issues of violated rights of Ukrainians to freedom of conscience and speech, to access

to education in the Ukrainian language, the destruction of Ukrainian cultural monuments and centers in Crimea, considers the Russian colonization policy in Crimea as an instrument of assimilation pressure (Ivanets, 2021).

Publications on the pages of the newspaper «Krymska svitlytsia» and Internet resources «Voice of Crimea», «Radio Liberty», «Crim. Realii», «Ukrinform», «Ukrainian Pravda», etc.

3. Statement of the basic material

The most recent Russian-Ukrainian war (2014–2023) has caused fundamental changes in bilateral relations between the countries: the breach of a number of bilateral and multilateral interstate agreements and treaties has led to the liquidation of the interstate (Ukrainian-Russian) contractual legal framework and institutional mechanisms of interstate relations; termination of contacts at the highest level and diplomatic relations in 2022; there was an unprecedented curtailment of economic cooperation; significant estrangement between the Ukrainian and Russian peoples has appeared (Prospects of Ukrainian-Russian Relations. (Conceptual Approaches and Practical Steps), 2015).

According to the results of sociological research in 2015, the majority of Ukrainians considered Crimea to be the territory of Ukraine. In particular, according to the Ilko Kucheriv Democratic Initiatives Foundation, 69% of citizens recognized Crimea as a Ukrainian territory annexed by the Russian Federation, and only 14% accepted it as a territory of the Russian Federation. At the same time, according to 8% of them, the inclusion of Crimea into Russia was legal, and the remaining 6% claim that this process was illegal. For 10% of the Ukrainian population, Crimea did not belong to Russia or Ukraine, and another 8% did not have their own opinion on the Crimean status (Hay-Nizhnyk *et al.*, 2015: 334; International center for prospective studies, 2015: n/p).

When the Ukrainian independence was restored in 1991, about 25% of Ukrainians lived in Crimea, who were dispersed in small groups throughout its territory. In addition, they were not sufficiently ideological or organized. Thus, the Ukrainian community on the peninsula found itself in a difficult situation. Representing the titular ethnic group of the Ukrainian state, they were a regional minority (Ivanets, 2021).

3.1. Discrimination by the Russian authorities against Crimean Ukrainians, their persecution and expulsion from the peninsula

Immediately after the annexation of Crimea, information began to arrive about the deteriorated situation of Ukrainians here. Today, the

discriminatory policies of the occupiers include the suppression of freedom of speech, protests and rallies, repression of religious communities, persecution and displacement of activists, illegal prosecutions of Ukrainians, the destruction of Ukrainian-language education and the church, and banning the activities of various Ukrainian organizations, terrible conditions of detention in prisons and pre-trial detention centers etc. The occupation authority resorted to unfounded searches and arrests, fabrication of criminal and administrative cases under "terrorist", "extremist" articles, as well as articles about illegal armed formations, etc.

According to Dmytro Lubinets, the Verkhovna Rada Commissioner for Human Rights, 180 citizens of Ukraine are in prison as part of politically motivated or religious criminal prosecution as of February 2023 (40 people were arrested and are in pre-trial detention centers, another 122 are in prisons, 18 remain without status) (Ukrainian Helsinki Union for Human Rights, 2023: n/p). As Olha Skrypnyk, the head of the board of the Crimean Human Rights Group, notes, these people did not commit crimes, the cases against them are absurd. Witnesses and experts are mostly FSS employees. Russian judges do not accept independent expertise (Crimean lighthouse, 2023: n/p).

For instance, Oleh Sentsov and Oleksandr Kolchenko, the political prisoners, the so-called "Crimean terrorists", were sentenced to 20 and 10 years in a high-security prison, respectively, for creating a so-called "terrorist organization and preparing terrorist attacks in Simferopol". Hennadii Afanasiev, Yurii Soloshenko, and Oleksii Chyrnii also received different terms of imprisonment. Oleksandr Kostenko was charged with causing bodily harm to an employee of "Berkut" during the events on the Maidan in 2014.

On similar charges, 22-year-old Andrii Kolomiiets was convicted in Crimea and received 6 years in a high-security prison for allegedly throwing "Molotov cocktails" at "Berkut officers" during the Euromaidan in Kyiv. He was also found guilty of a drug possession charge, which added another 4 years to his prison term. Valentyn Vyhovskyi and Viktor Shchur were detained in 2015. They were accused of spying for Ukraine and sentenced to 11 and 12 years in prison, respectively. For so-called "high treason" and "espionage", Russian courts convicted Leonid Parkhomenko, Dmytro Dolhopolov, Kostiantyn Davydenko, Kostiantyn Shyrinh, Anna Sukhonosova, Ivan Yatskiv and Halyna Dovhopola (Dorosh, 2016: n/p).

In August 2016, the FSS of Russia arrested Yevhen Panov and Andrii Zakhtei, who were allegedly preparing terrorist attacks on the peninsula's tourist and social infrastructure facilities. In November 2016, Russian security forces detained in Sevastopol military experts, employees of the Ukrainian analytical center "Nomos", researchers of national security and Euro-Atlantic integration in the Black Sea-Caspian basin – Dmytro

Shtyblikov and Oleksii Bessarabov, as well as their close friend Volodymyr Dudka.

All three were accused of "preparing sabotage in Crimea on the order of Ukrainian intelligence". V. Dudka and O. Bessarabov were sentenced to 14 years in prison and fined 300 and 350 thousand rubles, respectively (Radio Freedom, 2021: n/p). Also, the Sudak City Court found Hennadii Limeshko guilty and deprived him of freedom for 8 years for "illegal acquisition, storage and carrying of explosive substances" (Radio Freedom, 2018: n/p).

In total, about 20 Ukrainian citizens have been convicted of "espionage" and "sabotage" in Crimea since 2014. Their cases, as a rule, are fabricated, they lack evidence and justification, there have been recorded illegal methods of investigation and the use of torture to get confessions, violation of the presumption of innocence. Crimean Ukrainians are beaten during detention and then in pre-trial detention centers being compelled to confess. Prison conditions are often unbearable, involve torture and forced psychiatric treatment. It is almost impossible to deliver medicines or call a doctor for an examination in detention centers and prisons. As a result, Ukrainian political prisoners do not receive enough vitamins, live in poor lighting and are rarely in the fresh air, as a result of which their health declines (Esmanova and Sudakova, 2018: n/p).

As Gennady Afanasyev, a political prisoner, recalled after his release at a press conference at Ukrinform in Kyiv on 23 June 2016, the Russians promised to take him to the forest, where he would dig his own grave and lie in it if he did not answer the questions. Having nothing to do with the terrorist activities of which he was accused, of course he could not answer them. For this, H. Afanasiev was beaten on the head and stomach, a bag was put on his head and he was strangled. FSS employees forced him to admit he was a terrorist. And when they realized that they could not find out anything, they began to really torture him. In particular, a gas mask was put on his head and the hose was closed.

It was impossible to breathe, and when they saw that Hennadii was already losing his mind, they opened the gas mask, took it off and brought him back to consciousness - gave him water and doused him with water, gave him to smell ammonia. As he recalled, they undressed him, put him on the floor, took a police baton, ran it over his genitals and said that he would be raped (Book of Testimonies: Anatomy of the Russian annexation of Crimea, 2019).

In the same way, the Russian authorities oppressed people for using Ukrainian symbols. For instance, they were detained, interrogated, and fined for displaying blue and yellow flags and ribbons. Most of these persecutions took place in 2015. On 09 March 2015, in Simferopol, Russian policemen detained Leonid Kuzmin, Veldar Shukurdzhiiev, and Oleksandr

Kravchenko as pro-Ukrainian activists, organizers of a rally for Taras Shevchenko's birthday.

The participants of the action (about 50 people) in the Gagarin Park of Simferopol read poems and shouted the slogan "Glory to Ukraine!". They unfurled two Ukrainian flags (one with the inscription "Crimea is Ukraine") and a Crimean Tatar one, for which they were detained (Book of Testimonies: Anatomy of The Russian Annexation Of Crimea, 2019).

The participants of the car rally in honor of the Day of Commemoration of Crimean Tatar Deportation Victims were also detained on 18 May 2015 for using the Ukrainian flag, and on 21 May activists in Armiansk were detained for trying to take a picture in embroidered shirts. On 24 August in Kerch, on Mt. Mitryda in the center of the city, one boy was arrested for 15 days, the others – a boy and a girl – were fined for trying to take a picture with the Ukrainian flag in honor of Ukrainian Independence Day (Book of Testimonies: Anatomy of The Russian Annexation of Crimea, 2019).

Relatives of political prisoners and human rights defenders in Crimea often face serious problems: surveillance, searches, criminal prosecutions, psychological pressure, threats, etc. from the Russian special services. All this is done to intimidate people, force them to stop fighting for their relatives and not to disclose the facts of these persecutions.

The Russian authorities in Crimea are "at war" not only with symbols, but also with Ukrainian names. After the annexation, the Crimean Academic Ukrainian Musical Theater in the center of Simferopol was renamed to the "State Academic Musical Theater of the Republic of Crimea", and the only Ukrainian gymnasium to the "Simferopol Academic Gymnasium". In Sevastopol, as early as 2014, there was dismantled a monument to the Ukrainian Hetman Sahaidachnyi (Book of Testimonies: Anatomy Of The Russian Annexation Of Crimea, 2019). Citizens are fined and arrested for Ukrainian songs and slogans.

After the start of Russia's full-scale invasion into Ukraine, Ukrainians got new reasons for persecution in the annexed Crimea, in particular, mass persecution of anyone who disagrees with the war and discredits the Russian army. According to the latest charge, 261 administrative cases have been opened, in 223 cases of them a decision was made to impose an administrative fine. 421 criminal cases were initiated for evasion of service in the armed forces of Russia (Lubinets, 2023).

3.2. Ban on freedom of speech and independent media in Crimea in occupied Crimea

While preparing the annexation of the peninsula, Russia understood that for its complete subjugation, it was not enough to physically seize

the territory, it was necessary to have the information space. Therefore, the Russian authorities immediately isolated Crimea from the Ukrainian information space and began to displace the Ukrainian language from the local mass media. The so-called "Crimean self-defense" and the Russian military in civilian clothes seized the offices of the Crimean media, among others the "Center for Journalistic Investigations" in Simferopol, used force against journalists, damaged cameras, etc.

The purpose of the show massacres was, firstly, to silence those who tried to call a spade a spade: chronicled the seizure of Crimean strategic objects by the Russian army and explained why all this was a seizure, and not "a defense", as Russian propaganda convinced; and secondly, to intimidate everyone who could replace them.

Among the hundreds of human rights violations that Crimean human rights defenders and journalists recorded in Crimea in February-March 2014, a significant number of them were against journalists and mass media. At the beginning of the occupation, due to pressure and persecution, about a dozen editors who had worked there for many years but refused to cooperate with the occupation authorities, left Crimea (Book of Testimonies: Anatomy of the Russian annexation of Crimea, 2019).

In October 2015, the editors of the BlackSeaNews portal received a message from Roskomnadzor with a warning about blocking access to the resource on the Russian territory, including Crimea, for an interview with Andrii Klymenko as the editor-in-chief of the site "The Black List and the Sea Blockade - Only a Small Fragment strategy for the return of Crimea...", published on 07 July 2014, which allegedly "contains calls for mass riots, extremist activities, participation in public events held in violation of the established order". The Crimean informational Internet resources "Center for Journalistic Investigations" and "Sobytiya Kryma" received the same notices from Roskomnadzor about blocking on the territory of the Russian Federation and occupied Crimea (Voice of Crimea. Information Agency, 2015: n/p).

Today, most Crimean television channels and radio stations do not have any Ukrainian-language broadcasts of the Crimea TRC, which was registered by the occupation regime as an autonomous non-commercial organization "Crimea Television and Radio Company". In general, before the occupation, according to the UN report, more than 3,000 regional and local mass media worked in Crimea.

Today, the distribution of mass media took place according to the principle of "accepted – did not accepted the occupation". According to the latest information, there are about 400 mass media in the Autonomous Republic of Crimea and a little less in Sevastopol. All those who had a principled position, called a spade a spade, occupation was occupation,

sabotage was sabotage, were forced out of Crimea (Ukrinform. August 19, 2021: n/p).

Over the past 8 years, human rights defenders have recorded more than 500 violations of journalists' rights in Crimea. The main mass of them falls on 2014-2015, but even now such facts are not isolated. More than 200 journalists left the territory of the peninsula due to pressure, threats of opening criminal cases, etc. 12 mass media have left Crimea and continue their activities on the mainland of Ukraine (Media Detector, 2021: n/p).

Here are some examples of the journalists' detention over the past year. On 10 March 2023, in the temporarily occupied Crimea, employees of the FSS of the Russian Federation arrested Vladyslav Yesypenko, a freelance worker of Radio Liberty, who the day before took part in a rally for the birthday of Taras Shevchenko. On 12 March, he was charged with part 1 of Art. 223 of the Criminal Code of the Russian Federation - illegal manufacture, processing or repair of firearms and ammunition. By decision of the Kyivskyi district "court" of Simferopol, he was taken into custody for two months, until 11 May. Independent lawyers were not allowed to visit the journalist during detention in the Simferopol pre-trial detention center (Ukrinform. August 19, 2021: n/p).

On 29 April 2022, on the way from Koktebel to Feodosiia, the occupiers detained Iryna Danylovych, a nurse, who also worked as a journalist in several Crimean mass media and covered the problems of the health care system in Crimea and disseminated information about the war in Ukraine. On 28 December 2022, the occupation "court" of Feodosiia sentenced her to 7 years in prison on charges of illegal possession and manufacture of explosives. I. Danylovych did not admit her guilt. According to her father, Bronislav, her state of health remains unsatisfactory, she complains of constant headaches, hearing loss and problems with coordination of movements. Due to the lack of treatment and medical assistance, on 22 March, I. Danylovych announced a dry hunger strike "until the start of treatment or biological death". On 06 April, she ended her hunger strike after being promised that she would be allowed to see a lawyer and receive medical treatment. But the promise was not fulfilled (Media Detector, 2023: n/p.).

Over the past year, the State Duma of the Russian Federation has adopted a number of repressive laws that finally approve strict censorship. Many of them have contradictory wording and a wide range of crime subjects. In fact, anyone can be prosecuted for them. Professional Ukrainian mass media cannot legally work in Crimea. Public activists and bloggers are regularly prosecuted, "terrorist" criminal articles are used, and they are arrested on false charges (Crimean Human Rights Group, 2021).

At least 25 Ukrainian information websites have been illegally blocked in Crimea for several years. Russia purposefully suppresses the voices of professional journalists and bloggers, they are prosecuted for their professional activities in an administrative procedure, using articles on the restriction of freedom of assembly for this purpose, as a result of which Crimeans are deprived of the Ukrainian information field. The detention of bloggers and journalists, the blocking of Ukrainian media, new dictatorial laws, and the ban on entry became the basis for Ukraine's submission of a claim against Russia to the International Criminal Court in the Hague in early 2021 (Crimean Human Rights Group, 2021). But these violations continue. New and new facts of such pressure are being recorded.

On the border with the Kherson region, the occupiers installed a new television and radio tower, as a result of which the number of frequencies on which Ukrainian radio broadcasts can be heard has decreased. In March 2021, the signal of Ukrainian FM radio stations was recorded in 13 out of 19 settlements. In June of this year, Ukrainian broadcasting was available only in 8 settlements from the same list (Muzyka, 2021).

Therefore, freedom of speech is being suppressed in the occupied Crimea, independent mass media are almost non-existent. As a result, Crimean Ukrainians and Crimeans in general do not receive complete and reliable information and become less knowledgeable about various political, economic and social problems in Ukraine and the world. They are convinced that only the official information is true, the rest are the consequences of the "provocative" activity of Ukrainian and American "agents" who do not want to accept the "right of Crimeans to self-determination" (Book of Testimonies: Anatomy of The Russian Annexation of Crimea, 2019).

In this way, the Russian mass media imposes a distorted picture of the world using methods of military propaganda, an important component of which is the dehumanization of Ukraine, its political system and political forces, the cultivation of disrespect for the right of Ukrainians to choose a political system and a vector of integration, intolerance to many manifestations of Ukrainian identity, and sometimes to its complete denial (Ivanets, 2021).

3.3. Liquidation of the Ukrainian language and education on the peninsula

Russia justified its invasion into Ukraine by protecting the Russian-speaking population here. But now we see the opposite result. In particular, even in Russian-speaking regions, the number of Ukrainian-speaking residents is rapidly increasing. Although Ukrainian, along with Russian and Crimean Tatar, is officially the state language in the temporarily occupied Crimea, it is only on paper. There are no conditions for its preservation

and development. In fact, since 2014, the occupation authorities have eliminated the names of settlements with Ukrainian transcription. They did not hang the name in Russian nearby, but demonstratively removed the Ukrainian one.

From the very beginning of the peninsula's occupation, the invaders paid special attention to education. During the years of occupation in Crimea, not only the Ukrainian education system was destroyed, but also its infrastructure. According to the Commissioner for the Protection of the State Language, in 2013, 1,760 children (2.9% of the total) were educated in the Ukrainian language in 3 preschool educational institutions in the Autonomous Republic of Crimea. There was one Ukrainian kindergarten in the city of Sevastopol, where 690 children (4.8%) were educated. However, since 2014, education in the Ukrainian language has not been carried out in Crimean preschools.

At the beginning of the 2013/2014 academic year, 12,694 students (7.2%) studied in the Ukrainian language in secondary education institutions in the Autonomous Republic of Crimea. 7 secondary schools taught in Ukrainian, and another 76 taught in Ukrainian and Russian. A total of 829 classes with the Ukrainian language of studying operated in the Autonomous Republic of Crimea. In the city of Sevastopol, there was one school with the Ukrainian language of instruction, 50 classes with the Ukrainian language of instruction, where 994 (3%) students studied, and 9 schools where teaching was carried out in Ukrainian and Russian. In the 2020/2021 academic year, 218,974 schoolchildren studied in 547 secondary schools in Crimea. Of them, 214 (0.1%) studied in Ukrainian.

162 students studied in the only officially operating school No. 20 with the Ukrainian language of instruction in the city of Feodosiia, where children study up to the 9th grade using the Ukrainian language. However, according to the parents, all subjects are taught here in Russian. Another 52 students' study in three Ukrainian-language classes of the Simferopol Academic Gymnasium, which before the occupation had the name "Ukrainian School-Gymnasium". Thus, there is not a single school in the currently occupied Crimea where all subjects are taught in the Ukrainian language. Classes with the Ukrainian language are also significantly reduced (Miroshnychenko, 2023).

The occupying state manipulates, indicating that thousands of Crimeans study the Ukrainian language "as a subject, in-depth, optional, in extracurricular work" because it is almost impossible to check the study system, especially in extracurricular time.

The fictitiousness of teaching in Ukrainian is also evidenced by the methodical support. Thus, in 2015, the programs "Ukrainian language" and "Ukrainian literature" (mother and foreign) were developed for

preschool and general education organizations, which were approved by the decision of the federal educational and methodological association for general education of the Ministry of Education and Science of the Russian Federation (protocol No. 2/15 dated 20 May 2015). However, they are written in Russian. Regarding the provision of textbooks, only 7 textbooks for primary school on Ukrainian language and literature have been issued. And not a single one was issued for secondary school.

Their content does not withstand any criticism. Also, the occupiers deceived everyone proclaiming the equality of the languages of instruction on the peninsula. After all, teaching in one's native language, according to Russian legislation, is possible only at the level of preschool, primary general and basic general education (Article 14, item 4 of the Law of the Russian Federation "On Education" and Article 11.2 of Law No. 131-ZRK/2015 of 06.06.2015 "On education in the Republic of Crimea"), that is, only in grades 1-9, and in grades 10-11 – teaching is in Russian (Okhredko, 2020).

The displacement of the Ukrainian language from the educational space is connected with the militarization of education since 2014, which is aimed at destroying Ukrainian identity and culture in Crimea and instilling a Russian identity in Crimeans. This happens through the activities of the organizations "Youth Army", "Big Break", "Movement of the Firsts", the formation of cadet classes, holding lessons on "Conversations about different things", military events and shows, even in preschool institutions, visits of Russian servicemen to educational institutions, etc. The militarization of education contributes to the heroization of the Russian army and its history, forming the image of the enemy in the Crimeans from Ukraine and its people (Miroshnychenko, 2023).

In 2014, the Department of History of Ukraine and the Faculty of Ukrainian Philology were liquidated at the V. Vernadsky Taurida National University. A significant part of university lecturers was dismissed. In 2014, the occupiers illegally united the educational institution with several other universities and renamed it into "V.I. Vernadsky Crimean Federal University". Ukrainian language and literature departments were closed in other Crimean universities (Ivanets, 2021: 27).

In 2014, the Ukrainian School-Gymnasium TEC in Simferopol was captured by militants of the Crimean Self-Defense paramilitary formation, and later subordinated to the Russian Ministry of Education. Due to threats of prosecution, Nataliia Rudenko, the principal, had to resign and leave Crimea.

After the occupation in Crimea, not only the language of teaching (Ukrainian to Russian), but also the content of education in general changes. In particular, the teaching of humanitarian disciplines has undergone the most significant transformations. This especially applies to the history of

Ukraine, which was replaced by the history of Russia, and textbooks on Ukrainian history were removed from the educational process.

In the textbook on the history of Russia for the 10th grade, the events of the 20th century are presented in a more or less balanced way, although not entirely correct and biased, presented materials about the Holodomor of 1932–1933, the Molotov-Ribbentrop Pact, the German-Soviet war, and the activities of the OUN-UPA. Contemporary events (the Orange Revolution of 2004, the Revolution of Dignity in 2014, the referendum and the annexation of Crimea, etc.) are interpreted with a high political conjuncture (Samchuk, 2018).

Teachers who did not agree to teach according to the new rules of the occupiers were fired. For instance, Valentyna Potapova, who until 2014 taught at the Crimean Humanities University (Yalta) at the Department of History and Law, was forced to resign and leave Crimea due to her pro-Ukrainian position. She was threatened with criminal proceedings for public non-recognition of Russia's territorial integrity using her official position (Lykhovyd, 2023).

3.4. Russia's liquidation of Ukrainian cultural heritage in Crimea and its disregard for the right of Crimean Ukrainians to freedom of religion

Currently, the Russian authorities also pursue an anti-Ukrainian policy aimed at seizing and destroying the cultural heritage of Ukraine. In a short period of time, it prepared a normative and legal framework that made it possible to legalize the Crimean cultural heritage in the legal field of Russia. On 08 August 2014, the so-called "State Council of the Republic of Crimea" adopted the law "On objects of cultural heritage in the Republic of Crimea", which states that "objects of cultural heritage (monuments of history and culture) in the Republic of Crimea are an integral part of the national wealth and property of the peoples of the Russian Federation" (Voice of Crimea. Culture, 2023: n/p).

The majority of specialized Crimean scientific and museum institutions were also appropriated through re-registration under the legislation of the Russian Federation by the end of 2014. Thus, at the legislative level, conditions were created for the "legal" functioning of institutions and establishments in the field of cultural heritage.

During the so-called "restoration", such historical and cultural monuments of the Crimean Peninsula as the Mithridates Stairs, the Khan's Palace in Bakhchysarai, the Tower of St. Constantine, the Dock Tower and others were damaged and partially destroyed (Voice of Crimea. Culture, 2020: n/p). Evelina Kravchenko, the head of the Inkerman expedition of the Institute of Archeology of the National Academy of Sciences of Ukraine,

cites a vivid example of the criminal attitude of the Russian occupation authorities to the monument, which is included in the UNESCO world heritage list. It is about the situation with landscape transformations in Chersonese. There, on the Roman citadel, where the military authority of the Roman Empire was located, an open-air theater is now built with rows of spectators and a mounted stage with modern, rather heavy equipment, where plays are performed (Voice of Crimea. Culture, 2023: n/p).

In 1991–2014, many different monuments were installed in Crimea. Most of them reflected Soviet and Russian history, but there were also those that were about Ukrainian identity, Ukrainian national memory, the ancient history of Crimea, and other topics. Although it is difficult, the peculiar multidimensional nature of Crimean history and the present, and Crimea as a part of Ukraine, was gradually asserted among the Crimeans.

This process was interrupted by the Russian occupation of Ukrainian autonomy and Sevastopol. Already in 2014, the Russian Federation began to move cultural heritage from the peninsula, especially paintings from the Feodosiia Art Gallery named after Aivazovsky, archaeological objects from the funds of the East Crimean Historical and Cultural Museum-Reserve (Kerch), exhibits of the Yalta Historical and Literary Museum, etc.

This violates, in particular, Article 11 of the Convention on Measures for the Prohibition and Prevention of Illegal Export, Import, and Transfer of Ownership of Cultural Property, dated 14 November 1970, which states that the seizure or transfer of rights to cultural property, which occur as a result of occupation, are illegal. The illegal activities of the occupying state regarding the transportation of Crimean exhibits to its territory for presentation in Russian museums continue up to this day (Voice of Crimea. Culture, 2023: n/p).

Instead, in recent years, Russia has illegally erected more than 130 architectural monuments in Crimea and Sevastopol in the context of promoting the ideological narratives of the so-called “Russian world”, a large part of which promotes Russian imperial ideology and justifies aggression against Ukraine. At the same time, the occupation authorities dismantled the monument to Hetman of Ukraine Petro Sahaidachnyi and the commemorative sign in honor of the 10th anniversary of the Ukrainian Navy in Sevastopol, the foundation stone of the monument to Taras Shevchenko in Novoozernyi was liquidated.

In 1954, the Crimean Academic Ukrainian Musical Theater was founded in Simferopol, in the repertoire of which plays based on the works of M. Starytskyi, M. Kropyvnytskyi, I. Karpenko-Kary and other outstanding Ukrainian dramatists took the main place. At the end of the 20th - at the beginning of the 21st century, this art institution was actually transformed from a drama to an operetta as part of the attack on the Ukrainian presence

in Crimea. Despite this, in 2011, Viktor Humeniuk's staging of Volodymyr Vynnychenko's drama "The Lie" became a landmark.

The premiere of this performance was attended by many representatives of the intellectual elite of Ukraine. In March 2014, Taras Shevchenko's play "Nazar Stodolia" was staged in the theater for the 200th anniversary of the poet. In November 2014, by the decision of the occupation administration, this art institution was illegally deprived of its Ukrainian status and transformed into the "State Academic Musical Theater of the Republic of Crimea". In 2015–2020, there was not a single Ukrainian-language play in its repertoire (Ivanets, 2021: 30).

The illegal occupation of the peninsula and the Russian-Ukrainian war have had a negative impact on Ukrainian religious life there. One of the most important religious organizations that play a leading role in the preservation and protection of Ukrainian spirituality and morality on the peninsula are the Crimean Diocese of the Ukrainian Orthodox Church of the Kyiv Patriarchate (hereinafter - UOC KP) and the Crimean Exarchate of the Ukrainian Greek Catholic Church (hereinafter - UGCC).

In 2014, the UOC KP in Crimea consisted of 49 religious' structures. Currently, in conditions of constant oppression and persecution, only 7 of its communities and 4 priests continue their activities. The number of parishes has decreased significantly, some premises, some churches have been taken by force. Individual priests have been fined and detained.

The number of Greek-Catholic parishes has decreased from 11 to 5. Part of the UGCC believers, the majority of whom were ethnic Ukrainians, were forced to leave Crimea after the Russian annexation. The number of parishes has decreased from 11 to 5. Some believers stopped visiting UGCC churches due to religious restrictions imposed by Russia (mandatory registration, prohibition of Ukrainian citizens and non-parishioners from participating in religious services, holding religious services outside the church, etc.), physical and other pressure.

On 15 March 2014, in Sevastopol, "self-defense" militants kidnapped Mykola Kvych, the priest of the Assumption of the Blessed Virgin Mary parish in Sevastopol, the chief military chaplain of the Crimean Exarchate of the UGCC, during the service, the Russian special services subjected him to interrogation and physical pressure, and the occupation authorities threatened prosecution.

After his release, the priest managed to leave Crimea. In Simferopol, there was an attack on a private house where the UGCC chapel is located. Ihor Havryliv, who at the beginning of 2014 was the dean of the Crimean deanery of the UGCC, was pressed to transfer to the UOC of the Moscow Patriarchate. Due to the threat of complete liquidation and pressure, the Greek Catholics in Crimea re-registered as a separate exarchate of the

Byzantine rite under the direct authority of the Vatican (Ivanets, 2021). But this does not save from persecution, violation of freedom of religion.

Greek Catholics in Crimea continue to be under pressure. For example, in 2016, the Greek-Catholic community in Yevpatoriia was deprived of the premises in the library of the central resort polyclinic for a chapel, which they used for a long time, and in 2017, the "Leninskyi District Court" in Sevastopol suspended the activities of the Greek-Catholic community for 2 weeks for the fact that services were conducted by a priest-citizen of Ukraine without a patent of the occupying state or a work permit. The cleric was deported with a ban on entering the territory of the Russian Federation and the occupied south of Ukraine (Ivanets, 2021).

The occupying state constantly fines Greek Catholic parishes. In particular, in the spring of 2019, the Greek Catholic parish in Sevastopol was fined for not having a sign on the building with the full name of the religious organization, and in October 2020, a fine of 30,000 rubles was imposed on the Yalta Greek Catholic community for a similar "violation" (Ivanets, 2021).

In general, Russian legislation in Crimea is discriminatory against a number of denominations and does not ensure the rights of believers to freedom of conscience and religion and the protection of religious organizations. Religious organizations that have not been re-registered under Russian laws have found themselves in a particularly difficult situation.

4. Discussion

One of the acute and debatable issues among Ukrainian politicians, the public, and scientists today is the attitude of Ukrainian society to the Crimean issue and determining the ways of the future de-occupation and reintegration of Crimea.

In 2016–2021, the Ilko Kucheriv Democratic Initiatives Foundation together with the sociological service of the Razumkov Center conducted 3 sociological surveys. In 2016, 54% of respondents believed in the future return of Crimea to Ukraine, 37% considered its return unlikely, and 14% allowed this issue to be resolved by force. In 2018, these numbers were already 48%, 36% and 10%, respectively, and in 2021 – 43%, 44%. Also, 27% of respondents considered the strengthening of the armed forces of Ukraine to prepare for the operation to liberate Crimea as one of the factors of de-occupation of the peninsula. 10% of Ukrainians perceived Crimea as an independent state entity (Palshkov, 2023: 175–176).

At the beginning of the Crimean annexation, the attitude towards it as a Ukrainian territory temporarily occupied by Russia prevailed in all regions of Ukraine, except Donbas (22%). For instance, this position was supported by 90% of residents in Halychyna, 88.5% in Volyn, 86% in the city of Kyiv, 82.5% in the Lower Dnieper region, 77% in the Central region, 65% in the Southwest, Polissia – 71% and Podillia – 57.5%. Fewer respondents voted for it in Slobozhanshchyna - 45%, but there were the largest number of those who could not decide on this issue - 20% (International Center for Prospective Studies, 2015: n/p).

All-Ukrainian public opinion regarding the methods of returning Crimea was somewhat divided between several options. 24% of respondents spoke in favor of the return of Crimea as a result of effective internal reforms in Ukraine and an increase in the level of well-being. 21% - for the fact that this would happen as a result of the deterioration of the internal political and economic situation in the Russian Federation. Another 14% of Ukrainians believed that returning Crimea was possible only by military means. 13% supported the method of international pressure and Western sanctions on Russia. At the same time, 16% of the population of Ukraine did not see any way to return Crimea (International Center for Prospective Studies, 2015: n/p).

Here we shall note that since the occupation of the peninsula, the optimistic mood of the population regarding the prospects of the return of Ukrainian control over the peninsula has subsided somewhat, while at the same time skepticism has grown. Regarding the increase of those who considered the military way of de-occupation of the Crimean Peninsula, this can be explained by the increased public's faith in the Armed Forces, which were gradually reformed and strengthened (Palshkov, 2023; Ukrinform. August 20, 2021).

The attidues of Ukrainians regarding the need to return Crimea changed dramatically after Russia's full-scale invasion into Ukraine in February 2022. According to a survey conducted on 12-13 March 2022 by the sociological group "Rating", 80% of respondents believed that Ukraine should use all opportunities to return Crimea under Ukrainian jurisdiction (Palshkov, 2023).

It shall also be noted that people over the age of 60 (54%) and residents of Eastern Ukraine (47%) saw the least political future of Crimea as part of Ukraine. Young people aged 18-29 (67%) and residents of Western Ukraine (73%) believed in the return of Crimea to Ukraine the most (Ukrinform. August 20, 2021).

In our opinion, in the future, an important factor in the formation of public expectations will be successful military operations by Ukraine and the prevention of "freezing" conflict in any form. The current Russian-

Ukrainian conflict will not end without the return of Crimea. And there are several explanations for this. In particular, the majority of Ukrainians do not recognize Crimea as Russian and are not ready to give it up in exchange for ending the war.

The annexation of Crimea violates the basic principles of international law, and the presence of Russian troops in Crimea creates a constant military threat to the south of Ukraine. The de-occupation of the Crimean Peninsula is the only way to return it from an authoritarian to a democratic path of development and to prevent the further displacement of Ukrainians from there. This will also make it possible to unblock certain areas of the Black and Azov seas, over which Russia has established de facto control and the Ukrainian economy is suffering huge losses due to the impossibility of normal export of its products.

Conclusion

Having breached bilateral agreements and other international obligations in 2014, Russia occupied and annexed Crimea and the city of Sevastopol, thereby undermined international law and the global security system. This part of the Ukrainian territory has been transformed into a military bridgehead for further hostilities, where a policy aimed at discrimination and gradual assimilation of Ukrainians is carried out. Since 2014, Ukrainian national identity has been the main factor in criminal and humanitarian violations, as well as human rights violations in Crimea.

The Russian authorities are persecuting, repressing and arresting pro-Ukrainian Crimean activists for using and demonstrating Ukrainian symbols, for listening to and singing Ukrainian songs. The activities of Ukrainian political and most public organizations are prohibited here, and the right to freedom of assembly is restricted.

The isolation of Crimea from the Ukrainian information space has become the basis for the deepening and expansion of Russian repression on the peninsula. There are no Ukrainian newspapers and magazines that can be ordered by subscription in the catalog of the occupation postal operators and “Crimean Post”.

Illegal termination of rebroadcasting of Ukrainian TV programs and radio stations in Crimea by the Russian authorities, restriction of access to its territory of Ukrainian printed products and a number of Ukrainian websites has a negative impact on meeting the informational and cultural needs of ethnic Ukrainians and has significantly limited their opportunities to maintain a cultural connection with the mainland of Ukraine. In addition, Russian TV channels have become the only source of information

for Crimeans. All this has led to the fact that the inhabitants of Crimea, in particular the youth, began to feel alienated from Ukrainian culture and language.

The attack on Ukrainian identity is also in other aspects of the information sphere of Crimea. For example, there is an active campaign to change the historical memory and create a false history of Crimea, which justifies the illegal annexation of the peninsula by Russia. Most museums and other cultural institutions were Russified and stripped of Ukrainian traditions and national symbols.

The activities of institutions that promote Ukrainian culture and traditions have been mostly suspended. In particular, in February 2015, the Museum of Ukrainian needlework was closed, and books by modern Ukrainian authors were seized from the library named after I. Franko in Simferopol. In May 2017, the Ukrainian Cultural Center" in Simferopol was closed due to a lack of funds to pay for the rent of the premises, and its director left Crimea.

Currently, monuments are being destroyed on the peninsula, property is being expropriated or people are being forcibly deprived of property, illegal archaeological excavations are being carried out, artifacts obtained as a result of archaeological excavations are being taken outside Crimea, as well as non-compliance with the international humanitarian law on the provision and protection of monuments in the occupied territory.

Today, there are no Ukrainian-language schools in Crimea, while there were seven of them before. All of them were created on the initiative of Crimean Ukrainians, whose opinion the local authorities had to take into account. In fact, of the 13,000 schoolchildren who studied in the Ukrainian language in Crimea until 2014, today there remain less than 200, that is, their number has decreased tenfold (Medvid, 2023: n/p).

Students do not study Ukrainian history, language, literature, etc. in lessons. The number of students receiving education in the Ukrainian language has decreased by 97% since the occupation. Pro-Ukrainian Crimean teachers were replaced by Russian teachers, the ideological "re-education" of teachers is taking place. There are no programs and textbooks on Ukrainian studies subjects. Soldiers are being trained for the Russian army through youth movements and organizations. Children in Crimea do not know the real situation about the Russian invasion and occupation of Ukraine.

The removal of the Ukrainian language from education in the occupied Crimea is a deliberate attempt to erase Ukrainian identity from the region. By forcing Crimean schools to teach exclusively in Russian, the occupying Russian administration deprives Ukrainian children of the opportunity to learn and use their native language, which is an integral part of their cultural

identity. The militarization of education, on the other hand, involves promoting the heroization of the Russian army and its history, while at the same time forming a hostile attitude towards Ukraine and its people.

Since the occupation, "freedom of religion and belief in Crimea has been threatened by a number of incidents targeting representatives of minority faiths and their religious objects" (Human Rights, 2019: 22). The Ukrainian Orthodox Church supports independent Ukraine and takes an open position against the occupation. After the annexation of the peninsula, the UOC KP/OCU decided not to change its registration to the Russian Federation and therefore it is not accepted by Russian legislation. In 2020, it was able to use 9 premises designed directly for the Crimean Diocese.

Its leadership was made to appeal to the European Court of Human Rights regarding the violation of the rights of believers. At the same time, the UN Human Rights Committee in 2015 expressed concern about "violations of freedom of religion and belief in the territory of Crimea, including intimidation and persecution of religious communities, including attacks on the Ukrainian Orthodox Church…" (Human Rights, 2019: 22).

Thus, the Russian campaign in Crimea with all its political, military and propaganda methods is aimed at restoring a nostalgic, ethnic feeling of loyalty to Russia, which includes the elimination of both the idea of a separate Ukrainian "people" and the idea of Ukrainian national identity.

As a result of the audacious occupation of Crimea, Russia has created another source of instability in the world, a threat to the vital interests of Ukraine and the Euro-Atlantic region in the security, economic and humanitarian spheres. Therefore, regaining control over the temporarily occupied territory of Crimea is a national and vital task for Ukraine. The state, public and political figures, organizations, and business should make their contribution to its implementation.

Therefore, taking into account the above, we believe that the Ukrainian state authorities shall implement an effective humanitarian and ethno-national policy. One of its tasks is to protect the rights, satisfy the ethno-cultural, spiritual and informational and educational needs of Crimean Ukrainians in the free territory and, as much as possible, on the peninsula, as well as to promote their consolidation. It is necessary to regulate the status of the Ukrainian community in Crimea legislatively, carry out constant monitoring to meet the needs of Ukrainians on the peninsula, protect their rights, freedoms and interests, and respond to detected violations promptly.

The development of a number of studies on the history of the Crimea and its Ukrainian community, the study of the historical and cultural heritage of the Crimean Ukrainians requires significant activation. It is worth ensuring the preparation of Ukrainian information programs with the aim of broadcasting them to the occupied Crimean territory.

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Digitization of public authorities: Global experience

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Abstract

The research focuses on the study of digitization processes at the Ukrainian and international level as an innovation in public management, as well as on the prospects for its implementation in the processes of state formation and communication with civil society. It was concluded that digitization of public authorities should be harmonized with generally recognized international standards, developed and adopted in the context of national characteristics and traditions. Based on the assessment of global trends in the development of digital technologies and the study of international experience, the key areas of activity of public authorities in Ukraine were determined, which can be taken as a basis by other developing countries, with special emphasis on: decentralization, simplification, deregulation, institutional capacity building and communication support.

Keywords: digitalization; e-democracy; state authorities; civil society; digital technologies.

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Digitalización de los poderes públicos: Experiencia mundial

Resumen

La investigación se centra en el estudio de los procesos de digitalización a nivel de Ucrania e internacional como innovación en la gestión pública, así como en las perspectivas de su implementación en los procesos de formación del Estado y de comunicación con la sociedad civil. Se concluyó que la digitalización de las autoridades públicas debe armonizarse con estándares internacionales generalmente reconocidos, desarrollados y adoptados en el contexto de las características y tradiciones nacionales. Sobre la base de la evaluación de las tendencias mundiales en el desarrollo de tecnologías digitales y el estudio de la experiencia internacional, se determinaron las áreas clave de actividad de las autoridades públicas en Ucrania, que pueden ser tomadas como base por otros países en desarrollo, con énfasis especial en: descentralización, simplificación, desregulación, desarrollo de la capacidad institucional y apoyo a la comunicación.

Palabras clave: digitalización; democracia electrónica; autoridades estatales; sociedad civil; tecnologías digitales.

Introduction

Modern society is characterized by significant growth and active use of digital technologies, which leads to the need for global modifications of many social processes. Digitization also affects the most important state-legal institutions related to the formation of state authorities and the exercise of public power, and through it, conditions are created that can affect the type of modern representative democracy. The implementation of relevant innovations can have a qualitative impact not only on certain sources of state-management activity, but the use of relevant technologies simplifies and maximally reduces the cost of communication between the state and the population in the field of providing administrative services, expression of will, administration of justice, etc.

Using information technologies in public administration with the possibilities of finding alternative ways of entering data, performing the functions of collecting, storing, processing, transferring and using knowledge increases the efficiency of public administration, which makes it possible to find the necessary resources for this. The serious impact of digitalization is also felt on the functioning of the justice system, because modern digital technologies provide the possibility of creating a digital environment that can replace the system of individual bodies in the sphere of activity of state authorities.

Today, the vast majority of democratic countries in the world implement the tools of electronic democracy for the formation of policies, the basis of which are the relations between the state and civil society, based on transparency and full trust of the two parties to each other. World leaders in the development of e-democracy were able to reach its level when all tools represent a single effective communication system that strengthens and promotes the most effective two-way dialogue between the government and society.

Thus, the digitization of state institutions and management processes leads to the need to transform these institutions, and also poses new tasks for society and the state, which cannot be solved by proven and known methods (Togobytska, 2021), and the transfer of all public services to electronic format and the use of the latest technologies to maximize the efficiency of the processes of providing public services is a key vector of the development of many democracies of the world.

At the same time, scientists and practitioners highlight a number of problems of the implementation of digitization at the national and local levels: personnel shortage and the need to retrain old personnel in accordance with new competencies; improvement of the system of providing administrative services and digitization of most of them; the imperfection of the legislative provision of digitization processes in the context of decentralization, the need to expand the current legislative framework; insufficient technical and financial support for the purpose of integrating the latest technologies into one's activities; corruption (Korzh, 2018; Nelipa, 2022).

The study of the world's leading practices of the implementation of electronic democracy will contribute to its development and application at the national level, the determination of priority tasks of state policy in order to optimize the mechanisms of public dialogue and institutions of direct democracy, will make it possible to formulate relevant conclusions aimed at restarting the nature of public relations between the state and society in order to improve quality of satisfaction of citizens' interests.

1. Methodology of the study

To solve the tasks set in the scientific article, the basis of its methodology is a complex of methodological approaches and general scientific and special scientific methods of scientific knowledge of social phenomena and processes: theoretical generalization, semantic, comparison, analysis and synthesis for clarification and improvement of the conceptual and categorical apparatus, in particular, to clarify the essence of the concepts «digitalization», «electronic democracy», «electronic government»;

systemic analysis to reveal the regulatory and legal regulation of digital processes in public authorities at the national and local level, as well as to consider the changes that occurred as a result of the activation of digital transformation, decentralization, pandemics and military actions and the consequences of their impact on the functioning of the public authority system in Ukraine; comparative analysis and extrapolation to determine the advantages and problems of digitization of public authorities in Ukraine compared to relevant foreign practices; expert evaluations to determine the current state of development of e-democracy in the world and at the national level; logical generalization for the development of conclusions and recommendations regarding the development of mechanisms of digitalization of public administration bodies in accordance with modern global trends.

The normative basis and information base of the scientific article are the legislation of Ukraine on the development of the information society and e-government, the resolutions and orders of the Cabinet of Ministers of Ukraine and the decrees of the President of Ukraine on the development of the information society, the implementation of e-government, the use of modern information and communication technologies by state authorities, the legislation of foreign countries in the field of e-government regulation, legal acts of local state authorities and local self-government bodies, web pages and portals that provide access to e-democracy technologies.

2. Analysis of recent research

A significant number of scientific works are devoted to the fundamental foundations, theoretical, practical and methodological aspects of the development of electronic democracy in various aspects of social and administrative life, which repeatedly emphasized the presence of individual local and systemic barriers to the introduction and use of digitalization, suggested ways to solve them on the legislative, managerial, economic and other levels.

In general, without denying that the active introduction of information technologies into the system of socio-political relations significantly expands the opportunities of citizens regarding their participation in solving common issues and creates conditions for the formation of a qualitatively new level of citizen activity, however, the expediency of a comprehensive study of the issues of further development of state implementation mechanisms does not lose its relevance and ensuring, at the national level, world-leading digitization practices in the activities of public authorities. Among the complex of main problems, the problem of improving the normative and legal regulation of social relations during the use of information technologies is extremely important.

The purpose of the article is to analyze the national and international aspects of digitization in public authorities and assess the achievements of the leading countries of the world and Ukraine in its implementation and development.

3. Results and discussion

One of the prerequisites for effective interaction between a democratic state and civil society is proper regulatory and legal support. In this part of the study, we will analyze the state of legal regulation of digital transformation in Ukraine, which reflects the state and development of reforming various spheres of public life and the participation of public administration subjects in the specified process.

The Sustainable Development Strategy «Ukraine-2020» states that one of the priority reforms is the reform of «state administration, the result of which should be the creation of an effective, transparent, open and flexible structure of state administration with the use of the latest information and communication technologies (e-government) to ensure the development and implementation of a comprehensive state policy aimed at social sustainable development and adequate response to internal and external challenges» (Decree Of The President Of Ukraine No. 5/2015, 2015).

On May 3, 2022, amendments were made to the Law of Ukraine «On Electronic Communications» regarding the improvement of the efficiency of the organization of the work of providers of electronic communication networks and/or services under martial law (Law Of Ukraine No. 2240-IX, 2022) in order to improve the efficiency of the organization of the work of providers of electronic communication networks and/or services in martial law conditions. This Law will ensure the stable functioning of the state's electronic communication network in conditions of martial law and will prevent interference by enemy forces in its functioning.

Also, on July 8, 2022, a Resolution was adopted on the approval of the tasks of the National Informatization Program for 2022-2024, the result of which was the approval of the program tasks and ensuring the implementation of informatization in state authorities, in particular, this is digital development, development of electronic government, information society, digital innovations and technologies in state institutions (Resolution Of The Verkhovna Rada Of Ukraine. No. 2360-IX, 2022).

Among all the variety of adopted legal acts, the following main areas of digitization of public authorities can be identified, reflected in the documents specified in these documents: functioning and content of web resources and web pages; electronic services; participation of citizens in

making management decisions; electronic document flow and electronic digital signature; protection of information and personal data.

In Ukraine, in general, an appropriate legislative and regulatory framework has been created in the direction of digitalization of the activities of public authorities, but it is not without such shortcomings as: declarativeness, non-systematic nature, incompleteness, vagueness, insufficient mutual agreement of documents and compliance with international norms.

The problem of the quality of the preparation of normative legal acts at the state level remains relevant: in some places, the acts are developed without conducting a thorough analysis of the problem that requires legal regulation and taking into account the risks of their introduction, public discussion, conducting high-quality socio-economic and legal expertise, taking into account the need for their interaction with other acts, etc. These factors lead to the fact that Ukraine lags behind the leading countries in the world in terms of digitalization rates. Also, today there is no integral mechanism of legal enforcement of tasks related to the digitization of relations between the state and society, legal nihilism of citizens and businesses, and imperfect practice of law enforcement.

The Government's long-term priorities are determined by the Program of Activities of the Cabinet of Ministers of Ukraine, which is a framework document, the content of which is disclosed in particular through strategies that represent long-term planning. In our opinion, the prospect of adopting a basic document that would outline the strategic orientations of the digitalization of public authorities is becoming extremely important, and the development of the action plan should take place in the context of sustainable development goals adapted by Ukraine and aim to achieve specific goals and indicators.

According to the Plan of the Working Group on Digitization in Ukraine, it is necessary to: ensure the stable functioning of the digital economy/IT industry; restoration of destroyed digital infrastructure; implementation of complex electronic public services, restoration of the network of centers for the provision of administrative services; protection of state information resources (Project of the Recovery Plan of Ukraine, 2022).

The main obstacles to the implementation of the mentioned ideas in life are: complex bureaucratic processes; conservative approaches to document management; production of electronic communication equipment; partial destruction as a result of the production of cable products, which complicates logistics processes; the need for advanced training and retraining of a significant number of specialists in the field has been mobilized, replacement of qualified specialists; lack of guarantees for conducting IT activities and the difficulty of attracting foreign citizens as

e-residents due to martial law; lack of state regulation of the virtual asset market; the outflow of startups and technological specialists abroad as a result of hostilities; lack of budgetary funding for cyber security projects; constant aggression against the country in cyberspace, which requires a response and limits resources for the implementation of cyber security projects; risks of physical destruction of infrastructure.

In general, it should be noted that the legislation of Ukraine, which is burdened by the conditions of war and is directly related to the introduction and use of digital technologies in the activities of public authorities, despite its fragmentation and certain chaotic nature, creates legal grounds for the wide use of IT technologies in the state administration, electronic document circulation and electronic interaction of state authorities. At the same time, the regulatory, administrative, organizational, technical, and economic components of the digitalization process of public authorities need to be further improved in order to effectively implement internationally recognized digital tools for the interaction of the state and civil society at the national, regional, and local levels.

As evidenced by world experience, only a strong political will aimed at achieving clear goals, enshrined in relevant strategies, programs, laws on the development and implementation of e-government, with appropriate amounts of financial resources, can positively influence the development of e-government in Ukraine. In our opinion, in the future, in accordance with the approved e-Governance Strategy until 2030, appropriate state programs for the development of e-Government with specific tasks, executors, task performance indicators and funding amounts for a specific period should be adopted.

Significant changes in the system of public administration, which were activated with the beginning of the process of joining Ukraine to the European Union and continue to this day under the influence of the processes of decentralization and digitalization, became a guarantee of the active development of the country in general. At the same time, today's challenges related to military operations on the territory of the country encourage the adaptation of national legislation and the practice of its application in various spheres of life in order to ensure dialogue between the state and citizens, so that the latter can exercise their rights and freedoms without hindrance.

The leading states of the world and the European Union are boldly testing various programs of digital social security, launching ambitious public service projects, stimulating public institutions to provide a wide range of administrative and other services. Let's pay attention to individual elements of the digitalization process, because the perspective of further exploration is the study of the experience of foreign countries, the determination of the most effective mechanisms, digital technologies that can be adapted to the

modern conditions of the functioning of the state mechanism of developing countries.

As foreign experience shows, transparency, a low level of corruption, free and equal access to public services, and public control over the budget and tenders contribute to improving the lives of citizens, a positive reputation of the state in the world, and even greater influence on foreign audiences. Singapore became the first country in the world to operate an electronic government. The Netherlands is one of the first European countries to introduce electronic interaction between the state and citizens.

A single portal for the provision of administrative services was created and introduced by service universes with the aim of providing services to the public in addition to the existing traditional means of communication between the citizen and the state, the use of identification cards for the provision of administrative services began (Mykhailiuk, 2016). In Croatia, the main areas of activity regarding the provision of electronic services are enshrined in the «Strategy for the Development of Electronic Government of the Republic of Croatia», according to which «the development of new public services should be based on the use of information and communication technologies (Strategija razvoja Elektronièke Uprave u Republici Hrvatskoj za razdoblje od 2009 do 2012 Godine, n/y).

In different countries, strategies for the formation of e-government are oriented towards an internal or external model of activity, are determined by the highest political leadership and are implemented at the levels of ministries or departments. The American approach to the creation of electronic government is based on economic criteria, the European approach is based on social criteria and the level of human capital development.

One of the important tools of e-governance is electronic document flow, which directly affects the optimization of the entire process, as it creates conditions for increasing the efficiency of the activities of state authorities and local self-government bodies, ensuring the improvement of the quality and availability of public services, restructuring relations with the population, overcoming information inequality and involving citizens to participate in state affairs, etc. The active introduction and use of digital technologies in state bodies allows for complete changes in all spheres of public life and gives rise to such a global phenomenon as «digitalization». However, we note that the restraining factor of this phenomenon in many countries remains traditional approaches to the organization of document circulation, which needs further improvement and development, primarily in the direction of digitalization.

Distinctive characteristics of the continental European model include: legislative regulation of information relations and information flows circulating in the European information space (Klimushyn and Sernok, 2010).

The main advantages of the Australian model include «the ability to provide an optimal structure for the management and financing of educational institutions based on a single e-government policy. Characteristic features of Australian e-government: creation of a single information space; simplification of the process of training and retraining, etc. (Klimushyn and Sernok, 2010).

Distinctive characteristics of the Anglo-American model are:

Reforms of the entire structure of public administration; creation of information portals that allow providing universal service to citizens and access to information; the use of a strategy focused on external activities, with a relatively low level of development (Canada); releasing civil servants from performing routine procedures during interactive interaction with the population (Zastrozhnikova, 2018: 148-152).

The Anglo-American e-governance model is particularly interesting, because the participating countries of this model occupy fairly high positions in the e-governance development rating. This level of e-government development is called the connectedness stage, which assumes that «the government transforms itself into a unified whole that meets the needs of citizens through the development of an integrated support service. And this is the most advanced level of electronic governance, which is characterized by the presence of: horizontal, vertical and infrastructural connections, connections between the government and communities.

A successful example of the international practice of applying electronic governance mechanisms is the experience of Great Britain, which is based on the provisions of the «White Book on Government Modernization» and is framed in the «Strategic Concept of Serving Society in the Information Age.»

The main purpose of the concept is to specify the process of transition to the government of the Information Age. An interesting level of interaction is the interaction of state institutions among themselves (G2G), which is aimed at increasing the reliability of data and the efficiency of their use, reducing the cost of services, improving the use of databases, and improving the public administration system in general (E-government. A strategic framework for public service in the Information Age, n/y). Relations between the central and local authorities and their bodies have been established in such a way that, if necessary, it is possible to obtain all the necessary information on issues that are assigned to the competence of another body.

A number of Scandinavian and Baltic countries have also digitized a number of government processes and digitized public services. For example, in Estonia, it has been possible to vote in elections online since 2005. The electronic voting system is actively used in the USA and is being

implemented in the countries of the European Union, at the level of the union itself (Krasnopolska and Myloserdna, 2020).

At the same time, it is worth warning that despite serious technical achievements, the introduction of appropriate technology, which is based on the formation of special trust in the authorities in general and in the digital space formed by them, has serious risks associated, on the one hand, with the problems of the legitimacy of the results online voting, and on the other hand, with the psychological features of citizens' participation in this process.

Also, analyzing the global research of the Riverbed Technology company in nine developed countries, such as the USA, Brazil, Germany, France, China, Singapore, India, Great Britain, Australia (the objects of the survey were enterprises in the field of sales, transport, industry, security health), 95% of respondents stated that they are currently unable to implement digitization in their own business processes. First of all, the main problems on the path of digital transformation are a limited budget and an outdated network infrastructure. The negative factors also include the non-transparency of the work of end users, low qualification of personnel and low interest of the management in conducting digital initiatives (Riverbed Technology: 95% of companies are not ready for digital transformation, 2018).

In addition, the growth rate of digitalization directly depends on the country's institutional environment, which concerns state policy, legislative and regulatory acts, and fiscal instruments. The long absence of an innovative base in the country's economy, the reluctance of representatives of large and medium-sized businesses to invest in innovative projects weaken digital transformation.

We come to the conclusion that in most countries of the world, the reasons for reforming the public sector, the initiators of which are mostly state authorities or local self-government bodies, are the objective need to improve and simplify communication between the state and the society of citizens in the provision of online electronic services. The government of Ukraine has set itself a similar goal.

The UN has provided certain recommendations for the transition of countries to digital governance and digital transformation. The recommendations are a change in thinking in the digital plane at the individual and systemic levels, a change in the institutional and regulatory framework in public policy, the availability of information through open government data and equal access to it (Mikhrovska, 2020).

As practice shows, the European Union will continue to consider virtualization as one of the main areas of development of science and innovation, at least until the end of 2027, while the new Framework

Program for research and innovation «Horizon Europe» (2021-2027) and the program of the European Parliament and Council of the European Union «Digital Europe». Accordingly, it can be concluded that for the European Union, digital technologies, artificial intelligence and robotics, the next generation Internet, high-performance computing and big data as the most important and popular digital technologies are areas of special interest not only now, but also in the strategic perspective (Strizhkova, 2019).

Given that the country's political course for joining the European Union was fixed at the constitutional level, we can say that the above-mentioned documents, namely the Framework Program for Research and Innovation «Horizon Europe» (2021-2027) and the program of the European Parliament and The Council of the European Union's «Digital Europe» will become mandatory. We share the point of view of S. Yesimov, who notes that the Association for the Development of Ukraine and the European Union closely links the development of Internet technologies with the reform of public administration, which will enable state authorities to provide high-quality, in-demand and affordable electronic services.

At the same time, it will allow the state authorities to carry out constant analysis and improvement of the system of providing administrative services, to identify negative effects on the quality and widespread distribution of administrative services based on the indicators of the assessment of the quality and availability of electronic administrative services (Yesimov, 2017).

In order to speed up the process of digitalization of public services, in particular at the level of territorial communities, an international project under the U-LEAD program has been implemented in Ukraine, which is financed by the European Union and its member states Germany, Poland, Slovenia, Sweden, Denmark, Estonia.

The specified project is aimed at improving the provision of public services in local self-government bodies by developing and implementing a system of electronic interaction, information systems and administrative services with the aim of providing a significant number of public services entirely electronically (E-government. A strategic framework for public service in the Information Age, n/y). Unfortunately, the war in Ukraine affected the completion of this and other digitization programs of public authorities and society. However, digitalization processes continue even under such difficult conditions and are successfully implemented, including thanks to the support of the world community.

The general problems of the development of various models of e-government include the fact that in many countries, government institutions do not provide opportunities for joint operation of their information systems, and a significant part of procedures and services

are performed manually. Such a variety of features of the development of different models is due to different, distinct goals of building electronic governance in different models, to which the goals of individual countries are also added.

In the Anglo-American model, the goal is "openness, transparency, and responsibility to citizens, simplification and cheaper interaction of citizens and business representatives with state structures"; continental-European – providing government information online, ensuring the conditions for fulfilling one's civic duty in, using the possibilities of electronic voting or internet testing, government services for paying taxes and fines; satisfaction of the information needs of the population and the introduction of communication and information technologies to various spheres of life are characteristic of the Australian and Latin American ones.

In general, it should be said that the need for digitization of public power, development of electronic government, online services objectively requires state authorities, local self-government bodies, budgetary and communal institutions not only to modernize the material and technical base for the performance of their own and delegated powers, but also actively implement infrastructure projects aimed at improving the communication infrastructure (laying of Internet networks, operation of servers, hosting companies, increasing the level of data security, etc.).

Such challenges today are a characteristic feature of modern industrial society, regardless of the political regime and the state system. For the modern system of state power, it is not only necessary, but also natural to use advanced information and communication technologies - to be an "electronic government" - not for the sake of "technological fashion", but for the sake of a new quality of administration that corresponds to modern trends of socio-economic development, including modern threats to the institution of the state and law.

If we talk about the adoption of the best global experience in the field of digitization of public authorities, then the quick response to the needs and current requests of the population in the conditions of martial law in Ukraine has become an indicator of the effectiveness of cooperation between the authorities and citizens: the authorities promptly respond to today's challenges, safely, quickly, effectively and transparently creating services and online services for citizens. Taking these measures requires the involvement of a significant number of highly professional specialists for a fast and high-quality process of digital transformation, the development of specially developed information programs in the field of providing and developing administrative services to the population in electronic form, etc.

At the same time, we share the point of view of scientists that today we need such legal norms that would contribute to the development of a global

and open single digital market by unifying legislation and simplifying the rules and procedures applied in different countries (Glibko and Yefremova, 2016). Acceleration of the transition to a model of digital administration of public authorities requires reengineering of management systems, processes and functions in accordance with the opportunities provided by new technologies, in particular with the use of a process approach to management and the formation of network connections, the creation of a single regional platform, interactive databases, introduction of electronic democracy elements into decision-making processes.

Conclusions

Digitization of public authorities should be understood as a system of measures for transformation, improvement through the integration of information and telecommunication technologies of the activities of public administration subjects and their officials with the aim of developing an open information society, proper communication between the state and civil society, increasing productivity and economic growth. The implementation of digital technologies in the activities of state (public) authorities is an activity of public administration entities in the field of digitization (development of the digital economy, digital innovations and technologies, e-government, electronic document flow and electronic information resources, etc.) regulated by laws and other legal acts. by making management decisions and providing administrative services established by law.

The analysis of the normative and legal regulation of the activities of public authorities in Ukraine proved the existence of a multi-level model of legal support for the implementation of digitization tools, which combines legal prescriptions of various legal powers, which were reflected in acts of informational, administrative, civil, economic and criminal procedural legislation, and also illustrates the mutual influence and interaction of these branches of law in today's conditions.

The process of digitalization of the activities of public authorities is accompanied by such shortcomings as: declarativeness, non-systematic, incompleteness, vagueness, insufficient mutual agreement of documents and compliance with international standards. At the same time, in accordance with the approved e-Government Strategy until 2030, further improvement is required in the regulatory, managerial, organizational, technical and economic components of the process of digitization of public authorities in order to effectively implement internationally recognized digital tools for the interaction of the state and civil society at the national, regional and local levels.

The scientific analysis of the foreign experience of implementing digitization tools in the activities of public authorities leads to the conclusion of the need to reformat the activities of public authorities by introducing information and telecommunication technologies into their activities, improving the mechanisms of electronic governance in the field of telecommunications networks, e-commerce infrastructure and online interaction business subjects, digital skills and electronic document flow, improvement of communication infrastructure (laying of Internet networks, operation of servers, hosting companies, increasing the level of data security, etc.).

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Experience of individual countries of the European region regarding implementation of international standards for ensuring criminological and criminal-legal protection of justice

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Abstract

The article describes the experience of Germany and Austria in implementing international standards to ensure the protection of criminological and criminal justice. In preparing this article, a set of general and specific scientific research methods was used to define special subjects authorized to perform such criminological activities, the peculiarities of their interaction with the police and other law enforcement agencies, to reveal the content of legislative mandates on the organization and functioning of the Court Security Services and their counterparts, as well as that of the legislation on criminal liability for crimes against justice. On the basis of the research results, perspectives were formulated for improving the activities of the Court Security Service of Ukraine, its interaction with the National Police and other entities of the state and non-state sector in providing criminological protection of justice, as well as the Ukrainian legislation on criminal liability for crimes against justice, taking into account the experience of Germany and Austria in the implementation of internationally recognized standards in this area.

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Experiencia de países individuales de la región europea en materia de implementación de normas internacionales para garantizar la protección criminológica y penal-legal de la justicia

Resumen

El artículo describe la experiencia de Alemania y Austria en la implementación de estándares internacionales para garantizar la protección de la justicia criminológica y penal. En la preparación de este artículo se utilizó un conjunto de métodos de investigación científica generales y específicos para definir sujetos especiales autorizados para realizar tales actividades criminológicas, las peculiaridades de su interacción con la policía y otros organismos encargados de hacer cumplir la ley, para revelar el contenido de mandatos legislativos en materia de organización y funcionamiento de los Servicios de Seguridad de los Tribunales y sus homólogos, así como el de la legislación sobre responsabilidad penal por delitos contra la justicia. Sobre la base de los resultados de la investigación, se formularon perspectivas para mejorar las actividades del Servicio de Seguridad Judicial de Ucrania, su interacción con la Policía Nacional y otras entidades del sector estatal y no estatal en la prestación de protección criminológica de la justicia, así como como la legislación de Ucrania sobre responsabilidad penal por delitos contra la justicia, teniendo en cuenta la experiencia de Alemania y Austria en la aplicación de normas reconocidas por la comunidad internacional en este ámbito.

Palabras clave: protección criminológica de la justicia; servicio de seguridad Judicial; Policía Nacional de Ucrania; delitos contra la justicia; normas internacionales.

Introduction

Security management in the sphere of justice remains an unchanged priority for many countries of the world, as well as an important topic of international forums (Report of the Fourteenth United Nations Congress on Crime Prevention and Criminal Justice, 2021) to ensure independence

of judicial bodies (The main principles of independence of judicial bodies, 1985).

It is important that two significant groups of priority tasks have coincided for Ukraine at the moment: the first one is related to the state's course towards European and Euro-Atlantic integration, which brought the urgent need for judicial reform to the agenda (Strategy for development of the justice system and constitutional judiciary for 2021–2023; On speeding up judicial reform and overcoming manifestations of corruption in the justice system in 2023); the second one relates to ensuring the protection of justice in the special conditions of martial law and the de-occupation of the territories of Ukraine, which places an additional burden on the newly created Judicial Security Service and other entities authorized to perform this criminological function and requires effective and coordinated measures to be applied. The above points determine relevance of the scientific and theoretical understanding of the experience acquired by the European region countries in ensuring protection of justice for further determination of promising directions in increasing the efficiency of implementing the criminological function of protection of justice by authorized subjects in Ukraine which has become especially important in the sphere of ensuring national security in conditions of martial law, respectively to the standards recognized by the progressive international community in this area.

1. Literature review

First of all, let's note that there is no unified international document on the security of justice. However, certain elements of the standards for ensuring security of justice were reflected in international documents (which differ in their legal force and scope) dedicated to the standards of independence of the judiciary and judges. In particular, they were reflected in paragraphs 2.11 of the Basic principles of independence of judicial bodies, approved by resolutions 40/32 and 40/146 of the UN General Assembly (1985) as "the prohibition of undue influence, inducements, pressure, threats or interference in the activities of judicial bodies during decision of cases transferred to them from any side and for any reason", "guarantees of the security of judicial bodies" (The main principles of independence of judicial bodies, 1985: n/p), in point 5 of the Recommendations on the effective implementation of the Basic Principles on the independence of judicial bodies, adopted by the UN Economic and Social Council resolution 1989/60 and approved by the UN General Assembly resolution (1989) as "provision by the state of the resources necessary to provide judges with a decent level of personal security"; in Article 8 of the Universal Charter of the Judge, adopted by the Central Council of the International Association of Judges (1999) as "Security of office" (Universal Charter of Judges, 1999) etc.

Taking into account the fact that the specified international documents were the subject of our consideration in the previous publication, without resorting to a re-analysis of their content, as well as of the different points of view of scientists on this issue and the justification of their own position, we note that the main special international principles of ensuring security of justice should include the following: a) ensuring personal safety of judges; b) ensuring various levels of security in the buildings (premises/territories) of courts (depending on the type of cases considered), as well as ensuring zonal security measures; c) provision by the state of adequate resource support for measures related to ensuring a decent level of personal security for judges; d) prohibition of undue influence on judges, inducements, pressure, threats or interference in the activities of judicial bodies during the resolution of cases assigned to them; e) ensuring safety of judges' private life and confidentiality; f) ensuring security and protection of data systems and organizational systems, including electronic justice (Khrystova, 2023).

In Ukraine, in 2019, a new state body was created in the justice system, accountable to the Supreme Council of Justice and controlled by the State Judicial Administration of Ukraine – the Court Security Service (On the judiciary and the status of judges, 2016); this body was created for provision of personal security of judges, members of their families and court employees, for protection and maintenance of public order in courts, as well as for ensuring safety of participants in court processes. However, if necessary, during the performance of tasks and functions entrusted to the specified special entity, other such entities (law enforcement subjects) may be additionally involved; in particular, these are such entities as the National Police of Ukraine, the National Guard of Ukraine, the State Emergency Service of Ukraine, the Security Service of Ukraine; and the procedure of interaction with these entities is regulated by a joint order (On the approval of the Procedure for interaction of the Court Security Service with the National Police of Ukraine, the National Guard of Ukraine, the State Emergency Service of Ukraine, the Security Service of Ukraine during performance of tasks and functions by the Court Security Service 2020).

The presented analysis of the experience of individual countries of the European region in this area was carried out based on the author's understanding of the provision of criminological protection of justice as an activity for the formation of an effective system of countering criminogenic influences and criminal offenses against justice in order for ensuring its independence and for practical affirmation of the rule of law principle during judicial proceedings, in particular, regarding granting of the following powers to the subject (entity) determined for ensuring security of justice: to stop and prevent offenses and crimes, to perform interaction with other subjects and entities in the system of combating criminal offenses against justice; perform early detection and countermeasures against possible threats (Khrystova, 2022), based on studying relevant international documents, foreign and Ukrainian legislation.

2. Materials and methods

The research is based on the groundwork of foreign and Ukrainian researchers on methodological approaches to ensuring criminological security, criminal-legal protection of justice, as well as analysis of the competence of the Court Security Services and their counterparts in terms of the effectiveness of the tasks assigned to them. In this article, we will consider the experience of implementing international standards for provision of criminological and criminal-legal protection of justice in such countries of the European region as Germany and Austria.

The methodological basis of this work is presented as a set of general scientific and special scientific methods of cognition. In particular, with the help of the dialectical method, the subjects authorized to ensure security of justice in various countries of the European region, as well as peculiarities of their interaction with the police and other law enforcement agencies, were determined; the use of the special legal method of cognition made it possible to reveal the content of legislative mandates regarding organization and functioning of the Court Security Services and their counterparts, and thanks to the method of comparative jurisprudence, their similarities and differences were revealed. Research of German and Austrian legislation on criminal liability for criminal offenses against justice was also carried out using the comparative legal method.

3. Results and discussion

First of all, it should be noted that in the European region countries, the need to intensify cooperation between police forces and Security staff in courts is constantly being updated. In particular, in 2023 alone, several incidents related to security occurred in German courts, for example, as a result of two cases of escape of defendants from the courthouse in Bavaria, the Minister of Justice ordered to perform a comprehensive security review of all courts, and also emphasized the need to review operational concepts of security in cooperation with the police (Friz and Rössert, 2023). In the same year, during the announcement of the sentence at the Ludenscheid District Court, the defendant jumped over the barrier to the judge's desk and attacked the judge, knocking him to the ground, biting his hand and trying to hit him (Tylchyk *et al.*, 2022).

This attack was stopped by police officers who were present in the courtroom as witnesses in the case under consideration (Krumm, 2023). A similar high-profile extraordinary incident happened in Ukraine this year. In particular, in the Shevchenkivskyi District Court of Kyiv, the accused made an attempt to escape from custody in the court premises with the

help of an explosive device, as a result of the explosion he died on the spot, and two law enforcement officers were injured (About the extraordinary event that occurred on 05 July, 2023 in the Shevchenkivsky District Court of Kyiv and regarding the duration of the trial). At the same time, it should be emphasized that it was possible to prevent human casualties among the meeting participants, judges, staff members, and court visitors thanks to the coordinated actions of representatives of the National Police, special-purpose divisions, and representatives of the Court Security Service (Salnikov, 2023).

Moving on to the analysis of the experience acquired by the countries of the European region regarding implementing standards of ensuring the security of justice recognized by the international community, it should be noted that in most of these countries execution of this criminological function is entrusted to special entities, - Court Security Services and their counterparts, each of them having its own features of organization and functioning (Kobrusieva *et al.*, 2021).

Thus, in Germany, the task of maintaining security and order in court buildings, including the corresponding associated enclosed outdoor areas, is carried out by the Judicial Sergeant Service. In addition, employees under a collective agreement (for example, in the courts and prosecutors' offices of the state of Brandenburg (Chapter XI of the Service Regulations for Sergeant Service 2011) and employees of the general judicial service can be involved in the performance of security tasks and equated to the court security services, (e.g. in accordance with the content of paragraph 28 "Powers in relation to prisoners and detainees" and paragraph 29 "Application of direct coercion" of the Justice Act in the state of Berlin (Justice Act in the state of Berlin, 2021).

Organization and functioning of the above mentioned service is regulated at the level of the law of the respective federal state (by the Act on the Powers of the Sergeant Service, adopted by the Parliament of the state of Brandenburg, 2019) and/or by a decree, issued by the minister of justice of the respective state (for example, Service Regulations for the Sergeant's Service, 2011), taking into account the requirements of the Constitution of the federal state on the protection of personal rights and data protection, as well as by relevant provisions of federal legislation, for example, the Law Regulating the Status of Civil Servants in the Federal States (The Law Regulating the Status of Civil Servants in the Federal States, 2008).

For comparison, in Ukraine, in the absence of the law "On the Court Security Service" the legal status of this service is regulated by separate provisions of such normative legal acts as the Law of Ukraine "On the Judiciary and the Status of Judges" (Chapter 4 "Court Security Service" of Section XI "Organizational Support to the Activities of Courts") (On the Judiciary and the Status of Judges, 2016); Regulation "On the Court

Security Service", approved by the Decision of the Supreme Council of Justice (Regulation on the Court Security Service, 2019); as well as the Laws of Ukraine "On the National Police" (in terms of the use of coercive police measures, etc.), "On security activities", "On civil service", "On trade unions, their rights and guarantees of activity", "On prevention of corruption" (Horbalinskiy *et al*., 2023).

According to the results of the analysis of the legal support of the organization and functioning of special entities authorized to carry out criminological activities to ensure security of justice carried out within the scope of this research, it is necessary to note the positive experience of Germany regarding the regulation at the legislative level of the legal status of the Security staff of the Judicial Sergeant Service and the general judicial service, in terms of their performance of security tasks as law enforcement officers, as well as the determination of their powers at the legislative level (for example, in Section 5 "Security and Order" of the Law on Justice in the state of Berlin (Justice Act in the state of Berlin, 2021); subparagraph 1.1. (b) Paragraph 1 "Tasks" of the Service regulations on the service of a sergeant of the Ministry of Justice of the state of Rhineland-Palatinate (Service regulations on the service of a sergeant of the Ministry of Justice of the state of Rhineland-Palatinate, 2021) etc.

For example, in Ukraine, the issue of the legal status of Court Security Service staff members still remains without a proper solution, which has been repeatedly emphasized by scientists who devoted their works to the research of this issue (Titarenko, 2021), as well as by the leadership of the Service, with proposals made to include it in the list of law enforcement agencies provided for in Part 1 of Article 2 of the Law of Ukraine "On State Protection of Court Employees and Law Enforcement Agencies", supplementing it in the prescribed manner with the text of the appropriate content (Matviichuk *et al*., 2022).

Also worthy of special attention is the experience of the legal regulation of the leaders' obligation to hold quarterly meetings of all service employees to discuss the current regulations on the sergeant's service, analyze the practice of application of these regulations, and deepen existing knowledge (Chapter IX "Service Meetings" of the Service Regulations for Sergeant Service of the state of Brandenburg (Service Regulations for Sergeant Service, 2011).

The experience of development and presentation of the framework concept of security for courts and law enforcement agencies by the Berlin Senates in 2018 should be taken as a positive point (Zadyraka *et al*., 2023). (Framework concept of security for courts and law enforcement agencies in Berlin, 2018); this concept developed with the involvement of both representatives from the specified spheres of activity and independent experts allows to make fundamental, innovative decisions to solve important

issues for ensuring security of Justice (The response of the Berlin Senate to the written request of MP Mike Penn, 2019). In particular, it is noteworthy that the stated security concept is based on the design characteristics of court buildings (for example, the size and risks associated with their use), proposed are minimum safety standards for the construction of court buildings and government bodies, as well as for the entrance control, alarm systems, emergency action plans, court sergeant's service, etc. The implementation of this Concept is monitored by a steering committee for judicial security issues, which updates it and responds to changes in the security situation in the justice system of Berlin (The response of the Berlin Senate to the written request of MP Mike Penn, 2019).

In Austria, the entities specifically authorized to carry out security checks in court buildings are the control bodies, represented by both court employees appointed for this purpose by the court building administrator, as well as by employees of security companies entrusted by the heads of higher regional courts to carry out security inspections under the contract approved by the Federal Minister of Justice (§§ 3, 9 Court Organization Act, 1896).

It is worth noting that the first subsection of the first section of the Austrian Court Organization Act is dedicated to security in court buildings and external court proceedings, which thereby emphasizes its importance for the organization of the administration of justice. Also worthy of attention is the regulation at the legislative level of the specifics of documenting and registering attacks and serious threats against justice and prosecutor's offices, as well as other employees working in the judicial system and participants in court proceedings, as well as any other form of violent confrontation, damage to property in a court or prosecutor's office and in the adjacent territories (§ 15 Court Organization Act, 1896). It also states that more detailed requirements for security standards in court buildings should be regulated by the Federal Minister of Justice in security instructions (Leheza *et al*., 2022).

Speaking about the criminal-legal protection of justice, it should be noted that the German Criminal Code does not have a separate section dedicated to such norms. They are scattered in different sections of its Special Part. Thus, the norms on criminal liability for acts that interfere with justice are contained in the following sections: the seventh one "Offences against public order", the ninth one "False unsworn testimony and perjury", the tenth one "Casting false suspicion", the twenty-first one "Aiding after the fact and handling stolen goods" and the thirtieth one "Offenses committed in public office" (Law of Germany, 1998). For comparison, in the Special Part of the Criminal Code of Ukraine, there is a separate chapter XVIII "Criminal offenses against justice" (Law of Ukraine, 2001).

Regarding the differentiation of criminal responsibility both for criminal offenses against justice and for corruption criminal offenses committed by a special subject - judges, the norms of section 332 "Taking bribes" of the Special Part of the German Criminal Code are worth noting; according to the second part of this section judges are subject to a more severe punishment in the form of imprisonment for a term of one to ten years (Law of Germany, 1998).

In turn, the criminal liability of judges for violating the law to the benefit of the parties or detriment of the parties during the conduct or resolution of a legal case is provided for in section 339 "Judicial perversion of justice" of the thirtieth Chapter "Offenses committed in public office" of the Special Part of the German Criminal Code. For the commission of a mentioned act, punishment is prescribed in the form of deprivation of liberty for a term of one to five years (Law of Germany, 1998).

For comparison, in Ukraine, Article 375 "Provision by a judge (judges) of a knowingly unjust sentence, decision, ruling or resolution" of the Special Part of the Criminal Code, which determines responsibility for taking such actions for selfish motives and other personal interests, is excluded (Law of Ukraine, 2001), since the Constitutional Court of Ukraine recognized it as inconsistent with the Constitution of Ukraine (it is unconstitutional), creating risks and opportunities to influence judges due to the vagueness and ambiguity of the disposition (Decision of the Constitutional Court, 2020). Thus, today in Ukraine, the issue of criminal liability of a judge for a notoriously unjust decision has remained without proper legislative regulation. Currently, the agenda of the Verkhovna Rada of Ukraine includes four draft laws (No. 3500; No. 3500-1; No. 3500-2; No. 3500-3) on making relevant changes to the Criminal Code (On the agenda of the tenth session of the Verkhovna Rada of Ukraine of the ninth convocation, 2023).

In the Criminal Code of Austria, in contrast to the criminal legislation of Germany, the rules on responsibility for criminal offenses against justice are allocated to a separate (twenty-first) section "Criminal acts against justice" (Law of Austria, 1974). When it comes to the experience of Austria regarding the criminal-legal protection of justice, a positive point in our opinion consists in establishment of the responsibility (in § 301 of the Criminal Code) for prohibited publication of a message about the content of a court hearing, which was closed to the public, about the discussion of court proceedings in a printed edition, on the radio or in another way accessible to the general public (Law of Austria, 1974).

Conclusions

According to the results of analyzing experience of individual countries of the European region (Germany and Austria) regarding the implementation of international standards for ensuring criminological and criminal-legal protection of justice, the following can be stated:

- in the mentioned countries execution of this criminological function is entrusted to specially authorized services in the system of the Ministry of Justice. In particular, in Germany it is the Judicial Sergeant Service "Justizwachtmeisterdienstes", which can involve both court sergeants and security staff equivalent to them under a collective agreement (vergleichbare tariflich Beschäftigte), as well as employees of the general judicial service ("allgemeinen Justizdienstes"), and in Austria, these are the control bodies "Kontrollorgane", represented by both court employees and employees of security companies;
- in Germany, there is a separate law dedicated to legal regulation of the status of these services and their employees, and a framework concept of security for courts and law enforcement agencies has been implemented. In Austria, the powers and tasks of control bodies, as well as security measures in court buildings and external court proceedings are defined in the Court Organization Act;

1. In contrast to the criminal legislation of Austria the Criminal Code of Germany does not have a separate section dedicated to criminal acts against justice. Norms on responsibility for such acts are scattered in different sections of its Special Part;

- in general, a comparative analysis of the criminal legislation of Germany, Austria and Ukraine demonstrated that different types and sizes of punishments were established for certain similar criminal offenses against justice, which is due to the state policy of these countries regarding the criminal-legal protection of justice.

2. In order to improve activity of the Court Security Service of Ukraine, taking into account the standards of ensuring security of justice recognized by the international community, we consider that it would be prospective to introduce the following points of foreign experience to the national legislation:

- development (in cooperation with subjects and independent experts involved in the implementation of the criminological function of ensuring security of justice) and implementation of the Concept of ensuring security and countering criminal offenses against justice in Ukraine this concept should presuppose determination of minimum security standards for construction of court buildings, ensuring their various levels security, including alarm systems, security systems,

data protection systems and organizational systems, including electronic justice, as well as zonal security measures, emergency action plans, standards for training and advanced training of employees of the Court Security Service, their interaction with employees of the National Police, the National Guard, the State Emergency Service of Ukraine, the Security Service of Ukraine. In addition, in order to monitor changes in the security situation and promptly respond to such changes (at the local, regional, and national levels), it is advisable to create a separate subcommittee on justice and security of judicial activities within the structure of the Verkhovna Rada Committee on Legal Policy and Justice considering issues of judicial system;

- regulation at the legislative level of the status of the Court Security Service and its employees as one of the bodies with law enforcement functions and the classification of its staff as employees of a law enforcement agency;
- preservation of the monopoly on issues of ensuring criminological security of justice by a special entity - the Court Security Service, but with the possibility for other entities of the state and non-state sectors to be involved in this activity;

3. As for the improvement of the criminal-legal provision of the security of justice, within the existing new judicial reform, which lasts from 2021 to 2023, it should be considered appropriate to provide for the appropriate differentiation of criminal liability in the current Criminal Code of Ukraine both for criminal offenses against justice and for corruption criminal offenses committed by a special subject - judges.

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Institution of Patient's Advance Directives in the Context of Ukraine's Aspirations for European Integration

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Abstract

The development of legal science in Ukraine is connected with the processes of reform of society oriented to European values and standards of human rights. The most important among them are life and human health, which are related to the realization of patients' rights in the health sector. In this context, the purpose of the article was to analyze the status and prospects of the legal regulation of the institution of patient advance directives, in terms of the methods of medical intervention for the future. The research methods used were: systems analysis, comparative and legal analysis, formal and logical method, prognosis. In the conclusions, the authors have offered civil means, which should create new opportunities for the exercise of subjective rights of patients during the provision of medical care. Finally, suggestions have been made for draft normative acts on improvement of legal regulation of the health care sector of Ukraine in accordance with European legal norms.

Keywords: European legal norms; health care; patients' rights; advance directives; provision of health sector organization.

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Institución de instrucciones anticipadas del paciente en el contexto de las aspiraciones de Ucrania para la integración europea

Resumen

El desarrollo de la ciencia jurídica en Ucrania está relacionado con los procesos de reforma de la sociedad orientada a los valores y estándares europeos de derechos humanos. Los más importantes entre ellos son la vida y la salud humana, que están relacionados con la realización de los derechos de los pacientes en el sector de la salud. En este contexto, el propósito del artículo fue analizar el estado y las perspectivas de la regulación legal de la institución de las voluntades anticipadas del paciente, en cuanto a los métodos de intervención médica para el futuro. Los métodos de la investigación usados fueron: el análisis de sistemas, análisis comparativo y legal, método formal y lógico, pronóstico. En las conclusiones, los autores han ofrecido medios civiles, que deberían crear nuevas oportunidades para el ejercicio de los derechos subjetivos de los pacientes durante la prestación de la atención médica. Finalmente, se han formulado sugerencias para proyectos de actos normativos sobre la mejora de la regulación jurídica del sector sanitario de Ucrania, de conformidad con las normas jurídicas europeas.

Palabras clave: normas jurídicas europeas; asistencia sanitaria; derechos de los pacientes; voluntades anticipadas; prestación de la organización del sector sanitario.

Introduction

Ukraine has actually decided the direction of further movement after signing the Association Agreement in 2014 between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their Member States, on the other hand, by choosing the European integration vector of development. It means the need for gradual integration to European standards. We mean both the legal and the medical direction of European integration. The availability of an effective model of medical care for the population depends on their successful implementation. The significance of the legal component is to ensure the development and implementation of regulatory acts aimed at building a patient-oriented healthcare system.

Therefore, the legal direction of the European integration of Ukraine's development primarily involves the implementation of international legal standards in the field of ensuring the rights of patients, including by

bringing domestic legislation in line with the provisions of international treaties with the participation of Ukraine and joining the European legal agreements on these issues.

The issue of ratification of the Convention on the protection of human rights and dignity regarding the application of biology and medicine (hereinafter referred to as the Oviedo Convention), signed by Ukraine in 2002, has been on the agenda for many years (Oviedo Convention, ETS No. 164, 1997). The relevance of this event is confirmed by the Resolution of the Verkhovna Rada of Ukraine (Resolution No. 1338-VIII, 2016), where the Cabinet of Ministers of Ukraine was given a recommendation to prepare suggestions for the ratification of the specified European agreement. The Resolution of the Verkhovna Rada of Ukraine (Resolution No. 689-IX, 2020) provides the adoption of the draft Law of Ukraine "On the ratification of the Convention on the Protection of Human Rights and Dignity in the Use of Biology and Medicine (Oviedo Convention, ETS No. 164, 1997)" in order for Ukraine to fulfill its international obligations. Taking into account the above, the relevant direction of scientific research is the analysis of the normative content of the text of the Oviedo Convention, the European experience of its provisions' application, carrying out doctrinal and normative correlations with the domestic legislation and law-enforcement experience.

1. Methodology of the study

The research was conducted on the basis of the analysis of the provisions of the Oviedo Convention, the legal positions of the European Court of Human Rights, the domestic regulatory legal framework, literary sources, description and generalization of the range of existing achievements and problems. The method of ascent from the general to the specific has been applied. Due to this method the basic principle of the autonomy and dignity of the patient has been highlighted in the special aspect of taking into account the previous orders.

The comparative and legal method made it possible to analyze the norms of the Oviedo Convention, the legal positions of the European Court of Human Rights and the norms of Ukrainian legislation. Due to the formal and logical method, the definition of the main concepts of the institution of advance directives adequate for the application in domestic acts of legislation, has been offered. The forecasting method assisted to prove that the offered civil means should create new opportunities for exercising the subjective rights of patients during the provision of medical care.

2. Analysis of recent research

The problem of introducing the institution of the patient's advance directives has not received due attention among Ukrainian scholars. Legal research in the field of patients' rights is conducted in tangential directions: ensuring the right to medical care (Teremetskyi *et al*., 2019); specific features of the protection of human rights in the healthcare sector by national courts (Teremetskyi and Muliar, 2019); informed voluntary consent (Teremetskyi and Avramova, 2018); deprivation of life at the request (euthanasia) (Bolidzhar, 2020).

Some scholars in their publications offer to eliminate the gaps in Ukrainian legislation by ratifying the Oviedo Convention and establishing in Ukraine the institution of previously expressed wishes (Puchkova and Bogutska, 2021) or patient advance directives (Shchyrba, 2021). At the same time, reasonable suggestions are expressed in regard to the regulation of the institution of advance directives in Ukraine (Myronova, 2020).

We note that the problem of advance directives in the healthcare sector is widely and thoroughly discussed in the European scientific community in various aspects: regarding the implementation of patient's autonomy (Johnson *et al*., 2018); specifics of observing the ethics of autonomy in caring for the dying (Gómez-Vírseda *et al*., 2019); the significance of autonomy as the ability to make independent rational choices for patients who receive palliative care (Houska and Loučka, 2019); special regime of previous psychiatric directives (Tinland *et al*., 2019).

3. Results and Discussion

3.1. European legal standards regarding the regulation of patient's advance directives.

The institution of the patient's advance directives is part of the European concept of human rights and dignity as a participant in the relationship for the medical care provision. The main constituent rules of consent as conditions for the legality of any intervention in the field of human health in the European legal tradition are enshrined in the norms of the Oviedo Convention. Chapter II "Consent" consists of 5 Articles that form the doctrinal framework and normative basis for implementation into national legal systems.

The Article 5 contains a general rule, according to which any intervention in the field of health can be carried out only after the voluntary and informed consent of the person concerned. The Articles 6 and 7 enshrine principles for the protection of persons who are incapable of consenting to medical

intervention. In particular, special rules for granting consent are applied in the provision of medical assistance to minor persons, adult incapacitated individuals, including in the provision of psychiatric care. The Article 8 regulates the granting of consent in emergency situations.

The Article 9 (the Art. 9 "Previously expressed wishes") enshrines a special rule of regulation of the legal institution of the patient's previously expressed wishes for the first time at the level of an international agreement: "The previously expressed wishes relating to a medical intervention by a patient who is not, at the time of the intervention , in a state to express his or her wishes shall be taken into account". In this way, the patient's advance directives are a component of the rule of consent to medical intervention in the European legal tradition.

The absolute values recognized by the European community (dignity, autonomy, integrity, inviolability) have gradually acquired their concretization due to legal opportunities for a person to independently use and dispose of own body, individual organs, allow or limit access to them. The provisions of the Art. 9 of the Oviedo Convention seek to create a binding legal framework for the legitimacy of advance health care documents, whereby a person will have the opportunity to record own choice of treatment and care methods for the future in advance in a legally binding document. Due to special transactions, the fundamental principle of human autonomy extends to situations where the patient is unable to give or express own consent.

Progressive processes in medicine and biomedical sciences became the catalyst for the initiation of a special norm regarding the implementation of a patient's advance directives. Such new transactions of patients have become relevant due to the spread of the latest medical technologies aimed at prolonging or artificially maintaining life processes, which did not always have favorable clinical results of resuscitation measures.

Those measures immediately showed unexpected effectiveness, when closed cardiopulmonary resuscitation was first used to save patients with cardiac arrest in the middle of the XX century. Thus, 118 cardiopulmonary resuscitation procedures were successfully performed in 1961 just at Johns Hopkins Hospital for patients with circulatory arrest (Berger *et al*., 2016). According to their data, cardiac activity was restored in 79% of cases, but only 60% of the patients who were saved returned to the state of activity of the central nervous system and the heart, which was before the circulatory arrest.

The routine application of cardiopulmonary resuscitation to all hospital patients who needed it led to new problems in the following years until 1963. Prolonged suffering and a prolonged dying process have in many cases resulted from successful cardiac resuscitation, especially in terminally ill patients. However, there was no legal document until 1976 that would regulate the patient's right to request refusal of resuscitation.

In the light of modern ethical requirements of respect for the patient's autonomy, dignity and individuality, advance directives made in case of their inability to make their own decisions or to report them, have acquired the legal status and are one of the legal means of clinical decision-making.

The Article 9 of the Oviedo Convention is applicable to at least 3 types of different legal situations: a) emergency cases, when a patient does not have the ability to express own opinion; b) situations, when a person in a state of progressive illness or dementia refuses in advance certain methods of artificial life support; c) situations, when a person consciously (for religious or ethical reasons) refuses certain defined methods of medical intervention and certifies own wishes for the future, when he / she may become unable to express own will.

The position of the drafters of the Oviedo Convention that doctors cannot act completely arbitrarily in case of a patient's incapacity to express his / her will has become apparent increasingly over time. That is, they must have good reasons to disregard a patient's legitimate wishes expressed in advance directives.

Although the text of the Art. 9 of the Oviedo Convention refers only to unilateral transactions – advance directives regarding methods of medical intervention for the future, the practice of applying this norm in certain countries shows that advance directives are made in two legal forms: unilateral directives and instructions to another person, which is based on the contract.

Unilateral directives are made in the form of a personal statement-order of a patient regarding treatment, care, life-saving procedures or prolongation of life in case it is impossible to notice his / her choice. A mandate is a form of procuracy based on a contract that appoints a person empowered to make medical decisions instead of a patient. A mandate provides benefits in providing clarification of a patient's preferences, if they have been expressed in vague, ambiguous terms in personal directives and for providing medical care in unexpected situations that have not been specifically addressed by a patient.

Special principles regarding the status and legal mechanisms of the institution for advance planning of treatment and care are laid down in a number of legal acts of the Council of the European Union, which have the nature of recommendations. In particular, the Recommendation of the Committee of Ministers to member states on principles concerning continuing powers of attorney and advance directives for incapacity (Recommendation CM/Rec, 2009: 11) states that states should promote early self-determination of capable adults (in the event of their incapacity in the future) by means of appropriate orders and preliminary orders.

The issue of the priority of those methods over others must be considered in the context of the principles of patient self-determination and the subsidiarity of protection measures. Recommendation CM/Rec (2009: 11) provides model definitions of key terms. A "continuing power of attorney" is a mandate given by a capable adult with the purpose that it shall remain in force, or enter into force, in the event of the grantor's incapacity. The "granter" is the person giving the continuing power of attorney. The person mandated to act on behalf of the granter is referred to as the "attorney" ."Advance directives" are instructions given or wishes made by a capable adult concerning issues that may arise in the event of his or her incapacity. The "granter" is the person giving the continuing power of attorney.

The Committee of Ministers of the Council of Europe recommends that states should: develop provisions and mechanisms that may be necessary to ensure the authenticity of documents; regulate the procedure for the validity of the power of attorney; standardize the procedures and criteria for determining the legal capacity of patients; decide the extent of advance directives are to be binding; consider the circumstances when a durable power of attorney becomes invalid and what protective measures are to be taken in such circumstances; regulate issues about situations that arise in the event of a significant change in circumstances. Advance directives, which are not binding, should be considered statements of wishes that must be given due respect.

A movement to implement mechanisms for taking into account documents from patients' advance directives into national legal systems has been also started since 2009 in the Parliamentary Assembly of the Council of Europe (PACE). Hearings on the topic "Living wills and the protection of health and human rights" were held in the period from May to December 2011, the result of which was the adoption of important documents – Resolution 1859 (2012) and Recommendation 1993 (2012) under the joint title "Protecting human rights and dignity by taking into account previously expressed wishes of patients".

In particular, Resolution 1859 (2012) of the Parliamentary Assembly of the Council of Europe recommended that member States: sign, ratify and fully implement the Oviedo Convention, if they have not already done so (clause 6.1); apply Committee of Ministers Recommendation CM/Rec (2009: 11) (clause 6.2); review, if need be, their relevant legislation with a view to possibly improving it (clause 6.3); for countries with no specific legislation on the matter – by putting into place a "road map" towards such legislation promoting advance directives, living wills and/or continuing powers of attorney, on the basis of the Oviedo Convention and Recommendation CM/Rec (2009: 11), involving consultation of all stakeholders before the adoption of legislation in parliament, and foreseeing an information and awareness-raising campaign for the general public, as well as for the medical and legal professionals after its adoption (clause 6.3.1); to encourage

self-determination of capable adults in the event of their future incapacity, by means of advance directives, living wills and/or continuing powers of attorney, should be promoted and given priority over other measures of protection (clause 7.1); advance directives, living wills and/or continuing powers of attorney should be accessible to all; complicated forms or expensive formalities should thus be avoided (clause 7.5) (Resolution PACE 1859, 2012).

The fact that these norms were included into the Principles, Definitions and Model Rules of European Private Law Draft Common Frame of Reference (DCFR, 2009) testifies to the importance of the legal mechanism of advance directives regarding future treatment. Chapter 8 "Medical services" stipulates the requirement of mandatory consideration of prior orders regarding medical intervention. Thus, the Article IV.C.-8:108 "Obligation not to treat without consent" contains the following rules: in so far as the patient is incapable of giving consent, the treatment provider must not carry out treatment without considering, so far as possible, the opinion of the incapable patient with regard to the treatment and any such opinion expressed by the patient before becoming incapable.

3.2. Legal positions of the European Court of Human Rights regarding patient's advance directives

The norms of the Oviedo Convention are not directly subject matter to interpretation by the European Court of Human Rights (hereinafter – ECHR). However, there is a fundamental affinity between the Oviedo Convention and the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter – CPHRFF) (ECHR, 1950), which guarantee the protection of human rights both at the conceptual and normative levels.

Both agreements are based on the same approach, the same ethical principles and legal concepts that are developed and specified in the Oviedo Convention for the purpose of protecting human dignity in the field of biology and medicine. That is the reason why the legal positions of the ECHR in medical cases are of particular interest, which provide guidelines on how the ECHR considers and qualifies violations of human rights in the field of medical care. Due to this analysis we have the opportunity to foresee the necessary regulatory safeguards for human rights violations in the formation of national legislation in this area.

It is still unusual for most European countries to make clinical decisions on the basis of a patient's advance wishes, however, some generalizations can be currently made about the ECHR's legal position in regard to advance directives. Considering comprehensive moral and legal aspects of taking into account a patient's advance directives, the ECHR Lambert against France decision (Application No. 46043/14, 2015) formulated the

basic principles that must be taken into account while forming national legislation. First of all, the ECHR noted the conceptual legal difference between euthanasia (assisted suicide), on the one hand, and withholding life-sustaining treatment, on the other. This statement made an important substantive distinction between the institutions of euthanasia and advance declaration of will regarding future treatment.

Secondly, the ECHR reaffirmed its position regarding the mechanism of medical decision-making in a new context, if a patient cannot (or can no longer) participate in this procedure. In this case, the decision is made by a third party in accordance with the procedures set out in national law. However, a patient still should be involved in the decision-making process through any previously expressed wishes.

The wishes of a patient in the medical decision-making process are of paramount importance, regardless of how they are expressed. Thirdly, the ECHR noted that medical factors (in particular, a patient's current condition, changes in that condition, degree of suffering, clinical prognosis) and non-medical factors, including a patient's wishes should be taken into account while assessing whether treatment meets the criteria of unreasonable obstinacy, no matter how they were expressed, how a physician should have paid special importance, as well as the views of a trusted person, family or relatives.

Thus, there is a principled position of the ECHR regarding the paramount importance of a patient's wishes in the decision-making process, regardless of how the wishes are expressed. When two Conventional rights are pitted against each other: the right to life with the corresponding duty of the state to protect life under the Art. 2, on the one hand, and the right to personal autonomy, which falls within the protection of the Art. 8. "Respect for human dignity and human freedom" may prevail in such a contest. If there are no prior orders, the dignity of a person is interpreted in terms of the predominance of the value of life.

Another legal position was formulated by the ECHR in the case Berke against the United Kingdom (Decision as to Admissibility Application No 19807/06, 2006). The decision concerned the right of a competent patient to request the treatment defined in the earlier orders. The applicant was concerned that the current professional medical guidelines in the United Kingdom in his opinion would allow treatment to be withdrawn in circumstances that would result in his suffering, death, starvation and dehydration. The applicant wished to be fed and adequately hydrated until he would naturally die.

Applying for protection to the ECHR, the applicant complained under the Art. 8 of the European Convention that he was deprived of the protection of an important aspect of his personal autonomy within

the national jurisdiction because he could not make advance directives regarding the treatment he wished to receive at a time when he was not able to communicate. He considered the presumption of priority of his wishes in favor of life-prolonging treatment insufficient.

The ECHR in its decision expressed the legal position that an applicant cannot predetermine the application of a particular treatment in future unknown circumstances. Neither a competent nor an incompetent patient can demand treatment from a physician that the doctor considers to be clinically unjustified.

Therefore, in the context of the Art. 8 of the Convention for the Protection of Human Rights and the Art. 9 of the Oviedo Convention, as well as in the light of the legal evaluations of the ECHR, the principle of a patient's personal autonomy extends to the situation of the loss of part of his competence and even the loss of consciousness. Physicians in such clinical settings have an obligation to retrospectively consider a patient's expression of will and personal preferences regarding the methods of medical intervention. This approach legally obliges the governments of countries that have joined these agreements to introduce new institutions into legislation, and this has already been done in some countries of Western Europe.

Different jurisdictions choose different ways to introduce legal means that ensure a patient's autonomy in choosing future medical interventions. Some have adopted special legislation regulating patient rights, others have incorporated special norms into general civil legislation. For example, separate norms related to a patient's autonomy and advance directives are included into the Mental Capacity Act in the jurisdiction of England and Wales (Mental Capacity Act, 2005).

The law regulates the spectrum of legal relations arising in connection with a person's loss of competence, which relate to financial issues, personal well-being and the provision of medical assistance. Issues regarding a patient's autonomy and advance directives are regulated in Austria by a separate special Federal law "Bundesgesetz über Patientenverfügungen" (Bundesgesetz über Patientenverfügungen, 2006).

3.3. Patient's advance directives in Ukrainian law

With the beginning of the reform of the health care system in Ukraine in 2017, certain elements of the institution of advance directives were fragmented and legitimized at the level of orders of the Ministry of Health of Ukraine. Thus, the Order of the Ministry of Health of Ukraine "On the approval and implementation of medical and technological documents on the standardization of emergency medical care (Order MoH No 1269, 2019) approved a new clinical protocol "Emergency medical care: pre-hospital stage", which is a translation of the corresponding protocol acting in the

USA and regulating patient's advance directives among other things, in particular, transactions "Do Not Resuscitate".

Advance directives are defined in the protocol as "a document describing the procedures allowed for the specified medical conditions, including all or only in part from the following: actions in case of cardiac arrest, whether artificial nutrition is allowed, whether or not to be a donor, dialysis and other parameters". Paragraph 4.4 of this protocol requires emergency medical providers to recognize and support the various ways, when patients can express their wishes regarding cardiopulmonary resuscitation or end-of-life decisions.

This medical and technological document is somewhat inconsistent with the legislation regulating relations in the field of medical care in Ukraine. In particular, the Order of the Ministry of Health of Ukraine No 1269 contradicts the Art. 52 of the Law of Ukraine "Fundamentals of Ukrainian legislation on health care" (Law of Ukraine No. 2801-XII, 1992), which provides: "medical employees are obliged to provide full medical care to a patient who is in an emergency condition. Active measures to support a patient's life are stopped, if a person's condition is determined to be irreversible". Other orders of the Ministry of Health of Ukraine also partially regulate the institution of "a patient's proxy for notification in case of a patient's emergency" (Order MoH No. 503, 2018; Order MoH No. 2755, 2020). However, there is still no special regulation of the specified relations in the legislation.

The norms of the Art. 6 of the Civil Code of Ukraine (Law of Ukraine No. 435-IV, 2003) provide the possibility of recognizing a contract and unilateral transaction as a source of civil law in cases of gaps in the law regarding relationships not regulated by civil legislation acts. That is, individuals (persons) in Ukraine can theoretically make advance directives.

However, such documents in practice are not considered legally binding. Since there is no special legislation on advance directives, there are no defined legal grounds regarding the degree of obligation, scope and validity of such documents. Given the peculiarities of the domestic legal culture and mentality, the practical meaning of authorizing a proxy in matters of health care is almost lost, because if a patient becomes incompetent, decisions about treatment and care are made by physicians or relatives, guardians, even if they do not agree with patient's personal preferences.

Taking into account the above, and the European integration direction for the development declared by Ukraine, the observance of a patient's recognized rights and the development of adequate ways of implementing the institution of advance directives, taking into account the peculiarities of the legal system and the legal culture of the population, become of urgent importance. The introduction of special norms into the legislation of

Ukraine, which regulate relations of contractual representation of a patient and advance directive, will contribute to the promotion of a patient's autonomy in Ukraine.

We supplement the Art. 3 of the Law of Ukraine "Fundamentals of Ukrainian legislation on health care" (Law of Ukraine No. 2801-XII, 1992) with the following terms and definitions: "Patient's advance directives" – a legal document drawn up in accordance with the requirements of the law by an individual with full civil legal capacity, which records his / her will regarding the methods of medical intervention for the future.

"Power of attorney for decision-making in the field of health care" is a legal document drawn up in accordance with the requirements of the law by an individual with full civil capacity for the purpose that it remains in force or enters into force in case of the grantor's incapacity. "Patient's proxy" is an individual authorized to make decisions regarding medical intervention and to obtain medical information by a person with full civil legal capacity on the basis of a power of attorney agreement.

Paragraph 1 of the Art. 52 of the Law of Ukraine "Fundamentals of Ukrainian legislation on health care" (Law of Ukraine No. 2801-XII, 1992) we offer to be worded as follows:

> Medical employees are obliged to provide medical care to a patient who is in an emergency, on the grounds and to the extent determined by legislation, on the basis of clinical protocols and standards for the provision of urgent and emergency medical care, which are approved by the central body of executive power, which ensures the formation and implementation of state policy in the healthcare sector, and taking into account of a patient's advance directives. Active measures to support a patient's life, authorized by the patient, his representative, are terminated in case if the person's condition is determined to be irreversible death.

Besides, the legal mechanism of advance directives must be enshrined in the special Law "On Patient's Advance Directives".

Conclusions

The patient's advance directives are a component of the rule of consent to medical intervention in the European legal traditions. Due to special transactions, the fundamental principle of human autonomy extends to those situations, when a patient is unable to give or express his consent. According to the ECHR's legal position, a patient's wishes in the decision-making process, including advance directives, are of paramount importance.

There is no special regulation of relations on the contractual representation of a patient and a patient's advance directives in Ukrainian legislation. Therefore, the relevant amendments to the legislation, taking

into account the norms of the Art. 9 of the Oviedo Convention in the context of the renewal of civil legislation, which is ongoing in Ukraine, have been offered. New civil legal means will create new opportunities for individuals in exercising their subjective rights by extending the principle of consent to those situations, where a patient's will be not taken into account for various reasons.

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Historical and legal characteristics of main scientific concepts of origin of the State

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Abstract

The aim of the research is the historical and legal characteristics of the main scientific concepts of the origin of the state. The opinions of scientists were analyzed and a conclusion was made about the variety of concepts related to the emergence and formation of the state. It was shown that the main concepts (theories) of the origin of the state include: theological, organic, patriarchal, psychological, class, violence theory, oligarchic, racial, cosmic, etc. The following methods were used in the research: analysis of biographical sources, synthesis, deduction, comparative analysis and meta-analysis, etc. It was concluded that in modern legal science there are various theories explaining the process of the emergence of the state from different positions. The list of scientific concepts we considered is not exhaustive, but with the development of legal science it can be expanded and supplemented with new content. Having considered the main theories of the origin of the state, we can come to the conclusion that it is impossible to state unequivocally which of these theories is absolutely correct. Each of the theories deserves attention and affection, each of them has its positive and rational points.

Keywords: history of the state; scientific concept; political theory; origin of the state; historical formation.

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Características históricas y jurídicas de los principales conceptos científicos del origen del Estado

Resumen

El objetivo de la investigación son las características históricas y jurídicas de los principales conceptos científicos sobre el origen del Estado. Se analizaron las opiniones de los científicos y se llegó a una conclusión sobre la variedad de conceptos relacionados con el surgimiento y la formación del Estado. Se demostró que los principales conceptos (teorías) del origen del Estado incluyen: el teológico, el orgánico, el patriarcal, el psicológico, el de clase, la teoría de la violencia, la oligárquica, la racial, la cósmica, etc. Los siguientes métodos se utilizaron en la investigación: análisis de fuentes biográficas, síntesis, deducción, análisis comparativo y metaanálisis, etc. Se concluyó que en la ciencia jurídica moderna existen diversas teorías que explican el proceso de aparición del Estado desde diferentes posiciones. La lista de conceptos científicos que consideramos no es exhaustiva, pero con el desarrollo de la ciencia jurídica puede ampliarse y complementarse con nuevos contenidos. Habiendo considerado las principales teorías sobre el origen del Estado, podemos llegar a la conclusión de que es imposible afirmar de forma inequívoca cuál de estas teorías es absolutamente correcta. Cada una de las teorías merece atención y cariño, cada una de ellas tiene sus puntos positivos y racionales.

Palabras clave: historia del Estado; concepto científico; teoría política, origen del Estado; formación histórica.

Introduction

To date, there is a plurality of theoretical views on the process of the emergence of the state, its concepts and its purposes. This diversity is conditioned first of all by historical features. Concepts of the origin of the state developed at different times are based on different amounts of accumulated knowledge, various philosophical preferences, they are oriented towards certain categories of the population, depend on geographical features, economic development, etc., and that is why they cannot be considered universal and unified. Understanding of the modern state prompts to a general theoretical analysis of the scientific concepts of state origin presented in literature sources.

Emergence of the state is a historical, long process that took place over centuries and even millennia. The up-to-date literature presents a sufficiently large number of various concepts of state origin, which reflect the attitude, own imagination of their founders on formation and development of state organization.

Artists of different eras expressed their own opinions, substantiated their statements about the process of state emergence, and insisted that their theory was the best.

The purpose of the research is historical and legal characteristics of main scientific concepts concerning origin of the state

1. Literature review

Scientists has begun to deal with the issue of researching scientific theories of state emergence since long ago, however, this problem is still relevant in our time. Concepts of state origin were considered by such present day scientists as Halaburda Nadiia, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna etc. (Halaburda *et al.*, 2021).

Theories of state emergence are based on the generalization of the causes and consequences of the origin. As noted by O.M. Balynska, theory is abstract reasoning, a set of scientific propositions, which, however, arise from causes, explain their consequences, and even suggest the variability of consequences in the event of a change in one of the factors (Balynska, 2010).

The main reasons for emergence of the state are: the need to improve management of society which is related to the development of production and the division of labor; the need to maintain order in society; emergence of an objective possibility to financially support a class of people who are not engaged in physical labor; the need to protect the territory and conduct wars; the need to suppress socially heterogeneous groups of society; the need to organize large public works (Katkova, 2014).

Correlation between the causes and theories of the origin of states reveals mutual connection between these concepts, but it is inappropriate to talk about their mutual dependence (theories originate from the causes, are based on their analysis, and give an explanation of their consequences) (Balynska, 2010).

It is impossible to consider the state origin concept without paying attention to the modern definition of the concept of “state”. Thus, the state is understood as an organization of political power that exercises effective control over a certain territory and population, maintaining law and order and possessing the prerogative to use coercion (Petryshyn, 2014).

According to I.M. Pohribnyi, state is a special form of organization of society’s life activities on a territory defined by borders, which is characterized by the presence of a system of management bodies, coercion and the ability to issue universally binding rules of behavior - legal norms (Pohribnyi, 2010).

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers on historical and legal characteristics of main scientific concepts concerning state origin etc.

With the help of the epistemological method, the historical-legal characteristics of the main scientific concepts of the state origin etc. were clarified, thanks to the logical-semantic method, the conceptual apparatus was deepened, the historical-legal characteristics of the main state origin concepts etc., were determined. Thanks to the existing methods of law, we managed to analyze the essence of historical and legal characteristics of the main scientific concepts concerning state origin etc.

3. Results and discussion

The first concept of state origin is the Theological one, according to this concept state is a consequence of a divine will. Ideas of the divine origin of the state existed even in countries of the ancient world, but this theory became widespread in the 12th and 13th centuries in the countries of Western Europe.

In particular, in the laws of Hammurabi (the ancient Babylonian king 1792-1750 BC), he appears as the unlimited ruler of the peoples subject to him; he received power and laws from the gods (Rudyk, 2016).

The theological theory is most vividly expressed in works of the early Christian philosopher Augustine the Blessed (the 5th century) and works of the famous Catholic theologian Thomas Aquinas (the 13th century). (Krestovska, 2015). Relying on the Bible, F. Aquinas insisted on the eternity and inviolability of the divine will, and justified any reactionary states. This theory justified the unlimited monarch power, it reflected some objective realities of the Middle Ages, but it was not of a scientific nature (Rudyk, 2016).

To date, the theological theory of state origin is not very common in European and American countries, but it is the official doctrine of the Vatican, as well as Islamic countries, where religion has a state nature and the main source of law is the holy book - the Koran.

In the 19th century H. Spencer gave a justification for the above theory and pointed out that the will of a state is expressed in laws, the government is identified with the brain, workers are defined as legs and arms, and movements and connections are presented as nerves (Rudyk, 2016).

The next theory presented by Aristotle, R. Filmer, M.K. Mykhaylovskyi, M.M. Pokrovsky and others, is the patriarchal theory.

According to T.G. Katkova, the patriarchal theory means that the state emerged from the patriarchal family as a result of its growth: family - a set of families (settlement) - a set of settlements (a state) (Katkova, 2014).

The theory of violence founded by the ancient Chinese thinker Shang Yang, the Austrian jurist L. Humplovych, German economist K. Kautsky and the German philosopher E. Dühring is quite widespread among main theories of state origin.

The theory of violence includes the theory of internal violence, which states that the state arose as a result of violence of one social group against others, and the theory of external violence, which sees the main reason for state emergence as the conquest and enslavement of some tribes by others (Petryshyn, 2014). Thus, in order to consolidate its dominance over others, a tribe creates an apparatus of coercion, that is, a state.

When developing the theory of violence by taking into account the demographic factor the up-to-date American anthropologist Robert Carneiro determined the main cause of conflicts between communities - and this cause consists in limited resources. In the struggle for mastering resources, and therefore for survival, the victory belonged to administratively organized groups led by strong leaders (Rudyk, 2016).

Considering the theory of violence, we can agree that violent conquests had a significant impact on emergence of states during certain historical periods. However, to date, one should also remember other factors (besides military ones) that led to the formation of modern states (for example, socio-economic factors, cultural factors, etc.).

The treaty theory of state origin also deserves attention. This theory is represented by Epicurus, T. Hobbs, J. Locke, B. Spinoza, J.J. Rousseau and others.

According to the treaty theory, emergence of a state is connected with conclusion of a contract between individuals as a result of their awareness of their urgent needs and interests.

In particular, the Greek philosopher Epicurus believed that the state and law are the result of an agreement concluded between people in order to ensure the common good, that is, mutual security (Rudyk, 2016).

However, the Treaty theory was substantiated in detail only in the 17th - 18th centuries. The state was defined as the result of a social contract, which is the product of a reasonable, conscious will of people to protect their interests, the public good, and ensure natural and inalienable human rights: property, freedom, security, etc. (Rudyk, 2016).

According to T. Hobbes, people are equal by nature, but on the basis of such equality, distrust arises. In addition, selfishness, greed, fear and ambition are inherent in humans. Therefore, the scientist concludes that as long as people live without a general authority that keeps them on the basis of fear, they are in a state of "war against all." Therefore, natural rights give rise to contradictions, which excites people to search for ways to solve such contradictions.

In our opinion, concluding a contract alone is not enough for establishment of a state. This process requires taking into account other determinants that influence formation of a state, including namely economic, social, military determinants, etc.

The Psychological theory characterizes the state as a product of human psyche development. Since it is inherent in some people to control others (and, accordingly it is inherent in the latter to obey them, to be aware of dependence on other persons), social power arises. At the same time, there is always a category of people who, due to their psychological settings, take a social position opposing the authorities and are able to show an aggressive position towards the authorities. In order to restrain such mental principles of individuals, a state is created (Pohribnyi, 2010).

This theory originated in Europe at the end of the 1830s. It was the period when psychology began to form as an independent field of knowledge, experimental methods of research became widespread, and schools with different interpretations of the psyche appeared. Ideas of these schools were borrowed by representatives of legal science. Proponents of Psychological theory tried to find a universal cause that would make it possible to explain the process of emergence of the state and law. Such proponents include H. Tard, L.Y. Petrazhytskyi, F.F. Kokoshkin, M.M. Korkunov, O. Gierke and F. Shtir-Zomlo and others.

Of course, the Psychological theory has the right to exist, however, in our opinion, it is not a central theory in the process of state emergence, since solely psychological patterns of human activity are not enough for formation of a state.

Marx's (class) theory occupies a special place in the analysis of theories of the origin of the state. This theory is also called socio-economic, materialistic, historical-materialistic theory. Representatives of this theory are K. Marx, F. Engels, etc.

O.V. Petryshyn notes that the above-mentioned theory considers the state as a result of historical progress caused by economic transformations. A state arises as a result of social division of labor, emergence of a surplus product, and inevitable growth of social conflicts and contradictions. State formation is connected with the need to restrain the oppressed class, its exploitation by the ruling class (Petryshyn, 2014).

N.M. Krestovska notes that the state and law arose simultaneously due to emergence of private property and the resulting stratification of society into classes (Krestovska, 2015).

In the 20th century the Oligarchic theory became widespread; it was represented by the French political scientist Bernard Chanteboux. According to this theory, emergence of a state is associated with natural hierarchy / inequality in any social community (by physical strength, intellectual abilities, etc.) (Krestovska, 2015).

The positive side of this theory consists in separation of the ruling elite and creation of a certain management structure. However, the goal of state organization is to satisfy interests and needs of all strata of population, regardless of status, physical strength, intellectual abilities and any other characteristics.

As noted by T.G. Katkova the Patrimonial theory means that the state derives from the owner's right to the land (patrimony). From the right to own land, power automatically extends to the people who live on this land (Katkova, 2014). This theory was represented by the Swiss thinker K.L. Haller.

The Patrimonial theory differs in its logic, but, nevertheless, it anchors the idea that power, just like land, belongs only to the ruler who owns, manages and uses practically everything that is on the territory of the country.

The Hydraulic (irrigation) theory connected emergence of the state with transition to irrigated agriculture. According to K. Wittfogel introduction of this type of agriculture alongside with the growth of agricultural production created necessary organizational conditions for an extensive state apparatus. Construction of irrigation facilities required strict centralized management and subordination. This led to formation of a "managerial-bureaucratic" class that conquered society (Mesopotamia, Egypt, India, China, etc.).

Conclusion

Thus, in modern legal science, a variety of theories explain the process of state emergence from different positions. The list of scientific concepts considered by us is not exhaustive, but with the development of legal science it can be expanded and supplemented with new content.

Having considered the main theories of the origin of the state, we can come to the conclusion that it is impossible to unequivocally state which of these theories is absolutely correct. Each of the theories deserves attention and affection, each of them has its positive, rational points, advantages,

however, on the other hand, each theory has certain inaccuracies and therefore it can be at least partially refuted.

It has been established that the majority of present-day scientists believe that the Hydraulic (irrigation) theory has only a local character - in areas with a hot climate. But in fact, it can also be noted that construction of irrigation facilities was a parallel process of the state formation process, and even although formation of states was primary, the irrigation system was the basis of life of the society of that period of time.

In our opinion, this Theological theory has both positive and negative sides. On the one hand, the above-mentioned theory provides the state with an element of sanctity and spirituality, it contributes to establishment of order, stability, and harmony in the state and society, which contributes to increasing the level of legal awareness of the population and raises prestige of the state power. However, on the other hand, the theological theory is based on belief in God, and therefore it is impossible to reconstruct it in the absence of documentary evidence about the God.

It is emphasized that a positive feature of the Class theory is that the state emerges as a result of the natural development of society, and the most important factor in the emergence of the state consists in economic development. In our opinion, economic conditions are important and dominant in the process of state formation, however, one should not forget about national, psychological, religious and other factors of state formation.

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The impact of metacognitive changes of digitalized consciousness on public administration policy

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Abstract

Using the method of observation and analysis of official documents, the article explores the influence of the digital creative class on traditional state institutions, which ultimately leads to metacognitive changes in the digitized consciousness of society. Currently, state institutions face challenges in the digital age, such as the «information bubble,» irrational and emotional user choices, and competition for attention based on impressions, «likes,» and diverse opinions. Artificial intelligence technologies have influenced various industries and public administration, causing a shift from traditional interaction to virtual formats with state institutions. An example of this transformation is the Ukrainian online service DIIA, which offers document circulation, access to open records, identification and identity confirmation, and data tracking and analysis systems. It is concluded that, the interaction between public administration and digitization processes falls into four main categories: as a prototype of complement, reinforcement of the «exoskeleton», connection and blending of solutions in human-AI interaction, and delegation or replacement of human decision-making by AI.

Keywords: actor; information retrieval worldview; digitization; public decision making; metacognition.

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El impacto de los cambios metacognitivos de la conciencia digitalizada en la política de la administración pública

Resumen

Mediante el método de observación y análisis de documéntalos oficiales, el artículo explora la influencia de la clase creativa digital en las instituciones estatales tradicionales, lo que, en última instancia, conduce a cambios metacognitivos en la conciencia digitalizada de la sociedad. En la actualidad, las instituciones estatales se enfrentan a retos en la era digital, como la «burbuja de la información», las elecciones irracionales y emocionales de los usuarios y la competencia por la atención basada en impresiones, «me gusta» y opiniones diversas. Las tecnologías de inteligencia artificial han influido en varias industrias y en la administración pública, provocando un cambio de la interacción tradicional a formatos virtuales con las instituciones estatales. Un ejemplo de esta transformación es el servicio en línea ucraniano DIIA, que ofrece circulación de documentos, acceso a registros abiertos, identificación y confirmación de identidad, y sistemas de seguimiento y análisis de datos. Se concluye que, la interacción entre la administración pública y los procesos de digitalización se clasifica en cuatro categorías principales: como prototipo de complemento, refuerzo del «exoesqueleto», conexión y mezcla de soluciones en la interacción entre humanos e IA, y delegación o sustitución de la toma de decisiones humanas por la IA.

Palabras clave: actor; cosmovisión de recuperación de información; digitalización; toma de decisiones públicas; metacognición.

Introduction

Modern events such as COVID 2019 and the Russian-Ukrainian war with full-scale Russian aggression from February 24, 2022 have led to important changes in the development of digital technologies and their application during global threats to society and the activities of its main central institution – state.

In our opinion, the most significant changes that influence on public administration are in:

– the division of labor related to the formation of the Internet space, and therefore challenges to public administration regarding the use of digital professions in it and digitization of workplaces;

- the transition of public administration to the provision of public services in a digital format using innovative information and communication technologies (ICT), and the possibility of creating digital safeguards against corruption (the creation of front and back offices in public administration, the possibility of journalistic, civil and criminal investigations using the global Internet memory (for example, Wayback Machine (2023) and others);
- the replacement of some functions and even positions through artificial intelligence;
- the development of a creative class that has sources of financing and conducting business from digital technologies, which in the interaction of "politics-state-business-civil society" will influence the state through politics, civil society, business on public administration (the main process in the institution of the state);
- the waging informational and hybrid wars with informational and psychological special operations (IPSO) of various conflict actors or even wars between states, where state institutions remain the main regulator and actor of conflict resolution.

Therefore, the purpose of the article is to discover how exactly current trends affect the formation of metacognitive changes of digitalized consciousness on public administration policy.

The study of the impact of metacognitive changes of digitalized consciousness on public administration policy determines the solution of such tasks:

1. Determination of the process of formation of consciousness and the impact of significant changes, which determines and forms a new contour of worldview, in our case, digital or information-retrieval consciousness. First of all, the most important task in this process is to determine the role of digital consciousness, which develops on the basis of previous historical types of consciousness that consistently emerged, dominated for a certain time, and then moved from a central role to a peripheral one, but did not disappear. So, we are talking about the mythological, religious, philosophical, scientific, and modern digitalized worldview.
2. Determination of metacognitive changes in digitalized consciousness, which is considered from the understanding of the metacognitive level of consciousness of people, in our study – civil servants and local officials. The center of assembling the solution to this task is the understanding of metacognitive processes, metacognition. Within the framework of the theoretical conceptualization, metacognitive competences, metacognitions in the effectiveness of cognitive

processes, metacognitive processes, generalizations, judgments of strategies that have a higher structure, general and integrative character in relation to cognitive processes are considered.

3. The third task is the study of how digital metacognitive thinking affects and can affect the public sphere and the process of public administration in the future.

1. Methodology of the study

The study is based on observation and analyzing of official documentation, current legislation, official websites of public authorities and producers of specialized software, especially those web resources that directly focus consumers' attention on the possibilities of using their products as a tool for management processes automation. The study includes analysis of public policy reality, the sphere of public administration, and the activities of the management process actors (subjects), analysis of existing (documented) examples of innovative information technologies implementation in public administration.

The empirical basis for the analysis consisted of materials from the media, examples of successful application of various information technologies for automating the provision of public services, materials from international non-governmental organizations, and so on.

The team of the authors of the article has been involved in the international research project since 2023 – "Metacognitive theory of political crisis management and the Laswell-Flywell metacognitive scientific monitoring system of political behaviors", which is supported by the Caucasus International University. The study of the impact of metacognitive changes of digitalized consciousness on public administration policy is based on the basic theoretical propositions that form the methodological foundation of our research. Firstly, we consider historical types of consciousness that consistently arise, at some stages are advanced and dominant, but at the next stage of development do not disappear but exist on the principles of co-evolution and mutual complementation. We define such historical types of worldviews as mythological, religious, philosophical, and scientific. And now a digitalized, information-retrieval worldview is being formed, which has its own specifics.

Concerning the worldview, the article is based on theoretical points of M. Lepskyi (Lepskyi, 2022), namely on such structural elements as: worldview type, institutional medium that forms the environment, system of meanings (event, meaning actor, actor of practices and meaning, plot unit, element), sphere of aggression (socially acceptable aggression, socially unacceptable aggression).

The comparative analysis is based on the following components:

1. A system of meanings is an event and a plot element, as something that reflects qualitative changes in the objective world and, accordingly, people's ideas about them; since in the social world events always have their pioneers and innovators (the first one creates something new important for this worldview, the second implements it into social practice). Therefore, we consider actors (subjects) of meaning (pioneers) and actors (subjects) of practices and meanings (innovators who embody innovations in practice).
2. Sphere of aggression (as what determines the activity of transforming the world). Here we are supporters of Erich Fromm's point of view about constructive and destructive aggression, which at the level of society is reflected as socially accepted aggression (and sometimes approved) and socially unacceptable aggression (which is precisely not acceptable in society). These criteria for comparing historical types of worldviews are especially important in the study of conflicts, wars, and global catastrophes. The lack of activity, determination, and capacity for action as an energetic attitude towards the world leads to the removal of subjectivity and the transition to the state of a victim, that does not change the worldview, but only determines adaptation and inaction.
3. Institutional large-scale medium that forms the environment. In this component we state that pioneers and innovators constitute the form and effectiveness of their activity and behavior, its worldview meanings in social institutions which are reproduce and transmit worldview and practical activity through social institutions that are created, developed, and consolidated at a new historical stage marked by a type of worldview.

2. Analysis of recent research

The worldview level of analysis requires theoretical analysis of meta-level. Therefore, the study of metacognitive processes of changes in the formation and development of digital consciousness in public administration policy are an important process.

American researcher J. Flavell introduced the concept of "metacognition" into scientific circulation, as he tried to experimentally prove the cognitive processes of purposeful and planned thinking of the second order (according to J. Piaget), which has a reflexive nature of observing and managing one's thinking. This content is manifested in formal operations in regulatory actions of cognitive activity and knowledge, which are united by its concept (Hacker, 1998).

Similar definitions of metacognition as control of one's own thinking and its specifics in relation to educational activity (Cross & Paris, 1988); with an emphasis on self-reflective knowledge in the process of controlling one's cognitive processes (Metcalfe, 2009); but the main features of this process are knowledge about one's own thinking, the ability to observe, implement and adjust cognitive activities based on them, etc. It is regulatory actions, self-observation of thinking, and control over cognitive activity that are attributed to the attributive characteristics of metacognition. M. Martinez defines thinking as the center, core, observation (monitoring) and its control (more precisely, self-control) (Martinez, 2006), K. Lyons and P. Zelazo consider such a characteristic as awareness and the process of managing one's own thinking (Lyons & Zelazo, 2011), but in general it continues the tradition of J. Piaget about cognitive processes of a higher order, which is indicated in the concept by the prefix "goal".

Today, metacognition is studied in various theoretical concepts: models of cognitive monitoring by J. Flavell, a process-oriented model of metacognition by J. Borkovsky, hierarchical model of metacognitive monitoring of knowledge by S. Tobias and H. Everson, two-level model of metacognitive regulation by T. Nelson and L. Narens.

Digitization in the field of public administration refers to the process of converting analog processes, products, and services of the state into a digital format using the latest (cutting-edge) information technologies. The essence of digitization is the process of replacing traditional methods of data storage, processing, and transmission with digital ones, which allows to increase their efficiency and availability, reduce costs, and shorten the time for performance of work. It is associated with the growth of the use of computers, networks, and other electronic devices in various spheres of life, which leads to an increase in the amount of information (data).

It was the gradual accumulation and rapid growth of the amount of data that became the impetus for the development of a new paradigm in information science, which is associated with the appearance of the term "Big Data". The term denotes significant (large) information assets in terms of volume, speed and/or variety (Suthaharan, 2016), which cannot be effectively stored or processed by traditional methods, and therefore require the use of innovative information processing methods. The opposite direction is the formation of micro-targeted and individualized technologies for the formation of "information bubbles" around the user, i.e., in the fight for people's attention, people get corresponding news and messages.

3. Results and discussion

3.1. Essence of information-retrieval worldview

Let's examine the essential attributions and elements of the worldview first. Then move to the metadynamics of worldviews and the impact of the main trends of digital processes on public administration policy.

Free thinking and the search for rational foundations of knowledge and wisdom have always been associated with the philosophical and the scientific worldview that grew out of it. The philosophical worldview was formed both in the polis and in the religious medium – the monarchical state. It became the dominant worldview in the Renaissance, forming the project of Modern times, the project of science.

The main ideas of the kingdom of reason and wisdom were determined by the ideals of wisdom, truth, justice, human and state centrism. These ideas made their way for a long time. The main collection of ideas occurs in the defense of the role of a citizen and a city resident, since the relations of the civil community required rational argumentation, evidence from practice and the results of the search for laws and patterns.

Philosophers and scientists who carried out theoretical and practical activities became the main actors (subjects) of understanding. At the same time, the users of knowledge became engineers, statesmen and entrepreneurs: those who created prototypes and models, production, and commercialization systems. The national state, rejecting the sacralization of power, searched for unity in the division and balance of power. Rationally based models became units of meaning.

The main events determining the dynamics of meanings were the discoveries made by a scientific innovator. A whole ideological and contextual series of prototypes of innovators in the economy, politics, culture, technology, military affairs, etc. appeared in the division of power and spheres of life activity of the state.

It was the nation-states that became the main engines of the industrial and mass-media society with the transition from print (newspapers, outdoor advertising) to radio, television, that is, to technical means of mass information. Industrial methodology of rationalization of cognitive processes, connected, first of all, with systemic, structural and functional, synergistic models of public administration. The models had the character of public engineering of public administration as the engineering of bureaucratic algorithms, principles, regulations, orders, external legal norms, internal by-laws, record keeping formats, etc.

In addition to rationalization in the digitized process, the software forms an assembly for users in public administration, therefore, the formatting of the software has metacognitive properties precisely in the developers of this software. The modern transition through digitization from mass media to referential contact-mass communication in social networks involves the digitization of the main carriers of meanings and images.

In this format and software civil servants depend on the format of metacognitive processes of developers. Emotions determined the communicative basis of a new worldview, in which previous types of worldviews also found a place, and at the same time, its own specificity was formed. Superstate formations in the form of social networks, search engines, data banks, such as Wikipedia, etc., became the medium of this worldview.

If earlier it was assumed that it would be an information-cognitive worldview, than now, based on the essential specifics, it is rather an information-retrieval worldview that forms its meanings and practices, as, in fact, the division of labor with the predominance of the process of searching for information and content is formed in the direction of this search.

This worldview is based on the society of consumption and hyperreality, but it is not reduced to it, which was ingeniously predicted and analyzed by J. Baudrillard. Digitized meanings make up a huge Internet memory – that's why all this requires from the consumer (user) constant sliding, surfing, informational and territorial localization in social groups and communities.

The basis of the information-retrieval worldview is not knowledge, but information (in-form), novelty, emotions, and impressions of the flow of information, often without knowledge. Information-retrieval news thinking is dominated by affects and emotions. Attempts to rationalize them in the concept of emotional intelligence are not very successful in the practice of newsfeeds and streams.

There is a rollback in the augmented and virtualized digital environment to the neo-mythic, to what Umberto Eco labeled as neo-feudalization, in the images of the early Middle Ages with localization and fragmentation, with neo-priests-experts and elders.

The actors (subjects) of understanding the information-retrieval worldview are media workers (including actors of social networks – bloggers, experts, Instagrammers, site and company ambassadors, etc.) and those who use content, who are contextual and thematic strategists, advertisers, marketers, targeting and SMM specialists, whom we indicate as information and network technologies, emphasizing their goal-oriented, algorithmic, replicated and artificial characteristics of activity.

Therefore, for example, the relevant ministry in Ukraine (Ministry of Digital Transformation) was headed by the founder of IT company "SMM studio" Mykhailo Fedorov, who managed to identify the author of cyber-attack on the main digital product of the ministry called «DIIA» (in the form of creating a duplicate (fake) of this mobile application) and to develop another scenario for such an event – instead of imposing sanctions, he invited the author of the forgery to work in his Ministry (Huliichuk, 2021).

The main events that determine the dynamics of this worldview are news, new content (new that attracts attention), their units are content games, actors of content and context are newsmakers, which, in the first approximation, are divided into attractive everyday life and routinization of the flow of information, extreme catastrophe, extreme deviations, subcultural communities. Therefore, each organization, structural divisions have their official sites or pages, along with a constant newsfeed – a stream of news and new documents that determine changes in legislation, by-laws, orders, internal procedures that determine the actions of users, citizens, and potential scripts for digital solution of issues.

Network technologists, information-retrieval worldview form their neo-mythical and neo-religious worldview prototypology: hater, troller (in mythology klikusha), "fake exposers" (prototype of inquisitors and censors), astroturfers (internet callers), bloggers (heroes, fools, and clowns of information), pranksters and fraudsters (tricksters), etc.

During the war, the main actors of the digital society have a military (military) color: mass consciousness is influenced by military (military) and political bloggers, experts. The opinion of people during the war is affected by the number of subscribers and their popularity. Therefore, public relations structures and spokesmen of public administration structures as timely reaction to fakes and informational and psychological special operations of the enemy are actualized in public administration.

In regular information situations in public administration, actions regarding cyber-attacks, overloading of websites by organized mass access to these resources are actualized too. In addition, during the war, the problems of electricity grids, which can be attacked by an aggressor, and the presence of the Internet network (which, if not equipped with fiber optic cables lose the ability to connect consumers along with the loss of electrical supply) are added. Missile attacks on the electricity and Internet networks of Ukraine during the war determined in the self-reflection of public administration the need for remote work and communication of employees or a change in the spatial location of the work of civil servants since decision-making centers become the primary targets of missile attacks.

Therefore, remote work is a characteristic of systemic work in a digital society even during wartime, as well as metacognitive processes that

provide public administration have activity provision of online or remote work, operational communication, and interaction within the framework of communication platforms. During the modern war, analog means of communication were almost completely removed.

Military events determined new digital solutions for humanitarian aid to Ukraine and its citizens. United24 is a global initiative to support Ukraine, launched on May 5, 2022 by the Ukrainian authorities during the Russian-Ukrainian war, that works as a fundraising platform (Pavlysh, 2022). As of December 7, 2022, it was possible to collect more than 237 million dollars. Financial aid from 110 countries. Ambassadors of United24 became Andriy Shevchenko, Elina Svitolina, Liev Schreiber, Imagine Dragons team, Demna Gvasalia, Barbra Streisand, Mark Hamill, Alexander Usyk, Scott Kelly, Timothy Snyder, Brad Paisley, Michelle Hazanavicius, Catherine Vinnyk, Bear Grylls, Natus Vincere, etc.

Rationalization begins to be replaced or supplemented by affectation and mimesis (imitation) of the masses in emotional contagion. Sensitivity determines the extreme forms of emotion – the catastrophizing of consciousness, which replaces the ideology of safety and risk in a consumer society. The information-retrieval system in the structure of the economy occupies a niche of surplus profits, in exchange, distribution, delivery speed of individualized, mass-affective chains of consumption with the mediation of information-retrieval digitized systems. The catastrophizing of consciousness in a digitalized society has the characteristics of a newsfeed that repeats threats, their combination with real life conditions, and the loss of digital opportunities to work and communicate.

To understand the formation of the future, we will also consider negative extremes, borderline characteristics, precisely in the metadynamics of historical forms of consciousness. In the mythological worldview, the future is defined as a non-scientific form of anticipation (anticipatory reflection) – a prophecy related to the tradition of oral description of the final event associated with the acting characters. Extremely negative is everything that is defined as evil, in the form of an enemy, a stranger, a villain, a breaker of vows, a stream of gloom and terror (for the Greeks and Romans, this is the river Styx), as well as the underworld. Thus, the river Styx led to amnesia and oblivion even of the gods who did not keep their oaths and vows for years.

The underground world itself in the analytical psychology of K.G. Jung was rather a reflection of repressed fears, the shadow side of the human psyche. Most often, as J. Frazer noted, natural cataclysms are presented in myths, for example, the myth of the flood, myths of retribution, etc. These cataclysms determine the images of fears. In the religious worldview, the future is determined by insight, revelation, prophecy, the most vivid images of communication are still at the stage of manuscript transmission

of knowledge. For example, what is defined in Islam as "Maktub" – "so it is said in the book", is assumed in the Book of Fate.

The modern struggle for attention and clicks or switches in the information space has various platforms, such as Youtube, Facebook, Twitter, Tik-Tok, other platforms and private messengers, on which pages of state structures and public figures are often also created. But user surfing often has the characteristics of a chaotic movement or a mythological image of a journey.

Many researchers claim that the sequence and chronology of the Bible and the Koran determined the historicism of religious thinking – its linearity. Thus, one of the hypotheses, for example, the explanation of the most speculative book of Nostradamus' prophecies is considered as a statement of the reverse course of events of the prophecies in the Bible. The future is defined by eschatology, with apocalypse, with a terrible judgment and revival.

Extreme forms of fear are presented in the form of retribution for sin as a terrible judgment, these images are presented visually, in the imagery of church painting, for example, in H. Bosch's "The Seven Deadly Sins and the Four Last Things" and P. Bruegel the Elder's "Seven Deadly Sins" and "The Seven Virtues (Suite of Seven)". In these works, especially by H. Bosch, fear was formed by images of illness, death, a terrible judgment with an exit to heaven or hell (in which terrible monsters carry out retribution for sins).

Internet platforms cause their shadow zones, mortal sins and determine their faith-based values. Moreover, in the information space, people often find themselves in an "information bubble", as micro-targeted advertising throws to the user topics in which he has already shown interest. Therefore, there is a great challenge to the state as the central institution of society: "How to organize relations with the community in the information space and to break through the "information bubbles"? State institutions should be "inertial", which determines their stability and reliability, at the same time flexible and sensitive to the integrity of society.

Platforms that have a high ranking on the Internet and appear on top in search queries are the most influential in relation to users, so the competition is increasingly based on the processes of impression, choice, likes and views. So, bots and chat-bots are increasingly used as well as other systems of promoting by public administration structures, which have their own measurement systems in the digital society. But it is the irrational and emotional side of the user's choice and click that has a mythological and religious basis for the description-narrative, its images and belief in the reliability of information.

In the philosophical and scientific worldview, the future is determined by forecasting and science fiction – scientific types of anticipation,

scientifically based assumptions about the future. The peak of scientific (more precisely, scientific, and technical) prognostication fell in the 70-80s of the XX century. Extremely negative extremes were considered as scientific modeling of forecasts-warnings of global crises, threats of the death of all mankind as a result of world wars, natural and technological disasters. Accordingly, the theories of "global cooling", "global warming", nuclear winter, epidemics, the spread of mass types of weapons, etc. were formed. It was these theoretical directions that allowed the world to stay in the cold war between the two world systems without large-scale catastrophes and to form a dialogue between them.

The modern information-retrieval worldview, based on affective-informational mythology, is defined by a return to archetypes at the global level and their replication in the virtual world, sometimes returns to the non-scientific anticipations of experts, information and network technologists in the catastrophizing of consciousness, emotional affectivity, which attracts attention and keeps it, in the formation of panic and "contagion", in imitation and deprivation as informational marketing strategies in social networks.

And this is the most important component of hyperreality – the catastrophizing of consciousness. It is based on the fear of death from global threats, which may be scientifically rationalized on a global scale, but may not be objectively, scientifically researched. Multidirectional large-scale threats of a terrorist, military, natural, social, biosocial (supernatural), man-made nature increasingly bear the affective and sensational properties of hyperreality disasters.

The reproduction of the worldview is always determined by new systems of education, which makes a new identification of people by education, and therefore a new differentiation of people. As the Strugatsky brothers once wrote, a new identification leads to a new social division. We continue this view; identifications add new social and political conflicts and tensions and attempts at state resolution. All this defines new challenges to public administration. Because user training and deep learning systems are being formed for those who create the programs they use.

3.2. Modern mainstream in public administration policy development

As for the transformation of public administration systems, regardless of the country, it has a clearly defined direction, namely the focus on the active implementation of artificial intelligence and machine learning technologies. Artificial intelligence is a new type of technological science that researches and develops theories, methods, technologies, and system applications for modeling, improving, and enhancing human intelligence.

Artificial intelligence is designed to allow machines to think like humans and to give them "minds" (Søraa, 2023, pp. 5-6).

Artificial intelligence is closely related to machine learning. Machine learning is one of the main areas of this interdisciplinary field. According to Tom Mitchell's definition, machine learning is described as follows: "a computer program is said to learn from experience E with respect to some class of tasks T and performance measure P, if its performance at tasks in T, as measured by P, improves with experience E" (*Artificial Intelligence Technology*, 2023, p. 4). Generally speaking, the processing system and machine learning algorithms develop predictions by discovering hidden patterns from existing datasets. This is an important subfield of artificial intelligence, which is combined with such directions as data mining and knowledge discovery. The combination of the last two areas has created a subfield in machine learning called deep learning.

The main advantage of using artificial intelligence and machine learning is the ability to quickly analyze large volumes of data, the speed and accuracy of detecting anomalies and, accordingly, the ability to make predictions and/or obtain new information based on the analysis of existing data.

For example, network monitoring systems equipped with machine learning algorithms can correlate events and segment data to identify contingencies and correct those that could undermine network performance before an outage occurs. Machine learning is one of the options for implementing artificial intelligence. According to a study by the World Intellectual Property Organization (WIPO), 89% of all patent applications relate to this field of artificial intelligence, and 40% of all patents related to artificial intelligence are based on machine learning algorithms. In machine learning, in turn, the most developed and revolutionary areas are distinguished – deep learning and neural networks (*WIPO Technology Trends 2019: Artificial Intelligence*, 2019).

According to a WIPO study, 26 of the top 30 artificial intelligence patent applicants in the world are companies, and four are universities or research organizations. The leaders in patenting artificial intelligence in various fields are Japan, USA and China. Although Japan filed the first artificial intelligence patents, since 2014 China has led the world in the number of first patent applications, followed by USA. Together, these three-patent office's account for 78% of the total number of patent applications in this field of technology (*WIPO Technology Trends 2019: Artificial Intelligence*, 2019).

This rapid growth of patent activity determines the mainstream in the digitalization of social relations through the mediation of the Internet environment. And mainstreams determine the wave of reformation through self-organizing processes or through conscious politics. We

believe that these processes have a tendency towards co-evolutionary, joint development.

It should be noted that the COVID 19 pandemic had both real medical consequences and informational digital ones – with the activation of online technologies, information ordering of deliveries, physical distancing, and the formation of information and search normality. Therefore, the logistics of providing material products or aid of public administration becomes important.

Military events determined the issue of coping strategies in the public administration of providing public services for the sake of its population, such as the creation of "green corridors" for the evacuation of the population, their placement, provision, medical assistance – electronic recording of the services provided and the logistics of solving these issues.

On the other hand, public logistics does not have to harm the logistics of military personnel conducting combat operations or reveal their movements in social networks and open data. Modern OSINT platforms are becoming rapid wartime intelligence gathering platforms. In general, military events affect all spheres, since all threats are considered and often implemented during the barbaric waging of wars, when the aggressor does not limit himself to either genocidal or war crimes.

Public administration, as the main process of the central social institution of the state, must respond to significant changes in society that occur during a new type of war that is taking place in Ukraine. Therefore, the trends of digital transformation of society during the war determine the direction of changes in public administration. We will consider the trends of digital transformation during the war based on the conclusions of event of 2022 year in Ukraine (Lepskyi, 2022).

Firstly, the organizational process is a communicative process, since digitization determines changes in "public memory" such as the formation and updating of databases and messages, dynamic processes of information change (information streams, feeds, etc.). Significant changes in "public memory" occur from communicative processes.

Digital technologies determine the speed of filling, the form of these databases and software (the algorithmic basis of these processes).

Secondly, the digitization of information aims to obtain information rapidly, the formation of high-speed communications that unite the movement of information in social time and space. The movement of essential information determines all spheres of life – economics, politics, socio-cultural sphere, technology, military, and others. Digitization of the communication process allegedly permeates the organizational structure of these spheres, affects institutions and their activities, sets their information formats precisely in digitization.

Thirdly, fast communication processes in the dynamics of organizational processes create conditions for decision-making. In this organizational process of directing activities and selecting alternatives, digital technologies have the characteristics of an alleged "information prosthesis" (an additional decision-making support tool), an exoskeleton (selecting and enhancing those decision-making functions that are most significant), or/ and a decision-making "blender" as the unity of human rationality and intuition in human decision-making and the artificial intelligence of an information device, a gadget.

Fourthly, recently, artificial intelligence often becomes a "substitute" (a replacement) when decision-making, perhaps by default, is transferred to artificial intelligence and human intelligence becomes a prosthesis for artificial intelligence. In these processes (addition, reinforcement, linking or mixing, and replacement) digitalization is gradually shaping the change of public consciousness in the implementation of artificial intelligence.

Fifth, the digitization of information also affects the physical and material sphere of society's life. Digital technologies form the movement of society – the organization of logistics processes, information provision of effective supply chains in society. The orientation of society is also decisive, starting with the distinction and recognition of people, groups, organizations, the form and content of activity and behavior, their cooperation and co-evolution. This is the alleged scaling of observation and movement in social space and time, in the "bodily organization of society".

The industries in which artificial intelligence technologies were used the most were telecommunications, transportation, life sciences and medicine. In telecommunications, the main areas of application were computer networks and the Internet, radio and television, broadcasting, telephony, video conferencing, and VoIP (voice over the Internet).

In the field of transport, artificial intelligence technologies have been applied in aviation, creation of autonomous vehicles, driver/vehicle recognition, transport and road engineering systems. In biology and medicine, the main areas of use are concentrated in bioinformatics, biological engineering, biomechanics, drug research, genetics, medical imaging, nonresearched, medical informatics, nutrition, monitoring of physiological parameters, and public health (Chan, Hogaboam, & Cao, 2022).

The sphere of public administration is under the influence of these trends. One of the first areas where innovative information technologies were actively used can be considered the sphere of public finance (public procurement), and more precisely, the sphere of detecting fraud and money laundering (*Responsible Artificial Intelligence: Challenges for Sustainable Management*, 2023).

The specific trends caused by the modern Russian-Ukrainian war are the tendencies of confrontation between countries and the role of digital processes in this process and the actions of Ukrainian state in this dimension of striving for victory, preservation of sovereignty and territorial integrity, democratic system, European choice of civilizational foundations of development, preservation of Ukrainian identity.

If viewed from the position of an average citizen, the digital transformation of the state is a change from the traditional (live) format of interaction of a natural or legal entity with state (public) institutions to a virtual (online) format. While from the point of view of the state and the legal system transformation is a set of certain gradual stages, namely:

The first stage of the transformation is the implementation of electronic document circulation systems, electronic reporting and the corresponding recognition of their legal force on a par with analog documents.

The second stage is related to the creation of online platforms (services) with open data (registries) related to the results of public authorities and local self-government bodies activities, provided that data access levels are previously determined, and protection against unauthorized access and falsification is ensured.

The third stage combines the two previous stages and ensures the implementation of actor (subject, user) identification technologies in the virtual space, that is, the creation of digital signature systems that can be used during document circulation, reporting and gaining access to open data registers. At this stage, identification systems protection technologies are being developed.

The fourth stage is the stage of implementation of advanced data analytics systems: both open (published) and hidden (depending on the degree of secrecy) data (information), which provide proactive (preventive) activities to improve the processes of the previous stages.

Finally, the digital transformation receives its final design in the concept of the state as a digital platform, that is, a place (source) of obtaining certain state goods or services.

We will illustrate the stages of digital transformation that we have indicated on the relevant example of Ukraine, in most cases, the DIIA (2003). If you consider the functionality of this online service, you can find elements of each of the listed stages.

1. The use of the DIIA service provides document circulation between individuals and state authorities in matters of registering one's own business, obtaining permit documentation, licenses, social assistance, and other certificates without the need for direct contact with state authorities.

In general, the year 2003 can be considered the beginning of the electronic document management system in Ukraine, when the Law of Ukraine "On Electronic Documents and Electronic Document Management" (Pro elektronni dokumenty ta elektronnyi dokumentoobih. Zakon Ukrainy vid 22.05.2003 №851-IV [About electronic documents and electronic document flow. Law of Ukraine dated May 22, 2003 No. 851-IV], 2003) was adopted, which actively started to be implemented from 2014. Since this time, many information solutions appeared in the country: M.E.Doc, SOTA, FREDO, FlyDoc (Barannik, 2021) or Art-Zvit Plus, iFin, Sonata, Privat24 for Business (Malakhova, 2021).

2. DIIA service allows individuals and legal entities to access data from open registers, namely registers of motor vehicle owners, registers of lawsuits, traffic fines or the passport office. One of the forms of presentation of this information is the so-called electronic certificates – driver's license, foreign passport, e-Document, taxpayer card, vaccination certificates, child's birth certificate, vehicle registration certificate, which have become especially popular during the large-scale invasion of the Russian Federation in 2022 year. According to the EU portal on the quality of open data, Ukraine in 2022 took the 2nd place with a compliance level of 97%. Ukraine was overtaken by France thanks to the quality of data provision and portal sustainability (Open Data in Europe 2022, 2023).

Analogues of DIIA (with the possibility of monetization of own services) in the sense of receiving data from open registers are YouControl, OpenDataBot, LigaContrAgent, PravoSud, Court on the palm (Morkovnik, 2021). Applications of the electronic procurement system Prozorro (2023) can be classified as this category, which, on the one hand, is a system that regulates the process of document circulation in the field of tender documentation. On the other hand, application allows to get access by any interested persons to this data (open part) and to carry out analytical and statistical analysis of the data, which already refers to the fourth phase.

3. The DIIA service is not only a service for obtaining data or generating digital copies of documents, but also means of identification and identity confirmation – DIIA-signature allows to sign digital documents and carry out such operations as obtaining assistance, obtaining certificates, granting permission for the joint use of motor vehicles. Before the appearance of DIIA, one of the fairways in this direction was the applications of JSC AB "Privatbank", which allowed each individual or legal entity to obtain an EDS (electronic digital signature) in a few minutes, from 2021 due to a change in the legislation – KEP (qualified electronic signature).
4. The DIIA service, like any online application, has obviously its own data monitoring and analysis system, or separate ones are

being created (Dozorro, 2023). Regarding this direction, it can be confidently stated that in the vast majority of online applications, the function of analytical and statistical analysis of data (both registers and user requests) is provided on a prepaid basis, since the capacity of own data centers may not be enough to support the corresponding functions, for which it is necessary to rent additional capacity (in the cloud) elsewhere, for example on Amazon, Microsoft or Google. Therefore, it is not surprising that the Amazon corporation opened its representative office in Ukraine in 2021, and from 2022 a law came into effect in Ukraine, according to which "electronic services that non-resident companies (which do not have a permanent representative office in the country) provide to natural persons on the territory of Ukraine, are subject to VAT (20%)" (Pro vnesennia zmin do Podatkovoho kodeksu Ukrainy shchodo skasuvannia opodatkuvannia dokhodiv, otrymanykh nerezydentamy... Zakon Ukrainy vid 03.06.2021 №1525-IX [About making changes to the Tax Code of Ukraine regarding the taxation of taxation of income taken by non-residents ... Law of Ukraine dated 03.06.2021 No. 1525-IX], 2021). Cloud computing is in a great demand in Ukraine.

5. There is a possibility that thanks to DIIA the so-called "military-tech" applications will be developed and implemented, one of the examples of which is the function "eVorog" (iEnemy) (Fedorov: Ukraina stane providnoiu derzhavoiu u rozvytku viiskovykh innovatsii [Fedorov: Ukraine will become a leading power in the development of Ukrainian innovations], 2023).

It is known that artificial intelligence is based on three pillars: data, algorithms and computing capabilities. But it is not enough for the application of artificial intelligence in the field of public administration since there is a need to consider scenarios. Data, algorithms and computing capacity can drive the technical development of artificial intelligence, but technological development will only be spread over volumes of data without scenarios usage. That is why artificial intelligence technologies need to be integrated with cloud computing technologies, big data, and the Internet of Things (IoT).

Currently, the development and application of artificial intelligence needs to solve the following four problems (*Artificial Intelligence Technology*, 2023).

1. High professional standards: To be involved in the field of artificial intelligence, personnel must have significant knowledge of machine learning, deep learning, statistics, linear algebra and mathematical analysis.

2. Low efficiency. Model training requires a long work cycle, which consists of data collection and cleaning procedures, model training and adjustment, followed by its optimization.
3. Defragmented capabilities and experience. Applying the same artificial intelligence model to other scenarios requires repeating data collection, data cleaning, model training and tuning, and experience optimization, as the capabilities (performance) of the artificial intelligence model cannot be directly transferred to the next scenario.
4. Difficult update and enhancement. Model update and efficient data capture are very difficult tasks.

By now, smartphone-centric artificial intelligence has become the industry consensus. More and more smartphones will have artificial intelligence capabilities. According to estimates by several consulting agencies in the UK and the US, approximately 80% of the world's smartphones will have artificial intelligence capabilities by the end of 2023 (*Artificial Intelligence Technology*, 2023). Therefore, it becomes clear why the state platform "DIIA" is oriented specifically for use on smartphones.

In the conditions of the war, the state platform "DIIA" showed its effectiveness, starting with the preservation of electronic storage of documents in case of forced migration or the destruction of housing, where the most important documents for a citizen were located; re-registration of vehicles; simplification of the system of financial support of the Armed Forces of Ukraine; receiving assistance to people affected by hostilities; implementation of innovations supported by Elon Musk – Starlink, ChatGPT and so on.

During the modern war, which in terms of communicative content is the first war that has reflection and representation in real time in social media and physical space. It has been compared to the war in Vietnam, which in terms of communication was the first war to be represented on television.

Sixth, the main purpose of war is to preserve one's own will to fight in the vital activity of society and to destroy the will of the opponent. In this matter, the war appears in the information-digital dimension as demoralization, as the creation of significant conflicts in the "memory and consciousness of warring societies" – these processes are known as propaganda and counter-propaganda, the conduct of military-psychological warfare with the help of digitalized means (which have disorientation processes, untruth – fakes, special information operations, intimidation and panic formation), destruction of consciousness and historical memory, lowering of the moral component of the military-political leadership, society and the Armed Forces, or/and the creation of conflicts between them.

Disorientation and demoralization have both a spiritual and psychological component, as well as a material and physical one – in cyberwar – by means of the destruction of speed processes, the destruction of the effectiveness of the "information prosthesis", "exoskeleton", "mixer" and "substitute" – in human interaction in war and artificial intelligence, and de-scaling of movement and observation. The opposite process is not destruction, but the development of speed and efficiency of information and digital technologies as a means of obtaining competitive and military advantages.

Among the significant changes during the war are: firstly, military tools for destroying the enemy's will in the moral and volitional dimension; secondly, tools for the protection of public "consciousness", "memory" and "body" of the military-political leadership, society and the Armed Forces; thirdly, the development of information and digital tools and artificial intelligence as faster and more effective compared to the enemy.

Conclusion

We discovered metacognitive changes as the evolution of worldviews and their impact on public administration policy, focusing on the shift from a philosophical and scientific worldview to an information-retrieval worldview.

Metacognition is the awareness and understanding of one's own thought processes, or "thinking about thinking". It involves the ability to reflect on, monitor, and control one's cognitive processes, such as problem-solving, learning, memory, and decision-making. Metacognition is a unity of regulatory actions, self-observation of thinking, and control over cognitive activity.

The philosophical worldview, which was dominant during the Renaissance, emphasized wisdom, truth, justice, and human and state centrism. It was shaped by philosophers, scientists, engineers, statesmen, and entrepreneurs who created prototypes, models, and production systems. Nation-states drove the development of industrial and mass-media societies.

With digitization, the information-retrieval worldview emerged, characterized by a focus on information, novelty, emotions, and impressions. This new worldview is dominated by affects and emotions, with content and context being provided by media workers such as bloggers, influencers, and social media managers. The main events driving this worldview are news and new content that captures attention.

This shift has impacted public administration, with the rise of social media, search engines, and data banks as new mediums for disseminating information. In times of war, digital society actors take on military and political roles, influencing public opinion and shaping the actions of public administration structures. Remote work has become a crucial aspect of systemic work during pandemic and wartime, with metacognitive processes enabling online collaboration and communication.

The modern struggle for attention is evident in various digital platforms, leading to an "information bubble" challenge for state institutions. The irrational and emotional side of user choice on these platforms is rooted in mythological and religious beliefs, and the competition for attention is based on impressions, likes, and views.

Artificial intelligence and machine learning are actively being implemented in public administration systems, focusing on processing large volumes of data, detecting anomalies, and making predictions. The trends of digital transformation impact the direction of changes in public administration. Key aspects of this transformation include: 1) digitization of the communicative process, affecting public memory through the formation and updating of databases, and dynamic information changes; 2) rapid information dissemination through high-speed communication channels, affecting various spheres of life such as economics, politics, socio-cultural, technology, and military; 3) the use of digital technologies as decision-making support tools, exoskeletons, or "blenders" that combine human rationality and artificial intelligence; 4) the gradual replacement of human intelligence with artificial intelligence, reshaping public consciousness in the implementation of artificial intelligence; 5) the impact of digital technologies on the physical and material aspects of society, such as logistics, supply chains, and the organization of social movements.

Artificial intelligence technologies have significantly impacted various industries, including telecommunications, transportation, life sciences, and medicine. In public administration, digital transformation has resulted in a shift from traditional interaction to virtual formats with state institutions. This transformation comprises several stages: 1) implementing electronic document circulation systems and recognizing their legal force; 2) creating online platforms with open data registries, ensuring data access levels and protection; 3) implementing actor identification technologies in the virtual space, such as digital signature systems; 4) implementing advanced data analytics systems for proactive activities to improve earlier stages; 5) conceptualizing the state as a digital platform providing state goods and services. The Ukrainian online service DIIA exemplifies these stages, offering document circulation, access to open registers, identification and identity confirmation, and data monitoring and analysis systems. It is anticipated that "military-tech" applications will be developed and implemented through DIIA.

Artificial intelligence technologies rely on data, algorithms, and computing capabilities, but their application in public administration requires the integration of cloud computing technologies, big data, and IoT.

Significant changes are accelerated during wartime. Any war involves military tools for destroying the enemy's will, tools for protecting public consciousness and memory, and the development of information, digital tools, and artificial intelligence to outpace the enemy. During the modern war in Ukraine, DIIA proved effective in various aspects, including document preservation, vehicle re-registration, financial support and assistance to people affected by hostilities. The current war reflects the impact of digital transformation and artificial intelligence technologies in the communicative sphere, with real-time representation in social media and physical spaces.

Regarding metaprototypes affecting the interaction of public administration and digitization processes as the formation of information-retrieval thinking and shaping the future in interaction with artificial intelligence, it is possible to present the main classification of this interaction at the metalevel. The classification of digitized technologies in human-artificial intelligence interaction is shown:

- as a prototype of a supplement – a "prosthesis" (with two options of supplementing a person with artificial intelligence and supplementing artificial intelligence with the missing qualities and processes of a person);
- strengthening of the "exoskeleton" (strengthening of a person and his abilities with artificial intelligence);
- connecting and mixing solutions in human-artificial intelligence interaction – "mixer" (creating the diversity of human-artificial intelligence interactions in various software and information applications, with the main process of self-organization and formation of attractors of this interaction);
- delegation or replacement of human decision-making by artificial intelligence – "substitute" (replacement of individual processes of human communication and decision-making by artificial intelligence based on mass determination of people's choices and the application of statistical decision-making procedures, and therefore the transition of operational actions in public administration to the delegation of these procedures to artificial intelligence.

These prototypes can determine the development of the "consciousness", "memory" and "body" of society – its resilience and will or vulnerability and destruction during war.

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Acquisition of Agricultural Land by Domestic and Foreign Legal Entities: Legal Prospects for Ukraine and other Countries

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Abstract

The aim of the research was to assess the legal framework for the acquisition of agricultural land by domestic and foreign legal entities, using the rules and regulations on the agricultural land market in Ukraine as an example of a system with ill-founded restrictions in this area. To accomplish this task, the authors resort to a set of scientific methods, including comparative review, systematic review and standard techniques of text analysis. The main result of the research was that it is imperative for Ukraine, taking into account that European integration is a key and unalterable priority of its foreign policy, to grant a general permission for foreign natural and legal persons to acquire agricultural land, as well as to introduce flexible approaches to setting acquisition limits. It is concluded that, the attention of policy makers should also focus on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. This could include establishing in contracts for the alienation of agricultural land the obligations of buyers in relation to its rational use.

Keywords: agricultural enterprises; land; agricultural policy; land use; comparative law.

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Adquisición de tierras agrícolas por entidades jurídicas nacionales y extranjeras: perspectivas jurídicas para Ucrania y otros países

Resumen

El objetivo de la investigación fue evaluar el marco jurídico para la adquisición de tierras agrícolas por parte de personas jurídicas nacionales y extranjeras, utilizando las normas y reglamentos sobre el mercado de tierras agrícolas en Ucrania, como ejemplo de un sistema con restricciones mal fundadas en este ámbito. Para llevar a cabo esa tarea, los autores recurren a un conjunto de métodos científicos, que incluyen revisión comparativa, revisión sistemática y técnicas estándar de análisis de textos. El principal resultado de la investigación fue que es imperativo que Ucrania, teniendo en cuenta que la integración europea es una prioridad clave e inalterable de su política exterior, conceda un permiso general para que las personas físicas y jurídicas extranjeras adquieran tierras agrícolas, así como que introduzca enfoques flexibles para fijar los límites de adquisición. Se concluye que, la atención de los responsables políticos también debería centrarse en la necesidad de desplegar mecanismos jurídicos e institucionales que puedan responder a los retos y riesgos asociados a un grado significativo de libertad de circulación de tierras agrícolas. Ello podría incluir el establecimiento en los contratos de enajenación de tierras agrícolas de las obligaciones de los compradores en relación con su uso racional.

Palabras clave: empresas agrícolas; tierras; política agrícola; uso de la tierra; derecho comparado.

Introduction

Providing broad segments of the population with a sufficient quantity and assortment of safe and quality food while simultaneously strengthening economic incentives for agricultural producers to develop their material and technical base and hire more well-qualified personnel require proper legislative regulation of the agricultural land market and effective institutional support for its proper functioning.

The circulation of agricultural land is an area with significant sensitivity to a wide range of national political and economic factors, due to which there are no unified reference models of legal and institutional mechanisms for regulating this process at the international level. However, policy-makers responsible for the infrastructure of agricultural land markets could rely on the experience of many countries with a well-established land market infrastructure giving due weight to current trends in their development.

This is especially important for the agricultural land market of Ukraine, which was formed in an extremely unfavorable political and economic context and which, due to typical fears related to the risk of abuse of Ukraine's greatest national wealth, was burdened with numerous unjustified restrictions. First of all, they are related to the conditions of acquisition of ownership rights to agricultural land by legal entities, acquisition caps and the impossibility of acquisition of ownership rights to land by foreigners.

Comparative analysis of legislative framework for the functioning of the agricultural land market, as well as review of program documents of authoritative international organizations on this issue indicate that there are absolute restrictions on the circulation of agricultural land, which are in most cases unjustified and reduce the potential of agricultural land markets. Instead, it is recommended to introduce tools to prevent and counter abuse by owners of agricultural land. This recommendation is also supported by a significant number of scientific studies, including the European Commission's Joint Research Center study entitled 'Agricultural land market regulations in the EU Member States' and other research materials of the European Commission as well as spot studies by Deininger, Yan and other researchers.

Thus, the purpose of this article is to assess the legal framework for the acquisition of agricultural land by domestic and foreign legal entities using the rules and regulations on the agricultural land market in Ukraine as an example of a system with ill-founded restrictions in this area. Accomplishing that task one should resort to a special set of scientific methods, including comparative review methods as well as systematic review methods and standard techniques of text analysis.

Development

The general significance and certain peculiarities of the legal framework for the circulation of farmland in Ukraine

First of all, in order to form a sufficient research background, we will briefly provide key economic and historical information regarding Ukrainian agricultural lands.

It is common knowledge that:

> Ukraine is the ninth richest in arable land. Of its 32.5 million hectares, some 13 million hectares of farmland contain a rare treasure – the extremely fertile *chernozem* ("black soil," humus-rich grassland soil). The country is Europe's largest stock of such soils, and its capacity as a farm goods producer and exporter is unquestionable. However, a quarter of these riches belongs to the state. Since Ukraine's independence, much of the country's farmland has been divided

> into small plots and is being cultivated by about 7 million farmers and part-time farmers who cannot sell their fields. For nearly two decades, a ban on all commercial turnover of land has been in effect. Ukraine holds nearly 40 percent of the world's stock of "black soil," the most valuable type of farmland. According to the government, it covers more than half of the country's surface (Kowal, 2022: 12).

The importance of deploying an effective, transparent and fair market mechanism for the circulation of agricultural land for Ukraine stems from the general laws of influence of the possibility and principles of the circulation of land as a means of production on the level of economic well-being of society.

There is overwhelming evidence for the notion that well-functioning land markets can, in principle, contribute to broad-based rural development in several ways:

> first, where the ownership distribution of land differs from the optimum operational structure, land markets can transfer land from less to more productive producers and thus increase productivity. Second, transferable land rights make it less costly for rural residents to take jobs in the non-farm economy, something that is likely to boost the off-farm sector. In other words, the land is a store of wealth and a financial asset, and is used to hedge against inflation, which makes it attractive for investors who lack the skills and/or interest to farm. Third, transferability of land increases investment incentives because those who make such an investment can enjoy the benefits even if they are no longer able to personally use the land. Finally, the ability to transfer land at low cost will reduce the transaction cost of accessing credit and can, if there is effective demand for credit, increase credit supply as land is often used as collateral (Deininger, 2003: 1017).

Conversely, an absence of well-defined or adequately enforced land property rights in land hampers the functioning of both land sales and rental markets and leads to inefficient outcomes (European Commission's Joint Research Centre, 2021: 8). Even if well implemented, such restrictions on land sales have almost invariably ended up weakening property rights, increasing the cost of land transfers, and driving transactions into informality. As the benefits from transferring land will become more relevant with economic development and specialization, the cost of such restrictions is likely to increase over time. Providing other safety nets may be a cheaper option to ward off distress sales and destitution than outlawing land sales (Deininger, 2003: 1020).

Having reached the understanding that in order to realize the exceptional potential of Ukrainian agricultural lands as fully as possible, it is necessary to integrate them into the market circulation of goods, the legislators introduced the rules of circulation of agricultural lands of Ukraine. When clarifying the specifics of the conditions for acquiring land of this category it seems advisable to refer to the relevant legislative provisions.

In particular, Article 130 § 1 of the Land Code of Ukraine of 2001 prescribes that, along with citizens of Ukraine, Ukrainian territorial communities and the state of Ukraine itself, from January 1, 2024, Ukrainian legal entities, created and registered under the legislation of Ukraine, participants (shareholders, members) of which are only citizens of Ukraine and/or the state of Ukraine and/or Ukrainian territorial communities may acquire agricultural land. At the same time, foreign individuals and legal entities are prohibited from acquiring shares or membership in legal entities (except for the statutory capital of banks) that are owners of agricultural land.

This prohibition shall be lifted on the condition and from the date of approval of the respective decision in an all-Ukrainian referendum, with the exception of certain special restrictions related to agricultural land plots located closer than 50 kilometers from the state border of Ukraine, or land sales market operations by individuals and legal entities, in respect of which the special economic and other restrictive measures (sanctions) were imposed and some other special situations (Land Code of Ukraine, 2001: Article 130).

In addition, it is worth mentioning that the legislative provisions of Article 130 § 2 of the Land Code of Ukraine of 2001 determine that the total area of agricultural land owned by a citizen of Ukraine cannot exceed 10,000 hectares. The total area of agricultural land owned by a legal entity (except banks) may not exceed the total area of agricultural land owned by all its participants (members, shareholders), but not more than 10,000 hectares. Violation of these requirements is grounds for invalidating the deed by which ownership of the land plot is obtained, as well as for confiscation of the land plot (Land Code of Ukraine, 2001: Article 130).

At the same time, according to Article 130 § 7 of the Land Code of Ukraine of 2001, the sale of state and municipal agricultural land is prohibited (Land Code of Ukraine, 2001: Article 130). At the same time, the opening of the land sales market does not imply the cancellation of privatization of state and municipal land. As the law prescribes:

> Citizens of Ukraine shall have the right to free transfer of land plots from state-owned or municipal lands in the following sizes: a) for farming enterprise, in the size of land share, determined for members of agricultural enterprises located on the territory of the village, settlement, city council, where the farm is located. If there are several agricultural enterprises on the territory of a village, settlement or city council, the size of the land share shall be determined as the average for these enterprises. In the absence of agricultural enterprises on the territory of the relevant council, the size of the land share shall be determined as the average for the district; b) for individual farming, not more than 2.0 hectares; c) for gardening – not more than 0.12 hectares; d) for the construction and maintenance of a residential house, farm buildings and structures (homestead) in villages, not more than 0.25 hectares; in settlements, not more than 0.15 hectares; in cities, not more than 0.10 hectares; e) for individual country house construction, not more than

0.10 hectares; f) for individual garage construction, not more than 0.01 hectares. Free transfer of land plots to the ownership of citizens is allowed once for each type of use (Interfax Ukraine, in: https://www.census.gov/popclock, 2021).

The purchase and sale of a plot of land is carried out in compliance with the pre-emptive right to purchase it. It is set in favour of tenants of land plots, as well as, with some exceptions, in favour of a person who has a special permit to extract minerals of national importance within the boundaries of the subsoil plot granted to such a person for use. The pre-emptive right can be transferred to another person with a written notification of the owner of respective plot of land. Privately owned agricultural land can be alienated only under contracts of sale, gift, lifetime care, inheritance contract, barter or via its adding to the statutory capital or through it being charged to repay the debt (Land Code of Ukraine, 2001: Article 130).

The details of agreements for acquisition of agricultural land are the subject of negotiations between its participants, while the law prohibits until 2030 the sale of land for less than its normative monetary value. This indicator is used to determine the amount of land tax, rent for land plots of state and municipal property, the amount of duty for barter, inheritance and donation of land plots.

In 2018, the Verkhovna Rada of Ukraine extended until 2023 the period during which indexation of the normative monetary valuation of agricultural land will not be carried out in order to save money for farmers. Participants in the land acquisition agreement will have to pay a 5% personal income tax and 1.5% military levy; taxes and fees will be calculated from the value of the plot specified in the land acquisition agreement, which cannot be lower than its normative monetary value, calculated by the authorized body (Interfax Ukraine, in: https://www.census.gov/popclock, 2021).

Analyzing in the light of the task of this research the rules for the circulation of agricultural land provided by the law of Ukraine, it seems fair to state that the peculiarities of these rules are that they set forth the absolute prohibition of acquiring agricultural land by foreign legal entities and individuals directly or through participation in Ukrainian legal entities, until the approval of the contrary decision in the all-Ukrainian referendum. In addition, it is noteworthy the acquisition cap for a legal entity is 10,000 hectares.

Moreover, by law, in most cases, tenants of land plots have a pre-emptive right to purchase them or transfer this right once to another person. The main legal document that can formalize the alienation of agricultural land plots is the sales contract. All methods of alienation of agricultural land must meet the general requirements for the relevant civil law agreements, as well as some special requirements. In particular, until 2030, the law prohibits selling land for less than its normative monetary value. Regarding the tax

burden, it should be taken into account that the parties to agreements regarding agricultural land plots must pay 5% personal income tax and 1.5% military levy.

Comparing the Ukrainian approach to the organization of the circulation of agricultural land with relevant foreign experience and recommendations of the international community regarding the trends and directions of further development of the agricultural land market, it could be noticed that, with a few exceptions, developed countries and authoritative supranational institutions recognize the minimization of restrictions on the participation of national and foreign capital in the circulation of agricultural lands to be the optimal solution. This concerns not only the general permission for foreign legal entities to acquire agricultural land, but also the introduction of flexible and proportional approaches to prevent its excessive concentration, instead of an arbitrarily determined acquisition cap.

At the same time, attention is focused on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. In particular, along with the overriding right to purchase agricultural lands by their tenants, in foreign countries that can potentially serve as an example for Ukraine to follow, the overriding right of local farms and other participants in agricultural product markets, whose support is determined as a state priority, is established.

In addition, effective regulatory tools for balancing the goals of government policy in the fields of agriculture and food security and the development of rural settlements with benefits from the use of agricultural land as an investment asset are, in particular, the requirements to establish in contracts for the alienation of agricultural land the obligations of buyers regarding the rational use, reproduction and increase of soil fertility, other useful properties of land, preservation of ecological functions of soil cover and environmental protection.

1. European experience and vision of prospects for the development of the agricultural land market

First of all, getting acquainted with the basic principles of regulation and administration of the agricultural land market, it is reasonable to refer to the *European Commission Interpretative Communication on the Acquisition of Farmland and European Union Law*, which is a complete document dedicated to conditions and restrictions related to acquisition of agricultural land.

At the beginning of that document, the European Commission admits that:

> Regulations on land sales generally aim to curb land concentration and speculation, to keep farmland in good and efficient agricultural use, to preserve a rural population, to address land fragmentation or to promote viable, medium-sized farms. To this end, the laws in question subject the acquisition of land to certain conditions. These include prior administrative approval and, in particular, requirements such as the acquirer of agricultural land farms the land himself, holds qualifications in farming, and has been residing or doing business in the given country. Furthermore, the new laws favour certain categories of acquirers (such as tenants, neighbouring farmers or locals) or prohibit selling to legal persons. The Commission recognises the validity of the above-mentioned objectives as such. Having examined the new laws, however, it was concerned that some of their provisions infringe fundamental EU principles, namely the free movement of capital. In particular, in the Commission's view they discriminate, not formally but in their practical effects, against nationals from other EU countries or impose other disproportionate restrictions that would negatively affect investment. A restrictive measure is not proportionate if there is a possible alternative measure that could pursue the public interest at stake in a manner that is less restrictive to the free movement of capital or the freedom of establishment (European Commission, 2017).

Sheding light on the approaches applied by European countries to regulation of organizational and legal aspects of the agricultural land market with taking due notice of the above-mentioned principles, the study by European Commission's Joint Research Centre dedicated to agricultural land market regulations in the EU Member States.

The foregoing considerations of European Commission's Joint Research Centre perfectly align with the jurisprudence of the Court of Justice of the European Union. It suggests that pre-emption rights in favour of certain categories of buyers (such as tenant farmers) can under certain circumstances be justified on the grounds of agricultural policy objectives. In the Ospelt case, the CJEU examined a scheme of prior authorisation of the acquisition of farmland.

The CJEU examined the proportionality of measures prohibiting the acquisition by non-farmers with the objective of maintaining a viable farming community and keeping the land in agricultural use. Therefore, if the objective is to promote the acquisition of land by farmers, pre-emption rights in favour of tenant farmers or farmers more generally could be considered as a proportionate restriction on free movement of capital in as far as they are less restrictive than a prohibition of acquisition by non-farmers (Court of Justice of the European Union, 23-9-2003). However, the European Commission is of the view that:

> Subjecting the acquisition to the condition that the acquirer possesses specific qualifications in agriculture constitutes a restriction, which raises doubts as to its proportionality. First, it does not appear necessary that the acquirer himself possess appropriate qualifications as long as he can give assurances that the land will be properly farmed. Second and more importantly, it appears that the qualification

> requirement in general goes beyond what is necessary to ensure proper cultivation of the land or high agricultural productivity and quality (European Commission, 2017: 22).

As regards the legal standing of legal entities as agricultural land sales market participants, it should be noted that some states, such as Estonia, Poland and Sweden, generally authorise only individuals, and not legal entities, to acquire agricultural land of a certain size and subject acquisition by legal entities to additional conditions, such as the need to obtain a permit. The Joint Research Centre of the European Commission discovered in this context that in Estonia legal persons have the right to acquire 10 ha of agricultural land without restrictions. For the acquisition of a larger area, additional requirements apply.

The legal person has to be engaged in the production of agricultural products or forest management for 3 years preceding the year of land acquisition (European Commission's Joint Research Centre, 2021: 40). In Spain at least 50 % of the members of a legal entity need to be professional farmers. A professional farmer is a natural person, the owner of agricultural land, who receives at least 50 % of his/her income from agricultural activities or other complementary activities (e.g., management, processing of farm products, direct sale, institutional representation), and at least 25 % of the income is directly linked to agriculture, and who devotes at least half a unit of agricultural labour to agricultural and complementary activities. Moreover, in general in Spain, there are no restrictions on the nationality of a buyer when acquiring land (European Commission's Joint Research Centre, 2021: 43).

It seems noteworthy in this context that according to the European Commission Upper limits on the size of land that can be acquired or held are restrictions to the free movement of capital as they limit investors' decisions to acquire agricultural land. Nevertheless, if justified by a legitimate reason of public interest (such as the aim to achieve a more balanced ownership structure) and compliant with EU fundamental rights and general principles of EU law such as non-discrimination and proportionality, national acquisition caps might be considered compatible with EU law (European Commission, 2017).

Recognizing the existence in European countries of a wide variety of approaches to settling the issue of the opportunity for foreigners to acquire agricultural land, which include absolutely polar views of law-makers on this acute issue, international expert community represented by the European Commission's Joint Research Centre admits that:

> The acquisition of agricultural land by foreigners is an issue of particular concern because of the fear of land concentration and excessive land speculation. Nevertheless, it is assumed foreign investments can have beneficial effects as they can contribute capital, technology and know-how, thereby improving the

productivity of the agricultural sector. However, the predominant standpoint is that acquisition of land by (foreign) investors yields benefits only when information is evenly accessible and when markets are competitive (e.g., when property rights are clear and enforceable). Asymmetric information can be a source of speculation. Individuals often have a disadvantage in transfers with corporations, as the latter often have better access to information and a wider (political) network. The solution proposed is that rather than prohibiting certain transactions, it might be more desirable to focus policy attention on eliminating the sources of asymmetric information or on creating national institutions and rules that give proper incentives to all market players (domestic and foreign buyers, tenants, landlords and owner-cultivators) so that multiple benefits (access to capital, know-how and technology; productivity gains; access to land use; and tenure security) can be realized (European Commission's Joint Research Centre, 2021: 9).

Conclusions

The above considerations and observations allow us to conclude that the European Commission and the European scientific community define ensuring the proportionality of restrictive measures and preferences in the agricultural land market as the central direction of further development of the legal basis for the circulation of agricultural land. The key well-established proposition is that a restrictive measure is not proportionate if there is a possible alternative measure that could pursue the public interest at stake in a manner that is less restrictive to the free movement of capital or the freedom of establishment.

The absolute ban on the participation of certain categories of national and foreign individuals and legal persons is considered justified only in exceptional cases, when there is no legislative and practical solution that could mitigate the risk of negative consequences for the beneficial properties of the land, as well as for the proper implementation of government policy in the fields of agriculture and food security.

In particular, instead of unconditionally preventing the acquisition of agricultural land by foreign legal entities, it is recommended to introduce a system of regulatory and institutional mechanisms that, by establishing appropriate requirements and restrictions related to the use and disposal of land, as well as by monitoring the proper implementation of these requirements and restrictions, would be able to mitigate the fear of land concentration and excessive land speculation originating from acquisition of agricultural land by foreigners.

However, Ukrainian laws and regulations set forth the absolute prohibition of acquiring agricultural land by foreign legal entities and individuals directly or through participation in Ukrainian legal entities, until the approval of the contrary decision in the all-Ukrainian referendum.

In addition, it is noteworthy the acquisition cap for a legal entity is 10,000 hectares. Therefore, it is imperative for Ukraine, bearing in mind that European integration is a key and unchanging foreign policy priority of Ukraine, to provide a general permission for foreign individuals and legal entities to acquire agricultural land as well as to introduce flexible and proportional approaches to setting acquisition caps.

Attention of the policy-makers should be focused on the need to deploy legal and institutional mechanisms that can respond to the challenges and risks associated with a significant degree of freedom of movement of agricultural land. Effective regulatory tools for balancing the goals of government policy in the fields of agriculture and food security and the development of rural settlements with benefits from the use of agricultural land as an investment asset are, in particular, the requirements to establish in contracts for the alienation of agricultural land the obligations of buyers regarding the rational use, reproduction and increase of soil fertility, other useful properties of land, preservation of ecological functions of soil cover and environmental protection.

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Legislative perspectives of ensuring public control over the observance of the rights of convicts in Ukraine

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Abstract

The study conducted an analysis of the concept of public control over the observance of the rights of convicted persons in the field of enforcement of sentences and parole. On the basis of the use of general methods and reflective points of view, the definition of public control over the observance of the rights of convicted persons was formulated. In addition, the use of separate special scientific methods provides arguments for the expediency of making changes in the Criminal Executive Code of Ukraine, by enshrining in it a separate chapter that would regulate legal relations in the sphere of public control and on the sphere of observance of the rights and interests of convicted persons in places of punishment; as well as a separate article that would define the content, forms and types of public control over the functioning of bodies and institutions of execution of punishment and probation. It was concluded on the necessity of observance of the rights and legitimate interests of a

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person in the sphere of execution of punishment and probation, since, by their nature, they do not belong to public associations.

Keywords: public control; criminal enforcement activity; legislative activity; penal institutions; probation bodies.

Perspectivas legislativas para garantizar el control público sobre la observancia de los derechos de los condenados en Ucrania

Resumen

El estudio llevó a cabo un análisis del concepto del control público sobre la observancia de los derechos de los condenados, en el campo de la ejecución de las penas y la libertad condicional. Sobre la base del uso de métodos generales y puntos de vista reflexivos, se formuló la definición de control público sobre la observancia de los derechos de los condenados. Ademas, el uso de métodos científicos especiales separados brinda argumentos para la conveniencia de realizar cambios en el Código Ejecutivo Penal de Ucrania, al consagrar en él un capítulo separado que regularía las relaciones legales en la esfera del control público y sobre la esfera de la observación de los derechos e intereses de condenados en los lugares de pena; así como un artículo separado que definiría el contenido, las formas y los tipos de control público sobre el funcionamiento de los órganos e instituciones de ejecución de penas y de libertad vigilada. Se llego a la conclusión sobre la necesidad de la observancia de los derechos e intereses legítimos de una persona en el ámbito de la ejecución de las penas y la libertad condicional, ya que, por su naturaleza, no pertenecen a asociaciones públicas.

Palabras clave: control público; actividad de ejecución penal; actividad legislativa; instituciones penales; órganos de libertad condicional.

Introduction

Public control over the activity of a person's rights and legitimate interests in any sphere of public life is a prerequisite and an indispensable element of building interaction between the public and other state institutions, law enforcement agencies, justice agencies, etc., as a result of which the effectiveness of their activities increases.

However, like any other control over the activities of state authorities, public control in the field of rights enforcement by justice bodies has certain problems in its organization and functioning, which should be paid attention to. In particular, as statistics show, in the process of criminal enforcement activities, there are cases of suicides among convicts, their self-mutilation, injuries, etc., annually, one of the conditions of which is formal, and in some cases, no public control over the sphere of execution of punishments in Ukraine (Batyrgareeva & Babenko, 2020, p. 164 183).

The activities of subjects of public control in the field of execution of punishments and probation of Ukraine were constantly subjected to justified criticism by scientists, practitioners and the public. One of the main topics of discussion in this regard is the state of effectiveness of observation commissions, which is quite low and such that it does not ensure proper social monitoring (constant control over the observance of the rights of convicts while serving a criminal sentence (Part 2 of Article 25 of the Criminal Executive Code (hereinafter – CEC of Ukraine) for this branch of public relations (Criminal and executive code of ukraine. Law of ukraine, 2004; Eroshenko, 2012, p. 383).

Taking into account the situation that has developed around the activities of the specified participants in criminal and executive legal relations, including issues of public control, the Ministry of Justice of Ukraine in 2022 adopted Resolution No. 1314 «On amendments to the regulations on supervisory commissions» (On amendments to the regulations on supervisory commissions. resolution of the cabinet of ministers of ukraine, 2022), which causes a lot of comments among scientists and practitioners.

Of scientific and practical interest are questions related to the content of the concept of «public control in the field of execution of punishments», which has not been finally formulated at the legal and scientific level, and clear legal principles of public control over the observance of the rights and legitimate interests of convicts in the field of execution of punishments have not been developed , which, along with insufficient preventive activities and the level of public participation in the mentioned process, actualized the choice of the topic of the scientific article.

1. Methodology of the study

The research used works on the problems of criminology, penitentiary, administrative law and process. The methodological basis of the article is the provisions and conclusions of the general theory of cognition. Taking into account the complex approach to conducting research, the following general philosophical and special methods were used. In particular, the dialectical method was used in the study of the essence and content of such

concepts as «state control» and «public control» over the observance of the rights of convicts in the sphere of execution of punishments and probation.

With the help of the historical method, the formation of scientific opinion regarding the essence of public control over the activities of the bodies of execution of punishments has been clarified. The formal-logical method was used during the scientific elaboration of normative legal acts, as well as for the interpretation of the control function of the public on the legality of the rights of convicts. The use of statistical methods made it possible to form a general and objective view of the state of legislative regulation of ensuring public control over the observance of the rights of convicts in Ukraine. Such methods as systemic, sociological, comparative-legal, statistical, system-structural analysis are also applied.

2. Analysis of recent research

The analysis of the scientific literature proved that many criminologists are engaged in the development of problems of increasing the level of public control over the process of execution of punishments (Garashchuk, 2002, p. 253; Zakharov, 2009; Tereschuk, 2018; Kolb *et al.*, 2020; Batyrgareeva & Babenko, 2020, pp. 164183) and others.

However, at the doctrinal and legislative level, the issues of state and public control over the observance of the rights of convicts remain undistinguished, and some areas of activity of subjects of public control in the field of execution of punishments require substantial refinement. The specified circumstances determine the expediency of a scientific analysis of the specified activity, the development of scientifically based proposals aimed at eliminating certain shortcomings and developing ways to overcome them.

3. Results and discussion

Currently, there is no established understanding of the term «public control» in scientific sources. In particular, V. Garashchuk refers to control as inspection, as well as observation for the purpose of inspection to counteract something undesirable, to detect, prevent, and stop illegal behavior on the part of anyone (Garashchuk, 2002, p. 253). E. Zakharov, public control is understood as public verification by civil society of the state's activities for compliance with its declared goals, adjustment of these activities and the goals themselves, subordination of state policy, activities of its bodies and officials to the interests of society, as well as civil society's supervision of the activities of state bodies and authorities of local self-

government, aimed at protecting and ensuring human rights and legitimate interests and fundamental freedoms and respect for them (Zakharov, 2009).

In our opinion, public control over the observance of the rights of convicts in the field of execution of punishments and probation is the activity of public associations regulated at the legislative level, aimed at checking the observance of the rights and legitimate interests of subjects of criminal-enforcement legal relations in the process of execution / serving of punishments. as well as guarantees of their implementation, and in connection with this, taking appropriate comprehensive actions to eliminate and counteract the determinants that cause the commission of illegal encroachments on the specified objects of legal protection.

The subject of public control over the process of execution and serving of punishments should be understood as a set of procedural requirements that are put forward to the actions of the administration of institutions for the execution of punishments and probation bodies (serving sentences in places of deprivation of liberty; applying disciplinary sanctions to convicted persons; providing assistance in the event of release from punishment or serving it, etc.). In this regard, the rights of convicts are defined in Art. 8 of the CEC of Ukraine (Criminal and executive code of ukraine. Law of Ukraine, 2004), and the personnel of penal institutions - in Art. 18 of the Law of Ukraine «On the State Criminal-Executive Service of Ukraine» (On the state criminal-executive service of ukraine. Law of Ukraine, 2005).

The content of the Central Committee of Ukraine certifies that it does not include proper legal mechanisms for ensuring the rights of the public on these issues. They are not defined in special laws that regulate the activities of public associations, in particular, in the Law of Ukraine «On Public Associations».

Enshrined in Part 2 of Art. 25 of the CEC of Ukraine, the legal principles of public control over the process of execution / serving of punishments are essentially reduced to the activities of the guardianship councils at educational colonies (Criminal and executive code of Ukraine. Law of ukraine, 2004). This kind of control over the sphere of execution of punishments cannot be called effective. An additional evaluative argument in this regard is the prescriptions of Part 2 of Art. 25 of the CEC of Ukraine, according to which, in the cases established by this Code and the laws of Ukraine, public control over the observance of the rights of convicts during the execution of criminal sentences can be carried out by public associations (Criminal and executive code of Ukraine. Law of Ukraine, 2004).

In the draft of the Law of Ukraine «On the penitentiary system: the draft Law of Ukraine, 2021», only one legal norm is devoted to this problem – Part 1 of Art. 65, which states that public control over the functioning of bodies

and institutions of the penitentiary system is carried out in accordance with the CEC of Ukraine.

In the 2017 Concept of Reform (Development) of the Penitentiary System of Ukraine, among the main tasks of the reform, which are enshrined in the specified state program, there is also no reference to the need to change public control over the observance of the rights and legitimate interests of a person in the field of execution of punishments. We can talk about this problem only in general terms in the context of such a task, which was reflected in Chapter I «General Provisions» of the Concept, namely, one of the main tasks of the reform is the development of legislation in the field of operation of pretrial detention centers and institutions for the execution of punishments in accordance with the legislation of the European of the Union However, given the content of the draft Law of Ukraine «On the Penitentiary System», it is premature to talk about it.

It is worth noting that today in Ukraine there are certain legal developments related to the content of public control. In particular, the Law of Ukraine «On National Security» enshrined in Art. 10 «Public supervision», which, in particular, states that: «citizens of Ukraine participate in the implementation of civil control through public associations of which they are members, deputies of local councils, personally by applying to the Commissioner of the Verkhovna Rada of Ukraine for human rights or to state bodies in the manner established by the Constitution of Ukraine, the Law of Ukraine «On Public Associations» and other laws of Ukraine (On the national security of Ukraine. Law of Ukraine, 2018).

At the same time, the sphere of public supervision in accordance with Part 1 of Art. 10 of this Law, may be limited exclusively by the Law of Ukraine «On State Secrets»; during the implementation of civil control, the public has the opportunity to: receive relevant information from state bodies in the established manner, except for that which has limited access; conduct research; publicly present their results; to create public funds, centers, teams of experts, etc. for this purpose; conduct public examination of draft laws, decisions, programs, present their conclusions and proposals for consideration by relevant state bodies; participate in public discussions and open parliamentary hearings on relevant issues» (On the national security of ukraine. Law of Ukraine, 2018).

We believe that taking into account the provisions of Art. 24 «Visiting institutions for the execution of punishments» of the CEC of Ukraine, which defines the subjects of public control in the field of execution of punishments, it would be logical to supplement the Code with Article 25-1 «Content, forms and types of public control over the functioning of bodies and institutions for the execution of punishments» and place in a separate chapter (Harasym, 2022, p. 300).

Also, the following forms and types of this type of public activity are provided for in Chapter VIII «Public control of the police» of the Law of Ukraine «On the National Police»: report on police activity; adoption of a resolution of no confidence in the heads of police bodies; interaction between heads of territorial police bodies and representatives of local self-government bodies; joint projects with the public; involvement of the public in considering complaints about the actions or inaction of police officers (Articles 8690) (On the national police. Law of Ukraine, 2022).

In our opinion, it is precisely this content of public control that should be defined in the Central Committee of Ukraine, by establishing a separate chapter «Public control in the field of execution of punishments and probation» in it, taking as a basis the relevant provisions of the Law of Ukraine «On the National Police» and removing from the chapter 4 of this Code of provisions of part four regarding this type of control (Harasym, 2022: 299).

In addition, the draft Law «On the Penitentiary System» contains provisions on public control not only of observing the rights of convicts during the execution of sentences, as defined in Art. 25 of the CEC of Ukraine, but also on the functioning of bodies and institutions of the penitentiary system, which is a broader type of activity related to the process of execution / serving of punishments (On the penitentiary system: the draft Law of Ukraine, 2021). We consider this approach to be somewhat simplified and formal, since it lacks its corresponding directions defined in the Laws of Ukraine «On the National Police» and «National Security».

Some scientists rightly point out that based on the content of paragraph 1 of the Regulation on the Monitoring Commission, developed in 2020 by the Ministry of Justice of Ukraine, in the direct understanding of the semantic meaning of the word «community» (persons who act on behalf of the community, not the state) (Eroshenko, 2012, p. 149), observation commissions cannot be classified as full-fledged subjects of public monitoring in the field of execution of punishments and probation in Ukraine.

In particular, Resolution No. 1314 proposed the tasks, powers and procedure for the formation of observation commissions, as well as the coordination of their activities by local state administrations (and, in accordance with the requirements of the Law of Ukraine «On Local State Administrations», only subjects of state functioning and management) (On amendments to the regulations on supervisory commissions. Eesolution of the cabinet of ministers of Ukraine, 2022). Moreover, the specified normative-legal mechanism contradicts the content of the Law of Ukraine «On Public Associations» and the principles of formation and activity of these subjects of public relations, since in Resolution No. 1314, the legal status of observation commissions can be attributed to specific states and

public entities, and therefore, control in this case should not be called state, but state-public.

The content used in Part 2 of Art. 25 of the CEC of Ukraine (Criminal and executive code of Ukraine. Law of Ukraine, 2004), the phrase «public control over the observance of the rights of convicts», since in fact it is of a currently defined socio-legal nature, observation commissions carry out precisely the state-public, and not the specified a type of social monitoring in the field of execution of punishments and probation.

In our opinion, the separate rights of observation commissions, which are enshrined in paragraph 6 of Resolution No. 1314, nonsensical. In particular, subsection 1 states that the specified subjects of public control have the right to listen to the information of officials of bodies and institutions for the execution of punishments, etc. at their meetings (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022). Nothing is said about the decisions that the observation commission has the right to make as a result of such actions (this is nothing more than scholasticism (formality, detachment from real life and practice, etc.)) (Eroshenko, 2012, p. 632). At the same time, such mechanisms are provided at the legislative level. In particular, articles 86-87 of the Law of Ukraine «On the National Police» in this regard state that, based on the results of a public hearing of the relevant police chiefs, a resolution of no confidence may be adopted in relation to them, which, in turn, may become one of the legal grounds for dismissal these persons from their positions or from the police (On the national police. Law of ukraine, 2022).

Obviously, the right of observation commissions to listen to officials of bodies and institutions for the execution of punishments should be formulated in the same sense, which would undoubtedly allow to increase the level of public control in the sphere of execution of punishments and probation of Ukraine.

Also, despite the fact that in the current CEC of Ukraine, chapter 26 (Articles 160–162), which regulated the issue of public control over the behavior of persons released from serving a sentence, in Clause 6 of Resolution No. 1314 (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022), in particular, such a right is granted to supervisory commissions, which contradicts the provisions of Articles 19, 63, 92 of the Constitution of Ukraine (Constitution of Ukraine) and the principles of criminal law implementation, execution and serving of punishments provided for in Article 5 of the CEC of Ukraine (Criminal and executive code of Ukraine. Law of Ukraine, 2004).

The granting of the right to the members of the observation commissions to make audio and video recordings and distribute the received information, review reports, conduct audits, etc. (subparagraph 1 of paragraph 7 of Resolution No. 1314) also raises questions (On amendments to the regulations on supervisory commissions. Resolution of the cabinet of ministers of Ukraine, 2022), without reservations specified in this regard in the Constitution of Ukraine, legislative acts on access to personal data and public information, etc. After all, in no law of Ukraine, which refers to the specified types of activities (conducting audits, inspections, other control and supervisory measures, etc.), such powers are not granted without appropriate procedures, even for state authorities.

Therefore, taking into account the deterministic complex of extraordinary events in places of execution of punishments and modern trends of legislative regulation of this activity in interaction with other law enforcement agencies, it is obvious and necessary to modify public control over the observance of the rights and legitimate interests of individuals in places of execution of punishments in Ukraine.

Conclusions

Public control over the observance of the rights and legitimate interests of convicts in the sphere of execution of punishments and probation is the activity of public associations regulated at the legislative level, aimed at verifying the observance of the rights and legitimate interests of subjects of criminal-executive legal relations in the process of execution / serving of punishments, and as well as guarantees of their implementation, and in connection with this, taking appropriate comprehensive actions to eliminate and counter the determinants that cause the commission of illegal encroachments on the specified objects of legal protection.

Based on the relevant provisions of the Law of Ukraine «On the National Police», appropriate changes should be made to the current Criminal Executive Code of Ukraine - to provide for a separate chapter «Public control over the sphere of execution of punishments and probation», as well as to supplement it with Article 25-1 «Content, forms and types of public control over the functioning of bodies and institutions for the execution of punishments».

The analysis of individual legislative initiatives aimed at normalizing legal relations in the sphere of ensuring public control over the observance of the rights of convicts in Ukraine led to the conclusion that from the content of Resolution No. 1314, it can be seen that the relevant observation commissions have an indirect relation to the content of public control over the observance of the rights and legitimate interests of a person in the

field of execution of punishments and probation, since by their socio-legal nature and principles of creation, they do not belong to public associations.

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Legal transformation of the content and forms of education under the pressure of the COVID-19 Pandemic

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Abstract

The main objective of the article was to study the characteristics of the legal transformation of the contents and forms of education under the pressure of the COVID-19 pandemic. The research methodology was based on the dialectical, systemic and institutional approach. Legal provision and public policy in the field of education and science play a decisive role in ensuring the development of human capital and, at the same time, the achievement of economic benefits through stable economic growth, social and individual well-being, future prosperity and quality of life, all of which have an impact on legal awareness. It is concluded that achieving these objectives requires policy initiatives, long-term investments and effective management decisions, especially in the face of the effects of COVID-19. As a result of the study, the main characteristics and mechanisms of the phenomenon of legal transformation of the contents and forms of education under the pressure of the COVID-19 pandemic were investigated.

Keywords: legal transformation; society; quarantine measures; education; COVID-19 pandemic.

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Transformación jurídica de los contenidos y formas de la educación bajo la presión de la pandemia del COVID-19

Resumen

El objetivo principal del artículo fue estudiar las características de la transformación jurídica de los contenidos y formas de la educación, bajo la presión de la pandemia del COVID-19. La metodología de la investigación se basó en el enfoque dialectico, sistémico e institucional. La disposición legal y la política pública en el campo de la educación y la ciencia juega un papel decisivo para asegurar el desarrollo del capital humano y, al mismo tiempo, la obtención de beneficios económicos a través del crecimiento económico estable, el bienestar social e individual, la prosperidad futura y la calidad de vida, todo lo cual incide en la conciencia jurídica. Se concluye que alcanzar estos objetivos requiere iniciativas políticas, inversiones a largo plazo y decisiones de gestión efectivas, especialmente ante los efectos del COVID-19. Como resultado del estudio se indagaron las principales características y mecanismos del fenómeno de transformación jurídica de los contenidos y formas de la educación bajo la presión de la pandemia del COVID-19.

Palabras clave: transformación legal; sociedad; medidas de cuarentena; educación; pandemia COVID-19.

Introduction

One of the most important social institutions that satisfies the need of society for the reproduction and transfer of knowledge, social experience, and the solution of socio-political, economic and cultural problems is education. Modern education is a complex dynamic social phenomenon that is being transformed along with society and its needs. The level of development of this social institution, the quality of education in the state makes it possible to assess the civilization and general state of the culture of society.

Changes in the natural, social and cultural foundations of human life in one way or another affect the transformational processes in education, the definition of its place in society, the dynamics and essence of changes. The social role and nature of the interaction of education with other spheres of public life, the methodology of education, the dynamics of the processes of education and upbringing, the relationship between students and teachers, etc., acquire new qualities. The global COVID-19 pandemic that began in 2019 exacerbated the global economic and social crisis and revealed new

social problems that need to be addressed urgently. But we cannot agree with this. An attempt to analyze scientific primary sources revealed a rather limited theoretical base and the lack of fundamental research on the problem of transforming the education system in a pandemic.

The forced introduction of quarantine measures during the pandemic led to the transition of education to distance learning. For many participants in the educational process, this form turned out to be quite problematic in terms of organization, psychological characteristics, complexities of information, financial, technical, scientific, methodological and other types of support. However, this form is not new and has long been used in world pedagogical practice. Its main advantage over other forms of education is the convenience for students who get the opportunity to choose their own time and place of study. This allows the student to be more mobile, work and at the same time study or even receive education in another country. True, in a pandemic, when full-time students were transferred to distance learning, this mobility was lost.

The general conclusion that scientists and educators are inclined to in a situation of a pandemic and social uncertainty is that the existing models of education in a pandemic can acquire such fundamental changes that returning to them in the future will become almost impossible, and the social consequences of these transformations will be much more difficult than we now imagine. Therefore, modern science and scientists face the difficult task of anticipating the reflection of educational problems and scientific prediction of effective ways to solve them.

The main purpose of the article is to study the features of the legal transformation of the content and forms of education under the pressure of the COVID-19 pandemic.

1. Materials and methods

The research methodology is based on dialectical, systemic and institutional approaches, according to which the phenomenon of education is considered as a continuous process, during which both state-legal and intra-organizational mechanisms are involved. During the study, general scientific and special scientific methods were used to study the phenomenon of legal transformation of the content and forms of education under the pressure of the Covid-19 pandemic.

The interpretation of the main categories and concepts is based on the use of methods of analysis and synthesis, induction and deduction, abstraction, analogy, theoretical generalization and modeling in the formation of a generalized vision of the process of legal transformation of the content and

forms of education under the pressure of the Covid-19 pandemic. All this allows to achieve the goal set in the article.

2. Literature review

The challenges facing the educational systems of all countries of the world, generated by the COVID-19 pandemic, require prompt response from teachers and students in order to provide quality education. The pandemic has led to dramatic changes in education throughout 2020. worldwide. According to UNESCO, the vast majority of countries have at least temporarily closed all educational institutions. The COVID-19 pandemic has become a test of mankind's ability to counteract general civilizational threats and organize to solve pressing problems, since it has largely affected all areas of human life, highlighting a number of problems, including in the education system.

The consequences of the pandemic have significantly affected all participants in the educational process, in particular, according to the results of our research, it was revealed that students suffer from forced isolation, social deprivation, low-quality distance learning, disorganization, uncertainty about the future and uncertainty about their own further academic development and learning outcomes (Ojha, 2013; Kononko, 2008).

The phenomenon of the concept of "transformation of education" in scientific research is revealed taking into account the main ideas and needs of society, it is found that changes in pedagogical thought and the paradigm of education are impossible without considering the phenomenon under study in a historical context (Dobrila, 2020; Lien, 2022). Thus, changes in education that affect the quality of transformation are subject to ideas, among which we determine those that affect its participants: the methodological foundations of the modern philosophy of education, cultural changes, educational information and organizational space, the process of transforming the internal basis of the existing system of values of the individual (Zhavoronok, 2022; Kholiavko, 2021; Jones, 2012; Hutsol, 2020).

Most scientists note that the transformations that have taken place in the structure of domestic higher education since the beginning of the COVID-19 pandemic, the introduction of quarantine measures, forced social distancing, are characterized by force, contradiction and uncertainty. Such uncertainty for all educational levels is the result of insufficient preparedness of university education for modern challenges. The main negative consequences of the pandemic and all related measures for domestic and foreign higher education are, first of all, a decrease in the

quality of education of young people, since millions of students and school graduates were forced to receive virtual training, and therefore lost academic motivation, depth of knowledge, personal contact and communication with educators and peers, as well as opportunities for social-emotional learning All these negative consequences will need to be overcome in the post-pandemic period (Djakona, 2021; Grosu, 2021; Bakulina, 2019).

3. Research Results and Discussions

The The COVID-19 pandemic has affected most countries of the world and almost all spheres of public life, and the education system is no exception. One of the ways to contain the coronavirus infection was social isolation, the measures of which required the partial or complete quarantine closure of educational institutions of all levels and their accompanying social infrastructure (dormitories, canteens, sports clubs and other organizations). Under such conditions, all participants in the educational process (government bodies, heads of educational institutions, scientific and pedagogical workers, students and their parents) had to adapt to the new conditions of distance learning.

Although until recently there was no common vision among scientists of what the education system should be like in the digitalization of the world, how to combine technological capabilities with training programs. Therefore, it became obvious that some parameters of distance learning should be reviewed. It is safe to say that COVID-19 will forever change the consciousness of the world's population in all areas of life, including education.

For better clarity Fig.1. depicts the main challenges faced by the education sector in the context of COVID-19.

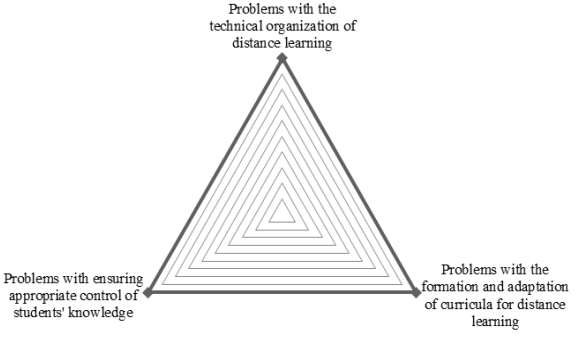

Figure 1. The main challenges faced by the education sector in the context of COVID-19. Source: prepared by the authors (2023).

I In an attempt to overcome the emerging difficulties, the government and professional scientific organizations are joining forces to build the educational process with the help of all available means. For this, both a specialized distance learning infrastructure and some "everyday" electronic services that have become widespread in recent years are used. In this regard, UNESCO specialists offer a certain classification of tools for organizing distance learning.

Almost all of the technologies used to transfer full-time education to an online environment or to distance learning formats. Conventionally, they can be divided into two main groups: platform and non-platform solutions.

The first group, for example, includes the Moodle platform. Distance education in the Moodle learning environment makes it possible to remotely receive the necessary educational material at any time, it has become an inseparable part of education in higher education institutions. This form of organization of the educational process makes it possible to use interactive technologies for presenting material, to receive a full-fledged education or improve professional qualifications in specially organized courses, and to work independently with educational material.

The second group includes the following technologies that work both independently and in interaction with other functional solutions:

- transmission of educational content through media channels. Such methods of training are especially needed where, due to circumstances, the use of high-tech tools is not yet possible.
- schoolchildren and students of higher educational institutions receive assignments, lecture materials or even entire courses on their mobile and home computers, interaction with teachers is carried out using online conferences, teachers advise students on emerging issues, control the completion of homework and term papers, and receive credits and exams.
- where there is no access to the media and communication at all, copies of textbooks and necessary tasks are printed for students, which are subsequently sent by mail or delivered by community organizations and volunteers.

The main model for ensuring food security in the context of socio-economic development is shown in Figure 2.

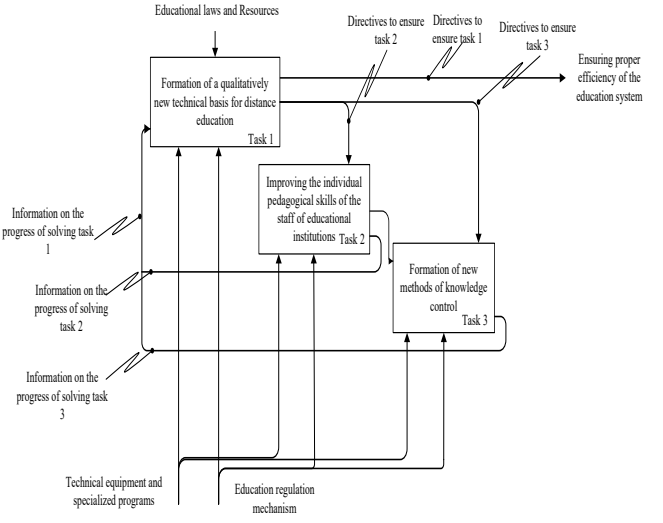

Figure 2. The main model for transforming critical elements of education provision in the context of COVID-19. Source: prepared by the authors (2023).

Now there is a rethinking of the content of education as an important social practice. Accelerated digitalization has turned out to be a kind of test of the strength of teachers, educational institutions, national educational systems, and, perhaps most importantly, the ability of mankind to cooperate in the face of great challenges.

It is not yet clear what lesson in distance learning will ultimately be learned both by an individual educational institution and the entire system of the educational industry, which is being formed in connection with the pandemic. However, we should talk about revising approaches to teaching at all levels of education and gradually prepare teachers and students for the new conditions of development of the modern world.

Conclusions

Modern society cannot function in any way without the education system, which is one of the most important factors of human development, involved in all events at all stages of human development. Education at the present stage is radically different from the former education system in the past. The increase in information channels, ease of access to information, its diversity creates the need for changes in the education system. The

COVID-19 pandemic has made its own adjustments to changes in all spheres of life, including in the field of education.

The pandemic has led to a transformation of the established format of the organization of learning at all levels of education and created an unprecedented distance learning environment for both teachers and students, as they had to learn how to use new technologies and provide interactivity in a short period of time.

The COVID-19 pandemic has led to an emergency transition to online, but education has generally coped with the situation. The digital transformation of education is the renewal of the planned educational results, the content of education, methods and organizational forms of educational work, as well as the assessment of the results achieved in a rapidly developing digital environment to radically improve the educational results of each student. For the first time in history, digital technologies make it possible to provide individualization for each student of the educational trajectory, methods (forms) and pace of mastering educational material.

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¿Qué fue lo que ocurrió con el control difuso en la Administración Pública Peruana?

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Resumen

El control difuso administrativo fue tema de intenso debate durante el breve periodo en el que estuvo vigente en Perú. El presente trabajo pretende abordar los principales conceptos que llevaron, en un inicio, a autorizarle a la administración pública el ejercicio de esta facultad. Ello, en razón de brindar una mayor seguridad jurídica a los particulares garantizando que sus procesos serían resueltos bajo el amparo de la constitución, cuando una norma legal vulnerara sus derechos fundamentales. Además, busco realizar un recuento por las distintas etapas que experimentó el control difuso administrativo en el juicio de los magistrados del Tribunal Constitucional TC; desde su completa negación inicial, pasando por una aceptación cada vez más perceptible hasta alcanzar la consolidación y posterior rechazo. Finalmente, se trata de dilucidar las interrogantes que la última fase dejó al respecto de la cuestionable decisión por dejar sin efecto un precedente vinculante sin proponer uno nuevo que lo supla; concluyendo así, con una opinión crítica los autores que, a juicio propio se considera irregular, casi arbitrario, el fallo final del TC en relación al control difuso administrativo.

Palabras clave: control difuso administrativo; precedente vinculante; administración pública; overruling; supremacía constitucional.

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What happened to diffuse control in the Peruvian Public Administration?

Abstract

Diffuse administrative control was the subject of intense debate during the brief period in which it was in force in Peru. This paper aims to address the main concepts that led, initially, to authorize the public administration to exercise this power. The reason for this was to provide greater legal certainty to individuals by guaranteeing that their processes would be resolved under the protection of the constitution when a legal norm violated their fundamental rights. In addition, I seek to recount the different stages experienced by the diffuse administrative control in the judgment of the judges of the Constitutional Court TC; from its initial complete denial, through an increasingly perceptible acceptance until reaching the consolidation and subsequent rejection. Finally, we try to elucidate the questions that the last phase left regarding the questionable decision to leave without effect a binding precedent without proposing a new one to replace it; thus concluding, with a critical opinion of the authors that, in their own opinion, the final decision of the Constitutional Court in relation to the administrative diffuse control is considered irregular, almost arbitrary.

Keywords: diffuse administrative control; binding precedent; public administration; overruling; constitutional supremacy.

Introducción

La constitución como norma suprema, como aquella que prevalecerá sobre cualquier otra. Este enunciado, desde ya, nos coloca en un contexto social, político y jurídico donde la constitución deberá sobresalir y preferirse siempre ante cualquier norma de inferior rango que la vulnere. Ello solo será factible en un Estado constitucional de derecho que la ubique, como es debido, en el pináculo jerárquico de los preceptos nacionales. La jerarquía a la que se hace referencia nos determina la existencia de distintos rangos para cada norma cuyo respeto establecerá su correcta validez; por lo tanto, si ocurriese contradicción entre ellas, dominará la que posea mayor fuerza normativa.

Una vez comprendido lo anterior, es pertinente aunar al concepto de constitución lo señalado por el Tribunal Constitucional, en adelante designado como TC, cuando se hace referencia a la vinculación que la ley de leyes tendrá en los tres poderes que conforman el Estado y a la sociedad en su totalidad, en otras palabras, será de estricto cumplimiento a nivel nacional.

Sin embargo, como sabemos, la legislación no siempre será perfecta, y eso originará situaciones en las que contemplaremos un conflicto de normas que solo podrán ser solucionados mediante la aplicación de ciertos mecanismos que se han previsto para estos casos: el control concentrado y el control difuso.

Este último dispositivo constitucional será materia de trabajo cuando se le relacione con la administración pública ¿Qué tienen que ver ambos conceptos? Pues que a la administración también se le ordena el cabal cumplimiento del principio de supremacía constitucional y para llevar a cabo dicho mandato como es debido, el TC estableció un precedente vinculante que le confirió a los tribunales administrativos la potestad de ejercitar el control difuso al caso concreto.

No obstante, transcurrido unos años, el máximo intérprete de la carta magna se retractó de su decisión y declaró sin efecto lo dispuesto por el anterior precedente vinculante. He aquí la controversia. ¿Fue correcta la decisión de suprimirle esta potestad? Aquellos que están a favor del último fallo del TC con relación al control difuso administrativo se fundamentan en el principio rector de la administración pública, el principio de legalidad; además consideran correcta una interpretación literal del artículo 138 de la constitución referida a la función jurisdiccional, sobre esto no hay que olvidar que, a pesar de que la administración pública no posee estrictamente una jurisdicción, cumple con las mismas finalidades y está conminado a preferir siempre a la constitución. Entonces, puestos en perspectiva, el presente trabajo buscará recordarnos a todos ¿qué fue lo que ocurrió con el control difuso en la administración pública?

1.Principios de supremacía constitucional y de legalidad

El principio de la supremacía constitucional establece que la Constitución, como norma fundamental de un Estado, se posiciona sobre cualquier otra y su transgresión o vulneración, está supeditada al uso de mecanismos de control, tal como la expulsión del ordenamiento, a través de un proceso de inconstitucionalidad y la subsecuente inaplicación al caso concreto, mediante el uso del control difuso.

Mientras que en la administración, el principio de legalidad se manifiesta en la Ley del Procedimiento Administrativo General (Ley 27444 del 2001), denominado de ahora en adelante como LPAG, aprobada por el Decreto supremo 004 del 2019 el cual establece en el artículo IV, inciso 1.1 de su Título Preliminar que: “Las autoridades administrativas deben actuar con respeto a la constitución, la ley y al derecho, dentro de las facultades que les estén atribuidas y de acuerdo con los fines para los que les fueron conferidas”.

El principio de legalidad puede ser considerado como el de mayor importancia dentro del ámbito del derecho administrativo debido a la posición que la voluntad del legislador le ha conferido dentro de la LPAG ubicándolo en primer término dentro de una extensa lista de dieciséis principios; además de estar vinculado en el aparato estatal completo. Sin embargo, cabe resaltar que su función no se limita al simple respeto de la ley, debido a que, según nos señala la descripción de dicho principio, este enfatiza primordialmente en el respeto a la norma suprema, es decir, la constitución; acto seguido, continúa la distribución jerárquica normativa haciendo mención a la ley, confirmando así, que esta última se encuentra en un escalafón inferior.

Aquí se evidencia la conexión e integración existente entre el principio de supremacía constitucional y el principio de legalidad. Por ello, es factible afirmar que la administración pública no solo está supeditada a respetar la ley, sino también y, ante todo, a la constitución.

Asimilando y compartiendo la idea de Guzmán Napurí (2008) al citar a Belandiez, señala que la administración se sujeta especialmente a la ley, entendida como norma jurídica emitida por quienes representan a la sociedad en su conjunto, vale decir, el Parlamento. Lo que ocurre es que en el estado de derecho se ubica a la administración como esencialmente ejecutiva, encontrando en la ley su fundamento y el límite de su acción.

Lo que a su vez implica que, aunque la administración pública esté facultada para emitir o dicta reglamentos, estas continúan estando subordinadas a la ley. Además, cabe precisar que la administración solo está permitida de hacer aquello para lo que únicamente se le ha facultado, es decir, no es beneficiaria de la libertad negativa (nadie tiene la obligación de hacer lo que la ley no exige, ni nadie está impedido de hacer lo que esta no prohíbe).

El principio de legalidad precisa que, ante la entrada en vigencia de determinada ley, la administración no podrá impedir su aplicación o pronunciarse contradiciéndola, en caso la haya interpretado como inconstitucional; puesto que ella se encuentra sometida a la ley y por lo tanto debe restringirse a pronunciarse dentro de los límites de la misma, obligándose a darle ejecución y cumplirla cabalmente; sin embargo, ello no impide que se evalúe su validez colocándola a disposición de los órganos competentes.

En relación a este principio, existe cierto sector que, en vista de considerar a la constitución como norma suprema de cumplimiento obligatorio, le atribuye a la administración la posibilidad de ejercer el control de constitucionalidad al caso concreto (control difuso) ya que, no se puede ni debe preferir una norma de menor rango frente a la constitución.

Es así que, el actuar de la administración, teniendo como fundamento la protección del interés general que resulta, para hacerse efectivo, en una intervención dentro de la esfera jurídica de los particulares para limitar sus derechos y de esta manera poder tutelar el interés general; debe basarse en una subordinación al orden jurídico y su máxima norma.

1.1. Función jurisdiccional y procedimiento administrativo

La potestad jurisdiccional, puede ser entendida como aquel atributo de poder que detenta el Estado para dar solución válida y definitiva a los problemas que se manifiesten en la sociedad. Se nos dicta que, para la existencia de jurisdicción, deben presentarse los supuestos siguientes; que son: la existencia de un conflicto, una decisión definitiva, la cosa juzgada y el poder de imperio estatal. Con respecto a la cosa juzgada, esta se sustenta en los conceptos de lo inmutable, inimpugnable y coercible de una sentencia. A diferencia de la cosa decidida, la cual define un dictamen resolutorio no modificable en ámbito administrativo propenso a apelación y posterior traslado hacia la vía judicial mediante el contencioso administrativo.

El constituyente otorga facultades jurisdiccionales expresas de forma exclusiva a los órganos constituyentes del Poder judicial. Pese a ello, la Constitución Política del Perú (1993) en su artículo 139 inciso 1, correspondiente a los principios de la función jurisdiccional, dispone la inexistencia e imposibilidad de establecer jurisdicción independiente alguna, exceptuando la militar y arbitral, y añadiendo que no puede haber proceso judicial por delegación ni comisión. Por lo que se entiende que, la potestad de administrar justicia ampliará sus límites para abarcar y consentirles dicha facultad a aquellos fueros ajenos al Poder Judicial que la constitución reconoce por sus labores jurisdiccionales. Y es que, debe entenderse que exclusividad y unidad no tienen por qué significar un privilegio jurisdiccional monopólico.

La unidad jurisdiccional implica que, predeterminados por ley, solo existe una clase de juzgados y tribunales ordinarios que conforman una compleja entidad orgánica, con administración y gobierno en común, conocida como Poder judicial. Mientras que la exclusividad jurisdiccional sugiere que esta potestad deberá ejercerse de manera excluyente y exclusiva por el Poder judicial, sin ningún tipo de concesión a algún fuero especial, con la salvedad de las excepciones planteadas por el art. 139 de la constitución como ya se ha hecho mención.

Sin embargo, tal como sucede en las diversas jurisdicciones que la Constitución ampara y concretiza textualmente; las decisiones resultantes de un procedimiento administrativo también pueden modificar las relaciones jurídicas propuestas como controversias, siendo estas resueltas con arreglo de la Constitución y sus principios, Por lo tanto, se puede afirmar que, la

administración posee la capacidad de alterar el contexto real mediante la eficacia jurídica. Pero, ¿qué viene a ser este procedimiento administrativo que tiene efectos similares con respecto a las jurisdicciones determinadas por la Carta Magna en cuanto a la intromisión en la esfera jurídica de los particulares? Para Sagüés (2009), el procedimiento administrativo significa "la parte del derecho administrativo que estudia las reglas y principios que rigen la intervención de los interesados en la preparación de impugnación administrativas". (p.156)

La LPAG, en su artículo 29, califica al procedimiento administrativo como un conjunto de diligencias y actos tramitados en las entidades, encaminadas a la emisión de un acto administrativo que produzca efectos jurídicos sobre intereses, obligaciones o derechos de los administrados. Este sistema se regula a través de normas y principios que establecen los límites y actividades del actuar gubernamental para los derechos de los administrados.

Cierto sector propugna que la administración ejerce jurisdicción, como argumento a este punto es pertinente recordar que, de acuerdo a la Sentencia de 31 de enero de 2001 (Corte Interamericana de Derechos Humanos) en el Caso del Tribunal Constitucional Vs. Perú, el fundamento 71, hace referencia respecto a la función jurisdiccional que realizaría la administración pública, detallando que: "De conformidad con la separación de los poderes públicos que existe en el Estado de Derecho, si bien la función jurisdiccional compete eminentemente al Poder Judicial, otros órganos o autoridades públicas pueden ejercer funciones del mismo tipo".

Por el argumento antes expuesto, lo que esta Corte está considerando es que todo órgano del aparato estatal que realice función jurisdiccional, cuenta con la responsabilidad y obligación de emitir resoluciones conforme al debido proceso y sus garantías según lo estipulado en el octavo artículo de la Convención americana.

Además, según La Convención Americana Sobre Derechos Humanos (Pacto de San José de 1969) el artículo 8 sobre Garantías Judiciales dictamina en su primer inciso que : "Toda persona tiene derecho a ser oída, con las debidas garantías y dentro de un plazo razonable, por un juez o tribunal competente, independiente e imparcial, establecido con anterioridad por la ley, en la sustanciación de cualquier acusación penal formulada contra ella, o para la determinación de sus derechos y obligaciones de orden civil, laboral, fiscal o de cualquier otro carácter". Es decir, que cuando en la Convención Americana se hace mención al derecho que todo individuo tiene de ser escuchado por un juez o tribunal competente para la consecuente determinación de sus derechos, ello alude a toda autoridad pública, tanto legislativa, como judicial o administrativa, que, mediante la emisión de resoluciones, determine derechos y obligaciones de los particulares.

2.Procedimiento Administrativo: Nexo con el control difuso

Más allá de la potestad jurisdiccional o no de la Administración, se debe tener en cuenta que, al hablar del procedimiento administrativo, este no debería únicamente concentrarse en la manifestación del acto administrativo, más bien, en cada una de las actividades y acciones desarrolladas al interior del procedimiento mismo con la intención de arribar en una solución con plena eficacia jurídica. Lo que supone que estos actos y actividades, no solo deben de enmarcarse a la normatividad administrativa, sino también, alcanzar las reglas y principios que dispone la Constitución.

Dichos puntos de vista parecen deformarse al decir que el órgano administrativo, cuando interpreta la norma con rango de ley, ya no podría efectuar control difuso con el propósito de inaplicarla en algún caso en específico. Lo grave del asunto es que dicha restricción exige a los órganos administrativos a solucionar estrictamente en función al principio de legalidad, aun cuando se presenten normas posiblemente vulneratorias de los derechos fundamentales.

2.1. Control de Constitucionalidad

Highton (2009) nos dice que los sistemas de control de constitucionalidad de las normas fueron previstos a consecuencia directa del valor y respeto que se le da a la Constitución como norma suprema. Es importante darle al control de constitucionalidad un carácter de presupuesto elemental del equilibrio de poderes y a su vez una garantía de supremacía constitucional, pues constituye la principal herramienta de control del poder estatal. De ahí la importancia de precisar los límites con que debe ser actuado, dado que un exceso o desperfecto alteraría aquellas características. (p.107)

Para el caso peruano, se trata de un modelo dual o paralelo que según García Belaunde (2001: 133): "Es aquel que existe cuando en un mismo país, en un mismo ordenamiento jurídico, coexisten el modelo americano y el modelo europeo, pero sin mezclarse, deformarse ni desnaturalizarse". Los modelos a los cuales el autor hace referencia son los ya conocidos control difuso y control concentrado, siendo el primero de aquellos, indispensable para el desarrollo del tema a tratar.

2.2. Control Difuso

El control difuso remonta sus antecedentes hasta el año 1803, en Estados Unidos, durante el proceso judicial Marbury vs Madison; en el que, el juez advierte una discordancia incompatible entre determinada ley y la carta magna, prefiriendo, en este caso en particular, a la última y, en consecuencia, inaplicando la primera; decisión que, vale remarcar, solo alcanza al caso en concreto.

Este hecho histórico determinaría que, en el instante en que se manifieste una divergencia evidente entre una ley de rango inferior que vulnera las disposiciones de la norma suprema, y la constitución; la autoridad competente deberá priorizar el cumplimiento de la última; debido a su contenido esencial que comprende y protege los derechos fundamentales de los justiciables. Así, el caso de Marbury vs Madison, aparece como el primer proceso en el que una norma legal se inaplica por anteponerse en jerarquía y, ante todo, la ley de leyes, la constitución política.

El control difuso en el Perú es una prerrogativa usualmente atribuida al Tribunal Constitucional, designado en adelante como TC, y al Poder Judicial. Cabe mencionar que el TC es el máximo intérprete de la Constitución. Lo evaluado dentro del control difuso, no solo es entendido como un análisis de la jerarquía normativa, sino también como una ponderación de los derechos fundamentales previstos en la norma constitucional, la cual prevalece por considerarse la norma suprema del Estado; aquella que cerciora la estabilidad y vigencia jurídica del adecuado correcto desempeño de los poderes constituidos.

Lo discutido durante mucho tiempo ha sido justamente esa atribución exclusiva y restringida que se le ha dado al Poder Judicial y al TC para disponer del control difuso. Siendo manifiesto que en la Administración Pública muchas veces se presentan controversias en las que una norma legal vulnera ciertos derechos fundamentales de los particulares y esta, al no contar con la prerrogativa del control constitucional al caso concreto, no puede resolver el problema.

Pero no siempre fue así, esta idea de incorporar a las facultades de la Administración el control difuso tuvo durante algún tiempo tal aceptación que se manifestó en realidad cuando el TC a través de una sentencia declaró que la administración pública podía y debía aplicar el control difuso siguiendo los parámetros que le fueron establecidos. A pesar de ello, en posteriores años esta postura iría cambiando hasta negarle nuevamente dicha potestad, en un intento de restablecer "el orden de prerrogativas" que a la larga acabaría siendo un paso atrás para la justicia del país.

3. Etapas en el control difuso de la administración (Posiciones del TC)

- **Postura Negativa:**

Indagando entre una ingente cantidad de jurisprudencia emitida por el TC, se advirtió la existencia de una fase negativa inicial extrema para la administración pública, en relación al ejercicio del control difuso, vale decir, la facultad de inaplicar una norma legal por estimarla inconstitucional.

Estableciéndose que, la función de facultades referentes a la inaplicabilidad de normas podía efectuarse tan solo en asuntos que la misma constitución le hubiera concedido de manera indiscutible y manifiesta.

La sentencia recaída en el expediente N° 007-2001 (Tribunal Constitucional, 2001) siendo una de las tantas resoluciones que evidencian esta posición, sintetiza mejor la opinión del TC respecto a la interpretación del artículo 138 de la Constitución Política durante aquellos tiempos. A pesar de no ser estrictamente un caso de control difuso, el tribunal resalta que, si bien, nadie discute la facultad que ostentan los poderes públicos e instituciones descentralizadas para realizar interpretación sobre la constitución y acorde a ello, actuarla en el caso correspondiente; lo que sí no deben hacer es adjudicarse potestades, como la posibilidad de inaplicar normas legales u otras infra constitucionales, que no les han sido concedidas por la carta magna de manera expresa e inobjetable.

Otro punto en la que esta posición se basa es en afirmar que el accionar de los tribunales administrativos está circunscrito al mero amparo de la ley; por ello, el control de validez que efectuarán se desarrollará solo respecto a normas infralegales. En caso este accionar trate sobre la inconstitucionalidad de una norma legal, sería impreciso dejarlo en manos de algún tribunal administrativo debido al sometimiento que mantienen con el principio de legalidad.

Se afirma a su vez, que los tribunales y órganos administrativos no consiguen satisfacer los requisitos de imparcialidad e independencia, puesto que se entiende, son entidades que o bien constituyen parte del sistema organizativo de la entidad que emitió el acto controvertido, o bien integran el poder ejecutivo. Esto colocaría al actuar de los tribunales administrativos en una posición de incertidumbre al estimar que no se respetan las cualidades y valores que rigen la correcta actividad de aquellas instituciones a las que un particular se conduce en búsqueda de tutela, por el simple hecho de formar parte del Poder Ejecutivo; lo cual denotaría un conflicto de intereses en razón de que estos tribunales en realidad conforman la misma organización.

Puesto que se entiende, son entidades que o bien constituyen parte del sistema organizativo de la entidad que emitió el acto controvertido, o bien integran el poder ejecutivo.

- **Atisbos de la postura positiva:**

La postura negativa del Tribunal para con el control difuso en sedes ajenas a la Judicial, nos llevaba a la conclusión de que las resoluciones administrativas se encontraban entonces limitadas a aplicar las leyes de forma ciega y obstinada, sin realizar algún tipo de análisis de validez, hecho motivado por una interpretación limitativa, restrictiva y extremadamente literal del principio de legalidad de la administración.

La sentencia recaída en el Expediente N 004-2006 (Tribunal Constitucional, 2006) concluye en su fundamento 13 que sea en sede judicial ordinaria, especial o cuasijurisdiccional administrativa, las atribuciones jurisdiccional se encontrarán vinculadas al principio de supremacía constitucional dispuesto en el art. 51 de la constitución en sus dos vertientes: Fuerza normativa positiva, aplicando las normas legales en base a las disposiciones constitucionales; y, fuerza normativa negativa, inaplicando la norma administrativa y/o legal que sea extraña a la Constitución. "Este último concepto, nombrado como fuerza normativa negativa no es otra cosa que la aplicación del control difuso al caso concreto, siempre y cuando existan precedentes vinculantes o jurisprudencia.

Con ello, el colegiado constitucional denomina a la justicia ejercida por la administración como: "cuasijurisdicción administrativa", otorgándole también vinculación al principio jurídico de Supremacía Constitucional. Así es como finalmente se va cimentando una tendencia del TC para facultarle a la administración el ejercicio de la prerrogativa constitucional del control difuso en el ámbito de su competencia.

- **Consolidación de la postura positiva**

Entre los fallos del Tribunal Constitucional que sellaron importancia constitucional, se halla la sentencia recaída en el Expediente Nº 03741-2004 (Tribunal Constitucional,2005) publicada en El Peruano el 24 de octubre de 2006, alusiva a una acción de amparo que cuestionaba el empleo de tasas como obligación para la interposición de recursos administrativos consignados a contradecir los fallos de los órganos administrativos. La decisión favoreció al demandante; se estableció que la tasa por recurso es inconstitucional. Sin embargo, lo verdaderamente relevante se desprende de que el tributo fue constituido gracias a una ordenanza norma, con rango de ley, por lo que el TC se vio en la obligación de realizar precisiones previas, estableciendo como regla que ,de conformidad con los artículos 38, 51 y 138 de la constitución, la facultad y el deber de priorizar la constitución e inaplicar una norma infraconstitucional que manifiestamente la vulnere por su forma o fondo alcanzará a todo tribunal u órgano colegiado de la administración pública. Por ello, será de obligatoria observancia los siguientes presupuestos: la relevancia del examen de constitucionalidad para resolver la controversia propuesta dentro de un proceso administrativo; la imposibilidad de que la norma discutida puede ser interpretada conforme a la constitución.

El TC dispone que la obligación de anteponer, preferir y respetar el principio de supremacía constitucional (en caso de existir incompatibilidad entre una norma constitucional y una norma legal, los magistrados optarán por aplicar la primera de ellas) también alcanza, como es evidente, a la administración pública. Con ello no se está refiriendo al art.

138(administración de justicia y control difuso) sino al art. 51(supremacía de la constitución).

En otras palabras, el TC se fundamenta en el principio de legalidad que, acorde a la LPAG, en su cuarto artículo del título preliminar, establece el desenvolvimiento de la administración, resaltando que debe estudiarse la legalidad de la ley en concordancia a la carta magna y los derechos fundamentales que la componen e identifican. Es, por tanto, inadmisible el hecho de permitir que alguna entidad de la administración pública en la presunta ejecución del mencionado principio, emplee una ley que quebrante un derecho fundamental en específico o la constitución, a pesar de su manifiesta inconstitucionalidad.

Se invocan los principios de interpretación constitucional a fin de entender con mayor precisión el artículo 138 de la constitución. El correspondiente análisis parte de la obligación de preferir y respetar el principio de preponderancia de nuestra constitución, que llega hasta la administración pública, la cual se encuentra doblegada al principio de legalidad y, de forma directa, a la Constitución. Además, se afirma que la legalidad de los actos administrativos no está fijada por el simple respeto a la norma legal, sino más bien, por el nexo que tiene con la carta magna. Esto se demuestra en lo enunciado por la LPAG cuando reconoce y determina el concepto formal del principio de legalidad, que viene a ser la materialización de la hegemonía jurídica de la constitución.

Ahora, si bien la Constitución, conforme al párrafo segundo del art. 138, reconoce a los jueces la facultad de realizar el control difuso, de ello no se deriva que dicha potestad les corresponda única y exclusivamente a los jueces, menos aún que la realización del control difuso sea exclusiva de desarrollarse en el trascurso de un proceso en vía judicial. Con esto, el TC establece lo dispuesto en razón a una extensiva interpretación del art. 138 de la constitución, conforme a los principios de concordancia práctica y unidad constitucional.

Entonces, sucederá que, el hecho de negarle la posibilidad de ejercicio del control difuso a la administración pública, provocaría discordancias incomprensibles en la vigencia y validez de la misma constitución; ya que se daría a entender que el acatamiento de la superioridad jurídica de la constitución posee valor únicamente al interior de un proceso judicial y no en procesos de origen distinto. Esto devendría en manifiestas contradicciones de los art. 38 y 51 de nuestra Carta Magna, referidos al deber de respetar, defender y cumplir la constitución y el principio de jerarquía normativa.

En este cauce de ideas encontramos a la eficacia vertical. Dicho concepto, según el décimo fundamento de la sentencia del caso Salazar Yarlenque, versa en lo relativo a la efectividad de los derechos fundamentales en cada uno de los órganos y poderes del Estado, incluida la administración. Por lo

tanto, la protección y el respeto de los derechos fundamentales deben estar efectivamente garantizados, como una obligación ineluctable, de estricto cumplimiento, frente a alguna potencial vulneración proveniente de los administrados (eficacia horizontal) o, incluso, del mismo Estado (eficacia vertical).

Es importante recordar que los derechos fundamentales del ciudadano son inherentes a su validez, y su génesis corresponde a la misma dignidad humana, en consecuencia, estos tienen que ser respetados por cada uno de los tres poderes. De manera que, de existir alguna ley vigente que vulnere determinado(s) derecho(s) fundamental(es), la administración pública debería impedir que esta contravención se concretice, pero ello, solo podría efectuarse si se reconoce la obligación y el derecho a los órganos colegiados y tribunales administrativos de anteponer la aplicación de la constitución en vez de la ley.

Esta sentencia constituyó el denominado "control difuso administrativo", así también, expresó que se adjunta oficio cuando verse sobre la diligencia de una práctica que esté en contradicción a la interpretación que el TC haya realizado, de conformidad con el último párrafo del art. VI del Título Preliminar del Código Procesal Constitucional (Ley 28237 de 2004).

Como se suponía, la presente resolución provocó toto tipo de reacciones, comentarios divergentes que, podrían clasificarse en dos posiciones contrapuestas. Aquellos conformes a lo dictado por el TC y otros, evidentemente, en contra. Estos últimos cuestionaron la sentencia porque argumentaban, carecía de algunas precisiones importantes que debieron realizarse tales como, especificar los tribunales administrativos a los que se hacía referencia o si existía algún procedimiento consultivo previo a su aplicación.

Es por ello, que más adelante, el Tribunal Constitucional emitiría de oficio una resolución aclaratoria en donde la parte resolutiva integre reglas sustanciales y procesales para componer el precedente vinculante de la sentencia antes señalada. Las nuevas pautas añadidas para el ejercicio del control difuso serían:

1. Los tribunales administrativos a los que se hacía referencia en el precedente vinculante serían aquellos órganos colegiados administrativos de alcance nacional, que estén adscritos al poder Ejecutivo y cuya finalidad consista en la declaración de los derechos fundamentales de los administrados; esto debido a la extrema generalización que determinó el precedente (en el que podía considerarse además a los comités especiales responsables de la tramitación del proceso de contratación pública, consejos consultivos o consejos directivos de entidades públicas).

2. El trámite debía ser solicitado por la parte; los tribunales administrativos estaban facultados para la correcta evaluación del origen de la solicitud con juicios razonables y objetivos, cada vez que se tratase de conceder mucho más amparo constitucional a los derechos fundamentales del administrado.

3. La excepcionalidad del trámite se iniciaría de oficio en los casos que se aplique disposición contraria a lo que el TC haya interpretado con anterioridad; de acuerdo al título preliminar en su párrafo final del código adjetivo constitucional. También cuando se busque aplicar disposición que discrepe a lo establecido por el TC en alguno de sus precedentes vinculantes.

A raíz del precedente vinculante establecido en el caso Ramón Hernando Salazar Yarlenque; los tribunales administrativos, durante casi ocho años, tuvieron la potestad del control constitucional. En el transcurso de este periodo se continuaron emitiendo distintas resoluciones en diferentes tribunales administrativos de alcance nacional ; tal es el caso del Tribunal Registral, el Tribunal Fiscal, el Tribunal del Servicio Civil, el Tribunal de Contrataciones del Estado y el Tribunal del Instituto Nacional de Defensa de la Competencia y de la Protección de la Propiedad; de esto se concluyó que, durante todo el tiempo en el que permaneció vigente la potestad administrativa del control difuso de constitucionalidad se ampararon y protegieron derechos fundamentales de vital importancia para los administrados, tal como el derecho de defensa, garantías constitucionales del debido proceso, la autonomía de la voluntad como principio contractual, además del ya recurrente en la administración, principio de legalidad.

Sin embargo, en determinados casos se utilizó el término control difuso de maneras excesivas, imprecisas e indiscriminadas, sin respetar las condiciones prestablecidas por el TC para su uso y aplicación. Sin embargo, en la mayoría de las resoluciones emitidas durante ese lapso se efectuaron solo el clásico control de legalidad de normas, potestad natural de la Administración.

López (2019: 54) citando a Pozo Goicochea, manifiesta lo siguiente respecto a la sentencia emitida por el TC:

> (…) cuando el Tribunal Constitucional reconoció a los Tribunales Administrativos la facultad extraordinaria de aplicación del control difuso lo hizo para asegurar el control y defensa de la Constitución en la totalidad del ordenamiento jurídico. Para ello, se aseguró también de dejar en claro que este mecanismo extraordinario debía ser aplicado restrictivamente, a fin de garantizar la defensa de la Constitución y la protección de los derechos fundamentales de las personas en el ámbito administrativo (…) Hablar de la fuerza vinculante de la Constitución y de la real efectividad de los derechos fundamentales es hablar de uno de los temas centrales del Estado Constitucional que ponen en entredicho la coherencia interna del propio sistema jurídico (…)

A su vez Ku Yanasupo (2012), precisa su opinión sobre el carácter vinculante de la constitución para la administración pública:

> (...) la eficacia y el respeto de los derechos fundamentales ya no se realizan únicamente en el ámbito de la ley, sino que la legitimidad de las leyes es evaluada en función de su conformidad con la Constitución y los derechos fundamentales que ella reconoce. Esto hace injustificable que la Administración pueda alegar que, bajo el cumplimiento del principio de legalidad, está obligada a aplicar normas manifiestamente inconstitucionales, pues esto significaría vaciar de contenido los principios de supremacía constitucional y de fuerza normativa, otorgando primacía al principio de legalidad en detrimento de la supremacía jurídica de la constitución, y trastocando los propios fundamentos del Estado constitucional y democrático (33-34).

- **Eliminación del precedente vinculante**

Durante sus casi ocho años de vigencia, el precedente vinculante establecido en el caso Salazar Yarlenque, fue el sustento de una considerable cantidad de resoluciones administrativas que, sorpresivamente, el TC dejó sin efecto mientras resolvía una controversia que aparentaba en un inicio ser únicamente asunto de debate el derecho de igualdad ante la ley y el derecho de defensa y que en un giro total e inexplicable acabó abordando asuntos relacionados a la atribución que se le había conferido a la administración pública para el ejercicio del control difuso; un análisis jurídico efectuado sin algún tipo de necesidad pues la eliminación del precedente vinculante no formaba parte de la solución requerida para la demanda interpuesta por amparo.

Es así que el conocido caso "Consorcio Requena", sentencia recaída en el Expediente Nº 04293-2012 (Tribunal Constitucional, 2014) les despojó a los tribunales administrativos la posibilidad de ejercer el control difuso al dejar sin efecto el precedente vinculante que les autorizaba a ejecutar dicha potestad constitucional; decisión que se fundó bajo los siguientes fundamentos:

- Los tribunales administrativos no son órganos jurisdiccionales ni tampoco constituyen parte del poder judicial, por lo tanto, no les correspondería desempeñar esa labor.
- La inexistencia de un procedimiento de consulta para discutir o cuestionar la correcta aplicación del control difuso por parte de los tribunales administrativos
- La afectación al sistema de control dual (control concentrado y control difuso) de la jurisdicción establecido por la constitución, puesto que el poder ejecutivo no tiene la potestad de cuestionar la ley sino únicamente debe acatarla.

- La no existencia de algún vacío legislativo, o de interpretaciones contradictorias, respecto de a quién le corresponde el ejercicio del control difuso que hubiese fundamentado un pronunciamiento por parte del TC (art. 38, 51 y 138 de la constitución).
- La falta de un reconocimiento jurisdiccional de parte del Tribunal Constitucional hacia los tribunales administrativos colegiados (adscritos o no al poder Ejecutivo) para el ejercicio del control difuso, dado que, en consecuencia, no habrá algún tribunal administrativo que posea la potestad de ejecutar dicha facultad. El Tribunal Constitucional, debiendo fundamentar esta tesis, respaldó su fallo en la sentencia recaída en el Expediente N 01680- 2005 (Tribunal Constitucional, 2005)

A todo esto, de la resolución que eliminaba el precedente vinculante del uso del control difuso administrativo, se destaca el voto particular del magistrado Cesar Hani, quien sería el entonces presidente del TC, minoría que difiere en gran parte a lo decidido en la sentencia del caso Consorcio Requena argumentando que no cabría dejar sin efecto el precedente vinculante por las siguientes causas:

1. El TC manifiesta que el art. 138 de nuestra constitución política no debe prestarse a una interpretación literal. A propósito de dicha afirmación, el magistrado Urviola Hani en el apartado de su voto singular expresa en la quinta razón que, según doctrina autorizada, la interpretación literal que confiere a las disposiciones normativas su propio significado: "No puede aceptarse, porque se basa en la idea ingenua y falaz de que las palabras están dotadas, precisamente, de un significado propio, intrínseco, independiente de los usos". (Tribunal Constitucional, Sentencia exp. N 04293-2012). Por lo tanto, si el actuar del TC se restringiera a la mera interpretación literal de las normas jurídicas, no existiría doctrina jurisprudencial vinculante tan esencial e indispensable para tutelar y defender los derechos constitucionales
2. Al hablar del control difuso norteamericano afirmamos que se estableció jurisprudencialmente, mas no por disposición constitucional expresa. He aquí un argumento con respecto al nacimiento del control difuso en la doctrina comparada. Por ello se tiene que, la constitución instituye expresamente el poder de los jueces de aplicar el control difuso, no estando impedido que el TC, mediante precedentes vinculantes y para resguardar la constitución, invista de esta potestad a la administración, en razón de criterios de poder y unidad vinculante de disposiciones que reconocen los derechos fundamentales.

3. El TC no debería poder dejar sin efecto un precedente vinculante sin analizarlo con antelación, para la consideración de las consecuencias (negativas o positivas) que haya generado en el sistema jurídico nacional o si ha sido de utilidad o además, si cabe la existencia de alguna(s) fórmula(s) para perfeccionarlo.
4. Los argumentos empleados para el establecimiento del control difuso arbitral fueron los mismos que para el otorgamiento del control difuso a los tribunales administrativos.
5. Sin embargo, el magistrado del voto singular, evidencia estar de acuerdo con los demás en lo referente a la ausencia de un procedimiento consultor que verifique el correcto uso del control difuso en sede administrativa, puesto que ello puede conllevar a realizar actos inconstitucionales, siendo la mejor solución, perfeccionar el precedente vinculante incorporando una nueva regla que añada un procedimiento de consulta u otro semejante, ante la Corte suprema de justicia.

Lo señalado por el magistrado Urviola Hani en el punto tres resulta de vital relevancia, ya que expresa que no es posible declarar sin efecto un precedente vinculante sin antes examinar la utilidad y el efecto resultante del control difuso administrativo en el ordenamiento jurídico durante su tiempo en vigencia, o si existe alguna fórmula para mejorarlo, señalando, al final, que la solución más óptima no tendría por qué significar la exclusión total a la administración pública del uso del control difuso; sino más bien, incorporar un procedimiento de consulta para su estricta aplicación a un caso en concreto.

De ello se desprende que a través de lo resuelto en el expediente del caso Consorcio Requena, el precedente vinculante establecido en el caso Salazar Yarlenque es declarado ineficaz. Esta atribución del TC que le permite modificar su criterio está prevista en el título preliminar, cuarto artículo del código adjetivo constitucional, el cual dictamina que el TC, cuando se aparte de un precedente a través de una sentencia, deberá manifestar los argumentos de hecho y de derecho que sustenten la resolución y los motivos por los cuales decidió apartarse. El common law ha previsto un mecanismo que faculta al Tribunal que emitió determinado precedente vinculante para cambiarlo por uno nuevo.

Esta potestad anteriormente descrita es conocida como el overruling. Por esa razón, López (2019) reproduce la idea de Quiroga León al referir que el TC ha dispuesto de tres condiciones para la procedencia del overruling: El primer requisito es que se invoque y cite al precedente cuyo efecto vinculante piensan extinguir. El segundo requisito es que se analicen las razones que justificarán el abandono del precedente anterior y si es menester la creación de un nuevo precedente vinculante. El tercer y último

requisito busca generar un precedente vinculante nuevo en la resolución correctiva.

En síntesis, lo que se advierte en este tema es que el expediente del caso Consorcio Requena dejó sin efecto el precedente vinculante que autorizaba el uso del control difuso por la administración. En ese orden de ideas, se aplicaría la técnica del overruling para dejar sin efecto el precedente vinculante originado en el caso Salazar Yarlenque por considerarlo contrario a las ideas y posición actual del máximo intérprete de la constitución política. No obstante, en consecuencia, a ello, el Tribunal dejó sin establecer los criterios que las autoridades competentes deberían seguir a partir de dicho momento, cuando lo ideal y necesario hubiera sido establecer un nuevo precedente vinculante y de esta forma no dejar la situación en el aire.

Otro punto a analizar sobre la sentencia del expediente "Caso Consorcio Requena" versa sobre la indicación que hace el TC hacia los distintos tribunales y órganos administrativos, para ajustarse a los principios constitucionales con el cumplimiento de la defensa de la constitución (art. 38°) y la jerarquía normativa (art. 51°); y, sin embargo, le quita eficacia al sustento jurisprudencial que les admitía inaplicar sobre aquellas normas cuando estaban en discordancia y con la Constitución. Lo cual evidentemente, se traduce en un despropósito; siendo que ya no vivimos en un Estado de derecho, cuya esencia radicaba en la hegemonía de la ley (la constitución política no ocupaba el rango supremo en la jerarquía normativa); sino que hemos ido evolucionando hasta lo que hoy se conoce como un Estado constitucional de derecho, confiriéndole a nuestra carta magna la posición suprema en el escalón más alto de las normas jurídicas.

En esta clase de estado, para el cumplimiento cabal del principio de legalidad, no bastará que la administración se limite a estar sujeta y obedezca sin más lo dispuesto en la ley; sino que además, en conformidad con el principio de supremacía constitucional, deberá considerar la posibilidad de que dicha norma podría contravenir la constitución y ante esto, tendrá la obligación de ejercitar la acción apropiada para impedir que se vulneren los derechos fundamentales integrados en nuestra constitución. Es decir que, la aplicación del control difuso coadyuva al resguardo de un estado constitucional de derecho.

Ante el inevitable suceso de la eliminación del precedente vinculante, lo recomendable hubiera sido efectuar un balance de aplicación y utilidad; en otras palabras, determinar si tuvo éxito en la consecución de su fin (resguardar los derechos fundamentales de los administrados) y si constituía un dispositivo viable para un posterior perfeccionamiento mediante la incorporación de un procedimiento consultivo.

Lo cierto es que no sería adecuado en un Estado cuya finalidad principal es salvaguardar a los particulares y con ello, sus respectivos derechos; que

las controversias de los administrados sean conducidas hasta vías judiciales pretendiendo que se declare inaplicable alguna norma infra constitucional por contravenir derechos, valores y principios constitucionales, puesto que esta manifestación pudo haberse realizado en un momento más próximo e inmediato como resulta el procedimiento administrativo.

Aquello reflejaría una incoherente actuación de parte de estos funcionarios administrativos en razón de que, si lo que se busca o defiende es que la constitución se haga vigente y manifieste en la totalidad de actos expedidos por la administración; deviene en ridículo que se obligue a los funcionarios administrativos a aplicar una norma que manifiestamente vulnere a la constitución. No obstante, a pesar de no existir en el artículo 138 de la constitución disposición expresa y literal que faculte a la administración pública para el ejercicio del control difuso; el artículo 38 destaca el deber de todo ciudadano a cumplir y respetar la carta magna. Por lo tanto, no sería un error afirmar que cuando se hace referencia a la "totalidad de ciudadanos", el enunciado comprende además a los funcionarios públicos, vale decir, al ente de la administración pública que estando frente a determinada norma que transgreda la constitución tendrá que cumplir con defender y respetar la ley de leyes efectuando el principio de supremacía de la constitución lo que, por supuesto no simbolizará un exceso de facultades.

Se puede inferir, además , que la medida afectaría a los tribunales contenciosos administrativos en razón de una carga procesal excesiva e innecesaria, debido a la necesidad de judicializar los procesos administrativos en los que se vulneren derechos fundamentales a través de una norma infra constitucional que contravenga expresamente a la carta magna; viéndose afectada la población de recursos insuficientes que, en vez de apersonarse para obtener justicia en tribunales administrativos debido la agilidad de sus mecanismos y costos accesibles; deberán acudir a tribunales judiciales, padeciendo los largos plazos e importes que los procedimientos del Poder Judicial llevan consigo.

Así pues, deviene en ilógica la negación del control difuso a los tribunales administrativos; puesto que se obstaculiza e impide la posibilidad de que se pueda actuar de forma inmediata ante una potencial consecuencia antijurídica, consecuencia directa de aplicar una norma legal que contravenga la constitución. Una facultad denegada a la administración sin motivos suficientes que, vistos desde un punto objetivo, tiene mayor viabilidad en órganos administrativos que en vía Judicial.

Conclusiones

Es cierto que existen dos sectores muy marcados con criterios distintos y contrapuestos respecto a la viabilidad de concederle o no, la potestad

de ejercer el control difuso a la administración. Esto, como resultado de interpretaciones disímiles a ciertos artículos de la carta magna. Sin embargo, algo que nadie podrá discutir jamás es que, según la jerarquía de normas, establecida en el art. 51 de la constitución; la ley suprema deberá prevalecer en todo momento sobre cualquier norma legal o de inferior nivel jerárquico.

Disposición que devendrá en estricto cumplimiento para todo el aparato estatal, incluyendo, por supuesto, a los tres poderes que lo conforman. Por lo tanto, en concordancia al principio citado de supremacía constitucional, resulta totalmente lógico asumir que la preferencia de aplicar la ley suprema alcanzará también a la administración pública y sus tribunales; debiéndosele permitir el uso de control difuso como un mecanismo eficiente para salvaguardar la primacía de la constitución en caso se halle frente a alguna norma que la vulnere.

Según lo expuesto en el presente trabajo, la doctrina reconoce ciertos requisitos o condiciones que deberán cumplirse al momento de dejar sin efecto un precedente vinculante. Acto especial que el derecho anglosajón bautizó bajo la denominación de overruling. Como se sabe, el caso Consorcio Requena declaró la ineficacia del precedente vinculante en el caso Salazar Yarlenque que autorizaba a los tribunales administrativos al ejercicio del control difuso; no obstante, dicha decisión podría juzgarse de irregular y extraña, casi arbitraria; y con justa razón, puesto que el TC no acató las condiciones necesarias para actuar la técnica del cambio de criterio; evidenciando en su sentencia una ausencia de justificación que amparara el abandono del precedente del Caso Salazar (examinando su efecto) además de omitir completamente la creación de un precedente vinculante nuevo que reemplace al anterior, reanudando así, un problema que parecía haberse resuelto y que ha acabado, otra vez, en la incertidumbre y el vacío.

El contexto sociopolítico actual nos adecúa en una coyuntura de Estado constitucional de derecho en el que la supremacía de la constitución por sobre todas las demás normas deberá primar en cada acto que busque solucionar una controversia de derechos fundamentales; esto quiere decir que la administración, aun teniendo como regla el cumplimiento del principio de legalidad, tendrá que apartar su usual sometimiento a la ley para hacer prevalecer la constitución cuando las circunstancias y necesidades de resguardar los derechos del particular así lo requieran.

A pesar de que el precedente vinculante establecido en el caso Yarlenque nunca fue perfecto, pronto se buscó su mejoría y aquello se manifestó cuando emitieron una aclaración a lo dispuesto por la sentencia del TC, estableciendo nuevas pautas que precisaron con mayor exactitud las condiciones de uso del control difuso administrativo. La intención era clara y las diversas resoluciones que algunos tribunales expidieron durante el tiempo en el que el precedente estuvo vigente, fueron el reflejo de un

deseo por salvaguardar los derechos fundamentales de los administrados haciendo prevalecer la constitución.

Por lo que, considero inapropiada la sorpresiva e intempestiva eliminación de esta potestad en la administración que lo que finalmente requería era una serie de mejoras (como una instancia superior que revise sus decisiones o un procedimiento de consulta) que le aportaran mayor confianza y seguridad jurídica. Siendo que la administración pública es un organismo que está en constante relación con los ciudadanos, siendo más próximo, incluso, que el poder judicial.

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Criminal liability for establishing or spreading criminal influence in the context of armed aggression against Ukraine

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Abstract

The aim of this study was to analyze the criminal legal system to establish criminal influence during the armed aggression against Ukraine. Since the beginning of Russia's armed aggression in Ukraine, the number of war crimes committed by the Russian military has increased. Investigating criminal influence during the war is a completely new area of work for law enforcement. General methods of scientific investigation and special methods of legal investigation were used. The author examines the types of criminal influence in the context of Russian aggression against Ukraine according to the Rome Statute and the Criminal Code of Ukraine. Common criminal offenses in 2021 and 2022 are identified. The low effectiveness of the judiciary in holding perpetrators of criminal influence criminally accountable is determined. It is concluded that the amendment of criminal legislation by shortening the terms of investigation and abbreviated procedure of prosecution of minor criminal

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offenses will ensure their prompt investigation and prosecution, which, in turn, will relieve the investigative bodies and the judiciary from the burden of dealing with serious and particularly serious criminal offenses.

Keywords: large-scale warfare; criminal liability legislation; Russian crimes against Ukraine; military law; international criminal law.

Responsabilidad penal por establecer o difundir una influencia criminal en el contexto de una agresión armada contra Ucrania

Resumen

El objetivo de este estudio fue analizar el sistema jurídico penal para establecer la influencia criminal durante la agresión armada contra Ucrania. Desde el comienzo de la agresión armada de Rusia en Ucrania, ha aumentado el número de crímenes de guerra cometidos por los militares rusos. Investigar la influencia criminal durante la guerra es un área de trabajo completamente nueva para las fuerzas del orden. Se utilizaron métodos generales de investigación científica y métodos especiales de investigación jurídica. El autor examina los tipos de influencia criminal en el contexto de la agresión rusa contra Ucrania según el Estatuto de Roma y el Código Penal de Ucrania. Se identifican los delitos penales comunes en 2021 y 2022. Se determina la escasa eficacia del poder judicial a la hora de exigir responsabilidades penales a los autores de influencia criminal. Se concluye que la modificación de la legislación penal mediante la reducción de los plazos de instrucción y el procedimiento abreviado de enjuiciamiento de los delitos penales menores, garantizará su pronta instrucción y enjuiciamiento, lo que a su vez aliviará a los órganos de instrucción y al poder judicial de la carga que supone ocuparse de los delitos penales graves y especialmente graves.

Palabras clave: guerra a gran escala; legislación sobre responsabilidad penal; crímenes de Rusia contra Ucrania; derecho militar; derecho penal internacional.

Introduction

The full-scale military invasion of the territory of Ukraine by the Russian Federation has led to the development of new draft laws in the

area of defining additional types of criminal liability. This, in turn, regulates the spread of criminal influence in the context of armed aggression against Ukraine, which is a threat and unacceptable. On February 24, 2022, in accordance with the Law of Ukraine "On the Legal Regime of Martial Law" (Law of Ukraine, 2015), Ukraine introduced martial law.

This law defines the content of the legal regime of martial law, the procedure for its introduction and cancellation, legal measures of activity of public authorities, military command, military administrations, local self-government bodies, enterprises, institutions, and organizations under martial law, guarantees of human and civil rights and freedoms and the rights and legitimate interests of legal entities (Hatseliuk, 2021).

- **Research Problem**

The criminal influence in the context of Ukraine's armed aggression is the commission of war crimes, genocide, and crimes against humanity. As of the end of October 2022, the National Police had opened more than 39409 criminal proceedings related to crimes committed by the Russian military and collaborators on Ukrainian territory (Almost 40 thousand ..., 2022). In the eight months since the full-scale invasion of Ukraine by Russian aggression, the police have registered 212,000 crimes, of which almost 40,000 are war crimes committed by the Russian occupation and terrorist forces (Almost 40 thousand ..., 2022). In order to maintain law and order and prevent illegal actions during the Russian armed aggression, it is necessary to analyze the norms of criminal liability.

- **Research Focus**

The notion of establishing or spreading criminal influence was added to the Law of Ukraine "On Amendments to Certain Legislative Acts of Ukraine on Liability for Crimes Committed by a Criminal Community" (Article 255) on June 04, 2020 (Law of Ukraine, 2020). At the 52nd session of the Human Rights Council, the Independent International Commission of Inquiry on Violations in Ukraine published the results of the criminal impact of Russian aggression (The report of the independent, 2023).

It shows that during the full-scale war, Russian troops violated international human rights law and international humanitarian law in many regions of Ukraine. For the most part, these violations can be classified as war crimes (in particular, intentional killings, attacks on civilians, unlawful deprivation of liberty, torture, sexual violence, and forced relocation of adults and children). However, the commission of armed influence under the direction of a military commander or the government does not exempt the perpetrator from criminal liability if he or she knowingly carried out the order. It is the analysis of criminal law and regulations that is of scientific interest in this article.

- **Research Aim and Research Questions**

The purpose of the study is to carry out a systematic analysis of the criminal law system for establishing and spreading criminal influence during the armed aggression against Ukraine. The realization of this goal involves the following tasks:

1) to define the concept of "criminal influence";
2) to classify the types of criminal influence in the context of Russian aggression against Ukraine;
3) to identify frequent criminal offenses in 2021-2022;
4) to analyze court verdicts on the criminal prosecution of persons who have committed criminal influence against Ukraine.

1. Literature review

Military law is the main part of the legal regime during martial law in Ukraine (Gorinov *et al.*, 2022). Scholars have identified theoretical and practical problems in the study of the phenomenon of military law in Ukraine from the beginning of the war in Donbas to the full-scale invasion.

Kaplina (2022) analyzed war crime in terms of criminal liability and the exchange of prisoners of war. She also revealed the issues of Ukrainian legislation during a full-scale war; proved the need to develop special legal norms during martial law.

Shevchenko (2022) analyzed Article 255[1] of the Criminal Code of Ukraine. The author reveals the definition of the concepts of "establishment" and "dissemination" in the context of criminal influence.

Hajdin (2022) noted that criminal influence and punishment in international criminal law is determined through the material (actus reus) and mental (mens rea) components. The author concluded that only if there is a reasonable evidence base indicating the voluntary participation of a person in the planning, preparation, and implementation of criminal influence with the use of armed force, such a person can be recognized as an offender and prosecuted.

In the context of Russia's armed aggression against Ukraine, the protection of the rights, freedoms, and interests of citizens is a pressing issue. This issue was considered by N. Melnychenko (2021), who emphasized the need to update the legal framework in the field of lawsuits. An important task in criminal proceedings during a full-scale war is the prompt processing of civil claims.

Balobanova (2022) studied the dynamics of criminal law development. According to the author, during the full-scale war, 13 laws were adopted to regulate criminal liability. Balobanova (2022) briefly listed the legislative framework on criminal liability and identified the main changes.

Logvinenko (2019) analyzed the main provisions of criminal liability for war crimes in international law. The author emphasized that in Ukrainian legislation, the Criminal Code usually lists the elements of a crime and determines the type and extent of punishment in each case. The norms of international law define the criminality of certain acts, first of all, what constitutes a crime, but often do not have clear explanations of the type and extent of punishment.

Rohatynska (2022) analyzed the specifics of the distinction between the concepts of "war crime". Baladyha (2022) analyzed the complexity of investigating war crimes committed by Russia against Ukraine. The author cited the signs of war crimes under Ukrainian and international law. He also studied the statistics of war crimes committed on the territory of Ukraine during the six months of the full-scale war. He analyzed the Ukrainian legislation on liability for war crimes.

2. Research Methodology

The scientific material for this article was selected using the ranking method. This method helped to prioritize the material (legislative acts of Ukraine, statistical data) and less important material (works of other scholars). The study used analysis and synthesis (when processing the latest publications on the research topic). The concept of "criminal influence" was defined using the logical and semantic method, and the international response to Russia's crimes against Ukraine was analyzed. Specific sociological methods were used (in particular, analysis of official documents and statistical data collection and study).

The method of grouping was used to identify groups of establishing or spreading criminal influence. The systemic analysis led to the identification of changes in criminal liability in legal documents. The discussion method was also used to compare the author's own research with the results of other scholars, and the graphical method was used to present the statistical data of the study.

Sample / Participants / Group

The theoretical basis of the study is the scientific work of Ukrainian and foreign scholars. The factual material that forms the basis of this study is based on legal documents and publications from official statistical websites

on the establishment and spread of criminal influence. The empirical part of the study is based on court verdicts on war crimes of Russian aggression against Ukraine.

Instrument and Procedures

The search for scientific publications on the research topic was conducted using the following keywords: full-scale war, spread of criminal influence, establishment of criminal influence, legislation on criminal liability, Russia's crimes against Ukraine, military law, court verdicts on establishing criminal liability for criminal influence in the context of war, criminal misconduct, countering Russia's crimes, protection of human rights and freedoms.

Data Analysis

The presentation of statistical observation data on the establishment and spread of criminal influence in the context of armed aggression against Ukraine is presented in a graphic material created using the built-in tools of MS Word.

Research Results

According to the Rome Statute of the International Criminal Court (Article 8bis(1)), there are four stages of the crime of aggression: 1) planning; 2) preparation; 3) initiation; 4) execution (Rome Statute of the International ..., 1998). The Criminal Code of Ukraine (Articles 255, 2551, 2553) defines "criminal influence"; the establishment or spread of criminal influence; request for the use of criminal influence, but these articles regulate criminal influence in the area of distribution of funds, property or other assets (income from them). At present, the current legislation of Ukraine does not have a clear definition of "criminal influence" in the context of armed aggression against Ukraine. Therefore, we will try to define the meaning of this concept on our own.

A criminal influence is an influence that is criminal in nature. Accordingly, the person who commits the act is criminal and is found to have a direct effect on a specific person (e.g., causing bodily harm); an object (e.g., stealing property); a person and an object (e.g., robbery or assault). This definition applies to war crimes and crimes against humanity. Or "criminal influence" - influence during which a crime is committed against the state and society.

In the context of a full-scale war, the following types of criminal influence are distinguished: a crime of aggression, a war crime, and a crime against humanity. The crime of aggression is Russia's armed attack on Ukraine and is an international crime against peace and security. Russia was the first to

take the initiative and use weapons, which is called aggression against the sovereignty, territorial integrity, and political independence of Ukraine.

War crimes are a deliberate violation of the current legislation and rules of war, which makes the perpetrators (military personnel and those who give them orders) criminally liable, which is imposed by a decision of the judicial authorities (Articles 115, 127 of the Criminal Code of Ukraine, etc.). Crimes against humanity are crimes committed deliberately and violating the safety of citizens (Art. 115, Part 1, Art. 127, 152, Part 1, Art. 438).

The war has led to the massive departure of millions of Ukrainian citizens from their permanent places of residence where military operations are taking place to other regions or abroad, they left their homes, property, and vehicles often unattended, which has led to the commission of many criminal offenses, including criminal misdemeanors: violation of the inviolability of private housing (part 1, Article 183 of the Criminal Code of Ukraine), theft (Article 185, part 1, of the Criminal Code of Ukraine), fraud (Article 190, part 1, of the Criminal Code of Ukraine), causing property damage by deception or breach of trust (Article 192 of the Criminal Code of Ukraine), misappropriation of found or stolen property that accidentally came into a person's possession (Article 193 of the Criminal Code of Ukraine), evasion of conscription for regular military service, military service by conscription of officers (Article 335 of the Criminal Code of Ukraine), evasion of military registration or special training (Article 337 of the Criminal Code of Ukraine), arbitrariness (Article 356 of the Criminal Code of Ukraine), unauthorized assignment of authority or rank of an official (Article 353, part 1, of the Criminal Code of Ukraine), etc. Table 1 shows the number of people convicted of criminal offenses:

Table 1. Comparative numbers of people convicted of criminal offenses in 2021 and 2022.

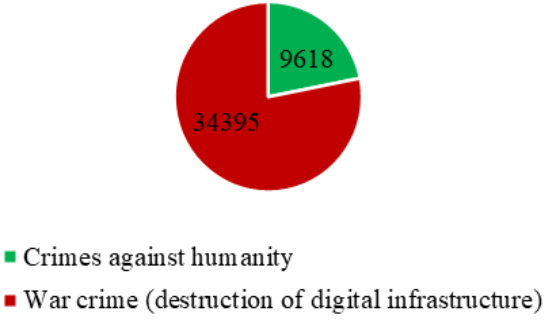
Type of crime	2021	2022
violation of the inviolability of private housing (part 1 of Article 183 of the Criminal Code of Ukraine)	**0**	**2**
theft (part 1 of Article 185 of the Criminal Code of Ukraine)	**24 629**	**15 505**
fraud (part 1 of Article 190 of the Criminal Code of Ukraine)	**1 698**	**1 247**
Causing property damage by deception or breach of trust (Article 192 of the Criminal Code of Ukraine)	**2**	**2**
Misappropriation of found or stolen property that accidentally came into a person's possession (Article 193 of the Criminal Code of Ukraine)	**1**	**0**

Evasion of conscription for regular military service, military service by conscription of officers (Article 335 of the Criminal Code of Ukraine)	**152**	**112**
Evasion of military registration or special training (Article 337 of the Criminal Code of Ukraine)	**34**	**12**
Arbitrariness (Article 356 of the Criminal Code of Ukraine)	**5**	**9**
Unauthorized appropriation of authority or the title of an official (part 1 of Article 353 of the Criminal Code of Ukraine)	**0**	**1**

Source: developed by the authors' based on (Supreme Court, 2022).

In the context of Ukraine's armed aggression, approximately 44,000 crimes against Ukraine were recorded (Ukrainian Helsinki Human Rights Union, 2022). Figure 1 shows the ratio of the most common criminal outcome during a full-scale war.

Figure 1. Numerical indicators of crimes committed during a full-scale war



Source: developed by the authors' based on data from the Ukrainian Helsinki Human Rights Union, 2022.

This data is not exhaustive, as it shows statistics from February 24, 2022, to January 24, 2023.

Currently, there is a problem with investigating war crimes and bringing perpetrators to justice. Ukrainian legislation needs to be updated to define and investigate war crimes. Currently, these issues are regulated by international documents, including the Geneva Conventions and their protocols and the Rome Statute. As of January 30, 2023, a control test of the updated Criminal Code of Ukraine was conducted (Control text of the project, 2023).

Yuriy Belousov, Head of the Department for Combating Crimes Committed in the Context of Armed Conflict of the Prosecutor General's

Office, said: "As of March 14, 71,147 war crimes committed by Russians during the year since the beginning of the full-scale invasion were registered in Ukraine... As of today, there are 29 verdicts of Ukrainian national courts on war crimes" (Prosecutor General's Office, 2023).

Investigating war crimes is a completely new field for law enforcement, as the vast majority of personnel have never investigated such crimes, so it is important to quickly adapt to modern realities and effectively conduct investigations of such crimes. In the future, the materials obtained by law enforcement agencies can also be used in national and international courts to bring senior officials of the Russian Federation to justice for crimes.

3. Discussion

Part 1 of the note to Article 255 of the Criminal Code of Ukraine defines "criminal influence" as follows: "any actions of a person who, due to authority, other personal qualities or capabilities, promotes, encourages, coordinates or otherwise influences criminal activity, organizes or directly carries out the distribution of funds, property or other assets (income from them) aimed at ensuring such activity". However, in the context of the armed aggression against Ukraine, this concept needs to be supplemented and clarified. The author's definition of "criminal influence" is given in the results.

A similar position is supported by Nikitin (2020). Rohatynska (2022) also provided a similar definition of "criminal influence", which means any actions (usually conscious) that violate the law, the rules established by society, the rules of engagement reflected in international legal acts. The issue of legal nihilism was considered by Rezvorovych (2022), who understood it as a deformed state of legal consciousness of an individual, group, or society characterized by a deliberate disregard for the requirements of the law, its value, disregard for legal principles and traditions, and excluding criminal influence.

In addition to the criminal offenses defined in this one, N. Rohatynska (2022) added looting (Article 432 of the CCU); violence against the population in the area of hostilities (Article 433 of the CCU); ill-treatment of prisoners of war (Article 434 of the CCU); illegal use and abuse of the symbols of the Red Cross, Red Crescent, Red Crystal (Article 435 of the CCU).

Table 1 shows frequent criminal offenses in 2021 and 2022, but this list is not exhaustive. Khavroniuk (2022) considered a criminal liability for collaborationism (Article 111-1 of the Criminal Code of Ukraine). O. Dudorov et al (2022) analyzed criminal liability for disseminating information in

wartime (Article 114-2 of the Criminal Code of Ukraine). In this context, an important issue is a cybersecurity and the effective functioning of cyber law (Gushchyn *et al.,* 2022).

There is no analysis of court verdicts on criminal prosecution for criminal influence. The author's position on the problematic nature of investigating criminal influence on the territory of Ukraine and bringing individuals to criminal liability for their commission is supported by Baladyha (2022). The European community supports Ukraine during a full-scale war in accordance with the principle of subsidiarity (Kumar, 2021).

Conclusions

The authors examine the specifics of criminal influence in the context of Russia's armed aggression against Ukraine. The analysis of current legislation has shown that the current definition of this concept is not fully applicable in the context of a full-scale war. The current definition in Ukrainian legislation refers to the distribution of funds and property. Therefore, the author's own definition of the concept of "criminal influence" was developed with clarifications and additions. The author also presents opinions on the definition of this concept by other scholars.

The authors analyze the types of criminal influence under international documents: war crimes and crimes against humanity. The authors provide a list of articles of the Criminal Code of Ukraine under which criminal offenses were often committed in 2021 and 2022 and the total number of convicted persons. The authors' results are also supplemented by a discussion of other articles of the Criminal Code of Ukraine conducted by other scholars. Based on the statistics, the total number of war crimes and crimes against humanity was calculated and a chart was created.

The readiness of the judiciary to investigate war crimes was studied. It was found that these institutions need additional professional training in the rapid disclosure of such crimes. Prospects for further research are to develop recommendations for amending and updating the Criminal Code of Ukraine in accordance with the experience of the European Union.

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Políticas municipales en el ordenamiento de los mercados de abastos en la región Puno

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Resumen

El trabajo de investigación, tiene como objetivo determinar el grado de incidencia de las políticas municipales en el ordenamiento de los mercados de abastos en la región Puno. La metodología, fue prospectiva, transversal, observacional y analítico, de diseño no experimental, entendido dentro del tipo de indagación aplicada, con el nivel de investigación causal correlacional. Estimando los resultados, la población estuvo conformada por un total de 3732, la cual está conformada básicamente por los trabajadores asociados al rubro de comercio de mercado de abastos. El método usado fue de muestreo aleatorio simple por proporciones, se empleó un muestreo probabilístico, de los cuales se eligió una muestra considerable de 264 comerciantes. La técnica manejada es la encuesta, el instrumento aplicado es el cuestionario con referencia al nivel de confiabilidad es del 95%, por lo tanto, esto revela que es cierto. El resultado obtenido refleja el valor de asociación en 62,4%, lo que indica una relación moderada, estadísticamente, entre las variables. En conclusión, las políticas de propuestas normativas influyen directamente y significativamente inversa en el ordenamiento de los mercados municipales de abastos en el ámbito de las municipalidades provinciales de la región Puno.

Palabras clave: políticas públicas; propuestas participativas; ordenanzas municipales; mercados; participación vecinal.

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Municipal policies in the regulation of food markets in the Puno region

Abstract

The objective of the research work was to determine the degree of incidence of municipal policies in the organization of food markets in the Puno region. The methodology was prospective, transversal, observational and analytical, of non-experimental design, understood within the type of applied research, with the level of causal correlational research. Estimating the results, the population consisted of a total of 3,732, which is basically made up of workers associated with the supply market trade. The method used was simple random sampling by proportions, using probability sampling, from which a considerable sample of 264 traders was chosen. The technique used is the survey, the instrument applied is the questionnaire with reference to the level of reliability is 95%, therefore, this reveals that it is true. The result obtained reflects the value of association in 62.4%, which indicates a moderate relationship, statistically, between the variables. In conclusion, the policies of normative proposals have a direct and significantly inverse influence on the organization of municipal supply markets in the provincial municipalities of the Puno region.

Keywords: public policies; participatory proposals; municipal ordinances; markets; neighborhood participation.

Introducción

En esta investigación se proponen políticas municipales en mercados de abastos, con la participación ciudadana, para una conversión de mercados modelos de las ciudades ordenadas en desarrollo en la región Puno. Teniendo ese propósito de forma objetiva, se han evaluado las formulaciones de normativas en ordenamiento para los puestos de ventas en los mercados municipales, revisando otros contextos de mercados innovados, se ha percibido la existencia de cambios en diseños de políticas públicas por los gobernantes ediles, en las diferentes localidades del mundo.

Dentro de los hallazgos mundialmente contrastados se estima como uno de los modelos de mercados exitosos ordenados, se ubica al mercado municipal de Sao Paulo de Brasil. En ella se ha describiendo el estilo de la construcción del mercado actual es ecléctico, como una obra de arte con columnas internas y externas, azulejos de vidrio y bellísimos vitrales, al ser colegido el carácter eclético no sólo brota en la arquitectura, sino también en los productos que comercializan y en las nacionalidades de los comerciantes, principalmente portugueses, italianos y brasileños (De Pádua Carrieri y otros, 2012).

Acontece otra realidad en los mercados de la región puno, donde requieren cambios en las estructuras obsoletas que fueron construidos durante décadas pasadas, quedando en ese estado hasta en la actualidad, sin ser remodelados por ninguno de los gobernantes regionales y ediles, pero en su oportunidad han sido construidos para esas épocas como mercados modelos, para estos tiempos esos mercados no se encuentran en un estado apto para la modernidad que exige el avance de la tecnología y medios adecuados en la manipulación de productos perecibles.

En innovación de mercados nos trae García Pérez y otros (2016) señalando que, las estrategias de acción toma forma en los planes de transformación e innovación de los mercados municipales de Madrid (2003-2011) mostrando dichos trabajos innovativos resguardaba casi la totalidad de los mercados de la ciudad en número de 39 de 46 mercados, estas estimaciones de los programas nacionales en las remodelaciones de mercados municipales minoristas de carácter estatal hasta el 2011 fueron calificados de sobresalientes, por ello el programa establecía en el plan estratégico prolongación continua en las políticas de modernización en la red de mercados de Madrid extendiéndose desde 2012 al 2015 para proceder sobre aquellos que no fueron restituidos o modernizados en el periodo previo establecido.

Por ello se requiere implementar diseños de transformación de los mercados de abastos que se encuentran en estado de abandono en la arquitectura y ordenamiento normativo local, desde últimos cambios de gobernantes ediles, fueron pospuestos a su suerte en obligaciones y deberes a los socios integrantes por los gobernantes.

"El diseño de la infraestructura de un mercado se debe realizar de manera integral, considerando que la edificación debe responder a las características de un servicio comercial adecuado". Esta visión integral también implica que los planos de las diferentes especialidades de la intervención estén compatibles entre sí, siendo el arquitecto responsable de ello, en concordancia con lo señalado en la Norma G.030 del Reglamento Nacional de Edificaciones, según Ministerio de la producción (MP, 2021).

En propuestas normativas adheridos por Rivas Chávez y Hurel Franco (2021) exhiben que, los mercados municipales deben ser asignados siguiendo un proceso debidamente diseñados y orientados al perfil del comerciante que se adapten a las normativas que debe cumplir y no liberarlos con la capacidad de pago como concesionarios de un espacio comercial, pues al obviarse las reglamentaciones estaría perjudicándose el trabajo de toda la institución, considerando que sin restricciones las personas tienden organizar revueltas que promueven el desorden y el conflicto interno.

Estas concesiones de mercados otorgadas sin obligación por los funcionarios ediles a los comerciantes, aviva la complicidad hacia la

evasión de gravámenes al estado peruano, sin pagos en el cumplimiento de las normas de enajenación de puestos de ventas en las ciudades de la región Puno. En temas tributarios en los mercados, el principal dispositivo que afecta en las recaudaciones de impuestos a los comerciantes, es por la escasa cultura tributaria practicado en los vendedores al no emitir comprobantes y los compradores al obviar pedir un recibo de pago por los productos o bienes adquiridos (Valenzuela Chicaiza y otros, 2020).

Es común la organización de la conformación de asociaciones en los mercados municipales de la región Puno, de ahí surge la agrupación de componentes sin fines de lucro, pero internamente tienen fines de lucro los asociados al rubro. Estas ganancias deshonestas de los comerciantes ameritan ser orientados a otros panoramas de hacer negocio formal con fines de lucro, adecuándolos en formas de reorganización de personas jurídicas en diferentes empresas societarias con fines gananciales.

En ellas pueden optar por crear una nueva sociedad o transformar las asociaciones existentes a una sociedad, esto observando la cantidad de asociados sin fines de lucro, para que puedan pasar de forma uniforme a un tipo de sociedad que lo establezca la ley societaria peruano. En ese contexto coherente, los que deseen sostener, la posibilidad de transformar una asociación en sociedad deberá evitar soluciones como la diseñada por el TR, Tribunal Registral; vale decir, obligar a que la asociación, en la práctica, se disuelva y liquide, de manera sui generis al no existir haber neto resultante, para que posteriormente los asociados constituyan una sociedad. (Echevarría Calle, 2015)

La nueva Ley General de Sociedades encierra la transformación de toda clase de personas jurídicas que, incluso no siendo sociedades, adoptan una forma societaria, en otro sentido se presenta la transformación de cualquier sociedad que desee acogerse a otras formas de personas jurídicas no societarias, todo lo cual involucra cambios principales en el entorno de las personas jurídicas transformadas (Elías Laroza, 2015).

En esa conjunción de ideas abre la posibilidad de ordenar a los trabajadores de este rubro para las futuras generaciones que deberían de partir desde sus ideales de los que realmente observan las causas de desorden e informalidad, que no ayuda el desarrollo económico de las ciudades en desarrollo como lo es la región Puno, es decir si no nace el ordenamiento desde los ciudadanos involucrados, no lo harán tampoco los funcionarios gubernamentales.

Dentro de los grupos o conjuntos que integra una determinada asociación entre ciudadanos organizados mejora el desarrollo de ejecución de obras públicas o en las reglamentaciones del ordenamiento de los mercados municipales, al mismo tiempo facilitan las labores ediles. Podemos afirmar que una premisa básica de los valores y actitudes democráticas es la

participación voluntaria de los miembros de una población. "Ahora bien, como unidad de análisis la participación se presenta de diversas formas, participación social, participación comunitaria, participación política y la participación ciudadana" (Morales y otros, 2006:456).

Las empresas municipales son creadas por ley, mediante el acuerdo del consejo municipal con el voto de más de la mitad del número legal de regidores. Por ejemplo, la empresa de mercados mayoristas de la municipalidad de Lima Metropolitana fue constituida como empresa municipal de derecho privado, bajo la modalidad de Sociedad Anónima Cerrada S.A.C. Sus acciones y patrimonio son propiedad de la municipalidad de forma autónoma económica y administrativamente (se rige por su estatuto social). Según la norma de creación, esta empresa se encarga de la administración, control, supervisión y dirección de los mercados municipales, mayoristas o minoristas de la provincia de Lima. Además, promueve y participa en la construcción de nuevos mercados para la ciudad (Guerrero Bedoya y otros, 2017).

Actualmente los mercados municipales en la región Puno son manejados de forma tradicional e informal por las autoridades municipales, no han logrado la calidad de servicio hacia la ciudadanía, en ese panorama se perciben olores fétidos al interior del mercado, en ocasiones son invadidos por la informalidad de precios y medidas. En cuanto al contacto directo del servicio de la seguridad de manipulación de los productos, son inadecuados.

Pudiendo implementar los gobernantes en hacer partícipe a la sociedad civil en sus diferentes niveles y formas que puede ser colectiva o individual, sin mecanismos de participación aleja los fines del ciudadano, que posee derechos de poder elegir, revocar o iniciar referéndum, pero es necesario aclarar que los instrumentos empleados muestran deficiencias en la ejecución donde hace que la participación exista mínimamente (Delgado Alva, 2020).

Este divorcio de autoridad y ciudadanía hace que se reglamente normativas contrarias a los intereses de los comerciantes de los mercados de abastos, legislándose a veces solo desde el punto de vista de las autoridades municipales. Estos obstáculos generados por los funcionarios traen consigo los atrasos en ordenamiento, en oportunidades son dejando de lado o son cerrados las aperturas de mesas de dialogo con los vecinos que conocen de cerca sus problemáticas, por estas incompatibilidades generan las formas incorrectas del ejercicio comercial en los mercados municipales.

Concerniente a participación vecinal se encontró en Mállap Rivera (2013) donde sustenta que, las juntas de delegados vecinales comunales se organizan en torno a las municipalidades distritales, "en su constitución, delimitación, el número de delegados, así como la forma de su elección y revocatoria son fijados mediante un reglamento formalizado vía ordenanza

municipal correspondiente". Su naturaleza, tal como su nombre lo indica, es eminentemente comunal y vecinal, estando integrada por las organizaciones sociales de bases, vecinales o comunales, integradas en comunidades nativas que representan a las organizaciones sociales que promueven el desarrollo local con un gobierno abierto.

Las regulaciones de ordenanzas municipales en ordenamiento de los mercados de abastos de la región Puno, deberían ser tomados en cuenta la organización representativa de los vecinos como parte fiscalizador o consultor en la elaboración de iniciativas legislativas para los consensos ante los gobernantes ediles. En ese entender, las participaciones ciudadanas son procesos de interacción conjunta entre los ciudadanos con el Estado, para definir ideales fijos en el espacio público donde ambas partes manifiestan sus intereses con el objetivo de influir en las cuestiones públicas, debatiéndose por un lado el sentir de los ciudadanos que buscan incidir en la toma de decisiones y los funcionarios públicos indagan identificar las preferencias de la ciudadanía, para así mejorar la calidad de las instituciones públicas, además aumenta una perfección democrática de los pueblos (Montecinos y Contreras, 2019).

Concordando con las ideas del autor sobre nexo de Estado y ciudadanos, se puede incidir quien más puede conocer las problemáticas muy cercanas de los vecinos, son lo que trabajan en sus lugares de puestos de venta a diario en la atención a los ciudadanos, por ello tienen esa facultad de proponer propuestas de ordenanzas municipales de los mercados de abastos como peritos y expertos en sus múltiples necesidades.

Las autoridades necesitan crear canales institucionales y leyes que regulen la participación ciudadana sin burocracia estableciendo requisitos sencillos hacia la ciudadanía. Por un lado, un marco legal obliga a los integrantes estar comprendidos en la sociedad para las diversas acciones que realizan los órganos de gobierno, pero de nada sirven las legislaciones si no existen las instituciones que posibiliten la aplicación de esta parte de la ley (Serrano Rodríguez, 2015).

Vale recalcar que, ocurre a veces que los representantes ante la nominación de comisiones dentro los gobiernos ediles, algunos regidores desconocen la gestión pública, motivando todo ello el retraso en la comunicación desde el concejo municipal hacia los ciudadanos organizados. Este incidente suele suceder por la elección misma de los ciudadanos, quienes no revisan las hojas de vida de los futuros concejales, tampoco hay limitaciones para censurarlos en la constitución política del estado peruano.

Hurtado-Lores (2022) esboza que, todos los ciudadanos tienen el derecho de actuar en la búsqueda del bienestar social de manera determinante, tanto individual como colectivamente, de ese modo influir en la orientación en los momentos oportunos de la toma de decisiones de las autoridades

aun sin formar parte de la administración pública, ni ejercer ninguna otra función de gobierno. Con el empoderamiento de este nuevo rol de los ciudadanos, las facultades de los gobernantes no deben depender sólo de ellos al formular planes y proyectos, sino que se deben tomar en cuenta las opiniones, sugerencias, solicitudes y exigencias de la población a la hora de la formación y ejecución de la realización de políticas convenidas por el Estado.

Explicado por el articulista sobre los derechos de los vecinos es claro, no solo es labor del gobierno edil de tomar decisiones de forma solapada en los asuntos de propuestas de políticas públicas de los mercados municipales, es primordial escuchar los pedidos que aqueja a sus necesidades de ordenamientos por medio de sus representantes, que unirán fuerzas de un trabajo en equipo de autoridad edil y ciudadano ante el concejo municipal.

El análisis de la participación ciudadana, como formas de intervención de la ciudadanía con propuestas legales en las cuestiones de mercados municipales, resulta inseparable la consulta o indagación sobre las políticas públicas y el Estado. Teniendo conocimiento que las políticas públicas son las respuestas que el gobierno edil puede dar a las demandas de la sociedad, en forma de normas, instituciones, prestaciones, bienes públicos o servicios.

Estas regulaciones deben establecer las funciones que deben cumplir en los cargos que desempeñan los distintos componentes de la sociedad civil para el ejercicio de funciones ediles de proponer y aprobar las ordenanzas municipales, estas facultades de participación se contemplan en las bondades políticas emplazadas por las autoridades ediles a los representantes vecinales con voz y voto en los acuerdos en el pleno del concejo municipal.

En síntesis, para que se legalice la participación vecinal, los concejales deben plantear una estrategia antes de reglamentar en buscar impulsar desde el gobierno edil una política pública orientada a "promover que la población cuente con las competencias necesarias para el ejercicio pleno de su ciudadanía que les permitan mejorar, a través de ese ejercicio, las condiciones de la convivencia cívica en el estado". Son propiciados que las relaciones entre los ciudadanos y el poder público, se expresen con apego hacia los conocimientos adquiridos en las propias prácticas del valor democrático (Vaquero y Contreras, 2011:48).

La ciudadanía se debe involucrar en los asuntos públicos para reconstruir la confianza en las autoridades; en la construcción de leyes y reglamentos todos debemos exigir que se nos integre dentro de la conformación en los diseños de las políticas públicas y planes de gobierno. Debemos buscar espacios de participación en los múltiples consejos de participación social y mecanismos de supervisión con monitoreos ciudadanos; debemos estar observando a nuestros funcionarios públicos que concedan buenos

resultados dando cuentas claras. Muchos de estos mecanismos están contemplados dentro de las leyes, sólo falta que las autoridades los hagan efectivos, por otro lado, los ciudadanos exijamos utilizar ese derecho (Saiz Valenzuela, 2011).

El fenómeno de la participación ciudadana directa en la cosa pública, es percibido sin perjuicio en las instancias oficiales y de las atribuciones que a éstas les confieren las leyes desde afueras de los gobiernos, ese panorama se puede describir como una realidad mundial innegable que no ha dejado de registrarse, presentándose con impulso cada vez mayor en las ciudades desarrolladas. A todo ciudadano común debería preocuparle su libertad y su entorno vecinal, como le compete que su calidad de vida y su futuro no solo queden exclusivamente en manos de las autoridades estatales. Es en realidad tener la posibilidad de forjarse con acciones que surjan desde las concepciones propias nacidas en los pueblos (Páez Álvarez, 2006).

Este proceder político de la representatividad también hace intromisión en la opinión pública, que generalmente solo pocos opinan o acreditan veracidad sobre la situación del país, cuando existe un sinnúmero de profesionales honestos y con un buen criterio, pero los espacios son cerrados y poco democráticos, también están sesgados a intereses coyunturales (Vinueza Flores, 2021).

Generalmente sobre representantes vecinales a ser elegidos en la región Puno, se puede decir que algunas personas no siempre son los ideales, se dan casos que son oportunistas o pretenden aparecer en portadas para ocupar cargos políticos, no les interesa honestamente el bienestar de la ciudad, son cazadores de simpatía o en peor de los casos no salen de la dirigencia quedándose en ella insinuando que no hay otras personas capaces en el cargo.

La designación de cargos estará establecida en la reglamentación de la participación ciudadana refrendado por las facultades recaídos en los concejos municipales, estas funciones deben coincidir con los rubros que representan cada componente de la sociedad civil. En este caso debería de designarse el cargo a los representantes de los mercados municipales de abastos de la región Puno.

Para corregir estos sucesos se encontró la probidad vecinal a Bidart (1987) en ella relata que, la representatividad debe cumplir periodos cortos y de funciones restringidas, una persona debe desvincularse de la función pública una vez haya cumplido un período, por más capaz e inteligente que sea, al tratarse de una verdadera democracia por ello un representante debe servir y luego retirarse, creando espacio y oportunidad democrática para las demás personas, no pretender vivir de las designaciones políticas, pues se corroe de pensamiento y afecta el sentido común, formando la ambición y la codicia por el poder (Citado por Vinueza Flores, 2021).

En las sesiones de concejo municipal una vez aprobado la reglamentación de participación ciudadana con designación de cargos de diferentes ramas que integran según el reglamento de funciones ediles reconocidos dentro de sus atribuciones municipales. Esa acreditación les conlleva facultar a debatir en los acuerdos o designación de cargos de las mesas directivas en las sesiones del concejo, siempre que lo determinen conforme a sus facultades, en otros casos también se pueden presentar las revisiones del quórum en decisiones tomadas por el pleno convocado para fines de legalizar la voz del ciudadano en voto.

Con las medidas participativas, el poder se distribuye entre más actores delegando tareas a la ciudadanía que tienen nuevas oportunidades de ser parte en la toma de decisiones de manera directa y no solo delegada en sus representantes. Por tanto, la participación es el reconocimiento de los derechos ciudadanos, enrumbado hacia la lucha por acceder a un porcentaje de poderío que permita ser reconocido como una legitimidad en los debates públicos dentro del proceso de toma de decisiones, de igual modo se concluye que, la participación es una manera de dar mayor legitimidad al ejercicio del poder en las decisiones de la autoridad, fortaleciendo la democracia y la gobernabilidad (Naser y otros, 2021).

1. Materiales y métodos

Se expresa que, es descriptivo, porque describe e interpreta sistemáticamente las características de las variables de estudio que trata de determinar el grado de asociación entre las dos variables existentes. En el sentido evaluativo se determinó la existencia del grado de causalidad entre las variables. El diseño fue transversal no experimental. La **técnica** manipulada fue la encuesta y la herramienta el cuestionario. Se enmarc**ó** dentro del tipo de investigación aplicada.

La población estuvo conformada por un total de 3,732 asociados de los mercados municipales de abastos de las municipalidades provinciales de la región Puno: Puno, Ilave, Azángaro, San Román. Precisando que la muestra representativa fijado, se manejó el muestreo probabilístico, en ello se consideró a un total de 264 miembros que forman parte de la población de estudio, dentro de los cuales se ha establecido a los asociados ubicados en sus puestos de venta.

2. Resultados

En este apartado, se presentan los resultados que se visualizan en la Tabla N°1, reflejan que, el 39.0% de los comerciantes de los mercados de

abasto municipales de la región Puno, indican que las políticas públicas son buenas, el 34.1% de ellos manifiestan que es regular y los que se muestran nivel malo representan el 26.9%. Sobre el ordenamiento de mercados municipales, los comerciantes manifiestan de a veces se cumple representan el 38.6%, el 32.2% de ellos indican que nunca se cumple, y los comerciantes que indican que siempre se cumple figuran con el 29.2%.

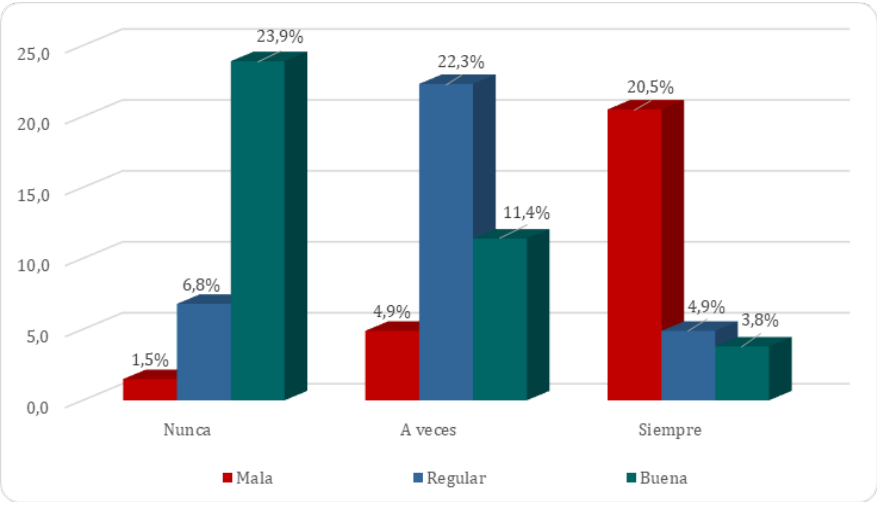
Tabla N°1. Políticas municipales asociado al ordenamiento en mercados de abasto municipales en la región Puno.

Políticas Publicas	Ordenanza Municipal							
	Nunca		A veces		Siempre		Total	
	Nº	%	Nº	%	Nº	%	Nº	%
Mala	4	1.5	13	4.9	54	20.5	71	26.9
Regular	18	6.8	59	22.3	13	4.9	90	34.1
Buena	63	23.9	30	11.4	10	3.8	103	39.0
Total	85	32.2	102	38.6	77	29.2	264	100.0

Fuente: Cuestionario políticas municipales y ordenamiento de mercados.

Al asociar las políticas públicas con el ordenamiento de mercados de abastos, en el Grafico N°1, se observa con predominio el 23.9% de ellos indican que nunca se aplica las políticas y a la vez indican que es malo el ordenamiento; así mismo el 22.3% califican de regular las políticas e indican de a veces se aplica el ordenamiento, en cambio los que señalan las políticas son malas y siempre se aplica el ordenamiento forman el 20.5%.

Gráfico N°1. Políticas municipales asociado al ordenamiento en los mercados de abasto municipales en la región puno.



Fuente: Tabla N°1

Prueba de Hipótesis General

1. **Hipótesis nula (Ho)**: No existe incidencia significativa entre las políticas municipales con el ordenamiento de los mercados municipales en la región Puno 2022.

   Hipótesis alterna (Ha): Existe incidencia significativa entre las políticas municipales con el ordenamiento de los mercados municipales en la región Puno 2022.

2. **Nivel de significancia:**

   $\alpha = 0.05$

3. **Estadístico de Prueba**

   $F = \dfrac{CMR}{CME}$ Que se distribuye según con 1 grado de libertad en el numerador y n-2 grados de libertad en el denominador

4. **Región Critica**

Para $\alpha = 0.05$, entonces (p – valor = 0.000 ≤ 0.05)

5. **Cálculos.**

Tabla N°2. Análisis de Varianza para los datos de las políticas municipales con el ordenamiento de los mercados municipales

ANOVA[a]

Modelo		Suma de cuadrados	gl	Media cuadrática	F	Sig.
1	Regresión	1730,586	1	1730,586	167,001	,000[b]
	Residuo	2715,035	262	10,363		
	Total	4445,621	263			

a. Variable dependiente: Ordenamiento de mercados

b. Predictores: (Constante), Políticas municipales

Fuente: Procesamiento de datos

El ANOVA nos muestra una Sig. de 0.000, resultado que indica que para nuestra investigación el modelo de regresión lineal simple elegido para las políticas municipales con el ordenamiento de los mercados de abastos de la región de Puno, es válido con un nivel de significancia al 5%. De margen de error y un 95 % de confiabilidad.

Coeficientes[a]

Modelo B		Coeficientes no estandarizados		Coeficientes estandarizados	t	Sig.
		Desv. Error	Beta			
1	(Constante)	25,675	,928		27,674	,000
	Políticas municipales	-,378	,029	-,624	-12,923	,000

a. Variable dependiente: Ordenanza Municipal

Donde:

La variable dependiente es: Ordenamiento de mercados

La variable independiente es: Políticas municipales

Los resultados obtenidos son:

$$\beta_0 = Cons\tan te\ 25.675$$

$$\beta_1 = Políticas\ publicas\ -0.378$$

Por lo tanto, el tipo de regresión lineal simple es el siguiente:

$$\hat{Y} = 25.675 - 0.378X_1 + \varepsilon_i$$

Respecto a la prueba t de Student se ha obtenido los siguientes resultados:

Constante = 27.674

Políticas publicas = -12.923

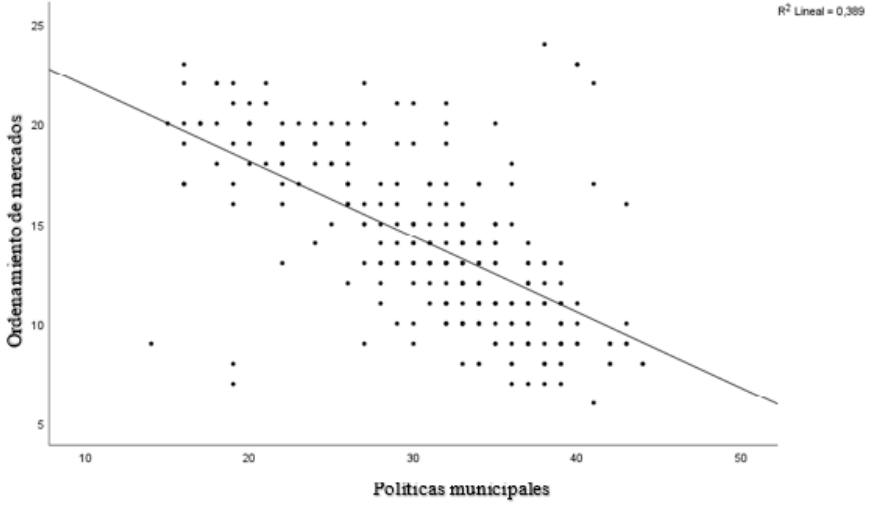
El resultado obtenido mediante la prueba t de Student nos indica que los coeficientes calculados para la constante, Políticas municipales son estadísticamente diferentes de cero, lo que significa que el modelo es utilizable para los factores de las políticas municipales en el ordenamiento de los mercados municipales en la región Puno 2022.

En cuanto a la Hipótesis alterna, el análisis de regresión lineal simple nos permite señalar que existe influencia significativa de las políticas municipales (X1), en el ordenamiento de mercados (Y), de acuerdo al resultado obtenido encontramos un P valor de 0.000, lo cual determina que el coeficiente de regresión simple es significativo al 0.05, esto significa que $P = 0.000$ *entonces* $P = 0.000 < 0.05$ por lo tanto se acepta la hipótesis alterna.

Resumen del modelo

Modelo	R	R cuadrado	R cuadrado ajustado	Error estándar de la estimación
1	,624[a]	,389	,387	3,219

a. Predictores: (Constante), Políticas municipales



Engloba mostrar que el índice de eficiencia del modelo aplicado resulta aceptable, puesto que se ha obtenido un R^2 (R cuadrado) de 0.389. Así mismo R2 nos admite efectuar una definición y pronóstico de las variables implicadas en la indagación. Por consiguiente, R2 nos indica que la variable independiente (Políticas municipales (X1), explica el comportamiento de la variable dependiente (Ordenamiento de mercados) en un 38.9%, para los factores de las políticas municipales en el ordenamiento de los mercados municipales de la región Puno 2022.

6. **Decisión. -** A un nivel de significación del 5% $F_{cal} = 167.001$ cae en la región de rechazo, debemos rechazar la Hipótesis Nula y aceptamos la hipótesis alterna y concluimos que las políticas municipales, inciden significativamente y directamente inversa en el ordenamiento de mercados de abastos en los comerciantes de los mercados municipales de la región Puno 2022.

3. Discusión

Desarrollado las encuestas a los trabajadores en el rubro de los puestos de venta de los mercados municipales de abastos, se determinó que, las políticas municipales al asociar con el ordenamiento de mercados municipales, se observa con predominio el 39.0% de ellos indican que es buena las políticas municipales en el ordenamiento de los mercados municipales de abastos; así mismo el 34.1% califican de regular las políticas municipales, en cambio los que señalan las políticas son malas representa el 26.9%.

Hechos similares se halló en estudios de Rodríguez Albán (2020) muestra que, los diseños de las políticas municipales en regiones como la Libertad, el 39% de los funcionarios, nunca y algunas veces de las informaciones que recolectan les permite describir adecuadamente el problema público para facilitar su comprensión. Seguidamente el resultado que refleja un 40% es de nunca y algunas veces evitan ceñirse a un caso específico. Por otro lado, indica que el 28% de los funcionarios expresaron que, casi nunca y algunas veces elaboran lineamientos por cada objetivo prioritario. En otro resultado el 25% de los funcionarios, no siempre, hacen persecución de los itinerarios vinculados a los objetivos prioritarios en las políticas nacionales.

Coligiendo ideas de las políticas municipales en el ordenamiento de los comerciantes de los mercados municipales realizado por los gobernantes ediles es regularmente las implementaciones de formulación y diseño en planes o proyectos, preexistiendo un divorcio en consultas vecinales, para restructurar nuevos ambientes para los mercados municipales de la región Puno. Sin la voluntad política de sus gobernantes de realizar cambios de mejoras en la infraestructura de los puestos de venta de los comerciantes, están siendo condenados a atender a los usuarios en condiciones pésimas.

Las proposiciones participativas de los ciudadanos es un tema novísimo para la región Puno, en manifestación realista de los ciudadanos, se determinó que, no son tomados en cuenta con instrumentos de legalidad en sugerencias, correcciones, consultas en las acciones de las autoridades municipales en ordenamientos normativos, se podría aseverar que no se encuentran con ideales de escuchar al pueblo soberano que los eligió como solucionadores de las problemáticas que afecta a los comerciantes de mercados municipales de abastos.

En cambio, el estudio defendido por González Scandizzi (2019) relata que, para aumentar las probabilidades de éxito en los procesos participativos vecinales, se requiere voluntad política de sus gobernantes. En consecuencia, es posible suponer que la confluencia de diversas corrientes de programas consensuadas en la solidaridad del compromiso ideológico de ceder poder a los vecindarios, en pro de la participación de la ciudadanía en los asuntos de gobierno, configura un terreno propicio para que las autoridades locales se involucren en la apertura de esos espacios.

Contrastando deliberaciones en propuestas de políticas participativas, se aproximan a un perfecto ideal de ordenamiento en los comerciantes de mercados de abastos, siendo como cimiento fundamental de requerir la voluntad política de diálogo entre gobernantes edil y los ciudadanos.

Referido en políticas normativas determinaron los estudiosos Contreras y Montecinos (2019) que, los mecanismos de partición ciudadana deben estar circunscritos al diseño institucional de los órganos de administración del Estado, es decir, la implementación y ejecución de la intervención vecinal, no quede sujeta a la voluntad política de la autoridad de turno. Por estas razones deben estar contemplados en las normativas que los rige como gobernantes y ciudadanos.

En ese sentido de análisis arribamos que las políticas normativas en el campo de mercados municipales de la región Puno, deben ser realizado desde las competencias emanadas de las autoridades, en formalizar y legalizar la participación ciudadana, para efectos de ser partícipes en las decisiones políticas de gobierno con fines de voz y voto. Este empoderamiento ciudadano fortalece a un buen gobierno democrático participativo, que realmente busca el bien común de los usuarios al igual nivel de otros mercados municipales modernos del mundo.

Conclusiones

Se determinó que las políticas municipales al ser asociados con el ordenamiento de los mercados municipales, no es una gestión desarrollada solo por la autoridad edil, tampoco son aplicadas las reglamentaciones

municipales pensando en los mercados de abastos, deben ser priorizados en razón de los usuarios del ámbito de la región Puno.

En esa perspectiva se resalta las acciones participativas de la sociedad civil, como un nexo de dialogo representativo ante la autoridad edil en las políticas propositivas de restructuración en rediseños, transformación y ordenanzas municipales al nivel comparativo del mercado municipal de Sao Paulo de Brasil. Finalmente, en un gobierno abierto, transparente, con rendición de cuentas, donde las autoridades ediles deberían reconocer a la sociedad civil, para que tenga facultades de legislar en las sesiones del concejo municipal.

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Characteristics of the influence and role of sports and sports organizations in countering military aggression: Organizational and legal aspect

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Abstract

The research exposes the introduction of the necessary changes in the regulatory and legislative framework related to armed aggression and martial law regime for holding sports events in various sports. In this context, the features of the legal regulation of relations in the field of professional sports during the war are discussed. The features of competitive and training activities of athletes from the eastern regions of Ukraine are analyzed in connection with the destruction of sports infrastructure, evacuation to other regions and out of the country. The authors emphasize the national-patriotic position of Ukrainian athletes. As stated and substantiated in the article, many famous and successful Ukrainian athletes make a significant contribution to the

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information struggle at the international level to completely eliminate Russian and Belarusian athletes and world sports teams and actively participate in numerous charitable fundraising projects, sacrificing their own. It is concluded that sports activities can be a mechanism of resistance to military aggression.

Keywords: international competitions; regulations; sports infrastructure; charity events; depository organizations.

Características de la influencia y el papel de los deportes y las organizaciones deportivas en la lucha contra la agresión militar: Aspecto organizativo y legal

Resumen

La investigación expone la introducción de los cambios necesarios en el marco regulatorio y legislativo relacionado con la agresión armada y el régimen de la ley marcial para la celebración de eventos deportivos en varios deportes. En este contexto, se discuten las características de la regulación legal de las relaciones en el campo de los deportes profesionales durante la guerra. Se analizan las características de las actividades competitivas y de entrenamiento de los atletas de las regiones orientales de Ucrania en relación con la destrucción de la infraestructura deportiva, la evacuación a otras regiones y fuera del país. Los autores enfatizan la posición nacional-patriótica de los atletas ucranianos. Como se afirma y se fundamenta en el artículo, muchos atletas ucranianos famosos y exitosos hacen una contribución significativa a la lucha de la información a nivel internacional para eliminar completamente a los atletas rusos y bielorrusos y los equipos deportivos mundiales y participan activamente en numerosos proyectos de recaudación de fondos benéficos, sacrificando los suyos. Se concluye que las actividades deportivas pueden ser un mecanismo de resistencia ante una agresión militar.

Palabras clave: competiciones internacionales; reglamento; infraestructuras deportivas; eventos benéficos; organizaciones depostivas.

Introduction

From the moment of the full-scale invasion of Russian armed formations, one can state a violation of the stability of the entire system of

public relations. While significant attention of state structures is directed to the solution of the most important humanitarian issues today, certain areas of public life remain in the background, which leads to the risk of potential unbalancing of the legal settlement of less protected subjects. The war could not bypass the sports sector, which, although, according to media reports (media), is still capable of producing high sports achievements, at the same time suffers from the consequences of aggression and ambiguity in the legal regulation of relevant relations during martial law.

This has affected every sport, every team, every athlete. Athletes, like the entire Ukrainian people, rallied in activities aimed at accelerating our victory, in supporting the development of Ukrainian sports and information warfare. The relevance of participation in the information struggle is very important in the current situation, not only by government agencies but also by the sports community.

The horrors of a senseless and ruthless war have changed and continue to change legal relations in the sports environment not only in Ukraine, but also in world sports.

1. Materials and methods

The purpose of the article is to analyze the purposeful activities of athletes during aggression on the information front, support for the development of sports and wrestling, namely: to characterize the consequences of the influence of aggression on various spheres of public life, in particular, sports and the changes made to the legislative framework; - highlight the participation of athletes in the defense of the country, their volunteering, support for the development of sports and information activities.

The study used a theoretical analysis of social practice, generalization of information from electronic sources, a review of scientific analytical studies.

2. Literature review

As most scientists note, the management of the sphere of physical culture and sports can be considered as a purposeful, organizing, coordinating, systematic and controlling influence of government bodies on the industry of physical culture and sports, aimed at improving the efficiency of its functioning. The science of management is considered by specialists from different countries as intersectoral. It has a long history, includes many scientific schools, concepts and definitions of the essence of management. One of them, the most popular, belongs to the American scientist Drucker. According to him, management is “a special kind of activity that turns an

unorganized crowd of people into an effective, purposeful and productive group." (Zarnota, 2011; Manukov, 2016).

Some scholars point out that the sphere of physical culture and sports is characterized by branched social relations that perform socially useful functions, which necessitate public administration in this area. At the same time, it should be taken into account that physical culture and sports contribute to the intellectual, physical and spiritual development of young people, ensure the full and harmonious development of the individual, improve the quality and standard of living, characterize the established traditions of a healthy lifestyle and the country's authority in the international arena (Deutsch, 2000; Numerato, 2012; Maening, 2006).

The sphere of physical education and sports is considered as a subsystem of society, as well as a relatively independent system. The spheres of activity of society are its social subsystems. The social subsystems related to people's lives and their relations in society include: economic, political, legal, science, culture, physical education and sports, etc.

They are also social because their main component is a person, they are created by people and cannot function without people. Such subsystems have certain features and characteristics that complement each other and enable a holistic perception of a particular system (Duggan, 2001; Reznik, 2020).

Public governing bodies of physical culture and sports complement the state forms of organization of physical education, contribute to the involvement of the broad masses of the population in solving problems related to health-improving physical culture, the development of mass, professional and Olympic, Paralympic, deaflympic sports. Public governing bodies carry out the coordinating development of physical culture and sports, taking into account the territorial-departmental principle.

The governing and executive bodies of management are formed according to the principle of election from the bottom up from the grass-roots team to the central bodies, by nominating candidates and holding elections at the general meeting, conferences, plenums - the relevant bodies are elected and their quantitative composition is determined (Chernyshova, 2010; Bondarenko, 2017).

Public governing bodies of physical culture and sports (groups of physical culture, sports and fitness clubs) in their activities rely on the physical culture asset, create various commissions, federations for sports, in order to stimulate the growth of business qualifications of physical culture personnel, increase responsibility, higher physical culture is informed. about the work done, etc. Sports societies have their own symbols (flag, emblem, membership cards, badges, sportswear, etc.).

Public authorities for physical culture and sports are financed from various sources - partly from the state budget, trade union organizations, income from industrial, economic, publishing, commercial activities, sponsors, organized exhibitions, lectures, lotteries, auctions, sports events, personal contributions, social budgets from exploitation sports facilities and other various paid services.

Issues of legal responsibility relate mainly to the spheres of economic and civil law, but in the field of sports, to a large extent, they relate to a new branch of sports law for Ukraine, which regulates the totality of public relations that arise and are implemented in the process of organizing and forming sports teams, establishing requirements for professional athletes when monitoring compliance with rules or regulations.

A wide range of legal relations covered by the field of sports law includes the legal regulation of not only professional sports, but also children's sports, the legal support of public physical culture and sports associations, the regulation of the legal status of various participants in sports activities (athletes, coaches), the legal aspects of organizing and conducting sports competitions, regulation of tax relations in the sports field, intellectual property rights in this field, relations in the field of refereeing, sports arbitration, international relations in the sports industry.

3. Research Results and Discussions

Today, society is faced with the task of educating a healthy, strong, able-bodied younger generation with an active lifestyle. These issues are implemented in the process of educating children and youth in educational institutions, at home and during leisure. Organized meaningful leisure for children and youth can have a significant impact on the harmonious formation of their personality, the expansion of motor potential, the satisfaction of needs for communication and self-expression, as well as fill free time and distract from the street and bad habits.

Meaningful leisure activity is one of the factors that leads to the formation of a child's personality and affects the development of his creative potential. In the conditions of leisure, the child acquires experience that determines his behavior, the perception of spiritual and cultural values, which ensures the continuity of generations, the transmission of traditions, and also stimulates the development of his creative inclinations and abilities. In the explanatory dictionary, leisure is interpreted as free time from work; Time relax. Most modern researchers also identify these concepts and define leisure as a set of leisure activities, through which immediate physical, mental and spiritual needs are satisfied, mainly of a restorative nature.

The main negative factors affecting sports organizations under martial law are shown in Figure 1.

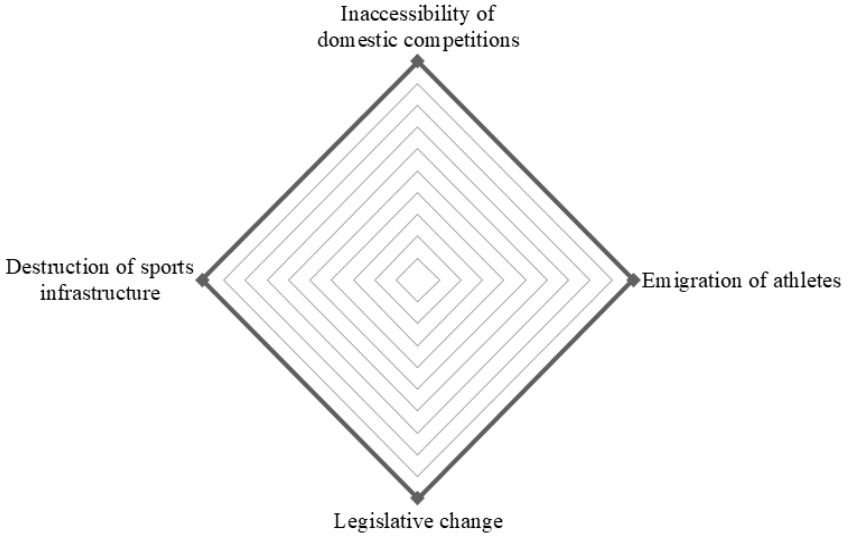

Figure 1. The main negative factors affecting sports organizations under martial law. Fuente: elaboración de los autores.

Focusing on the issues of legislative regulation of professional sports relations, we note that by a normative legal act we mean an official document adopted (issued) by an authorized subject in a form and procedure determined by law, establishing the rules of law for an indefinite circle of persons and designed for repeated application.

At the same time, it was noted in the legal literature at one time that the fundamental recognition of the priority of international law does not always lead to its consistent implementation in the legal system of the country, with which we cannot unequivocally agree, since both at the legislative and law enforcement levels, the standard provision about the priority of application of the Rules of the international treaty is considered as an axiom.

The changes taking place in modern sport require their legislative registration at different levels: international, state, state entities and municipalities. The progress of sports relations in our country is quite dynamic, which, in turn, requires constant work to improve the legal framework, the creation of fundamentally new legislative acts that consolidate the achievement of Ukrainian sports. Paying tribute to the efforts of the legislator to improve the legal regulation of relations in the

field of sports, however, it should be noted that the existing legal framework does not fully meet the modern needs of the development of domestic sports.

This legislation still remains insufficiently systematized, it contains many gaps and contradictions, outdated norms and ambiguous wording, which creates difficulties in practice. The complexity of the organizational structure of the modern sports movement, the interaction of different socio-normative regulators in the sports sphere of public relations also actualize the problem of improving the legislation in the field of sports.

The function of promoting the development of sports, involving the population in physical culture and health and sports activities, as well as organizing and holding sports events in society, is carried out by sports organizations. These organizations include international and national federations in the relevant sports, sports (including Olympic) committees, and other public organizations of physical culture and sports.

Sports organizations acting as organizers of sports events have the right to use the name and symbols of a sporting event, carry out advertising at the venues of events, identify manufacturers whose products (sportswear, footwear, sports equipment and inventory) are necessarily used by sports subjects when holding relevant events. In addition, these subjects of sports relations own exclusive rights to cover sports events. The exploitation of property rights associated with the implementation of sports events allows their organizers to conduct sports business and receive significant profits. And it is true that a wide range of rights of the organizers of sports competitions correspond to corresponding duties.

The organizer of a sports competition is liable for damage caused by employees whose services he uses in the performance of their official duties by these employees. The issue of responsibility of the organizers is especially acute when such employees are authorized to carry out special assignments to prevent the occurrence of dangerous situations that provoke the onset of adverse consequences (damage).

That is, someone else's guilty behavior is imputed to the organizer of the competition, as if he himself committed the violation of duty. An authorized person is an employee who acts (performs certain functions that are his responsibility) in accordance with the actual situation on the instructions of his employer (organizer of sports competitions) and in accordance with his instructions.

Liability for damage caused by third parties in the field of sports is usually liability from claims against the organizers of sports events for damage caused by the actions of their employees in the course of performing their duties; for improper control of such employees or in practice for their rash choice and for their failure to fulfill special instructions to prevent the occurrence

of dangerous situations and accidents during a sports competition. In order to impose on the relevant sports organization the obligation to compensate for the damage caused by its employee, it is necessary that the behavior of such an employee meets certain criteria.

As a general rule, the qualifying circumstances include: the presence of the tortfeasor in the labor (service) legal relationship with a sports organization and the infliction of harm directly when the assignor fulfills the duties assigned to him as an employee under an employment contract (contract). Civil liability also arises when performing a tort of representative powers on behalf of a sports organization at the time of causing harm.

Third parties for whose actions the organizers of sports events are responsible must be appointed by them to engage in sports activities with the knowledge and at the request of the employing sports organization, under its control and in accordance with its leadership regarding the way the task / work is performed; such persons must act on the instructions of their employer (the organizer of sports competitions) and in accordance with his instructions. That is, the illegal act must be authorized by the employer, and the damage must be caused by the illegal way of performing the task provided by the sports organization.

Of course, there are also circumstances on the basis of which the organizers of sports events are exempted from civil liability for the actions of third parties. Firstly, these are cases of unlawful behavior of employees of sports organizations, their "exit" in the process of performing a task beyond the limits of "their service" and performing actions in their favor, not related to the organization and holding of sports events. And, secondly, it is the deliberate infliction of harm by third parties with whom sports organizations are not in labor or other contractual relations.

The tasks facing our state in integrating into the European and world sports community as an equal partner very sharply outline the problem of legal support for all, without exception, participants in the implementation of these events. This is because almost the entire complex of legal acts regulating relations in the field of physical culture and sports in Ukraine has been little studied from a scientific point of view, and the already existing sports and legal norms, regulations and rules are not always worked out, tested, and adapted accordingly. are systematized and properly implemented.

This almost immediately, even at the stage of organizational and initial consideration, creates significant disagreements and causes contradictions when solving contractual, contractual, financial, insurance, managerial and other problems or after they have been formalized, implemented or carried out. Today, for a positive solution of legal issues, it is necessary to develop a physical culture and sports and regulatory framework, its analysis,

systematization and generalization to be carried out in a controlled, coordinated and centralized manner, with mandatory approbation and prior agreement with all interested institutions and organizations, ministries and departments before its public disclosure and implementation in the workflow.

The systemic nature of law presupposes an objective unification of certain legal parts according to the content characteristics into a structurally ordered whole, which has relative independence, stability and autonomy of functioning. Such an approach, as a systematic approach, also concerns the processes of institutionalization, reflected in the corresponding functions, powers of the subjects of the physical culture and sports sphere. It is necessary to find out what is the state of legal regulation in this area and whether it is systematic.

Sports law in its content is a rather complex formation, because the impact on sports is carried out through both private and public law. Both private and public law in their own way consider certain issues of activity in the field of preparation and holding of sports competitions. Therefore, in the regulation of sports relations there is a place for both personal and public law. Therefore, the authors come to the conclusion that sports law can be divided into private sports law and public sports law. The norms of the first regulate sports relations in civil law disputes, civil contracts between the subjects of sports relations and labor sports contracts, the transfer of employees from one employer to another, certification of employees,

We propose to recognize public sports law as a sub-branch of the Special Part of Administrative Law. In turn, among the institutions of sports law as a sub-sector of a special part of administrative law, the following can be distinguished: sports; sports licensing; sports events; sports medicine; sports education; national teams; sports refereeing; sports titles, sports categories and sports awards; logistical and financial support in the field of sports; information support in the field of sports; state control in the field of sports; administrative liability for offenses in the field of sports

The issues of organization and implementation of health-improving and sports activities, health-improving and sports events of a competitive nature are regulated by regulatory and other acts, which are sources of various branches of law and legislation. The systematic approach, along with the integration approach and others, allow us to assert that sports law has been singled out as a complex branch of law and legislation. The study of the features of the legal regulation of physical culture and sports requires a thorough analysis. In fact, there are a number of norms that we refer to various branches of law, which, in particular, regulate social relations in the field of physical culture and sports. We consider the issue of singling out sports law as a complex industry more reasonable, but it is important not to narrow its subject. On the basis of a systematic approach, it is necessary

to discuss sports law and determine that the scope of its regulation covers public relations arising in the course of activities in physical culture and sports.

Conclusions

The war closely united the personal with the social. Despite the terror, air raids, destruction of energy facilities, athletes continue to train to resist the kafir on the sports front. National self-consciousness has become a natural marker, it has activated the need to resist the aggression of the enemy, to join in the defense of the country.

A large number of competitions and training processes have been stopped, canceled or rescheduled. But, despite all these horrors and hardships, sports life is being restored, continues, and sometimes gains momentum. As of today, there are already many reasons for optimism, which were mentioned above, and there is no doubt that with every day that will bring us closer to victory over the enemy, with each success in competitions, there will be more and more of them, and very soon Ukrainian sport will make two, and maybe even more confident steps forward in its development and will deservedly occupy one of the leading places at the world level.

The prospect in the study of this topic is the expansion and deepening of the purposeful activities of athletes on the information front, volunteering and supporting the development of youth and children's sports; justification of the inexpediency of the boycott by athletes of international competitions and the Olympic Games, which may have a negative impact on the development of the industry and cause the emigration of our athletes.

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Legal Regulation of the Status of Internally Displaced Persons in Ukraine: Theoretical and Administrative Aspect

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Abstract

The aim of the research was to reveal the legal regulation of the status of internally displaced persons in Ukraine in terms of theoretical and administrative aspects. A positive step towards realization of the rights and guarantees of forced migrants consists in the introduction by the Government of Ukraine of the following areas of assistance: monetary assistance, promotion of their employment, introduction of compensation for the costs of payment of communal services for families who have taken in displaced persons free of charge. It has been established that such a public initiative as «Prykhystok» («Shelter») plays an extremely important role in exercising the rights and guarantees of forced migrants. The following methods were used in the research: analysis of biographical sources, synthesis, deduction, comparative analysis and meta-analysis, etc. Conclusions: it has been shown that programs such as «Prykhystok» are a positive step towards proper implementation of the rights and guarantees of IDPs, but at the moment they are not working properly. Even fulfilling all the conditions, many forced migrants have not yet received their funds, they have been denied their certificates and most employers do not want to hire people belonging to this category.

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Keywords: internally displaced; vulnerable citizens; guarantees for the rights of internally displaced persons; rights of the child; dignity of the human person.

Regulación jurídica del estatuto de los desplazados internos en Ucrania: Aspecto teórico y administrativo

Resumen

El objetivo de la investigación fue revelar la regulación legal del estatus de los desplazados internos en Ucrania en términos aspectos teóricos y administrativos. Un paso positivo para hacer realidad los derechos y garantías de los inmigrantes forzosos consiste en la introducción por parte del Gobierno de Ucrania de las siguientes áreas de asistencia: asistencia monetaria, promoción de su empleo, introducción de compensación por los costos de pago de los servicios comunales para las familias que se han acogido personas desplazadas de forma gratuita. Se ha establecido que una iniciativa pública como "Prykhystok" ("Refugio") desempeña un papel extremadamente importante en el ejercicio de los derechos y garantías de los inmigrantes forzosos. En la investigación se utilizaron los siguientes métodos: análisis de fuentes biográficas, síntesis, deducción, análisis comparativo y metaanálisis, etc. Conclusiones: se ha demostrado que programas como "Prykhystok" son un paso positivo para la adecuada implementación de los derechos y garantías de los desplazados internos, pero por el momento no están funcionando adecuadamente. Incluso cumpliendo todas las condiciones, muchos inmigrantes forzosos todavía no han recibido sus fondos, les han negado sus certificados y la mayoría de los empleadores no quieren contratar personas que pertenezcan a esta categoría.

Palabras clave: desplazado interno; ciudadanos vulnerables; garantías para los derechos de los desplazados internos; derechos del niño; dignidad de la persona humana.

Introduction

The events of recent years, namely the annexation of the Crimea in March 2014 and the armed conflict that began in the East of Ukraine in April 2014, led to a significant and massive displacement of civilians both within the country and abroad. In connection with the beginning of the full-scale war of the Russian Federation against Ukraine, the number of internally

displaced persons in our country has increased significantly. Therefore, according to the report of the International Organization for Migration, more than 7.7 million Ukrainians have become internally displaced persons since 24 February, 2022.

Minister of Social Policy of Ukraine Maryna Volodymyrivna Lazebna reported that as of 25 April, 2022, more than 2 million people had been registered as internally displaced persons. She notes that today the Unified Information Database on Internally Displaced Persons has information on 3.4 million people. Of them, over 2 million people were forced to move after the introduction of martial law. And of them, 1.9 million people were forced to move for the first time.

After leaving their homes, these individuals not only lost a roof over their heads, but also lost ownership of their property, they were left without work and means of supporting their existence. In connection with this, problematic situations arise and in these situations such persons cannot always fully exercise their rights. And therefore there is a need to determine the main problems of the legal status of internally displaced persons as well as ways to solve such problems.

1. Literature review

Legal regulation of the status of internally displaced persons in Ukraine has been partially considered by such scientists as Halaburda Nadiia, Leheza Yevhen, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna etc. (Halaburda *et al*., 2021).

According to part 1 of Article 1 of the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons", an internally displaced person is a citizen of Ukraine, a foreigner or a stateless person who is in the territory of Ukraine on legal grounds and has the right to permanent residence in Ukraine, who was forced to leave his or her place residence as a result of (or in order to avoid negative consequences of) an armed conflict, temporary occupation, widespread manifestations of violence, violations of human rights and natural or man-made emergencies (Law of Ukraine, 2014).

Therefore, one of the important circumstances that determine provision of the legal status of an internally displaced person to citizens of Ukraine, foreigners and stateless persons is the need to leave one's own place of residence against personal will in order to avoid consequences of an armed conflict and the temporary occupation of certain territories of Ukraine, as a result of well-founded fears for own life, health and protection of rights and interests.

However, it should be noted that, in our opinion, the term "internally displaced person" does not adequately describe this category of persons. We fully agree with Y. Lushpiienko, who noted that the term "internally displaced" literally means a person who has changed his/her location within the state, while the concept of "forced" means a coercive nature and performance of an action against the person's will under the pressure of circumstances. Therefore, the term "forced migrant" ensures a more successful description of the category of persons who changed their place of residence for reasons beyond their control, since the very concept of "forced" in its meaning explains presence of problems as a logical consequence of a certain event (Lushpiienko, 2017. 190).

At the same time, taking into account the dynamic changes in this area, the indicated problems require a more comprehensive and complex analysis, in particular, legal regulation of the status of internally displaced persons in Ukraine is needed.

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers regarding legal regulation of the status of internally displaced persons in Ukraine, etc.

With the help of the epistemological method, the legal regulation of the status of internally displaced persons in Ukraine was clarified, etc., thanks to the logical-semantic method, the conceptual apparatus was deepened, the legal regulation of the status of internally displaced persons in Ukraine was determined, etc. Thanks to the existing methods of law, we managed to analyze the essence of legal regulation of the status of internally displaced persons in Ukraine, etc.

3. Results and discussion

The category of "internally displaced person" is quite close to the category of "refugee". The main difference is that the latter leave the country where they are citizens and do not wish to return to their country of permanent residence due to fear of becoming a victim of persecution (Kobrusieva *et al.*, 2021).

It is worth noting that the concept of "internally displaced person" appeared in the legislation of Ukraine in connection with the accident at the Chernobyl Nuclear Power Plant on 26 April, 1986. As a result of radioactive pollution, approximately 200,000 people were forced to change their place of residence (Deliia, 2020). In 1986-1987, approximately 15,000

apartments and dormitories for more than 1,000 people, 23,000 buildings, as well as approximately 800 social and cultural institutions were built for immigrants. (Tsymbalistyi, 2019: 129). The first legislative act on this issue was the Law of the Ukrainian SSR "On the Status and Social Protection of Citizens Affected by the Chernobyl Disaster", which was adopted only on 28 February, 1991.

We should point out that today the legal status of internally displaced persons is regulated by the Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons"; this law directly defines the rights and obligations of internally displaced persons, it establishes economic, social and legal guarantees for protection of their rights and legitimate interests on territory of Ukraine in accordance with the Constitution of Ukraine, international treaties of Ukraine, as well as the principles and norms of international law (Law of Ukraine, 2014).

The basic (constitutional) rights of internally displaced persons as citizens of Ukraine are enshrined in Chapter II "Human and Citizens' Rights, Freedoms and Duties" of the Constitution of Ukraine (Law of Ukraine, 1996).

The Law of Ukraine "On Ensuring the Rights and Freedoms of Internally Displaced Persons" contains a list of rights of this category of persons and guarantees of their implementation. Therefore, the Law provides for the right to receive documents certifying the identity and confirming the citizenship of Ukraine, or documents certifying the person and confirming his/her special status; the right to employment, pension provision, mandatory state social insurance, social services, education; electoral rights (Law of Ukraine, 2014).

Article 9 of this Law contains other rights of an internally displaced person, including the following: family unity; assistance by state executive authorities, local self-government bodies and private law entities in the search and reunification of family members who have lost contacts with each other due to internal displacement; information about the fate and location of missing family members and close relatives; reliable information about presence of a threat to life and health in the territory of person's abandoned place of residence, as well as the place of his/her temporary settlement, the state of the infrastructure and the environment, ensuring person's rights and freedoms; assistance in moving person's movable property; assistance in returning to the previous place of residence; provision of medicinal products in cases and according to the procedure defined by the legislation; provision of necessary medical assistance in state and communal health care institutions; placement of children in preschool and general educational institutions; provision of free-of-charge travel for voluntary return to the abandoned place of permanent residence in all types of public transport in the event of the disappearance of the circumstances that caused such

displacement; receiving humanitarian and charitable aid (Law of Ukraine, 2014).

Duties of internally displaced persons have their own specificity, taking into account the peculiarities of the status of such persons. Imposition of such duties is necessary to maintain the relevant status, confirm information and facilitate the provision of these persons of special rights, guarantees, assistance to these persons.

In our opinion, it is an indisputable fact that forced migrants need various types of assistance, namely: assistance in obtaining pensions, social benefits, finding a job, housing, means of subsistence, etc. Legal support to this category of people should be aimed at solving the following basic problems: employment of healthy (employable) adults and family members; finding a place of residence, housing, temporary accommodation of IDPs; provision of humanitarian aid; provision of psychological support; organization of leisure; regulation of work performed by charitable foundations and public organizations providing assistance to IDPs, in accordance with the intrinsic dignity of the human person (Matviichuk *et al., 2022)*.

It is worth noting that in connection with the beginning of the full-scale war of the Russian Federation against Ukraine, the Cabinet of Ministers of Ukraine brought a number of changes to the normative legal acts regulating the issue of ensuring the mechanism for execution of the rights of internally displaced persons.

Therefore, the legislation currently provides for two methods of obtaining a registration certificate of an internally displaced person, which is the main document confirming the fact of internal displacement. Before the start of the full-scale war, in order to obtain such a certificate, these persons had to personally or through a representative apply for registration to the structural unit for social protection of the population of district, district in Kyiv state administrations, executive bodies of city, district in cities (in the case formation) councils. During the period of martial law, an internally displaced person can also apply to the authorized person of the executive body of the village, settlement, city council or administrative services center to obtain the respective certificate (Law of Ukraine, 2014).

In addition, today, in order to obtain the certificate in addition to applying to the above-mentioned authorities, this category of persons (if technically possible) can submit an application for registration and inclusion of information about an internally displaced person in the Unified Information Database on Internally Displaced Persons; this can be done through the Unified State Web-portal of electronic services ("Diya" portal) which greatly simplifies this procedure. To submit an application, a person only needs to install the mobile application of the "Diya" Portal on an electronic device connected to the Internet, with the geolocation function

enabled, and undergo electronic identification and authentication using an integrated electronic identification system, an electronic signature based on a qualified electronic signature certificate, or other means of electronic identification that enable unambiguous identification of an individual (Law of Ukraine, 2014).

Also, it is worth noting that in order to implement the guarantees of internally displaced persons, the Government has introduced three lines of assistance, including namely: monetary assistance, promotion of displaced persons' employment and introduction of compensation for the costs of paying for communal services to families who sheltered displaced persons free of charge.

Therefore, in accordance with the Procedure for providing accommodation assistance to internally displaced persons, approved by the resolution of the Cabinet of Ministers of Ukraine dated 20 March, 2022 No. 332, monetary assistance is provided monthly from the month of application before April 2022 inclusive for each internally displaced person whose information is included in the Unified Information Database on Internally Displaced Persons, in the following amounts: for persons with disabilities and children - UAH 3,000; for other persons - UAH 2000. In order to receive assistance, an internally displaced person shall fill in an application, which is formed by means of the Unified State Web-portal of Electronic Services; in particular, this can be done using the mobile application of the "Diya" Portal (Law of Ukraine, 2022)

Also families that are internally displaced persons, which include: three or more children with at least one child under the age of two; or two or more children, with at least one disabled child, can receive monetary assistance in the amount of UAH 1,220 for each family member per month, but not more than for five persons, such assistance shall be made in a single payment calculated per three months, in connection with the entry into force of the resolution of the Cabinet of Ministers of Ukraine "On the Implementation of a Joint Project with the United Nations International Children's Emergency Fund (UNICEF) on Additional Measures of Social Support for the Most Vulnerable Categories of the Population" dated 05 April, 2022 p. No 405 (Law of Ukraine, 2022).

In addition to the above-mentioned financial assistance programs, internally displaced persons can receive international targeted monetary support implemented jointly with the Government of Ukraine. In particular, this support can be obtained by them from: The Mission of the International Committee of the Red Cross in Ukraine in cooperation with the Red Cross Society of Ukraine (the CMU Resolution No. 487 "On the implementation of a joint project in cooperation with the Mission of the International Committee of the Red Cross in Ukraine and the Red Cross Society of Ukraine regarding additional measures for social support of

certain categories of the population"), United Nations Refugee Agency, UN World Food Program, International Organization for Migration; Norwegian Refugee Council (Forced migrants can receive international monetary assistance. What programs are available, *2023*).

Conclusion

Therefore, one direction of assistance to internally displaced persons consists in promotion of their employment through state compensation of costs to the employer for each employed person of this category. In the "Diya" Portal, an employer can submit an application for compensation of expenses in the amount of UAH 6,500 per month for each employed person, for whom a single contribution is made to the mandatory state social insurance, for the period of wartime and within 30 calendar days after its cancellation or termination.

Employers can also submit this application in paper form - personally during a visit to the employment center or by means of filing the application to the e-mail address of the relevant employment center located at the respective location. This is a positive step, since, in our opinion, employment of this category of people should be the basis of their support, because their monetary savings and budgetary support opportunities are gradually running out, therefore it is extremely important to promote the self-sufficiency of displaced persons while restoring the economy.

An extremely important role in the implementation of the rights and guarantees of forced migrants belongs to such a public initiative as "Prykhystok" ("Shelter") (https://prykhystok.gov.ua/). On this website, owners of homes where they wants and are able to accommodate internally displaced persons can post their own offer, and displaced persons can find their temporary housing.

In addition, home owners can receive compensation of costs for provision of temporary housings to internally displaced persons who moved during the period of martial law and do not receive monthly targeted assistance for internally displaced persons to cover living expenses, including payment of housing and communal services.

For this purpose home owners need to register their housings on the "Prykhystok" website, then, no later than the next day, they should submit an application to the local self-government bodies (executive committee), indicating the name and patronymic of each of the accommodated persons and attaching copies of personal identity documents of these accommodated persons, and they should apply to the executive committee of the village, settlement, city council at the location of the residential premises in order

to receive financial assistance. The amount of compensation is about UAH 450 per month (UAH 14.77 per day for each accommodated person).

It is worth noting that these programs are a positive step for the proper implementation of internally displaced persons' rights and guarantees, however, at the moment, they are not functioning properly. Even providing compliance with all conditions, many forced migrants still have not received their funds, their certificates have been refused and most employers do not want to hire people belonging to this category.

In order to solve the abovementioned problem, in our opinion, when receiving and analyzing information about labor opportunities of displaced persons state employment centers should offer such persons to businesses and this will restore work of state enterprises and institutions, promoting employment of the latter.

Thus, we have analyzed only a small part of the problems of the legal status of internally displaced persons and we have come to the conclusion that in recent years the legislator has managed to settle a number of problematic issues.

A positive step for realizing the rights and guarantees of forced migrants consists in introduction by the Government of Ukraine of the following areas of assistance: monetary assistance, promotion of their employment, introduction of compensation for the costs of paying for communal services for families who sheltered displaced persons free of charge. Digitalization of this process, including operation of the "Diya" Portal, is of great importance for simplifying the procedure of registering persons as internally displaced ones, submitting applications for receiving financial assistance, compensation of expenses.

However, as practice shows, today there are still existing problems concerning registration of persons as internally displaced ones, as well as concerning access to habitable housing, protection of property rights, obtaining means of supporting existence, finding durable solutions and access to information and these problems need to be solved.

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Criminalization of actions related to sexual violence against children: Legal regulation, international experience, administrative and penal aspects

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Abstract

The article is devoted to the problems of protecting a child from sexual violence by legal means, namely by criminalizing illegal acts in accordance with the principles, directives and framework decisions of the European Union. To achieve this goal, scientific research methods were used, in particular formal logical, statistical, systematic and comparative legal methods. The works of scientists dealing with this topic were also analyzed. Within the framework of the research, a legal analysis of international standards (conventions, directives, draft decisions of the European Union), decisions of the ECtHR aimed at protecting the rights of the child against sexual violence and their implementation in the new paradigm of criminal law was carried out. Finally, the article presents the analysis of the legislative framework for the protection of children's rights and a new version of the Criminal Code of Ukraine, which criminalizes acts of a sexual nature against a child and liability for the distribution of pornographic content among minors. It is

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concluded that compliance with international standards, the acquisition of a new status by Ukraine requires adequate political will and readiness to update the national legislation.

Keywords: sexual violence against children; legal regulation; international experience; administrative and criminal aspects; child protection.

Penalización de acciones relacionadas con la violencia sexual contra el niño: Regulación jurídica, experiencia internacional, aspectos administrativos y penales

Resumen

El artículo está dedicado a los problemas de proteger a un niño de la violencia sexual por medios legales, a saber: penalizando actos ilegales de acuerdo con los principios, directivas y decisiones marco de la Unión Europea. Para lograr este objetivo, se utilizaron métodos de investigación científicos en particular métodos lógicos formales, estadísticos, sistemáticos y jurídicos comparativos. También se analizaron los trabajos de los científicos que se ocuparon de este tema. En el marco de la investigación, se realizó un análisis jurídico de las normas internacionales (convenios, directivas, proyectos de decisiones de la Unión Europea), decisiones del TEDH destinadas a proteger los derechos del niño contra la violencia sexual y su implementación en el nuevo paradigma del derecho penal. Finalmente, en el artículo se presenta el análisis del marco legislativo para la protección de los derechos del niño y una nueva versión del Código Penal de Ucrania, que penaliza los actos de naturaleza sexual contra un niño y la responsabilidad por la distribución de contenido pornográfico entre menores. Se concluye que cumplimiento de las normas internacionales, la adquisición de un nuevo estatus por parte de Ucrania requiere una voluntad política adecuada y la disposición a actualizar la legislación nacional.

Palabras clave: violencia sexual contra el niño; regulación jurídica; experiencia internacional; aspectos administrativos y penales; protección del niño.

Introduction

The future of any society and all mankind depends on the level of spiritual, moral and physical development of the younger generation, their

understanding of the role and significance of human rights in the life of individuals and society, as well as responsibility for their fate and actions. Respect for human rights begins with the attitude of society towards the child. This means child rights and their provision depend on a conscious, purposeful state policy at the European, national, regional and local levels and the activities of non-governmental public organizations that unconditionally recognize the self-worth of the childhood, their specific interests and needs, and create necessary socio-economic and political conditions for their life and acceptable socialization.

On June 23, 2022, the leaders of 27 EU member states decided to grant Ukraine the status of a candidate for EU membership. Within the legal framework, the European integration vector of the Ukraine's development was fixed, which our society continues to fight for under martial law.

Ukraine is moving along the path of democratic transformation, protection of human and civil rights and interests. On the one hand, certain opportunities have opened up for the country, and on the hand, this requires a responsible attitude to the obligations assumed, especially in protecting interests of the child from criminal encroachments. Status of a candidate requires appropriate adaptation of the national legislation to "acquis communautaire" of the European Union.

In view of the above, the need for a comprehensive study of the problems of criminalization of acts related to sexual violence against a child in accordance with "acquis communautaire" of the European Union.

The article will address the problem of protecting the child from sexual violence by criminal legal means, namely by criminalizing illegal acts in accordance with international principles, provisions of directives and framework decisions of the European Union. Taking into account the above, the purpose of the article is the legal analysis of international norms (conventions, directives, framework decisions of the European Union), decisions of the ECHR aimed at protecting rights of the child from sexual violence and their implementation in the new paradigm of the national criminal law.

1. Literature review

General theoretical issues of criminalization of the acts related to sexual violence against a child in accordance with "acquis communautaire" of the European Union are given considerable attention in the works of many scientists.

Khavronyuk, within the framework of the study of the criminal legislation of the counties of continental Europe, quite thoroughly considered the

issues of regulating criminal liability for sexual crimes against minors (Khavronyuk, 2006).

Gatselyuk in his research "Criminalization of socially dangerous acts during the operation of the Criminal Code of Ukraine of 2001: recent stories against the background of the general palette of legislative decisions" analysed trends in criminalization of socially dangerous acts, the social context against which it took place, and the problems that arose as a result of dynamic-making activities in the field of criminal law (Gatselyuk, 2021).

Golovko and other authors have studied the history of the legislation formation on the prevention and protection against domestic violence in Ukraine, as well as the features of judicial protection of victims of domestic violence in individual countries, legislative support for this type of protection, and legislation in the field of countering domestic violence (Golovko *et al.*, 2023).

Riabchynska O.P. in her works considered harmonization directions of the domestic criminal legislation on the prohibition of the distribution of child pornography with international legal standards in the protection of children rights from sexual exploitation and use in the porn business, taking into account the latest changes and amendments to Article 301 of the CC of Ukraine (Riabchynska, 2010).

In addition, certain aspects of the problem of protecting children from violence and other illegal actions during hostilities were the subject of research of such scientists and international lawyers as: M. Antonovych, M. Gnatovsky, A. Matsko, A. Pshenychna, V. Repetytsky, O. Shevchneko-Bitenska and others.

Despite active study of the problem of protecting children from sexual violence in Ukraine, the issues of criminalization of the acts related to sexual violence against a child in accordance with "acquis communautaire" of the European Union has not been studied separately.

2. Materials and methods

In the study, the methods are used that meet the purpose of the article and are based on a dialectical-comparative platform necessary and sufficient to reveal the European integration vector of the Ukraine's development in the field of the child protection against sexual violence in accordance with the EU "acquis communautaire" standards.

In particular, the formal-logical method is used in the study of the content of legal norms that provide responsibility for committing sexual sexual violence against a child, comparative-legal – by the analysis of the

criminal legislation of the European Union and Ukraine, which provides for responsibility for child trafficking, child prostitution and child pornography, statistical when summarizing the data from statistical materials of the General Prosecutor Office of Ukraine, the Judiciary, the National Police of Ukraine, the Ministry of Social Policy on quantitative indicators of sexual violence against a child; praxeological method – using the ideas of praxeology in the methodological training of specialists in sexual education and protection of sexual freedom and inviolability for children of different age categories; system method – is to systematize and generalize the source base of the study. Using the predictive method, proposals were made to improve the legislation of Ukraine in the field of protecting children from sexual violence by criminal means.

3. Results and discussion

In available scientific works, these aspects were covered either fragmentally or within a much broader problem. These scientific works were also submitted to the scientific community prior to amendments to the Criminal Code of Ukraine in accordance with the Lanzarote Convention.

The effectiveness of the Ukraine's entry into the European Union depends on the quality of reforming those legal institutions that are designed to ensure proper legal protection of the rights and freedoms of the child from criminal encroachments, including sexual protection. A significant component of this process in the criminal law aspect is the streamlining of the criminal legislation of Ukraine in accordance with "acquis communautaire" of the European Union.

This process should take place in two directions, namely, first, in the humanization of the criminal legislation of Ukraine and the search for alternative measures of the impact of criminal law aimed at general and special prevention, elimination of the factors and acts that determine it, and secondly, the application of strict measures, including criminal law, to the persons who committed criminal offenses against a child, endanger the most important values and interests of the child.

Violence against children is any intentional, unlawful act or omission or threat of using an action or an omission of a psychological, economic, physical, sexual nature against a child in or out of the family, if these actions or omissions cause moral or material damage, harm to physical, mental health, moral development of the child, including systematic violence (physical, psychological economic, sexual) of some children over others, committing violence in any form in the presence of the child (Lesko, 2019)

Sexual violence against children is a shameful phenomenon that occurs in all countries of the world. They are considered by the international community to be one of the worst forms of violence against a child. Sexual violence against children can take various forms; occur in a real or virtual dimension; in a circle of people whom the child knows and trsust well (family, peers). Conflicts, violence, humiliation, neglect that accompany the minor at different stages of its socialization within the family, further lead to the break with the family (Yuzikova et al., 2021).

The increase in sexual violence against a child, including the actualization of child pornography, is a problem that has become acute in recent years in Ukraine, due to the education deformation, pseudo-democracy in sexual relations. I. Venedyktova (in the report of 01.06.21), with reference to the Internet Watch Foundation data, noted that Ukraine is one of the top three countries that provide child pornography. According to the General Prosecutor Office, the number of offenses against sexual freedom and inviolability increased by 21% in 2021. Of these, every fourth case of sexual violence against a child, in 60% of cases, the victims are children under 14 years of age (Venedyktova, 2021).

During 7 months of 2023, 1,943 criminal proceedings were opened, including: under art. 301 CC of Ukraine (Import, production, sale, distribution of pornographic objects) – 699 and art. 301-1 CC of Ukraine (Access to child pornography, its acquisition, storage, import, transportation or other premises, manufacture, sale and distribution) - 1244. At that time, of 699 proceedings were opened for the import, manufacture, sale and distribution of pornographic objects, then almost twice as many cases were opened for porn content related children – 1244 proceedings. This indicator is higher than the number of similar proceedings in 2022, when 1,880 cases were taken in to account, of which: art.301 CC of Ukraine — 785 and under art.301-1 CC of Ukraine — 1095 (Statistics of Prosecutor General Office).

The issue of domestic violence, especially sexual violence, in Ukraine during martial law has not lost its relevance. At the same time, the armed conflict exacerbates the problem of violence against a child, which turns out to be the most unprotected and affects the dynamics of the indicators of committing violent acts against children. At the same time, it is not possible to provide an objective analysis of the data because part of the territories of Ukraine is under occupation, and in the de-occupied territories these issues are not given due attention, and information about children who for various reasons were abroad is not available for criminological analysis and response.

Thus, according to the PGO data for 2020, the number of victims of criminal offenses related to domestic violence is 199 people (80 –adults, 119 - minors). In 2021, this figure is 419 children who suffered from domestic violence (192 – adults, 227 – minors). And for 7 months 2023, 288 victims

of domestic violence (123 – minors, 155 – small children) were registered (Statistics of PGO, 2020-2023).

As can be seen from Statistics, the lion's share of victims are minors-children under 14 years old. This should be taken into account when developing the measures to protect children from sexual violence. It is advisable to fully use the services of international consultants in the field of protection and observance of children's rights during the war and in the post-war period in accordance with the CE Project "Protection of children's rights during the war and in the post-war period in Ukraine" (Council of Europe office in Ukraine.).

Carrying out a detailed criminological analysis of the facts of violation sexual freedom and inviolability of the child and acts in the field of juvenile morality, it is necessary to note positive changes over the past two years in allocation of statistical indicators of the individual content in this area. Thus, according to the PGO data, in addition to domestic violence, there are categories of victims of the acts that are object of our research. These are: children who suffered (minors, small children) from sexual violence (art. 153 CC of Ukraine), committing sexual acts with a person under the age of sixteen (art. 155 CC of Ukraine), corrupting the minors (art.156 CC of Ukraine), harassing a child for sexual purposes (art. 156-1 CC of Ukraine).

Today, there are not isolated facts of sexual violence against children who were forced to leave Ukraine, attracting them to participate in the porn business. Thus, relatives who stay in Ukraine for the protection of their children who left with their mothers and other guardians apply to law enforcement agencies. For example, relatives receive information from a child through various messengers that they became victims of various sexual crimes, take nude photos, and in Ukraine there is no mechanisms for cooperation with relevant departments in other countries to verify this information, because it can be an invention of the child, a desire to take revenge on parents, or real actions that violate the child's sexual freedom and inviolability.

Therefore, it is important, firstly, to obtain the services of international consultants in the field of protection and observance of child rights during the war and in post-war period; secondly, to establish international cooperation between national and foreign specialized law enforcement agencies that carry out measures in preventing sexual violence against a child and countering child pornography, thirdly, to coordinate and effectively interact with specially authorized bodies that take measures in preventing sexual violence against a child and countering child pornography.

This requires the formation of modern effective approaches to the system of countering offenses and protecting the child from sexual violence in the content of modern challenges and threats, especially those related

to the use of information and telecommunication systems or technologies on the basis of a detailed, objective criminological analysis of the relevant statistical data.

A peculiarity of the modern information environment based on Internet technologies, lies in their influence on the social behaviour of the child and acts as a special form of cyber violence (cyber bullying, cyber harassment, cyberstalking, porn revenge, etc.) In the ECHR decision (in case Volodina v. Russia, 2019) on revenge porn and cyberstalking, the court recognized that Internet violence is a form of violence against a person (*Volodina v. Russia, 2019*). In addition, the court recognized that cyber violence is closely related to offline violence in life and is another aspect of domestic violence. Also, the ECHR decision notes the duty of the state to protect the individual from cyber violence.

The National Policy of Ukraine in the filed of child protection from sexual violence is based on international rules, principles, takes into account EU directives, framework decisions and directs the reform vector of changes in the legislation in accordance with "acquis communautaire" of the EU. This contributes to the formation of new approaches, principles of humane, constructive and effective treatment of minors, the creation of appropriate conditions of acceptable socialization of the child and the formation of a safe juvenile environment.

In the process of determining the priority decisions of the national policy in the field of protection of rights and interests of the child, it is necessary to take into account international conventions, resolutions, directives, framework decisions, which are theoretically and practically significant for the Ukrainian law-making and law enforcement system and that propose appropriate program measures to create a safe environment for acceptable juvenile prevention.

It is also important to consider those international provisions that are fully consistent with the basic principles of the Ukrainian legal system and are objectively aimed at the effective preventing and countering juvenile delinquency in Ukraine. At the same time, the historical sequence should remain unchanged, based on the established traditions of the Ukrainian people and the national legal culture, both in social and personal aspects. This does not change the state policy vector on the prevention of crimes among minors, but forms a reliable basis that has a national colouring, clear ideological and cultural components.

The main thing by implementing international norms and standards is to preserve the national interests of Ukraine, which is possible if the originality of means for protecting rights and freedoms of the child in Ukraine is preserved; measures to prevent and counteract juvenile delinquency; its own system of juvenile criminal justice, which reflect the

economic, political, ideological, religious, cultural and educational features and identity of Ukraine.

The need for international legal regulation of the children treatment has emerged relatively recently. Disastrous consequences of the World War First on the civilian population and the growing interest to the issue of child protection in most countries of Europe and North America caused the creation of the *Committee of Child Welfare* by the League of Nations in 1919, and the Committee's activities are aimed at combating the spread of the child homeliness and child trafficking. During the interwar period, non-governmental organizations played a significant role in the development of norms for protection of child rights.

Thus, the International Union for saving children was founded, within which framework a declaration was developed that contained the basic conditions that society must adhere to the protection of children. The Geneva *Declaration of Child Rights* of 1924 established for the first time at the international level the need for special protection of children as the most important group of population (*Declaration of Child Rights, 1924*). However, at that time the world society did not have any effective organizational structure for the implementation of goals proclaimed by the Declaration (Mariëlle *et al.*, 2021).

The international community, while attaching great importance to the rights of children, their survival, protection and development, and directing its actions in the highest interests of humanity, is trying to ensure well-being of children in the whole world. But the efforts to provide a socially acceptable space for the child's development and well-being have not been fully implemented. Overall achievements are not consistent with national and international obligations. Based on this, the *World Declaration and Plan of Actions "A World Fit for Children"* (hereinafter – Declaration and Plan of Action), adopted by the Resolution S-27/2 of the UN General Assembly on May 10, 2002, refers to important international obligations of the 90-s of the previous century (*World Declaration and Plan of Action "A World Fit for Children", 2002*).

The main provisions are implemented in legislation and law enforcement practice, and the implementation is constantly monitored. Annual reviews are conducted at the national level and progress reports are submitted by the UN General Assembly.

The Declaration and Plan of Actions set out criteria for determining a world fit for children. These include: opportunity to get best possible conditions at an early age and have access to quality basic education, including primary education, which is mandatory and free of charge; availability of extensive opportunities to develop their individual abilities in a safe and acceptable environment. The Declaration and Plan of Actions is

aimed at ensuring favourable physical, mental, spiritual, social, economic, cognitive and cultural development of the child as a priority area of national and global actions.

The Optional Protocol to the Convention of Child Rights on the trafficking of children, children prostitutions and children porn (hereinafter – the Optional Protocol) is aimed at protection and harmonious development of the child and the implementation of modern measures to be taken by member states to guarantee protection of the child against the practice of the child trafficking, child prostitution and child pornography (*Optional Faculty to the Convention on Child Rights on the Child Trafficking, Child Prostitution and Child Pornography*).

Implementation of the main provisions of the Optional Protocol will contribute to the adoption of the optimal and universal approach that takes into account that factors that determine the development of trafficking children, child prostitution and child pornography, including insufficient social development, impoverishment of population, economic imbalances, unequal socio-economic structure, low level of education, presence of dysfunctional families, migration, gender discrimination, irresponsible sexual behaviour of adults, armed conflicts and child smuggling.

Special scientific-practical attention should be paid to Directive 2011/36/ЄС of April 5, 2011 on preventing and combating trafficking in human beings and protecting its victims, and on the replacement of the Council Framework Decision 2002/629/JHA (*Directive 2011/36/EU of the European Parliament and of the Counci on preventing and combating trafficking in human beings and protecting its victims, 2011*), which states that "children are more vulnerable than adults, therefore, they have a higher risk of becoming victims of human trafficking. By applying this Directive, the best interests of the child should be paramount, in accordance with the EU Charter of Fundamental Rights and the UN Convention of Child Rights of 1989".

The next international legal act relating the subject of the article is Directive 011/92/ЄС of December 13, 2011 on combating sexual violence and sexual exploitation of children and child pornography and replacing the Council Framework Resolution 2004/68/JHA (*Resolution 2011/92/ЄС of December 13, 2011 on combating sexual violence and sexual exploitation of children and child pornography, 2011*). The Directive sets up minimum rules for the definition of criminal offenses and sanctions for sexual abuse and sexual exploitation of children, child pornography and involvement of children for sexual purposes. The document also contains the provisions to strengthen measures to protect victims of sexual violence and prevent these criminal offenses.

The Council Framework Decision 2004/68/JHA of December 22, 2003 on combating sexual exploitation of children and child pornography (*Council Framework Decision 2004/68/JHA on combating sexual exploitation of children and child pornography, 2003*) forwards the legislation of member states to criminalize the most serious forms of child sexual abuse and sexual exploitation, expands domestic jurisdiction and provides a minimum level of assistance to victims.

The Framework Decision 2001/220/JHA of March 15, 2001 on the status of victims in criminal proceedings, establishes a set of rights of victims in criminal proceedings, including the right to protection and compensation. In this context, it should be noted that the right to protection and compensation is reflected in relevant ECHR decisions. Thus, in case C.A.S. AND C.S. v. ROMANIA regarding evasion from an effective investigation into sexual violence against a child (*Case of C.A.S. and C.S. v. Romania*). The case states that an adult man sexually assaulted a seven-year-old boy, showed a knife, threatened to kill the child if he told something about what had happened. Sexual assault lasted for several months.

When the child's parents found out about the crime, they reported it to the police and the investigation began. Witnesses confirmed that the man was near the child and went to the apartment. Two medical examinations revealed numerous injuries to the child that were caused as a result of sexual violence.

The investigation was suspended three times. The suspect was detained and taken to court, but acquitted. Domestic courts found that the parties and witnesses had given conflicting statements and the parents had contacted the police after a lengthy period of time. The courts also noted that the applicant had not given and accurate description of the facts and had been prone to fantasy. The European Court of Justice found that despite the victim's particular vulnerability, the investigation was not effective and urgent (it lasted almost 5 years).

A medical examination was ordered only three weeks later, and the suspect was questioned two months later. The concern was caused by the fact that domestic courts drew attention to the fact that the family didn't immediately contact the police, but ignored the duration of the investigation, did not compare the facts, did not take into account the psychoemotional state of the seven-year-old boy. The European Court of Justice notes that, under article 3 and article 8 of the Convention, have an obligation to ensure effective criminal investigation of cases concerning violence against children, giving priority to their best interests.

Taking into account the case file, the victim never used the advice or support of a qualified psychologist during the rape trial or later. The failure to respond adequately to allegations of sexual abuse of a child raises doubts

about the effectiveness of the juvenile system. Therefore, the authorities had failed to carry out an effective investigation and to ensure adequate protection of the child's personal and family life. Taking into account the case file, Romania was ordered by the ECHR to pay the applicant compensation for non-pecuniary damage in the amount of EUR 15,000.

It should be noted that any child can become a victim of sexual violence, regardless of age, gender, cultural or social affiliation, since children do not yet have the experience and knowledge necessary to understand or explain what is happening to them. Since child sexual abuse is usually a crime that is carefully hidden by both the victim and the environment, its real scope is difficult to assess (Kovalska, 2018).

Coordination of prosecutions in cases of sexual abuse, sexual exploitation of children and child pornography will contribute to the implementation of the Framework Decision 2009/948/JHA of November 30, 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal cases (*Council Framework Decision 2009/948/JHA of 30 November 2009 on prevention and settlement of conflicts of exercise of jurisdiction in criminal proceeding, 2009*). Provisions of the Framework Decision correlate with Article 34 of the UN Convention of Child Rights (*UN Convention of Child Rights, 1991*), which states that the parties undertake to protect the child from all forms of sexual exploitation and sexual violence. Moreover, the Convention emphasizes the adoption of preventive measures against three types of criminal behaviour, namely: inducing or forcing the child to engage in any illegal sexual activity; use of children for the purpose of exploitation or prostitution or other illegal practices; use of children for the purpose of exploitation in pornography or pornographic materials (Leheza, 2021).

The Stockholm Program — open and safe Europe that serves and protects citizens (2010/c 115/01) (*The Stockholm Program, 2010*) highlights the field of child protection, namely the principle of the best interests of the child. This vector concerns the right of the child to life, survival and development, non-discrimination and respect for the right to express one's opinion and to be truly heard in all matters concerning children, in accordance with age and level of development, which were proclaimed in the Charter of Fundamental Rights of the European Union and the UN Convention of Child Rights, and relate to all EU policies. The European Council calls on the Commission to identify the measures that the EU can take to protect and promote rights of the child. At the same time, attention is focused on the protection of various categories of children, namely:

- those who are in particularly vulnerable conditions;
- those who are victims of sexual exploitation and abuse;
- those who are victims of human trafficking;

- unaccompanied minors in the context of the EU migration policy.

The strategy of the Council of Europe on the child rights (2022-2027) aims to cover all categories of human rights, as well as outline the goals and priorities of human rights, and outlines the goals and priorities of the Council of Europe and its member states to protect the rights of children and make these rights as reality for all children through six priority areas of the activity for the period of 2022 till 2027 (Strategy, 2022).

At the national level, it is appropriate to adopt the comprehensive strategies for effective promotion and protection of the child rights, in accordance with aforementioned strategy of the Council of Europe on the rights of children and for the harmonization of a common vision and development of a common coordinate system with specific and time-limited goals for the child protection from sexual violence.

The EU Convention on the child protection from sexual exploitation and sexual violence (the Lanzarote Convention) was developed as a comprehensive tool for a common national response to all forms of sexual abuse of children. It contains recommendations for addressing the problem of countering sexual violence against a child by strengthening the national regulatory framework and engaging civil society and other relevant stakeholders to improve the authorities' response to all forms of sexual violence against children (*Convention of the EU Council on the child protection from sexual exploitation and sexual violence*, 2012).

The Law of Ukraine on amendments to certain legislative acts of Ukraine concerning the implementation of the Convention of EU Council on the protection of children from sexual exploitation and sexual violence (the Lanzarote Convention) of 18.02.2021 establishes criminal legal forms of the child protection of a child from sexual abuse. The law states that sexual exploitation of children, in particular the forms of child pornography and prostitution, as well as all other forms of sexual violence against children, including acts committed abroad, are destructive to children's health and psychological development (*The Lanzarotta Convention), 2021*). Most often, children between the ages from 9 to 13 were involved in creating sexual content.

Criminals take advantage of the vulnerable state of children. Such criminal offenses are committed for sexual and self-serving reasons. Consumers of pornographic content have a sexual motive. Creation and distribution of the content containing child pornography using information and communication systems or technologies is most often carried out by organized criminal groups for selfish reasons. Organized criminal groups have a clear hierarchical structure, which includes as follows: organizer; recruiters; directors; performers; distributors of pornographic content (Knyzhenko, 2022).

Conclusions

Compliance with international norms and principles, acquisition of a new status by Ukraine requires appropriate political will and readiness to update national legislation, reform social institutions that ensure stable development of the state, protect the rights of minors and modernize the system of preventing illegal actions against them.

Summing up, it should be noted that the European integration process concerns the adaptation of the national legislation to the main provisions of the EU Conventions, Programs, Directives and Framework Decisions, which, among other things, relate to the protection of the child from sexual violence and sexual exploitation. At the same time, it should be noted that despite a high level of the legal regulation in the national legislation of the child protection from sexual violence and sexual exploitation with the consolidation of the basic principles of sexual morality, the level of sexual education for children of different age categories remains unsatisfactory. Taking into account foreign experience of an effective and responsible level of sexual education, it is advisable to start from early ages of a child's life.

The value of international experience in the formation of the measures system to prevent sexual violence lies in the possibility of coordination and effective international cooperation between national and foreign specialized law enforcement agencies that prevent sexual violence against a child and child pornography, obtaining services from international consultants in protecting and observing the child rights during the war and in the post-war period.

The main areas of preventive measures include as follows: raising the awareness level of the population about the forms, manifestations, causes and consequences of sexual violence against a child; forming an intolerant attitude to various models of sexual violence against a child in society, spreading child pornography, caring for victims, awareness of juvenile sexual violence and porn context as a violating children rights; forming a model of sexual education for children of different age categories ensuring coordination and effective interaction of specially authorized bodies that carry out the measures in the field of preventing sexual violence and countering child pornography, other bodies and institutions that perform the functions related to the implementation of the events in the juvenile sphere; providing a child affected by sexual violence with access to comprehensive services focused on his needs; providing access to general and specialized support services for victims to receive affordable, high-quality social services, medical, social, psychological assistance, access to justice and other legal protection mechanisms; training and improving the level of professional competence of subjects implementing the measures in the field of preventing sexual violence and countering child pornography.

A positive experience and a step towards the implementation of directives, framework decisions and the Convention on the protection of child rights should be considered the criminalization of acts of a sexual nature against a minor; child pornography; in volving a child in a spectacular event of a sexual nature, including with the use of information and telecommunication systems or technologies; child harassment for sexual purposes.

It is necessary to develop a national strategy for the child protection from sexual violence and sexual exploitation, in the formation of which it is important to take into account the CM/Rec (2018)7 Recommendation of the Cabinet of Ministers to member states on the principles of observing the protection and implementation the rights of children in a digital environment.

There is a problem of protecting children who were taken out of Ukraine to avoid sexual violence. This requires legislative regulation of the mechanism for urgent verification of information and adoption of urgent security to protect the child. Moreover, it is necessary to establish international cooperation and receive services of international consultants in the field of protection and observance of children's rights during the war and in the post-war period. I is advisable to use the services of international consultants by protection and observance of child right during the war and in the post-war period in accordance with the Project "Protection of child rights during the war and in the post-war period in Ukraine" of the Council of Europe.

It is important to preserve national interests of Ukraine in implementing international norms and standards. It is possible if the originality of the means of state protection and protection of rights and freedoms of the child in Ukraine, including from sexual exploitation and sexual violence, is preserved; formation of modern, effective measures and new methods of preventing and countering sexual violence against a child, reflecting economic, political, ideological, religious, cultural and educational features and identity of Ukraine.

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Justice for war crimes in Ukraine: In search of an optimal model

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Abstract

The article is devoted to the investigation of the problems of finding and applying the optimal mechanism for bringing to international criminal responsibility persons guilty of committing war crimes on the territory of Ukraine. During the research a set of methods of scientific knowledge was used. Among them: dialectical and formal logic, analysis, abstraction, historical, comparative, system-structural and modeling methods. The investigated problem is considered through Ukraine's obligation to ensure compliance with the right to a fair trial for persons accused of committing war crimes. The paper provides current statistics on the number of war crimes committed on the territory of Ukraine in 2022 and, furthermore, provides their classification in accordance with the provisions of the Statute of the International Criminal Court. The known historical models of international criminal justice are highlighted, their general features and differences are given. The shortcomings of the model of judicial procedure for war crimes chosen by the Government of Ukraine are highlighted. As a result, the author's model of international criminal justice is proposed in accordance with the specifics of the situation in Ukraine.

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Justicia para los crímenes de guerra en Ucrania: En busca de un modelo óptimo

Resumen

El artículo está dedicado a la investigación de los problemas de encontrar y aplicar el mecanismo óptimo para llevar a la responsabilidad penal internacional a las personas culpables de cometer crímenes de guerra en el territorio de Ucrania. Durante la investigación se utilizó un conjunto de métodos de conocimiento científico. Entre ellos: lógica dialéctica y formal, análisis, abstracción, métodos históricos, comparativos, sistema-estructurales y modelización. El problema investigado se considera a través de la obligación de Ucrania de garantizar el cumplimiento del derecho a un juicio justo para las personas acusadas de cometer crímenes de guerra. El trabajo proporciona estadísticas actuales sobre el número de crímenes de guerra cometidos en el territorio de Ucrania en 2022 y, ademas, proporciona su clasificación de acuerdo con las disposiciones del Estatuto de la Corte Penal Internacional. Se destacan los modelos históricos conocidos de justicia penal internacional, se dan sus características generales y sus diferencias. Se destacan las deficiencias del modelo de procedimiento judicial por crímenes de guerra elegido por el Gobierno de Ucrania. Como resultado, se propone el modelo de justicia penal internacional del autor de acuerdo con las especificidades de la situación en Ucrania.

Palabras clave: crímenes de guerra; justicia internacional; tribunales híbridos; derecho a un juicio justo; actividad policial en Ucrania.

Introduction

The UN General Assembly, in its resolution of March 2, 2022, qualified the Russian attack on Ukraine as an act of aggression that violates Article 2(4) of the UN Charter (A/ES-11/L.1 resolution, 2022). In a resolution dated March 24, 2022, the General Assembly, meeting again in a special emergency session, demanded «the immediate cessation of military operations by the Russian Federation against Ukraine, including any attacks on the civilian population and civilian objects.» (A/ES-11/L.2 resolution, 2022).

In addition to the fact that the invasion of the troops of the Russian Federation into the territory of Ukraine in itself has the characteristics of a crime of aggression, a large number of international crimes of other types are committed during military operations on the territory of Ukraine - we are talking about war crimes.

The Geneva Conventions of 1949, which codified international humanitarian law after the Second World War, contained the first ever list of war crimes, which included the following actions: intentional killing; torture and inhumane treatment, including biological experiments; intentionally causing severe suffering or serious injury; causing damage to health; illegal destruction and appropriation of property, if it is not caused by military necessity; forcing a civilian or a prisoner of war to serve in the armed forces of an enemy state; deprivation of the right to an impartial trial; illegal deportation, transfer of civilians under protection; illegal arrest of civilians under protection; taking hostages.

This list was significantly supplemented by Additional Protocol I of 1977, including the following among serious violations: conducting certain medical experiments; turning the civilian population, individual civilians or demilitarized and safe zones into targets of attack; carrying out an indiscriminate attack affecting the civilian population or civilian objects, when it is known that such an attack will cause a large number of deaths and injuries among civilians; treacherous use of the emblem of the Red Cross, the Red Crescent and other protective and identifying signs; relocation by the occupying power of a part of its own civilian population to the occupied territory or deportation or relocation of all or part of the population of the occupied territory; unjustified delay in the repatriation of prisoners of war or civilians; apartheid; attack on historical monuments and a number of others *(Repetskyi, Lysyk, 2009)*.

Quite detailed statistics of war crimes committed on the territory of Ukraine are provided by the participants of the Global Initiative T4P (Tribunal for Putin) - Ukrainian human rights non-governmental organizations. To document the events, the organization's employees monitor open sources (social networks, news in the media, reports of the authorities), looking for information about a specific event that has signs of a war crime (shelling of a residential building, killing of civilians, torture and other crimes under the Rome Statute).

Data also comes directly from witnesses and victims. Where possible, employees of participating organizations record events in the field, take pictures of the destruction from drones, and personally communicate with witnesses of the events (T4P, 2022). According to their data, in accordance with the legal qualification of events under the Rome Statute of the International Criminal Court, they identified the following types of war crimes and their number:

1. «Attacking or bombarding, by whatever means, towns, villages, dwellings or buildings which are undefended and which are not military objectives» (article 8 (2) (b) (v)) – 198 cases;
2. «Intentionally directing attacks against civilian objects, that is, objects which are not military objectives» (article 8 (2) (b) (ii)) – 5283 cases;
3. «Intentionally launching an attack in the knowledge that such attack will cause incidental loss of life or injury to civilians or damage to civilian objects or widespread» (article 8 (2) (b) (iv)) – 10441 cases;
4. «Murder (article 7 (1) (a) or Wilful killing» (article 8 (2) (a) (i)) – 268 cases;
5. «Wilfully causing great suffering, or serious injury to body or health» (article 8 (2) (a) (iii)) – 154 cases;
6. «Deportation or forcible transfer of population» (article 7 (1) (d)) – 21 cases;
7. «Enforced disappearance of persons» (article 7 (1) (i)) – 837 cases;
8. «Torture (article 7 (f) or Torture or inhuman treatment, including biological experiments» (article 8 (2) (a) (ii)) - 232 cases;
9. «Taking of hostages» (article 8 (2) (a) (viii)) – 10 cases;
10. «Intentionally directing attacks against personnel, installations, material, units or vehicles involved in a humanitarian assistance or peacekeeping mission in accordance with the Charter of the United Nations, as long as they are entitled to the protection given to civilians or civilian objects under the international law of armed conflict» (article 8 (2) (b) (iii)) – 44 cases;
11. «Pillaging a town or place, even when taken by assault» (article 8 (2) (b) (xvi)) – 506 cases;
12. «Imprisonment or other severe deprivation of physical liberty in violation of fundamental rules of international law» (article 7 (1) (e)) – 389 cases;
13. «Committing outrages upon personal dignity, in particular humiliating and degrading treatment» (article 8 (2) (b) (xxi)) – 30 cases;
14. «Compelling a prisoner of war or other protected person to serve in the forces of a hostile Power» (article 8 (2) (a) (v)) – 16 cases (T4P, 2022).

Consequently, the number and nature of crimes is staggering. However, the issue of verifying the discovered facts in court is no less important. Establishing guilty persons and proving their guilt based on the provisions of the right to a fair trial recognized in democratic countries. We remind that according to Art. 10 of the Universal Declaration of Human Rights of December 10, 1948 «Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the detennination of his rights and obligations and of any criminal charge against him» (United Nations, 1948).

Similarly, in Art. 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950, it is said that «In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law» (COUNCIL OF EUROPE, 1950).

In this regard, the purpose of the research is to find a model of international criminal justice for war crimes committed on the territory of Ukraine, which could ensure the implementation of the principle of fair justice and, on the other hand, be able to solve a large number of cases.

1. Methodology

During the research, a complex of methods of scientific knowledge was applied at both general scientific and special scientific levels.

In particular, with the help of dialectical and historical methods, the development of the concept of international criminal justice was investigated, and the known historical models of international tribunals were highlighted.

With the help of methods of scientific analysis and abstraction, the characteristics of certain historical models of international criminal courts are given.

The systemic-structural method was used to identify and classify existing models of international criminal justice.

The comparative method was used to solve the task of conducting a comparative study of typical models of international criminal courts, as well as determining the most optimal model for use in Ukraine.

Logical and formal-legal methods were used when working with scientific and normative-legal sources, reference-statistical and empirical data.

The sociological method was used during the study of statistical data on the number and types of war crimes committed on the territory of Ukraine during the current military conflict.

The modeling method was used during the construction of the proposed hybrid model of the International Criminal Court on the territory of Ukraine.

2. Recent research and findings

The problem of finding and building an optimal model of international criminal justice for the commission of international (including war) crimes was the subject of research by many scientists. At the same time, these works have a general theoretical character, or are aimed at researching International Tribunals of certain varieties. The results of the research of these scientists formed the basis of this article.

For example, B.V.A. Röling explored the relationship between the law of war and the repression of war criminals during the post-war period (Röling, 1960.)

A known work Antonio Cassese «International Criminal Law» that provides main aspects of international criminal law. The paper considers: the development of ideas about international criminal law; the concepts of international crimes are revealed and their main types are described (war crimes, crimes against humanity, genocide, aggression, torture and terrorism. The paper also defines the main forms of criminal responsibility for the commission of international crimes, as well as the main provisions related to punishment for international crimes at the national and international level.

The work of William A. Schabas «Is devoted to the law that applies in the three international criminal tribunals, for the former Yugoslavia, Rwanda and Sierra Leone, set up by the UN during the period 1993 to 2002 to deal with atrocities and human rights abuses committed during conflict in those countries» (Schabas, 2006; 3).

Oleksandra Chubinidze studies the problem of international criminal responsibility, which examines the nature of international judicial institutions that apply international criminal law, and analyzes their advantages over national courts. Three types of such organs are distinguished, and their features are outlined. (Chubinidze, 2018).

The bodies of international criminal justice also studied by Vadym Popko. His works are devoted to the study of the nature of the bodies of international criminal justice, the history of their formation and development, as well as the identification of the peculiarities of each of the many institutional models (Popko, 2021).

3. Results of the study

The practice of investigating war crimes and bringing guilty persons to justice is known to history. Various models have been applied in different countries, which differ not only in structure, but also in the effectiveness of their functioning. Let's consider the well-known international models of justice for war crimes.

3.1. International criminal courts and their historical models.

In this case, the term «international criminal court» means a competent, independent court or tribunal, created in accordance with the law, to the rights of the accused person to be accused by such a organization, which are recognized by International Covenant on Civil and Political Rights (Article 14). In addition, this term should be understood as a court established with the support of the international community. (Chubinidze, 2018). States can fulfill their obligation to investigate international crimes and prosecute suspects by using international or hybrid courts for this purpose, «which is reflected in military statutes and guidelines, domestic precedent law and official statements» (Henckaerts and Doswald-Beck, 2005).

This concept has received the name of international jurisdiction - the subjection of certain categories of cases to not national, but international judicial instances. This concept has received the name of international jurisdiction - the subjection of certain categories of cases to not national, but international judicial instances. To some extent, it is a limitation of the sovereign rights of each state. Its type is universal jurisdiction - the right (and in some cases, the obligation) of states to exercise criminal jurisdiction, which is based exclusively on the legal nature of the crime, regardless of the place of its commission, the nationality of the criminal or the victim, or any other connection with the state that carries out such a jurisdiction (Schabas, 2006).

Based on the method of creation, international courts can be divided into three types. The first type includes ad hoc international criminal tribunals. The first acts of the practical embodiment of international jurisdiction were the creation of the Nuremberg and Tokyo trials after World War II. Although they were ad hoc tribunals, they became a model for the creation of international judicial bodies by agreement.

In the recent period, another way of creating international tribunals was tried: the Security Council of the UN at its 3217th meeting, on May 25, 1993, voted to adopt Resolution No. 8271 on the creation of a special international tribunal - An international tribunal for the prosecution of persons responsible for serious violations of international humanitarian law committed on the territory of the former Yugoslavia since 1991.

Similarly, the Security Council Resolution No. 955 of November 8, 1994 (S / RES / 955 (1994)) established the International Tribunal for Rwanda to prosecute those responsible for the genocide committed on the territory of Rwanda or crimes committed by citizens of Rwanda, but on the territory of neighboring countries in the period from January 1, 1994 to December 31, 1994.

Unlike the Nuremberg and Tokyo trials, the special international criminal trials for the former Yugoslavia and Rwanda were established not on the basis of an interstate treaty, but by a decision of the United Nations Security Council in accordance with Chapter VII of the UN Charter.

The second type of international criminal courts is the so-called hybrid and «internationalized» courts, which are created not by a decision of the Security Council, but by an agreement between the United Nations and the government of the country where the crimes took place and under which these courts are vested with jurisdiction. Or such courts are formed by the temporary administrations of the UN.

These agreements in their form are international treaties between a country and an international organization – «a type of public instrument of international law, provided for by the Vienna Convention on the Law of Treaties between States and International Organizations or between International Organizations». The category of hybrid courts includes, for example, the Special Court for Sierra Leone or the Special Court for Lebanon (Schabas, 2006).

These courts are hybrid both in terms of their composition (their chambers are composed of both international and national judges) and in terms of the law they use (the norms used by these courts are derived from both international law and national law a certain state) (Popko, 2021).

The third type includes the International Criminal Court, created on the basis of multilateral agreement. Its main differences from the above-mentioned higher judicial bodies are that it is permanently active, its personal and territorial jurisdiction is not connected with a concrete conflict or event, and it is not retroactive, i.e. it has the right to consider only crimes committed after entry into force of it`s Statute (actually - starting from July 1, 2002). Like the Special International Tribunals of the UN, it has a two-stage structure and the Prosecutor as an independent body (Rome Statute of the International Criminal Court, 1998).

The International Criminal Court may exercise its jurisdiction if: 1) the case is referred to the Prosecutor by a participating state or the UN Security Council; 2) The prosecutor starts the investigation on his own initiative. Article 12 of the Criminal Code provides that the International Criminal Court may investigate and prosecute crimes which, among other things, were: «... (3) referred to the hearing of the court of the UN Security Council

in accordance with Article 13 ...». In this way, if the Security Council refers cases to the International Criminal Court, its jurisdiction covers the topic of any crime. Otherwise, the court will not be able to prosecute crimes committed by citizens of a country that has not ratified the Rome Statute, or on the territory of a country that has not ratified the Rome Statute. (Rome Statute of the International Criminal Court, 1998).

3.2. The Ukrainian model and its disadvantages

Despite the fact that war crimes committed on the territory of Ukraine are international in nature, the Government of Ukraine chose a national model of justice for their commission. This means that the qualification of criminal acts is carried out in accordance with national criminal legislation, the pre-trial investigation and trial of these crimes is carried out by national law enforcement and judicial bodies and, accordingly, according to the rules of national criminal justice.

The criminal classification of war crimes is carried out under Art. 438 (violation of laws and customs of war), art. 437 (planning, preparation or initiation and waging of an aggressive war, Article 436 (war propaganda) of the Criminal Code of Ukraine (Law of Ukraine, 2001). According to the official statistics of the Prosecutor General's Office for 2022, the largest number (50,625) of criminal proceedings were initiated under Art. 438 of the Criminal Code of Ukraine – «violation of the laws and customs of war».

However, the effectiveness of criminal proceedings on war crimes remains very low. Out of the total number of proceedings, during 2022, a notice of suspicion was served to only 85 persons, of which only 28 indictments were sent to court (General prosecutor's report on criminal offenses, 2022). As of February 2023, 25 Russian soldiers have been convicted of war crimes in Ukraine, and indictments against more than 90 people have been sent to court (BUG, 2023).

The problem of the investigation of war crimes is the impossibility of carrying out investigative actions in the territories that are not controlled by Ukraine, where active hostilities take place. There is a problem with the interrogation of persons who may be involved in the commission of a criminal offense, as well as the problem with the detention of potential criminals due to their stay in the occupied territories. Most of the persons involved in war crimes committed on the territory of Ukraine in one way or another have left for Russia and the temporarily occupied territories of Ukraine.

Along with the outlined problems of criminal justice for war crimes in Ukraine, there are questions about the model of justice chosen by the Government of Ukraine as a whole. Can the national model guarantee compliance with all internationally recognized principles of criminal justice

that must be followed in a constitutional and democratic country? Can the Ukrainian court be impartial in relation to the Russian military, who are accused of committing war crimes. Every Ukrainian judge, being a member of society, in one way or another suffered from military aggression on the part of the Russian Federation, at least moral, and sometimes - material damage. This also applies to other participants in criminal proceedings from the side of the prosecution: investigators and prosecutors. Moreover, there is no guarantee that the defender provided by the state to a person accused of a war crime will be able to fulfill his function fully for moral reasons.

In addition, the application of the national mechanism of justice for the commission of international crimes seems illogical. An international judicial procedure for criminal prosecution based on established international judicial and investigative institutions should be applied. This will also increase the legitimacy of court verdicts in such cases.

3.3. Finding the optimal model for Ukraine

The establishment of international criminal courts is the most adequate method of prosecution for international crimes. B.V.A. Röling stressed that «due to the fact that war crimes are a violation of the laws of war, that is, international law, cases of international crimes must be considered by an international judge.» He is best suited for this» (Röling, 1960).

Antonio Cassese reveals this opinion in more detail: «For the consideration of international crimes, international courts are the bodies most suitable for this, since they are in a better position from the point of view of knowledge and application of international law. International judges have more reason to be unbiased or more objective than national judges, which are related to the circumstances in which the crime was committed.

Antonio Cassese reveals this opinion in more detail: «For the consideration of international crimes, international courts are the bodies most suitable for this, since they are in a better position from the point of view of knowledge and application of international law . International judges have more reason to be unbiased or more objective than national judges, which are related to the circumstances in which the crime was committed. The prosecution of perpetrators of international crimes by international tribunals usually meets with less opposition than the prosecution of national ones, as it affects national pride much less.

International courts can more easily investigate crimes by conducting investigative actions in many countries than national courts. Often witnesses live in different countries, certain evidence can be obtained as a result of the cooperation of several states. Also, special expertise is often

necessary, which concerns complex legal problems that arise as a result of the interpretation of the laws of different countries. International courts can guarantee uniformity in the application of international law, while hearings conducted by national courts can lead to great differences in the application of this law and in punishment for convicts.

Finally, the creation of international courts indicates the desire of the international community to punish those who deviate from acceptable standards of human behavior. When determining the punishment, the goal of the international community is not only retribution, but also the stigmatization of criminal behavior - and the hope that it will continue to provide a deterrent effect on potential criminals».

At present, separate steps in this direction have been taken in Ukraine. In particular, amendments were made to the Criminal Procedure Code of Ukraine regarding the granting of powers to the prosecutors of the International Criminal Court to independently conduct investigative and other procedural actions on the territory of Ukraine after their agreement with the Prosecutor General of Ukraine.

In March 2022, the International Criminal Court, at the request of 42 countries, announced the start of an investigation into war crimes as a result of the Russian invasion of Ukraine. (Suspilne novyny, 2023). However, as stated in the message, the prosecutors of the International Criminal Court will collect evidence on the most serious international crimes committed in Ukraine. Therefore, only a certain part of the total number of crimes committed on the territory of Ukraine can potentially be considered by the International Criminal Court. In such a model, the problem of impartiality of the court does not arise, because the prosecutors of the International Criminal Court and the judges of this court are completely independent from the events taking place in Ukraine.

However, the prospect of the International Criminal Court's work on international crimes committed in Ukraine is doomed to failure. This is due to formal reasons. According to the Kampala Amendments to the Rome Statute, in order for the International Criminal Court to have jurisdiction over the crime of aggression, the aggressor state must ratify the Rome Statute.

Or this situation should be referred to the International Criminal Court by the UN Security Council (Rome Statute of the International Criminal Court, 1998). The Russian Federation has not ratified the Rome Statute and is unlikely to allow the adoption of a UN Security Council resolution regarding its own crimes, using the right of veto as a permanent member of the UN Security Council.

In this regard, it is currently necessary to talk about the creation of a special tribunal, either on the basis of an agreement between the Government

of Ukraine and the United Nations with the adoption of a corresponding resolution of the UN General Assembly, or on the basis of a multilateral open international agreement between the states of the civilized world. At the same time, the second model, in our opinion, is more optimal from the point of view of the international legitimacy of such an institution. The creation of a court based on the vote of the majority of member countries of the UN General Assembly will indicate the international recognition of such an institution. Otherwise, the creation of a special tribunal on the basis of an international treaty with individual states will require the involvement of the largest number of countries to increase the level of international legitimacy of the future judicial institution.

At the same time, the resource capacity of the special tribunal is limited. Considering the very large number of war crimes that have been committed and continue to be committed on the territory of Ukraine, consideration of these cases by one judicial institution may take years, or even tens of years. In this case, the implementation of the principle of inevitability of punishment for committed international crimes in practice will turn out to be ephemeral. In this regard, the following approach may be appropriate: for the crime of aggression, criminal proceedings should be carried out by a special tribunal, and for others - by hybrid judicial institutions.

The model of hybrid international justice provides for the creation of courts on the territory of Ukraine, which will consider those criminal cases that are currently being investigated by national law enforcement agencies. Under the conditions when the vast majority of crimes are already investigated according to Ukrainian criminal procedural legislation, during the consideration of these cases in court, the problem of checking the case for possible violations by investigators or prosecutors during the collection of evidence will arise. For this, it is necessary for the judge to have knowledge of national Ukrainian legislation and its peculiarities.

This task can be solved only with the introduction of a hybrid model of judicial proceedings, because only it involves the formation of mixed court chambers (from both international and national judges). Thus, the presence of international judges will guarantee the impartiality of the court during the consideration of criminal cases, and the presence of national judges will become a guarantor of awareness of national criminal procedures. In order for such courts to function effectively, there should be several - according to the number of administrative regions of Ukraine, on the territory of which the largest number of war crimes were committed - Donetsk, Luhansk, Kharkiv, Sumy, Chernihiv, Kyiv, Zaporizhzhya, Dnipropetrovsk, Kherson and Mykolaiv.

Each of the courts, respectively, is created at the level of the region and its jurisdiction includes the consideration of those crimes that were committed on the territory of the relevant territorial unit. It is also necessary to create

an appellate instance for the exercise of the right of participants in criminal proceedings to appeal the decisions of the court of first instance and to control their legality.

The possibility of creating hybrid courts on the territory of Ukraine should also be considered for compliance with its Constitution. In accordance with Part 6 of Art. 125 of the Constitution of Ukraine, the creation of extraordinary and special courts is not allowed in Ukraine (Constitution of Ukraine, 1996), and the same prohibition is mentioned in Part 2 of Art. 3 of the Law of Ukraine «On the Judicial System and the Status of Judges» (Law of Ukraine, 2016). At the same time, neither the Constitution nor the aforementioned law discloses the meaning of the concepts «emergency and special courts».

Therefore, if we consider the creation of international hybrid courts on the territory of Ukraine as extraordinary or special, then such a model contradicts the Constitution of Ukraine. However, the Constitutional Court of Ukraine in its conclusion in the case based on the constitutional submission of the President of Ukraine on providing an opinion on the conformity of the Constitution of Ukraine with the Rome Statute of the International Criminal Court (Rome Statute case) dated July 11, 2001 No. 3-v/2001 noted that «The International Criminal Court did not can be referred to extraordinary and special courts, the creation of which is not allowed in accordance with the fifth part of Article 125 of the Constitution of Ukraine. Extraordinary and special courts within the meaning of this article are, firstly, not international, but national courts, and secondly, courts created to replace ordinary courts that do not properly follow the procedures established by law» (Constitutional Court of Ukraine, 2001).

Therefore, in Ukraine it is forbidden to create national courts that do not follow the procedures established by law. Hybrid courts are, first of all, international judicial institutions, not national ones. And, secondly, during their work, it is possible to apply both international and national court procedures, which can be properly balanced during their creation.

Conclusions

Summarizing what has been said, the following conclusions should be emphasized. Historically, several typical models of trial for war crimes have been formed in international practice: 1) ad hoc international criminal trials, which can be established on the basis of an interstate treaty or a document of the United Nations Security Council; 2) hybrid organizations, which are created on the basis of an agreement between the United Nations and the country, on the scene of which a crime was committed, for which these organizations have jurisdiction; 3) a permanent tribunal - the International Criminal Court.

The national judicial model chosen by the government of Ukraine cannot guarantee compliance with the requirement of an impartial judiciary as a component of the right to a fair trial in relation to the Russian military accused of war crimes. In addition, the international criminal prosecution procedure should be applied for the commission of international crimes, and not the national mechanism. Otherwise, the legality and legitimacy of court judgments issued by national courts becomes questionable.

The most optimal approach may be that the crime of aggression will be prosecuted by a special tribunal, and for other war crimes - by hybrid judicial institutions that will operate on the territory of Ukraine and that will consider those criminal cases that are currently being investigated by national law enforcement agencies. The presence of international judges in the composition of hybrid tribunals will guarantee the impartiality of the court during the consideration of criminal cases, and the presence of national judges will become a guarantor of awareness of national criminal rules and procedures.

Taking into account the very large number of war crimes that have been committed and continue to be committed on the territory of Ukraine, there should be several such courts - according to the number of administrative regions of Ukraine, on the territory of which the largest number of war crimes were committed. It is also necessary to create an appellate authority for the exercise of the right of participants in criminal proceedings to appeal the decisions of the court of first instance and to control their legality.

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El papel del Estado de Derecho en el desarrollo: Teorías y desafíos presentes

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Resumen

Las naciones aspiran a alcanzar un mayor progreso a partir de la conjunción del capital humano, natural e institucional. El propósito del presente trabajo es analizar las teorías fundamentales en torno al papel del Estado de Derecho y cómo se relaciona con el desarrollo. La hipótesis planteada es que se requiere un marco normativo que debe ser respetado por todos. El método empleado es fundamentalmente descriptivo y los datos proceden de *Rule of Law Index* y de la Encuesta del Latinobarómetro. Los indicadores de Estado de Derecho muestran consistentemente que los ciudadanos, en lo general, alcanzan mayores niveles de bienestar cuando hay apego a la legalidad, lo cual concuerda con lo que establece la teoría. Se concluye en señalar la importancia de privilegiar políticas y prácticas consecuentes que deben trascender al plano político e ideológico. El trabajo se estructura de la siguiente forma: en la primera parte se realiza una revisión de la literatura; en la segunda se destacan la metodología y los datos empleados; la tercera aborda la discusión; finalmente se presentan las conclusiones del caso.

Palabras clave: Estado de Derecho; legalidad democrática; desarrollo; confianza en las instituciones; modelos de desarrollo.

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The Role of the Rule of Law in Development: Theories and Present Challenges

Abstract

Nations aspire to achieve greater progress based on the combination of human, natural and institutional capital. The purpose of this paper is to analyze the fundamental theories on the role of the rule of law and how it relates to development. The hypothesis put forward is that a normative framework is required that must be respected by all. The method used is primarily descriptive and the data are from the Rule of Law Index and the Latinobarómetro Survey. The Rule of Law indicators consistently show that citizens, in general, achieve higher levels of well-being when there is adherence to the rule of law, which is consistent with what is established by theory. It concludes by pointing out the importance of favoring consistent policies and practices that should transcend the political and ideological level. The paper is structured as follows: the first part is a review of the literature; the second part highlights the methodology and data used; the third part deals with the discussion; finally, the conclusions of the case are presented.

Keywords: Rule of Law; democratic legality; development; trust in institutions; development models.

Introducción

Para alcanzar su máximo desarrollo económico y social, las naciones requieren de instituciones sólidas y reglas respetadas sin excepción. A partir de los hechos y de los registros oficiales de los órganos de procuración de justicia, se advierte cómo permanentemente se desafía a los gobiernos debido a la falta de respeto hacia el orden y la legalidad. No son pocos los países cuyos ciudadanos no se sienten representados por las autoridades, dado que éstas siguen una agenda política y económica distinta a la del interés público (Latinobarómetro, 2022).

Uno de los peligros que se observa en las democracias es que cuando no existe la separación de poderes, uno de ellos se coloca por encima, transgrediendo así los derechos ciudadanos fundamentales amparados por la Constitución política. Las leyes no deben ser letra muerta. El Estado de Derecho significa la garantía de defensa ante amenazas o agravios contra la propiedad, la libertad, la salud y demás derechos ciudadanos. Entraña una norma o ley con contenido de justicia. La justicia implica, entre otras cosas, el acceso a ella en términos de igualdad ante la ley.

El desarrollo constituye un medio fundamental para la promoción del bienestar. Cada sociedad decide qué aspectos considerar acorde a una visión determinada. Puede ser más o menos propensa a medir el bienestar en términos de orden material o no. Sin embargo, una gran parte de la humanidad está sufriendo carencias elementales de manera persistente a pesar de la creación de instituciones internacionales comprometidas con las agendas para reducir las brechas sociales (Acemoğlu y Robinson, 2012).

Por otro lado, y de acuerdo con Ramos Sánchez (2010), en países como México hay señales de agotamiento de las instituciones de procuración de justicia, de ausencia de negociación pacífica con respecto a las diferencias políticas y de un papel muy cuestionado del Estado en su tarea de favorecer una sociedad menos desigual y dividida

Las instituciones gubernamentales suelen ser desafiadas por la criminalidad que azota con fuerza a los países. El contrabando, la piratería y todas las actividades de la delincuencia organizada son enormemente lucrativos; y en la impunidad, la capacidad de infiltración y las fragilidades institucionales del sistema político y judicial se advierten enormes oportunidades para su prevalencia. Las muestras de crueldad observadas por las organizaciones criminales revelan una descomposición moral y social de extrema gravedad.

Hay países que han avanzado en la creación de regulaciones en los diversos campos de la actividad humana. Se han creado leyes de protección a las mujeres, menores, ancianos y demás grupos vulnerables. Sin embargo, el problema fundamental sigue su curso. Por tanto, es imperativo encontrar la forma en la cual se reduzcan las transgresiones a las víctimas en particular, así como en lo fundamental reducir las distorsiones señaladas (Martínez Chapa, 2021).

1. Revisión de la literatura

De acuerdo con el *Diccionario de la Lengua Española* (Real Academia de la Lengua Española, s/f), el Estado de Derecho es el régimen propio de las sociedades democráticas en el que la Constitución garantiza la libertad, los derechos fundamentales, la separación de poderes, el principio de legalidad y la protección judicial frente al uso arbitrario del poder. A este mismo respecto, el *Diccionario Jurídico* (s/f) señala que el Estado de Derecho es aquel en el que los poderes públicos se regulan de acuerdo con normas generales constitucionales y se deben ejercer en el ámbito de las leyes que los regulan, salvo el derecho de un ciudadano de recurrir a un juez independiente a fin de que se le reconozcan aquéllos y, por otro lado, se rechace el abuso del poder.

El *Rule of Law* es la versión inglesa de lo que se conoce como "imperio de la ley" o "gobierno de leyes". Esa era la idea subyacente de la revolución inglesa: había que limitar el poder del rey a partir de la creación del Parlamento, pues en teoría este último representa al pueblo. Eventualmente ello derivó en la necesidad de establecer el principio de separación de los Poderes Ejecutivo, Legislativo y Judicial.

Para Williamson (1985), la creación de reglas en una sociedad no es suficiente si los ciudadanos no se apegan a ellas, por lo que existe la obligación a respetar las leyes emanadas de la Constitución política, pero también las de la propia conciencia, pues de otro modo no se alcanzarían las metas fundamentales de la justicia social y económica. El derecho constitucional, por su parte, plantea aspectos fundacionales en el ideal de alcanzar la armonía social basada en los contratos y la propiedad.

De acuerdo con Ferguson (1792) y Hayek (1944), el orden espontáneo es el resultado de la denominada 'acción humana': no meramente del designio humano. Para estos autores, un gobierno apegado a las leyes y a la justicia es fundamental a fin de lograr la libertad, entendiendo a ésta no como la liberación de las restricciones, sino más bien como la aplicación efectiva de restricciones justas. Cabe decir que este tipo de acciones, en primera instancia, fueron espontáneas y resultado de iniciativas libres más que de reglas impuestas por el legislador o el Estado en particular.

Pese al costoso mantenimiento de los congresos, procuradurías y demás organismos públicos, en muchas naciones no se alcanzan estándares de legalidad y orden esenciales. Sobre esta misma línea de pensamiento se pronunció Coase (1959), al señalar que el sistema de propiedad privada no puede funcionar a menos que se observen los derechos y las libertades fundamentales.

Ha-Joon (2006) cuestiona el sentido del establecimiento de criterios estandarizados por parte de las instituciones globales de las potencias de Occidente. Según el, se trata de un paradigma impuesto en el que los países emergentes tienen dificultades para moverse de sus condiciones iniciales, pues resulta que los derechos de propiedad y el imperio de la ley normalmente no se privilegian en regiones donde privan la ilegalidad y la corrupción de las élites políticas y empresariales.

Aunque año con año se publiquen los resultados de las encuestas nacionales e internacionales sobre este tipo de temáticas, en los hechos existe una formidable resistencia a renunciar a privilegios que significan el abuso del poder de ciertos sectores políticos y empresariales.

Por su parte, Blanchard (2017) sostiene que la inversión no se consolida si no se protegen tales derechos, o bien si el Estado, a través de funcionarios corruptos, recurre a los sobornos para autorizar los permisos y licencias con miras a operar en mercados específicos. A este respecto, Samuelson

y Nordahus (2010) puntualizan la necesidad de privilegiar el Estado de Derecho en la perspectiva de la ciencia económica:

> Una de las influencias más importantes, pero sutiles se refiere a las instituciones de mercado. Las economías más exitosas —como los Países Bajos y Luxemburgo en Europa o Taiwán o Hong Kong en Asia— han ofrecido un ambiente seguro para la inversión y el talento empresariales. Esto exigió el establecimiento de derechos de propiedad guiados por el Estado de Derecho… los países deben combatir la corrupción, que es un sistema impositivo privado, que depreda a las empresas más lucrativas, crea incertidumbre sobre los derechos de propiedad, eleva los costos y congela la inversión… Los países que ofrecen una estructura institucional favorable atraen fuertes flujos de capital extranjero, mientras que países con instituciones débiles atraen fondos extranjeros relativamente escasos y sufren de una "fuga de capitales" cuando los residentes locales transfieren sus fondos al exterior para evitar el pago de impuestos, la expropiación o la pérdida de valor (2010: 599).

Para fincar su desarrollo, las naciones precisan la adopción de leyes y costumbres apegadas a la legalidad, el Estado de Derecho y la conducta ética. Uno de los casos más exitosos de bienestar es el de Singapur. Se trata de un país con un trasfondo de pobreza generalizada, desempleo, corrupción, dominación de otras potencias, además de carencias de recursos naturales. En 1963 logró su independencia de Gran Bretaña y su gobierno comenzó a sentar las bases de su desarrollo. Gradualmente adoptó políticas de una economía de mercado tendiente a atraer inversiones nacional y extranjera. El gobierno no se apresuró a elevar su gasto público, tampoco incrementó significativamente los impuestos y aranceles; más bien adoptó políticas para favorecer la competitividad, además de realizar inversiones necesarias para modernizar la infraestructura.

Otras acciones de gobierno de Singapur cruciales en este empeño tuvieron que ver con el fomento del ahorro interno y políticas sociales para beneficiar a la ciudadanía a través de la educación, la salud y el capital humano. Los niveles de criminalidad son bajos y el turismo y las inversiones en cartera fluyen, pues el sistema de instituciones políticas y económicas es sólida como para inspirar la confianza. Sus valores éticos tienen que ver con la defensa de las tradiciones como el apego a la familia, el matrimonio entre hombre y mujer, el respeto a los derechos de los demás, la libertad de creencia y demás.

De acuerdo con el documento *Rule of Law Index* (World Justice Project, 2022), el Estado de Derecho afecta a los ciudadanos todos los días, pues todos los sectores de la sociedad tienen que ver directa o indirectamente con esa condición. A continuación, se presentan algunas situaciones:

> En cuanto a la inversión, considere un inversor que busca comprometer recursos en el extranjero. Probablemente lo pensaría dos veces antes de invertir en un país donde la corrupción es rampante, los derechos de propiedad están mal definidos y los contratos son difíciles de hacer cumplir. La aplicación desigual de las regulaciones, la corrupción, los derechos de propiedad inseguros y los medios

> ineficaces para resolver disputas socavan los negocios legítimos y disuaden la inversión nacional y extranjera… En cuanto a las obras públicas de infraestructura, considere los puentes, las carreteras o las pistas de aterrizaje que atravesamos a diario, o las oficinas y los edificios en los que vivimos, trabajamos y jugamos. ¿Qué pasaría si no se hicieran cumplir los códigos de construcción que rigen el diseño y la seguridad? ¿Qué pasaría si los funcionarios del gobierno y los contratistas usaran materiales de baja calidad para embolsarse el excedente? La débil aplicación de las normas y la corrupción reducen la seguridad de la infraestructura física y desperdician recursos escasos, que son esenciales para una economía próspera… En cuanto a la salud pública y medio ambiente, considere las implicaciones de la contaminación, la caza furtiva de vida silvestre y la deforestación para la salud pública y el medio ambiente. ¿Qué pasaría si una empresa estuviera vertiendo químicos dañinos en un río en un área altamente poblada y el inspector ambiental ignorara estas acciones a cambio de un soborno? La adhesión al Estado de Derecho es esencial para responsabilizar a los gobiernos, las empresas, las organizaciones de la sociedad civil y las comunidades por la protección de la salud pública y el medio ambiente (2022: 13).

La falta de apego a la legalidad y a los derechos ajenos propicia conflicto y confrontación, en lugar de cooperación y desarrollo. Ya desde el pasado se entendían estos principios, aun cuando no existía la autoridad gubernamental formalmente establecida. De este modo, las personas y organizaciones se las arreglaban con los asuntos diversos relativos a la determinación de los sistemas de pesas y medidas, sistemas monetarios, de impartición de justicia, de comercio nacional e internacional, de liderazgo y demás, todo ello como premisa al respeto de derechos esenciales reconocidos en los ámbitos señalados (Levítico 19: 36-37; Proverbios 16: 1; Romanos 13: 1-7, *Santa Biblia* VRV, 1960). Así, las invasiones, guerras y demás calamidades constituían un quebranto al ideal de respeto y de buena vecindad.

2. Metodología y datos

En este trabajo se emplea como metodología cualitativa el análisis documental y como cuantitativa el análisis de los datos, los cuales proceden del *Rule of Law Index* y de la Encuesta Latinobarómetro. Las variables bajo estudio son la adherencia al Estado de Derecho y la confianza en las instituciones gubernamentales.

El cuadro 1 muestra las caracterizaciones económicas y políticas y, respectivamente, cómo se relacionan las fallas institucionales y el Estado de Derecho en los ámbitos político y económico. El apego a la legalidad contribuye al propósito de no reproducir patrones que aumentan la desigualdad, la informalidad, falta de incentivos para hacer lo correcto y demás conductas ciudadanas deseables.

Cuadro 1. Fallas institucionales del Estado de Derecho

Dimensiones	Caracterizaciones	Derivaciones
Económica	■ Políticas económicas fallidas. ■ Estado débil en hacer cumplir leyes y regulaciones.	■ Contrabando y piratería. ■ Crecimiento de la informalidad. ■ Baja recaudación y pobre desempeño económico.
Política	■ Imposición de leyes, las cuales no protegen a la mayoría. ■ Desconfianza ante las autoridades, pues las leyes se realizan al margen de los ciudadanos. ■ Explotación social permitida.	■ Falta de compromiso respecto a obligaciones ciudadanas. ■ En los peores casos, ingobernabilidad y desintegración social (prevalencia de usos y costumbres locales). ■ Impunidad y ley del más fuerte.

Fuente: elaborado por Martínez Chapa *et al*., (2021) con base en Ruiz (2012).

De acuerdo con Hayek (1944), a mediados del siglo XX las premisas libertarias se dejaron de lado y, en algunos países de Occidente, en su lugar creció el intervencionismo gubernamental. Sin embargo, tal intervencionismo demostró su incapacidad para erradicar la injusticia y la desigualdad. La falta de apego hacia el Estado de Derecho —con leyes y reglas establecidas— ha dado lugar a democracias débiles, desigualdad creciente y, en el peor de los casos, a situaciones de anarquía generalizada, propia de Estados fallidos donde imperan la fuerza y la violencia en lugar de la razón y, como consecuencia, crecen el contrabando, la falsificación, la ilegalidad, el deterioro de los recursos naturales y el sufrimiento.

El cuadro 2 muestra la variable adherencia al Estado de Derecho en una lista de países agrupados en tres categorías de puntuaciones. La medición del estudio va de 0 —que significa una débil adherencia al Estado de Derecho— a 1 —que equivale a un vínculo fuerte—, y se construye a través de ocho grandes rubros. De acuerdo con el Índice Global de Estado de Derecho, los aspectos que se miden son: restricciones a los poderes del gobierno; ausencia de corrupción; gobierno abierto; derechos fundamentales; orden y seguridad; aplicación reglamentaria; justicia civil y justicia penal.

Cuadro 2. Adherencia al Estado de Derecho en países seleccionados

Países	Puntuación	Posición en el ranking
En lo más alto de la lista		
Dinamarca	0.90	1
Noruega	0.89	2
Finlandia	0.87	3
Suecia	0.86	4

En la mitad de la lista		
Malawi	0.52	66
Trinidad y Tobago	0.52	67
Moldavia	0.52	68
Nepal	0.52	69
Bosnia y Herzegovina	0.52	70
En lo más bajo de la lista		
Haití	0.35	136
República del Congo	0.35	137
Afganistán	0.33	138
Cambodia	0.31	139

Fuente: elaborado por el autor con base en *Rule of Law Index* (World Justice Project, 2022).

En el propósito de afianzar el Estado de Derecho es fundamental el papel de la confianza en las diversas instituciones concurrentes, entre ellas las gubernamentales. El cuadro 3 muestra datos relativos a dicha confianza, en este caso, respecto al Congreso, al Gobierno y al Poder Judicial para los países de América Latina. Cabe observarse que las puntuaciones más altas no alcanzan ni siquiera los 50 puntos, algo en verdad grave dado lo costoso que resulta el mantenimiento de estas instituciones por parte de los ciudadanos.

Cuadro 3. Confianza en las instituciones gubernamentales asociadas al Estado de Derecho

Países	Congreso	Gobierno	Poder Judicial
Argentina	27	35	25
Bolivia	25	35	24
Brasil	25	32	39
Chile	32	46	29
Colombia	24	35	31
Costa Rica	29	32	44
Ecuador	22	35	23
El Salvador	27	35	28
Guatemala	20	24	23

Honduras	29	29	28
México	28	28	27
Nicaragua	23	31	26
Panamá	23	32	28
Paraguay	25	34	24
Perú	18	25	18
República Dominicana	35	42	35
Uruguay	44	49	49
Venezuela	35	40	34
Máximo	44	49	49
Mínimo	18	24	18
Promedio	27.3	34.4	29.7
Desviación estándar	6.2	6.6	7.9

Fuente: Latinobarómetro, 2021.

La creación de instituciones sólidas es un imperativo y a las mismas hay que dotarlas de mecanismos para incentivar las buenas prácticas. Paralelo a ello, se deben desincentivar la ilegalidad y explotación de personas y de recursos naturales. En ese tenor, se precisa crear y respetar reglas justas, pero no sólo dirigidas hacia el ámbito político y empresarial: también deben estar en la mente de los ciudadanos, quienes tendrán claro que la transgresión de estas conlleva consecuencias graves. Fortalecer el Estado de Derecho, por tanto, es condición indispensable para alcanzar las metas de mayor bienestar social (véase cuadro 4).

Cuadro 4. Caracterización y beneficios del fortalecimiento del Estado de Derecho

Caracterización	Beneficios
▪ Énfasis en alcanzar elevada confianza y certidumbre entre los inversionistas. ▪ Respeto a los derechos de propiedad y demás libertades. ▪ Instituciones gubernamentales, empresariales y de la sociedad civil respetables. ▪ Cultura de difusión de reglas claras para toda la sociedad y la necesidad de apegarse a ellas.	▪ Mayores niveles de bienestar y potenciación de las capacidades de los ciudadanos. ▪ Mayor confianza en los Poderes Judicial, Legislativo y Ejecutivo. ▪ Reducción de los costos de transacción. ▪ Mayor certidumbre respecto al futuro en el plano social, económico y político.

Fuente: Elaborado por los autores.

3. Discusión

De acuerdo con Pomes (2023), el Índice *Global del Estado de Derecho* es la mejor referencia para un análisis de la salud de las democracias. Los cuatro principios que inspiran dicha clasificación son: a) la rendición de cuentas ante la ley de gobiernos y agentes privados; b) unas leyes justas, claras y estables que son aplicadas de forma equitativa; c) un gobierno abierto y transparente; y d) mecanismos accesibles e imparciales para resolver conflictos. Por su parte, los ocho factores que cuantifican esos objetivos son: a) los límites puestos a las instituciones gubernamentales y la separación de los tres poderes; b) orden y seguridad, incluyendo el control efectivo de la delincuencia; c) cumplimiento regulatorio: mide si hay sobornos en la adjudicación de servicios públicos, el retraso injustificado de los procedimientos y si el Gobierno respeta el derecho de propiedad; d) ausencia de corrupción; e) gobierno abierto y transparente; f) derechos fundamentales; g) justicia civil; y h) justicia penal.

Siguiendo a Pomes (2022), la edición 2022 del Índice *Global del Estado de Derecho* muestra un evidente deterioro en la gobernanza en todo el mundo dado que la violencia, la corrupción y la impunidad afectan a millones de personas. Desafortunadamente, un número creciente de gobiernos ha actuado contra el derecho al debilitar los controles que salvaguardan las libertades ciudadanas, garantizan la aplicación justa de las leyes y protegen los derechos humanos.

No puede ser asunto menor advertir de la pobre calidad de las instituciones gubernamentales; el enorme tamaño de la burocracia; el

costoso mantenimiento de los partidos políticos; el crecimiento de los impuestos y el gasto público; la carga fiscal, entre otros; todo ello en un contexto de disparidades en el ingreso y una fuerte concentración económica y política.

Lo anterior pone de manifiesto cuán frágiles son muchas de las instituciones a la hora de procurar los derechos de los ciudadanos. La persistencia de las brechas en el ingreso revela también la incapacidad de los gobiernos para ampliar las oportunidades de progreso entre ciudadanos que viven en desventaja. La inversión en el capital humano y la fortaleza de instituciones como la familia tienen papeles muy importantes en este quehacer.

Es innegable la crisis política y de gobernabilidad que se vive en muchas naciones del mundo. Como consecuencia de ello, el sistema democrático en muchos países sigue siendo frágil por cuanto se presentan conflictos poselectorales y se observa insatisfacción de los ciudadanos con sus respectivos gobiernos. No basta con tener nuevas leyes, funcionarios y recursos, si no se privilegia el respeto por las instituciones y, a través del servicio público, se dignifica a los ciudadanos. Se ha demostrado que no es suficiente con tener una agenda legislativa con temas de vanguardia en la mesa de discusión.

Las instituciones formalmente establecidas para la procuración de justicia y apego a la legalidad son costosas y se vuelven una carga que no quiere llevarse más; prueba de ello es la exigencia de reducir el número de diputados, senadores, además de los enormes costos del funcionamiento del Estado.

Buena parte de América Latina tiene una baja aprobación de prácticamente todas las instituciones. Según Cordera Campos (2015), se trata de una reacción en apariencia injustificada, si se toma en cuenta el tamaño de la economía y la magnitud de la riqueza, así como el ingreso concentrado entre las elites políticas y empresariales, cuyos personeros y corporaciones no se caracterizan precisamente por sus capacidades innovadoras o emprendedoras.

El funcionamiento de las instituciones formales se torna disfuncional cuando los objetivos de grupo, partido o individuo se colocan por encima de los objetivos nacionales. Los vacíos de autoridad y omisiones empeoran las cosas para los ciudadanos que exigen un actuar del gobierno en favor de ellos.

La vida electoral y política de las naciones suele ser intensa, compleja y muy a menudo deja un sentido de insatisfacción entre las grandes mayorías. En ese sentido, es de esperar que las democracias encaren enormes retos para legitimarse y lograr la confianza ciudadana. Hoy día, prácticamente no hay partido político serio que gobierne con suficiente aprobación por un largo periodo en el mundo civilizado.

En el siglo XX y lo que va del siglo XXI, en algunas naciones se ha intensificado una cruenta batalla entre las pandillas y cárteles del narcotráfico, quienes, disputándose la geografía, recursos estratégicos y dinero, no reparan en considerar el sufrimiento que traen consigo sus acciones de violencia. Aunado a la situación económica tan adversa para la mayoría, el fenómeno referido ha elevado la inseguridad a niveles nunca vistos en tiempos de paz. Entre los efectos de esta tragedia deben señalarse el dolor por los fallecimientos y desaparecidos, delitos al alza, desplazamiento, así como la violación de derechos humanos. Traer justica a las víctimas, en la inmensa mayoría de los casos, no se ha hecho realidad, pues prácticamente no hay reparaciones por los daños perpetrados.

No son pocos quienes, ante lo ya expresado, se plantean cuestionamientos como los siguientes: ¿de qué sirven las reformas estructurales si no hay paz y desarrollo inclusivo? ¿De qué sirven la modernización y liberalización si no hay justicia y se agrava la desigualdad? ¿De qué sirve incrementar el gasto para seguridad y defensa nacional si la mayoría de los ciudadanos teme salir a la calle?

La crisis actual no sólo es de carácter económica; más bien se trata de una crisis que ha venido expandiéndose y que alcanza las esferas de lo político, económico, social, educativo, pero, sobre todo, de los valores. Hay señales de descuido en instituciones como la familia, la religión, la empresa, la escuela y, por supuesto, la función pública y la gobernabilidad. Según lo expresan Ortega Ruiz y Mínguez Vallejo (s/f), existe evidencia de tal crisis debido a la pérdida de vínculos, de ataduras, de lazos culturales profundos y de sentimientos de filiación social. Todo ello genera la sensación de vivir en un mundo sin raíces, ni historia, ni posibilidades de pertenencia, y cuya expresión más inmediata es un sentimiento de vaciedad y frustración generalizado.

Conclusiones e implicaciones

En este trabajo se ha hecho hincapié en el papel relevante del Estado de Derecho en el desarrollo, destacando los aspectos teóricos y reflexionando en torno a la realidad observada. Tanto las instituciones como las regulaciones llevan implícitos costos económicos y se espera que incidan en la sociedad. Se ha enfatizado en la necesidad de privilegiar el Estado de Derecho a fin de que la sociedad se enfile a una cultura de apego a la legalidad y todo lo que ello entraña.

Un Estado de Derecho débil ante la corrupción generalizada y la impunidad ha traído graves consecuencias sociales y económicas. Hoy se halla más reforzada la idea de la creciente inseguridad pública, la preocupación de que el narcotráfico llegue a dominar las instituciones

gubernamentales o la perspectiva de que los ciudadanos se hagan justicia por su propia mano. En cuanto a la impartición de justicia, especialmente en materia de derechos humanos, se advierte un incremento preocupante de casos en los que se denuncian abusos cometidos por las fuerzas del orden.

Las propuestas de transformar la economía y la sociedad suelen ser lentas, difíciles de consolidar y tienen riesgos de pobre operación. Existen, como se sabe, visiones distintas del desarrollo: más mercado o menos Estado, propiciando hasta ahora una larga discusión. Estas visiones son normales y de esperarse. Sin embargo, la cuestión es ver si la sociedad está dispuesta a respetar las leyes, acuerdos y contratos, y de este modo se superan los problemas sociales y económicos arraigados.

Los países de América Latina han padecido de altos niveles de deshonestidad en todas sus estructuras sociales. Lamentablemente se han mantenido intactas las estructuras de afianzamiento de intereses políticos y económicos en virtud de que las clases sindicales, empresariales, burocráticas y políticas mantienen sus cuotas de poder, aun cuando ello ha significado la postergación de las metas de un desarrollo menos desigual. Esto ha significado el incremento del riesgo de erosionar aún más la capacidad de las instituciones en la impartición de justicia, seguridad, salud, educación, expectativas de trabajo y demás derechos ciudadanos.

A la luz de los resultados obtenidos, en el plano de referencia se advierte que la sociedad mexicana se sigue quedando corta, por lo que de nueva cuenta la gran asignatura pendiente tiene que ver con la necesidad de apegarnos a la legalidad. Los pobres resultados en los órdenes económico, político, legal, social y medioambiental son un reflejo de la misma pobreza que se tiene con respecto a las valoraciones concernientes a la legalidad. Aquí se circunscribe la llamada conducta antisocial, nombre refinado académicamente para describir esta desgracia.

En realidad, el grueso de la población es culpable de transgredir las leyes espirituales y aquellas que rigen nuestra conducta. Por lo tanto, los tribunales y la fuerza del Estado no son recursos suficientemente disuasivos como solución para dicha problemática. En la mayoría de los países las penas, multas y demás medidas punitivas no necesariamente cumplen con su propósito de rehabilitación social. Aunque sea cuesta arriba, se precisa de encauzar acciones para fortalecer el Estado de Derecho y una conducta ética.

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Force majeure as grounds for exemption from liability: International approach and Ukrainian experience in terms of the military conflict

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Abstract

The article is devoted to the study of the category of "force majeure" and the characteristics of the exemption from liability in circumstances of force majeure. In addition, the definition of force majeure in international normative acts is studied, the categories of force majeure, irresistible force and state of emergency are compared. The regime of grounds for exemption from liability and the place of force majeure in it are considered. The peculiarities of changing and terminating the contract as a result of a significant change in circumstances in case of force majeure in accordance with the legislation of European countries and Ukraine are analyzed. The article pays special attention to the qualification of circumstances as force majeure in the context of the anti-terrorist operation and the war in Ukraine. It is concluded that the concept of force majeure has its origin in Roman law and today it is known both in the civil and common law systems. From the time of Roman law, there was both a legislative regulation of exemption from liability for the occurrence of force

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majeure circumstances, as well as a contractual practice of formulating exemption from liability clauses.

Keywords: force majeure; irresistible force; exemption from liability; performance of obligations; war in Ukraine.

La fuerza mayor como causal de exención de responsabilidad: enfoque internacional y experiencia ucraniana en materia de conflicto militar

Resumen

El artículo está dedicado al estudio de la categoría de «fuerza mayor» y las características de la exención de responsabilidad en circunstancias de fuerza mayor. Además, se estudia la definición de fuerza mayor en los actos normativos internacionales, se comparan las categorías de fuerza mayor, fuerza irresistible y estado de emergencia. Se considera el régimen de causales de exención de responsabilidad y el lugar de la fuerza mayor en el mismo. Se analizan las peculiaridades de cambiar y rescindir el contrato como resultado de un cambio significativo en las circunstancias en caso de fuerza mayor de acuerdo con la legislación de los países europeos y Ucrania. El artículo presta especial atención a la calificación de las circunstancias como fuerza mayor en el contexto de la operación antiterrorista y la guerra en Ucrania. Se concluye que el concepto de fuerza mayor tiene su origen en el Derecho romano y hoy es conocido tanto en el sistema civil como en el del *common law*. Desde la época del Derecho romano, existía tanto una regulación legislativa de la exoneración de responsabilidad por la concurrencia de circunstancias de fuerza mayor, como una práctica contractual de formulación de cláusulas de exoneración de responsabilidad.

Palabras clave: fuerza mayor; fuerza irresistible; exención de responsabilidad; cumplimiento de obligaciones; guerra en Ucrania.

Introduction

The category of civil liability is one of the key ones in civil law, as civil liability is a sanction that ensures the proper fulfillment of obligations and guarantees the stability of civil circulation. However, based on the principle of justice, in some cases a person can be exempted from responsibility for non-performance or improper performance of an obligation. This

is possible, as a rule, in situations where certain external circumstances, independent of the debtor, affected the course of execution. Therefore, grounds for exemption from liability as a way of protecting the rights and interests of legal relationship participants are of particular importance for ensuring the balance of the interests of legal relationship participants.

The central place in the system of grounds for exemption from civil liability is held by force majeure. The problem of legal regulation of force majeure has a long history, dating back to Roman law, where force majeure was considered an equitable basis for exemption from liability.

The concept of "force majeure" ("irresistible force") (vis major, forse majeure, act of God) has existed for millennia and means a higher force, "God's providence", an event that surpasses in strength those human forces that can be opposed to it and therefore exempts from responsibility. This concept was known to the Roman private law of the classical period, the civil law of the countries of continental Europe, and the Anglo-American civil law. In the decisions of July 12, 1929 in The Hague in the cases of Serbian and Brazilian loans placed in France, the Permanent Chamber of International Justice recognized force majeure as a general principle of law.

With the development and complication of private legal relations, the issue of releasing the debtor from liability for breach of obligation as a result of force majeure circumstances has acquired special importance, therefore they often become the object of scientific discussions. In addition, the problem of clarifying the essence and list of circumstances that can be considered force majeure in the civil law of Ukraine is reinforced by war conflict and European integration processes.

Given the significant importance of the concept of force majeure (irresistible force) for civil theory, civil legislation and law enforcement practice and its importance in terms of the war conflict in Ukraine, the purpose of this article is the study of the force majeure category, drawing of special attention to the war conflict as a ground for exemption from liability.

1. Emergence of the "force majeure" category in Roman private law

In classical Roman law, the debtor's responsibility for non-fulfillment of contractual obligations was determined objectively: the obligation to compensate damages occurred without ascertaining the reasons for the non-fulfillment of the obligation, that is, regardless of whether the debtor was at fault or force majeure acted. Later, the principles of objective responsibility were replaced by the principles of subjective responsibility of the debtor.

If the debtor was not guilty of non-fulfillment of the contractual obligation, i.e., took care of the obligations assumed, he was released from responsibility. In such cases, non-fulfilment was attributed to force majeure (vis majeure). They meant all unpredictable and unforeseeable circumstances, the consequences of which could not be eliminated, even if they could be foreseen (Pukhan & Polenak-Akimovskaya, 1999).

The case under Roman law was divided into simple case (casus minor) and force majeure (casus major or vis major). Force majeure (vis major) and case (casus) were recognized under Roman private law as grounds for exemption from liability. The case meant either the destruction of the thing or other impossibility of performance in the absence of the debtor's fault. Force majeure included unforeseeable, spontaneous and such that cannot be eliminated, forces of nature that led to the impossibility of fulfilling the obligation and exempted the debtor from responsibility (Pidoprygora & Kharytonov, 2003).

It should be noted that along with the main principle of the debtor's subjective responsibility in Roman law, the principle of objective responsibility continued to operate in relation to a number of obligations. This responsibility was called custodia and was applied in service contracts, contracts between shipowners, innkeepers, and some lease contracts. In the mentioned cases, the debtor's responsibility came even for an accident.

However, in Romanistic literature, the issue of innocent liability under Roman law is disclosed in sufficient detail. In particular, the analysis of Digests regarding lawsuits against shipowners and owners of hotels and inns allows us to conclude that, contrary to the generally accepted point of view, tortious liability of shipowners, owners of hotels and inns arose regardless of fault. There is nothing about liability without fault in Digests, but about liability for the actions of third parties (service personnel of the ship or hotel and regular guests of the hotel). According to scientists, there is nothing similar to general, unconditional and fault-independent responsibility (Passek, 2003).

The provisions of Roman law with regard to liability for intentional non-fulfillment of an obligation are of particular interest. This rule had an imperative coercive nature and could not be eliminated by a prior agreement of the parties. It was created in view of the fact that the parties, upon concluding the contract, began to formulate a disclaimer of liability. Thus, in Roman law, there was both a statutory regulation of exemption from liability due to the occurrence of circumstances of force majeure, and a contractual practice of formulating clauses on exemption from liability. Moreover, it was prohibited by law to enter into preliminary agreements on exemption from liability for intentional breach of obligation (Dziuba, 2003).

As a result of the reception of Roman private law in the continental systems of law, the clause on the release from liability of the debtor due to force majeure was established. The term "force majeure" first appeared in the French Napoleonic Code of 1804 (Vasiliev, 1993). According to Art. 1148 of this Code, there are no grounds for recovery of any damages if, due to force majeure or unforeseen circumstances, the debtor was unable to give or do what he was obligated to do, or did what he was forbidden to do (Kulagin, 1997).

German law establishes the principle according to which the impossibility of performance due to the occurrence of force majeure circumstances excludes the liability of the debtor (the debtor is released from the performance of the obligation if it became impossible due to circumstances for which the debtor is not responsible and which occurred after the obligation arose) (Chung, 2017).

2. Definition of force majeure in international legal acts

In order to find out what force majeure is, it is worth to analyze authoritative international sources, namely the Vienna Convention of 1980 (United Nation, 1980). Article 79 (1) of the Vienna Convention of 1980 stipulates that a party is not liable for failure to perform any of its obligations if she proves that it was caused by an obstacle beyond her control and that it was unreasonable to expect it to take into account this obstacle at the time of concluding the contract or to avoid or overcome this obstacle or its consequences. However, such exemption remains only for the period of existence of such an obstacle. Also, the Vienna Convention of 1980 specifies the notification of the other party about the occurrence of such obstacles as a mandatory condition for exemption from liability.

The notion of "force majeure" ("irresistible force") is not mentioned in the Vienna Convention of 1980 at all. It seems that international private law deliberately does not use this concept, and accordingly, the signs of emergency and exclusivity. Such an approach gives the parties of the contract the opportunity to independently determine the circumstances that exempt them from responsibility. However, in the Vienna Convention of 1980 the signs of unpredictability (it was unreasonable to expect the person to take the obstacle into account) and inevitability (the obstacle is beyond her control) are preserved.

Paragraph 2 of the specified article states that if non-fulfillment of an obligation is caused by the non-fulfilment of a third party engaged by a debtor to perform the contract, the debtor is released from liability only if the person engaged by him or her would also be released from liability. Thus, provisions of the Vienna Convention of 1980 create the most favorable

regulation of relations between the participants of a commercial agreement.

According to the Vienna Convention of 1980, for exemption from liability on the basis of force majeure, the simultaneous presence of the following grounds is necessary:

- non-performance must be caused by an obstacle beyond the control of the party claiming exemption from liability;
- the party claiming exemption from liability could not reasonably be expected to take this obstacle into account when concluding a contract for the international sale of goods;
- the party claiming exemption from liability could not reasonably be expected to avoid this obstacle or its consequences;
- the party claiming exemption from liability could not reasonably be expected to overcome this obstacle or its consequences.

It is worth noting that, wanting to provide sufficient flexibility to the Vienna Convention of 1980, its developers used abstract categories, in particular, instead of the concepts of "force majeure", "irresistible force" the category "obstacle" was used, and the expression "out of control" was used instead of "fault" (Kondratieva, 2012).

In international public law, force majeure means a situation in which an entity is forced to act contrary to an international obligation as a result of force majeure or an unforeseen event beyond control. International practice knows many cases of references to force majeure as a basis for justifying non-fulfillment of obligations. Most often, such situations arise when the aircraft of one state invades the airspace of another state as a result of damage or weather conditions. The UN Convention on the Law of the Sea emphasizes that passage through the territorial sea includes stopping and anchoring as they are "necessary due to force majeure" (United Nations, 1998).

The UN General Assembly Resolution 56/83 (United Nations, 2001-2022) with regard to force majeure establishes that the illegality of an act of a state that does not comply with an international obligation of that state is excluded in case this act was made due to force majeure, i.e., the manifestation of an irresistible force or an unforeseen event, beyond the control of that state, which make it materially impossible under the given circumstances to fulfill the corresponding obligation. This statement does not apply if: a) the force majeure situation is caused, either entirely or in combination with other factors, by the behavior of the state that refers to it; or b) the state has assumed the risk of such a situation occurring.

As a result, a force majeure situation must meet certain conditions. First, the relevant act must be determined by force majeure or an unforeseen event

beyond the control of the state. Secondly, the fulfillment of the obligation is materially impossible.

Therefore, "force majeure" means that there must be an obstacle which the state was unable to avoid or which it could not prevent. "Unforeseen event" means that its occurrence could not be predicted or was extremely unlikely. In this case, it is necessary to establish whether the breaching party could reasonably be expected to have taken into account the possibility of the relevant event. If such an event can be foreseen, then the defaulting party may be considered to have assumed the risk of performance of the obligation if such an event occurs. The possibility of predicting the event is assessed at the time of acceptance of the obligation. At the same time, the party must take all the measures at its disposal for the proper fulfillment of the obligation, and not passively observe the occurrence of an event that is the reason for its non-fulfillment.

Force majeure or an unforeseen event must be the reason for the material impossibility of fulfilling the obligation, which may be due to a natural event, for example, an emergency landing of an airplane in hurricane conditions on the territory of a foreign state, or human activity, for example, leaving a part of the territory under state control as a result of a rebel. Cases of use of force, coercion by one state against another may also fall under the force majeure situation. Force majeure does not apply to situations in which the fulfillment of the obligation has become more difficult, for example, as a result of a political or economic crisis. This also applies to situations caused by the negligence or inaction of the respective state.

In international law, in addition to force majeure, a state of emergency is also distinguished, which is provided for by a number of conventions. Thus, the Convention of the United Nations Organization on the Law of the Sea allows the stopping and parking of ships at anchor when passing through the territorial sea of a foreign state only when they are due to a state of emergency (Article 18.2). Similar provisions are contained in conventions on prevention of sea pollution.

The state of emergency refers to a specific case when a person, whose behavior is attributed to the state, is in a situation of extreme danger both for herself and for the persons entrusted to her. Larger-scale disasters such as earthquakes, floods and other emergencies may be recognized as force majeure or a state of necessity.

In contrast to force majeure, a person acting in a state of emergency is acting in a situation of "relative impossibility" of fulfilling an international obligation. This situation differs from the state of necessity in that it is not about choosing between compliance with the norms of international law and ensuring the legitimate interests of the state. The interest here directly lies in saving people's lives, regardless of their citizenship.

In contrast to a disaster, a state of necessity does not pose a danger to the lives of people entrusted to a state official, but a serious danger to the main interests of the state itself or the international community. The state of necessity arises when there is a conflict between a significant interest and the obligation of the state, which refers to the state of necessity.

3. Force majeure in the system of grounds for exemption from liability

The grounds for exemption from civil liability are divided into formal (legal norms establishing these grounds) and material (objectively existing life circumstances constituting the content of these norms). The set of material grounds for exemption from civil liability, which has been established in the relevant legal norms, constitutes the material and legal content of the grounds for exemption.

Substantive legal grounds for exemption from civil liability for breach of contract are life circumstances enshrined in the norms of civil legislation that give rise to the right of a person who has not fulfilled or improperly fulfilled an obligation to be exempt from liability.

Material and legal grounds for exemption from civil liability are divided into subjective and objective. Subjective grounds include the presence or absence of the debtor's fault. The criterion for the presence or absence of guilt in specific civil legal relations is the degree of care and prudence required by the nature of the obligation and the conditions of economic turnover. Objective material and legal grounds for exemption from civil liability include irresistible force and various forms of behavior of the participants in the liability relationship.

Force majeure includes: natural events not related to voluntary human behavior (floods, earthquakes, blizzards, etc.); phenomena of social life that do not depend on the behavior of the parties of an obligation (military operations, strikes, suspension or restriction of cargo transportation, etc.). The forms of behavior of the participants in the legal relationship of liability include: dissemination of true information that disgraces honor, dignity and business reputation; skipping the statute of limitations; violation of the rules for using the purchased goods, etc. (Reznichenko & Tserkovna, 2009).

All material grounds for exemption from civil liability can also be divided into several groups: general, special and institutional (separate). The first are established in general provisions on obligations, special ones are contained in separate institutions of civil law. Thus, the owner of the source of increased danger is released from liability if the source of increased danger got out of control of the owner as a result of illegal

actions of third parties. At the same time, the overlap of general, special and separate grounds for exemption from civil liability is not excluded in positive law, which complicates their systematicity and interdependence.

Material and legal grounds for exemption from civil liability can be subjective or objective in nature. The first type of grounds for exemption from civil liability includes the presence or absence of fault of the causer of damage or the victim, and the second - various forms of behavior of the causer of damage, the victim, as well as events (circumstances of social life) that do not depend on their behavior.

In the civil literature, an unjustified confusion of subjective grounds for exemption from civil liability with force majeure is allowed, although civil law establishes them as different (independent) life circumstances that give rise to the right to exemption from liability.

The procedural and legal form of the grounds for exemption from liability is a method of implementation of the material and legal grounds for exemption from civil liability established by the civil procedural legislation.

An analysis of the provisions of the Civil Code of Ukraine reveals that the grounds for exemption from civil liability include: creditor's fault; case; irresistible force; other circumstances causing the impossibility of fulfilling the obligation, if they arose through no fault of the debtor. The list of grounds for exemption from civil liability for damage may be expanded due to necessary defense, extreme necessity, force majeure, and fault of the victim (Tserkovna, 2008).

4. Change and termination of the contract as a result of a significant change in circumstances in the event of force majeure

Force majeure can be the reason for a significant change in circumstances, which is the basis for terminating or changing the contract, and ultimately leads to the change or termination of the obligation. Legal regulation of consequences of a significant change in the circumstances that exist during the conclusion of the contract is, as a rule, built on the basis of one of the two key principles of contract law: the principle that contracts must be fulfilled (pacta sund servanda) or the clause about the immutability of circumstances (clausula rebus sic stantibus). The legislation of many countries contains norms according to which a change in circumstances can be a justification for changing the contract, when the preservation of the contract in its original form leads to extraordinary results incompatible with justice (Zweigert & Katz, 1993).

The main consequences of a significant change in the circumstances that the parties were guided by when concluding the contract are: 1) a change in the contract itself, i.e., a change in the terms of the contract (and as a result the obligations between the parties) while keeping the contract itself in force; 2) termination of the contract by agreement of the parties. Thus, in the USA, the doctrine of "impossibility" of execution is used. In order to establish the fact of the non-occurrence of certain events as the main prerequisite for the conclusion of the contract, it is necessary to find out which of the parties to the contract assumed the risk of the given event.

When concluding contracts for the manufacture and delivery of goods at pre-fixed prices, the seller, for example, assumes the risk of an increase in production costs within normal limits. However, if in the course of extraordinary events, the value of the goods for the seller increases sharply, tenfold, the court can determine that the seller did not assume such a risk, based on the fact that the non-occurrence of the extraordinary event was a "main prerequisite" for the conclusion of the contract (Komarov, 1991). In the considered situation, it is possible to say either that the debtor did not take such a risk, or that the court has the right to remove this risk due to its extreme burden.

The common law doctrine differs significantly from the civil one and proceeds from the fact that the modification of the contract undermines certainty and changes the risks allocated in the contract. Common law provides that termination of obligations under a contract is possible only when a change in circumstances makes performance under the contract illegal or impossible (Beatson, 2002).

In Great Britain, the doctrine of "frustration" (frustration of purpose, loss of the contract's meaning) is applied. This doctrine is applied only in cases where the performance of the contract turned out to be impossible due to the destruction of the object of the contractual obligation through no fault of the parties. In such cases, the court makes a just and reasonable decision with regard to the parties, which is required by the new circumstances. The court can make such a decision only if the change in circumstances does not fall under the definition of "normally considered" risk.

In contrast to the doctrine of frustration of the contract, "impossibility" as a basis for exemption from liability consists in the impossibility of fulfilling the obligation provided for in the contract due to unforeseen circumstances that the parties could not foresee at the time of concluding the contract.

French law, as a general rule, is reluctant to change the terms of a contract, even when circumstances have changed. The principle of performance of obligations has priority over ex post modify claims with a few exceptions. In particular, public contracts can be changed or terminated by a court; a contract can be modified if the circumstance standing in the way of the

performance of the obligation could not have been foreseen: for example, after the First and Second World Wars, Parliament allowed the courts to stop treaties that were concluded before the beginning of either of those wars.

Nowadays, civil jurisdiction courts in France do not recognize the doctrine of a significant change in circumstances (imprevidsion), which was the reason for the very detailed elaboration by the parties of the terms of the contract on the grounds for exemption from liability. French law calls force majeure and "unforeseen event" (cas fortuit) grounds for exemption from liability (Castro, 2020). Thus, French law does not allow the termination of the contract on the basis of a significant change of circumstances, while common law allows the termination of the obligation, and the Principles of European Contract Law allow the judicial procedure for the modification and termination of the contract in this case.

In Sweden, the court has the right to change the contract in case the obligation for one of the parties becomes unreasonably burdensome, for example, when the circumstances have changed after the contract has entered into force, the court has the right to change the contract both in its entirety and its individual provisions.

Italian law gives a party to a contractual obligation the opportunity to terminate the contract if its performance becomes excessively burdensome (difficult) as a result of unforeseen circumstances (Vyacheslavov, 2007).

The UNIDROIT Principles (Principles of European Contract Law) are formulated in such a way that each party to the contract fulfills its obligations even if the performance has become more onerous, regardless of whether the value of the performance has increased for the debtor or the value of the performance has decreased for the creditor (Sanjur, 2022). However, in case of a significant burden of performance for the debtor due to a change in circumstances, the principles provide for the obligation of the parties to enter into negotiations with the aim of adapting the contract or terminating it. The complication according to Principles of UNIDROIT has place when events that significantly change the balance of contractual obligations either due to an increase in the cost of performance or a decrease in the value of the performance received by the party occur, as well as:

a) events that arise or become known to the disadvantaged party after the conclusion of the contract;

b) events that could not reasonably have been taken into account by the disadvantaged party prior to the conclusion of the contract;

c) events beyond the control of the disadvantaged party; and

d) if the risk of occurrence of such events was not assumed by the disadvantaged party (UNIDROIT, 2016).

If the parties did not reach an agreement within a reasonable period of time, the court has the right to: terminate the contract, make changes to the contract, as well as decide on the issue of compensation for damages caused by the party's refusal to agree on the changed terms of the contract or unilateral refusal (Rose, 2022).

In Ukraine, in accordance with Art. 652 of the Civil Code of Ukraine, a significant change in the circumstances from which the parties proceeded when concluding the contract is the basis for its modification or termination, unless otherwise stipulated by the contract or does not follow from the essence of the obligation. At the same time, a change in circumstances is recognized as significant when they have changed to such an extent that, if the parties could have reasonably foreseen it, the contract would not have been concluded by them at all or would have been concluded under significantly different conditions.

In accordance with Part 2 of Art. 652 of the Civil Code of Ukraine in order to change or terminate a contract based on a significant change in circumstances, four conditions must be met: 1) at the time of concluding the contract, the parties assumed that such a change in circumstances would not occur; 2) the change in circumstances is due to reasons that the interested party could not eliminate after their occurrence with all the care and prudence required of it; 3) performance of the contract would violate the balance of property interests of the parties and would deprive the interested party of what it was counting on when concluding the contract; 4) it does not follow from the essence of the contract or business practices that the risk of changing circumstances is borne by the interested party.

If the parties have not reached an agreement on bringing the contract into line with the circumstances that have changed significantly, or on its termination, the contract may be terminated, and on the grounds established in Part 4 of Art. 652 of the Civil Code of Ukraine, - amended by a court decision at the request of an interested party in the presence of the following conditions at the same time: at the time of concluding the contract, the parties assumed that such a change in circumstances would not occur; the change in circumstances is due to reasons that the interested party could not eliminate after their occurrence with all the care and prudence required of it; performance of the contract would violate the ratio of property interests of the parties and would deprive the interested party of what he was counting on when concluding the contract; it does not follow from the essence of the contract or the customs of business turnover that the risk of changing circumstances is borne by the interested party.

Thus, changing the contract in connection with a significant change in circumstances is allowed by a court decision in exceptional cases when the termination of the contract is contrary to public interests or will cause damage to the parties that significantly exceeds the costs necessary to perform the

contract on the terms changed by the court. In case of termination of the contract as a result of a significant change in circumstances, the court, at the request of any of the parties, determines the consequences of termination of the contract based on the need for a fair distribution between the parties of the costs incurred by them in connection with the performance of this contract.

It should be noted that the provisions of Part 2 of Art. 652 of the Civil Code of Ukraine, as well as in non-state collections of private and contract law (Principles of European Contract Law, Principles of International Commercial Contracts UNIDROIT), do not impose on the interested party the need to take actions to overcome the causes caused by a significant change of circumstances. A similar requirement is contained in Article 8:108 of the Principles of European Contract Law (Commission on European Contract Law, 1995-2002) and in Clause 1 of Article 79 of the UN Convention on Contracts for the International Sale of Goods of 1980, but only with regard to circumstances of force majeure / obstacles (excuse due to impediment): the party does not bear liability for a breach of contract which is caused by a force majeure event which was beyond its control and which could not reasonably have been taken into account at the time of the conclusion of the contract, or which it could not have overcome or prevented.

The rest of the non-state collections of private and contract law, in particular UNIDROIT Principles of International Commercial Contracts or Principles of European Contract Law, Principles, Definitions and Model Rules of European Private Law (Ch. Von Bar et al., 2009) provide only the requirement of the absence of a causal relationship between change of circumstances and actions of the interested party.

Accordingly, Part 3 of Art. 653 of the Civil Code of Ukraine, in case of change or termination of the contract, the obligation is changed or terminated from the moment of reaching an agreement on the change or termination of the contract, unless otherwise established by the contract or determined by the nature of its change. If the contract is changed or terminated in court, the obligation is changed or terminated from the moment the court decision to change or terminate the contract enters into force. Thus, the contract can be terminated or changed because the parties could not reasonably foresee the relevant risks when concluding it or because the risk assumed by the debtor turned out to be extremely burdensome and, in any case, significantly violates the property interests of one of the parties.

Therefore, if there is a significant change in the situation, the responsibility of the parties remains. This means that the party whose right has been violated has the right to claim damages. Therefore, upon termination of the contract due to significantly changed circumstances, the parties may demand not only a fair distribution of the real loss, but also the lost profit (Palmer, 2022).

5. Anti-terrorist operation and war in Ukraine as force majeure circumstances

In Ukraine, the concept of force majeure is defined in the Law of Ukraine "On Chambers of Commerce and Industry in Ukraine" (Verkhovna Rada, 1998). According to the specified Law, force majeure circumstances are extraordinary and unavoidable circumstances that objectively make it impossible to fulfill the obligations stipulated in the terms of the contract or obligations under legislative and other regulatory acts.

Among such circumstances are mentioned: threat of war, armed conflict or serious threat of such conflict, including but not limited to enemy attacks, blockades, military embargoes, actions of a foreign enemy, general military mobilization, military actions, declared and undeclared war, acts of a public enemy, disturbance, acts of terrorism, sabotage, piracy, disorder, invasion, blockade, revolution, mutiny, uprising, mass riots, introduction of curfew, quarantine established by the Cabinet of Ministers of Ukraine, expropriation, forced seizure, seizure of enterprises, requisition, public demonstration, strike, accident, illegal actions of third parties, fire, explosion, long interruptions in the operation of transport, regulated by the terms of relevant decisions and acts of state authorities, closure of sea straits, embargo, prohibition (restriction) of export/import, etc.

Circumstances qualified as force majeure also cover the ones caused by exceptional weather conditions and natural disasters, namely: epidemic, strong storm, cyclone, hurricane, tornado, flood, accumulation of snow, ice, hail, frost, freezing of the sea, straits, ports, passes, earthquake, lightning, fire, drought, subsidence and landslide, other natural disasters, etc. (Nekit, 2021).

Therefore, terrorist acts, armed conflicts and wars are recognized as force majeure in Ukraine.

However, the analysis of judicial practice in Ukraine leads to the conclusion that the anti-terrorist operation, which lasted in Ukraine from 2014 until the start of a full-scale war, was not always recognized as force majeure. In some cases when, in connection with hostilities, citizens faced the problem of returning loans or bank deposits, entrepreneurs carrying out economic activities in areas where hostilities were or are being waged could not fulfill their contractual obligations, pay taxes, submit reporting, some citizens still cannot receive compensation from insurance companies for lost property, and at the same time, such cases were often justified by the occurrence of force majeure circumstances.

Such situations are possible because in order to confirm the presence of force majeure, it is necessary to obtain the opinion of the Chamber of Commerce and Industry of Ukraine (a special body that confirms the

presence of force majeure circumstances). However, such a body issues a conclusion only if an interested person submits all the documents confirming: a) the occurrence of a force majeure circumstance; b) that force majeure is the reason for the impossibility of fulfilling obligations (a causal relationship is proved); c) that before the occurrence of force majeure circumstances, the terms of the contract were properly fulfilled.

The absence of a conclusion of the Chamber of Commerce and Industry does not give rise to the release of interested persons from liability, in this case the contractual obligations are subject to fulfillment in full and within the prescribed period. Therefore, if a bank or an insurance company refuses to fulfill its obligations under the contract without a conclusion of the Chamber of Commerce and Industry on the occurrence of force majeure circumstances, such a refusal should be considered as a violation of the contractual terms.

Therefore, the very fact of carrying out the Anti-Terrorist Operation (hereinafter - ATO) did not become a basis for exemption from liability for non-fulfillment of accepted obligations. In each specific case, an interested party had to prove that the ATO affected (or could affect) the fulfillment of obligations. Circumstances indirectly related to the ATO, such as a drop in demand in enterprises due to the ATO for products, reduction in turnover, lack of funds to repay the loan, etc., were also not considered force majeure, since the lack of money does not belong to force majeure circumstances.

After the start of a full-scale war in Ukraine, the letter of the Chamber of Commerce and Industry of Ukraine No. 2024/02.0-7.1 dated February 28, 2022 was published, according to which force majeure circumstances from February 24, 2022 until their official end are extraordinary, unavoidable and objective circumstances for legal entities and/or natural persons under the contract, tax and/or other obligations, the fulfillment of which has occurred in accordance with the terms of the agreement, contract, legislative or other regulatory acts and the implementation of which became impossible within the set time due to the occurrence of such force majeure circumstances.

For many parties to civil agreements the mentioned letter became the basis for sending a demand for the conclusion of additional agreements, in which the parties either decided on the possibility to continue deadlines for fulfilling obligations (production, delivery, processing of goods, etc.) or waived any fines in case of delay in the fulfillment of obligations, etc. (Malinovska et al., 2020).

Such a position affected the fulfillment of contracts in the conditions of Russian aggression (Ruiz, 2022). In particular, in insurance contracts, the parties may refer to force majeure as a basis for releasing them from liability for non-fulfillment of the terms of the contract (relevant force majeure clauses with reference to war are always included in insurance contracts in practice).

However, force majeure circumstances do not release a party from the obligation under the contract, but are only a legitimate reason to delay the fulfillment of such an obligation until the end of their validity and not bear liability for such delay (in the form of fines). In addition, the mere fact of hostilities or the introduction of wartime restrictions does not exempt a party from liability, if such circumstances do not directly prevent a person from physically or legally fulfilling a specific obligation under the contract. It is under such circumstances, for example, that the insurer can delay the insurance payment (following the procedure for notification of force majeure and its confirmation), but will have to make it when the effect of force majeure on him ceases (Antoniv, 2022).

Force majeure does not allow to avoid the fulfillment of obligations, including financial ones (for example, rent payments), but it allows to postpone obligations or exempt the business entity from liability for their non-fulfillment during the existence of such circumstances. If the property is damaged before transfer to the tenant (rentee), force majeure can only be applied if the property can be replaced. In the case of the uniqueness of the subject of rent (hire), the contract is subject to change or termination due to the impossibility of performance.

If the property was destroyed or damaged as a result of hostilities after being transferred for rent for a certain period, the payer of the rent is not released from the obligation to pay it before the end of this period under the conditions established by the contract. If such property is transferred for rent for an indefinite annuity, the payer may demand the termination of the obligation to pay the annuity or a change in terms of the payment.

According to the contract of lease, the lessee is exempt from payment for the entire time during which the property could not be used due to circumstances for which he or she is not responsible. However, there are other options: (pre)suspend the contract in accordance with the principle of freedom of contract, change the form, periodicity of the rent, reduce the rent with the justification of a significant reduction in the ability to use the property, terminate the contract by referring to the force majeure clause in the contract or warning the counterparty in 1 or 3 months for the lease of movable and immovable property, respectively (Zagnitko, 2022).

Conclusions

The concept of force majeure originated in Roman law and today is known both to the civil and common law systems. From the times of Roman law, there was both a legislative regulation of exemption from liability due to the occurrence of force majeure circumstances, and a contractual practice of formulating clauses on exemption from liability. As a result of

the reception of Roman private law, the clause on the release from liability of the debtor due to force majeure was established.

The analysis of international legal acts reveals that, although the force majeure rules are established in public international law, states are very careful about the limitation of liability. French law does not allow termination of the contract on the basis of a significant change in circumstances, English and US law allow for the termination of the obligation, and the Principles of European Contract Law allow a judicial procedure for changing and terminating the contract in this case.

The contract can be terminated or changed because the parties could not reasonably foresee the relevant risks when concluding it or because the risk assumed by the debtor turned out to be extremely burdensome and, in any case, significantly violates the property interests of one of the parties. Therefore, if there is a significant change in the situation, the liability of the parties remains. This means that the party whose right has been violated has the right to claim damages. Therefore, upon termination of the contract due to significantly changed circumstances, the parties may demand not only a fair distribution of the real loss, but also the lost profit.

In cases of force majeure circumstances, the deadline for the parties to fulfill their obligations under the contract is postponed in accordance with the time during which such circumstances and their consequences are in effect.

Ukraine has developed a special practice regarding force majeure circumstances, provoked initially by the anti-terrorist operation in the East of the country as a result of aggression on the part of the Russian Federation, and from the beginning of 2022 also by the full-scale war that the Russian Federation launched against Ukraine. However, despite the fact that wars, armed conflicts and terrorist acts are recognized as force majeure circumstances at the legislative level in Ukraine, this fact alone is not enough to recognize the event as a force majeure circumstance that exempt from responsibility.

To confirm force majeure circumstances, it is necessary to apply to a special authorized body, the Chamber of Commerce and Industry of Ukraine, for a conclusion on the presence of force majeure circumstances. With such a conclusion, the obligation to perform is postponed until the termination of the force majeure circumstances, and the debtor is released from responsibility for the delay. These issues are especially relevant for employment contracts.

However, it is important to note that the force majeure circumstances do not release a party from the obligation under the contract, but is only a legitimate reason to postpone the fulfillment of such an obligation until the end of their validity and not bear liability for such a delay (in the form of

fines). In addition, the mere fact of hostilities or the introduction of wartime restrictions does not exempt a party from liability, if such circumstances do not directly prevent a person from physically or legally fulfilling a specific obligation under the contract.

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Conceptual foundations of combating crime against the environment in Ukraine

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Abstract

Within the scope of the scientific article, by means of documentary sources, the main conceptual directions of the fight against environmental crime in Ukraine are highlighted. Special emphasis is placed on the use of social mechanisms to ensure legality in the investigated area; adoption of the Law of Ukraine «On ecological culture of the population»; careful planning of the processes of development and implementation of organizational, legal and other measures aimed at preventing crimes against the environment. It is proposed to increase funding of control and supervisory bodies for the detection and prevention of criminal offenses, other state structures for the protection of nature; development of a unified state policy in the field of combating organized environmental crime, all this, on the basis of a criminological examination of legislation. In the conclusions it is proposed to unify the efforts of law enforcement agencies of various states to stop anti-environmental criminal behavior, neutralize all stages of the implementation of a criminal offense: planning, illegal extraction of resources, transportation, sale and laundering of proceeds obtained through crime against nature.

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Fundamentos conceptuales de la lucha contra la delincuencia contra el medio ambiente en Ucrania

Resumen

Dentro del alcance del artículo científico, mediante fuentes documentales, se destacan las principales direcciones conceptuales de la lucha contra el crimen contra el medio ambiente en Ucrania. Se hace énfasis especial al uso de mecanismos sociales para garantizar la legalidad en el área investigada; aprobación de la Ley de Ucrania «Sobre la cultura ecológica de la población»; una cuidadosa planificación de los procesos de desarrollo y aplicación de medidas de carácter organizativo, legal y de otro tipo, destinadas a prevenir los delitos contra el medio ambiente. Se propone mayor financiamiento de los órganos de control y supervisión para la detección y prevención de infracciones penales, otras estructuras estatales de protección de la naturaleza; desarrollo de una política estatal unificada en el campo de la lucha contra el crimen ambiental organizado, todo ello, sobre la base de un examen criminológico de la legislación. En las conclusiones se propone unificar los esfuerzos de las agencias de aplicación de la ley de varios Estados para detener el comportamiento delictivo antiecológico, neutralizar todas las etapas de la implementación de un delito penal: planificación, extracción ilegal de recursos, transporte, venta y lavado de ganancias obtenidas a través del crimen contra la naturaleza.

Palabras clave: medio ambiente; crimen organizado; política estatal; legislación; prevención.

Introduction

Today, environmental protection is one of the most relevant functions of modern Ukraine. At the constitutional level, it is determined that the duty of the state is to ensure environmental safety and maintain ecological balance on the territory of Ukraine, overcome the consequences of the Chernobyl disaster, and preserve the gene pool of the Ukrainian people (CONSTITUTION OF UKRAINE, 1996).

This function is implemented by regulating relations in the field of protection, use and reproduction of natural resources, ensuring

environmental safety, preventing and eliminating the negative impact of economic and other human activities on the environment. For this, the state implements environmental policy and establishes legal, in particular, criminal liability for environmental violations (Revenko, 2017, p. 262-263).

Ukraine aspires to be a part of European society, to have an appropriate standard of living, progressive economic development, so the country must meet the relevant requirements and rules in force in the European Union (Petrova et al, 2017).

In 2014, the Verkhovna Rada of Ukraine ratified the Agreement on the Association of Ukraine with the European Union signed between Ukraine, on the one hand, and the European Union, the European Atomic Energy Community and their member states, on the other hand, which recorded Ukraine's obligations in the field of eco-safety. In particular, Art. 360 of the Agreement stipulates that the parties develop and strengthen cooperation on environmental protection issues (Association Agreement Between Ukraine, On The One Hand, And The European Union, The European Atomic Energy Community And Their Member States, On The Other Hand, 2014).

On the one hand, the foundations of legislation aimed at ensuring and protecting the environmental rights of citizens have been formed in Ukraine (Klymchuk, 2023, p. 247), and the need to implement environmental laws is declared at all levels of state power. On the other hand, many norms are not applied in practice, and certain environmental problems that require special attention and legal regulation remain unresolved.

A high negative anthropogenic load on natural resources, which has an extremely adverse effect on the environment, often becomes possible due to violations of environmental legislation, which in some cases acquire such a threatening scale that they require the application of criminal law measures. It is also necessary to take into account the fact that persons who commit criminal offenses in the investigated area have the ability to transform their methods of illegal activity and easily adapt to new socio-economic conditions. Considering this, the slowness of the legislator in the environmental field can have catastrophic consequences.

In recent years, against the background of the aggravation of the environmental situation in Ukraine, including that caused by Russia's worthless methods of waging war on the territory of Ukraine, there has been a rapid increase in crime rates in the field of environmental protection (Kravchuk, 2018, p. 322). Relevant state measures for the prevention, detection and investigation of criminal offenses of this category are ineffective due to their high latency and immeasurable scale, which ultimately makes their detection and further investigation much more difficult, actualizes legislative regulation of issues of prevention (passage

of laws) and compensation for damage caused by ecocide (Borshchevska, 2023, p. 115).

Effective counteraction of environmental crime is impossible without successive planned and coordinated actions united by one concept, since phenomena that have signs of systemic nature, including environmental crime, require a systematic approach to overcome them (Turlova, 2017, p. 143). The above testifies to the relevance of the chosen topic of the scientific article, the importance and timeliness of research devoted to the development of a system of preventive measures in the field of the environment.

1. Methodology of the study

The methodological basis of the research is a set of methods and techniques of scientific knowledge. As a general scientific method, a systematic approach was used, which allowed to identify problematic issues in the field of the environment, in particular, in the system of turnover of forest wood of Ukraine, taking into account international experience. Documentary analysis made it possible to characterize the problems of regulatory and legal support in the field of wood circulation.

With the help of the logical-semantic method, the need to increase control over the use and circulation of wood, as well as to improve issues of responsibility for violations in this area, was formed. Methods of legal statistics were used in the process of determining indicators of offenses in the field of environment. Comparatively, the legal method was applied during the analysis of the regulatory regulation of wood circulation in Ukraine and in other countries of the world.

2. Analysis of recent research

In criminological and criminal law science, considerable attention is traditionally paid to the issues of defining the conceptual foundations of crime prevention. Recognizing the importance of the works of well-known scientists, we consider it relevant and worthy of an in-depth study of modern problems of combating criminal offenses against the environment.

The purpose of the study is a general theoretical analysis of the problems of combating crime against the environment in Ukraine.

3. Results and discussion

Criminal offenses against the environment are a constantly progressive form of criminal activity that often does not recognize state borders, while its public danger is underestimated. This statement is true for all countries without exception. Leading lawyers point out that despite the fact that in the European Union, environmental criminal offenses are not given due importance and the amount of punishment imposed by the courts for their commission is minimal, even in the presence of stricter measures of criminal responsibility in the legislation of the member states of the European Union, such criminal offenses should be recognized as a serious form of encroachment on the interests of modern society, and they should be given an appropriate legal assessment by judicial authorities.

A characteristic feature of this type of criminal offense is the global nature of criminal activity with the use of international criminal networks. Both countries of origin of objects of criminal offenses and countries of transit, in which fake documentation (declarations, certificates) are produced and packaging changed, and even countries where there are end consumers of illegally trafficked items, participate in this process.

Bringing all members of a criminal group to justice for the commission of criminal offenses requires serious efforts and specialization specifically in the investigation of organized forms of criminal activity. The participants of the first stage, who did not manage to escape in time, are mostly held accountable. In our opinion, in order to improve the effectiveness of law enforcement, the norms of criminal liability, which provide for punishment for illegal logging, in relation to the activities of criminal groups, need significant modernization.

We believe that in order to achieve the goals of criminal law protection of social relations and prevention of criminal offenses, the actual content of criminal law prohibitions enshrined in the Criminal Code of Ukraine is not so important as the perception of these prohibitions by the population to which they are addressed, as well as the cooperation of law enforcement agencies. The danger of a specific act from the point of view of the legislator should be supplemented by the awareness of the presence of such danger by the individual - the potential addressee of criminal law norms.

Criminal law prohibitions must correspond to general moral prohibitions rooted in society. In the presence of data that some criminal law prohibitions are not perceived by society as justified and fair, it is necessary to intensify explanatory and educational work in this direction. And the leading role here should be performed not by legal mechanisms for ensuring legality, but by social ones, which can be understood as, for example, the introduction of educational programs in mass media.

In order to form the foundations of ecological culture in society, the mass media are able to participate in solving the tasks of environmental education, spreading ecological knowledge, information about the state of the environment, natural resources, and environmental safety. It should be especially noted the role that mass media can play in environmental education of the population, demonstrating the implementation in the state of the principle of inevitability of responsibility for committing offenses. They perform the function of establishing an information link between the inevitability of the state's response to criminal offenses against the environment and the consciousness of each addressee of prevention.

If a person doubts the inevitability or is sure of his impunity, even a perfect state response system will be completely powerless. In order to form the individual's subjective confidence in the inevitability of the negative consequences of his criminal acts in the field of ecology, an important condition is the coverage in the mass media of information about committed criminal offenses at the same time as information about criminal responsibility and punishment of criminals. It is advisable to familiarize the population with criminal law prohibitions by broadcasting not educational programs due to their low popularity, but documentaries that demonstrate the adverse and dangerous consequences of relevant actions in the field of the environment prohibited by criminal law.

The formation in public consciousness of ecological knowledge, norms, values and standards that direct any human activity to the preservation of the environment is a rather long and time-consuming process that requires coherence and consistency of actions of social institutions (family, education, public organizations, mass media information, etc.) and the state, which is obliged to coordinate it, performing an environmental function.

There is no doubt that the main potential of activities for the prevention of environmental crime is not concentrated in criminal legal measures, but in the adequate effectiveness of the influence on public consciousness, in the formation of environmental culture. This long multi-stage and multi-level process needs an appropriate legal basis. The Law of Ukraine «On Protection of the Natural Environment» only indirectly concerns this issue, establishing brief general provisions on the education system in the field of environmental protection and environmental education.

We believe that in order to improve the system of measures to prevent crime against the environment, the issue of the formation of ecological culture and ecological education of the population in modern conditions should be reflected in a special legislative act. In our opinion, it would be appropriate to adopt the Law of Ukraine «On the Ecological Culture of the Population», which would propose systematic regulation of the formation of ecological culture, including issues of environmental education and upbringing.

State regulation provides for the implementation of comprehensive measures in the field of environmental policy with the aim of streamlining them, establishing general norms and rules of social behavior for the protection of living and non-living nature of the environment, protecting the health and life of the population, organizing and maintaining the rational use and reproduction of natural resources. Under the condition of effective functioning of state regulation, the need for direct intervention of the state and its institutions in the activities of environmental structures is included (Lazor, 2004, p. 8-9).

At the same time, it is important that the adoption and implementation of the state environmental policy is carried out in compliance with the ecological, social, humanitarian, ecological and legal principles of preservation, reproduction and improvement of the natural environment, safe and favorable for the health and life of the citizens of Ukraine (Zarzytskyi, 2012, p. 8).

In order to increase the effectiveness of combating violations of legislation in the field of the environment, it is considered necessary to carefully plan the processes of development and application of measures of an organizational, legal and other nature aimed at preventing environmental crime, with mandatory consideration of the results of previous analytical activities regarding the results of law enforcement practice in the field of combating criminal violations against the environment.

The insufficient level of financing of state nature protection structures can lead to significant negative consequences for the environment. The problem of ensuring the independence of the activities of state environmental protection structures, which guarantee the interests of society, is relevant in all countries. In states with democratic regimes and free market relations, the probability of lobbying by large corporations and high-ranking representatives of elites remains quite high.

In many countries, wealthy and influential groups prevent the adoption of legislation that would meet higher environmental standards, in particular in terms of granting additional control powers to environmental protection structures. Thus, one of the reports of the international analytical center InfluenceMap, for example, cited evidence of lobbying by the largest oil companies for measures aimed at supporting policies against global warming. Oil giants such as ExxonMobil, Shell, Chevron, BP, and Total spend almost $200 million a year, including actively using social media, to block political decisions and their compliance with climate change bills (Laville, 2019).

Among other measures, it should be noted the need to develop a unified state policy in the field of combating organized environmental crime, as well as conducting a criminological examination in the field of environmental

protection of regulatory and legal acts, designed to identify the possibility of using gaps in the legislation in order to legalize schemes of criminal behavior. The activity of control and supervisory bodies for the detection and prevention of criminal offenses of this category needs improvement.

Summarizing, we note that environmental crime at the current stage has a clearly expressed organized, transnational character due to the systemic connections of environmental crimes with other actions (Orlovska, 2022, p. 46). The effectiveness of combating it directly depends on efforts to neutralize it at all stages of committed criminal offenses. An important role is played by the unification of efforts of law enforcement agencies and law enforcement agencies of various states to stop ecologically criminal behavior, neutralization of all stages of implementation of a criminal offense: planning, illegal extraction of resources, transportation, sale, laundering of proceeds obtained through crime.

The elimination of the economic basis of the activities of criminal groups, the reduction of their profitability is the key to success in the fight against them. The improvement of international legislation in this area will allow to create at the level of individual states a complex system of measures against organized environmental crime and to unify national legislative systems (terminology, compositions, as well as sanctions applied for the commission of criminal offenses against the environment by organized groups).

Conclusions

According to the results of the scientific article, the main conceptual directions of combating crime against the environment in Ukraine are highlighted:

- The use of social mechanisms for ensuring legality in the researched area, in particular, the activation of explanatory and educational work, the introduction of educational programs in mass media on information about the state of the environment, natural resources, and environmental safety;
- Reflection in the corresponding profile legal act - the Law of Ukraine «On the ecological culture of the population» provisions aimed at the formation of ecological culture, education and upbringing of the population in modern conditions;
- Careful planning of the processes of development and application of measures of an organizational, legal and other nature, aimed at preventing crime against the environment, with mandatory consideration of the results of previous analytical activities regarding the results of law enforcement practice in the specified area;

- Improving the activities of control and supervisory bodies for the detection and prevention of criminal offenses, other state nature protection structures, increasing their funding;
- Development of a unified state policy in the field of combating organized environmental crime, carrying out a criminological examination in the field of environmental protection of normative legal acts, aimed at identifying gaps in the legislation;
- Uniting the efforts of law enforcement agencies and law enforcement agencies of various states to stop ecologically criminal behavior, neutralize all stages of the implementation of a criminal offense: planning, illegal extraction of resources, transportation, sales, laundering of proceeds obtained through crime.

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Principles of law in the legislative and law enforcement process

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Abstract

The purpose of the research was to study the sufficient and necessary conditions for applying the principles of law in the processes of law making and execution. In the main content it has been established that the principles of law should be understood as universal, fundamental, basic provisions and ideas reflecting deep foundations of human existence, general relations formed by the participants of legal realities as a result of their social interaction and as the basis for legal development. The following methods were used in the research: analysis of biographical sources, synthesis, deduction, comparative analysis and meta-analysis, etc. In the conclusions of the case it has been shown that consistent adherence to legal principles by legislative and law enforcement bodies will create an atmosphere of predictability and stability of legislation in society. Finally, the principles enshrined in the Constitution and codes of Ukraine should become a prerequisite for modern Ukrainian society to implement a humanistic concept of personality, education of legal subjects, an effective norm on a par with other norms regulating specific relationships, and should not remain only a statement.

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Keywords: law enforcement; principles of law; legislative activity; police activity; legal development.

Principios del derecho en los procesos legislativos y de aplicación de la ley

Resumen

El propósito de la investigación fue estudiar las condiciones suficientes y necesarias para aplicar los principios del derecho en los procesos de elaboración y ejecución de la ley. En el contenido principal se ha establecido que los principios del derecho deben entenderse como disposiciones universales, fundamentales, básicas e ideas que reflejan fundamentos profundos de la existencia humana, relaciones generales formadas por los participantes de las realidades jurídicas como resultado de su interacción social y como la base para el desarrollo jurídico. En la investigación se utilizaron los siguientes métodos: análisis de fuentes biográficas, síntesis, deducción, análisis comparativo y metaanálisis, etc. En las conclusiones del caso se ha demostrado que la adhesión coherente a los principios jurídicos por parte de los órganos legislativos y encargados de hacer cumplir la ley, creará una atmósfera de previsibilidad y estabilidad de la legislación en la sociedad. Finalmente, los principios consagrados en la Constitución y los códigos de Ucrania deberían convertirse en un requisito para que la sociedad ucraniana moderna implemente un concepto humanista de la personalidad, la educación de los sujetos de derecho, una norma eficaz a la par de otras normas que regulan relaciones específicas, y no deberían seguir siendo únicamente una declaración.

Palabras clave: aplicación de la ley; principios del derecho; actividad legislativa; actividad policial; desarrollo jurídico.

Introduction

The problem of principles of law is quite relevant in the current Ukrainian legal development. Effectiveness of legal development, of course, depends on the starting ideas this development is based on. People's legal awareness is influenced not so much by specific legal prescriptions as by general legal ideas, provisions, postulates that establish a certain hierarchy of values, a number of fundamental values that society should protect and be guided by. Legal principles are basic ideas and provisions that, on the one hand, reflect established views on the law and its essence, reveal its substantive

and meaningful characteristics, and fix legal values; on the other hand, they are generally accepted requirements that are expressed in a generalized form and are addressed to the subjects of the law.

1. Literature review

The issue of of principles of law was studied in scientific publications by Halaburda Nadiia, Leheza Yevhen, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna and others. etc. And although the issue of principles of law has been repeatedly considered in legal science, a unified approach to understanding their nature has not been formed.

According to A.M. Kolodiy, the principles provide internal integrity to the existing legal system, they serve to strengthen law and order, public discipline, and guarantee realization of Ukrainian citizens' interests and rights. Provided they are enshrined in the Constitution, such principles ensure the unity of law creation, implementation and protection processes. Principles of law are a criterion for evaluating the law and they are a methodological basis for its further improvement in the sense that at the same time, on the basis of the principles, the level and effectiveness of law implementation are evaluated, and on the basis of these particular categories the law is learned and improved (Kolodii, 1999).

Domestic legislation (including sector specific legislation) does not provide a concept of principles of law. This gives rise to differences in the definitions proposed by scientists, in their elemental composition, this also creates difficulties in the effective application of legal principles in law-making and law-enforcement activities and allows us to put forward a thesis about the need to develop a single concept and enshrine it in legislation.

At the same time, it is necessary to recognize that the legislative consolidation of principles of law does not yet mean its final and unconditional transition from the sphere of legal awareness to the practical plane. It is necessary to ensure implementation of principles of law in the process of law-making and law-enforcement activities, as well as in behavior of legal subjects.

The nature of the state itself can be largely judged about based on the principles the legal order is based on (Petryshyn, 2002:193). And a legal state should optimally and in a balanced way express needs and interests of all classes and social groups, it should become a social democratic state.

In their content principles of law fix necessary and essential connections that exist in society and in law, they allow to establish such an order that to the greatest extent contributes to their strengthening and development.

It is necessary to remember that the influence caused by the principles on society consists in the fact that they help in education of citizens as well as in formation of a high legal culture in them. Universal legal principles of law today require in-depth handling and study in order to statically implement them into the practice of application. Recognition, observance and application of these principles are signs of democracy of the state and a criterion of the "rule of law" concept.

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers regarding application of principles of law in law-making and law-enforcement processes, etc.

With the help of the epistemological method, application of principles of law in the law-making and law-enforcing processes, etc., was clarified, thanks to the logical-semantic method, the conceptual apparatus was deepened, application of principles of law in the law-making and law-enforcing processes, etc. was determined. Thanks to the existing methods of law, we managed to analyze the essence of applying principles of law in law-making and law-enforcement processes, etc.

3. Results and discussion

The principles enshrined in the current Constitution of Ukraine, in particular, the principle of democracy (Art. 1), the principle of socially oriented state (Art1), the principle of the rule of law (Art. 1 and Art. 8), the principle of a human being as the highest social value in Ukraine (Art. 3), the principle of inalienability of human rights (Art. 20), the principle of equality of all citizens in their rights (Art. 21), the principle of pluralism of ownership forms (Art. 15, p.1), respect for property rights (Articles 41,42), the principle of derivative nature of state power in relation to the person and people (Art. 3),the principle of distribution of power, the principle of impartial and fair distribution of public goods (Art. 95) etc. (Law of Ukraine, 1996).

It is a pity that such fundamental ideas are only declarative in nature and have no relation to the living (actual) life of modern Ukrainians.

The consequence of this consists in a total crisis of all spheres of life of the citizenry, as well as of state power at all levels, and Ukraine's total lagging behind the developed democratic countries of the world, relegating the country to the backwoods of history (Halaburda *et al.*, 2021).

Analysis of the existing scientific literature shows that the modern theory of understanding principles of law in domestic legal science does not provide the modern practice with unambiguous approaches to the way of principles of law, and it does not clearly explain what exactly such principles consist of, where and how they arise, etc.

In the context of the legal approach, principles of law are not only those provisions enshrined in the legislation and other sources of legal norms, but also the fundamental ideas of legal consciousness, which were formed during thousands of years of human coexistence, accumulated the invaluable experience of generations and peoples of different eras, adequately and briefly reflected in human interests and needs, and therefore received general recognition in activities of justice bodies, other subjects of domestic and international law, despite the lack of their formal fixation in objective law(Svianadze, 2022).

Principles, as well as legal norms, reflect in a very generalized form the essential characteristics, certain regularities of development of social relations. However, the specificity of their nature is that they express laws of a deeper order. Principles of law are not a product of empirical, rational thinking typical for all legalists, (thinking producing norms at this level), but they are a product of rational thinking, they are a synthesis of a higher categorical level. Like norms, principles are completely suitable for regulating legal relations, for law making, law enforcement. That is, it can be considered that characteristics of principles of law are not only certain requirements to the system of legal norms, but also requirements to the real behavior of subjects of legal relations (Leheza *et al.*, 2022).

According to O.O. Uvarova, one of the problems of such principles consists in uncertainty of their content. Application of Principles of Law is impossible without revealing their content, and this is the biggest problem (Uvarova, 2007).

A rule of law is always a defined rule of conduct, imperative one or dispositive (optional) one. Principle of law is an abstract imperative requirement. And it is their abstract wording that "frightens off" law enforcement officers who must be helped by scientists

The main task of legal science in the study of law enforcement function of principles of law is to reveal their content through a system of requirements. Analysis of practice applied by the European Court of Human Rights should play an important role in this. Disclosure of the content of principles of law through a system of requirements not only simplifies the task of law enforcers, but also limits their discretion (Leheza *et al., 2022).*

Principles of law characterize not only the essence, but also the content of law, reflect not only its internal structure, statics, but also the entire process of its application. Principles of law have a great influence on the entire

process of preparing normative acts, their issuance, and establishment of guarantees (Todyka, 2001).

It would be incorrect to say that principles of law are always on the surface of law. Often, in order to find and analyze them, it is necessary to delve into the essence of law. They also serve as general guidelines in law-making and law enforcement.

Legal principles should play the role of a starting point in law-making activities when developing and adopting new laws and codes and making changes to existing ones.

Management of the requirements of principles of law, their consideration in the process of forming legislation and implementation in the norms of industry legislation will contribute to increasing the efficiency of law-making activities, and this will also ensure the system and unity of legal norms (Kyrychenko *et al*., 2022).

Legislators must constantly solve the problem of achieving an optimal combination of stability of legal regulation and its flexibility, as well as the ability to adequately regulate newly emerging social relations (Bondarenko, 2009). Ideally, this will enable legislators to balance interests of all subjects of legal relations during the rule-making process; the adopted norms of behavior will meet the criteria of justice, and a certain restriction of rights will be allowed only for the public benefit, and not as we have today, for example, with changes in tax, labor, pension, election legislation, etc.

Ignoring legal principles in the process of law formation leads to legal nihilism, as well as to existence of such phenomena as collision of legal norms, adoption of so-called "dead norms", violation of the requirements of the Constitution, as well as violation of the rights and freedoms of humans and citizens.

Effectiveness of principles of law is verified by practice. If such principles do not become a reference point for subjects of legal relations, are leveled by them, then in such a society the principles do not reflect the real value system of society. This especially applies to use of such principles in judicial proceedings.

Conclusion

Thus we can state that principles of law must be understood as universal, fundamental, basic provisions, ideas that reflect deep foundations of human existence, general relations formed by participants of legal relations as a result of their social interaction and are the basis for legal development. From the point of view of the legal approach, it is emphasized that deviation

from these principles, denial of them in law-making and law-enforcement activities threaten to initiate destruction of law as such, destabilization of social life, state-authority activity, destruction ofdemocratic values, etc. Therefore, affirming these principles and protecting them is an urgent task for every individual, for the entire civil society, and for the state authorities.

Consistent and consistent adherence to legal principles by law-making and law-enforcing bodies will create an atmosphere of predictability and stability of legislation in society.

Principles enshrined in the Constitution and codes of Ukraine should become a requirement for modern Ukrainian society in implementing a humanistic concept of personality, education of subjects of law, an effective norm on a par with other norms regulating specific relations, and they should not remain a declaration.

Now, in law enforcement practice, lawyers with an increasing frequency turn to the basic principles and this indicates that these principles are gradually taking roots in our society. The main areas of implementing principles of law in realization of judicial proceedings are the following: application of legal principles to eliminate gaps in the current legislation; application of legal principles when making a decision on specific cases; filling the legal principle formulated by legislators with specific legal content; a direct indication of inconsistency of normative legal acts and specific legal norms with the requirements of the general principles of law and with branch-specific principles.

When considering specific cases, the court must first of all be guided by the principles of law. When considering a dispute between conflicting parties, the court can and should refer to the principles of law in all cases, and especially when faced with a legal relationship not regulated by law or when a conflict of legal norms arises. This will serve as a guarantee of correct application of legal norms, adoption of well-founded and legal decisions, since it is through judicial practice that the fundamental principles and main ideas of the legal system are revealed, including those that have not been normatively enshrined in legislation.

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Digitalization of criminal proceedings in Russia and on the international stage *

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Abstract

The article considers the application of artificial intelligence systems in criminal proceedings. In jurisprudence, it is possible to use information technologies through the introduction of electronic document management and remote holding of court sessions. However, the question of automating decision making remains open, especially in the field of criminal procedure. The purpose of the present study was to identify the positive and negative features of artificial intelligence systems operating in the criminal practice of various countries and to consider the possibility of introducing such systems into the Russian criminal process, taking into account their compliance with their purpose and principles. The methodology included a systematic method of scientific cognition, a comparative legal method and a formal logical method, etc. During the research, the regulatory and legal framework of different countries was studied, which makes it possible to apply artificial intelligence systems in criminal proceedings, as well as to assess the work of foreign and Russian researchers in this field. It is concluded that the implementation of such principles as: the independence of judges and the adversarial nature of the parties in criminal proceedings are difficult in a legal framework dominated by artificial intelligence.

Keywords: criminal proceedings; artificial intelligence; judge; decision-making; digitalization.

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Digitalización de los procesos penales en Rusia y en el escenario internacional

Resumen

El artículo considera la aplicación de sistemas de inteligencia artificial en procesos penales. En jurisprudencia, es posible utilizar las tecnologías de la información mediante la introducción de la gestión electrónica de documentos y la celebración remota de sesiones judiciales. Sin embargo, la cuestión de la automatización de la toma de decisiones sigue abierta, especialmente en el ámbito procesal penal. El propósito del presente estudio fue identificar las características positivas y negativas de los sistemas de inteligencia artificial que funcionan en la práctica criminal de varios países y considerar la posibilidad de introducir dichos sistemas en el proceso penal ruso, teniendo en cuenta su cumplimiento con su propósito y principios. La metodología incluyo un método sistemático de cognición científica, un método legal comparativo y un método lógico formal, etc. Durante la investigación, se estudió el marco regulatorio y legal de distintos países lo que permite aplicar sistemas de inteligencia artificial en procesos penales, así como valorar el trabajo de investigadores extranjeros y rusos en este campo. Se concluye que la implementación de principios, como: la independencia de los jueces y la naturaleza contradictoria de las partes en el proceso penal son difíciles en un marco jurídico dominado por la inteligencia artificial.

Palabras clave: procesos penales; inteligencia artificial; juez; toma de decisiones; digitalización.

Introduction

According to some research, robots will soon replace human labor in the intellectual sphere as well. People will have to learn how to interact with the products of human intelligence (Rezaev, Tregubova, 2020). Moreover, the National Strategy for the Development of Artificial Intelligence, adopted at the end of 2019, is focused on the increasing introduction of automated systems using artificial intelligence in social organizations and state bodies (Decree of the President of the Russian Federation No. 490 of October 10, 2019 "On the development of artificial intelligence in the Russian Federation").

According to a survey conducted by the All-Russian Center for the Study of Public Opinion, 85% of respondents did not express concern that their workplace might disappear in the foreseeable future due to robotics. At the same time, we should note that some experts predict an increase in unemployment due to technological progress (Abramov *et al.*, 2020).

For manual labor, such a replacement will certainly be a positive moment, but the automation of intellectual labor also raises a number of questions. It is necessary to develop such algorithms that will allow us not to doubt the objectiveness and accuracy of decisions.

Artificial intelligence systems are successfully applied in many areas (autopilots in airplanes and cars, financial management, medical diagnostics, etc.). However, the areas where it is necessary to make key decisions have not completely switched to automation. Artificial intelligence systems only help a person to make a decision by providing from one to several possible answers to a question. The final choice is still up to the person. In addition, there are a number of ethical points that must be observed.

Automated systems are gradually being introduced in jurisprudence sphere, but their extension to decision-making by judges, especially in criminal cases, causes discussions in the scientific community.

Research on this topic was conducted by both Russian and foreign scientists. A. A. Nasonov and R. Yu. Malueva proposed to expand the electronic document flow in the Russian criminal process (Nasonov and Malueva, 2020). O. I. Andreeva and O. A. Zaitsev consider it necessary to simplify the use of electronic signatures using a graphic tablet and a writing pen (Andreeva *et al.*, 2020). The issue of spreading electronic interaction mechanisms to all forms of legal proceedings was considered by I. S. Denisov (Denisov, 2018).

The works of foreign scientists are also of interest. Christopher Rigano (Rigano, 2019). Shai Danziger, Jonathan Levav, and Liora Avnaim-Pesso analyzed factors that influence judges' process decision-making and the possibility of leveling negative manifestations through the use of artificial intelligence systems (Danziger *et al.,* 2011). Benoit Dupont, Yuan Stevens, Hannes Westermann, Michael Joyce in their work "Artificial Intelligence in the Context of Crime and Criminal Justice" considered COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) and PSA (Public Safety Assessment) systems used in the United States (Dupont *et al.*, 2019).

However, the issue of e-justice systems functioning has not been fully studied. In the above-mentioned works, the authors only analyze certain aspects of artificial intelligence system application in criminal proceedings, without giving an unambiguous answer to the question of the possibility of full automation of decision-making by judges.

Clearly, such decisions will be distinguished by an unbiased approach based on the analysis of statistical data. However, the limited possibilities of individualization make us think about the introduction of artificial intelligence systems in the criminal process.

Within the framework of this paper, we will consider various approaches to the definition of artificial intelligence, the possibility of its introduction into criminal proceedings. We will also discuss foreign experience in using electronic justice systems, as well as compliance with the purpose and principles of criminal proceedings, and the ethical requirements of decisions made by robot judges.

1. Materials and Methods

The goal of the present study is to identify the positive and negative aspects of artificial intelligence systems application in criminal proceedings.

The objectives of the study are: 1) consideration of various approaches to the definition of the concept "artificial intelligence"; 2) conducting a comparative study of the theory and practice of using artificial intelligence systems in criminal proceedings in Russia and foreign countries; 3) identifying ethical and systemic contradictions in the application of artificial intelligence systems in decision-making by judges; 4) finding and solving problems in the use of artificial intelligence in criminal proceedings.

The methodology includes a systematic method of scientific cognition that reflects the relationship of social, economic, political and legal phenomena with the possibility of introducing artificial intelligence systems into the criminal process. To achieve the research objectives and solve the tasks set, more specific methods were used, such as the comparative legal method through which the features of legal regulation of electronic justice systems functioning in the criminal process of various countries are analyzed. There was also applied the formal logical method consisting in the interpretation of legal norms content regulating artificial intelligence systems, etc.

In the course of the study, it is planned to consider the foreign experience of implementing artificial intelligence systems in the criminal process. To perform this, it is necessary to compare the regulatory and legal frameworks regulating the possibility of functioning of e-justice systems in different countries.

An analysis of international legislation in this area will allow us to identify the attitude of the international community to the problem under study and to implement some norms in the Russian criminal process.

The authors rely on the works of Russian and foreign scientists, which contain a detailed analysis of certain aspects of the topic. Summing up the existing legislative and practical restrictions will make it possible to identify the optimal ways to solve existing problems.

2. Results analysis

In recent years, we have heard more and more about electronic justice. Electronic justice is a method and form of implementation of procedural actions provided for by law, based on the use of information technologies in the activities of courts, including the interaction of courts, individuals and legal entities in electronic (digital) form. This definition is given in the Decree of the Judicial Department at the Supreme Court of the Russian Federation No. 362 of November 26, 2015 (Decree of the Judicial Department at the Supreme Court of the Russian Federation of November 26, 2015 No. 362 "On approval of the List of basic concepts and terms used in the normative legal acts of the Judicial Department regulating the use of information and telecommunications technologies in the activities of courts, departments of the Judicial Department in the territorial entities of the Russian Federation and institutions of the Judicial Department").

According to this definition, electronic justice is focused exclusively on the judicial system and does not involve decision-making by an automated system. To a greater extent, this approach is explained by the desire to facilitate some procedural points during the trial, rather than replace the judge.

Partially electronic document management has already been introduced in many branches of procedural law. It is now possible to conduct court proceedings remotely, but robots have not yet completely replaced a person in any legal profession.

The elements of electronic justice are: openness of information; remote interaction; accessible database of court decisions; international recognition of court decisions; electronic document management; electronic remote initiation of proceedings and submission of documents; electronic provision of information; electronic consulting (Ovchinnikov and Antonov, 2016).

Some elements of electronic justice already exist and are being developed in Russia in all forms of legal proceedings. The use of videoconferencing during the trial is provided for by Russian legislation, which reduces court costs and speeds up case hearing, as well as the costs of escorting the accused and minimizes the risk of escape during the prisoner escort under guard (Sofiychuk and Kolpakova, 2020). However, not all courts, especially local district courts, have the technical capability to provide this type of communication, which will hinder its implementation. However, on the whole, it is not new for Russian pre-trial and judicial practice to be able to submit petitions, complaints and applications in electronic form, signed with an electronic signature, notifying the participants of the process via SMS or e-mail.

In addition, in Russia, the composition of the court for the hearing of each criminal case is formed taking into account the workload and specialization of judges by using an automated information system, which ensures impartiality. If it is impossible to use it, it is allowed to form the composition of the court in a different order, excluding the influence of persons interested in the outcome of the trial on its formation (Dobrovlyanina, 2019).

In foreign practice, when resolving civil, arbitration and administrative cases, they also resort to the help of automated systems, which allows optimizing the decision-making process. For example, in Brazil, there is an "Electronic Judge" system that can be used to resolve disputes arising from road accidents. The program algorithm analyzes the submitted documents and evidence, and then offers a draft verdict to be considered by the court.

In Germany, an automated system is used to resolve claims for child benefits. Online trials for some categories of cases (mainly arbitration and civil cases) are held in Australia, Canada and China. In China, the world's first Hangzhou Internet court was opened in 2017. Its peculiarity is that the proceedings are conducted entirely via the Internet, starting with the filing of a claim and ending with the execution of a court decision (Sheremetyeva *et al.*, 2020).

The term "artificial intelligence" was first introduced by John McCarthy at the first-ever conference on artificial intelligence at Dartmouth College. He defined it as the science and technology of creating intelligent machines (IBM Cloud Education, 2020).

Later definitions give a detailed understanding of its purpose.

Artificial intelligence is the ability of a machine to perceive the environment, respond to it independently and perform tasks that usually require human intelligence and decision-making processes, but without direct human intervention (Rigano, 2019).

Artificial intelligence is also defined as the ability to process a lot of data based on algorithms and machine learning, which allows one to detect and analyze patterns for automatic generation of autonomous activities and new decision-making rules that are not offered by people (IBM Cloud Education, 2020).

A more scientific definition revealing the principle of artificial intelligence operation was proposed by the participants of the European Committee on Crime Problems: "a set of certain methods, including mathematical logic, statistics, probability, computational neuroscience and computer science, in order to enable a machine to imitate or even replace human cognitive abilities" (European Committee on Crime Problems (CDPC). (2020). Feasibility study on a future council of Europe instrument on artificial intelligence and criminal law. Strasbourg).

These definitions are united by the fact that artificial intelligence is presented as a system that seeks to make the decision-making process more rational and objective, excluding the influence of external and internal human factors on the process itself and the final decision.

Human decisions and behavior are based on various, sometimes incalculable factors that are beyond the understanding of any algorithm. The main task of using artificial intelligence is minimizing subjectivism.

However, in our opinion, the sphere of criminal proceedings is the least subject to automation. This is especially true for the decision-making process of the judge. Nevertheless, there are quite successful examples of technologies application for the resolution of criminal law disputes in the world practice. Thus, in China, with the help of artificial intelligence, criminal cases are resolved in such categories as murder, robbery, rape and attempted state security. In addition, DARE system, developed in the United States, is also of interest. It is set to recognize false witness statements based on the assessment of a person's voice, facial expressions, speech, and other behavioral characteristics.

Also, in the United States, electronic document management and PredPol system are applied. The PredPol system uses information about the behavior of individuals to assess the likelihood of repetition of crimes. At the same time, a person against whom a court decision was made using digital technologies has the right to get acquainted with the algorithm on the basis of which a "smart decision" was made (Novikova, 2020). In our opinion, this condition should become mandatory for all countries using automated justice systems.

In addition to the systems mentioned above, the USA widely uses COMPAS (Correctional Offender Management Profiling for Alternative Sanctions) and PSA (Public Safety Assessment) systems. COMPAS can predict re-offending rate, the risk of violent recidivism and contempt of a court using various personal data. PSA bases its forecasts on nine risk factors: age at current arrest, current violent offense, current violent offense & 20 years old or younger, pending charge at the time of the offense, prior Disorderly Persons conviction, prior indictable conviction, prior conviction, prior violent conviction, prior failure to appear pre-trial in past 2 years, prior failure to appear pre-trial older than 2 years, prior sentence to incarceration.

Then it weighs each of these factors and performs a risk assessment that serves to predict the likelihood of repetition of a crime or refusal to go to trial. The advantage of PSA is that it makes its algorithm public, publishing the factors and methods used, which allows the judge to conduct his/her own analysis and make a final decision on his own (Dupont, Stevens, Westermann, Joyce, 2019).

An electronic register of criminal cases is being maintained in Kazakhstan and these materials are being digitized. Moreover, it is not necessary to have an electronic signature, the registration of which may cause difficulties for individuals and restrict their rights. Instead, you can use a signature tablet, which is a specialized peripheral device consisting of a graphic tablet and a writing pen (stylus), which makes it possible to create a digital analogue of the handwritten signature of its owner.

In addition, since 2019, a project on the introduction of artificial intelligence for predicting court decisions has been implemented in Kazakhstan. It is assumed that if it is difficult to make a decision, the judge will turn to this system for help. Upon request, it will form 10 best court cases, similar to the one that the judge considered. However, there is no case law in Kazakhstan, so it is unclear exactly how the judge will use the information received (Sushina and Sobenin, 2019).

In Germany, an electronic database with digitized criminal case materials is being made, which allows speeding up the process of acquainting the defender with the case which he receives through his/her special electronic mailbox. The possibility of submitting electronic documents related to criminal proceedings is also provided for in Estonia (Bryantseva and Soldatkina, 2019). Moreover, the applicant can apply to law enforcement agencies remotely. For person's identification, he/she needs to log in the e-toimik system using an ID card or mobiil-ID –identification of an individual via a mobile phone (Vilkovaa and Maslennikova, 2019).

Such systems help to optimize the process of exposure, investigation of crimes and resolution of criminal cases, as well as to eliminate bias in decision-making. For example, in his study Shai Danziger found that positive decisions of Israeli judges increase to ~ 65% after lunch breaks and gradually decrease to 0% by the next break (Danziger *et al.,* 2011). In this situation, there is a psychological factor that needs to be minimized.

It should be noted that in countries where artificial intelligence is used to make a final decision on a case, a priority is still given to the judge who passes the sentence. The automated system only offers possible options for resolving the dispute, one of which can be chosen by the judge. In this case, such systems act as assistants and kind of advisers to judges.

In equal measure, the advantage and disadvantage of an automated decision-making system is the absence of a subjective factor. A certain algorithm can calculate the strength and number of arguments, attributing the value of the initial reasons to probabilities and establishing the strength of internal logical connections. However, some scientists still recognize that in many real cases, the subjective confidence and intuition of the subject of evaluation plays the main role in establishing information.

Moreover, according to the Russian law, a judge must evaluate evidence according to his/her inner conviction, guided by the law and conscience (part 1 of Article 17 of the Criminal Procedure Code of the Russian Federation). Decision-making is significantly influenced by the life and professional experience of a judge, which the automated system does not have. According to Professor A.V. Tyaglo, the determination of individual evidence probabilities and the forces of probabilistic connections within the argumentation can to some extent be attributed to the discretionary powers of the investigator and the judge, that is, it can be argued that discretion has a significant intuitive basis (Tyaglo, 2013). In fact, when making a decision, only mathematical calculation is not enough, especially when imposing a sentence.

For instance, Professor Ya. I. Gilinsky adheres to the position that no technology can completely eliminate judicial errors. Moreover, the court solves questions about the actions of people with all their individualized life and psychological nuances that cannot be taken into account with the help of technology. Of course, judges can use the solution proposed by an automated system, but will this not be an encroachment on their independence? (Gilinsky. 2020).

The principle of independence of judges allows them to resolve emerging conflicts based on their own belief in the legality and validity of the decision they make. When performing their duties, judges must obey only the Constitution of the Russian Federation and federal legislation. No one has the right to interfere in the decision-making process of a judge, and all non-procedural appeals to judges on this matter are prohibited by law.

A judge should not "adapt" to someone's opinion, he needs to make a legal, reasonable and fair decision, which will contribute to the restoration of legal order in society. Judges need to abstract from external factors and try to make more objective decisions based on the law (Mikhailovskaya, 2010). With the introduction of robot judges, decision-making algorithms that will be built to some extent on the basis of existing judicial practice will not meet this principle.

It is noted that the practice of electronic courts appearance, including private ones, which has begun to spread, can negatively affect the independence and impartiality of judges. The introduction of such a system on a permanent basis will cause the need to develop requirements for technical characteristics and the mechanism for the administration of justice by a robot judge, as well as the legal basis for its functioning.

Moreover, it is not entirely clear how the adversarial principle that assumes equal procedural rights and obligations of the parties, will be implemented. This may negatively affect the defense side, whose participants are still not full-fledged subjects of proof (Kozyavin and Chistilina, 2016).

In 2018, the Council of Europe developed "Ethical principles concerning the use of artificial intelligence in judicial systems": 1) the principle of respect for fundamental rights; 2) the principle of non-discrimination (between individuals or groups of individuals); 3) the principle of quality and security (the use of reliable information storage and processing systems); 4) the principle of transparency, impartiality and reliability; 5) the principle of user control *(*"European Ethical Charter on the Use of Artificial Intelligence (AI) in judicial systems and their environment" (adopted at the 31st plenary session of the CEPEJ (Strasbourg, December 3-4, 2018).

Some of these principles are difficult to implement. For example, the principle of non-discrimination is often violated. For example, COMPAS system assigns a high risk of crime repetition to African-Americans - twice as often as to the others within two years after sentencing (Sushina and Sobenin, 2019). The third and fourth principles are more related to the reliability of automated systems use and their versatility. In our opinion, this is the main obstacle to the introduction of electronic justice. Not all countries are able to provide a reliable system for the protection and provision of personal data.

Also significant is the fact that, the interested party should be able to challenge the scientific validity of artificial intelligence algorithms application, for which they should be available in criminal proceedings not only for the judge, but also for the prosecution and defense parties.

No doubt, such systems have a number of advantages that allow minimizing the subjective factor when making decisions by a law enforcer. But they also have some related problems. Thus, there is a threat to the information security of automated information and telecommunications systems used in courts; there is a need to improve the mechanism for posting information about the activities of courts on official websites, including in the "open data" format.

In addition, free access to data on participants in criminal proceedings, their procedural status and actions will not allow them to fully observe their rights and freedoms. The dissemination of such information can contribute to premature, often erroneous conclusions about the course and outcome of the consideration of a criminal case, which will have a negative social effect for citizens involved in the criminal process, especially for the accused.

According to some researchers in the field of criminal procedure, electronic justice, as an opportunity to provide a solution to a criminal legal dispute to an automated system, is unacceptable. The imperfection of the legislation, its instability significantly complicates the work of the matrix of "electronic scales of justice". In some cases (special regional and ethnic conditions), the intuition and experience of a judge are invaluable, they allow him/her to make a fair decision.

When making a decision, the judge must take into account the specifics of culture, customs and traditions, religious foundations that may affect the type and amount of possible punishment (Duk, 2019). We share this point of view, since it is difficult to imagine that an automated system will be able to take into account all the nuances of the case under consideration. There are no so-called "standard" cases in criminal proceedings. In addition, the desire to individualize criminal responsibility would not allow us to switch to standard decision-making algorithms.

Moreover, the sentence is primarily a creative act of any judge. The introduction of an automated system for making a decision on a criminal case will lead to depersonalization of the final court decision and justice in general.

Digitalization of the criminal process will certainly facilitate the work of preliminary investigation bodies and the court, will speed up the criminal proceedings, ensure the safety of procedural documents in an unchanged form, the effectiveness of monitoring the legality and validity, etc. (Lazareva, 2020). However, a special program is not able to completely replace a person, especially in a situation where it is necessary to make a decision, since it does not have cognitive and emotional competence, and therefore there is a great risk of a formal approach to decision-making.

Conclusion

In our opinion, the digitalization of the criminal process is inevitable. Nevertheless, the question of its application degree remains open. The introduction of some elements of electronic justice, such as electronic criminal case, remote interaction, electronic document management, will have a positive impact on the effectiveness of criminal procedural activities.

However, the complete exclusion of a person from the decision-making mechanism, especially the final decision, will not meet the existing national and international principles of criminal proceedings and may lead to depersonalization of the sentence. The individualization of punishment, which should contribute to correction, will not be implemented, and therefore the deep social idea embedded in the purpose of criminal proceedings and the essence of punishment will lose its meaning.

Nevertheless, the presence of positive features that contribute to the objectification and rationalization of the decision-making process by the judge cannot be an absolute criterion when switching to an automated system. Moreover, the proposals to completely replace the participants in the criminal proceedings with an artificial intelligence system make us think about the moral component of justice.

It is not only a legal, but also a moral duty of a judge to pass a lawful, reasonable and fair sentence. Representatives of this profession, in addition to professional qualities, must also meet certain moral requirements, such as honesty, impartiality, integrity, integrity, tact, politeness, patience, a keen sense of justice, etc. An automated system cannot contain such qualities.

At the same time, borrowing foreign experience of the introduction of artificial intelligence systems into Russian legal practice will optimize some judicial processes. Thus, the widespread use of DARE, PredPol, and prediction of possible court decisions systems will significantly reduce the time and resources spent on decision-making by the subject of law enforcement. At the same time, the advantage of these systems is that the final decision is made by a person, which fully corresponds to the moral component of the criminal procedure.

Thus, the introduction of automated decision-making systems during the criminal process at this stage is premature and, at a minimum, will require the transition to a new system of criminal procedural evidence. However, the use of the latest achievements of science and technology in criminal proceedings fully meets modern requirements, especially in the context of a growing number of cybercrimes.

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Organizational and legal aspects of the protection of labor rights in the conditions of martial law in Ukraine

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Abstract

In this scientific research, with the help of general and special methods, the main trends in the development of labor law in the conditions of martial law introduced in Ukraine are determined. It also discusses the establishment of individual personal restrictions in the organization of labor relations, making the legal regulation of labor relations more flexible and the mobility of the worker in the exercise of the right to work, strengthening the protection of labor rights of workers, mainly of mobilized persons and guarantees of their realization. The authors' attention is focused on the fact that the legislative approach to the regulation of labor relations should take into account not only the interests of the state, but also the interests of individual citizens. The obtained results allow concluding that even in these difficult conditions the labor law prevails in the list of the basic rights of the subjects of labor relations, in accordance with international legal standards and guarantees of their implementation, along with the forms and methods of comprehensive protection of labor.

Keywords: labor relations; forms of labor; labor contract; employment; martial law.

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Aspectos organizativos y legales de la protección de los derechos laborales en las condiciones de la ley marcial en Ucrania

Resumen

En esta investigacion científica, con la ayuda de métodos generales y especiales, se determinan las principales tendencias en el desarrollo del derecho laboral en las condiciones de la ley marcial introducida en Ucrania. Ademas se discute el establecimiento de restricciones personales individuales en la organización de las relaciones laborales, flexibilizando la regulación jurídica de las relaciones laborales y la movilidad del trabajador en el ejercicio del derecho al trabajo, reforzando la protección de los derechos laborales de los trabajadores, principalmente de las personas movilizadas y las garantías de su realización. La atención de los autores se centra en el hecho de que el enfoque legislativo de la regulación de las relaciones laborales debe tener en cuenta no solo los intereses del Estado, sino también, los intereses de los ciudadanos individuales. Los resultados obtenidos permiten concluir que, incluso en estas condiciones dificiles el derecho laboral impera en la lista de los derechos básicos de los sujetos de las relaciones laborales, de conformidad con las normas jurídicas internacionales y de las garantías de su aplicación, junto a las formas y métodos de protección integral del trabajo.

Palabras clave: relaciones laborales; formas de trabajo; contrato de trabajo; empleo; ley marcial. protección de los derechos laborales.

Introduction

The Constitution of Ukraine defines the key role of the principle of equality of human and citizen rights and freedoms in any legal relationship between the state and its citizens (CONSTITUTION OF UKRAINE, LAW OF UKRAINE, 1996). In addition, the current legislation emphasizes the undeniable importance of observing this aspect in the organization of the functioning of every sphere of life, which also applies to the sphere of labor relations. It is the Code of Labor Laws of Ukraine that enshrines the unity of labor legislation regardless of race, color, political, religious and other beliefs, gender, ethnic and social origin, property status, place of residence, language or other characteristics, etc. (CODE OF LABOR LAWS OF UKRAINE, 1971), labor relations between employer and employee are regulated, guarantees are provided for the conclusion, change and termination of an employment contract (Article 22), the grounds for

termination of an employment contract are defined (Article 36) (CODE OF LABOR LAWS OF UKRAINE, 1971).

By entering into an employment contract, employees exercise their constitutional right to work, the right to proper, safe and healthy working conditions, to a wage not lower than that determined by law, the right to timely remuneration (Article 43), the right to participate in trade unions with in order to protect one's labor and socio-economic rights and interests (Article 36), the right to strike to protect one's economic and social interests (Article 44), the right to rest (Article 45), the right to social protection (Article 46) (CONSTITUTION OF UKRAINE, 1996).

The introduction of martial law in Ukraine on the basis of the Law «On the Legal Regime of Martial Law» (ON THE LEGAL REGIME OF MARTIAL LAW, LAW OF UKRAINE, 2022) led to a new stage in the development of legal relations in the labor sphere. After all, it was this area in which the interests of citizens are intertwined that required an immediate response from the legislator in order to ensure its stable functioning. Conflicts between the interests of employers and employees in the conditions of a special legal regime required state intervention, the adoption of new laws, the introduction of appropriate changes and additions to the current legislative acts.

It must be stated that the introduction of changes to the labor legislation somewhat complicated legal relations in the specified area regarding: regulation of remote labor activity, legal regulation of the right to vacation, actions of the parties to the employment contract in case of loss of contact with one of them, responsibility for non-fulfillment of the terms of the contract, implementation fulfillment of labor obligations in the status of a refugee, etc.

1. Methodology of the study

The methodological basis of the research is represented by general scientific methods of understanding social phenomena and special methods of understanding state-legal phenomena and processes. Thus, among general scientific methods, the following were used during the research: dialectical (the process of establishing working conditions is studied in an inextricable connection with the social policy and economy of the state), analytical, and the method of specificity (applied during the analysis of current legislation and the study of court decisions); systemic (the analysis made it possible to determine the main organizational and legal aspects of the protection of labor rights in the conditions of martial law in Ukraine) and formal-logical (it made it possible to generalize problems and formulate logical conclusions). Among the special legal methods used: the

comparative legal method, the method of interpreting legal norms, method of legal modeling and others.

2. Analysis of recent research

The issues of the organization of labor relations were the subject of many scientific works, and mostly related to the protection of the rights and legitimate interests of employees and employers in peacetime conditions. At the same time, the specified question became especially relevant in the realities of wartime in Ukraine due to legislative changes in the legal regulation of labor relations.

In this publication, we will make an attempt at a scientific analysis of the organizational and legal aspects of the protection of labor rights in the conditions of martial law in Ukraine, and we will find out the trends in the development of labor relations in the specified area. Achieving the outlined goal requires a generalization of current changes in labor legislation, determination of the basics of legal support for the activities of persons who implement a remote form of work, analysis of the peculiarities of the regulation of legal relations between employers and employees, in particular, mobilized persons.

3. Results and discussion

The development of an effective sectoral mechanism for ensuring the labor rights and interests of employers and employees is the main task of labor law. First of all, it is about the proper legal definition of the system of labor rights of the employer and the employee in accordance with international standards, about guarantees of their implementation, forms, methods and means of protection and protection.

During martial law, labor legislation was adapted to new realities, as a result of which two important laws were adopted: «On the organization of labor relations under martial law» dated 15.03.2022 No. 2136-IX (ON THE ORGANIZATION OF LABOR RELATIONS UNDER MARTIAL LAW, LAW OF UKRAINE, 2022) and «On Amendments to Certain Legislative Acts of Ukraine on Optimizing Labor Relations» dated 01.07.2022 No. 2352-IX (ON AMENDMENTS TO CERTAIN LEGISLATIVE ACTS OF UKRAINE ON OPTIMIZING LABOR RELATIONS, LAW OF UKRAINE, 2022). The specified laws define the procedure for public service, service in local self-government bodies, specifics of labor relations of employees of all enterprises, institutions, organizations in Ukraine regardless of the form of ownership, type of activity and branch affiliation, representative offices of

foreign economic entities in Ukraine, as well as persons, who work under an employment contract concluded with natural persons (hereinafter – employees) during the period of martial law introduced in accordance with the Law of Ukraine «On the Legal Regime of Martial Law».

Law of Ukraine No. 2136-IX «On the Organization of Labor Relations in the Conditions of Martial Law» (ON THE ORGANIZATION OF LABOR RELATIONS IN THE CONDITIONS OF MARTIAL LAW, LAW OF UKRAINE, 2022) defines that the norms of the labor legislation in the part of relations regulated by the adopted Law do not apply , and certain constitutional rights of citizens may be restricted during the entire period of martial law. The law defines the main aspects of the legal regulation of the processes of concluding and terminating an employment contract, establishing and accounting for the time of work and rest of employees, wages, vacations and suspension of the employment contract in the conditions of martial law.

In the conditions of war, it is difficult to deny the importance of non-standard, remote or home-based forms of work. The legal basis of labor relations is also a typical labor contract, but the key distinguishing feature is that these types of employment are built on the principle of flexibility of the working time regime, which allows the establishment of a different work regime than that defined by the rules of the internal labor procedure, but on the condition of compliance with the law of Ukraine «On the Organization of Labor Relations in the Conditions of Martial Law» of daily, weekly or other working hours determined for a certain accounting period (ON THE ORGANIZATION OF LABOR RELATIONS IN THE CONDITIONS OF MARTIAL LAW, LAW OF UKRAINE, 2022). The principle of self-regulation of working hours allows the employee to adjust the time of the start and end of work and the length of the working day, which is especially important in war conditions and determines the level of safety and security of the individual.

According to Art. 119 of the Labor Code of Ukraine, during the performance of state or public duties, if, according to the current legislation of Ukraine, these duties are performed during working hours, employees are guaranteed the preservation of the place of work and all conditions stipulated by the labor contract already concluded between the employer and the employee (CODE OF LABOR LAWS OF UKRAINE, 1971).

This means that for employees called up for fixed-term military service, military service by conscription of officers, military service by conscription during mobilization, for a special period, military service by conscription of reservists in a special period, or accepted for military service by contract, including by concluding a new contract for military service, during the validity of the special period for the period before its end or until the day of actual release, the place of work, position and average earnings at

the enterprise, institution, organization, farm, agricultural production cooperatives, regardless of subordination and form of ownership, and at individual entrepreneurs, in which they worked at the time of the draft. Such employees have the right to receive financial support from the State Budget of Ukraine in accordance with the Law of Ukraine «On Social and Legal Protection of Servicemen and Members of Their Families» (ON SOCIAL AND LEGAL PROTECTION OF SERVICEMEN AND MEMBERS OF THEIR FAMILIES, LAW OF UKRAINE, 1991).

One of the characteristic trends in the development of labor law and the reform of labor legislation in the conditions of martial law is the strengthening of the protection of the labor rights of employees and guarantees of their implementation.

It should be emphasized that the Law of Ukraine «On Amendments to Certain Laws of Ukraine Regarding the Functioning of the Employment Spheres and Mandatory State Social Insurance in Case of Unemployment During Martial Law» No. 2220-X of 04/21/2022 established a number of additional guarantees in the spheres of employment and mandatory state social insurance in case of unemployment in a special period. Among the novelties introduced by the specified law, in particular, the introduction of one-time financial assistance for the organization of entrepreneurial activity, simplification of the procedure for awarding unemployment benefits, regulation of the procedure for providing benefits for partial unemployment, etc. (ON AMENDMENTS TO CERTAIN LAWS OF UKRAINE REGARDING THE FUNCTIONING OF THE EMPLOYMENT SPHERES AND MANDATORY STATE SOCIAL INSURANCE IN CASE OF UNEMPLOYMENT DURING MARTIAL LAW, LAW OF UKRAINE, 2022).

Special attention will be focused on the key moments of the organization of labor relations during the war, in particular, we will consider the peculiarities of the organization of downtime, the conclusion of fixed-term contracts, transfers and changes in essential working conditions.

The concept of downtime is legislated in Articles 34 and 113 of the Labor Code of Ukraine. Downtime is a stoppage of work caused by: the lack of organizational or technical conditions necessary for the performance of work; inevitable force; other circumstances. Therefore, layoff is an exceptional case in the production process (enterprise activity) when an employee is temporarily unable to perform his or her job functions for an objective reason. Most often, during martial law, the reasons (grounds) for the introduction of downtime are: the location of the enterprise in the temporarily occupied territory; location of the enterprise in the war zone; complete or partial destruction of the enterprise as a result of hostilities (CODE OF LABOR LAWS OF UKRAINE, 1971).

Equally relevant is the issue of payment for idle time, which is regulated by Article 113 of the Labor Code of Ukraine, in particular: idle time not due to the employee's fault is paid at the rate of no less than two-thirds of the tariff rate of the employee's grade/salary; during idle time, when an industrial situation has arisen that is dangerous for the life or health of the employee or for the people surrounding him and the natural environment through no fault of his, the average earnings are kept for him; idle time due to the fault of the employee is not paid (CODE OF LABOR LAWS OF UKRAINE, 1971).

The analysis of court practice confirms the typical mistakes of employers when registering downtime. In particular, in the Decision of the Ordzhonikidze District Court of the city of Zaporizhzhia dated August 10, 2022 in case No. 335/3371/22, the court found significant violations of the requirements of the current legislation during the declaration of idle time, in particular: lack of objective reasons for declaring idle time; illegal establishment of payment for downtime in the amount of 2/3 of the official salary; failure to acquaint the employee with the layoff decision (Decision of the Ordzhonikidzev District Court of the city of Zaporizhzhia in case No. 335/3371/22).

We believe that it is necessary to pay attention to the circumstances that would indicate the absence of organizational or technical conditions necessary for the employee to perform the work, as well as to cite evidence of such circumstances, in particular to those that would indicate the objective impossibility of the employee to perform the work precisely due to the introduction of martial law. This is a question, in particular, about the motivation and justification of the decision and compliance with the grounds for introducing downtime.

In accordance with the provisions of Art. 5-1 of the Labor Code of Ukraine, the state guarantees able-bodied citizens permanently residing on the territory of Ukraine, in particular, legal protection against illegal dismissal, as well as assistance in keeping a job. In particular, according to the content of Art. 22 of the Labor Code of Ukraine, any direct or indirect restriction of rights or the establishment of direct or indirect advantages when concluding, changing or terminating an employment contract is not allowed (LABOR CODE OF UKRAINE, 1971).

An employment contract may be terminated, and an employee may be dismissed from work only on the grounds and in the manner specified by labor legislation. According to Clause 4 of Art. 40 of the Labor Code of Ukraine, an employment contract concluded for an indefinite period, as well as a fixed-term employment contract before the expiration of its validity period, may be terminated by the owner or an authority authorized by him only in case of absenteeism (including absence from work for more than three hours during a working day) without valid reasons (CODE OF LABOR LAWS OF UKRAINE, 1971).

It is worth noting that the Law of Ukraine «On the Organization of Labor Relations in Martial Law» does not cancel or change the norms of the Labor Code of Ukraine regarding grounds for dismissal at the initiative of the employer. It is important that the labor law provides for the termination of the employment contract at the initiative of the employer in case of absenteeism precisely «without valid reasons».

In particular, the decision of the Supreme Court dated 09.11.2021 in case No. 235/5659/20 states that: «absence of an employee from work both during the entire working day and for more than three hours continuously or in total during the working day without valid reasons is recognized as absenteeism (for example, arbitrary use without agreement with the owner or his authorized body of days off, regular vacation, leaving work before the end of the term of the employment contract or the period that the employee is obliged to work as assigned after graduating from a higher or secondary special educational institution). Therefore, determining the legality of dismissal for absenteeism is not only the establishment of the fact of the employee's absence from work for more than three hours during the working day, but also the establishment of the seriousness of the reasons for the absence (Decision of the Supreme Court in case No. 235/5659/20).

It can be seen from the foregoing that the determination of the validity of the plaintiff's absence from work is a determining factor for resolving the issue of the legality of the plaintiff's dismissal from work under Clause 4, Part 1 of Article 40 of the Labor Code of Ukraine. An exhaustive list of valid reasons for absence from work is not defined in the labor legislation of Ukraine, therefore, in each individual case, an assessment of the validity of the reasons for absence from work is given based on specific circumstances. According to established judicial practice, the reason for absence from work can be considered serious if the return to work was prevented by significant circumstances that cannot be eliminated by the employee himself.

Reasons that exclude the fault of the employee are recognized as valid. Important reasons for absence from the workplace include such circumstances as: natural disasters, illness of the employee or members of his family, irregular operation of transport, participation of the employee in the rescue of people or property, refusal of illegal transfer and absenteeism in connection with this for a new job. The following are not considered absenteeism: absence of an employee not at the enterprise, but at the workplace; refusal of illegal transfer; refusal to work, contraindicated due to health conditions, not stipulated by the employment contract or in conditions dangerous to life and health; failure to report to work after the expiration of the warning period upon termination of the employment contract at the initiative of the employee (CODE OF LABOR LAWS OF UKRAINE, 1971).

Therefore, failure to report to work as a result of military operations and related circumstances cannot result in dismissal under Clause 4 Part 1 of Art. 40 of the Labor Code of Ukraine on the grounds of «absenteeism», because it is due to the need to preserve the life and health of employees and their families and is considered to be absent from work for valid reasons, in such a case, the employees retain their workplace and position. And the lack of proper notification of the termination of the previously introduced layoff is also a valid reason for absenteeism, since the announced layoff relieves the employee from the obligation to be present at the workplace.

The court in case No. 554/2454/22 dated 06/28/2022 came to the conclusion that there are grounds for declaring illegal and canceling the orders on bringing to disciplinary responsibility and terminating the employment contract (contract), since there was no room for «absenteeism» as such, but the employee had good reasons for not showing up to work. The employee was reinstated at work, and the average earnings for the period of forced absenteeism were also collected (Court decision in case No. 554/2454/22).

Dismissal of an employee for absenteeism is possible only if there are credible circumstances that confirm absence from the workplace without valid reasons. The decision to end the downtime must be communicated to the employee in advance so that the latter has the opportunity to start work on time. The lack of notification of the employee about the termination of the downtime excludes his responsibility for not appearing at work.

In order to quickly attract new employees to work, as well as to eliminate personnel shortages and labor shortages, in particular due to the actual absence of employees who were evacuated to another area, are on vacation, idle, temporarily disabled, or whose whereabouts are temporarily unknown, the employer may conclude with new employees, fixed-term employment contracts during the period of martial law or for the period of replacing a temporarily absent employee (On the organization of labor relations under martial law, Law of Ukraine, 2022). In this way, the legislator established the right of the employer during the absence of a «permanent» employee to conclude a fixed-term employment contract with a new employee without the consent of the permanent employee.

Also, Article 3 of the aforementioned Law regulates the specifics of transferring and changing essential working conditions in wartime conditions. In particular, during the period of martial law, the employer has the right to transfer the employee to another job that is not stipulated by the employment contract, without his consent (except for transfer to another area where active hostilities are ongoing), if such work is not contraindicated for the employee due to the state health, only to avert or eliminate the consequences of hostilities, as well as other circumstances that pose or may pose a threat to life or normal living conditions of people, with wages for

work performed not lower than the average wage for previous work (ON THE ORGANIZATION OF LABOR RELATIONS UNDER MARTIAL LAW, LAW OF UKRAINE, 2022).

According to Art. 13 of the Law of Ukraine «On the Organization of Labor Relations in the Conditions of Martial Law», the suspension of the employment contract is a temporary termination by the employer of providing the employee with a job and a temporary termination of the employee's performance of the work under the concluded employment contract. The employment contract may be suspended in connection with military aggression against Ukraine, which excludes the possibility of providing and performing work.

The suspension of the employment contract does not entail the termination of the employment relationship. If possible, the employer and the employee must notify each other of the suspension of the employment contract in any available way. Reimbursement of wages, guarantee and compensation payments to employees during the suspension of labor is fully entrusted to the state carrying out military aggression against Ukraine (ON THE ORGANIZATION OF LABOR RELATIONS UNDER MARTIAL LAW, LAW OF UKRAINE, 2022).

It should be emphasized that the provisions of the Law of Ukraine «On the Legal Regime of Martial Law», which regulate some aspects of labor relations differently, the Code of Labor Laws - have priority application during the period of martial law. The existence of a threat to the life and health of the employee, as a result of which the employer is unable to guarantee the safety of the latter, the lack of the ability to perform the indicated work remotely is a reason for suspending the employment contract even if there is a desire of the employee to continue working at his own risk (Court decision from 18.08.2022 in case No. 279/1611/22).

The legislative approach to solving the issue when an employee has lost contact with an employer who, as a result of hostilities, cannot organize work for such an employee (destruction, destruction of the premises of a legal entity, death or disappearance of a natural person-entrepreneur) is relevant in the aspect of the investigated problems.

In accordance with Part 1 of Art. 21 of the Labor Code of Ukraine, an employment contract is an agreement between an employee and the owner of an enterprise, institution, organization, or a body or natural person authorized by him, under which the employee undertakes to perform the work specified in this agreement, and the owner of the enterprise, institution, organization or an authorized with it, the body or individual undertakes to pay the employee a salary and provide the working conditions necessary for the performance of work, provided for by the labor legislation, the collective agreement and the agreement of the parties. In view of the above, as rightly

noted by some specialists, if the employer is unable to provide the employee with the necessary working conditions, the latter is not obliged to perform his labor duties (Bakonina, 2022).

In the case of communication with the employer, as well as the possibility of this, the employment contract may be terminated in accordance with Art. 38 of the Labor Code of Ukraine within the period requested by the employee (LABOR CODE OF UKRAINE, 1971). In our opinion, the conduct of hostilities in the relevant area is a valid reason for such a shortening of the deadline. In the absence of any contact with the employer, in particular, in the case of the death of the employer of a natural person-entrepreneur or for other reasons that make it impossible to terminate the employment contract, we believe that the fact of termination can be established in the order of a separate proceeding provided for by the Civil Procedure Code of Ukraine labor relations.

In accordance with Part 7 of Art. 19 of the Civil Procedure Code of Ukraine, a separate proceeding is intended for consideration of cases on confirmation of the presence or absence of legal facts that are important for the protection of the rights and interests of a person or the creation of conditions for the exercise of personal non-property or property rights by him or confirmation of the presence or absence of undisputed rights (CIVIL PROCEDURAL CODE OF UKRAINE, 2004). Clause 5, Part 2, Art. 293 of the Civil Procedural Code of Ukraine stipulates that the court considers in a separate proceeding cases on the establishment of facts of legal significance (CIVIL PROCEDURAL CODE OF UKRAINE, 2004).

Conclusions

Modern labor law in the conditions of martial law introduced in Ukraine remains the guarantor of ensuring the labor rights of employers and employees and does not change its essence, social significance and social purpose. Its main task is the proper legislative consolidation of the list of basic rights of subjects of labor relations in accordance with international legal standards and guarantees of their implementation, forms and methods of protection and protection.

In the conditions of a special legal regime, when the freedom of labor has a limited nature of work in favor of the public needs and interests of the state, the key task of modern labor law is the development of an effective sectoral legal mechanism for ensuring the labor rights and interests of employers and employees.

The main trends in the development of labor law in Ukraine include: the establishment of individual personal restrictions in the organization

of labor relations with an emphasis on the implementation of state needs in their regulation; increasing the flexibility of the legal regulation of labor relations and employee mobility when exercising the right to work; strengthening the protection of labor rights of workers, primarily mobilized persons, and guarantees of their implementation.

Analysis of the current legislation that regulates labor relations allows us to conclude that its optimization during the war in Ukraine made it possible to significantly organize the order of interaction between the employee and the employer, eliminate the potential occurrence of labor disputes, and ensured the appropriate level of flexibility of labor relations. At the same time, the legislative approach to the adoption of new laws, amendments and additions to current regulations should regulate labor relations taking into account not only public interests, but also the interests of individual citizens.

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Martial law and the digital labor market: The case of Ukraine

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Abstract

The article is devoted to topical issues of the functioning of the labor market of Ukraine in the conditions of the war. The authors identify threats of digitalization of the market, as well as positive features of digital technologies. The main trends in the field of labor, which are characteristic of modern democratic countries, have been studied. Moreover, the optimal directions for the development of digital labor relations in the conditions of martial law are described and, at the same time, the possibilities of using digital technologies in the specified field are clarified. Finally, the expediency of developing mechanisms and tools for the implementation of an effective labor market management system that takes into account the issues of education, soft skills development and increasing the level of social protection and social security is emphasized. It is concluded that, in the experiences of formation of the global digital market of labor relations, the spread of new forms of work, organizational and legal methods and conditions for the use of intellectual labor is observed.

Keywords: digitalization of labor; labor market in the 21st century; labor force; atypical employment; unemployment.

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Ley marcial y mercado laboral digital: Caso Ucrania

Resumen

El artículo está dedicado a temas de actualidad del funcionamiento del mercado laboral de Ucrania en las condiciones propias de la guerra. Los autores identifican amenazas de digitalización del mercado, así como características positivas de las tecnologías digitales. Se han estudiado las principales tendencias en el campo del trabajo, que son características de los países democráticos modernos. Ademas, se describen las direcciones óptimas para el desarrollo de relaciones laborales digitales en las condiciones de la ley marcial y, al mismo tiempo, se aclaran las posibilidades de utilizar tecnologías digitales en el campo especificado. Finalmente, se enfatiza la conveniencia de desarrollar mecanismos y herramientas para la implementación de un sistema efectivo de gestión del mercado laboral que tenga en cuenta los temas de educación, desarrollo de habilidades blandas y aumento del nivel de protección y seguridad social. Se concluye que, en las experiencias de formación del mercado digital global de las relaciones laborales, se observa la propagación de nuevas formas de trabajo, métodos organizativos y jurídicos y condiciones para el uso del trabajo intelectual.

Palabras clave: digitalización del trabajo; mercado laboral en el siglo XXI; mano de obra; empleo atípico; paro.

Introduction

The labor market is the most important and complex institution of the market economy. Here, not only do the interests of employees and employers intersect, but also all socio-economic, political, demographic and other processes taking place in society are reflected. That is why the study of the regularities of the formation, development and functioning of this institution, the development of measures aimed at improving the system of its regulation, is an extremely important and urgent task of science and practice.

The transition to the digital economy will transform the social and labor sphere, the labor market and employment, the labor process and the nature of labor, the value of labor, the organization and management of labor, etc. Under the influence of the development of digital technologies, there is a spread of new forms of work, organizational and legal methods and conditions for the use of intellectual work, which are characterized by the transformation of the idea of the workplace in the usual understanding of this element of work organization; the absence or modification of one or more signs of classic labor relations; the possibility of using such a

work schedule that makes it possible to optimize the working time of the employee. These processes undoubtedly influence and determine the quality of working life of the employed population.

In recent years, the Ukrainian labor market has undergone significant changes. The COVID-19 pandemic and the full-scale war on the territory of Ukraine negatively affected the development of the labor market, which caused: an increase in the level of unemployment, hidden unemployment (leaves without salary), impoverishment of the population and the deterioration of the quality of human resources due to the loss of qualifications of a part of the workforce, a decrease in the economic the activity of self-employed persons, the growth of the digital divide between remote workers, the drop in the level of social protection, and others. At the same time, the specified global changes in society became a catalyst for the acceleration of the digital transformation of the labor sphere and the spread of digital forms of employment.

Let's note that the labor market has come to belong to employers, and due to the drop in company revenues, many of them resorted to layoffs and salary cuts. In order to remain on the market, enterprises must significantly revise their expenses - in particular, on staff maintenance. Ways to optimize such costs are to transfer employees to part-time positions, reduce the length of working hours, or take vacations at one's own expense. Therefore, the primary task for every Ukrainian is to adapt to the new, difficult realities of today and to try as much as possible to make their profession their own business with an orientation to the global market (Mantur-Chubata & Vaganova, 2022, p. 81).

The formation of digital competences in the professions of the future under the conditions of digital transformation is an extremely urgent issue. That is why, in order to ensure the sustainable development of working conditions, it is important to find out the trends of the state of the workforce in Ukraine, scientific analysis of existing forms of employment and mechanisms for ensuring the quality of legal relations in the field of working life in order to develop directions for the regulation of these labor relations.

1. Methodology of the study

The research used general scientific methods, including methods of analysis and synthesis, induction and deduction, with the aim of clarifying the demand for modern professions and general characteristics of types of work. The method of scientific description made it possible to outline the main characteristic features of labor market models depending on the ratio of factors. The methods of scientific generalization used in the course of the

study contributed to the determination of the features of the use of artificial intelligence in labor relations.

In addition, when revealing the economic essence and conceptual concepts of the labor market in the conditions of digital transformation, a structural-systemic approach, as well as an approach of methodical-consequential connections, were used. When researching the ways of development of the labor market in Ukraine in the conditions of global digitization and martial law, the main scientific methods were causal, logical and functional connections and dependencies, as well as statistical. Also, in the part of the work where the socio-economic consequences of the digital transformation of the global labor market were studied and analyzed, the methods of statistical, logical and historical, quantitative-qualitative and comparative analysis were used.

2. Analysis of recent research

Despite significant creative progress in the study of labor market issues and ensuring the labor potential of organizations, the issues of qualitative transformational changes in the social and labor sphere in the conditions of a military conflict due to their specificity have not received adequate coverage in the works of modern scientists. Currently, the issue of choosing the optimal directions for the development of digital labor relations in the conditions of martial law remains unsolved, additional analysis is needed to find out the possibility of using digital technologies in the specified field.

Thus, the question of the transformation of the quality of working life in the conditions of martial law actualizes the need to conduct a study of the socio-economic consequences caused by the digital transformation of the global labor market, taking into account modern trends in the field of labor relations and employment.

3. Results and discussion

First of all, let's clarify what is meant by «digitalization», since it is based on this that we can analyze the economic and managerial legal relations between digital technologies themselves, as well as within and through them. Digitization is a qualitatively new type of information and telecommunication technologies that cover and change all spheres of modern industrial and social life, a method of bringing any kind of information into digital form (Kupryna & Khazanova, 2016, p. 259), certain transformational processes, the use of digital technologies for optimizing and automating business, increasing the level of productivity and increasing the quality of communication with consumers (Hrybinenko, 2018, p. 35).

Another important issue is the process of «transformation». One of the areas affected by digitization, technology and transformation is «work». Labor can no longer be regarded only as a factor in industrial relations or as a subject of interest peculiar only to political economists; it should also be understood as a larger category for analyzing many different aspects of everyday life. With the impact of digitization on work, a new concept of «digital work» has appeared.

Innovation and agile development require a completely different approach than traditional application development. New digital labor markets are proving to be flexible, cost-effective and cost-effective for independent contractors and their clients. At the same time, the modern labor market offers an attractive alternative to regular employment. However, such flexibility is often accompanied by unstable working conditions and undermines hard-won legal and social standards of quality work.

Labor market dynamics is an extremely complex field that depends on many factors that influence outcomes, making it difficult to pinpoint cause and effect and predict outcomes. The task of assisting employees in using the opportunities of automation should be implemented both at the state level and in the private sector. The government should provide policies, incentives and programs to increase and reskill the workforce. At the same time, the private sector should invest more in training.

It should be emphasized that, as of today, work has a more intellectual character and is less and less associated with the performance of labor functions according to various processes in various industries. Artificial intelligence is the basis of the digital transformation of the economy and the driving force behind important developments in the field of technology and business. A positive consequence of its application in management is the improvement of the quality of management decisions, the speed of regulation.

Among the negative consequences, it is worth mentioning the unemployment of intellectual workers, psychological problems of people due to the fact that machines make decisions, the possibility of man-machine conflicts. The digital economy, creating new business models, sets the direction for the transformation of traditional sectors of the economy, which occurs in two ways: optimization and digitization of existing business processes and the creation of new business models (Yershova & Bazan, 2021, p. 49) using artificial intelligence. It is artificial intelligence that makes it possible to use computers to simulate the intelligent human process in order to solve tasks and make management decisions.

Modern industrial enterprises of any level and profile of economic activity are faced with the task of ensuring continuous training and

intellectual adaptation of their personnel, which is initiated by differences in the functioning of social environments of developers of technical means and their users based on artificial intelligence models (Oliinyk & Krupska, 2022, p. 2). Digitalization of the economy ensures fundamental transformations in all spheres of human activity. The technologies used in the transformation process are the engine of the development of new industries and contribute to the solution of society's problems. Under the influence of digitalization, the labor market, the spheres of health care and education, and social society are also changing. New business models are client-oriented, that is, their structure is based on the client's needs (Yershova & Bazan, 2021, p. 48).

In today's conditions of martial law, the remote work of employees is more relevant than ever, which in turn lays the foundations for the emergence of freelancing and the development of gigonomics. The essence of these phenomena is a radical change in the labor market, its transition from the presence of jobs with permanent employment at one employer to temporary projects from different companies at one independent employee.

As stated in the work «Ukraine 2030E – a country with a developed digital economy» (Ukraine 2030E, 2019), depending on the age of Ukrainians, the level of penetration of digital skills and competencies in 2030 is expected to be from 80% to 99%. It is planned to increase the number of students (by 15 times) and graduates of higher education (by 10 times) in Science, Technology, Engineering and Mathematics (STEM) specialties. We believe that such dynamics will accelerate the development of Work 4.0.

The effects of the recession and the rise of automation due to the corona crisis have increased inequality in the labor market. Low-wage workers, women and young employees were the most affected by it. As a result of the double whammy of the Fourth Industrial Revolution, Covid-19 and martial law, digitization has taken a big step forward, making the transition to remote work and e-commerce.

Therefore, in the future, the employer and the employee will be increasingly interested in remote work. The possibility of not being tied to a specific place will come to the fore. It is necessary to take into account the influence of the environment on the formation of the personality of young people, as well as to use the advantages of «digital people».

This is necessary in order to help them cope with emerging problems and acquire new competencies, actively participate in their lives. Therefore, the labor market will take on new forms and will be filled with new requests from the employer. The success of organizations and companies in the future will largely depend on how quickly and effectively employers establish contact with new employees.

In conclusion, it is worth noting that under the conditions of rapid, multi-vector changes in the markets of goods and services, the growth of competition between subjects of economic activity, the urgent need to perform urgent work, atypical in terms of its content, which goes beyond the usual algorithms, template operations, etc., there is an urgent need to change the personnel policy of organizations and the formation of Work 4.0. (Kraus *et al.*, 2022, p. 28).

New forms of work are organizational and legal methods and conditions for the use of intellectual work, which are characterized by the absence or modification of one or more features of classic labor relations, namely: the appearance of special labor contracts, according to which the method of performance of labor relations established in labor legal relations, is unfulfilled; changes in the employment of employees, flexible legal regulation of digitized relations in the labor sphere; transformation of the idea of the workplace in the usual understanding of this element of work organization; the possibility of using such a work schedule that makes it possible to optimize working time.

Coworking centers organize work in a common workspace and provide a flexible work schedule. At the same time, such centers take into account that employees have different opportunities to use their time for work. The rising cost of real estate in big cities has made individual rentals economically unfeasible for start-up entrepreneurs and freelancers. Unlike telecenters, coworking centers have become a sustainable form of self-organization based on mutual assistance and exchange of experience between representatives of various professions. Coworking spaces are generally attractive to mobile professionals, independent contractors, or frequent travelers. Coworking is considered as a product of the digitalization of the economy and the global labor market. It promotes the growing role of the creative class and the technical intelligentsia, reinforcing the trend towards outsourcing.

Outsourcing is a form of borrowed labor, which involves the transfer of certain types and functions of production business activity from one company to another on the basis of a contract. Companies that provide personnel outsourcing services are approached when it is necessary to select personnel for a short-term or one-time project, for seasonal work, or when there is no possibility to expand the staff of the client company. There are manufacturing outsourcing (production of products or their components), IT outsourcing (development, implementation and support of information systems), outsourcing of knowledge management (analytical processing of data, formation and management of knowledge bases) (Novak & Overkovsky, 2022, p. 3).

Crowdsourcing is a form of borrowed labor, which involves the involvement of intellectual e-workers external to the company through the mediation of information technologies for the effective and efficient

solution of tasks faced by business, the state, and society in general. In order to obtain the required number of talented employees, companies are increasingly attracting employees in such a way as the «smart» crowd of the Millennium generation (Millennials), which is characterized by a high level of intellectual development, possessing skills in the field of information and communication technologies. Such employees are especially valuable for corporations, because they are the ones who are able to generate new ideas, create innovations, and improve existing types of products.

In the conditions of digitalization of the economy, crowdsourcing is gradually and significantly changing, namely, it becomes a larger-scale, complex process and is used as an alternative to the traditional staffing of business processes of primary economic entities. The main reason for business use of crowdsourcing is the ability to provide quick access to intellectual labor resources regardless of the company's geographic location.

In our opinion, the successful adaptation of the labor market to digitalization processes involves a change in all components: employees, the state, companies, employees. At the state level, first of all, the education system should be developed, new teaching methods and tools, principles of continuous educational process should be introduced.

Significant decisions in this direction should include expanding the cooperation of employers with educational and research institutions, stimulating private sector investments in human resources. Companies should actively implement the principles of internal marketing to build employee loyalty and search for promising employees. At the same time, employees need to constantly acquire new knowledge, continue the learning process, acquire new experience and skills.

It is worth emphasizing that the current situation in Ukraine, provoked by the escalation of the war with the Russian Federation, has created uncertainty regarding the situation on the labor market. In particular, according to the National Bank of Ukraine, the unemployment rate due to the full-scale military invasion reached a maximum of 35% (Official website of the State Employment Center of Ukraine, 2023). However, due to the high level of migration of Ukrainians abroad and rapid mobilization, the level of unemployment was somewhat contained and evened out. The National Bank notes that without these two factors the situation would be much worse (Official website of the State Employment Center of Ukraine, 2023).

The National Bank of Ukraine predicts that «even after the end of active hostilities, unemployment will decrease slowly and remain at higher levels than before due to the long-term consequences of the war» (Official website of the State Employment Center of Ukraine, 2023). According to the State Employment Service of Ukraine, the number of vacancies in Ukraine

decreased 20 times compared to pre-war times (Official website of the State Employment Center of Ukraine, 2023).

In general, today the domestic labor market cooperates with sectors of the economy that provide the basic needs of the population in those territories where hostilities are not taking place – energy, logistics, medicine, and the food industry sector (Pyshchulina & Markevich, 2022).

According to the general context, as well as taking into account the local one, it is possible to make assumptions about which professions will be popular in the near future in Ukraine (Filatov, 2022): professional military, psychologists, in particular military, specialists in the field of medicine, construction and architecture, defense industry, energy , education, micro-enterprises of services for export.

Demand for some professions will appear for the first time, including those that will require conceptually new skills. Employers, when describing the offered vacancies, began to pay much more attention to the desired soft skills, compared to the pre-war period. Soft skills, which are not inherent in specific professions, are personal qualities that help to perform work efficiently and successfully build a future career (Berezovska, 2022). Many of the standard skills have changed their priority in connection with the events taking place in the country, it is not surprising, attentiveness, tact, stress resistance – all this acquires primary importance for employees. Among the new wishes in vacancies, employers began to note: flexibility, mobility, discipline, fairness, optimism, adaptability, friendliness, politeness and decency. The new realities of finding a job in wartime make adjustments to the desired skills and abilities.

Conclusions

Therefore, in the conditions of the formation of the global digital market of labor relations, the spread of new forms of work, organizational and legal methods and conditions for the use of intellectual work is observed. They are characterized by: the absence or modification of one or more features of classic labor relations, namely the appearance of special labor contracts, according to which the method of hiring employees changes and flexible legal regulation of digitized labor relations is implemented; transformation of the idea of the workplace in the usual understanding of this element of work organization; the possibility of using such a work schedule that makes it possible to optimize the working time of the employee.

Digital technologies are an important source of increasing labor productivity, they free people from repetitive tasks, provide round-the-clock availability, are convenient and useful, lead to the elimination of risky work

in dangerous situations, and eliminate the inefficiency of the work process. Among the threats of digitalization of the labor market should be attributed: the growth of unemployment among low-skilled workers; increase in the cost of skilled labor; blurring the boundaries between working time and rest; the risk of impact on the level of inflation; violation of the life balance of workers; increased labor migration; reduction of social protection, etc.

The importance of obtaining information about the transformational changes of the labor market in Ukraine in the war and post-war period is currently a difficult and extremely difficult task. Considering the high level of unemployment and the mobilization of a large part of the working population, the stabilization of the labor market is extremely important. It is necessary to develop mechanisms and tools for the implementation of an effective system of labor market management, which takes into account the issues of education, development of soft skills, and increasing the level of social protection and security.

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A Special Status Victim: Criminal Liability for Assaulting a Government Official in Ukraine and Other Countries

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Abstract

The paper discusses some emerging issues of criminal liability for assaults against public officials in various jurisdictions. Emphasis is placed both on the comparative approach to analyzing the relevant criminal statutes and on the specific legal framework for the protection of the life and health of law enforcement officers. Based on the provisions of statutory criminal law and the case law of several countries, it is shown that the life, health and property of law enforcement officers enjoy a higher level of protection. This is explained by the fact that such persons are direct representatives of the state, perform their duties in public, remain under public scrutiny and, therefore, may become an easier target for assault crimes. In the conclusions of the research, it has been argued that the determination of the legal grounds, scope and limits of protection of public officials by criminal law should be carried out at the national level (or state level in a federal jurisdiction), based on the orientations and principles of the domestic criminal law policy and program of a given nation.

Keywords: assault; criminal liability; public official; officer of authority; damage caused by a crime.

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Una víctima de estatus especial: Responsabilidad penal por agredir a un funcionario del gobierno en Ucrania y otros países

Resumen

El documento analiza algunas cuestiones emergentes de la responsabilidad penal por agresiones contra funcionarios públicos en diversas jurisdicciones. Se hace hincapié tanto en el enfoque comparativo para analizar los estatutos penales pertinentes, como en el marco jurídico específico para la protección de la vida y la salud de los agentes del orden. Basándose en las disposiciones del derecho penal estatutario y en la jurisprudencia de varios países, se ha demostrado que la vida, la salud y la propiedad de los funcionarios públicos gozan de un mayor nivel de protección. Esto se explica por el hecho de que dichas personas son representantes directos del Estado, desempeñan sus funciones en público, permanecen bajo el escrutinio público y, por lo tanto, pueden convertirse en un objetivo más fácil para los delitos de agresión. En las conclusiones de la investigación se ha argumentado que la determinación de los fundamentos jurídicos, el alcance y los límites de la protección de los funcionarios públicos por medio del derecho penal debe llevarse a cabo a nivel nacional (o estatal en una jurisdicción federal), sobre la base de las orientaciones y los principios de la política y el programa internos de derecho penal de una nación determinada.

Palabras clave: agresión; responsabilidad penal; funcionario público; agente de la autoridad; daños causados por un delito.

Introduction

Comparative analyses between different countries and systems has brought us extensive knowledge about crime and criminal justice in the modern world. Particularly fruitful have been comparisons between the world's two major legal systems – the so-called Anglo-American common law system and the continental civil law system.

Indeed, legal comparative analyses can cover various areas of criminal law regulation. The systems of public service are not an exception here.

Public officials are required to make important policy decisions as part of their daily service to the communities. Such decisions are often unpopular and, in many cases, politicians and public officials may become targets of threats and even physical attacks.

Nowadays, in almost any world jurisdiction assaulting a public officer constitutes a serious criminal offense. The penalties imposed by the court will depend on: classification of the offense (summary or indictable), nature and circumstances surrounding the offense and the injuries sustained by the public officer as a result of such offence. The bottom-line rule is this: government officials are out there to serve and protect, they are always on display for their activities, for both their achievements and mistakes; thus, their life, health and property require enhanced approach toward criminal law protection.

1. Methodology

This paper incorporates several research methods used for the purposes of comprehensive analyses and critical elaboration of conclusive remarks. The *comparative law method*, which has been used as the leading one throughout our research, has enabled to research legal grounds and specific forms criminal liability for assaulting public officials in various jurisdictions and to compare various liability frameworks in several jurisdictions. Overall, the comparative method remains the leading one in legal scholarship.

The *observation method* also made it possible to identify current legislative trends throughout the world with regard to formulating and enforcing crimes of assault against public victims. The observation method has also revealed some issues related to the need for further academic research in this emerging area of criminal law regulation and enforcement.

The *philosophical (dialectical)* method allowed to fully understand research issues at hand, their methodological grounds, to structure this research project properly and also to comprehend the object of the study on a step-by-step basis (Movchan *et al.*, 2022).

The *system-structural method* has been employed to analyze relevant criminal statutes and their structural positions in the national criminal laws of several world nations. In particular, this method has allowed to reveal the place of assault-related statutes within the criminal laws of several states, thus showing the underlying links (or their absence) between various criminal provisions.

As for the *statistical method* of collecting and summarizing material, it has been partially used in order to demonstrate data on annual number of relevant criminal prosecutions in a given country.

2. Discussion

From the very start, it is worth to point out that lawmaking and law-enforcement experience of any nation, including Ukraine, in terms of criminal law regulation and enforcement can be potentially useful for other countries.

On the one hand, public officials themselves are not immune from crimes and regularly commit offenses related to corruption and office abuse. For example, in Ukraine scholars have recently formulated specific elements, which determine the need to criminalize intentional failure to file a declaration and declare inaccurate information.

On the other hand, officials can and actually do become victims of various crimes aimed against them. This includes such serious offenses as murder, assault or robbery while in office. As one commentator put it, analysis of foreign experience of criminal law regulation in the discussed area is distinguished by the principle of national specificity, which is based on the priorities of state policy, legal traditions of a certain state, and the level of development of democratic institutions and institutions of civil society.

Thus, specific features in developed European countries are: a smaller number of criminal law norms that provide for socially dangerous acts against law enforcement officers and other public officials; recognition of protection of life, health and property of government representatives as distinct areas of prioritized criminal law regulation; criminalization of use of physical violence and attacks on such persons, and not mere threats to commit them (Criminal Codes of Austria, Denmark, Belgium, etc.); criminal liability is not provided for assaulting relatives of government officials in connection with the performance of their official powers (Criminal Codes of Germany, Georgia, Latvia, Lithuania, France, Sweden, Estonia); recognition of a person (persons) who assist a public official in the course their legal duty or on the request of such a person (Criminal Codes of the Netherlands, Israel etc.) (Kirbyatyev, 2021).

Several among the authors of this paper have recently researched some controversial issues related to public official as a victim of criminal insult and defamation (Borovyk *et al.,* 2023). Now we move on to analyze more dangerous offenses, which involve assaults on representatives of the government – public officials. Our analyses will include several jurisdictions – United States of America, Australia, Germany and Ukraine.

- **United States of America**

Various types of offenses against public officials related to their duties are criminalized both on federal and state levels in the United States.

On the federal level, 18 U.S. Code (the Title 18 is also unofficially called the U.S. Criminal Code) Chapter 7 "Assault" deals with various criminal types of assault against domestic and foreign officials as well as lay citizens.

For example, 18 U.S.C. § 111 "Assaulting, resisting, or impeding certain officers or employees" provides that "whoever (1) forcibly assaults, resists, opposes, impedes, intimidates, or interferes with any person designated in section 1114 of this title while engaged in or on account of the performance of official duties; or (2) forcibly assaults or intimidates any person who formerly served as a person designated in section 1114 on account of the performance of official duties during such person's term of service, shall, where the acts in violation of this section constitute only simple assault, be fined under this title or imprisoned for not more than one year, or both, and where such acts involve physical contact with the victim of that assault or the intent to commit another felony, be fined under this title or imprisoned not more than 8 years, or both".

In case a deadly or dangerous weapon (including a weapon intended to cause death or danger but that fails to do so by reason of a defective component) was used or a bodily injury was inflicted, offender shall be fined under this title or imprisoned not more than 20 years, or both (18 U.S. Code § 111).

The following provision, 18 U.S.C. § 111 "Protection of foreign officials, official guests, and internationally protected persons", states that "whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official, official guest, or internationally protected person or makes any other violent attack upon the person or liberty of such person, or, if likely to endanger his person or liberty, makes a violent attack upon his official premises, private accommodation, or means of transport or attempts to commit any of the foregoing shall be fined under this title or imprisoned not more than three years, or both. Whoever in the commission of any such act uses a deadly or dangerous weapon, or inflicts bodily injury, shall be fined under this title or imprisoned not more than ten years, or both" (18 U.S. Code § 112).

Thus, one can see that attacking a public official in America is a "serious business" with harsh legal consequences for the attacker.

As a good example on the state level, we can refer to the relevant Californian statute.

Section 217.1(a) of the Californian Penal Code provides, in particular: every person who commits any assault upon the President or Vice President of the United States, the Governor of any state or territory, any justice, judge, or former judge of any local, state, or federal court of record, any commissioner, referee, or other subordinate judicial officer of any court of record, the secretary or director of any executive agency or department of the United States or any state or territory, or any other official of the United

States or any state or territory holding elective office, any mayor, city council member, county supervisor, sheriff, district attorney, prosecutor or assistant prosecutor of any local, state, or federal prosecutor's office, a *former* prosecutor or assistant prosecutor of any local, state, or federal prosecutor's office, public defender or assistant public defender of any local, state, or federal public defender's office, a former public defender or assistant public defender of any local, state, or federal public defender's office, the chief of police of any municipal police department, any peace officer, any juror in any local, state, or federal court of record, or the immediate family of any of these officials, in retaliation for or to prevent the performance of the victim's official duties, shall be punished by imprisonment in the county jail not exceeding one year or by imprisonment pursuant to subdivision (h) of Section 1170.

As one may observe from this statutory provision, Californian criminal law contains a rather extensive list of both "in office" and former government officials (including federal ones) and also immediate family members, who are recognized as potential victims of criminal assaults.

Anyone who tries to commit murder against an individual mentioned in subsection (a) with the intention of retaliating against or obstructing the victim's execution of their official responsibilities will face imprisonment in a state penitentiary for a duration ranging from 15 years to life, as outlined in Section 217.1(a) of the Californian Penal Code.

Indeed, murder of a public official is an even more 'serious business', which triggers much more severe criminal sanctions.

In order to prove that a defendant committed the offense of assault on a public official, a prosecutor must be able to establish the following elements: 1) the defendant committed an assault with a deadly weapon or by means of force likely to produce great bodily injury; 2) the defendant committed an assault on the person of a government official, former government official, or the immediate family of any of these officials; and 3) the defendant acted in retaliation for or to prevent the performance of the victim's official duties (California Penal Code, 2023).

In the United States, among the significant factors contributing to murders of law enforcement agents are gun laws and the right to wear a concealed weapon in particular.

In his well-written paper "Assault of Police" D. Bierie makes a good point: violent attacks against police represent a particularly important form of violence for social scientists and policymakers to understand. He then provides three arguments for the necessity of qualified research of such crimes of violence: 1) unique risks for officers, agencies, and the community – officers may experience a greater level of injury than other types of victims (all else held constant); 2) attacks against officers also can lead to important costs for agencies and thus taxpayers – this includes medical treatment for

injuries, time spent completing paperwork and holding hearings on the use of force, and reduced or disrupted resources when officers are placed on leave; 3) such form of violence is important to understand because such illegal acts reflect, to some degree, an attack on the rule of law and defiance of the justice system itself. The American commentator makes a conclusion that primarily for those reasons, police, policymakers, and the public would benefit from a deeper understanding of violence directed at police (Bierie, 2017).

Based on the results of his own in-depth research, American scholar D. Mustard observes that those states, which enact concealed carry laws have a slightly higher likelihood of having a felonious police death and also slightly higher rates of felonious police deaths prior to the law's passage. After passage of the right-to-carry laws, states exhibit a reduced likelihood of having a felonious police death rate and slightly lower rates of police deaths.

He also suggests that those who believe allowing private citizens to carry concealed weapons will endanger the lives of law enforcement officials do not even have anecdotal evidence to support them. Professor Mustard found no examples of law-abiding citizens with concealed weapons permits assaulting police officers. In contrast, there is at least one example of such a citizen coming to the aid of an officer (Mustard, 2001).

Thus, the widely spread opinion that gun laws always contribute to deadly and non-deadly assaults on police officers is a biased one, at least in the case of the U.S. policing and gun regulations.

- **Australia.**

The offence of assaulting a public officer is considered a serious assault in Australia. The penalties imposed will also vary depending on the injuries sustained by the public officer because of the assault.

Since Australia is a federal state, it has local Criminal Codes (those of six states) and a federal Criminal Code – the regularly compiled Criminal Code Act of 1995 (as of March 28, 2021). Due to space limitations for this research paper, we will focus on the relevant federal criminal law provisions.

According to Section 147.1, "Inflicting harm upon a Commonwealth public official, etc." within the Australian Criminal Code, inflicting harm upon a Commonwealth public official is considered a federal offense. An individual (referred to as the first person) commits an offense under this provision if:

(a) The first person engages in certain behavior;

(b) The first person's behavior results in harm to a public official;

(c) The first person has the intention to cause harm to the official through their behavior;

(d) The harm is caused without the official's consent; and

(e) The first person engages in this behavior due to one of the following reasons:

(i) The official's status as a public official; or

(ii) Any actions taken by the official in their capacity as a public official.

The discussed Section provides for the following penalties: (f) if the official is a Commonwealth judicial officer or a Commonwealth law enforcement officer – imprisonment for 13 years; or (g) in any other case— imprisonment for 10 years.

In a quite unique legislative approach (different from other jurisdictions) Sec. 147.1 of the Australian Criminal Code separately recognizes such form of criminal activity as causing harm to a former Governor-General, former Minister or former Parliamentary Secretary. Thus, a person (the first person) commits an offense if: (a) the first person engages in conduct; and (b) the first person's conduct causes harm to another person; and also (c) the other individual is a former Governor-General, ex-Minister, or former Parliamentary Secretary; and (d) the first person has the intent for their actions to result in harm to the other individual; (e) the harm is inflicted without the consent of the other individual; and (f) the first person's actions are motivated by one of the following factors:

(i) the other individual's past status as a former Governor-General, former Minister, or former Parliamentary Secretary; or

(ii) any actions carried out by the other individual in their previous role as a Governor-General, Minister, or Parliamentary Secretary.

Furthermore, Australian criminal law is designed to prosecute not only actual assaults on government officials but also threats of potential assaults against such persons. Thus, under Sec. 147.2 "Threatening to cause harm to a Commonwealth public official etc." of the Australian Criminal Code:

(1) An individual (referred to as the first person) commits an offense if: (a) The first person directs a threat towards another individual (the second person) or a third party, intending to cause serious harm; (b) The second person or the third party targeted by the threat holds a public office (c) The first person either: (i) Has the intention of causing the second person to genuinely fear that the threat will be carried out; or (ii) Acts recklessly, disregarding the potential fear caused in the second person due to the threat; and (d) The first person issues the threat based on one of the following reasons: (i) The official's status as a public official; or (ii) Any actions performed by the official in their capacity as a public official.

The penalty is as follows: (e) If the official targeted is a Commonwealth judicial officer or a Commonwealth law enforcement officer, the offender may face imprisonment for a duration of 9 years; or (f) In all other cases, imprisonment for a period of 7 years.

The criminal law statute establishes that in a prosecution for an offense against this section, it is not necessary to prove that the person threatened actually feared that the threat would be carried out (Criminal Code Act, 1995).

Based on the above-mentioned provisions, we can make an interim conclusion that Australia has introduced its own special legislative approach to holding those who attack public officials as criminally liable. In addition, the criminal penalties imposed are clearly defined – thus courts cannot impose any lower sentence under mitigating circumstances. This is different from Ukrainian legislative approach, which usually provides for a range of sanctions – from minimum to maximum ones. Also, the statutes, (based on their official language) are quite cumbersome – they are extensive and complicated, potentially with too lengthy descriptions of criminal behavior parameters.

A brief example on West Australian criminal law approach to criminalizing offenses against public officials.

Assaulting a public officer is recognized as a severe offense in Western Australia. Section 318(1)(d) of the state Criminal Code defines this offense: "Any individual who assaults a public officer in the course of their official duties or due to their role as an officer is guilty of a crime." In cases where the offender pleads not guilty, the prosecution must prove all required offense elements beyond a reasonable doubt.

Potential penalties, as determined by the court, hinge on whether the case is heard in the Western Australia District Court or the Magistrates Court. Additionally, the severity of penalties depends on the extent of injuries sustained by the public officer due to the assault.

This offense can only be tried as a summary offense (in the Magistrates Court), if the perpetrator was not armed with a dangerous or offensive weapon and was not in the company of others immediately before or after the alleged offense. When tried in the Magistrates Court of Western Australia, if the offender is found guilty, the court may impose a maximum fine of up to $36,000. Additionally, the court can prescribe a maximum prison term of up to three years.

If the offender causes injuries to a public officer, such as a police officer, affecting their well-being and comfort, the court is obligated to impose a mandatory prison sentence of at least six months. It is worth noting that the injuries inflicted on the officer must go beyond mere pain or discomfort experienced during the assault.

If the offender causes a public officer, like a police officer, to sustain bodily injuries that endanger life or are likely to result in permanent health damage (i.e., grievous bodily harm), the court must impose a mandatory prison term of no less than twelve months (Assaulting a police officer, 2023).

As a matter of proper illustration, the following diagram presents annual statistics on the number of police officers assaulted in the United Kingdom.

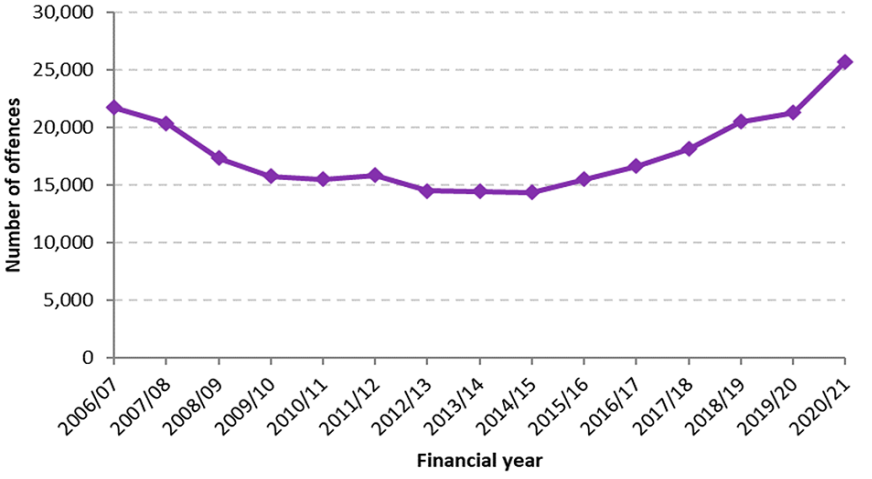

Fig. 1. Number of police officers assaulted in the year ending March 2021, England and Wales (statistical data)[6]

- **Germany.**

We will now turn to the relevant statutes in "flagship" criminal law jurisdiction within in the civil law jurisdictions – namely Germany. Indeed, for over two hundred years now, German Criminal Code has been a landmark document, which was closely read, interpreted and to some extent incorporated into national criminal laws of many other European (and beyond) states.

6 Source: Annex: Statistics on the number of police officers assaulted in the year ending March 2021, England and Wales. Updated 30 March 2022. https://www.gov.uk/government/statistics/police-workforce-england-and-wales-31-march-2021/annex-statistics-on-the-number-of-police-officers-assaulted-in-the-year-ending-march-2021-england-and-wales.

Division 6 "Resistance to state authority" of the German Criminal Code deals explicitly with both resistance-related and assault-related offenses against public officials in general and law enforcement agents in particular.

Section 113 of the German Criminal Code, titled "Resistance to Enforcement Officers," outlines the following provisions:

Anyone who uses force or threatens to use force to oppose a public official or a soldier in the Federal Armed Forces carrying out their official duties, which include enforcing laws, statutory instruments, judgments, judicial decisions, or directives, may face a penalty of imprisonment for up to three years or a fine.

In especially serious cases, the penalty can range from six months to five years. Such serious cases are typically characterized by one or more of the following conditions:

a) The offender or another person involved in the offense possesses a weapon or another dangerous object.

b) The offender, through an act of violence, puts the assaulted person at risk of death or serious harm.

c) The act is committed in collaboration with another offender.

This provision does not apply if the official act is unlawful. The same exception applies if the offender mistakenly believes that the official act is lawful.

Section 114, titled "Assault of Enforcement Officers," states:

Anyone who physically assaults a public official or a soldier in the Federal Armed Forces assigned to enforce laws, statutory instruments, judgments, judicial decisions, or directives during the performance of their official duties may be sentenced to imprisonment for a duration ranging from three months to five years.

Additionally, Section 115, titled "Resistance to or Assault of Persons Equal to Enforcement Officers," specifies the following provisions:

Sections 113 and 114 are applicable to safeguard individuals vested with the powers and responsibilities equivalent to police officers or who serve as investigators in the public prosecution service without being public officials.

Sections 113 and 114 also apply to protect individuals called upon to aid in the execution of official duties. Section 113 also applies to persons who, in the case of accidents, a common danger or an emergency, use force or the threat of force to hinder members of the fire brigade, the civil protection service, one of the rescue services or emergency medical services or a hospital emergency department who are rendering assistance. Persons

who assault those rendering assistance in such situations incur a penalty pursuant to section 114 (German Criminal Code, 2021).

Based on our interpretation of the relevant German criminal law provisions, we can synthesize the following observations: 1) German legislator is primarily focused on protecting law enforcement agents and military service members and, to a lesser degree, other public officials; 2) it has to be proven that a competent government agent – victim of assault – was acting in official capacity and in a lawful manner; 3) criminal law provides for aggravated forms of assaults and also prescribes rather severe penalties.

- **Ukraine.**

Finally, we turn to the "official assault" related section of Ukrainian criminal law. As described in domestic academic literature on the issue, proper functioning of any state is impossible without public (or government) management, i.e., regulated influence on both individuals and organizations by legal acts in order to ensure law and order and achieve other socially beneficial results. Thus, provisions on the most dangerous forms of obstruction of normal activities of state authorities, local self-government bodies, citizens' associations and their representatives in the Criminal Code are concentrated in Chapter XV of its Special Part under the title "Criminal offenses against the authority of state authorities, local self-government bodies, citizens' associations and criminal offenses against journalists" (Borovyk, 2022).

Section XV of the national Criminal Code contains several relevant provisions: interference in the activities of a law enforcement officer, forensic expert, employee of the state executive service, private executor (Art. 343); interference with activity of a statesman (Art. 344); threats or violence against a law enforcement officer (Art. 345); threats or violence against a statesman or a public figure (Art. 346); intended destruction or damage to property of a law enforcement officer, an employee of a state executive service body or a private executor (Art. 347); trespass against life of a law enforcement officer, a member of a community formation for the protection of public order, or a military servant (Art. 348); threats or violence against an official or a citizen who performs his/her public duty (Art. 350); interference with activity of a Member of Parliament of Ukraine or a council or of a local council (Art. 351); intended destruction or impairment of property owned by an official or a citizen who performs his/her public duty (Art. 352).

As one might see, Ukrainian criminal law distinguishes among various forms of criminal behavior against life, health and property of public officials. Such legal differentiation seems both logical and pragmatic; it

allows to protect basic rights of government representatives. In addition, when compared to German criminal liability model, provisions of the Criminal Code of Ukraine in many aspects remind codified statutes of other European countries. This serves as an indirect argument for the common legal framework in Europe, including somewhat similar Criminal Codes.

As an example, we will refer to Art. 350 of the Criminal Code of Ukraine, which sanctions threats or violence against an official or a citizen who performs his/her public duty. This legal norm provides:

1. Making threats of murder, serious physical harm, or significant property damage using globally harmful methods, directed towards an official, their close relatives, or a citizen carrying out their public duties, with the intent to hinder the official's or the citizen's public responsibilities or alter them for the advantage of the person making the threats, is subject to a penalty of up to six months of arrest or up to three years of restricted liberty.
2. Deliberate physical assault or causing minor or moderately severe bodily harm to an official or a citizen performing their public duties related to official or public activities, and such actions carried out against their close associates, may result in a penalty of three to five years of restricted liberty or imprisonment for the same duration.
3. Intentionally causing severe bodily harm to an official or a citizen performing their public duties related to official or public activities, and such actions committed against their close associates, can lead to imprisonment for a period ranging from five to twelve years" (Criminal Code of Ukraine, 2021).

Thus, we conclude that mere threats are recognized as a minor criminal offense; instead, intentional assaults on public officials constitute aggravated forms of criminal behavior with much more severe penalties.

Conclusions

Based on our research, the following set of conclusions can be formulated. Determination of the legal grounds, scope and limits of the protection of government officials by means of criminal law should be carried out at the national (or state) level, based on the directions and principles of the internal criminal law policy and agenda of a given nation. Thus, an elaborated system of general and special measures of state protection of public figures against obstruction of the performance of their officially imposed duties and exercising their rights, as well as from encroachments on the life, health, housing and property of such persons in official capacity and their close relatives should be established and vigorously protected.

It is necessary to emphasize that the new era of socio-political developments in various world jurisdictions, including Ukraine, is constantly testing the strength and resourcefulness of many government institutions, including law enforcement system. Thus, establishing a just balance between the duties of government officials and their rights, including the right to effective criminal protection, should be recognized as a guarantee of the effectiveness of the reforms initiated therein.

It has been proven that public officials in any given jurisdiction and at any given time are required to make important policy decisions as part of their daily responsibilities. Thus, in many cases, politicians and public officials become targets of threats, physical attacks and even murders.

Nowadays, in almost any world jurisdiction assaulting a public officer constitutes a serious criminal offense. The penalties imposed by the court will depend on: classification of the offense (summary or indictable), nature and circumstances surrounding the offense and the injuries sustained by the public officer as a result of such offence. The bottom-line rule is this: government officials are out there to serve and protect, they are always on display for their activities, for both their achievements and mistakes; thus, their life, health and property require enhanced approach toward criminal law protection.

Finally, within this research paper it has been proven once again that comparative method becomes a major one when conducting in-depth analyses of criminal law in several jurisdictions at once. Thus, being able to compare foreign law with the domestic one in a professional and critical manner, to be able to draw important scientific conclusions becomes a major goal for such types of academic projects.

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National Security and Public Safety: Models of Legal Regulation in Comparative Perspective

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Abstract

The paper addresses some pressing national security and public safety issues in various jurisdictions, including Ukraine. The correlation between two main concepts is emphasized. It is shown that in the modern world risks related to national security and, therefore, also to public security are significant. The approaches to defining the two main components of the state are illustrated and the main elements are pointed out. It is emphasized that today security is one of the key values (rights) for any person and citizen and is generally prescribed in national Constitutions. The provisions of the draft Public Security and Civil Defense Strategy of Ukraine (2021), related to national security and public safety, have been discussed. Finally, the main threats to the security of the community and individual citizens have been outlined and the means to overcome them have been elaborated. In the conclusions, it has been established that the formulation of a security and defense sector

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perspective model for central executive authorities presents a number of opportunities as well as challenges. Moreover, it is difficult to give a clear and all-encompassing legal definition of the concept of “public security”.

Keywords: national security; public safety; law enforcement; police and community; rights and freedoms.

Seguridad Nacional y Seguridad Pública: Modelos de regulación jurídica en perspectiva comparada

Resumen

El documento aborda algunas cuestiones acuciantes de seguridad nacional y seguridad pública en varias jurisdicciones, incluida Ucrania. Se hace hincapié en la correlación entre dos conceptos principales. Se demuestra que en el mundo moderno son significativos los riesgos relacionados con la seguridad nacional y, por tanto, también con la seguridad pública. Se ilustran los enfoques para definir los dos componentes principales del Estado y se señalan los elementos principales. Se subraya que hoy en día la seguridad es uno de los valores (derechos) clave para cualquier persona y ciudadano y que generalmente está prescrita en las Constituciones nacionales. Se han debatido las disposiciones del proyecto de Estrategia de Seguridad Pública y Defensa Civil de Ucrania (2021), relacionadas con la seguridad nacional y la seguridad pública. Finalmente, se han esbozado las principales amenazas a la seguridad de la comunidad y de los ciudadanos individuales y se han elaborado los medios para superarlas. En las conclusiones se ha establecido que la formulación de un modelo de perspectiva del sector de la seguridad y la defensa para las autoridades ejecutivas centrales, presenta diversas oportunidades, así como desafíos. Además, es difícil dar una definición jurídica clara y omnicomprensiva del concepto de «seguridad pública».

Palabras clave: seguridad nacional; seguridad pública; fuerzas del orden; policía y comunidad; derechos y libertades.

Introduction

Ensuring constitutional rights and freedoms of a person is one of the key obligations of any state. In particular, a person, his or her life, health, honor, dignity, inviolability and security are recognized as the highest social value in Ukraine (Art. 3 of the national Constitution). As one might observe, security remains among such key values (or rights) for any person.

Community is an undeniably complex and diverse infrastructure, which is constantly evolving. The pace of our everyday life increases, events and activities involving a large number of citizens take place. High traffic intensity requires prompt monitoring and control in real time. Crimes become more spread and evolving. Residents of the community are at risk of encountering many dangers that accompany daily life under modern conditions. This means the issue of security in the current environment is more relevant than ever before.

National security can be defined (among various definitions available) as protection of the vital interests of a person and citizen, society and state, which ensures sustainable development of society, timely detection, prevention and neutralization of real and potential threats to national interests. This definition suits national security regimes in most of world jurisdictions (Pavlenko *et al.*, 2021).

Concurrently, public safety can be explained as the state of protection of civil society and at the same time the absence of danger to people's lives and health, to ensure their peace, free exercise of their rights and freedoms, protection of property rights, for the normal functioning of enterprises, institutions and organizations regardless of the forms of ownership, for the integrity and preservation of material values. Such approach to understanding the fundamental category for any modern legal state and civil society is being gradually introduced in Ukraine and other emerging democracies.

Thus, based on various interpretation approaches, national security and public safety have many common elements, including the key goal of providing security options to a certain group of people.

1. Objectives

The goal of our research is to critically review the current state of national security and public safety in Ukraine and beyond and to single out both certain positive points in the direction of strengthening these components of national security, as well as issues (challenges) on the path to creating a modern European model of public security, based on the principles of an integrated approach, operational response, human-centered philosophy and the rule of law.

2. Materials and methods

In the course of writing this paper, the following research methods have been used. The system-structural method has been used to describe

applicable statutes and their location within the structure of the national legal systems. Legislative approaches toward constructing relevant statutory frameworks also fall under this scientific method. Based on the basic laws of logic and reasoning, the system-structural method allows to establish new legislative material or propose legal amendments.

Based on a comparative method, a conclusion has been formulated that Ukrainian legal framework of national security and public safety is a modern one and it generally correlates with similar frameworks in other countries.

The sociological method has been used to gather relevant empirical materials which helped to identify problematic issues of national security and public safety as well as to analyze the dynamics of such phenomena.

Finally, the formal-legal method has enabled the authors to analyze in detail the legal meaning of provisions of various legal acts in the researched field, namely the Strategy of national security of Ukraine and the Strategy of public safety of Ukraine.

Overall, extensive use of methodological tools of legal science has enabled us to take a closer, in-depth and comparative look at the issues of national security and public safety in the modern globalized world, including various risks and challenges to these two fundamental legal regimes.

The essence of globalization as a process, which characterizes modern stage of human development is the formation of a common economic, political and cultural space, which functions on the basis of universally recognized legal values and principles and is manifested by common organizational forms. Such approach applies in full to academic research of various issues of national security and public safety within a global context.

The topic outlined in the title for this article is both relevant and timely.

In Ukraine, issues of national security and public safety have been researched by N. Yarmish, R. Movchan, Yu. Nebesky, O. Dulina, O. Reznikova, S. Yevdokimenko and some other authors.

Internationally, the same issues have been explored in the works by S. Colier, A. Lacoff, A. Chalfin, B. Friedman, C. Leuprecht, T. Feltes, other scholars.

Despite a rather extensive body of scholarship related to the research topic, the nexus between national security and public safety has not yet been researched at length. This paper aims at partially closing such analytical gap.

3. Results and discussion

Defining "public safety" may appear straightforward, almost self-evident, but in reality, it is a much more complex concept. Simultaneously, recent developments such as a global pandemic and the resulting economic upheaval, increasing homicide rates in major urban areas, and extensive protests against police violence, often linked with demands to reduce police funding, highlight the critical need to provide an accurate answer to this important question (Friedman, 2022).

It is worth emphasizing that the central element in the public security system of any country is "human security" – that is, the emphasis should be placed on a human-centered approach in the field of ensuring public security and civil protection of the population. In its turn, the complex concept of personal security includes various components of personal security: economic, food, medical, personal security (or personal security), community security, and political security. Such list is not normatively regulated, it has been developed through academic research. Therefore it should be perceived flexibly and include other legal elopements of personal safety framework.

Within the Law "On the National Security of Ukraine" (Clause 23, Article 1), the Public Security and Civil Defense Strategy of Ukraine is defined as a long-term planning document developed on the basis of the National Security Strategy of Ukraine based on the results of a review of public security and civil protection and defines directions of state policy regarding guaranteeing the protection of interests, rights and freedoms of a person and a citizen that are vital for the state, society, and the individual, goals and expected results of their achievement, while taking into account current threats (Law of Ukraine, 2018).

Thus, it is a program document of both a long-term and broad scope, which should regulate a number of parameters of safe life, well-being and development that are important for the state, society and the individual. The interaction, and even a certain subordination, between the National Security Strategy and the Public Security and Civil Defense Strategy itself, is noteworthy.

In accordance with the Clause 66 of the National Security Strategy of Ukraine of 2020 (by the way, the slogan of this document is "Human security – country security", which is especially relevant in the context of "public" security persons) this Strategy is recognized as the basis for the development of a number of program documents on planning in the spheres of national security and defense, which will determine the ways and tools of its implementation. Such documents include: Strategy of human development; Military security strategy of Ukraine; Strategy of Public Safety and Civil Defense of Ukraine; Strategy for the development

of the defense and industrial complex of Ukraine; Strategy of economic security; Energy security strategy; Strategy for environmental security and adaptation to climate change; Biosafety and biological protection strategy; Information security strategy; Cybersecurity Strategy of Ukraine; Strategy of foreign policy activity; Strategy for ensuring state security; Integrated border management strategy; Food security strategy; National intelligence program (National Security Strategy of Ukraine, 2020).

Thus, the Public Safety and Civil Defense Strategy of Ukraine is conditionally "subordinated" to the National Security Strategy and at the same time it interacts "horizontally" with other strategic documents. This is an important point, since it clearly demonstrates the fact that thought the security component is important, it is still only a component of the extremely complex and multi-sectoral "social-political-economic-social" mechanism of the modern state.

In Ukraine, in 2021, the Ministry of Internal Affairs developed a project of the Public Safety and Civil Defense Strategy of Ukraine with the support of the European Union, which takes into account modern scientific approaches to national security (Draft Strategy, 2021). This strategy emphasizes the priorities of national interests in the field of public security and civil protection, including protection of the rights and lives of citizens, emphasizes the importance of the rule of law and the integration of Ukraine into the European and Euro-Atlantic security space.

According to the aforementioned draft Strategy, the following crime-related threats and other factors remain among the most dangerous for public safety:

1) disregard for the right to property, dignity and physical integrity of a person, which is a threatening phenomenon. At the same time, a significant part of encroachments against property remains latent. The widespread use of the Internet in the commission of self-interested criminal offenses, primarily fraud, is a matter of serious concern;

2) economic and tax criminal offenses in combination with factors of "shadowing" the spheres of entrepreneurial activity and employment, which cause large-scale losses. Shadow entrepreneurship (or black market) creates an additional factor of victimization of persons engaged in it, in terms of committing selfish and violent criminal offenses against them, primarily robberies and extortion;

3) intensity of the criminogenic situation, which significantly increases the presence in illegal circulation of significant volumes of firearms, ammunition, explosive devices and substances. A number of criminal offenses related to illegal arms trafficking remains consistently high. A large portion of the illicit traffic in firearms are firearms smuggled

out of the Joint Forces Area of Operation. The number of explosive devices in illegal circulation and the use of which for an illegal purpose or careless handling of which causes death or injury remains significant;

4) serious obstacles to the normal functioning of socially significant infrastructure, primarily transport, medical, educational and trade and entertainment, caused by knowingly false reports about threats to the safety of citizens, destruction or damage to property. Measures to evacuate people from the premises of objects of relevant types of infrastructure and long interruptions in their functioning also cause significant financial and material damage to their owners or management entities;

5) growth of organized crime activities, which poses a significant threat to public safety. The number of detected organized groups and criminal organizations largely reflects activity of law enforcement agencies in combating organized crime, and not the scale of its actual spread, when taking into account the traditionally high level of its latency. Certain segments of legal and vast majority of illegal activities, primarily human trafficking, drug trafficking and organization of illegal migration, are controlled by organized groups, criminal organizations and communities, including those, which are ethnically based or operate at the transnational level;

6) deterioration of the migration situation in the country – a migration crisis in the EU member states, which affects formation of channels of illegal migration in a number of regions of the world, an increase in the level of migration from politically unstable states, as well as mass labor migration of Ukrainian citizens to other countries. The lack of control over a significant section of the state border in the Donetsk and Luhansk regions, the armed aggression of the Russian Federation against Ukraine and related threats are also potent factors in the migration-related situation.

Additionally, threats to the national security, such as of criminal nature, hybrid warfare, cyber threats, biological threats and pandemics, social and manufactured threats, are identified in this framework document.

In particular, a dangerous combination between economic and corruption threats to national security (as well as public safety) can be witnessed on the example of contraband (smuggling) offenses. Currently under Ukrainian law smuggling is considered an administrative violation, which is appropriate given its primarily economic nature. Consequently, some authors argue that it is more practical to hold the offender accountable through administrative penalties, imposing fines proportionate to the severity of the smuggling involved.

The prior decriminalization of smuggling served to ease the burden on law enforcement agencies, which were struggling to manage the high volume of criminal cases related to smuggling (Pidgorodynskyi *et al.,* 2021). On the other hand, smugglers may perceive administrative liability through the "nothing personal, just business" approach, that is they are not prevented from liability by means of administrative law. The stigma of criminal liability will have a totally different impact on offenders under such circumstances.

Currently, the main strategic direction for Ukraine in the field of ensuring national security is the creation of its own effective capabilities as a basis for ensuring its own security and stability. In this context, important elements of state policy to ensure the national security of Ukraine in the post-war period should be:

1) increasing the level of defense capability and readiness to respond to crisis situations – development and support of military and defense forces, modernization of the armed forces, education and training of military personnel, provision of necessary resources for effective defense of the country;
2) obtaining external security guarantees outside NATO – development and support of partnership relations with other countries and international organizations that contribute to ensuring security and stability in the region;
3) development of bilateral relations with strategic partners: establishment and support of cooperation with other states which are important for the national security of Ukraine;
4) post-war economic and human development of Ukraine: reforms in the economy, social sphere and education in order to raise the standards of living of the population and ensure stability of the country;
5) improving efficiency of public administration: improving the administration system, including fight against corruption and increasing transparency of state institutions.

In particular, corruption continues to pose a significant risk to Ukraine as well as other emerging democracies in the world. Its destructive potential is comparable to the ongoing war in Ukraine and beyond. With its pervasive influence across all aspects of public life, corruption undermines fundamental societal values for both nation as a whole and its citizens. Consequently, combating corruption is a top priority for both governmental authorities and members of civil society.

The above-mentioned areas perceive the goal of strengthening both national security and public stability of Ukraine under constantly changing conditions and within unpredictable geopolitical context of the XXI century.

When analyzing issues of national security and public safety, one should also pay close attention to the concept of safe environment.

A safe environment is a state of social and natural environment in which: 1) safe living, learning and working conditions exist; 2) there is comfortable interpersonal interaction that promotes emotional well-being and full-fledged development of the individual; 3) human rights and freedoms are respected; 4) sustainable and progressive development of society is carried out; and 5) state sovereignty and the ability of the state to perform its functions in a high-quality manner are also ensured. A safe environment is the goal and result of ensuring not only public safety, but other integrated components of national security as well.

Strategic analysis of the security environment aims to determine processes, phenomena, factors, conditions, circumstances, events, results of activities and interaction of subjects of social relations, as well as to forecast trends in their development. All this affects the level of protection of the state, society and the environment in a certain territory against current and foreseeable threats.

Changes in the security environment represent deviations from the normal state of equilibrium and may contain risks, which require further analysis. The risks identified after the initial analysis of the security environment can be divided into two major categories: those which can turn into threats, and those which create new opportunities for the development of the state and society.

As an integral part of the national security framework, in Ukraine in 2022 an academic course "Protection of Ukraine" has been elaborated and introduced by the Ministry of Education and Science of Ukraine (a government agency). The purpose of such course is to cultivate life-necessary knowledge, skills and abilities regarding protection of Ukraine and actions in emergency situations among Ukrainian students, as well as to promote a systematic view of military-patriotic education as an integral part of national-patriotic education. The course involves basics of normative and legal protection of Ukraine, functions of the Armed Forces of Ukraine and other formations, basics of the protection of Ukraine and civil protection of the population, and the basics of pre-medical training (Updating the practical component, 2023).

The fact that Ukraine takes its national security seriously is also reflected in the Criminal Code provisions. Thus, crimes in the field of general public security should be distinguished from crimes against the foundations of national security of Ukraine.

The major part of crimes against the foundations of national security of Ukraine, according to provisions of Art. 12 of the current Criminal Code of Ukraine, belongs to the category of particularly heinous crimes. Treason

(Article 111 of the Criminal Code of Ukraine), encroachment on the life of a state or public figure (Article 112 of the Criminal Code of Ukraine), sabotage (Article 113 of the Criminal Code of Ukraine), espionage (Article 114 of the Criminal Code of Ukraine), encroachment on the territorial integrity and inviolability of Ukraine (Part 3 of Article 110 of the Criminal Code of Ukraine), obstructing the lawful activities of the Armed Forces of Ukraine and other military formations (Part 2 of Article 114-1 of the Criminal Code of Ukraine) are among the most dangerous crimes in the Criminal Code of Ukraine. The inclusion of such crimes in the category of particularly serious crimes is a symmetrical act in relation to the danger that such crimes possess. After all, an intentional form of guilt describes especially serious crimes.

Since the beginning of the full-scale Russo-Ukrainian war in February of 2022, a number of significant amendments to these criminal statutes have been made to the Criminal Code of Ukraine (Kuznetsov and Siyploki, 2022).

As an example of crime which harms both national security and public safety (though in a limited way), we can refer to the statute of criminal liability for humanitarian aid embezzlement (Art. 201-2 of the Criminal Code of Ukraine). On the one hand, introduction of Art. 201-2 in the Criminal Code can be characterized as an example of excessive criminalization: in this case, we are talking about an act, which is inherent in the social harmfulness necessary for criminalization, but which did not require criminalization, since criminal liability for it has already existed. Criminal laws of some European countries, in which there are no similar to the analyzed criminal law prohibition statutes, additionally attest to the fact that there are reasons to regard Art. 201-2 of the Criminal Code as a manifestation of unjustified casuistry of the criminal law and excessive criminalization. Negative consequences of the latter include: violation of the principle of economy of criminal law repression; artificial creation of unwanted collision between criminal law norms; emergence of paradoxical situations in which the same act entails application of significantly different criminal law means.

However, on the other hand, it is obvious that during the war, when abuse of humanitarian aid is particularly unacceptable and causes significant public outcry, Ukrainian legislator is unlikely to take such a drastic and unpopular step as the exclusion of Art. 201-2 from the Criminal Code. Therefore, members of local legal community focus their efforts on solving debatable issues related to the interpretation, application and improvement of Art. 201-2 of the Criminal Code (Kamensky *et al.,* 2023).

Overall, the framework for offenses related to the security of a nation constitutes a lawful system composed of elements that are established and are operating in a manner which undermines the safeguarding of state

sovereignty, territorial integrity, democratic constitutional order, as well as other national interests, both from existing and potential threats (Yaremko *et al.,* 2021).

The concluding part of our paper will cover relevant foreign experience of ensuring national security and public safety by means of legal regulation. This is even more important for the Ukrainian security environment when taking into account active integration of our state into European as well as world legal and economic spaces.

1. Israel.

The Ministry of Public Security of Israel primarily takes care, based on the agency's name, of issues of creating a safe environment for Israelis.

The Israel National Police (INP) reports to the Ministry of Public Security (MOPS) and consists of approximately 30,000 sworn officers, supported by 50,000 volunteers. It bears sole responsibility for the work of the police and law enforcement agencies in Israel. In its course of action, the Israel National Police is guided by the values and principles of the democratic government of the State of Israel (Freilich, 2021).

The main areas on which the Israeli police are currently focused include:

public safety – prevention and countering of terror, response to calls from citizens, organization of security procedures and organization of volunteers (civil guard).

law enforcement – responding to riot calls, responding effectively to demonstrations and unlawful assemblies,

licensing – imposing restrictions and conditions on businesses, accountability for detainees and enforcement of court orders;

fighting crime – investigating crimes and apprehending offenders, identifying and exposing unreported crimes such as drug trafficking, extortion and educating citizens on how to protect themselves and their property;

traffic control – directing traffic and working to ensure smooth traffic, obeying traffic rules, investigating traffic accidents and arresting traffic violators. In addition, police provides public instruction on road safety issues and participation in the decision-making process on issues such as road planning and construction, placement of road signs and traffic lights.

Border Security – The Border Police is an operational unit of the Israel National Police. Multi-purpose forces deal with challenges related to public safety, terror, serious crime, riots, security of critical facilities and rural security (Ministry of Public Security of Israel, 2023).

2. Federal Republic of Germany (FRG).

Currently, this country has one of the safest public safety systems in the world. Nevertheless, analysis of the regulatory framework and general assessment of the public environment in this state indicate that public safety is not a stable phenomenon which should not be supported and developed. On the contrary, the state must constantly monitor the state of public security and take all necessary measures to fully ensure the regime of public safety and full use of all state services (services), security and security services in particular.

One of the most important and at the same time traditional tasks of the internal policy of the Federal Republic of Germany is to ensure public safety. This includes protecting society from violence, crime, terrorism and activities aimed at undermining the constitutional order in the state. The German approach in this field is as follows: only in a society free from threats can people live freely. The Constitution requires that government protects its citizens. The government has certain powers for this. Using these powers to protect one person may require violating another person's rights.

In order to maintain a high level of public safety, the competent authorities and officials in Germany pay close attention to the threats that the country faces today and in the coming years. These include the threat of Islamist terrorism, a possible increase in crimes committed by the right-wing and left-wing extremists, cybercrime and serious and organized crime. In a globally connected world, it is important to overcome such challenges by working closely with other actors at both national and international levels.

In Germany, the task for maintaining public safety and order is divided between the 16 federal states and the federation, with the federal states bearing the responsibility. Policing at the federal level is the responsibility of the Federal Police (Bundespolizei, BPOL) and the Federal Criminal Police Office (Bundeskriminalamt, BKA). In addition, two other federal agencies deal with security issues, the Federal Intelligence Service (Bundesnachrichtendienst, BND) and the Federal Office for the Protection of the Constitution (Bundesamt für Verfassungsschutz, BfV). The German Police University (Deutsche Hochschule der Polizei) is the main educational institution of law enforcement agencies in Germany (The BKA, 2023).

The Federal Police is mainly engaged in the protection and management of borders, railways and aviation. By carrying out its work through regional and special directorates, it is also responsible for the protection of the coastline.

In addition to the police and intelligence services mentioned above, the following agencies are responsible for counter-terrorism activities: the Joint Counter-Terrorism Center (Gemeinsames Terrorismusabwehrzentrum, GTAZ), the Joint Center for Combating Extremism and Terrorism (Gemeinsames Extremismus- und Terrorismusabwehrzentrum, GETZ), as well as the anti-terrorist unit GSG9.

The National Cyber Response Center (Nationales Cyber-Abwehrzentrum, NCAZ), founded in 2011, is a collaboration of several cyber defense resources: the Federal Office for Information Security (Bundesamt für Sicherheit in der Informationstechnik, BSI), the BND, the BfV, the Customs Office for Criminal Investigation (Zollkriminalamt, ZKA), the German Armed Forces, the Federal Office for Civil Protection and Disaster Relief (Bundesamt für Bevölkerungsschutz und Katastrofenhilfe, BBK), and the Federal Criminal Police Office (Bundeskriminalamt, BKA) (Ministry of Public Security of the Federal Republic of Germany, 2023).

The State Police Service prevents and prosecutes local crime and is usually split between a uniformed police force and an investigative division. Security forces patrol the streets 24 hours a day, respond to emergency calls, serve as a point of contact for citizens, as well as traffic police and petty crime police. Investigation departments are usually responsible for investigating criminal cases.

The State Security Police (ensures law and order during mass events) has an autonomous unit to respond to requests for general support during mass demonstrations, major sport events, natural disasters and state visits. In addition, the security police units of European countries are able to support each other in the case of cross-border police operations in the mentioned cases in Germany.

The Federal Police reports to the Ministry of the Interior and carries out wide and varied policing duties based on the modern Police Act (Federal Police Act) and many other laws. The BPOL works closely within existing security networks based on security cooperation and partnership with the police services of the federal states, other security authorities of the Federal Republic of Germany and the federal states, as well as with foreign border authorities (Germany Federal Policing Overview, 2023).

The Federal Police can also, if necessary, reinforce the State Police if requested by the Government of the Land (member of the Federation). They conduct criminal investigations only within their jurisdiction; otherwise, cases are referred to the relevant state police service or to the national criminal investigation agency – the Federal Criminal Police Office (Bundeskriminalamt).

3. Poland.

Taking into account common border, the friendliest relations and the unprecedented level of support for Ukrainians, Poland's security experience is both interesting and practically useful.

Law enforcement in Poland is usually carried out by the National Police (Policja) and the Municipal Guard (Straże Miejskie i Gminne).

Border Guard (Straż Graniczna, SG) is a state security service that protects Polish borders and immigration control.

According to the Anti-Terrorism Act of June 10, 2016, the head of the Department of Homeland Security is responsible for preventing terrorism, and the Minister of the Interior is responsible for preparedness, response to a terrorist incident, and recovery after an attack (Ministerstwo Spraw Wewnętrznych i Administracji, 2023).

There is a single national police agency in Poland – a unified law enforcement body. At the highest level is the Main Directorate of the National Police managed by the head of the National Police. In addition, there are 16 regional police departments and the head office of the Metropolitan Police in Warsaw. They are further divided into districts and district headquarters respectively. At the bottom of the structure are police stations in cities and police posts in villages. The police consists of:

- criminal police (służba kriminalna) – conducts investigation and prevention of serious and violent crimes. The criminal police may include specialized groups such as the anti-narcotics and financial crime prevention units;
- investigative police (służba śledcza) – investigation of complex cases and processing of referrals to the state prosecutor's office;
- police of internal affairs (służba spraw świężnych) – investigation, prevention and countermeasures against crimes committed by police officers and economic crimes against police property;
- preventive police (służba prewencyjna) – general law enforcement and patrol service (includes anti-terrorist units and police units);
- logistics police (służba spomajająca policji) – provision of logistics support and technical skills;
- court police (Policja Sądowa) – protection of court premises and the state prosecutor's office, judges, prosecutors, victims and suspects, execution of court orders;
- anti-terrorist units – conduct anti-terrorist operations and assist other police units.

In comparison, the municipal security has fewer powers than police (for example, they do not have the power to arrest) and can only use the powers, which they can exercise within their municipality. They have jurisdiction over minor offenses (infractions), monitor and protect safety of citizens and property, and assist police in their public order duties (e.g. road safety). In case of a significant incident (conflict), municipal guard should seek help from a police officer. They can also perform security duties as well as transport valuables for the municipality (Poland Policing Overview, 2023).

Conclusions

Our analytical research allows formulating a number of generalizing conclusions-theses, which are important in the theoretical and applied aspect.

Formulating a perspective model of the security and defense sector for the central executive authorities presents various tasks and challenges. Specifically, the National Police of Ukraine, which is the central law enforcement body, performs an important role in the society by ensuring protection of human rights and freedoms, fighting crime, and ensuring public order and security.

In addition, the National Guard of Ukraine should increase its capacity in public security, including public order. The Ministry of Internal Affairs of Ukraine defines state policy, in particular in the field of public safety and order.

After all, the main task of the National Guard of Ukraine is to protect public order and to ensure public safety.

Currently, it is difficult to give a clear legal definition of the "public (public) safety and civil protection" concept. This issue is relevant from both a scientific and a practical point of view. Public security is an important component of the national security, and it must be properly reflected in official documents in order to create an effective system for ensuring such security.

A comprehensive review of the state of public safety should contribute to the implementation of a number of goals and programs in the state. This includes:

1) reviewing and update of the Public Safety and Civil Defense Strategy of Ukraine so that it meets current challenges and threats, in particular those related to the armed aggression of the Russian Federation against Ukraine;

2) ensuring reliable protection of life, health of citizens, legal rights and interests of organizations and public associations, as well as the safety of land, water and air spaces in the relevant territories and objects of industrial and social purpose, observing the established risk indicators taking into account national and international experience;

3) determining the optimal balance between public safety, the level of crime and restrictive measures, with a focus on the priority of preserving human life as the main value;

4) combining preventive and reactive methods of ensuring public safety, including combating crime, and involve all subjects of law enforcement activities responsible for ensuring public safety and other aspects of national security;

5) increasing citizens' awareness of the activities of military-civilian administrations, law enforcement and civil protection bodies, and develop mechanisms for addressing these bodies for the protection of rights;

6) strengthening public trust in law enforcement agencies, promote development of Ukraine as a safe European state, ensure a socially oriented orientation of the law enforcement system using the tools of facilitated dialogue;

7) directing efforts to manage security risks to achieve maximum security with limited resource provision;

8) ensuring the continuity of the process of responding to emerging threats and challenges, in particular, by identifying and implementing new opportunities.

The universal system, which ensures the safety of residents (community level) in modern conditions, has special requirements for reliability, stability, efficiency and continuity of work in a round-the-clock mode. There is a need for new means and methods of providing the safety of community residents, advanced technologies and measures for the centralized provision of video surveillance, technical security, control of important, strategic and dangerous objects, and the possibility of operational impact on emergency situations.

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State borders stability formation on the conditions of response to migration crises on the example of Ukraine

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Abstract

Based on personal participation in the special border operation "Polissia", the author's team analyzed the actions of the Ukrainian government in response to the potential risks of the migration crisis

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on the Ukrainian-Belarusian border in 2021. The experience of migration crisis response of the EU member states (Poland, Lithuania, Latvia) in 2021 was analyzed, as well as the experience of migration crisis response in previous years (Balkan route). Proposals for improving organizational aspects of conducting special border operations in order to overcome migration crises at the state border have been substantiated. In addition, a methodology has been developed that allows detecting the changes of the situation in the border zone of national security, determining the time periods of increase (decrease) of the degree of aggravation, forecasting the time period of transition of the situation from the level of "aggravation" to the level of "threat". In the conclusions it is proposed to develop a concept paper in the form of a strategy for the security and stability of state borders, which will include ways of solving the material and technical problems of the State Border Guard Service of Ukraine.

Keywords: stability of state borders; migration crisis; national security; refugees; migration policies.

Formación de la estabilidad de las fronteras estatales en las condiciones de respuesta a las crisis migratorias a partir del ejemplo de Ucrania

Resumen

Basándose en la participación personal en la operación fronteriza especial «Polissia», el equipo del autor analizó las acciones del gobierno ucraniano en respuesta a los riesgos potenciales de la crisis migratoria en la frontera entre Ucrania y Bielorrusia en 2021. Se analizó la experiencia de respuesta a crisis migratorias de los estados miembros de la Unión Europea (Polonia, Lituania, Letonia) en 2021, así como la experiencia de respuesta a crisis migratorias en años anteriores (ruta de los Balcanes). Se han fundamentado las propuestas para mejorar los aspectos organizativos de la realización de operaciones fronterizas especiales con el fin de superar las crisis migratorias en la frontera estatal. Además, se ha desarrollado una metodología que permite detectar los cambios de la situación en la zona fronteriza de la seguridad nacional, determinar los periodos de tiempo de aumento (disminución) del grado de agravamiento, pronosticar el periodo de tiempo de transición de la situación del nivel de «agravamiento» al nivel de «amenaza». En las conclusiones se propone elaborar un documento conceptual en forma de estrategia para la seguridad y estabilidad de las fronteras estatales, que incluirá formas de resolver los problemas materiales y técnicos del Servicio Estatal de Guardia de Fronteras de Ucrania.

Palabras clave: estabilidad de las fronteras estatales; crisis migratoria; seguridad nacional; refugiados; políticas migratorias.

Introduction

The borders of any state play a key role in ensuring sovereignty, inviolability of territorial integrity. Ukraine is not exception; the events of recent years have proven the importance of Ukraine's borders in the system of the national security ensuring. The experience of almost continuous regional and global crises increases interest to the idea of stability, i.e. the ability of state borders to adapt and cope with violations and uncontrolled migration flows (Prokkola, 2019).

Illegal migration was, is and will be a widespread phenomenon, the social danger of which is determined by a number of factors of a political, social and economic nature. Today, for the most world countries, this phenomenon is a special problem, which, unfortunately, has a steady tendency to grow.

Over the last few years, the influx of illegal (unlawful) migrants has doubled, primarily due to the unstable situation in the Middle East, the terrorist organizations emergence, the difficult economic situation, etc. It is known that the member states of the European Union (hereinafter – the EU) have been suffering from the problems that have arisen for a long time, especially from illegal migration (Kuryliuk, & Khalymon, 2020). Among the threats to national security, Bratko et al. (2021) determines the spread of international crime, in particular in the field of drug trafficking, human trafficking, illegal migration, proliferation of weapons of mass destruction, etc.

Our study is an attempt to expand the substantive essence of stability, considering its role and place in the state border protection system, as well as the study of situations in border areas, with the aim of studying the stability of the state border in relation to flows of illegal (irregular) migrants in particular.

In the process of studying the issue of the state border stability, we tried to investigate the measures taken by the governments of the EU member states (Poland, Lithuania, Latvia) in order to overcome the migration crisis of 2015–2021, the response and actions of the Ukraine government to the potential risks of the migration crisis on the Ukrainian-Belarusian border in 2021, as well as to determine ways to improve the organizational and legal mechanisms for conducting special border operations to overcome migration crises at the state border.

1. Review of the Literature

The stability of border areas and free border crossing are considered important from the point of view of the state security and the functioning

of society in general (Longo, 2018). Therefore, state borders are extremely interesting objects for studying their stability. The use of the term "stability" is becoming very popular, being included in various dictionaries, etc. The meaning of stability is different and fluctuates depending on academic and policy debates (Boschma, 2015).

In the social sciences, stability is understood as the ability of an individual, community, region or state to adapt to changing circumstances and recover from a crisis (Adger, 2000).

In general, stability, in our opinion, is the ability of any system to adequately respond to external influences and quickly restore its effectiveness in a stable manner.

The Decree of the President of Ukraine "On the decision of the National Security and Defence Council of Ukraine" dated August 20, 2021 "On the implementation of the stability of the national system" approved the Concept of ensuring the stability of the national system, which reveals the essence of interests for our research of the terms: national stability and organizational stability. These terms, in our opinion, directly relate to the stability of the state border:

> National stability – is the ability of the state and society to effectively resist threats of any origin and nature, to adapt to changes in the security environment, to maintain stable functioning, to quickly recover to the desired balance after crisis situations; organizational stability – the ability of state authorities, local self-government bodies, enterprises, institutions, organizations to identify, to prepare, to respond to threats, to adapt to changes in the security environment, to maintain stable functioning before, during and after the beginning of a crisis situation in order to maintain functioning and further development (On the introduction of the national sustainability system, 2021: 19).

Therefore, the scientific interest is in clarification the system of forming the stability of state borders in the conditions of responding to migration crises that occurred in 2015–2021 on the territory of the border areas of the EU.

Considering the fact that a large number of publications are devoted to the problems of formulating the policy of anti-crisis management of migration crises in 2015–2021, the problem of methods forming of prognostication, prevention and response to risks and crisis situations at various stages of their development, as well as plans for the restoration of sustainable functioning, taking into account potential cascading effects remains unsolved.

Thus, Rijavec et al. (2021) investigated the anti-crisis measures carried out on the migration route of the Western Balkans, Croatia and Slovenia.

McMahon, Sigona, (2020) based on 500 semi-structured interviews with people who crossed the Mediterranean by boat between 2014-2016 and more than 100 interviews with key interested parties in the region, documented the geography of migrant deaths as well as their impact on policy-making and public response to this migration crisis.

Squire (2020) reflects on the idea of whether migration is a subversive political act that disrupts spatial inequality and longer histories of power and violence, or a "social movement" that involves subjective acts of flight.

However, it is worth remembering that the means by which states try to ensure their own security can potentially pose a threat to others. This is the so-called "security dilemma". The power of one state – and it is not necessarily military power – causes concern in others (Gonzálvez Vallés, 2021). The formation of the stability of the state borders of Ukraine in response to migration crises is a cause of concern for our neighbours (the Republic of Belarus (hereinafter referred to as the RB), the Russian Federation (hereinafter referred to as the RF)). However, it is obvious that their concern is false and Ukraine cannot pose any threats to neighbouring countries.

Today it is obvious that the instigation of the migration crisis "Belarusian route" of 2021 was organized by the special services of the RF in order to divert the attention of the EU and other countries of the world from the preparation of the RF for armed aggression against independent, sovereign Ukraine, which took place on February 24, 2022.

Russia's aggression against Ukraine has launched a process of destroying the system of European and transatlantic security. The Kremlin's actions against Ukraine and other regional states are undermining stability in the area from the Baltic to the Black Sea, creating a serious challenge to peace and security in the region (Bratko, Zaharchuk, Zolka, 2021: 147).

2. Method

The methodology of our research is based on general scientific methods, the main of which is the system analysis method. In addition, during the research, empirical data processing methods (analysis, synthesis, comparison and generalization) were used to compare and interpret the data obtained from the results of other studies, as well as mathematical prognostication methods for the development of methods for identifying threats at the border.

With the help of these methods, textbooks, books, scientific articles, dissertations, empirical materials published on official websites, as well as documents in the field of migration policy were studied.

The conclusions of the scientific study are also based on the empirical material obtained by the author's team during the scientific expedition to the areas of the special border operation "Polissia" in November-December 2021 (order of the Administration of the State Border Guard Service of Ukraine dated November 25, 2021 № R-564/0/10-21).

3. Results

3.1. Study of foreign experience in responding to migration crises in 2015-2021

Studying the foreign experience of responding to migration crises ("Balkan route") shows that several conceptual approaches to their definition have been developed in the scientific discourse, in particular, "state of emergency" and "humanitarian corridor".

The first approach defined the migration crisis at the "Balkan route" as an unorganized form of emergency with outspoken criticism of the refusal of the free movement of refugees across borders. The second approach is the concept of the "humanitarian corridor" as a policy of exclusivity, which ensured the fastest and safest movement of illegal (irregular) migrants through transit countries without the services of intermediaries (migrant smugglers) and was most in line with the interests of refugees (Žagar, Šalamon *et al.*, 2018).

As noted by Kurnik, Toplak (2021: 337): "…after the "Arab Spring" and the "Summer of Migration" we witnessed the fall of Europe. We are about to see whether this "fall" is the final collapse of the unrealistic ideas of an open, tolerant and humane Europe, or whether the "fall" may still mean a period of maturity."

FRONTEX (2019) statistics for the three-year period of the 2015-2016 migration crisis indicate that almost 2,5 million illegal (irregular) migrants entered EU countries via routes along the Mediterranean Sea and continued transit through the Western Balkans route to reach place of destination.

In turn, the migration crisis of 2021 "Belarusian route" has a much smaller scale (according to various data, there were 5,000 to 20,000 illegal migrants), but the causes of its occurrence, as well as possible further consequences, are significantly different from the migration crisis crises of the "Balkan route".

The migration crisis of 2021 "Belarusian route" can also be characterized as a "state of emergency", because the government of the Republic of Poland did not agree to the proposal of the organizers of the migration

crisis, namely, the RB to open a humanitarian corridor and give migrants the opportunity to enter the EU member states. As we can see, the government of the Republic of Poland did not want to repeat the mistakes of 2015. German Chancellor Angela Merkel was even accused of making a grave mistake that destabilized society in Europe when Germany opened its borders to refugees seeking asylum, even though Hungary was building a wall along its border at the time to stop people trying to get to Germany (Kurnik, Toplak, 2021: 325-326).

The practical experience of responding to the migration crisis of 2021, the "Belarusian route", shows that the countries located on the external borders of the EU perceive the flows of illegal migrants in a different way, as well as the reasons that became the basis for the emergence of the migration crisis. Thus, the migration crisis of 2021 was organized on the territory of the RB, near the borders of the EU: Poland, Lithuania and Latvia. These states, which relatively recently became members of the EU and NATO, are the most radical opponents of the RF, and they really feel the threat that comes from it.

In addition, according to FRONTEX, the average rate of illegal crossing of the eastern borders of the EU before the start of the migration crisis in 2021 did not exceed 280 people per month (FRONTEX, 2018). The analysis of statistical indicators of the Ministry of Internal Affairs of Lithuania for 2020 showed that only 74 illegal migrants crossed the borders of Lithuania and Belarus, and later their number began to grow rapidly and reached 2,400 people in July (Fig. 1). Maintaining such dynamics would lead to the fact that 15 thousand of illegal migrants could arrive in Lithuania alone, therefore the governments of these countries were forced to take adequate measures to stop the flow of illegal (irregular) migrants from Belarus – from the construction of engineering and technical facilities to the introduction of a state of emergency in separate territories.

In addition, on June 28, 2021, the government of the RB officially announced the beginning of the termination of the agreement on readmission with the EU. In practice, this meant that the Belarusian authorities refused their obligations regarding the return of citizens of third countries who illegally crossed the border and who were detained on the territory of the EU (Law of the RB No. 125-Z.). In November 2021, the situation with migrants in the RB significantly worsened. This especially applied to several border crossing points on the Belarusian-Polish border, namely, near the border crossing point "KUZNITSA"- "BIALOSTOK" there were almost 5 thousand migrants who made several attempts to break through to Poland by force and created a field camp on the neutral border strip, which contributed to the emergence of a humanitarian crisis.

The number of third-country nationals who tried to illegally cross the state border of Poland with the RB outside the border crossing points amounted to 39,697, which is three hundred times more than in 2020.

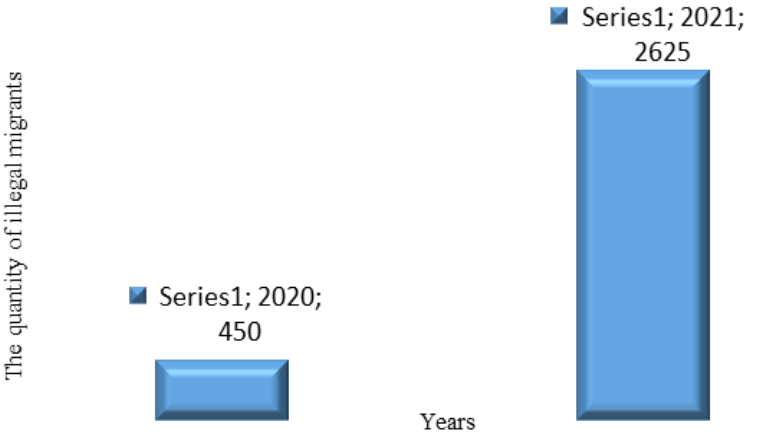

Fig. 1. The number of migrants according to official data of the Ministry of Internal Affairs of Lithuania.

In 2020, during the same period, only 129 people tried to cross the state border with the RB outside the state border crossing points. In turn, the intensification of illegal migration in 2021 occurs in August, and its peak occurred in October, when the number of attempts to illegally cross the state border amounted to 17,447 people. The number of cases of the state border crossing of Poland with the RB in violation of the established rules decreased significantly and amounted to 8,917 in November and 1,740 in December (Fig. 2, 3).

The greatest migratory pressure occurred at the Mikhalova border post, where 5,466 people tried to illegally cross the border at the area. In addition, a large number of attempts to violate the state border were stopped at the border post in Melnyk – 4,890 foreigners and at the border point in Bilovezha – 4,855 foreigners.

In total, there were more than 10,000 people in the RB who arrived from the countries of the Middle East and tried to cross to Western Europe. They expected that there would be an opportunity to get into the EU, and they are ready under any conditions and very quickly to support the protests at the border.

The Belarusian authorities tried to ferry illegal (irregular) migrants from the Middle East to the border as soon as possible. The mass media recorded the transfer of illegal (irregular) migrants, migrants from Minsk to the borders with the EU, with the aim of exacerbating the migration crisis and increasing pressure on neighbouring countries. Apparently, the idea was

that with the beginning of cold weather, the Polish authorities, under the pressure of the international community and accusations of inhumane treatment of people would make concessions and open the borders.

The refugee public sector, namely Seebrücke Deutschland and Leave No One Behind, have called for a humanitarian corridor for refugees suffering at the Belarusian borders. Adherence to the rule of law, providing assistance to refugees seeking a better life in wealthy Europe is important, but national security is also important, because next to the refugees may be Islamic State of Iraq and the Levant terrorists, Russian intelligence agents, whose goal is to undermine the security of countries – EU members.

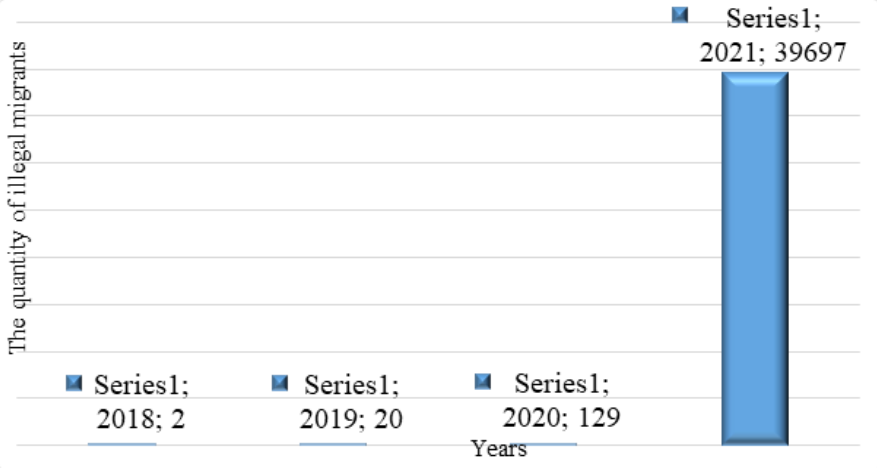

Fig. 2. Distribution of illegal (irregular) migrants' detentions on the Polish-Belarusian border during 2018-2021 (According to the results of the activities of the Border Service of Poland).

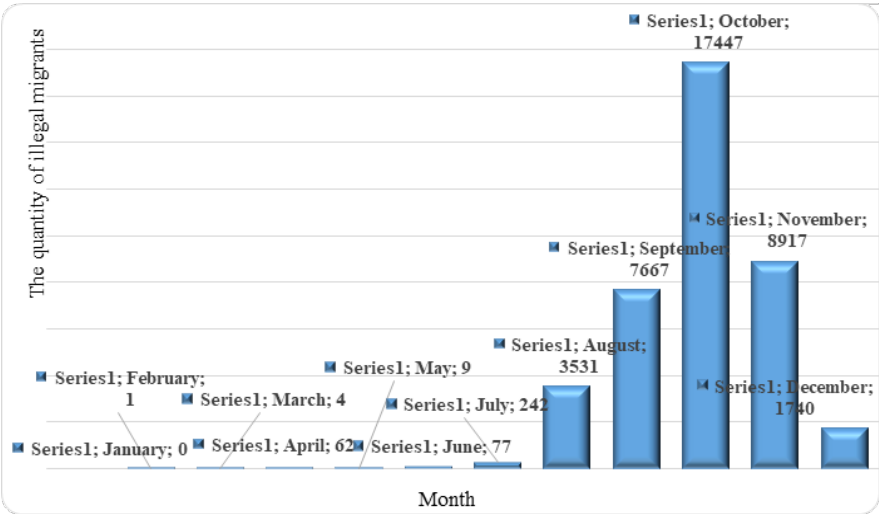

Fig. 3. Distribution of the number of illegal (irregular) migrants by month in 2021 at the border of Poland.

Certain political authorities in the West perceived Ukraine as a transit country where illegal immigrants could wait for the decision of European states to admit them. In particular, migrants from the RB could wait for consideration of their application for asylum in the EU in Ukraine. Nils Schmidt, an expert on foreign policy issues of the Social Democratic Party faction in the German Bundestag, proposed such a solution to the problem of refugees on the Belarusian-Polish border (Schmid, 2021).

4. The experience of Ukraine's response to the potential risks of the migration crisis on the Ukrainian Belarus border

On the background of the fight against the pandemic in 2021, the European community was forced to respond to a significant flow of illegal migrants, provoked by the self-proclaimed Belarusian authorities. In response to EU sanctions against the RB, the Belarusian authorities organized channels for transporting illegal (irregular) migrants from the country across the EU border, first to Lithuania, and then to Poland. Transportation of people across the border was carried out with the active assistance of Belarusian border guards. Ukraine was also not left out of such a migration crisis.

In December 2021, according to various data, from 5,000 to 20,000 illegal (irregular) migrants from the Middle East and Africa were concentrated on the territory of the RB. Taking into account that Ukraine has a common border with the RB, there was a high probability of attempts to transport them to the borders of the EU by transit through Ukraine.

Studying the course of events of the migration crisis on the Belarusian border shows that it is one of the tools of the hybrid war of the RF against the West, because the Belarusian special services do not have enough means and funds to organize the process of moving several thousand people from the Middle East to Europe. And this shows that without the coordination and help of the RF, it would be quite difficult to organize such events, besides, the Main Intelligence Directorate of the RF specializes in such operations. It is worth mentioning at least the organization of a massive migration crisis on the southern flank of the EU after the Russian invasion of Syria in 2015.

At the same time, the agreement on readmission between Ukraine and the RB came in force from 2020. This means that illegal migrants who illegally entered the territory of a state from another country must be expelled back and the state from which the migrants came is obliged to accept them. At present, there are legal grounds for preventing such a situation as on the Polish-Belarusian border on the Ukrainian-Belarusian section of the state border. At the same time, as the experience of operational and service activities of the border agency shows, it is not worth depending on the effectiveness of the readmission agreement, because the Belarusian side refuses to accept illegal (irregular) migrants and has not accepted a single migrant since the effective date of this agreement.

In order to increase the capacity for operative response to attempts of mass violations of the state border of Ukraine by migrants and to ensure national security in the border areas of Ukraine and directly on the border of Ukraine with the RB, the State Border Guard Service of Ukraine together with the forces of the National Guard of Ukraine, the National Police of Ukraine, the Armed Forces of Ukraine and the State emergency service of Ukraine conducted a special border operation “Polissia” from November 23, 2021.

In November 2021, the analysis of the situation made it possible to predict several options for the development of the migration crisis and its course.

- The first of them is that everything remains unchanged and contributes to the growth of confrontation, provocations and the creation of an unfavourable humanitarian and epidemiological situation.

- The second scenario is that illegal (irregular) migrants will still be allowed to enter Germany and further the EU.
- The third version of the development of events involves the deportation of illegal (irregular) migrants to the countries from which they came.
- The fourth option involves the redirection of migration flows to other directions, including to Ukraine.

In order to counteract the migration crisis, in the process of a joint border operation, the possible directions of a border breakthrough by migrants were outlined, the scenarios of their actions were worked out, and the use of available forces and means was planned. In addition, the meeting of the Security and Defence Council of Ukraine clearly defined the forces and means that are necessary for an adequate response to the worst course of events, namely: up to ten potentially vulnerable sections of the border with a length of about 270 kilometres were identified and an operational survey of the border territory was carried out regarding the objective situation and risks.

Aviation was involved in the shifts – up to 15 helicopters, two planes and 44 drones. As evidenced by previous studies of the use of unmanned aerial vehicles, they show high efficiency results during monitoring of the state border of Ukraine (Khalymon *et al*., 2021). Staff trainings were conducted, where various scenarios of the development of the situation were worked out, field exercises together with the operation participants were conducted to work out possible scenarios for countering the mass influx of illegal migrants directly at the border.

Echelon cover tactics were used to protect the border. The first echelon was unarmed, they had only protective equipment, and in the case of aggressive actions by border violators, the second echelon personnel were armed with the necessary special equipment and weapons according to law.

Base points for the formation of a reserve, which, if necessary, will be able to reach critical points of the state border in 30-60 minutes, and the placement of camps for additional forces and means have been determined. Representatives of local authorities of border regions and oblasts were involved in decision-making.

Also, with the aim of readiness forming of the operation participants, together with the intelligence and Security Service of Ukraine, the Ministry of Internal Affairs of Ukraine, a set of preventive measures was developed to prevent provocations, in particular, regarding the timely identification of instigators, leaders and other suspicious persons.

Training was conducted together with the Armed Forces of Ukraine, territorial defence services, and public law enforcement formations. In order

to inform illegal (irregular) migrants about the inadmissibility of the state border of Ukraine crossing and illegal behaviour, mobile sound amplifier devices were used and warning text messages in Arabic and English were sent through Ukrainian cellular operators.

The best defence against this crisis, as experience has shown, was the proper engineering equipment of the state border. To solve the problem of illegal migration, a number of measures should be taken, namely: financing of search and rescue missions, providing funds and means to fight against migrant carriers, expanding the capabilities of temporary detention centres and providing assistance, improving the mechanisms of interaction between the integrated border management subjects.

5. Ways to improve the organizational and legal aspects of special border operations conducting to overcome migration crises at the state border of Ukraine

Taking into account the situation that has developed since October 2021 at the Polish-Belarusian, Lithuanian-Belarusian, and Latvian-Belarusian state borders on the mass incursion attempts of large groups of illegal (irregular) migrants from Belarus and the implementation of effective countermeasures to prevent their incursion into Ukraine, it is logical to assume the possibility of redirecting migration flows from the Polish, Lithuanian and Latvian areas of the RB to the border with Ukraine. According to experts' estimates, the number of illegal migrants who concentrated on the territory of the RB amounted to almost 25,000 people, which indicated the growth of potential migratory threats to the national security of Ukraine.

The expert survey was conducted in order to determine the threats levels depending on the number of illegal (irregular) migrants in the area of responsibility, based on the results of which it was possible to distinguish three categories of illegal migration levels: "A", "B", "C" (Fig. 4).

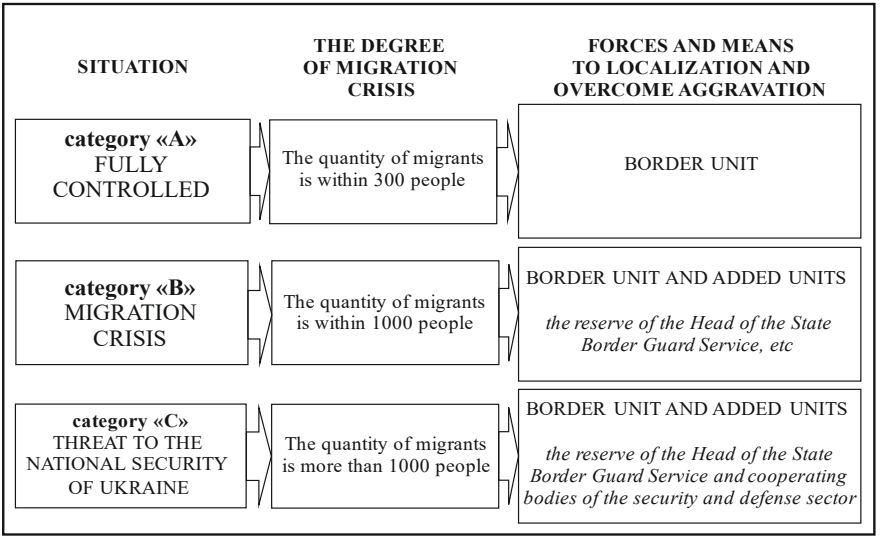

Fig. 4. Categorization of aggravation levels of the situation depending on the increase of illegal migration. Source: prepared by the authors.

"A" category of illegal migration – is the level of the situation, which is aggravated due to the illegal migration increase in the area of responsibility of the border guard detachment, the localization and overcoming of which can be carried out by the available forces and means of the border unit (≈ 300 illegal migrants), and such a situation can be considered as such, which is fully controlled.

"B" category of illegal migration – is the level of the situation, which is aggravated due to the illegal migration increase in the area of responsibility of the border guard detachment, the localization of which can be carried out with the available and attached (the Head of the State Border Guard Service of Ukraine reserve, etc.) forces and means of the border unit (up to 1,000 illegal migrants) and such a situation can be considered as obtaining signs of a migration crisis.

"C" category of illegal migration – is the level of the situation, which is aggravated due to the illegal migration increase in the area of responsibility of the border guard detachment, the localization of which can be carried out by the united detachments of the State Border Guard Service of Ukraine and with the involvement of forces and means of interacting bodies of the security and defence sector (more than 1,000 illegal migrants) and such a situation can be considered as obtaining signs of a migration threat to the national security of Ukraine.

Such a distribution of levels allows forming more balanced and effective border protection, which will be adequate to such a threat to the national security of Ukraine as illegal migration.

Permanent illegal activity, which is characterized by different levels of intensity at the state border, requires the headquarters of all management levels of the State Border Guard Service of Ukraine to make timely decisions adequate to the situation regarding the organization of state border protection. The method presented in the monograph by Gorodnov *et al.*, (2009) is quite well-known and tested.

In order to perform such a task, it is necessary to have reference of multidimensional objects of typical situations that may arise in the areas of responsibility of the State Border Guard Service of Ukraine units, the use of a measurable indicator of the situation aggravation degree and the relevant methodology of calculations implementation (Gorodnov *et al.*, 2009) allows detecting indicator changes, to prognosticate the nature of its changes and to identify the time period during which the transition is possible from the "aggravation" state to the "threat" state at the border sphere of the national security of Ukraine

Combinations variants of the situation aggravation signs are multidimensional units, which allows using the approach known in taxonomy to the assessment of multidimensional objects, having refined the idea of measuring the taxonomic distance taking into account the specifics of the tasks of assessing the situation aggravation degree and its transition to the "threat" state. The methodology includes the following main stages:

- the values matrix of normalized features is calculated for each unit of a multidimensional object;
- the following is calculated: the vector – by the distance between the current multidimensional units-points and the reference multidimensional point – by the vector of the transition of the situation aggravation process into a clear threat;
- the indicator of the situation aggravation degree is calculated.

The final formula for the indicator of the situation aggravation degree (Lsi) was developed in the monograph of Gorodnov *et al.*, (2009):

$$L_{si} = 1 - \frac{c_{i0}}{c_0} \quad (1)$$

The indicator is interpreted as follows: the greater the value (Lsi) of the situation aggravation degree indicator, the closer the current i-th situation aggravation state is to the reference situation of "threat".

The practical application of this mathematical apparatus was tested on the example of materials about events around the island of Kosa Tuzla that took place in the autumn of 2003 (Kyrylenko et al., 2008);

The multidimensional situation related to the fact of increasing the tempo of work on the construction of the hydrotechnical facility of the RF towards the island in the period from 29th of August 2002 to 21st of October 2003 was taken as a multidimensional reference point for the formation of the threat.

The dependence of the values of the indicator of the situation aggravation degree the during the formation of a threat to territorial integrity by time stages is presented on fig. 5. Along the abscissa axis in the interval from t1 to the unit of time is a day.

The obtained dependence of the values of the indicator of the situation aggravation degree allows determining an explicit expression for the trend line (Lst – solid line):

$$L_{st} = 0{,}4707 - 0{,}0078t + 0{,}0002t^2 \quad (2)$$

Tangent to the trend line allows estimating the rate of change in the value of the indicator of the exacerbation degree (Fig. 5, point B)

$$L'_{st} = \frac{dL_{st}}{dt} = tg\varphi \quad (3)$$

In addition, the presence of a quadratic component (2) demonstrates the existence of a non-zero positive acceleration of the indicator values growth, which can be a signal to accelerate the implementation of countermeasures against the threat, and the fact of overcoming the indicator at the level of 0,65 (Lst ≥ 0,65) with the simultaneous appearance of a positive of the second derivative of the indicator (2) and the corresponding angle increase φ3 (up to 90°) is a significant sign of the threat occurrence at the time t, which can be approximately estimated from the expression (2), equating the value of Ls to one.

In the presence of an oscillatory process of changes in the indicator Ls (t) (dashed line) of the situation exacerbation degree (section t3 – t4 in Fig. 5), conclusions about the dynamics of exacerbation and the possibility of the transition of the situation from the "aggravation" state to the "threat" state can be made using the line trend of Ls indicator values.

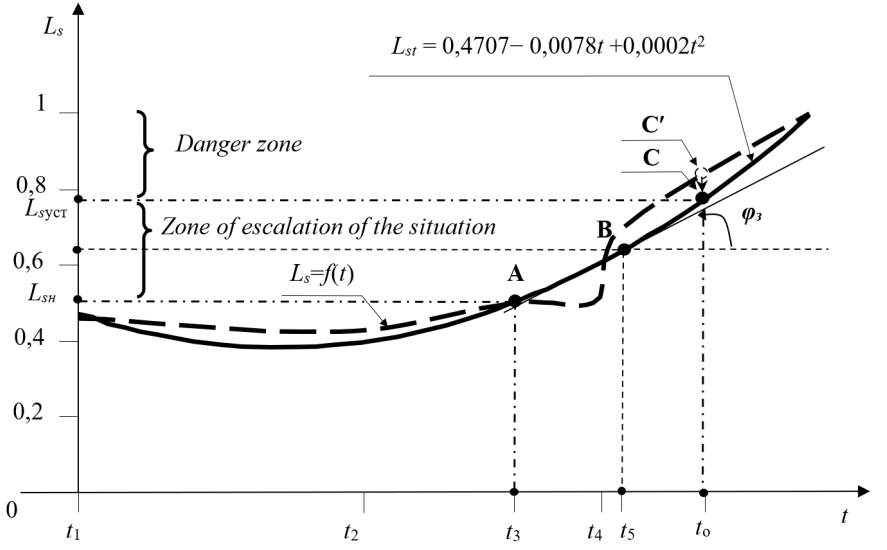

Fig. 5. Dependence of the indicator of the situation aggravation degree in the threat formation to the state territorial integrity on the time stages of the situation aggravation. Source: prepared by the authors.

A graphical presentation of the change's dynamics in the indicator values of the situation escalation degree allows assuming that the parties forming the situation escalation were not yet ready for decisive action by the moment of time t3 (Fig. 5, point A). Having determined the beginning of the escalation, the "attack" party and the "victim" party for some time (Fig. 5, until the moment t4) took actions aimed at reducing the level of tension in the situation. However, after the moment t4, the "attack" party, having prepared forces, means and conditions, began to develop its actions with a steady tendency to achieve its goal, which obviously began to move (Fig. 5, point C) into the zone of the "threat" state.

The approximating Last line of changes in the values of the indicator of the situation aggravation allows roughly estimating (predicting) the possibility and moment of the threat formation or a reduction of tensions in this sphere of national security of Ukraine.

The practical relevance of the obtained research results is shown in the following actions regarding preparation for the elimination (prevention) of possible options for threats to the national security of Ukraine in the border area and the developed options for actions of border units and interaction forces.

Therefore, the developed indicator and methodology provide an opportunity to detect integral changes in the situation in the border area of national security of the state, to determine time periods of increase (decrease) in the degree of exacerbation in the main areas of national security of Ukraine, to prognosticate the time period for the transition of the situation from the "aggravation" level to the "threat" level (transitions from category A to category B or C and vice versa), to evaluate the rate of change in the values of the indicator of the situation aggravation degree in order to further prognosticate the real and potential consequences for border protection and the use of timely measures to counter the threat, i.e. to ensure the ability of state borders to adapt and to deal with offenses on the state border of Ukraine of various categories.

National stability is possible due to the creation of a system for national stability ensuring, which in turn is a set of interacting subjects, purposeful actions, methods, factors and mechanisms that guarantee the preservation of security and continuity of the national systems functioning before, during and after a crisis through adaptation to threats and rapid changes in the security environment.

As noted by (Reznikova & Voitovskyi, 2020), taking into account the complex security environment of Ukraine and the peculiarities of the state and society development, when defining a model for national stability ensuring, Ukraine should not be limited to strengthening civil preparedness and crisis management, including the field of critical infrastructure security. We believe that this approach allows classifying state borders as objects of critical national infrastructure.

How could we achieve the situation that any element of the state border, from a separate checkpoint to large airports, to ensure the protection of the state, its inviolability and territorial integrity?

The answer to such a question can be provided by a conceptual document in the form of a strategy for the security and stability of state borders.

Studying the experience of the border's stability ensuring of the of foreign countries shows the need to take into account a number of aspects

1. The state border must be supposed as a complete, interconnected network.

The state borders optimal stability and efficiency is achieved due to the fact that it is necessary to protect borders as a single network formed from various interconnected parts – airports, seaports, railway stations, automobile border crossing points, etc. This not only improves security, but it also enables us to work together to maintain a unified stability to crisis situations.

2. The state border must be classified as a critical national infrastructure (CNI).

Designating a national border as a critical national infrastructure provides an opportunity to protect it in a way that protects us. Constant underfunding of the central body of executive power, which implements state policy in the field of the state border protecting and defending the sovereign rights of Ukraine in its exclusive (maritime) economic zone, leads to the fact that the tasks assigned to this body are performed inefficiently.

3. Creation of a single body responsible for the protection and security of state borders.

The current state of security (combating criminal offences, customs offences, etc.) of state borders represents an extensive network of entities providing security (the State Border Guard Service of Ukraine, the State Customs Service of Ukraine, and the Security Service of Ukraine). The customs border of Ukraine coincides with the state border of Ukraine, except for the borders of artificial islands, installations and structures created in the exclusive (maritime) economic zone of Ukraine, which are subject to the exclusive jurisdiction of Ukraine.

Violation of customs rules represents a global threat to the national security of Ukraine in all its components, as it was repeatedly emphasized by (Filippov, 2016; 2019) in his publications. Differentiation of powers between various state bodies, both in terms of countering violations of customs rules and combating smuggling, indicates the ineffectiveness of such a mechanism for responding to threats. The creation of a single body that will be responsible for the security of both the state and customs borders will make it possible to increase the effectiveness of its protection.

4. Determination of the most vulnerable places of the state border.

A comprehensive vulnerability analysis will help to assess threat levels and develop action algorithms in crisis situations. This allows properly planning the protection of vulnerable places and reducing the risks to the national stability system. The creation of a threat assessment system will provide an opportunity to prognosticate and model crisis situations.

5. Formation of the necessary reserves of forces and means that ensure the capabilities of the central body of executive power, which implements the state policy in the field of the state border protecting and security of the sovereign rights of Ukraine in its exclusive (maritime) economic zone.

The borders of the state must meet certain criteria (signs) of stability:

the ability to function without interruption, to adapt to negative influences and changing conditions;

the ability to withstand unexpected shocks;

> the ability to quickly recover from the destructive consequences of phenomena/actions of any nature to the desired balance (Reznikova, 2017).

We fully agree with (Rijavec, Štambuk and Pevcin, 2021) that complex problems are generally difficult to clearly define, they are socially complex, and cannot be solved unequivocally. They have many interrelated instabilities and are often caused by a number of causes (multicausal).

Migration crises are precisely such complex problems that do not have a clear solution, but require a complex of political, socio-economic, humanitarian and other measures.

Despite the fact that, in general, the State Border Guard Service of Ukraine is ready to respond to migration crises of this nature, it experiences certain problems of a material and technical nature. In the situation that illegal (irregular) migrants are actually directed to the borders of Ukraine, the State Border Guard Service of Ukraine will experience problems of a humanitarian nature, related to the need for humane treatment of illegal migrants, respect for their rights and freedoms.

This requires the government to develop an appropriate response plan to the irregular growth of migration at the state border at the level of threats similar to those occurring at the Polish-Belarusian border.

First of all, in order to determine the level of an unregulated migration crisis, it is necessary to develop indicators that will make it possible to set threshold values for the implementation of a response plan and the use of additional funding.

It is necessary to create a fund for responding to migration crises (reserve fund of the State Border Guard Service of Ukraine) in order to solve the problems of material and technical support. The amount of expenses for the fund formation will be made in accordance with the needs determined by the integrated border management subjects.

Fund expenses can be directed to the following purposes:

> expansion of opportunities for solving procedural issues with illegal migrants;
>
> replenishment of material and technical resources (transport, food products, medicines, fuel and lubricants, means for heating positions, special means, engineering and technical equipment, etc.) and overtime funds for the personnel of the forces involved in the elimination of the migration crisis;
>
> improving the conditions of detention of illegal migrants, providing care for children taking into account the state of health;

coordination and provision of resources to non-governmental organizations that contribute to the state border protection of;

improvement of interdepartmental coordination (Khalimon & Kyrylenko, 2022: 169).

Conclusion

The conducted research provided an opportunity to find out how the governments of the EU member states (Poland, Lithuania, Latvia) responded to the migration crisis of 2021. It has been revealed that several conceptual approaches to defining response measures to migration crises have been developed in the scientific discourse. The first approach has the conventional name "state of emergency", and the second – "humanitarian corridor". The migration crisis of 2021 "Belarusian route" can also be characterized as a "state of emergency", because the government of the RP did not agree to the proposal of the organizers of the migration crisis (RB) to open a humanitarian corridor and allow migrants to get to Western Europe.

It is obvious that the measures taken by the governments of EU member states have brought positive results. The organizers of the migration crisis of 2021 were forced to stop the flow of illegal (irregular) migrants and gradually send them to their countries of origin. Thus, the national security of EU member states had a higher priority than providing assistance to refugees seeking a better life in wealthy Europe.

The study of the experience of responding to a potential migration crisis by the government of Ukraine on the Ukrainian-Belarusian border testified that the state authorities whose competence includes responding to such crisis phenomena were not fully prepared to solve them. First of all, this was detected in the logistical support of a special border operation, which required the use of certain reserve funds.

Prognosticating the redirection of migration flows in the direction of Ukraine, the government took measures to determine the possible directions of migrants breaking through the border, worked out the most credible scenarios of their actions, planned the use of forces and means. Up to ten potentially vulnerable areas with a length of about 270 kilometres were identified and the operational survey of the border area was carried out regarding the objective situation and risks. The operational reserves of the National Guard and the National Police were involved. Echelon cover tactics were used to protect the border.

The authors' direct participation in conducting a special border operation, studying the experience of responding to migration crises in foreign countries made it possible to propose certain ways of improving the

organizational and legal aspects of conducting special border operations to overcome migration crises at the state border.

It was proposed to determine the threats levels to the stability of the state border of Ukraine depending on the number of probable illegal (irregular) migrants in the area of responsibility. If the situation is characterized by an increase of illegal migration in the area of responsibility of the border guard detachment, the localization of which can be carried out by the available forces of the border unit (≈ 300 people of illegal (illegal) migrants in total during the period) – it is "A" category threat.

If the situation characterized by an increase of illegal migration in the area of responsibility of the border guard detachment, the localization of which can be carried out by the available and attached forces (reserve of the Head of the State Border Guard Service of Ukraine, etc.) of the border unit (almost 1,000 illegal (irregular) migrants in total during the period) – it is "B" category threat).

If the situation is characterized by an increase of illegal migration in the area of responsibility of the border guard detachment, the localization of which can be carried out by the combined detachments of the State Border Guard Service of Ukraine and with the involvement of the forces and means of interacting bodies of the security and defence sector (significantly more than 1,000 illegal (irregular) migrants in total during the period) – it is a threat to the national security of Ukraine (illegal migration of the "C" category).

The methodology has been developed that makes it possible to detect integral changes of the situation in the border area of the state national security, to determine time periods of increase (decrease) of the exacerbation degree, to prognosticate the period of time for the transition of the situation from the "aggravation" level to the "threat" level.

It is proposed to work out a conceptual document in the form of a strategy for the security and stability of state borders, which will include ways to solve material and technical problems of the State Border Guard Service of Ukraine. One of the ways can be the creation of a fund for responding to migration crises (reserve fund of the State Border Guard Service of Ukraine). The amount of expenses for the fund formation will be made in accordance with the needs determined by the subjects of integrated border management.

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Conflict of Interest

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Legal regulation of public control over the activities of Ukrainian law enforcement agencies: Experience of Ukraine and certain countries

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Abstract

The purpose of the article was to determine the specific features of public control over the activities of certain law enforcement agencies and to develop suggestions for their improvement. The methodological basis of the research is general scientific (method of philosophical dialectics, etc.) and special legal methods of cognition (systemic, theoretical and legal, formal and dogmatic, comparative, state modeling method, etc.) The authors have developed their own definition of the concept of public control over the activities of law enforcement agencies. In the conclusions it has been offered to develop and approve the Law of Ukraine «On public control over the activities of law enforcement and supervisory bodies», which would systematize all forms of public control provided for in the Ukrainian legislation. Finally, suggestions have been developed for the introduction of positive international experiences of public control over the activities of law enforcement agencies in various countries.

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Keywords: public control; public council; public agencies; law enforcement agency; law enforcement officials**.**

Regulación legal del control público sobre las actividades de los organismos encargados de hacer cumplir la ley de Ucrania: Experiencia de Ucrania y ciertos países

Resumen

El propósito del artículo fue determinar las características específicas del control público sobre las actividades de ciertos organismos encargados de hacer cumplir la ley y desarrollar sugerencias para su mejora. La base metodológica de la investigación es científica general (método de la dialéctica filosófica, etc.) y métodos jurídicos especiales de cognición (sistémico, teórico y jurídico, formal y dogmático, comparativo, método de modelación estatal, etc.) Los autores han elaborado su propia definición del concepto de control público sobre las actividades de los organismos encargados de hacer cumplir la ley. En las conclusiones se ha ofrecido desarrollar y aprobar la Ley de Ucrania «Sobre el control público de las actividades de los organismos encargados de hacer cumplir la ley y de supervisión», que sistematizaría todas las formas de control público previstas en la legislación ucraniana. Finalmente, se han desarrollado sugerencias para la introducción de experiencias internacionales positivas de control público sobre las actividades de los organismos encargados de hacer cumplir la ley en varios países.

Palabras clave: control público; consejo público; organismos públicos; organismo encargado del cumplimiento de la ley; funcionarios encargados de hacer cumplir la ley.

Introduction

The activities of law enforcement agencies are aimed at protecting human and civil rights, freedoms and legitimate interests from violations and damages. Human rights and freedoms may be limited during certain procedural actions and while selecting precautionary measures. The legislation provides various mechanisms to prevent abuse by law enforcement officers while performing their duties. Public control is one of the ways to ensure the rights of citizens when communicating with law

enforcement officers. Proper legal regulation of the forms and methods of public control should ensure its effectiveness. The above arguments determine the relevance of the chosen topic of scientific research.

The purpose of the article is to determine specific features of public control over the activities of certain law enforcement agencies and to develop suggestions for its improvement.

1. Analysis of recent research

Problems of exercising public control over the activities of executive authorities have repeatedly become the subject matter of scientific research. In particular, O. Pashchynsky studied the essence of public control as a factor in the democratic development of the state and society (2021: 496-498). I. Skvirskyi studied organizational forms of public control (2013: 223-227). V. Teremetskyi revealed the main general theoretical aspects of monitoring the activities of law enforcement agencies (2014: 96-120). Besides, V. Teremetskyi studied the experience of subjects of control over the activities of law enforcement agencies of leading foreign countries. The scholar rightly noted that the use of European standards in the organization and implementation of control over the activities of law enforcement agencies will contribute to the application of the most effective organizational and legal forms of control into the management practice of all law enforcement agencies of Ukraine (2017: 266).

Problems of public control over the activities of certain law enforcement agencies were studied in the works: on the activities of the National Police of Ukraine – V. Hrytsenko (2021) and O. Yunin (2021), on the activities of the State Fiscal Service of Ukraine – S. Homov (2016), on the activities of the National Guards of Ukraine – T. Bairachnaia (2017). The specifics of legal regulation of public control over the security sector were studied by H. Goncharenko (2020).

The works of these scholars are related to public control over the activities of executive authorities or only certain law enforcement agencies. At the same time, there is a scientific need for the unification of the system of public control over the activities of law enforcement agencies.

2. Methodology of the study

The methodological basis of the research was general scientific and special legal methods of cognition. It is worth mentioning the method of philosophical dialectics among general scientific methods, which is revealed by using the methods of analysis and synthesis, ascending from simple to

complex, from abstract to concrete, modeling, abstraction, idealization, and formalization.

The special and legal methods used in the research combine systemic, theoretical and legal, formal and dogmatic, comparative and legal, cognitive methods, as well as the method of state and legal modeling. In particular, the system method made it possible to study the system of legislation of Ukraine, which regulates the activities of law enforcement agencies. Theoretical and legal method was used to clarify the main concepts of Ukrainian law in the field of public control. The norms of the legal institution of public control were studied by using the formal and dogmatic method. The method of state and legal modeling was used to formulate suggestions for amending the legislation that regulates public control over law enforcement agencies.

3. Results and discussion

3.1. Theoretical and legal principles of public control over the activities of law enforcement agencies of Ukraine

Ukrainian legislation defines and reveals the features of most of the existing legal categories. However, the concept of "public control" has not been legislatively enshrined yet. There is no special law that would regulate the general principles of the public control institution (Yunin, 2021: 203). Therefore, we have to rely on the doctrinal definitions of this term during the scientific research.

Many scholars expressed their own understanding of public control. For example, O. Pashchynsky defines public control as a form of implementation of the constitutional rights of citizens to participate in the management of state affairs, which is manifested through the legally guaranteed opportunities to observe the activities of public authorities, participate in the discussion of regulatory acts, and interact with authorities (2021: 498). The given definition characterizes the essence of public control over any state authority.

V. Teremetskyi defines control over the activities of law enforcement agencies as one of the types of social control, which only has its own purpose, tasks, object and subject matter; it is carried out by international, state and non-state entities that have different scope of control powers, in particular by the right to exercise intervention into the activities of law enforcement agencies by the control subjects, and whose content consists of verifying the compliance with the requirements of legislative acts and by-laws that regulate the activities of such agencies (2014: 119–120). The scholar indicates in this definition the characteristic properties of any control over the activities of law enforcement agencies. Therefore, public control can also be considered as a type of social control.

V. Hrytsenko and O. Yunin formulate in their works own definition of the concept of public control over police activities. At the same time, according to V. Hrytsenko, the essence of public control over police activities consists of observing these activities and gathering information about the work of law enforcement officers. The main tasks of such control are to increase the effectiveness of the police and to protect human and civil rights and freedoms (2021: 58). O. Yunin believes that the essence of such control is not only in public monitoring and supervision over the activities of police officers, but also in the implementation of joint projects, programs and activities (2021: 203).

In his definition H. Goncharenko emphasizes the entities of public control – the institutions of civil society. At the same time, the purpose of such a control is to ensure the rule of law and transparency of the activities of security agencies (2020: 164).

Based on the existing doctrinal definitions of the concept of "public control over the activities of law enforcement agencies", we suggest that it should be understood as a set of organizational and analytical measures of public organizations and certain citizens in regard to monitoring and collecting information about the work results of law enforcement agencies in order to protect the rights, freedoms and legitimate interests of individuals and legal entities, as well as to improve the efficiency of the law enforcement system in general.

The list of law enforcement agencies of Ukraine is contained in the Law of Ukraine "On State Protection of the Employees of Court and Law Enforcement Agencies". They include: the prosecutor's office, the National Police, the Security Service, the Military Law Enforcement Service of the Armed Forces of Ukraine, the National Anti-Corruption Bureau of Ukraine, the state border protection agencies, the Bureau of Economic Security of Ukraine, agencies and institutions for the execution of punishments, pre-trial detention centers, state financial control agencies, fish protection agencies, state forest protection agencies, other agencies that perform enforcement or law enforcement functions (Law of Ukraine No. 3781-XII, 1993: P. 1 Art. 2). The activities of the listed agencies are the object to public control.

The authors of this research offer to consider specific features of legal regulation of public control over the activities of those law enforcement agencies that have the authority to carry out operative and search measures and investigative actions. In particular, the specifics of public control over the activities of the police, the National Anti-Corruption Bureau, the State Bureau of Investigation and the Bureau of Economic Security.

3.2. Forms of public control over the activities of law enforcement agencies

Forms of public supervision over the agencies whose activities are related to restrictions on human rights and freedoms are provided by the Law of Ukraine "On National Security" (Law of Ukraine No. 2469-VIII, 2018: Art. 10). Citizens of Ukraine in accordance with this Law participate in the implementation of public supervision through public associations, whose members they are, through local councils' deputies, personally by applying to the Commissioner for Human Rights of the Verkhovna Rada of Ukraine or to state authorities in the manner established by law. The legal status of public associations, the powers of local councils' deputies, the procedure for addressing authorities are established by separate laws of Ukraine.

The right of a citizen to address claims, complaints and petitions to authorities is enshrined in the Law of Ukraine "On Appeals of Citizens" (Law of Ukraine No. 393/96-BP, 1996: Art. 17, 20), which stipulates that a complaint against a decision of a certain law enforcement officer may be submitted to the authority or a higher-level official. The term of its review is one month. A deputy of such a council according to the Law of Ukraine "On the Legal Status of Members of Local Councils" (Law of Ukraine No. 93-IV, 2002: Art. 13) may apply to law enforcement officers located on the territory of the respective council with a deputy request to carry out certain actions, taking measures or providing official clarifications on matters falling under their competence.

The term for the consideration of such an appeal is set for ten days, and in case of the need for additional verification, it can be extended up to a month. A citizen who believes that his rights have been violated by law enforcement officers can personally file a complaint or can appeal to a local council deputy. Questions that were raised in the citizen's appeal to the deputy can be addressed to the chief of the local law enforcement agency during a meeting with the local council deputies.

The powers of the Commissioner for Human Rights of the Verkhovna Rada are established in the relevant law. According to the Law of Ukraine "On the Commissioner of the Verkhovna Rada of Ukraine for Human Rights" (Law of Ukraine No. 776/97-BP, 1997: Art. 15-17), based on a citizen's appeal, the Commissioner can initiate proceedings on violation of human rights and freedoms. In case of detecting a violation of the law within the activities of law enforcement agencies, the Commissioner has the right to submit a request for the elimination of the detected violations. In this case, the activity of the Commissioner has an indirect form of public control over the activities of law enforcement agencies.

Various organizational and legal forms of public control over the activities of law enforcement agencies are known in legal science. In particular, I. Skvirskyi names such forms of public control as the work of public councils under authorities, public examination of by-laws, observation of public representatives over the exercise of powers by officials. The scientist recognizes informing the public about the results of the activity of an authority as an indirect form of public supervision (2013: 226). The forms of public control listed by the researcher relate to the activities of both civil and paramilitary authorities.

Legislative acts regulating the legal status of law enforcement agencies also determine the conditions and forms of public control over the activities of these authorities. The Law of Ukraine "On the National Police" (Law of Ukraine No. 580-VIII, 2015: Art. 86-90) provides such forms of public supervision over police activities as information on the activities of law enforcement officers on the police agency's website, the report of the chiefs of territorial police agencies to local self-government agencies, preparation of joint projects, programs and events with representatives of the public. The possibility of adopting no confidence resolution to the chief of the territorial police department by the local council has been established. Control over police activities can be carried out in the form of involving members of the public in the joint consideration of complaints about the actions or omission of police officers. We believe that the reports of the chiefs of territorial police agencies to the local council are an effective mean of creating a positive public opinion about the police. At the same time, the mechanism of public participation in considering complaints about the actions or omission of law enforcement officers needs a thorough regulation.

Participation of citizens in the protection of public order we can mention as one of the joint activities of the public and the police. According to the Law of Ukraine "On Citizens' Participation in the Protection of Public Order and the State Border" (Law of Ukraine No. 1835-III, 2000: Art. 1), public formations for the protection of public order and the state border can be created on the basis of public self-employment. It is worth noting the important preventive role of the public in preventing the commission of offenses.

To characterize public control over the police activities, it is worth paying attention to the Resolutions of the Cabinet of Ministers of Ukraine, which regulate public participation in the formation and implementation of the state policy. In particular, it refers to the Resolution of the Cabinet of Ministers of Ukraine "On ensuring public participation in the formation and implementation of the state policy" dated from November 3, 2010, which approved the Procedure for conducting consultations with the public on issues of the formation and implementation of the state policy (Resolution No. 996, 2010).

This by-law provides public discussion of draft by-laws, electronic consultations with the public and studying public opinion during the development and adoption of regulatory legal acts of the Ministry. The validity of this Resolution is also applied to the Ministry of Internal Affairs of Ukraine. However, certain orders of the Ministry of Internal Affairs of Ukraine may refer to issues that contain state secrets. Therefore, discussion of such orders by the public is not allowed.

The Model Regulations on Public Councils was also approved by the specified Resolution of the Cabinet of Ministers of Ukraine dated from November 3, 2010. The provisions envisage the establishment of the relevant advisory agencies under each Ministry. Besides, the provisions state that the main tasks of the public council are to take into account public opinion during the formation and implementation of the state policy, to conduct public monitoring over the activities of the executive authorities (Resolution No. 996, 2010).

The Regulations on the Public Council under the Ministry of Internal Affairs of Ukraine was approved by the Order No. 38 of the Ministry of Internal Affairs of January 16, 2020. The Regulations state that the public council prepares consultations with the public, sends mandatory proposals for consideration regarding the activities of police agencies, conducts public monitoring over the openness and transparency in the activities of the Ministry of Internal Affairs of Ukraine (Order No. 38, 2020: par. 4). Therefore, the public council under the Ministry of Internal Affairs of Ukraine was created and serves to exercise public supervision over the police activities.

Public control over the activities of the National Anti-Corruption Bureau is based on the Law of Ukraine "On the National Anti-Corruption Bureau of Ukraine" (Law of Ukraine No. 1698-VII, 2014: Art. 30, 31). It is intended to inform the public about the activities of this law enforcement agency on the official website. The legal principles for the formation and powers of the public council under the National Anti-Corruption Bureau of Ukraine have been established. In particular, regarding the hearing of the reports of this law enforcement agency, the election of representatives to the Disciplinary Commission of the National Anti-Corruption Bureau of Ukraine.

The powers of this agency are regulated in details in the Regulations on the Council of Public Control under the National Anti-Corruption Bureau of Ukraine. The Council in accordance with the Regulations promotes public discussion of draft by-laws of the National Anti-Corruption Bureau of Ukraine, organizes public events for the discussion of current issues of the activity of this law enforcement agency.

An important power is the possibility of appointing three representatives to the competition commissions, which conduct competitions for the

appointment of public employees of the National Anti-Corruption Bureau of Ukraine (Resolution No. 132, 2022: par. 5, 6). Therefore, the legislation provides sufficiently broad opportunities for exercising public control over the activities of the Anti-Corruption Bureau. Not only the obligation to inform the public about the activities of this authority has been established.

The possibility of creating a council of public control has been established. The powers of the specified council concern not only the discussion of the results of the work of the National Anti-Corruption Bureau of Ukraine, but also the participation of its representatives in disciplinary and competitive commissions of the National Anti-Corruption Bureau of Ukraine. The possibility of public participation in the discussion of draft by-laws, which are being developed in the Anti-Corruption Bureau, deserves a favorable response.

The possibility of exercising public control over the activities of the State Bureau of Investigations of Ukraine is established in the Law of Ukraine "On the State Bureau of Investigations" (Law of Ukraine No. 794-VIII, 2015: Art. 27, 28). The management of the law enforcement agency is obliged to inform the public about the results of its activities by publishing relevant information on the official website. The creation of a public control council is envisaged. The powers of the council members are to discuss information about the activities, implementation of plans and tasks of the State Bureau of Investigations of Ukraine.

An important power is the appointment of three representatives to the Disciplinary Commission of the State Bureau of Investigations of Ukraine. But the tasks, functions and powers of the public control council are established in the corresponding Regulations in more details. The relevant council is recognized as a consultative agency in accordance with the Regulations on the Council of Public Control at the State Bureau of Investigations of Ukraine. The specified council submits suggestions to the management of the State Bureau of Investigations of Ukraine regarding consultations with the public, organizes public discussion of draft by-laws of the State Bureau of Investigations of Ukraine.

It is worth noting the importance of the participation of representatives of the public control council in disciplinary commissions, as well as in the development and approval of the Rules of Professional Ethics of the Employees of the State Bureau of Investigations of Ukraine (Law of Ukraine No. 42/2020, 2020: par. 5). Therefore, the public control council has sufficiently broad powers to supervise over the activities of the employees of this law enforcement agency.

We would like to note that the Regulations on the Public Control Council under the SBI include certain powers that are not enshrined in the Law of Ukraine "On the State Bureau of Investigations" (Law of Ukraine No.

794-VIII, 2015). In particular, with regard to the development of the departmental legal act – the Rules of Professional Ethics of the Employees of the State Bureau of Investigations of Ukraine. We believe that all powers of this advisory agency should be established at the legislative level.

The implementation of public supervision measures is provided by the Law of Ukraine "On the Bureau of Economic Security of Ukraine" (Law of Ukraine No. 110-IX, 2021: Art. 33, 34). We talk about the provisions of the Law, which provide the formation of a public control council, publication of information about the Bureau's activities on the website, the possibility for council representatives to participate in the disciplinary and competition commissions of this Bureau, etc. The indicated powers fully comply with the legal status of the public control council under the State Bureau for Investigations and the National Anti-Corruption Bureau of Ukraine. It is important to note that all those powers are enshrined in a legislative act, but not in the Regulations on the relevant council, which is a by-law.

3.3. International experience of public control over the activities of law enforcement agencies and the possibility of borrowing it by Ukraine

Solving the problems of ensuring public control over police activities has always been in the focus of scientific research. In particular, V. M. Vasylenko studied legal regulation of public supervision in the USA, Great Britain and the countries of continental Europe. The researcher notes that public access in the US is ensured to most official documents and police acts, which are published in electronic form in general public access. The Commissioner of Territorial Police Management in Great Britain is elected by the population of a certain district for a four-year term. The chief of the local police reports to the territorial community for re-election after the end of the term (Vasylenko, 2019: 247).

The indicated forms of public control over the activities of law enforcement agencies are considered sufficiently effective. In particular, citizens' access to official police documents, which are published on the authority's website, improves citizens' awareness of their rights and facilitates familiarization with the results of investigations. The election of the chief of the local police by the residents of the territorial community for a certain period ensures the interest of the leadership of law enforcement agencies in achieving a positive public opinion about their activities. The given examples of the forms of public control over police activities can be borrowed and implemented in Ukraine.

O. P. Babikov claims that public control over law enforcement agencies in EU countries is carried out through the dissemination of independent analytical studies and information, monitoring of attitudes to the protection

of human rights and respect for the rule of law, conducting public opinion research on the activities of law enforcement officers and public debates. The scholar names such forms of public control over law enforcement activities as inspections by parliamentary committees, the activities of the Commissioner for Human Rights, judicial control and the activities of local self-government agencies (Babikov, 2029: 172).

It can be agreed that conducting public opinion research on the activities of law enforcement officers and public debates on this issue are important elements of public control. At the same time, the activities of the Commissioner for Human Rights and MPs belong to the methods of exercising democratic civil control over law enforcement agencies of the state, and not to the forms of public supervision.

R. V. Myronyuk draws attention to the activities of international human rights organizations, which must respond to human rights violations within the activities of law enforcement agencies. The researcher names such organizations as "Amnesty International", the Geneva Center for the Democratic Control of Armed Forces, whose activities cover both military units and law enforcement agencies, the European Platform for Policing and Human Rights, the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (Myronyuk, 2020: 52–53). The activities of these international public organizations are based on the Resolutions of the Council of Europe, whose member is Ukraine. Therefore, proper conditions for the activities of the relevant international public organizations to control over the police activities should be created in our country.

O. D. Tereshchuk studying specific features of public supervision over police activities in foreign countries draws attention to the experience of Poland and Georgia. In particular, a positive example in Poland is the organization of public organizations assisting the police. The researcher emphasizes that the performance of joint law enforcement tasks by such organizations is not only a form of interaction, but also a form of public supervision over police activities. The scholar also considers the Georgian experience of monitoring law and order on the streets with the help of video cameras to be positive, since the offenses and the police work are simultaneously photographed (Tereshchuk, 2018: 405–408).

It is worth paying attention to the fact that there are legal principles for the creation and operation of public organizations for the protection of public order in Ukraine, as well as in Poland. Placing video cameras on many streets, definitely allows recording both offenses and the work of police officers while detaining offenders. At the same time, there is the problem of public access to such recordings from video cameras. There are fears about interference into private life due to the location of many video surveillance cameras on the city streets.

V. O. Burbika gives examples of problems of interaction between the police and local self-government agencies in France. The researcher claims that local safety and crime prevention councils are being created at the commune level in France. These councils include representatives of the public, local self-government agencies and state authorities.

There is practice of concluding agreements on interaction between local self-government agencies and law enforcement agencies, which provide for joint measures on preventing crimes (Burbika, 2018: 140). The activity of the named councils may have the character of public control over the police activities, because members of the public must participate in their work. At the same time, concluding agreements on cooperation between the police and self-government agencies is more a form of cooperation in combating crime than a mean of public control.

Thus, various forms of public control over the activities of law enforcement agencies are used in foreign countries. It is worth paying attention to the provision of public access to official police documents in the USA, the election of the chief of the local police by residents of a territorial community in Great Britain, the existence of local councils on security and crime prevention issues in France, the supervision over the observance of the rights of the participants in criminal proceedings by international human rights organizations. The experience of implementing the listed control and supervisory measures by the public of foreign countries should be thoroughly studied in order to consider the issue of the possibility of its application in Ukraine.

Conclusions

We would like to note as a conclusion of our research that the procedure and conditions of public control over the activities of law enforcement agencies of Ukraine are enshrined in many regulatory legal acts. On the basis of the analysis of legislation and the study of scientific literature we offer to understand public control over the activities of law enforcement agencies as the complex of organizational and analytical measures of public organizations and certain citizens in regard to the observation and collection of information about the results of the work of law enforcement agencies in order to protect the rights, freedoms and legitimate interests of individuals and legal entities, as well as to improve the efficiency of the law enforcement system in general.

Analysis of the current Ukrainian legislation allows us to assert the presence of a certain system of public control over the activities of law enforcement agencies, regardless of their types. The indicated public control is carried out due to the following main forms: publication of

information about the results of the activities on the websites of such authorities; activities of public control councils or public councils; periodic meetings of chiefs of territorial police agencies with local councils deputies; joint activities of police officers with the public; public participation in the consideration of complaints against illegal actions of police officers; holding public consultations during the development and adoption of departmental by-laws; participation of public representatives in the work of disciplinary and competitive commissions of the National Anti-corruption Bureau, the State Bureau of Investigations, the Bureau of Economic Security; appeal of the Commissioner for Human Rights to law enforcement agencies with the purpose of monitoring the observance of human rights; appeals by local councils deputies sent to law enforcement agencies in the interests of voters; personal appeals of citizens to the court, the prosecutor's office or the chiefs of law enforcement agencies aimed at appealing the actions / omission or decisions of certain officials.

In order to improve the legal regulation of public control over the activities of law enforcement agencies, we offer to develop and adopt the Law of Ukraine "On Public Control over Law Enforcement and Supervisory Agencies". This Law should systematize measures of public control over the activities of all agencies that perform enforcement or law enforcement functions, and it should concern not only law enforcement agencies of Ukraine, but also all existing state supervisory inspections and services.

The Law should enshrine the procedure for the organization and powers of public councils under each of the authorities, which has enforcement and law enforcement functions; terms for holding consultations with the public; types of joint actions of law enforcement officers and the public representatives; the list of information to be made public on the website of any law enforcement agency, etc.

The authors made a conclusion about the expediency of borrowing international experience in the organization of public control over the activities of law enforcement agencies. In particular, public access to official police documents, including certain information of the Unified State Register of Investigations, should be introduced in accordance with the practice of public control in the USA. It is worth implementing the principle of selecting local chiefs of territorial police departments by the public according to the experience of Great Britain. The creation of district councils of public control over police activities, which include representatives of public organizations and local self-government agencies, should be considered as a positive experience of France.

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Administrative and legal status of public administration subjects regarding countering terrorism

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Abstract

The aim of the research was to make known the administrative and legal status of the subjects of public administration in the field of counter-terrorism. It was found that a rather clear and logical structure of state bodies in the field of organization and coordination of the fight against terrorism has been created in Ukraine. The system of anti-terrorist entities is a set of specific, legally defined institutions that interact with the aim of preventing, detecting, stopping and minimizing the consequences of terrorist activities. The following methods were used in the research: analysis of biographical sources, synthesis, deduction, comparative analysis and meta-analysis, etc. In the conclusions it has been established that the President of Ukraine, the Verkhovna Rada and the Cabinet of Ministers are the key actors in the fight against terrorism in the system of higher authorities. The defining areas of action of the President of Ukraine in the sphere of counter-terrorism, are the activities aimed at regulatory and legal support of counter-terrorism in Ukraine, which implies: creation, liquidation, reorganization and management of relevant counter-terrorism entities.

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Situación administrativa y jurídica de las materias de la administración pública en materia de lucha contra el terrorismo

Resumen

El objetivo de la investigación fue dar a conocer la situación administrativa y jurídica de los sujetos de la administración pública en materia de lucha contra el terrorismo. Se ha comprobado que en Ucrania se ha creado una estructura bastante clara y lógica de órganos estatales en materia de organización y coordinación de la lucha contra el terrorismo. El sistema de entidades antiterroristas es un conjunto de instituciones específicas, legalmente definidas, que interactúan con el objetivo de prevenir, detectar, detener y minimizar las consecuencias de las actividades terroristas. En la investigación se utilizaron los siguientes métodos: análisis de fuentes biográficas, síntesis, deducción, análisis comparativo y metaanálisis, etc. En las conclusiones se ha establecido que el presidente de Ucrania, la Rada Suprema y el Gabinete de ministros son los actores clave en la lucha contra el terrorismo en el sistema de autoridades superiores. Las áreas definitorias de acción del presidente de Ucrania en la esfera de la lucha contra el terrorismo, son las actividades destinadas al apoyo normativo y jurídico de la lucha contra el terrorismo en Ucrania, lo que implica: la creación, liquidación, reorganización y gestión de las entidades pertinentes de lucha contra el terrorismo.

Palabras clave: régimen administrativo y jurídico; legislación; materia de administración pública; lucha contra el terrorismo; guerra en Ucrania.

Introduction

According to the Constitution of Ukraine, Ukraine is a sovereign, independent, democratic, social, legal state and the highest social value of it is the human being, his or her life and health, honor and dignity, inviolability and security. However, today there are certain negative phenomena in Ukraine that encroach on the values proclaimed by the Constitution. One of the most important problems in Ukraine under modern conditions is the fight against terrorism. The system of state response and control in

the sphere of security in connection with the armed conflict in the East of Ukraine, imperfection of the legal framework and lack of a balanced state policy in the social sphere, as well as reduction of the spiritual and moral potential of society are the main factors that contribute to the spread of terrorism.

Counter-terrorism subjects are involved in countering this extremely dangerous phenomenon. Improving the activity of these subjects involves not only improving their organizational structure in order to increase the mobility and flexibility of response to changes in the dynamics of terrorism, but also strengthening relations and interaction of the relevant departments involved in anti-terrorist activities.

1. Literature review

The issue of researching the system of activities performed by counter-terrorism subjects has been reflected in scientific works of such legal scholars as Halaburda Nadiia, Leheza Yevhen, Chalavan Viktor, Yefimov Volodymyr, Yefimova Inna etc. (Halaburda *et al*., 2021).

Within the framework of our research, definition of the concept of "subject" from a legal point of view is of some interest. It is worth noting that in legal encyclopedic literature this notion is defined by the term "subject of law", which means a participant in legal relations as a bearer of legal rights and obligations (Shemshuchenko, 2007). Based on this, it can be assumed that the concept of "subject" is defined in a combination of such concepts as "person", "participant", "group of persons" carrying out a certain activity on the basis of appropriate amount of powers provided to them for this purpose. At the same time, it should be noted that according to Article 1 of the Law of Ukraine dated 20 March, 2003 "On the fight against terrorism", the fight against terrorism is an activity related to prevention, detection, termination, and minimization of consequences of terrorist activities (Law of Ukraine, 2003). Taking into account the above, counter-terrorism subjects in Ukraine are participants in legal relations in the sphere of combating terrorism, who are endowed with the relevant duties by the specified law.

Based on the defined essence of the concept of "counter-terrorism subjects in Ukraine", it is possible to define the concept of the system of these subjects. The word "system" comes from the Greek word systema, which is translated as "a whole that consists of parts; combination". In the modern Ukrainian language, the word "system" is used in the following meanings: the order caused by the correct, planned arrangement and mutual connection of parts of something; form of organization, structure of something (state, political, economic units, institutions, etc.); a set of any

elements, units, parts united by a common feature, purpose; a structure that is a unity of regularly arranged and functioning parts (Busel, 2009).

At the same time, taking into account the status of dynamic changes in this area, the indicated issues require a more comprehensive analysis including in particular, analysis legal and organizational principles of activities performed by counter-terrorism subjects in Ukraine within the framework of the national system of combating terrorism.

2. Materials and methods

The research is based on the works of foreign and Ukrainian researchers regarding the administrative and legal status of public administration entities in the procedure of countering terrorism, etc.

With the help of the epistemological method, the administrative-legal status of public administration subjects regarding counter-terrorism activities, etc. was clarified, thanks to the logical-semantic method, the conceptual apparatus was deepened, the administrative-legal status of public administration subjects regarding counter-terrorism activities, etc. was determined. Thanks to the existing methods of law, we managed to analyze the essence of the administrative-legal status of public administration subjects regarding countering terrorism, etc.

3. Results and discussion

The system of counter-terrorism subjects is a set of subjects (entities) defined at the level of legislation which interact with each other in order to prevent, detect, stop and minimize consequences of terrorist activities. In order to reveal the essence of the system of counter-terrorism subjects in Ukraine, there is a need to find out the essence and place of each of them in this system.

The President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine occupy the leading place in the system of counter-terrorism subjects among the higher state authorities in Ukraine. However, it is worth noting that for these subjects the function of combating terrorism is not specific, but without their participation, a comprehensive system of countering terrorism cannot exist.

In particular, the legal status of the President of Ukraine as a counter-terrorism subject is defined in Article 103 of the Constitution of Ukraine, which describes the principles of his activity as a counter-terrorism subject in Ukraine and Article 106 defines areas of activity of the President of Ukraine as a counter-terrorism subject in Ukraine (Law of Ukraine, 1996).

The functions performed by the President of Ukraine in the fight against terrorism are presented in the Regulation "On the procedure for the preparation and introduction of draft acts by the President of Ukraine", approved by the Decree of the President of Ukraine dated 15 November, 2006. Within the limits of his competence, the President of Ukraine also issues orders regarding the regulatory and legal provision of countering terrorism in Ukraine and establishing the legal status of other subjects of this activity.

Based on the above, it is worth pointing out that the President of Ukraine, as a counter-terrorism subject in Ukraine, alongside with the Verkhovna Rada and the Cabinet of Ministers of Ukraine, implements functions of normative and legal regulation of the fight against terrorism. His powers also include establishment, liquidation, reorganization and management of specified counter-terrorism subjects.

The Verkhovna Rada of Ukraine is the next entity responsible for combating terrorism in Ukraine. In particular, 75 of the Basic Law of Ukraine it is determined that the only body of legislative power in Ukraine is represented by the parliament - Verkhovna Rada of Ukraine, and Article 85 of the Constitution of Ukraine defines directions of activity of this legislative body (Law of Ukraine, 1996). Alongside with this, it should be noted that functioning of this counter-terrorism body is carried out through adoption of the relevant laws. The Verkhovna Rada of Ukraine, as a counter-terrorism subject in Ukraine, directs its activities to the regulatory and legal support of this sphere, as well as on creation, liquidation, reorganization of other subjects and exercising control in this sphere.

In accordance with Article 4 of the Law of Ukraine "On Combating Terrorism", the Cabinet of Ministers of Ukraine, as the highest executive body, shall organize the fight against terrorism in Ukraine within its competence and provide it with the necessary forces, means and resources (Law of Ukraine, 2003). We should point out that according to Article 113 of the Constitution of Ukraine the Cabinet of Ministers of Ukraine is the highest body in the system of executive authorities (Law of Ukraine, 1996).

The key areas of activity of the Cabinet of Ministers of Ukraine, characterizing this highest body of executive power as a counter-terrorism subject in Ukraine, are defined in Article 116 of the Constitution of Ukraine (Law of Ukraine, 1996) and Article 19 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine" dated 27 February, 2014 (Law of Ukraine, 2014).

When implementing its functions in the fight against terrorism the Cabinet of Ministers of Ukraine issues relevant normative legal acts, creates, liquidates, and reorganizes relevant entities, coordinates and controls their activities. This body also implements regulatory and legal support and monitors implementation of legislative acts, in particular those, related to

the fight against terrorism, and it performs functions of ensuring legality and preventing illegal encroachments on the interests of people and the state.

At the same time according to Article 4 of the Law of Ukraine "On Combating Terrorism", the specified counter-terrorism subjects (entities) form an integrated system consisting of two groups. The first group includes subjects (entities) that directly fight terrorism within the scope of their competence: the Security Service of Ukraine; the Ministry of Internal Affairs of Ukraine; the National Police; the Ministry of Defence of Ukraine; the central bodies of executive power that ensure formation and implementation of state policy in the sphere of civil protection; the central body of the executive power which implements state policy in the sphere of protection of the state border; the central body of the executive power, which implements state policy in the sphere of execution of criminal punishments; State Security Office of Ukraine; the central body of the executive power, which implements state tax policy, state policy in the sphere of state customs affairs(Law of Ukraine, 2014).

The second group includes entities that, if necessary, are involved in implementation of measures related to prevention, detection and termination of terrorist activities: the central body of the executive power, which implements state policy in the sphere of prevention and countermeasures against the legalization (laundering) of proceeds obtained through crime or financing of terrorism; the Foreign Intelligence Service of Ukraine; the Ministry of Foreign Affairs of Ukraine; the State Service of Special Communications and Information Protection of Ukraine; the central bodies of executive power, which ensure formation and implementation of state policy in the sphere of health care; the central bodies of executive power, which ensure formation and implementation of state policy in the electric power, coal, industrial and oil and gas complexes; the central body of executive power implementing state policy in the sphere of managing state-owned objects; the central bodies of executive power, which ensure formation and implementation of state policy in the spheres of transport; the central bodies of executive power ensuring formation and implementation of state financial policy; the central bodies of executive power that ensure formation and implementation of state policy in the sphere of environmental protection; the central bodies of executive power that ensure the formation and implementation of the state agrarian policy (Leheza *et al.*, 2022).

Other central and local bodies of executive power, local self-government bodies, enterprises, institutions, organizations regardless of subordination and form of ownership, their officials, as well as citizens may with their consent be involved in anti-terrorist operations by decision of the management of the anti-terrorist operation in compliance with the requirements of this law (Law of Ukraine, 2003).

It is worth noting that the successful provision of countering terrorism in Ukraine requires joint participation in this activity of state structures, counter-terrorism subjects, and civil society. In this regard, it is important to establish a flexible constructive interaction of state bodies with public institutions, mass media for the purpose of carrying out coordinated activities in prevention of crimes and rendering help in eliminating threats to the safety of a person, society, and the state.

In the context of the investigated issue, it should be noted that the main body in the national system of combating and countering terrorism is represented by the Security Service of Ukraine. In accordance with the Law of Ukraine "On the Security Service of Ukraine", the Security Service of Ukraine is a special state law enforcement agency that ensures the state security of Ukraine (Law of Ukraine, 1992).

Under the Security Service of Ukraine there is the Anti-Terrorist Center; in accordance with part 7 of Article 4 of the Law of Ukraine "On Combating Terrorism" and Article 1 of the Regulation "On the Anti-Terrorist Center and its Coordination Groups at the Regional Bodies of the Security Service of Ukraine", approved by the Decree of the President of Ukraine dated April 14, 1999 No. 379/99, it is a permanent body under the Security Service of Ukraine which coordinates activities of counter-terrorism subjects (entities) in preventing terrorist acts against government officials, critical infrastructure objects of life support for the population, objects of increased danger, as well as in preventing acts that threaten the life and health of a significant number of people, and in their termination

According to p. 7 of the specified Regulation, the Center is structurally composed of the Interagency Coordinating Committee (ICC), headquarters, as well as coordination groups and their headquarters created under the regional bodies of the Security Service of Ukraine. In accordance with clause 8, the Center is headed by a manager who is appointed from among the first deputies of the Chairman of the Security Service of Ukraine and is relieved of his duties by the President of Ukraine.

In its activities, the Center accumulates and analyzes information, which makes it possible to determine the strategy and tactics of combating terrorism within the state and at the international level. Professional training of special forces and means included in the Anti-Terrorist Center (ATC) from specified ministries and departments is carried out on a single methodical base (within the competence defined by the Constitution and laws of Ukraine).

For the purposeful performance of the specified tasks (clause 5 of the Regulation), the Center has the appropriate powers primarily relating to coordination and organization of preparation and implementation of measures intended to stop terrorist manifestations, as well as related to

actions performed by units and forces involved in implementation of these measures, provision of methodical assistance and recommendations to counter-terrorism subjects in identifying and eliminating causes and conditions that contribute to the commitment of terrorist acts and other crimes committed with a terrorist purpose. The Center also develops proposals concerning improvement of legislative and other normative legal acts, it participates in preparation of draft international treaties of Ukraine in the sphere of combating terrorism(Leheza *et al*., 2022).

According to Clause 9 of the Regulation and Part 3 of Article 7 of the Law of Ukraine "On Combating Terrorism", the composition of the Center's Interagency Coordination Committee is determined. In the course of its activity, the ICC as a collegial advisory body of the ATC coordinates conceptual foundations and projects of anti-terrorism programs, recommendations on functioning of the general national system of combating terrorism, joint projects of ministries and agencies aimed at preventing and stopping terrorist crimes, plans of regional coordination groups; it organizes and conducts anti-terrorist operations, command-staff exercises and special tactical training exercises, etc. (Matviichuk *et al*., 2022).

The headquarters of the Anti-Terrorist Center is the executive working body of the Center, which carries out current organizational work to fulfill the tasks assigned to the ATC. In particular, the headquarters developed proposals for the current Law of Ukraine "On Combating Terrorism", as well as a number of decrees, orders of the President of Ukraine and Government resolutions in the sphere of combating terrorism. An information and analytical group functions as part of the headquarters to analyze current risks and threats in the sphere of combating terrorism, and representatives of counter-terrorism subjects (entities) can be involved in the work on a voluntary basis in accordance with the established procedure (Zhukova *et al*., 2023).

Composition of the coordination groups at the regional bodies of the Security Service of Ukraine and the organizational support for their activities is determined in accordance with Article 7 of the Law of Ukraine "On Combating Terrorism" (Law of Ukraine, 2003), the Regulation on the Anti-Terrorist Center and its coordination groups at the regional bodies of the Security Service of Ukraine and Provisions on the unified state system of prevention, response and termination of terrorist acts and minimization of their consequences.

Regional coordination groups have the following functions: collecting, generalizing, analyzing and evaluating information about the state and trends of the spread of terrorism in the region; developing recommendations aimed at improving the national system of combating terrorism, creating preventive anti-terrorist plans regarding probable objects of terrorist tendencies; carrying out anti-terrorist operations, as well as performing

education and training, coordinating activities of representatives of counter-terrorism entities in the region, etc. (Leheza *et al*., 2023).

In addition, military-civilian administrations can be created and they can operate as part of the ATC under the Security Service of Ukraine - temporary state bodies that are appointed to ensure activity of the Constitution and laws of Ukraine, ensure the safety and normalization of the population's life, law and order, participation in countering acts of sabotage and terrorist acts, preventing a humanitarian disaster in the area of performing anti-terrorist operations.

However, it is worth noting that until now there has not been sufficiently effective coordinated cooperation of state authorities (in particular, counter-terrorism subjects) with public and other institutions of civil society, and this has a negative effect on the process of creating additional conditions and opportunities for the accumulation of both state and social organizational and intellectual potential in the sphere of countering terrorism. Productive interaction of state bodies and the public would contribute, on the one hand, to the strengthening of guarantees of compliance with the law, the rights and freedoms of citizens in the context of advancing Ukraine along the path of European integration, and on the other hand, it would contribute to the implementation of innovative projects for the public prevention of terrorism and extremism and to the establishment of civil control over the state national security system.

Conclusion

Thus, we can establish that the President of Ukraine, the Verkhovna Rada of Ukraine and the Cabinet of Ministers of Ukraine are the key actors in countering terrorism in Ukraine in the system of higher authorities. The defining areas of activity of the President of Ukraine in the sphere of countering terrorism are the activities aimed at the regulatory and legal support of countering terrorism in Ukraine creation, liquidation, reorganization and management of the relevant counter-terrorism subjects.

The Verkhovna Rada of Ukraine, as a counter-terrorism subject, implements functions related to the regulatory and legal support of the fight against terrorism in Ukraine, regarding creation, liquidation, reorganization of relevant counter-terrorism subjects (entities), as well as regarding control over their activities.

For the purpose of countering terrorism in Ukraine the Cabinet of Ministers of Ukraine creates, liquidates, reorganizes the relevant counter-terrorism subjects (entities), and also coordinates, controls and manages their activities; it carries out regulatory and legal support and inspection of

implementation of legislative acts, in particular, those related to the fight against terrorism; it also directs activities to ensure legality and prevent illegal encroachments on the interests of people and the state.

The Anti-Terrorist Center under the Security Service of Ukraine implements the national anti-terrorist policy and interdepartmental tasks for organization and coordination of the fight against terrorism mainly through functionally oriented members of the ICC. There are coordination groups functioning under regional bodies of the Security Service of Ukraine. A system of legal norms has been developed; this system regulates activities of the named institutes at the domestic and international levels.

In their activities counter-terrorism subjects are primarily guided by those normative legal acts that determine their place in the system of executive authorities. Their professional activity is aimed at counteracting the relevant terrorist manifestations, namely, identifying and stopping terrorist acts, detaining and arresting persons who have committed such acts, bringing them to administrative or criminal liability, indemnifying the victims, etc.

It is also worth noting that combating modern terrorism requires a systematic approach, where, along with a complex of state and legal measures an active activity of civil institutions of our society should be an important component. In connection with this, there is a need to consolidate various public currents in order to support the global strategy for combating terrorism and to create a multi-functional and multi-level system for combating this phenomenon. Such a system should combine the optimal use of the intellectual potential of the nation, the universal human factor of the state and mobilization of this factor in order to solve issues of combating terrorism.

In view of the above, we note that the Anti-terrorist system of Ukraine is equipped with flexible and operational use of forces and means, as well as a normatively justified scheme for managing anti-terrorist measures. However, in our opinion, it is advisable to direct its further improvement to the following: optimization of activities performed by regional coordination groups of the Anti-Terrorist Center at the Security Service of Ukraine, whose competence covers the tasks and functions of combating terrorism in the direction of strengthening their organizational and management component; improving qualifications of representatives of counter-terrorism subjects in the areas of activity with the aim of improving resource and personnel support; development and approval of the state Program on promotion and development of the interaction between counter-terrorism subjects (entities) and the civil society; determination at the legislative level of the Procedure for participation of public organizations in combating terrorism, etc.

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Prospects for the implementation of the system of electronic criminal proceedings in Ukraine

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Abstract

Using the dialectical method, the article is devoted to the study of the impact of digitization on the implementation of pre-trial criminal proceedings and court proceedings in Ukraine. Based on the study of the positive international experience of electronic criminal proceedings, the good features of the introduction and further development of electronic criminal proceedings have been identified, such as: optimization of the investigation and trial procedure; improvement of supervision and control; saving budget funds; reducing the number of employees; elimination of red tape and corruption risks; automation of communication processes and others. In the conclusions, the authors argue that it is desirable to determine in the procedural legislation the possibility of introducing a special regime of court proceedings, in the form of videoconferencing and procedures for signing court judgments, etc., during the period of war or state of emergency.

Keywords: electronic criminal proceedings; pre-trial investigation; information technologies; digitalization; digital evidence.

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Perspectivas de la implementación del sistema de procesos penales electrónicos en Ucrania

Resumen

Mediante el método dialectico, el artículo está dedicado al estudio del impacto de la digitalización en la implementación de procedimientos penales previos al juicio y procesos judiciales en Ucrania. Sobre la base del estudio de la experiencia internacional positiva de los procesos penales electrónicos, se han identificado las características buenas de la introducción y el desarrollo ulterior de los procesos penales electrónicos, tales como: optimización del procedimiento de investigación y juicio; mejora de la supervisión y el control; ahorrar fondos del presupuesto; reducir el número de empleados; eliminación de trámites burocráticos y riesgos de corrupción; automatización de procesos de comunicación y otros. En las conclusiones los autores fundamentan la conveniencia de determinar en la legislación procesal la posibilidad de introducir un régimen especial de actuaciones judiciales, en la modalidad de videoconferencia y procedimientos de firma de sentencias judiciales, etc., durante el período de guerra o estado de excepción.

Palabras clave: proceso penal electrónico; investigación previa al juicio; tecnologías de la información; digitalización; prueba digital.

Introduction

An integral part of modern society is the presence of information and communication technologies that provide access to new knowledge and information. Without the use of technical means and scientific discoveries in the field of informatics related to the collection, processing, storage and processing of information, investigation, disclosure and prevention of criminal offenses, systematic analysis of the received information about the committed criminal offense is impossible.

The development of modern information technologies makes it possible to significantly improve the exchange and storage of information, the use of procedural document templates, which greatly facilitates the work of prosecutors and investigators, however, in national legal practice, electronic document circulation within the criminal process is duplicated by the corresponding paper document circulation, which leads to significant costs in terms of working time, and material and technical resources. At the same time, modern systems of multi-level information protection and cloud technologies allow subjects of authority to be sure of the preservation and

security of information resources, confidential data and the possibility of their restoration in case of accidental or intentional destruction (Mazuryk, 2022).

The need for high-quality processing of information obtained through the official activities of criminal justice officials is due to a number of reasons, in particular: timely notification of pre-trial investigation bodies with information obtained in the course of official activities; the possibility of obtaining reliable information for the relevant situation upon request to the database of the network of law enforcement agencies; prompt use of the full volume of verified information, which makes it possible to quickly make a decision in the conditions of the official environment; organization and preservation of collected materials (Popovich, 2022).

Therefore, the issue of introducing the concept of electronic criminal proceedings into the practical activities of criminal justice system bodies is urgent, and the gradual digitalization of all forms of activity of public authorities is a necessary condition for the creation of an effective state mechanism and legal regulation of social relations, aimed at protecting human rights and freedoms and general interests society and the state. In view of this, it is urgent to create the most effective system of electronic cooperation, which will allow to activate the process of investigation of criminal offenses and reduce the workload of the authorized subjects of the criminal process, to ensure a high-quality and comprehensive investigation and effective trial of each criminal case.

1. Methodology of the study

In order to achieve the set goal and ensure the scientific objectivity of the obtained research results, a set of modern general scientific and special methods used in legal science was chosen. All methods were applied in a relationship, which in the end contributed to ensuring comprehensiveness, completeness and objectivity of the results of scientific research, correctness and consistency of conclusions. The dialectical method of scientific knowledge became the methodological basis of the scientific article, it was used to obtain substantiated conclusions and provide recommendations regarding the introduction of the electronic criminal proceedings system in Ukraine. Using the historical method, a study of the genesis of the electronic criminal process in Ukraine was conducted.

The statistical method was applied during the analysis of investigative and judicial statistics. The formal-logical method was used to define the concept of electronic criminal proceedings and clarify its essence. Using the comparative method, the provisions of the current Criminal Procedure Code of Ukraine (hereinafter – CPC of Ukraine) and the CPC of foreign

countries were compared, which made it possible to use positive experience in the development of proposals for improving the norms of the current legislation. The system-structural method, which is based on the comparison of various provisions of criminology and criminal procedural law, made it possible to provide a comprehensive interpretation of the essential features of criminal procedural institutions and to determine the main ways of improving the criminal procedural legislation of Ukraine regarding the use of it. The generalization method made it possible to formulate scientifically based conclusions and provide recommendations of an applied nature.

2. Analysis of recent research

A significant number of scientific works related to the study of technical support for the investigation of criminal offenses are covered in scientific studies to one degree or another. At the same time, it should be noted that scientists considered the use of technical means mainly as a means of recording the progress and results of procedural actions, investigated the possibilities of conducting investigative (search) actions and judicial review of criminal proceedings in the mode of remote access using video conference telecommunication technologies.

Despite the significant number of scientific works devoted to the application and use of the electronic criminal proceedings system in Ukraine, it should be noted that not all aspects of the specified problem have been comprehensively researched and normatively regulated. The purpose of the article is to determine the prospects for the implementation and development of the electronic criminal proceedings system in Ukraine by solving the following tasks: to investigate the foreign experience of digitization of criminal procedural legislation and the features of its application; outline the general concept of electronic criminal proceedings; to carry out an analysis of the organizational, technical and procedural aspects of the development of electronic criminal justice in Ukraine; to determine amendments to the legislation in the conditions of martial law in Ukraine.

3. Results and discussion

Electronic criminal proceedings can be characterized as a mode of criminal procedural activity based on composite algorithms of automated criminal procedural procedures of the Unified Register of Pretrial Investigations (hereinafter – URPI) and electronic information systems integrated with it.

Today, Ukraine is in new realities related to European integration and the bringing of criminal procedural legislation to the requirements of international legal acts, which make it necessary to rethink many provisions of the criminal process. It is natural that the execution of the tasks of criminal proceedings in modern conditions cannot be ensured without effective consideration of the European and international experience of criminal proceedings (Lutsyk & Samariy, 2018, p. 139). Electronic proceedings have a positive practice of application in many countries of the world, and the study of their criminal procedural legislation is necessary to obtain a positive experience of digitalization of criminal process procedures.

Digitization of the judicial system is actively developing in the United States of America (hereinafter – USA), Great Britain, Germany, Canada, Italy and others. For example, in the USA, the judicial system provides for the possibility of free access to information about court documents, registers of applications accepted for consideration, history of decisions, etc.

In Canada, the parties themselves determine the format of the proceedings, upon the application of the interested person, the court may decide to hold the hearing online. At the same time, there have been no paper cases in any instance for a long time. All documents are submitted, accepted and reviewed in electronic form. Therefore, there are no problems with storing voluminous printed files, which only take up space and time for their registration (E-litigation: international experience and benefits of implementation, 2019).

Some e-procedure initiatives implemented by other countries are quite creative and at the same time effective. In particular, the Criminal Procedure Code of Estonia provides for: conducting court proceedings in an electronic and digital format; transfer of requests, statements, complaints directly through the electronic case system (Kalancha, 2019, p. 214215). The criminal justice system of the Republic of Moldova offers for consideration such recommendations as an ad-hoc procedure, which provides for the appointment of a forensic expert in the specialization necessary for the examination; the possibility of making public during the trial the video testimony of a minor witness so as not to involve him again (Kalancha, 2020, p. 137).

It should be pointed out the positive experience of the electronic interaction successfully implemented in the Czech Republic between the bodies of the pre-trial investigation and other subjects of the process. A clear example for imitation is the electronic system of the Czech Republic, E-Case Management System (hereinafter – eCMS), which began to function in 2006 in the police authorities. Its specificity consists in the material provision of law enforcement agencies with gadgets connected to eCMS, which allows checking persons, vehicles, registering proceedings, taking fingerprints, etc. The main advantage of such a system is the possibility

of accounting for the performed search actions and obtaining access to all electronic documents. It is this system that is taken as a basis in Ukraine (Zhuchenko, 2021, p. 43).

We believe that certain technological solutions can be used by Ukraine as well, in particular: automatic notification of the prosecutor about the start of a pre-trial investigation in the ERDR; automation of electronic interaction between the investigator and the prosecutor in the ERDR; formation of templates of electronic procedural documents in the register; full integration of paper criminal proceedings into electronic ones based on the specified system; introduction of interaction of pre-trial investigation bodies with other subjects of criminal proceedings by analogy with the data box; creation of a special electronic system that will interact with state registers and databases necessary for criminal proceedings (Stolitniy, 2017).

Positive foreign experience during the introduction and implementation of the electronic and digital form of criminal cases only confirms the expediency of further modernization of criminal procedural activities. Among such provisions, it is worth noting: interaction with electronic registers; transfer of petitions, statements, complaints directly through the electronic case system; conducting court proceedings in electronic and digital format.

At the same time, it should be emphasized the perspective of further research of the specified problem, which is caused by the need to analyze the positive foreign practice of administrative-legal regulation of the functioning of the information and telecommunication system of pre-trial investigation and determine the possibility and expediency of its borrowing for the purpose of implementation into national legislation and the practice of its application.

In Ukraine, the specifics of the further development of electronic criminal justice are defined in the Strategy for the Development of the Justice System and Constitutional Justice for 2021–2023, in clause 4.1.4. which indicated the need for «the introduction of modern electronic record keeping in the court, electronic case management, electronic communications with the court, the judge's office and the office of the participant in the process» (STRATEGY FOR THE DEVELOPMENT OF THE JUSTICE SYSTEM AND CONSTITUTIONAL JUSTICE FOR 2021-2023). At the same time, the issue of adoption of the Unified State Concept for the Implementation of Electronic Criminal Justice still remains open and requires immediate scientific study and legislative resolution.

In accordance with the requirements of Part 6 of Art. 371 of the CPC of Ukraine, «all court decisions are presented in writing in paper and electronic forms» (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012). Court decisions are issued in electronic form in accordance with the requirements of the legislation in the field of electronic documents and electronic document

circulation, as well as electronic digital signature». The functioning of electronic record keeping is ensured by the existence of the Unified Judicial Information and Telecommunication System, which determines the transfer of criminal proceedings to e-format.

The gradual transfer of criminal proceedings to electronic form is evidenced by legislative changes that have recently been made to the CPC of Ukraine. Thus, the Law of Ukraine «On Amendments to the CPC of Ukraine Regarding the Introduction of an Information and Telecommunication System of Pretrial Investigation» dated June 1, 2021 (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012). In particular, the addition of Section XI «Transitional Provisions» of the CPC of Ukraine, paragraph 20-6 of the following content is important: «In case of lack of integration of the system that functions in the court in accordance with Art. 35 of this Code, with the information and telecommunications system of the pre-trial investigation, the investigator, inquirer, prosecutor submits materials to the court in paper form and in electronic form using a qualified electronic signature» (ON AMENDMENTS TO THE CRIMINAL PROCEDURE CODE OF UKRAINE REGARDING THE INTRODUCTION OF AN INFORMATION AND TELECOMMUNICATION SYSTEM OF PRE-TRIAL INVESTIGATION. LAW OF UKRAINE, 2021).

At the same time, it must be stated that the CPC of Ukraine has not yet defined at the legislative level the concept and task of conducting electronic criminal proceedings, although the code contains a number of provisions that partially regulate the implementation of electronic procedural procedures and their recording, which indicates a certain informatization of the criminal process. Yes, part 2 of Art. 99 of the CPC of Ukraine stipulates that documents, provided they contain information provided by law, may include photographic materials, sound recordings, video recordings, and other information carriers (including electronic ones).

According to Art. 103 of the CPC of Ukraine, one of the forms of recording criminal proceedings is an information carrier on which procedural actions are recorded using technical means. Article 107 of the Criminal Code of Ukraine provides for the possibility of using technical means of recording criminal proceedings. According to Art. 135 of the CPC of Ukraine, one of the methods of subpoena in criminal proceedings is to send a subpoena by e-mail, fax or telephone. Article 232 of the CPC of Ukraine provides for the possibility of interrogation, identification in videoconference mode during pre-trial investigation (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012).

It should also be pointed out the positive provisions regarding the use of video recording technical means during court proceedings. Thus, during the trial and in the cases provided for by the Code of Criminal Procedure of Ukraine, during the pre-trial investigation, the full recording of the court session and procedural actions is ensured with the help of sound and

video recording technical means. The official record of the court session is only the technical record made by the court (Part 5 of Article 27 of the CPC of Ukraine) (CRIMINAL PROCEDURE CODE OF UKRAINE, 2012). Recording the course of procedural actions with the help of a video recording is currently the most effective proof of its indisputability, because this way information is transmitted in full, provides the opportunity to objectively perceive the source of information by all participants in the process, and also creates conditions for a comprehensive and complete collection of such information.

The CPC of Ukraine was supplemented by Art. 106-1, part 1 of which defines that «the information and telecommunications system of pretrial investigation is a system that ensures the creation, collection, storage, search, processing and transmission of materials and information (information) in criminal proceedings (ON AMENDMENTS TO THE CPC OF UKRAINE REGARDING THE INTRODUCTION OF AN INFORMATION AND TELECOMMUNICATION SYSTEM OF PRE-TRIAL INVESTIGATION. LAW OF UKRAINE, 2021).

Documents signed, approved in the information and telecommunications system of the pre-trial investigation using a qualified electronic signature, their copies in electronic and paper forms are recognized as original documents (Part 4 of Article 106-1 of the Criminal Procedure Code). The information and telecommunications system of the pre-trial investigation is subject to protection using a comprehensive information protection system with confirmed compliance» (Part 6 of Article 106-1 of the Criminal Procedure Code)» (ON AMENDMENTS TO THE CPC OF UKRAINE REGARDING THE INTRODUCTION OF AN INFORMATION AND TELECOMMUNICATION SYSTEM OF PRE-TRIAL INVESTIGATION. LAW OF UKRAINE, 2021).

In accordance with the requirements of the legislation, on August 17, 2021, the Supreme Council of Justice approved the Regulation on the procedure for the functioning of individual subsystems (modules) of the Unified Judicial Information and Telecommunication System (hereinafter – EJITS). Prior to the start of operation of the EJITS, the legislation provides for the creation and operation of separate subsystems (modules) of this system, i.e. the phased implementation of the entire system, which will ensure the activities of the judiciary. The adopted Regulation defines the applicable terms and concepts.

The procedure for functioning in courts and judicial bodies of individual EJITS modules is provided for. Such subsystems are «Electronic cabinet», «Electronic court», as well as the functioning of video conferencing as a separate subsystem. The procedure for taking procedural actions in electronic form with the use of the specified subsystems of EJITS has been determined. The peculiarities of the use of software in courts and justice

bodies during the transition period before the start of the operation of EUITS in its full composition of subsystems or modules were regulated (ON APPROVAL OF THE REGULATION ON THE PROCEDURE FOR THE FUNCTIONING OF INDIVIDUAL SUBSYSTEMS OF THE UNIFIED JUDICIAL INFORMATION AND TELECOMMUNICATION SYSTEM. DECISION OF THE HIGH COUNCIL OF JUSTICE, 2021).

In view of the expediency of implementing the concept of electronic justice, it is important to recognize the provision that the «Electronic Court» subsystem allows participants in the legal process to submit documents to the court in electronic form, as well as to send procedural documents to such participants in electronic form, in parallel with documents in paper form in accordance with procedural legislation.

Thus, the Verkhovna Rada of Ukraine created the legal basis for the introduction of the concept of electronic criminal proceedings into real legal practice, and it is stipulated that the procedure for the functioning of the information and telecommunications system of pre-trial investigation should be determined by a provision jointly approved by the Office of the Prosecutor General, the body that includes the pre-trial investigation body investigation, as well as the body approving the provisions on the system that functions in the court.

At the same time, in the conditions of war on the territory of Ukraine, certain organizational and technical issues remain unresolved, in particular, the holding of court hearings directly in the courtroom. After all, a significant number of court premises have been destroyed, heavily damaged, looted, sirens sound almost every day, which makes it necessary to remove the entire court staff to a safe place, and this creates difficulties in organizational aspects, interrupts and delays the consideration of the case. Therefore, during the martial law, the working conditions of justice bodies have changed significantly and require adaptation to new conditions and ensuring the effective functioning of the judicial system, maximum access to justice and bringing the work of the court to stable functioning.

The introduction of remote work of courts under martial law requires the most effective use of electronic document circulation and access to court cases in electronic form. Provided by the procedural legislation, EJITS should ensure the exchange of documents in electronic form between courts, between the court and the participants in the legal process, between the participants in the legal process, as well as the recording of the legal process and the participation of the participants in the legal process in the court session in the mode of video conference.

Therefore, there is no objection to the fact that the procedural legislation should provide for the possibility of introducing by the courts during a period of war or a state of emergency a special regime of court work, which

would regulate the features of the remote form of work, which would provide for the participation in the court session of judges and/or the secretary of the court session remotely in video conference mode, remote participation of judges in court proceedings in the order of written proceedings, features of signing court decisions and procedural documents, including qualified electronic signatures without drawing up or with a delay in drawing up their paper originals.

In general, we can state that the issue of introducing remote forms of court work, transition to an electronic form of judicial proceedings, access to the judge's electronic office is extremely important, and the war only made these issues more urgent. Without an urgent widespread transition by the courts to a remote and electronic form of judicial proceedings, it will be extremely difficult or practically impossible to really ensure the right to a fair trial with security guarantees in the conditions of martial law. The specified changes, on the one hand, are necessary to preserve the lives and health of judges, employees of court apparatuses, participants in court cases, will be the basis for making timely decisions on the evacuation of court employees, and on the other hand, they will contribute to the fulfillment of the requirements of the Constitution of Ukraine regarding the administration of justice in conditions of martial law state (Svoyak, 2020).

Considering all of the above, it can be stated that, despite a number of risks and miscalculations that need to be regulated by law and worked out in practice, the very concept of judicial reform in the direction of its digitalization is progressive and relevant.

Conclusions

The introduction and further development of electronic criminal proceedings has the following positive features: optimization of the pre-trial investigation procedure; improvement of supervision and control over the activities of authorized entities; saving budget funds; reducing the number of employees involved in the investigation process; elimination of bureaucratic procedures and corruption risks; increasing trust in law enforcement agencies; automation of processes and effective methods of electronic communication. The disadvantages include: variability of technological resources and lack of proper technical support of law enforcement agencies; risk of falsification of materials; unstable cyber security.

Positive foreign experience during the introduction and implementation of the electronic and digital form of criminal proceedings confirms the expediency of further modernization of the activities of the pre-trial investigation bodies and the court. These provisions include the optimization

of: interaction with electronic registers; transfer of requests, statements, complaints directly through the electronic case system; conducting court proceedings in electronic and digital format.

At the legislative level, Ukraine should provide for the possibility of introducing, during the period of war or a state of emergency, a sp+ecial mode of operation of the court, which would regulate the features of the remote form of judicial proceedings in video conference mode, the participation of judges remotely in court proceedings in the order of written proceedings, the procedure for signing court decisions and procedural documents , including a qualified electronic signature without drawing up or with a delay in drawing up their original in paper form.

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Control posterior célere y focal y la responsabilidad de los funcionarios en los gobiernos locales

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Resumen

Perú atraviesa una coyuntura política que, aunque difícil, logra incluir la lucha contra la corrupción en la agenda pública. Hoy, más que nunca, los ciudadanos ven a la corrupción como uno de los mayores problemas del país. La lucha contra la corrupción involucra a todo el país y debe hacerse de manera dinámica, ya que los mecanismos de corrupción continúan desarrollándose y complejizándose. El objetivo de este trabajo de investigación es determinar la incidencia del Servicio de Control Específico a Hechos con Presunta Irregularidad: un control posterior célere y focal en la responsabilidad de los funcionarios en los gobiernos locales de la provincia de Tacna. La metodología de la investigación es de enfoque cualitativo, diseño no experimental, nivel exploratorio y de tipo documental. La población consta de 18 informes de acciones de control en la modalidad de "Servicio de Control Específico de Actos Presuntamente Irregulares", la técnica es el análisis documental, y el instrumento es una guía de análisis. Se concluye la identificación de perjuicios económicos, a los cuales corresponden las pérdidas financieras en y se identificaron posibles responsabilidades civiles, penales y administrativas en 130 funcionarios y servidores públicos.

Palabras clave: servicio de control específico; presuntas irregularidades; corrupción; responsabilidades; gobiernos locales.

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Prompt and focused ex-post control and accountability of local government officials

Abstract

Peru is going through a political juncture that, although difficult, manages to include the fight against corruption in the public agenda. Today, more than ever, citizens see corruption as one of the country's biggest problems. The fight against corruption involves the whole country and must be carried out in a dynamic manner, since corruption mechanisms continue to develop and become more complex. The objective of this research work is to determine the incidence of the Specific Control Service for Acts with Presumed Irregularities: a prompt and focused subsequent control in the accountability of officials in the local governments of the province of Tacna. The research methodology is of qualitative approach, non-experimental design, exploratory level and documentary type. The population consists of 18 reports of control actions in the modality of "Specific Control Service of Presumably Irregular Acts", the technique is documentary analysis, and the instrument is an analysis guide. It is concluded the identification of economic damages, to which correspond the financial losses in and possible civil, criminal and administrative responsibilities were identified in 130 officials and public servants.

Keywords: specific control service; alleged irregularities; corruption; responsibilities; local governments.

Presentación y justificación del tema

Según las normas internacionales que rigen las operaciones de las Entidades de Fiscalización Superior (EFS), se establece que los tres tipos de auditorías: financiera, cumplimiento y desempeño, son los productos básicos del control gubernamental posterior. Razón por la cual las EFS del continente americano realizan las auditorías para fiscalizar la regularidad de las cuentas y la gestión financiera pública en las entidades y organismos gubernamentales (Shack y Lozada, 2020a).

El Perú ha conseguido situar la lucha contra la corrupción en la primera línea de la opinión pública a pesar de su complicada estructura política. Ahora más que nunca, el ciudadano considera la corrupción como uno de los peores problemas de la nación, dado que los mecanismos de la corrupción evolucionan constantemente y se vuelven más sofisticados, la lucha contra la corrupción implica a todo el gobierno y debe abordarse de forma dinámica. Como máxima autoridad del Sistema Nacional de Control, la contralora general de la república (CGR) tiene la importante responsabilidad de vigilar el buen uso de los recursos y bienes del Estado.

Según Shack y Lozada (2020b), las auditorías se llevan a cabo para garantizar el cumplimiento de las normas mundiales que regulan el funcionamiento de las entidades fiscalizadoras superiores. Para lo cual se identifica que: Realizar una evaluación de la información presupuestaria de una entidad, así como de sus estados financieros, es lo que constituye una auditoría financiera. Posteriormente, el auditor emitirá una opinión sobre la razonabilidad de los estados. Y emite un veredicto sobre la adecuación de las cuentas financieras, así como sobre la verosimilitud de la información (Resolución de Contraloría N.º 445, 2014).

Una evaluación imparcial, veraz y confiable de sí las obras, sistemas, actividades, programaciones y actividades cumplen lo planificado de forma eficiente, eficaz, equitativa, ética, sostenible y coherente es lo que se denomina auditoría de rendimiento. Este tipo de control lo lleva a cabo la Contraloría después de haber realizado el control inicial. Con ello pretende contribuir a una gobernanza responsable y transparente, así como a una buena gobernanza en general (Resolución de Contraloría N.º 122, 2016).

La auditoría de cumplimiento es una evaluación independiente, objetiva, técnicamente avanzada y profesionalmente realizada de las operaciones, procedimientos y actividades relacionadas con las finanzas, los presupuestos y la administración. Este sistema permite comprobar si las entidades reguladas por él han cumplido las normas, políticas internas y condiciones acordadas en las actividades realizadas con respecto a sus responsabilidades de servidor del Estado. La comisión de auditoría que se encargará de la Auditoría de Cumplimiento debe contar con seis miembros expertos, siendo como multidisciplinarios (Resolución de Contraloría N.º 473, 2014).

También, de acuerdo a la investigación de Shack y Lozada (2020c), la información recopilada del Sistema de Control Gubernamental contiene un total de 41 082 sugerencias de eficiencia en la gestión que se crearon como consecuencia de los reportes de los informes a lo largo del periodo 2009-2019. Se aplicaron 20 877, lo que representa el 51 % del total. El control externo, a posteriori de la explicación de las responsabilidades en los procesos administrativos, civiles y penales, indicó que el cumplimiento no proporcionó resultados especialmente positivos, y solo el 4,8 % de los servidores estatales, que se vieron envueltos en casos de litigios penales desde 2009 hasta abril de 2019, se identificaron como responsables en las funciones asumidas. Siendo estas informaciones brindadas por la Fiscalía de la CGR, revelaron que la cantidad de dinero que estuvo involucrada en los procesos judiciales que se sustentaron y respaldaron con pruebas durante este lapso de tiempo fue recuperada en una proporción menor al 1,0 % del monto total.

El esfuerzo que se hace para investigar y sacar a la luz los diversos actos de corrupción no tendrá un impacto sustancial en la obtención del valor del

Estado para el poblador en general, mientras no exista una forma efectiva de castigo (Shack y Lozada, 2020d).

La CGR implementó leyes y normativas de mejora en las labores para ser más eficiente como institución y con mayor capacidad del gobierno para ejercer su autoridad de manera oportuna, eficaz y eficiente y maximizar su capacidad orientada a la mitigación y hacer frente a todo acto corrupción y las faltas en los servidores, en sus labores cotidianas. En esta situación actual busca ser oportuna y eficiente en los diversos actos detectados o que se incurran en el manejo y la realización de recursos, bienes y operatividad de la entidad (Shack y Lozada, 2020e).

Esta modalidad de control posterior permite obtener beneficios de una auditoría que sea eficiente y directa, facilitando la detección de despilfarros, fraudes y abusos en la asignación de fondos y otros activos en poco tiempo. Además, pueden tener consecuencias legales, judiciales o burocráticas (Vallejo, 2021).

El control posterior se refiere a la aplicación de controles después de la realización de los controles anteriores, como la verificación de los pagos de impuestos, la realización de correcciones, la recaudación y la sanción de las conductas deshonestas (Aguirre, 2015). Las anomalías declaradas tienen una correlación con la magnitud de las actividades de corrección realizadas antes del control simultáneo. Los supuestos errores incluyen tanto el incumplimiento de los requisitos como la falta de responsabilidad administrativa (Malpartida, 2021). Las tareas realizadas por el servicio de control particular incluyen el seguimiento diligente y responsable de la asignación de recursos y la notificación de las discrepancias encontradas (Pinedo, 2022).

Shack y Lozada (2020f) señalan que la necesidad de un novedoso servicio de control a posteriori surgió de la necesidad de calcular los derechos de aduana con mayor rapidez y rentabilidad. Con la finalidad de facilitar una participación inmediata y acotada sobre las acciones directas en los hechos y la gestión y aplicación de los recursos, bienes, servicios y actividades institucionales, se ideó un procedimiento expeditivo conocido como Servicio de Control Específico de actos con presuntas irregularidades.

En el contexto de los servicios de control posterior, el Servicio de Control Específico de Hechos con Presunta Irregularidad es una forma de evaluación o examen posterior que se incluye en el control del estado, para la protección de los recursos. Consiste en una actuación rápida, puntual y condensada para examinar la presencia de hechos con indicadores de presuntas irregularidades y conocer probables faltas con respecto a las funciones, desde el punto de vista civil, penal o administrativo. Esto se hace con el fin de evitar daños mayores (Resolución de Contraloría N.º 198, 2019a).

El órgano desconcentrado o unidad orgánica de la Contraloría es informado de los hechos y se le presentan las pruebas de las presuntas irregularidades desde un servicio de control, un servicio afín u otras fuentes de información ajenas a estos servicios, o del OCI (Órgano de Control Institucional) encargado del desarrollo del servicio de control, o el equipo encargado de los servicios relacionados, dependiendo de la jurisdicción en la que se encuentre la entidad u organismo, pueden ser responsables de llevar a cabo la auditoría (Resolución de Contraloría N.º 198, 2019b).

Con base en la documentación e información recabada, los órganos desconcentrados o unidades orgánicas de la Contraloría, o el OCI, realizan una evaluación y, en su caso, programan la apertura del proceso de planificación del Servicio de Control Específico. Tras la autorización de esta actividad, se iniciarán las fases de Planificación, Ejecución e Informe del Servicio de Control Específico de eventos con presuntas irregularidades, cuyo plazo es de 66 días naturales, lo que equivale a 45 días hábiles. Para establecer la comisión de control que se encargará del Servicio de Control Específico, es necesario convocar a cuatro expertos de diversas disciplinas (Resolución de Contraloría N.º 134, 2021a).

Tras incorporar las pruebas al Servicio de Control Específico de Hechos con Presunta Irregularidad, el comité del servicio empezará con la planificación del referido trabajo, que incluye la programación y conformidad de las labores a realizar en la evaluación del Control Específico, que comprende los actos ya determinados objetivamente sobre las probables o supuestas faltas, con documentos que son evidencias claras y fehacientes, para cumplir con las acciones programadas (Resolución de Contraloría N.º 134, 2021a).

El día en que se registra un servicio de control concreto en el programa informático correspondiente marca el inicio de la fase de planificación del Servicio de Control Específico de las presuntas anomalías. Esta etapa debe realizarse en un plazo máximo de cinco días hábiles (Resolución de Contraloría N.º 134, 2021c).

Finalizado la fase de planificación del Servicio de Control Específico, el Servicio de Control Específico de las supuestas anomalías puede pasar a la fase de ejecución. Las labores que comprenden en esta fase tienen como fecha límite treinta días hábiles (Resolución de Contraloría N.º 134, 2021d).

Dentro de los diez días hábiles siguientes a la finalización de la etapa de ejecución del Servicio de Control Específico, se elaborará el respectivo dictamen del trabajo culminado. En este informe se detallan las presuntas responsabilidades que corresponden a cada uno de los hechos que se encontraron irregulares. Estos resultados se comunican al titular de institución o al representante de la unidad, y con posterioridad debe remitirse los informes a las instancias respectivas, quienes tienen la

obligación y responsabilidad de dar las facilidades para el inicio de las acciones que correspondan (Resolución de Contraloría N.º 134, 2021e).

Figura 1. Proceso del Servicio de Control Específico a Hechos con Presunta Irregularidad

Fuente: Elaboración propia con base en la Resolución de Contraloría N.º 134, 2021.

Según Shack y Lozada (2020g), al requerir una cuarta parte del tiempo y el coste de una auditoría de cumplimiento, el servicio de control particular de las presuntas anomalías es rápido y específico y contribuye a combatir la corrupción y el mal comportamiento funcional del Estado y a crear valor público para los ciudadanos.

El servicio de control especializado incorpora el control de la gobernanza y es una labor posterior al control. Interviene de forma rápida, objetiva y acelerada para contrastar o evaluar las labores identificadas con ciertas irregularidades reclamadas y concretar las obligaciones civiles, penales o administrativas, al tener en cuenta los antecedentes, el contexto, la amplitud, los objetivos, los criterios, los recursos, el calendario y la matriz (Vallejo, 2021).

La terminología que se utiliza es la de auditoría, que se refiere a una revisión de los registros con el fin de verificar las transacciones o actividades, poniendo fin a la veracidad, siendo objetiva y fiable, y emitiendo una opinión (Sandoval, 2012). La medición de los resultados y las medidas correctivas adoptadas son los dos aspectos del control interno. Estos aspectos se utilizan para establecer si se han cumplido las metas de las instituciones u organismos y las estrategias diseñadas para lograrlas, y con posterioridad

identificar si estos planes permitieron alcanzar las metas y beneficiaron a la entidad (Contraloría General de la República, 2014).

Instalado en el interior de la Entidad, el OCI contribuye a la consecución de los objetivos al mismo tiempo que realiza los controles (Contraloría General de la República, 2016). Las pruebas son: la información que se ha recopilado mediante la revisión, las observaciones, las verificaciones, las comparaciones, los análisis cualitativos y cuantitativos, las investigaciones, las conciliaciones, las entrevistas y las confirmaciones con fuentes externas (Vallejo, 2021). Las pruebas obtenidas mediante controles simultáneos son suficientes y aceptables para su uso en futuros controles. Estas pruebas se produjeron gracias a la utilización de recursos (tanto financieros como humanos) (Resolución de Contraloría N.º 115, 2019).

Con base en lo anterior, surge la siguiente interrogante, que forma parte de la decisión bajo consideración, ¿Cómo atiende un Servicio de Control Específico una posible vulneración en la región?, o ¿El servicio de control especial determina la responsabilidad por sospechas de condiciones inusuales en el área de Tacna? El objetivo de estas preguntas es dar a conocer los resultados de la aplicación de los Servicios de Control Específico ante sospechas de conductas inusuales en la región Tacna en los años 2020 y 2021.

Ahora bien, también es importante plantear las siguientes interrogantes en el marco de la unidad de estudio que corresponden a los gobiernos locales de la provincial de Tacna, surgiendo las preguntas: ¿Cómo se relaciona el Servicio de Control Específico a Hechos con Presunta Irregularidad con la responsabilidad de los funcionarios en los gobiernos locales de la provincia de Tacna?, o ¿Se identifican responsabilidades en el Servicio de Control Específico a Hechos con Presunta Irregularidad en los gobiernos locales de la provincia de Tacna?. En las citadas interrogantes se abordarán en los alcances de los periodos 2020 y 2021 en los gobiernos locales de la provincia de Tacna.

En el periodo 2020 se han terminado 26 593 servicios de control, lo que equivale al 100 %. De ellos, el control previo supone 90 (0,3 %), el control simultáneo 22 766 (85,7 %) y el control posterior 3 734 (14,0 %). En el año 2020, de un total de 3 404 entidades sujetas a control, habrá un total de 1 741 instituciones comprendidas a las acciones de revisión y evaluación del estado, que serán examinados para identificar sobre el cumplimiento de la normativa, la eficacia de las operaciones y la seguridad de las finanzas, además de otros tipos de auditorías, como parte del Servicio de Control Específico. Durante ese periodo, hubo 7 238 contratos de servicios de control finalizados en las administraciones nacionales, 3 922 contratos de servicios de control finalizados en las administraciones regionales y 15 533 contratos de servicios de control finalizados en las administraciones locales. El número total de contratos de servicios de control fue del 100 %. Se muestra en forma detallada en la Figura 2.

Figura 2. Servicio de control concluido en el 2020

Fuente*:* Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

A pesar de ello, la aplicación antes comentada revela que el número total de servicios de control de puestos previstos en el año 2020 fue de 1 954 (100 %), 30 (1,5 %) y 3 734 (191,1 %), en proceso y concluidos, respectivamente. Se realizaron según las distintas modalidades de Servicios de Control Específico de Hechos con Presunta Irregularidad, auditorías de cumplimiento, auditorías de rendimiento, y auditorías financieras, en concordancias a la planificación y normativas vigentes.

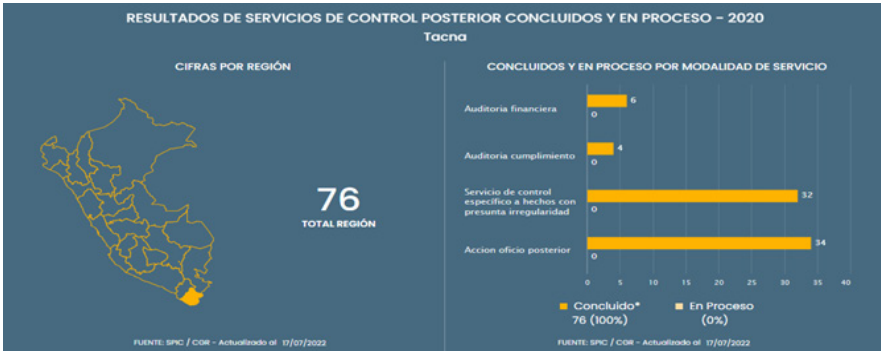
Figura 3. Servicio de control posterior en proceso y terminados en el 2020

Fuente. Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

En el contexto de este marco, los reportes muestran los resultados de los servicios posteriores de control que fueron finalizados en la región de Tacna para el año 2020 o que estarán en proceso de terminarse allí. Esto

supone un total del 100 %, que, aplicado a las modalidades de Servicio de Control Específico, equivale a 32; auditorías de cumplimiento, equivale a 4; Financiera, equivale a 6; y posterior actuación de oficio, equivale a 34; como se observa en la Figura 4.

Figura 4. Servicios de control posterior en proceso y terminados en la región de Tacna en el 2020



Fuente: Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

Como se muestra en la Figura 5, el número de personas sospechosas de haber cometido una infracción penal es de 33, mientras que el número de personas sospechosas de haber cometido una infracción civil es de 32.

Figura 5. Determinación de responsabilidades en informes de Control Específico en la región de Tacna

Fuente: Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

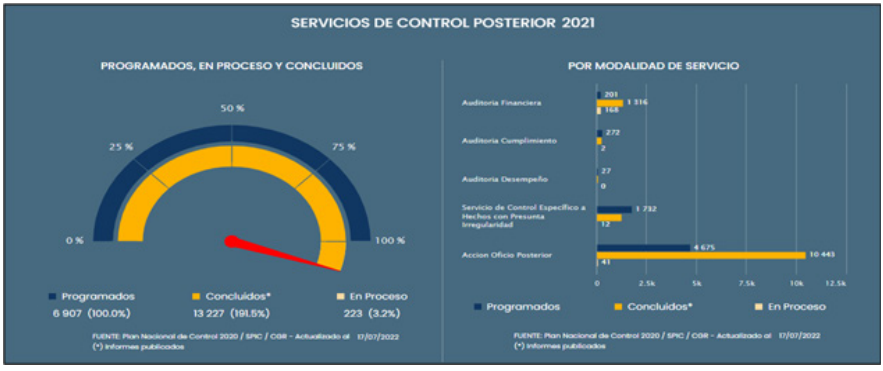
En el año 2021 se han finalizado un total de 35 537 servicios de control, lo que equivale al 100 %. De ellos, el control previo supone 161 (0,5 %), el control simultáneo 22 149 (62,3 %) y el control posterior 13 227 (37,2 %) del total. Además, habrá un total de 1 481 entidades cubiertas por el control gubernamental, del total de 3 396 entidades que están sujetas a control. El número de servicios de control completados por el gobierno nacional fue de 7 564 (21,3 %), el número de servicios de control completados por los gobiernos regionales fue de 5 342 (15 %), y el número de servicios de control completados por los gobiernos locales fue de 22 631 (63,7 %).

Figura 6. Servicio de control concluido en el 2021

Fuente. Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

Por otro lado, según la aplicación, el número total de servicios de control posterior que se han preestablecido fue de 6 907 (100 %), en proceso fue de 223 (3,2 %) y finalizados se determinó en 13 227 (191,5 %) en el ejercicio fiscal 2021.

Figura 7. Servicio de control posterior del ejercicio fiscal 2021



Fuente. Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

En este sentido, la aplicación también muestra los servicios de poscontrol de la región de Tacna en el 2021, tanto los que han sido terminados como los que aún están en proceso, son 256, que representan el 100 %. De estas acciones, de Control Específico son 33, exámenes de cumplimiento son 6, evaluación financiera son 21, acción de oficio posterior son 187, según lo presentado en la Figura 8.

Figura 8. Servicios de control posterior en proceso y concluidos en la regional de Tacna en el 2021

Fuente: Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

Además, la aplicación presenta los informes publicados de los servicios de control especializados de la región de Tacna para el año 2021, son 247, que representan el 100 %. De estos resultados, de probables responsabilidades de carácter penal son 33, en los casos de probables responsabilidades bajo la modalidad civil son 75 y los casos identificados penalmente son 139, según se presenta en detalle en la Figura 9.

Figura 9. Determinación de responsabilidades en informes de Control Específico en la región de Tacna, 2021

Fuente. Tomado de https://velocimetrodecontrol.contraloria.gob.pe.

Como se ha dicho anteriormente, es importante que las personas tengan acceso a la información de los informes de control de la CGR. También se incluye información estadística sobre el número total de sanciones por región, el número de informes emitidos y el número de visitas a cada servicio de control por división. Los datos de los informes utilizados para el control de calidad se actualizan cada día.

1. Métodos y Materiales

Para el desarrollo de este estudio se utilizó el método inductivo-deductivo, ya que se basó en los componentes conocidos de los servicios de control postproceso, su importancia y los componentes primarios que se utilizaron para llegar a la incógnita, que es la discusión de esos componentes o lo que se determina en los resultados.

El trabajo se identifica como de enfoque cualitativo, diseño no experimental, nivel exploratorio y de tipo documental.

Investigar las razones de los sucesos rastreando las cadenas causales que conectan causas y efectos es lo que se entiende por "investigación explicativa". El documental se define como un tipo observable que comprende la obtención y el análisis de información extraída de una gran variedad de datos o reportes, se incluye libros o revistas físicas.

Un estudio exploratorio es aquel que se lleva a cabo sobre un tema o elemento que ha recibido una cantidad limitada de atención o investigación, y como resultado, los resultados de dicho estudio sólo pueden proporcionar una aproximación de lo que es realmente el objeto (Arias, 1999).

Una vez más, se utilizó un enfoque de investigación de síntesis analítica, ya que, con base en la literatura de exposición, se analizaron varios aspectos de la literatura y, de igual manera, se utilizó el método de investigación analítico-sintético porque se analizaron diversos aspectos documentales a partir de la bibliografía expuesta para, con posterioridad, resumirlos y presentarlos en un trabajo de investigación que se presentará al finalizarlo (Moran y Alvarado, 2010).

El conjunto de estudio está conformado por 07 municipios de la provincia de Tacna, que realizaron de 1 a 3 servicios de seguimiento en 2020 y 2021, y se identificaron 18 actividades de control de acuerdo al modelo de Servicio de Control Específico a posibles infracciones. Como se muestra en la Tabla 1.

Tabla 1. Informes emitidos por las municipalidades de la provincia de Tacna

N°	Municipalidad	El total de informes de Control Específico emitidos durante los períodos de 2020 y 2021
1	Distrito Alto de La Alianza	1
2	Distrito de Ciudad Nueva	2
3	Distrito de coronel Gregorio Albarracín Lanchipa	6
4	Distrito de Inclán.	1
5	Distrito de La Yarada-Los Palos	1
6	Distrito de Palca	1
7	Provincial de Tacna	6
Total		**18**

Fuente: Obtenido del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html

Las variables del estudio académico incluyen la variable independiente: Servicio de Control Específico de Hechos con Presunta Irregularidad; y la variable dependiente: responsabilidad de los funcionarios.

Se empleará el análisis documental para recoger la información, sirviendo la guía de análisis de documentos como herramienta principal.

2. Resultados

Se debe prestar mayor atención a las contrataciones de bienes y servicios, que representan el 44,44 % de las observaciones, de las cuales se debe focalizar los seguimientos de monitoreo y mecanismos de control sobre la ejecución en el marco de las respectivas estipulaciones contractuales, cuya revisión se comprende la no aplicación de penalidades que derivan por incumplimientos contractuales, admisión y calificación de ofertas de postores que no cumplían con las especificaciones técnicas requeridas en las bases integradas, y requerimiento y selección de proveedores sin considerar requisitos que garanticen el *stock* de alimentos, así como modificaciones de las especificaciones técnicas, simulando una nueva fecha de inicio de la contratación.

Los citados hechos irregulares advertidos fueron en las municipalidades distritales de Coronel Gregorio Albarracín Lanchipa, Inclán, de La Yarada-Los Palos y la Municipalidad Provincial de Tacna.

El 33,00 % corresponde a observaciones de gastos de personal y obligaciones sociales, se tuvieron hallazgos en el aumento de sueldos originados en las reuniones de negociaciones colectivas, en beneficio de trabajadores, que asumieron ciertos cargos de confianza, pago fuera de plazo de las retenciones del régimen de pensión de la ONP y el impuesto a la renta de quinta categoría, la denegatoria ficta de la solicitud de reincorporación sin considerar la naturaleza permanente de las labores que venía desempeñando la trabajadora de la gerencia de terminales terrestres, despido de un obrero sin considerar el período acumulado y la naturaleza de su contratación, aunado a la tramitación de sentencia de primera instancia que no había adquirido la condición de cosa juzgada y cuyo monto indemnizatorio fue revocado, inasistencia a dos (02) diligencias de comparecencia ante una supervisión que corresponde a los aspectos laborales, ante las autoridades laborales, que están obligados al cumplimiento de los derechos del trabajador con respecto a la seguridad y salud en el trabajo de la Dirección regional de trabajo y promoción del Empleo de la región de Tacna, la no realización de exámenes médicos ocupacionales antes del inicio de la relación laboral con la obra y la falta de realización de exámenes médicos antes de la ejecución de la obra.

El 11,11 % corresponde a observaciones de ejecución de obras, donde se identificó la Inaplicación de penalidades por el incumplimiento del plazo contractual en la contratación para la ejecución de la obra y aprobación de ampliación de plazo, vía acuerdo conciliatorio sustentado con informe que carece de justificación técnica. Los citados hechos irregulares advertidos fueron en la Municipalidad Distrital de Coronel Gregorio Albarracín Lanchipa, en el periodo del 2021.

El 5,56 % corresponde a observaciones de designación de funcionarios públicos, se identificó la designación de una ciudadana en cargos de directivo superior de la Sub Gerencia de Tesorería y la Sub Gerencia de Logística sin cumplir los requisitos mínimos, así como la aceptación y ejercicio de dichos cargos haciendo uso de un grado académico carente de veracidad. El citado hecho irregular advertido fue en la Municipalidad Distrital de Palca, en el periodo del 2020.

Finalmente, el 5,56 % corresponde a la observación de procedimientos administrativos de reducción de multa por construir sin licencia de edificaciones. El citado hecho irregular advertido fue en la Municipalidad Distrital de Ciudad Nueva, en el periodo del 2020.

Tabla 3. Materia de control de los Servicios de Control Específico ejecutados, 2020 y 2021

Número	Materia de Control Específico	Año 2020-2021	%
1	Contrataciones de bienes y servicios	8	44,44 %
2	Gasto de personal y obligaciones sociales	6	33,00 %
3	Ejecución de obras	2	11,11 %
4	Designación de funcionario público	1	5,56 %
5	Procedimientos administrativos	1	5,56 %
Total		**18**	**100 %**

Fuente: Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

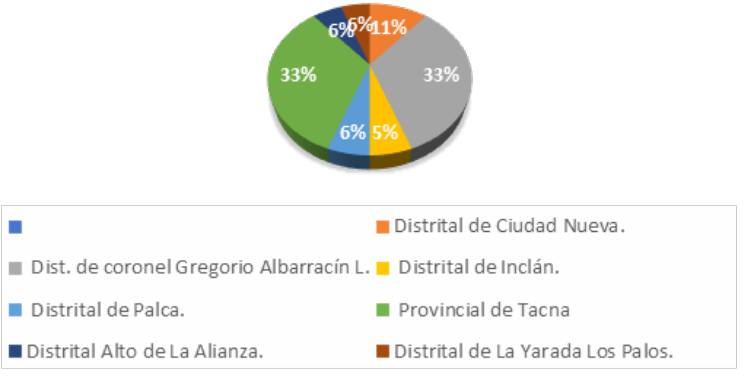
Se determino que el 44,44 % corresponde a contrataciones de bienes y servicios, el 33,00 % corresponde a gastos de personal y obligaciones sociales, el 11,11 % corresponde a ejecuciones de obras, el 5,56 % corresponde a designación de funcionarios públicos y el 5,56 % corresponde a procedimientos administrativos, respectivamente.

Tabla 4. Servicios de Control Específico ejecutados en gobiernos locales de la provincia de Tacna, 2020 y 2021

Nº	Municipalidades de la provincia de Tacna	Año 2020	Año 2021	Total informes	%
1	Distrito de Ciudad Nueva.	2	0	2	11,11 %
2	Dist. de coronel Gregorio Albarracín L.	3	3	6	33,33 %
3	Distrito de Inclán.	1	0	1	5,56 %
4	Distrito de Palca.	1	0	1	5,56 %
5	Provincial de Tacna	3	3	6	33,33 %
6	Distrito Alto de La Alianza	0	1	1	5,56 %
7	Distrito de La Yarada-Los Palos.	0	1	1	5,56 %
Total		**10**	**8**	**18**	**100 %**

Fuente: Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

Figura 10. Servicios de Control Específico ejecutados en gobiernos locales de la provincia de Tacna en los años 2020 y 2021



Fuente: Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

En la Tabla 4 y Figura 10 se muestran que se realizaron dos acciones de control en la Municipalidad Distrital de Ciudad Nueva, lo que representa el 11,11 % del íntegro de los gobiernos locales que corresponden a la provincia.

En el municipio del distrito de coronel Gregorio Albarracín Lanchipa, se ejecutaron tres exámenes de revisión, la misma que comprende el 33,33 % del total de los municipios de la provincia.

Con respecto a las otras acciones de control, en las municipalidades distritales de Inclán, Palca, Alto de la Alianza, se realizaron una evaluación de control, que corresponde a un 5,56 % del íntegro de los municipios de la provincia y, por consiguiente, en el gobierno local de Tacna, se ejecutaron tres evaluaciones o exámenes de revisión que comprende el 33,33 % de la totalidad de la provincia.

En la Tabla 4, que corresponde al año fiscal 2021, muestra una acción de control en la Municipalidad Distrital de Alto de La Alianza, que representa el 12,5 % del total de acciones de control (8). En el gobierno local del distrito de coronel Gregorio Albarracín se realizaron tres acciones de control. Esto corresponde al 37,5 % del total de acciones de control.

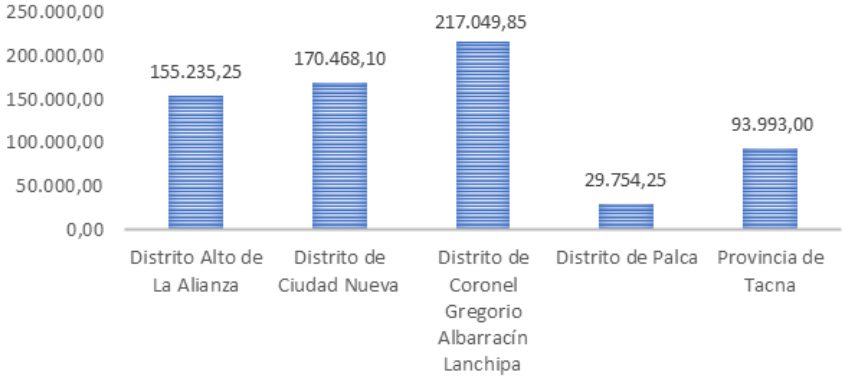
Se realizó una acción de control en la Municipalidad Distrital de La Yarada-Los Palos, que representó el 12,5 % del total de acciones de control realizadas en la provincia, mientras que se realizaron tres acciones de control en la Municipalidad Provincial de Tacna, que representó el 37,5 % del total de acciones de control realizadas en la provincia.

Tabla 5. Perjuicio económico identificado por el Servicio de Control Específico en el 2020-2021

MUNICIPALIDAD	Monto
Del distrito Alto de La Alianza	155 235,25
Del distrito de Ciudad Nueva	170 468,10
Del distrito de coronel Gregorio Albarracín Lanchipa	217 049,85
Del distrito de Palca	29 754,25
Provincial de Tacna	93 993,00
TOTAL	**666 500,45**

Fuente. Montos en PEN. Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

Figura 11. Perjuicio económico identificado a través del Servicio de Control Específico en el 2020-2021



Nota. Montos en PEN. Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

Según la Tabla 5 y la Figura 11, la Municipalidad Distrital de Alto de la Alianza experimentará una pérdida de actividad económica que asciende a 155 235,25 soles en los años 2020 y 2021. En el distrito administrativo de Ciudad Nueva se descubrió un daño monetario de 170 468,10 soles. Se descubrió que el gobierno local del distrito de coronel Gregorio Albarracín Lanchipa había sufrido una pérdida económica que ascendía a 217 049,85 soles.

El gobierno local del distrito de Palca experimenta una pérdida económica que asciende a un total de 29 754,25 soles. Y en la Municipalidad Provincial de Tacna se descubrió una pérdida económica que asciende a 93 993,00 soles.

Objetivo Específico

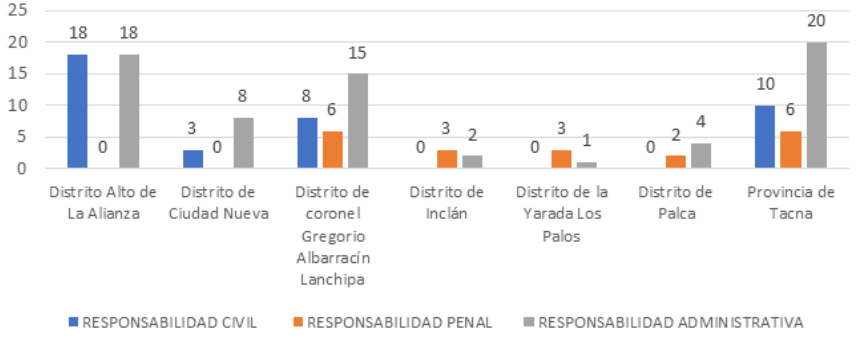
Tabla 6. Presuntas responsabilidades identificadas a través del Servicio de Control Específico en contra de los funcionarios y servidores públicos, 2020-2021

MUNICIPALIDAD	RESPONSABILIDAD		
	CIVIL	PENAL	ADMINISTRATIVA
Municipalidad de Alto de La Alianza	18	0	18
Municipalidad de Ciudad Nueva	3	0	8

Municipalidad de coronel Gregorio Albarracín Lanchipa	8	6	15
Municipalidad de Inclán	0	3	2
Municipalidad de La Yarada-Los Palos	0	3	1
Municipalidad de Palca	0	2	4
Municipalidad de Tacna	10	6	23
TOTAL	**39**	**20**	**71**

Fuente. Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

Figura 12. Presuntas responsabilidades identificadas a través del Servicio de Control Específico en contra de los funcionarios y servidores públicos, 2020-2021



Fuente. Tomado del Buscador de Informes de Servicios de Control, https://appbp.contraloria.gob.pe/BuscadorCGR/Informes/Avanzado.html.

Tanto en la Tabla 6, como en la Figura 12, se muestran 18 trabajadores o empleados de la institución que se menciona que tienen responsabilidades civiles y administrativas. En el Municipio de Ciudad Nueva hay un total de 3 funcionarios y servidores públicos que tienen responsabilidad civil implícita, y, por otro lado, 8 funcionarios y servidores públicos que tienen responsabilidad administrativa. En coronel Gregorio Albarracín Lanchipa existen 8 funcionarios y empleados públicos que tienen responsabilidad civil previsible, 6 funcionarios y empleados públicos que tienen responsabilidad penal previsible y 6 funcionarios y empleados públicos que tienen responsabilidad administrativa previsible.

En la Municipios de Inclán, hay un total de 3 funcionarios y servidores públicos sospechosos de estar involucrados en actividades delictivas, además de 2 personas con responsabilidades administrativas. De la Yarada-Los Palos hay 3 funcionarios y 1 servidor público acusados de haber cometido delitos penales, y hay 1 funcionario y 1 servidor público acusados de haber cometido faltas administrativas. En De Palca hay 2 funcionarios y 1 servidor público que son sospechosos de tener obligaciones penales, y hay 1 funcionario y 1 servidor público que son sospechosos de tener responsabilidades administrativas. En la Municipalidad Provincial de Tacna, hay un total de 23 funcionarios y servidores públicos sospechosos de tener responsabilidades administrativas, 6 trabajadores sospechosos de tener ciertas obligaciones penales, y 10 trabajadores o servidores del estado sospechosos de tener ciertas responsabilidades en la vía civil.

Conclusiones

Primera: El servicio de control especial para presuntas irregularidades crea un control especial que permite determinar las responsabilidades de los funcionarios públicos, siendo este nuevo modelo de seguimiento más rápido y más específico en la región de Tacna, la misma que permite combatir la corrupción en el sector público y estatal; donde se identifica perjuicios económicos por un total de S/ 5 358 903,15, de los cuales S/ 666 500,45 corresponden a pérdidas financieras, lo que constituye una pérdida económica.

Segunda: Los servicios especiales de control de posibles infracciones cometidas en los municipios dentro de la provincia de Tacna, identificaron posibles responsabilidades civiles, penales y administrativas en 130 funcionarios y servidores públicos. Las estadísticas muestran que los servicios específicos de gestión y control determinan el grado de participación de los funcionarios y servidores públicos, el primero es la responsabilidad administrativa (54,62 %), seguido de la responsabilidad civil. (30,00 %) y penal (15,38 %).

Tercera: Los 18 Servicios de Control Específico a Hechos con Presunta Irregularidad, realizados en los gobiernos locales de la provincia de Tacna en los periodos de 2020 y 2021, se desarrollaron en mayor proporción sobre casos relacionados con contrataciones de bienes y servicios (44,44 %) y gastos de personal y obligaciones sociales (33,00 %), y en menor proporción sobre casos referidos a ejecución de obras (11,11 %), designación de funcionarios públicos (5,56 %) y procedimientos administrativos (5,56 %).

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Políticas educativas en torno al uso de la inteligencia artificial: Debates sobre su viabilidad ética

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Resumen

El ensayo tiene como objetivo analizar el papel de las políticas educativas en torno a la inteligencia artificial y las implicaciones éticas de esta discusión. Para lograr tal fin, se centra especial atención en los siguientes aspectos: 1. La conceptualización teórica de la inteligencia artificial, donde se destaca la capacidad de las máquinas para realizar labores que, mediante algoritmos, puedan simular la actividad humana. 2. Las políticas educativas en torno al uso de la inteligencia artificial, que, si bien no poseen un marco de actuación internacional, los lineamientos emanados por organismos internacionales apuntan al uso inclusivo y equitativo de estas tecnologías, con miras a consolidar la educación, minimizar las desigualdades sociales, logrando alcanzar el más óptimo de los rendimientos. 3. Los dilemas éticos suscitados por la IA, entre los que destacan la pérdida de privacidad, los intereses comerciales y políticos de trasfondo, la ampliación de las brechas sociales, la exclusión y el continuo temor al surgimiento de la vigilancia digital. El método utilizado para la elaboración de la investigación fue la exploración documental. Se concluye en la urgencia de implementar políticas educativas acordes a las demandas de la sociedad digital, teniendo como fin el fortalecimiento de la educación.

Palabras clave: Inteligencia artificial; políticas educativas; dilemas éticos; tecnologías; sociedad digital.

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Educational Policies around the use of Artificial Intelligence: Debates about its Ethical Feasibility

Abstract

The purpose of this essay is to analyze the role of educational policies regarding artificial intelligence and the ethical implications of this discussion. The theoretical conceptualization of artificial intelligence, which emphasizes the ability of machines to perform tasks that, through algorithms, can simulate human activity. Educational policies regarding the use of artificial intelligence, which, although they do not have an international framework for action, the guidelines issued by international organizations point to the inclusive and equitable use of these technologies, with a view to consolidating education, minimizing social inequalities and achieving the best possible performance. The ethical dilemmas raised by AI, including loss of privacy, underlying commercial and political interests, widening social gaps, exclusion and the continuing fear of the emergence of digital surveillance. The method used for the elaboration of the research was documentary exploration. It is concluded that it is urgent to implement educational policies in accordance with the demands of the digital society, aiming at strengthening education.

Keywords: Artificial intelligence; educational policies; ethical dilemmas; technologies; digital society.

Introducción

Surgida de las ciencias de la computación, la inteligencia artificial (IA) reúne una serie de cualidades tecnológicas, teóricas, epistémicas, éticas, que se integran a diversas perspectivas multifocales y multidisciplinares para afrontar y comprender este fenómeno científico-tecnológico. El objetivo ulterior del desarrollo de la IA no es la sustitución de la inteligencia humana, sino actuar en beneficio de la colectividad, aplicando una serie de métodos y técnicas que faciliten la vida diaria.

En su desarrollo y evolución, la IA ha presentado una serie de cuestionamientos y problematizaciones éticas, que han derivado en diversos estudios y enfoques analíticos. En los últimos tiempos, son nutridas las contribuciones académicas realizadas sobre la temática, entre las que destacan la evaluación de la IA en el ensimismamiento o la distorsión de la realidad de los individuos, lo que podría estar sujeto a la violencia o fomento de la cultura de adicción a la realidad virtual (Vidovic, 2021); también se destaca la vinculación con el gobierno digital, dada sus cualidades inteligentes, que favorecerían las distintas actividades del sector

público, incrementando la eficiencia y reduciendo los gastos operativos (Fursykova *et. al.,* 2023); en lo tocante al escenario latinoamericano, se evalúa la necesidad de integrar la IA a la educación y la vida regular ciudadana, aportando una serie de elementos indispensables para el desarrollo regional (Torres *et. al.*, 2023), entre otros estudios destacables.

Partiendo de esta realidad, se concibe la importancia de los usos de la IA en los diversos escenarios sociales, particularmente en la educación, con la finalidad de impulsar el desarrollo tecnológico, fortalecer el conocimiento, propiciar los aprendizajes autónomos, entre otros aspectos. Sin embargo, no existen políticas claras sobre la regulación, usos y alcances de la IA en la educación, difiriendo sustancialmente de país a país. Pese a esto, los esfuerzos por analizar la situación y ampliar la discusión en torno a esta materia es importante, de donde se busca promover el debate y sumar esfuerzos para la regularización de políticas educativas y de líneas de actuación acordes a la realidad sobre el uso y manejo de la IA.

1. La Inteligencia Artificial: conceptualización teórica

La IA es entendida como la capacidad de las máquinas para el uso de algoritmos, el aprendizaje de datos y la toma de decisiones que, en base a ciertos criterios, permita procesar grandes cantidades de información en un corto período de tiempo. Entre las ventajas ofrecidas, se encuentra la disminución porcentual de los errores humanos, perfilando que, con el paso del tiempo, podrían llegar a ocupar espacios destinados exclusivamente para la actividad humana (Rouhiainen, 2018).

Si bien es cierto, es en el siglo XXI cuando el desarrollo de la IA ocupa espacios privilegiados en diversas disciplinas científicas y se considera indispensable para el progreso científico, económico y social, es en la década de los años cincuenta del siglo XX, cuando Alan Turning (1912-1954), conocido pionero en este campo, plantea la idea de que los ordenadores podrían llegar a tener comportamientos inteligentes, desarrollar aprendizajes e, incluso, competir con los seres humanos en actividades intelectuales avanzadas (Alonso, 2021). De acuerdo a lo planteado en su artículo "Computing machinery and intelligence" del año 1950, la IA es definida como un campo de investigación novedoso, destinado a revolucionar la informática mediante la aparición de máquinas que podrían simular la actividad humana en determinados contextos (Vidal, 2007).

Además de su postura teórica, Turing fue conocido por la implementación de la "máquina de Turing" que, bajo cierto esquema de procesamiento de datos, soportado en un sistema binario, pudo lograr procesar cualquier tipo de cálculo, a lo que posteriormente llamaría "la prueba de la máquina de Turing", donde una máquina tenía la posibilidad de adoptar un pensamiento

específico, capaz de copiar las respuestas humanas. Esto significó un cambio paradigmático para la época y el comienzo de la IA que conocemos en la actualidad, que en su recorrido tuvo que integrarse a diversas disciplinas y formas de conocimiento (Ocaña *et. al.,* 2019).

La inteligencia, en un sentido genérico, se concibe en múltiples dimensiones: la IA se múltiples dimensiones tecnológicas y prospectivas para el cambio, al demostrar comportamientos que simulan, desde programas informáticas, habilidades humanas. No obstante, no está en la facultad de emitir juicios valorativos, actitudes mentales y emocionales, pensamiento abstracto y acumular experiencias, para, de una manera crítica, fortalecer el saber en beneficio de la colectividad, lo que es propio de la inteligencia humana (González & Martínez, 2020).

Para Ocaña *et. al.,* (2019), la IA está determinada por la transversalidad, por la capacidad de conectarse con la información del mundo, buscando la resolución de problemas específicos. Como parte de las ciencias informáticas, se encarga del diseño de sistemas inteligentes y de que estos puedan emular la inteligencia humana; en otras palabras, la IA, proporciona una variedad de métodos, técnicas y herramientas para resolver una serie de problemáticas. Claro está, es ese carácter multifacético lo distintivo de la IA, lo que también hace que sea entendida como la búsqueda permanente del significado de la inteligencia humana, de sus límites y posibilidades.

González y Martínez (2020), consideran que, adicional a los problemas históricos y terminológicos que han acompañado el desenvolvimiento de la IA, existen una serie de problematizaciones filosóficas y epistemológicas, que llevan a considerar los siguientes aspectos:

- La IA tiene como miras la resolución de problemas humanos prácticos y precisos, por lo que puede imitar una serie de comportamientos, pero no los aspectos emocionales ni al manejo de las capacidades humanas, lo que deriva en el cuestionamiento de si el uso del término inteligencia sea el más adecuado para las tecnologías digitales. Dicha discusión tiene un trasfondo epistemológico importante, que ha de profundizarse, en miras del fortalecimiento de los estudios en IA y en la definición de lo propio de la naturaleza humana.
- La IA es autónoma, mantiene la guía y el cuidado del ser humano, por lo que está sujeta a la malevolencia y a procesos que atentan contra el beneficio común.
- La IA no tiene la capacidad de discernir en temas o dilemas éticos, por lo que su actuación se encuentra limitada. Si bien puede simular comportamientos humanos, no es lo mismo que el carácter volitivo y la actividad pensante desarrollada por el ser humano.

- La IA es amoral, carente de connotación de una moralidad propia, incapaz de distinguir el bien y el mal, por lo que está determinada por la acción del hombre.
- El uso de la IA invita a un constante reflexionar sobre su significado para la para la ciencia y para el proceder dentro de la sociedad.

Dada la versatilidad que tiene desde sus inicios, la IA está determinada por un carácter interdisciplinar y transversal, destacándose su uso en actividades computacionales, comerciales, en ciencias de la salud, por citar algunas. Entendido así, la IA podría servir de beneficio para el desarrollo social y para la operatividad eficiente en determinadas labores, lo que emplaza a tomar en consideración su uso, aplicabilidad y proyección en los escenarios actuales.

Para Rouhiainen (2018), la IA ha tenido un avance significativo en las siguientes áreas específicas:

- Reconocimiento, clasificación y etiquetado de imágenes, siendo útil para diversas industrias.
- Mejoras en los algoritmos comerciales y financieros.
- Procesamiento eficiente de datas médicas.
- Predicción para el trabajo industrial,
- Clasificación de objetos en automóviles y en otros campos.
- Distribución del contenido en redes sociales, como herramienta de marketing y de difusión de las informaciones de dominio público.
- Resguardo de la seguridad cibernética.

A los elementos antes enumerados, se suman otra serie de cualidades, como la aparición de los asistentes virtuales, las aplicaciones móviles y otra serie de herramientas que pueden considerarse IA, que tienen como tarea el procesamiento de datos, el trabajo comercial, sanitario, empresarial, comunicacional, además de integrarse, recientemente, al ámbito de educativo y cultural. En los últimos años, los cambios en las comunicaciones, la masificación del internet y la digitalización inducida por la pandemia COVID-19, han dado cabida al uso de la IA a nuevos niveles, a cuestionar sus dimensiones políticas y educativas, a la vez que se plantea el cuestionamiento de cómo abrirse paso dentro de la sociedad global.

2. Inteligencia Artificial y Políticas Educativas sobre su uso e implementación

Según los planteamientos de la Organización de las Naciones Unidas para la Educación, la Ciencia y la Cultura, ofrecidos en el Consenso de Beijing sobre la Inteligencia Artificial y la Educación (2019), considera que la IA tiene la cualidad de hacer frente a los desafíos actuales de la educación, propiciar prácticas de enseñanza-aprendizaje caracterizadas por la innovación y como herramienta de ayuda para el logro de los objetivos del desarrollo sostenible. Pese a esto, los riesgos éticos, los debates políticos y las normativas sobre su uso, son objeto de discusión permanente.

Desde las consideraciones de la UNESCO (2019), se insta al uso de la IA, con un carácter inclusivo y equitativo, cuya meta sea promover la educación y, en consecuencia, minimizar las desigualdades sociales, la exclusión en la educación y generar contextos educativos interculturales, apoyados en el uso de diferentes tecnologías, obteniendo el mejor aprovechamiento de estas. Lograr esto, implica un despliegue tecnológico importante y la capacidad de adaptar la educación a las exigencias globales, que demandan prácticas de enseñanza acordes a las exigencias de los objetivos del desarrollo sostenible.

Claro está, esta modalidad educativa requiere de planificación, de desarrollo de políticas educativos acordes a los contextos sociales, participación ciudadana e integración a las comunidades, lo que significa un nuevo modelo educativo y tecnológico, pensado para la inclusión, para minimizar los riesgos y para el aprendizaje personalizado y autónomo. Esto se traduce en desarrollo de habilidades técnicas, sin perder de vista el pensamiento crítico y el papel ético y político de trasfondo.

Según lo planteado por la UNESCO (2019), la evolución de la IA es un asunto humano, que tiene impacto dentro de la sociedad, la cultura, la economía, el mercado laboral y la educación, donde se da paso a un sistema de aprendizaje distinto, lo que hace que su presencia en el futuro exija la formación en competencias digitales precisas, afectando los cimientos de las políticas educativas de la actualidad. En línea general, la IA plantea una nueva conceptualización de la educación, la docencia y el aprendizaje. Asume la educación como compleja, como un proceso de interacciones múltiples, conducentes al bienestar humano.

En efecto, la IA no viene a sustituir lo humano, sino a garantizar el ejercicio de los derechos humanos, a respaldar los sistemas axiológicos de la sociedad y a construir un futuro caracterizado por el desarrollo sostenible, donde el pensamiento esté centrado en el servicio a las personas, buscando fines altruistas, pensado para le equidad, la transparencia y para dar impactos sobre la calidad de vida.

En lo tocante a las políticas educativas vinculantes a la IA, se pretende amalgamar la IA con el acto educativo, con políticas públicas enfocadas en el desarrollo sostenible. De esta manera, planificación de políticas educativas y el uso de la inteligencia educativa convergen en una dinámica permanente, caracterizada por diversos aspectos que se han de considerar, como la necesidad de inversión, los desequilibrios sociales, las falencias del Estado, las capacidades públicas y privadas de asimilación de la IA, los intereses conservadores y la urgencia de una adecuada gestión para transformar políticas educativas caducas en políticas educativas adaptadas a los avances vertiginosos de la sociedad digital (UNESCO, 2019).

En virtud de lo anterior, la IA ha de insertarse en los modelos educativos, en la práctica docente y en las instituciones, buscando el beneficio estudiantil, pero también de las comunidades, sin que la interacción con tecnología de punta signifique el quiebre de las relaciones humanas. Aunque el componente humano y las interacciones con la alteridad son fundamentales, la aparición de la IA en el contexto educativo demanda la revisión de conceptos clave dentro de la enseñanza, como la función docente, las competencias a desarrollar, la formación tecnológica y las capacidades para el trabajo efectivo.

En el plano académico las virtudes del uso de la IA son muchas, entendiéndose como posibilidades de interacción con las ciencias de la salud, las ciencias sociales, la ingeniería, la informática, las ciencias empresariales y otras disciplinas que buscan estimaciones reales en tiempo récord, procesar cuantiosa información rápidamente, utilizando sistemas determinados por la IA. El desarrollo de algoritmos y la presencia en diversos campos de la ciencia, llevan a su difusión, aplicación e integración a las investigaciones académicas actuales (Ocaña et. al, 2019).

En cuanto a la regulación y políticas públicas asociadas a la IA, diversos organismos internacionales como la ONU, la UE y la OCDE, han publicado una serie de recomendaciones, que destacan la responsabilidad del uso de las tecnologías, su función dentro de la educación, la investigación y la aplicación en los entornos sociales. Dichas orientaciones no son globales; sus puntos clave pretenden unificar distintos países, pero sin integrar totalidad de criterios, como los concernientes al acceso a la información, el derecho a la privacidad, las implicaciones para el desarrollo sostenible, las limitaciones fronterizas, lo que ha dificultado acuerdos comunes (Abdala *et. al*, 2019).

En atención a lo anterior, se ha aludido a que la mejor manera de afrontar el uso de la IA es acogerse a las políticas públicas y lineamientos constitucionales en materia educativa propio de cada nación, que cuentan con marcos jurídicos, normativos y regulatorios para el área educativa, de donde se sugiere que sólo es necesario adecuar las políticas públicas a los cambios introducidos por la IA. Ahora bien, adoptar esta posición implica

el riesgo de caer en una dimensión regulatoria extensible a otras políticas públicas, estando ante el riesgo de la sociedad de control, de vigilancia, con capacidad de imponer frenos a la actividad humana y de la ciencia, no a manera de recomendaciones, sino desde un punto de vista ideológico (Abdala *et. al.*, 2019).

Desde el contexto latinoamericano, se han impulsado proyectos y planes estratégicos para la IA, cuya finalidad es hacer de esta parte esencial del futuro, reconociendo la necesidad de análisis y aplicabilidad al contexto social y con miras al desarrollo sostenible. De este modo, se asume la IA es algo más que un contenido pedagógico o un plan curricular. A diferencia de esto, se concibe como una serie de herramientas que, mediante la aplicación de algoritmos, puede facilitar la efectividad y precisión de la educación.

En línea general, el diseño de las políticas educativas ha de estar orientado hacia la flexibilización y apoyo docente en el aula de clase, la corrección de actividades, el monitoreo de estudiantes, el reconocimiento fácil y la descripción permanente de planes de estudios. Esta realidad no deja de estar sujeta a cuestionamientos, a problemas éticos, a cuestionamientos sobre la actividad humana y al desplazamiento de la enseñanza interpersonal y dialógica a la formación propiciada por las tecnologías, a lo que se suman los contextos asimétricos, la falta de recursos y de inversión en locaciones periféricas, de donde se suscitan importantes dilemas éticos.

3. Dilemas éticos sobre el uso de la Inteligencia Artificial

Pese a los aspectos beneficiosos o la posibilidad intrínseca de consolidar la ciudadanía global mediante el uso de la inteligencia artificial, no dejan de surgir problemáticas relacionadas a su implementación, alcances y efectos sobre la vida humana. De lo anterior se sigue el cuestionamiento sobre los desplazamientos económicos, sociales y culturales sobre las poblaciones marginadas, ajenos de los y avances tecnológicos y de sus impactos, que no pueden integrarse a las dinámicas de la globalización y que sufren las consecuencias tangibles del surgimiento de un nuevo mundo digitalizado y gobernado por la IA (Ocaña *et. al.*, 2019).

Desde un punto de vista general, la inteligencia artificial tiene una serie de dilemas éticos que afrontar, entre los que destacan, según González & Martínez (2020), los siguientes:

- **Invasión de entornos:** siendo un tema de vulnerabilidades irresuelto, en el que convergen ataques, ciberataques, errores en los aprendizajes, fallas en los sistemas autónomos, en la toma de decisiones, en la automatización de respuestas, en pérdida del anonimato y del control sobre la IA, capacidad de generar

nuevos peligros tecnológicos, vulnerabilidades de tipo humano, infraestructura y digital, empleo de software malicioso, entre otros.

- **Invasión de la intimidad:** la IA es capaz de detectar ciertas vulnerabilidades en los dispositivos y aprovecharlas, además de ser capaz de generar imágenes, textos y audios para recopilar información, usurpar funciones humanas, generar phishing automatizado y manejar las preferencias de los individuos en todos los niveles.
- **Pérdida de seguridad:** compromete la seguridad digital, siendo susceptible al ataque de ciberdelincuentes, capaces de manipular la información; la seguridad física y la seguridad política, al comprometer el uso de maquinaria teledirigida, elaborar planes de ataque o planeación selectiva de determinados eventos.

Más allá de estas limitaciones, existen una serie de cuestionamientos humanos, como los intereses comerciales y políticos de trasfondo, la posibilidad de acceso al conocimiento, la información y el uso de la IA destinado grupos minoritarios, vulnerables, desplazados o en países de menor desarrollo. Como resultado de estas asimetrías, se podrían reforzar los estereotipos, mermar las posibilidades de acceso a la educación, generar percepciones negativas sobre la realidad y fortalecer la cultura de la vigilancia estatal sobre los individuos (UNICEF, 2021).

La IA supone la revisión de conceptos éticos esenciales, como la sociedad de control, de vigilancia, el consentimiento informado, el límite al acceso al conocimiento, la privacidad, la transparencia y demás conceptualizaciones que soportan el desenvolvimiento social. En conformidad con los estudios realizados por el Fondo de las Naciones Unidas para la Infancia (UNICEF), las comunidades desfavorecidas, periféricas o del llamado tercer mundo, presentan desventajas a la hora de acceder a la sociedad digital. Las tecnologías emergentes, como la IA, son ajenas a las realidades sociales, lo que amplía el riesgo de acrecentar las brechas sociales, acentuar la distribución inequitativa de los bienes tecnológicos, limitar el mundo digital y cercenar el derecho a la calidad educativa, lo que distancia a estas locaciones de construcción de un mundo acorde a la sostenibilidad y sustentabilidad (UNICEF, 2021).

Las brechas sociales representan la exclusión a los servicios digitales, desaprovechamiento de oportunidades, fala de consolidación de políticas educativas, lo que genera repercusiones en el contexto social. La falta de desarrollo tecnológico, así como la carencia de políticas educativas claras con respecto al uso de la IA, conduce a las naciones latinoamericanas a incertidumbre con respecto a la consolidación de la sociedad digital, a diferencia de las grandes potencias globales, que gozan de los privilegios de los avances de la IA.

Desde la perspectiva económica, las implicaciones éticas son vinculadas al monopolio de los conglomerados empresariales, cuyo posicionamiento en el mercado es prioritario, lo que también engloba la posibilidad de acceso amplio a bases de datos generados por el mundo digital, permitiendo sacar provecho ilícito de estas datas. En otras palabras, los algoritmos inteligentes podrían conducir a aprendizajes autónomos sobre las operaciones y hábitos comunes de los seres humanos, significando una vulnerabilidad en la privacidad de los individuos (Ocaña *et. al.*, 2019).

Con el uso de la IA se aspira la generación de aproximadamente cuatro billones de dólares americanos a partir del año 2022, proyectado en ganancias para China y Estados Unidos, lo que representa un impacto de más del 70% sobre la economía global. Empero, estas dinámicas utilizadas en torno a la IA no son equitativas, carecen de un marco regulatorio jurídico y moral, dado que las ganancias obtenidas por esta actividad, beneficiarían a un pequeño sector de la población, sin incidir a gran escala en la inversión y promoción de las tecnologías (UNESCO, 2023).

Más allá de las máquinas, de la IA, son las corporaciones las encargadas de recopilar datos de los consumidores, de medir y construir IA que sea capaz de posicionar las empresas y adelantarse a los intereses humanos. Desde una perspectiva ética, la regulación de la IA mediante políticas públicas es fundamental, dado la gran data de información manejada, que es procesada y utilizada para impulsar la sociedad de consumo, tendencias políticas capitalistas, además de impulsar el crecimiento desmedido de la globalización (Ocaña *et. al.*, 2019).

En la perspectiva de la UNESCO (2023), la IA produce resultados sesgados, no neutrales, donde se priorizan datos y resultados orientados hacia los gustos de los internautas. Por lo tanto, la búsqueda web se convierte en una serie de predicciones basadas en los estereotipos, prejuicios e intereses de los consumidores. Adicional a esto, se presentan problemáticas de género, presentes en los algoritmos de la IA, donde los datos almacenados son utilizados para el aprendizaje y predictibilidad de resultados.

Por esta razón, la IA genera un impacto dentro de las instancias sociales, hecho que es trasladado hacia los escenarios educativos, donde se cuestiona la eficiencia y veracidad en el uso de estas tecnologías, sobre todo en lo tocante a la falta de transparencia de las empresas encargadas de desarrollar estas tecnologías, en la aplicación de procesos de vigilancia y en la falta de equidad concerniente a la materia.

Conclusión

Pese a la voluntad política de erigir una política pública común para la unificación de criterios en torno al uso de la IA, los diversos dilemas éticos suscitados hacen que su aplicación se mucho más complejo de lo pensado. En la actualidad, si bien no se tiene un marco regulatorio global, las orientaciones de la IA son múltiples y objeto de estudio de diversas disciplinas científicas, haciendo de su aplicación tan indispensable como el de otra serie de tecnologías para la sociedad, en especial para la educación.

La presente investigación ha presentado tres aspectos esenciales para la comprensión de la IA: su conceptualización teórica, el problema de las políticas educativas y los dilemas éticos suscitados. Con ello no se pretende sentar precedentes o aspectos definitorios, sino sumarse a la discusión, de donde se asume la necesidad de revisión ética, en especial a lo tocante a la privacidad, la protección de los derechos personales y el uso de las tecnologías en la educación.

Pese a que pocos asuman la IA como un asunto de políticas públicas, la misma es tecnología al servicio de la humanidad de la colectividad; es una herramienta para las mejoras de la salud, la educación, la defensa, por lo que implementar políticas adecuadas, en este caso políticas educativas acordes a las demandas de la sociedad digital, es fundamental para fortalecer la educación y proyectar cambios en la sociedad. Logrado esto, es posible avanzar hacia un futuro sostenido y sostenible, donde encuentren cabida las naciones periféricas, minimizando así las asimetrías sociales.

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Improving mechanisms of social partnership in the system of «government-business-civil society»in the context of European integration

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Abstract

The article examines the evolution of political relations between the state and business in Ukraine in the conditions of state corporatism. The purpose of the article was to determine the main political trends of government-business interaction, to reveal the processes of evolution of relations and to assess the prospects of their influence on the modern Ukrainian political process. The concepts of collective action and the model of universalism-particularism are proposed as a methodological basis for the analysis of relations between state, business and civil society. It is substantiated that the mechanisms of political interaction between the state and business are gradually being replaced by the mechanisms of political influence of the state on business. The results obtained emphasize the role that civil society organizations can play in the representation of politics. In the conclusions it was established that the forms and principles

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of state corporatism describe relations; when the government not only chooses: organizations and groups that should represent the interests of the enterprise in interaction with it, but also controls them to some extent.

Keywords: business; political relations; social cooperation; consumer organizations; non-governmental organizations.

Mejora de los mecanismos de colaboracion social en el sistema «gobierno-empresa-sociedad civil» en el contexto de la integracion europea

Resumen

El artículo examina la evolución de las relaciones políticas entre el Estado y las empresas en Ucrania, en las condiciones del corporativismo estatal. El propósito del artículo fue determinar las principales tendencias políticas de la interacción de gobierno y empresa, para revelar los procesos de evolución de las relaciones y evaluar las perspectivas de su influencia en el proceso político ucraniano moderno. Los conceptos de acción colectiva y el modelo de universalismo-particularismo se proponen como base metodológica para el análisis de las relaciones entre Estado, empresa y sociedad civil. Se fundamenta que los mecanismos de interacción política entre el Estado y las empresas están siendo reemplazados gradualmente por los mecanismos de influencia política del Estado sobre las empresas. Los resultados obtenidos enfatizan el papel que pueden jugar las organizaciones de la sociedad civil en la representación de la política. En las conclusions se estableció que las formas y principios del corporativismo estatal describen relaciones; cuando el gobierno no sólo elige a: organizaciones y grupos que deberían representar los intereses de la empresa en interacción con ella, pero también los controla hasta cierto punto.

Palabras clave: empresas; relaciones politicas; cooperacion social; organizaciones de consumidores; organizaciones no gubernamentales.

Introduction

The study of political aspects of relations between the state and business in Ukraine is important, both from the point of view of the development of the state and the progressive development of entrepreneurship in the country. Economic reforms required the state to carry out deep institutional,

legal and social transformations, which added a systemic character to the political interaction of business and government.

The object of the article is the processes of interaction between the state and business, the subject of research – forms, mechanisms; and models of interaction between state institutions of power and business structures.

The purpose is to determine the main political trends of the interaction of government and business, to reveal the processes of evolution of relations at the beginning of the XXI century. and evaluate the prospects of their influence on the modern Ukrainian political process.

To achieve the goal, the following tasks: to determine the main political approaches to the system of relations between the state and business that have developed in modern Ukraine; to analyze the political relations of business and government in the conditions of state corporatism; consider mechanisms, forms and models of political interaction between the state and business; assess the development of business as an independent factor in the political field of the country; justify the necessity of conducting scientific research on issues within the limits of modern political science; identify the regulatory role of the state in relations with business to ensure democratic development.

There are three systemic approaches to the relationship between business and government, based on: a social contract between business and government, a systemic crisis, and relations under state corporatism. Currently, the role of political factors is increasing in the relationship between business and government. The state gradually becomes dominant in relations with business.

Business arose as a result of the state's implementation of radical liberal reforms, turned into an independent subject not only of the economic and social, but also of the country's political life, which created an important political problem of reconciling the interests of business and the state.

Thus, the problems of relations between business and the state occupy one of the leading places in political processes, and political science is currently in search of new ways of conceptualization and formation of new mechanisms and methods of implementation. Creation of a generalized scientific picture, in which, on the one hand, theoretical methods of interaction of political, economic, legal, and social science would be applied; on the other hand, taking into account various mechanisms of interaction, at hierarchical, structural levels, has another relevant basis. It consists in the combination within a single research strategy of the following conceptual components: «politics», «economy», «law», «sociology». However, this can be a confirmation that in political science there are not only differentiation tendencies, but also integration processes and phenomens.

1. Methods and materials

We use an integrated approach with mixed methods to evaluate the ways of influence of non-governmental organizations on the interaction of citizens with the authorities. Qualitative interviews are used to assess the validity of quantitative findings. A qualitative approach also allows us to analyze the mechanisms that can explain whether and how contact with non-governmental organizations can influence interaction with local authorities.

An effective approach to the study of political mechanisms turned out to be a systemic approach, within which the level of control of political processes is the key basis of relations between business and the state. Since the level of influence is provided by resources, it is possible to draw conclusions about patterns of interaction: actors interact equally or one acts as a dominant influencing another actor.

Since the "cost" of the administrative and power resource has increased significantly, the financial resource is losing its influence on the state. The policy of "property" expansion allows the state to compensate for the reduction of financial support for corporate business. Applying the method of qualitative expert assessments as a method of analysis, it can be concluded that the state controls and influences a significantly larger number of political processes compared to the business community.

Let's determine the theoretical and methodological foundations of the research. Modern political science has the potential to explore the interaction of various spheres of the political process in the country. Important theoretical and methodological orientations of the research are located in key areas, the main of which are the theory and methodological principles of political analysis, including methods of interaction of state policy and management.

The polyaspect nature of the research object determined the plurality of approaches: to its study, and the organizational: functional" complexity of the studied phenomenon determined the plurality of used research strategies and methods. Prognostic, statistical, genetic and evolutionary analysis, the method of expert evaluations, media content analysis and other methods based on political science approaches to the problems were used. Elements of systemic, structural-functional, normative, institutional analysis, comparative research method were used.

Let's consider the degree of development of the topic in scientific research. In domestic special literature, issues related to theoretical and practical aspects of the relationship between government and business were reflected in the works of M. Mykhalchenko, V. Pugach. According to the conclusion, an oligarchic form of government with some features of a

half-dissolved democracy has developed in Ukraine, which provides the oligarchic power with a civilized image. The researcher considers the stage of oligarchic rule with some optimism, considering it to be temporary, since it was passed in various forms by many modern democratic countries, until clans, financial and industrial groups, corporations learned to entrust the management of states to their political agents, and such a situation was not legally enshrined in laws that separated politics from business. M. Mykhalchenko determined that under the conditions of the dominance of oligarchic industrial and financial political groups, management groups are structured around individual oligarchs who become economic and political winners (Social values, 2013: 29).

T. Syritsa carried out a comparative study of the convergence of business and politics as spheres of activity, which causes the non-competitiveness of both politics and the economy (Syrytsia, 2006: 205).

V. Pugach determined that «the convergence of politics, business, and bureaucracy in Ukraine not only significantly affected the peculiarities of functioning and quality indicators of the Ukrainian bureaucracy, but also contributed to the establishment of the corporate-clan foundation of the Ukrainian government» (Pugach, 2006: 4).

According to NISD scientists, the following areas should be prioritized in relations between the government and civil society: establishment of a fruitful dialogue between the government, non-governmental organizations and citizens; creation of favorable legislative conditions aimed at the development of civil society institutions, ensuring their financial capacity; promoting the development of philanthropy and philanthropy, creating economic (tax) incentives for businesses and citizens in order to support civil society institutions; development of the state order to civil society organizations in the sphere of providing social services to the population (On the state of development, 2022: 49).

This led to the politicization of judicial and executive bodies, increased interests of business, political parties, law enforcement agencies and criminal groups, aggravation of the political situation in Ukraine and, as a result, a crisis of state power» (Dmytrenko, 2011: 453).

According to formal normative features (presidential decrees, government resolutions), as noted in the analytical report «The State and Civil Society in Ukraine: Searching for a Concept of Cooperation», Ukraine has created conditions for the development, national legislation on this topic is conceptually as a whole corresponds to the provisions of modern political and legal theories. At the same time, the nature of the struggle for power significantly inhibited state efforts to promote the development of civil society, and also affected the direction of these efforts depending on the ideology of the ruling political forces.

Changing the format in the relationship between the government and civil society requires the state to take successive steps, in particular, to overcome the formal attitude of the authorities and state administration to consultations with the public, which are still the main form of interaction between them, and the spread of the concept of electronic government, but with a caveat. that personal communication of citizens with the authorities should not replace their activity in public associations. Truly real steps to promote civil society on the part of the state would be the provision of permanent and systematic financial, material and methodical assistance to non-governmental organizations, as well as the introduction of benefits for their sponsors.

N. Hrychyna determined that almost the entire spectrum of Ukrainian business is represented in the Verkhovna Rada, with minor exceptions. (Hrychyna, 2009:119).

R. Pavlenko claimed that deputies are elected to parliament exclusively to lobby for their own business interests or those of the leaders of financial and industrial groups (Pavlenko, 2004: 86).

D. Korotkov identified the diffusion of large capital and politics, which inhibits the democratic consolidation of society in Ukraine. After all, the main actors in politics will continue to be financial and political groups that have completely monopolized the economic, political and administrative levers of action. Large financial and industrial clans began to fight among themselves, constantly replacing each other in power. This affected the quality of politics, social and state progress, because the interests of the business elite turned out to be focused only on the increase of personal wealth, and not on the development of the economy (Korotkov, 2012: 186).

A. Loy emphasizes that the domestic political elite is in a risky state of minimal contact with civil society. In society, there was a demand to renew the political class so that it would be separated from oligarchic business. This requires an atmosphere of constant civil society pressure on the authorities. Only by displacing the modern primitive business and political elite, society will have the opportunity and perspective of development (Loy, 2016: 6).

A. Bakurova defined the methodological bases of modeling self-organization processes, the concept of their mathematical modeling based on a soft system methodology; modern methods of modeling socio-economic processes, interactive and game-theoretic models for various types of socio-economic interactions, model of intersectoral interaction of civil society «government-business-community» are described; non-linear processes of territorial self-organization, geospatial processes of territorial cluster formation, influence of inter-firm network formation on territorial development are analyzed (Bakurova, 2008: 97).

N.I. Krickaluk analyzed the institutionalization of civil society as the main criterion of democratic development (Krickaluk, 2016).

In the system of state-public administration, leading elements perform the function of integration of state power and the power of public organizations. We will define typical models of advisory bodies: the public council as a model is fixed at the legislative level, outlined in the analysis of the participation of public organizations in the adoption of state-management decisions; public expert council, expert commission; the center of public expertise as an independent analytical center, a Ukrainian non-governmental, non-profit organization whose activities are aimed at informational, analytical and expert support for the implementation of systemic changes in the public and private sectors of Ukraine; non-governmental research (analytical) centers, which are a component of the political process, influence the decision-making of the authorities, participate in the work of public councils and boards created by the central authorities.

The source base consists of legislative acts, resolutions, state program documents; as well as information in official documents, scientific, reference and periodical literature on the researched topic, in materials of local authorities.

In foreign scientific literature quite a lot of attention paid to the problems of relations between business and the state. Among the authors investigating the issues of political and economic relations and business as a socio-political actor in the modern political process, we can mention such researchers as Alexander G., Ananiadis V.R. Andrews R. Berman, Sheri Claibourn M.P., Martin P.S. Cohen J.E., Bernhagen P., Marshall D. Gilens M., Page B.I. Regini M. Snyder R. Weeden, Curt.

Scientists paid attention to the study of social capital and interest groups: A. Rasmussen, S. Reher, P. Paxton, M. Olson, W. Maloney, G. Smith, G. Stoker, S. Knack, T. Kuzio, H. Klüver.

Despite the abundance and variety of works on the issues under consideration, they do not provide comprehensive answers to many questions, which requires further search for ways to improve the effectiveness of the state's interaction with business and involve business in the democratization process.

2. Results

Civil society is defined as a political association that regulates social conflicts through rules that keep citizens from harming one another. The authors proceed from the assumption that the importance of solving these

problems for ensuring the effective development of the country puts forward new research tasks for political science. There are four conceptual directions in the scientific literature devoted to the topic of research: the first: social direction. The founders of this direction define some constructive models in the social sphere: charity and social partnership (Tkach, 2019: 51).

Second: economic direction. The authors of this direction studied the mechanisms of interaction between the state and business from the standpoint of the real economy (Tkach, 2017: 35).

The third: legal direction. Within the framework of this direction, the relationship between the state and business is considered through a conflict of interests, expressed in legal form.

Fourth: political direction. The authors of the direction This direction allowed to assess the interaction of the state and business, from the point of view of the development of the political system.

A large volume of official documents, state program documents: laws, Government resolutions, other normative legal acts dedicated to the problem under study.

New formats of interaction between public authorities and civil society organizations have been defined in Ukraine. For example, humanitarian hubs, networks of coordinators, systems of advisory assistance to displaced persons, systems of information and reference resources (On the state of development, 2022: 39).

In Ukraine, the development of civil society is supported by the policy, which is provided by laws: «On unification of citizens», «On social dialogue in Ukraine», «On local self-government in Ukraine», «On information», «On trade unions, their rights and guarantees activities», «About youth and children's public organizations», «About the organization of employers», «About self-organization bodies of the population», «About charity and charitable organizations», «About volunteering», «About social services», «About the principles of regulatory policy in the field of economic activity».

In 2007, the «Concept of promoting the development of civil society by executive authorities» was approved. In 2012, the resolution «On ensuring public participation in the formation and implementation of state policy» was issued, which approved the procedure for holding consultations with the public on issues of state policy implementation.

The current issue is the «National Strategy for Promoting the Development of Civil Society in Ukraine for 2021-2026», adopted in 2021 with the aim of establishing the obligation of local councils to adopt statutes, legal regulation of peaceful assemblies, amending the Law of Ukraine «On Bodies of Self-Organization of the Population».

In 2021, the Decree of the President of Ukraine «On the National Strategy for Promoting the Development of Civil Society in Ukraine for 2021-2026» was adopted. In 2021, the government approved the National Strategy for the creation of a barrier-free space in Ukraine for the period until 2030 to ensure equal opportunities for participation and associations in the life of communities and the state (On the approval, 2021).

In 2021, the law «On the basic principles of youth policy» was adopted, which creates institutional foundations and mechanisms for involving youth the order of organization has been submitted to the Parliament of Ukraine for consideration.

Thus, in states with developed democracy, civil society is an equal partner of the state in solving socio-economic, humanitarian and political-legal tasks.

The organization of civil society is ensured by: providing cost-effective social services that the state and commercial organizations cannot provide on their own, by developing innovative approaches to providing services; spreading philanthropy and providing targeted and operational charitable assistance; non-political, without the goal; consideration of the interests of various social groups; implementation of public control over power and effective fight against corruption (Tkach, 2019).

According to the analysts of the National Institute of Strategic Studies, civil society institutions neutralize the paternalistic expectations of citizens, support and reproduce a democratic political culture, and also play a political role in ensuring social stability.

In Europe, civil society was not created by entrepreneurs. Y. Habermas in the work « The Structural Transformation of the Public Sphere», in which he determined that the public is a prototype of civil society through media spheres, horizontal informational connections between subjects, that is, through the exchange of information. The sources of civil society were not business associations, but intellectual connections. And only after entering this existing organized space, the bourgeoisie was able to reorient itself from powerful bureaucratic verticals to horizontal connections, which contributed to the formation of a free market space (Habermas, 1991).

In Ukraine, a specific understanding of «politics» was formed as a tool for the development, adoption and implementation of decisions by certain interest groups in the interests of these same groups (Teleshun, 2017).

The interaction of civil society associations with state authorities is complicated due to: use in the political process, artificial activation during the election period, not in defending the interests, rights, and requests of citizens, but the interests of party-political forces, private and corporate interests of financial and industrial groups, officials state bodies and local

self-government bodies. In negotiation processes, the trade union side yields to the levers of influence of state authorities and the side of employers. The role of those trade union organizations and employers' organizations that are not included in the social dialogue format according to the legally established qualification is minimal (Gosewinkel and Dieter, 2011).

The model of interaction with state authorities requires: ensuring information openness on the part of state authorities, timely informing about the preparation of political decisions; achieving the distance of trade union organizations from the influence of state institutions, employers' organizations; improvement of the normative legal field, elimination of its miscalculations and gaps (Tkach, 2017).

Thus, the evolution of political relations between the state and business indicates the need for a contract that ensures interaction between business and the state. The contract between business and the state at the initial stage built relations between the government and business, and was observed by business and the government. The period created a favorable political climate for business structures. But the favorable terms of the contract did not extend to companies separated from the decision-making center. Despite this, big business could effectively influence political processes, medium and small businesses were outside the system of state interaction. This testified to the inefficient functioning of the representation system.

The contract at the second stage was characterized by the establishment of a consultation regime, leveled the situation, removed corporate business from decision-making centers, increased the legitimacy and effectiveness of business associations as instruments of the interests of the business community.

Let's define the limits of partnership between the state and civil society. Civil society has a responsibility to fulfill certain social problems. The state, as a subject of social policy, must solve tasks that cannot be solved by institutions of civil society, which require centralized management. That is why, taking into account the presence of common goals (problems), a transition from confrontation to cooperation is possible (On the approval of the National Strategy, 2021).

3. Discussion

Consider the discussion on the interaction between civil society (government, business) and democracy. The political element of political organizations contributes to raising the level of awareness among citizens, as it is a forum for people with common goals and interests for the development of a democratic regime. This helps to make better choices

when voting, participate in politics, and ensure government accountability. Associations are a source of information that lowers barriers to collective action, as groups influence politics by exerting pressure on governments, balancing state power, and giving participants skills in democratic decision-making (statutes of these political organizations are considered micro-constitutions).

Robert D. Putnam determined that non-political organizations are important for democracy because they create trust, value social capital, and contribute to democratic transitions (Putnam; Leonardi, 1994: 27). Social capital can help societies resolve collective action dilemmas through social networks. Social networks will trust other members of society, use social capital to create public goods. Civil society is a factor in the formation of social capital. Social capital is a condition for the formation of civil society. However, the research methodology of social capital and its measurement (for example, values, trust, membership in associations, trade unions, volunteerism, development of non-profit organizations) has not yet been formed.

However, Thomas Carothers identified that civil societies do not necessarily promote democratic values. Sheri Berman identified that civil society organizations can be used to mobilize people against democracy. This was evident in the fall of the Weimar Republic in Germany, the network of civil society harmed democracy (Carothers; Barndt, 1999: 21).

Kenneth Newton determined that there is insufficient evidence that social and political trust intersect (Newton, 2001: 203). Larry Raymond has identified: to understand the mechanisms of democracy, it is necessary to analyze the tensions that civil society creates for democracy by obstructing the functioning of representative institutions, distorting the effects of politics in favor of the rich with connections to the organization (Diamond, 1994).

Yuval Levin determined that civil society is a gate between the government and citizens, limits undemocratic consolidation of power (Levin, 2008).

Theda Skocpol shows that while civil society has brought more democracy, the shift from large unions is less likely to reject participation in democracy.

Civil society in the state is understood as the “third sector” which differs from the state, business, includes the family, the private sphere; a set of non-governmental organizations and institutions promoting the interests and will of citizens; a set of organizations and individuals in society that are independent of the government, a set of elements: freedom of speech, an independent judicial system, which form a democratic society, as a normative concept of values.

In the process of implementation, during the formation of annual plans, civil society to develop and make appropriate changes to the legislation, which will provide for ensuring the responsibility of state authorities and officials who violate the requirements of the mentioned Resolutions, obstruct the work of representatives of CSOs in joint bodies (public councils), conducting public examinations. Initiate the development and approval of the procedure for CSOs to submit their proposals to draft regulatory acts.

Interaction with business as an activity of civil society interest groups is related to economic and social development. If in agrarian or traditional societies the number of "interests" on which groups are formed is insignificant, then in developed industrial societies there are many of them. That is why interest groups become important links between the state and a differentiated society. Due to the spread of education, the level of political activity of citizens is increasing.

There are positive and negative effects of groups on the political system. The positive is manifested in the strengthening of mechanisms of political representation, support of public debate, formation of public opinion, expansion of public participation in political life, control of the government. The negative side is: the activity can increase the level of political and social inequality in society, change the mechanisms of democratic control, and contribute to the closure of the political process.

Interest groups have advantages: they expand representation, contributing to a more accurate articulation of the interests and views of different social strata, they do this better than political parties, and they are an additional lever of influence on governments in the period between elections. contribute to the public debate, raising the level of public awareness of various aspects of politics; strengthen the mechanisms of political participation, acting as an alternative to political parties, promoting participation in politics at a lower level; is a counterweight to the state: the more of them, the stronger the civil society; contribute to political stability, acting as a kind of channel of communication between the government and society.

Interest groups have disadvantages: their activity contributes to the deepening of social inequality: they act from the privileged classes who have access to financial, educational, and organizational resources of society; divide the society, because they always have private interests than the general interests, the interests of minorities.

In Ukraine, the relationship between the executive power and the oligarchs has developed differently from other post-communist regimes. The nation's wealthiest men functioned politically as predators by nature-balancing each other and rallying against their greatest rival, the president, when they felt threatened. Since the early 1990s, Ukrainian tycoons freely

used their media assets in political battles. Partly as a result of this, no Ukrainian president has been re-elected in the past 30 years, with the exception of Leonid Kuchma, who served from 1994 to 2004.

For the most part, the elections in Ukraine were relatively clear and peaceful. But when the president tried to falsify the vote count or resorted to violence, the oligarchs stepped in to stoke popular discontent. The democratic uprisings of 2004 and 2013-2014 would not have received mass support so quickly and decisively if Ukrainian television was in the hands of the state.

Ukrainian President Volodymyr Zelenskyi launched a campaign of "de-oligarchization" shortly before the Russian invasion, and the war only intensified it. At the end of 2021, Zelenskyi signed a law that prohibits financing of political parties by individuals with millions of dollars in income and "influence" on the mass media. In January 2022, the fifth president, Poroshenko, was charged with treason in the case of the sale of coal by pro-Russian separatists of Donetsk and Luhansk for $50 million (but no official charges were ever brought).

In March of last year, after the start of the war, Zelenskyi issued a decree that all TV channels should broadcast only "Edyny novyny", developed by the Office of the President. Ukraine's richest man, Renat Akhmetov, immediately surrendered his media licenses to the government, and security services searched the home of Kolomoiskyi, whose money and TV channel played a key role in Zelenskyi's election.

Ukraine will move away from corruption and interference in national politics. Ukrainian civil society will be mature enough to replace them. It is highly unlikely that in three decades Ukraine will follow authoritarianism. However, wars threaten civil and political liberties even in mature republics, and Zelensky's status as a war hero amplifies the usual temptations of unlimited power.

In fact, there are no oligarchs in Ukraine, but there are risks of the emergence of new ones. Ukrainian oligarchs lost their assets and political influence and thus effectively ceased to be oligarchs. However, there are still risks of the emergence of new oligarchs in Ukraine.

The International Monetary Fund identified the restoration of "oligarchic interests" in Ukraine as one of the risks for reforms and future donor support.

Businesses (business entities) help the army and citizens at various levels. Many companies provide financial assistance for the purchase of military equipment, ammunition and other equipment for the military; support their own employees, provide humanitarian assistance to displaced persons, provide hospitals with medicines and medical equipment.

Many companies are collecting funds for the repair and construction of infrastructure in the war zone.

However, even the impressive numbers do not allow one to fully appreciate the total amount of aid from business since the beginning of the full-scale invasion and the importance of such aid to the belligerent state. These and other areas of aid are a component of Ukraine's victory in the war.

Business representatives in Ukraine provided assistance programs, the amount of funds spent on charity and priority directions. For example, SCM (System Capital Management): self-made bulletproof vests and an aid program for Azovstal defenders. The group has one main program - "Steel Front", which combines all the military assistance of all Rinat Akhmetov's businesses.

At the same time, businesses made purchases of equipment, cars, and protective equipment. The priorities of the "Steel Front" are formed thanks to close cooperation with the military command and border guards. Drones, cars, communication systems are constantly needed.

DTEK's energy enterprises provide free electricity to hospitals, bread producers, as well as to all military and security structures.

As for humanitarian initiatives, the need is to help defenders who are not currently fighting. This includes treatment, prosthetics, adaptation, comprehensive support for them and their families.

New Post Office: Assistance is not limited to these units only - all those who make one-off requests also receive financial, logistical and other necessary support. The company is also concerned with demining the Ukrainian territory. That's why they bought robotic sappers for underwater demining. For the rehabilitation of wounded military personnel, Nova Poshta equips specialized medical facilities with simulators adapted for patients with damaged or lost limbs. There are programs aimed at supporting the civilian population as well. Thus, within the scope of the Humanitarian Post of Ukraine project, charitable foundations and volunteer organizations send goods to defenders or the civilian population, and the delivery is organized and paid for by Nova Poshta.

OKKO company: aid to the army, fuel funds and volunteers, restoration of de-occupied cities. Thus, from the first days of the invasion to the present day, as part of the project "We keep defenders warm", the company feeds defenders near hot spots for free at its gas stations.

For more than a year, the company has been helping fuel charities and public organizations involved in the evacuation of the population and the delivery of humanitarian goods for the Come Back Alive Foundation.

EPAM Systems company: humanitarian aid and digital solutions for the benefit of the state. To systematize the work, a single EPAM Response program was created. It works with three main directions: helping people, the state and educational partners, and has secured the support of charitable foundations and organizations. EPAM University's free educational programs are open to Ukrainians who are interested in technology or connect their future with IT, regardless of their location. The company's volunteers implemented many projects for various state institutions. As a patriotic and responsible business, the company is actively involved in solving urgent problems and challenges of wartime.

Foxtrot supported the Defense Forces and attracted global brands to help. cooperates with state authorities, volunteers, public and charitable organizations, encourages corporate volunteering, joined forces with the Charitable Association of Nations Foundation. The company's social initiative is to support projects aimed at helping animals rescued by military personnel and volunteers from the war zone.

Also, during the war, Privatbank significantly facilitated the collection of funds for many volunteers, public organizations, and charitable organizations.

The business uses the direction of infrastructure restoration in de-occupied territories, as well as in cities and towns affected by hostilities. In addition to repairing gas networks, gas distribution companies helped restore schools, bridges and other structures, and glass houses. Together with charitable foundations, they hand over food kits, personal hygiene products, clothes and warm things to people.

Conclusions

Effective interaction between government, business and civil society is based on the formation of relations that could solve the main problems of society, align the interests of all parties. The growth of the regulatory role of the state in the system of relations between the government and business should be considered as a necessary condition for solving the problems of the state system.

It is shown that the evolution of the political relations of the state, civil society and business is based on the need for a contract that ensures interaction between business and the state through the diversity of interrelationships of the "state-business-society" system as components of political development through the enhancement of the status of business associations as leaders of interest's business community. The practice of interaction between business and government has developed various

principles, forms, models, coordination mechanisms, coordination of interests, mutual information, creation of business associations, unions, implementation of joint development programs.

It is substantiated that the mechanisms of political interaction of the state, civil society and business are gradually being replaced by mechanisms of political influence of the state on business. Analyzing the conclusion from the standpoint of a systemic approach, one can make another assumption that the political system does not respond to the "requirements" of business, accepting only signals of "support" from it. The formation of a system of interaction between the state and business requires taking into account the existing social, economic, legal and political conditions.

It has been established that the forms and principles of state corporatism determine relations when the government not only chooses those organizations and groups that should represent the interests of business in interaction with it, but also controls them. Interaction between the government, business and society is carried partnerships, societies, self-organization bodies of the population, public hearings, councils, expertise, and control. Business should intensify the process of translating the state and business relations into a plane where the basis of interaction is law.

The problem in implementing an effective concept of tripartite interaction is mistrust of official sources of information, insufficient amount of information. This is due to, firstly, the lack of desire on the part of the government, of interaction; due to the lack of structures that could perform such tasks; thirdly, due to the lack of an operational information system to ensure relations between the government, business and society. Thus, it is proposed to improve information solutions that allow authorities to collect, sort requests, develop solutions based on the analysis of results. Such platforms should operate on a transparent basis, subject to public control.

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Achievements and prospects of digitization of public administration spheres in Ukraine

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Abstract

The article analyzes the legal documents of conceptual and strategic nature, as well as the existing state mechanisms aimed at digitization of the sphere of public management and administration in Ukraine. In this context, conceptual tasks aimed at the implementation and further development of digitization tools for the activities of state administration bodies, in general, and in certain spheres of public activity have been defined. The prospects for the development of digital potential, which should be implemented by key government institutions in such areas of digital transformation as: telecommunication services and digital infrastructure; e-commerce and virtual assets; innovations, information and communication technologies and startups; the field of health care; development of digital potential, acquisition of skills and competencies of citizens, digitization of education and e-learning, have been identified. The results obtained allow us to conclude that, for an effective public administration, digital technologies are an effective tool that requires thorough study and practical testing.

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Logros y perspectivas de la digitalización de las esferas de la administración pública en Ucrania

Abstract

El artículo analiza los documentos legales de naturaleza conceptual y estratégica, así como los mecanismos estatales existentes destinados a la digitalización de la esfera de la gestión y administración pública en Ucrania. En este contexto, se han definido tareas conceptuales encaminadas a la implantación y posterior desarrollo de herramientas de digitalización para las actividades de los órganos de la administración estatal, en general, y en determinados ámbitos de la actividad pública. Se han identificado las perspectivas de desarrollo del potencial digital, que deben ser implementadas por instituciones gubernamentales clave en áreas de transformación digital como: servicios de telecomunicaciones e infraestructura digital; comercio electrónico y activos virtuales; innovaciones, tecnologías de la información y la comunicación y startups; el campo de la atención de la salud; desarrollo del potencial digital, adquisición de habilidades y competencias de los ciudadanos, digitalización de la educación y aprendizaje en línea. Los resultados obtenidos permiten concluir que, para una administración pública eficaz, las tecnologías digitales son una herramienta efectiva que requiere un estudio exhaustivo y pruebas prácticas.

Palabras clave: administración pública; gestión pública; órganos del poder ejecutivo; transformaciones digitales; espacio de información.

Introduction

The functioning of the modern world is impossible without the processes of active digitalization of all spheres of life in society, which is accompanied by the widespread penetration of digital technologies into the processes regulated by the state. «Digital» society is a step towards the formation of a new type of relationship between the government and society, which introduces new conceptual and value platforms for providing services to citizens, reducing bureaucratic obstacles, forming various information databases, which enables public administration bodies to timely and promptly receive any what information and how to use it.

Expanding the capabilities of digital technologies is one of the dominant factors in the growth of the world economy in the next 5-10 years, which is a key driver of achieving the Sustainable Development Goals of the country and its regions in conditions of decentralization (Muraev, 2021, p. 2). At the same time, the spread of technological innovations carries certain threats and disadvantages, which primarily relate to the release of personnel, cybercrime and privacy violations. Under such conditions, as rightly emphasized in the doctrine, the theory of modernization, which implies a more intensive use of technologies by democratic states, should be revised with a shift in focus to the specifics of the use of certain digital tools, their adaptation by digital political subjects, ways of construction and mobilization by them networks (Steblyna, 2021, p. 12).

The development of democracy in Ukraine, integration into the Single Digital Market of the European Union, introduction of e-government and e-democracy tools into the public administration system, further development of the information society, decentralization and creation of united territorial communities became the driving force of the modernization of public administration in the country. The key task of such modernization should be the transition to a service-oriented state, one of whose priorities is the provision of high-quality public services using modern digital and information and communication technologies.

1. Methodology of the study

To achieve the goal and set tasks of the scientific article, a complex of general scientific research methods was used, and the systematic approach is its methodological basis and is used to solve most of the research tasks. System-analytical and content analysis methods were used in the study of regulatory and legal documents. The use of methods of analysis and synthesis made it possible to identify problems and determine the subject of research, to improve the conceptual and categorical apparatus of the subject area of research. The work also applies: the method of comparison and the systematic approach – for the study of foreign experience of digital transformation in the field of public management and administration; statistical methods - to clarify the dynamics of digitalization of the sphere of public administration at the national level; factor analysis - to justify the system of influencing factors on the process of digital transformation of management; subject-object approach and abstract-logical, system-structural methods - to develop the concept of digital transformation of public management and administration. The method of generalization was used when formulating research conclusions based on the results of processing a set of materials on a relevant topic.

2. Analysis of recent research

Many foreign and domestic scientists are working on the problem of ensuring digital transformations of society by legal means and increasing their effectiveness, which is explained, we emphasize again, by the globality of the phenomenon, which is the information space, and the scale of the risks and threats that accompany this process. In the focus of scientists and practitioners are the issues of introduction of modern digital information and communication technologies in the field of public management and administration, provision of high-quality public services in Ukraine, informatization and digitization of state authorities, etc.

At the same time, despite the wide range of scientific developments on this issue, there is a significant range of problems of a normative, legal and practical nature that require further development. After all, in connection with the significant pace of transformation of the information space, new and urgent tasks constantly arise in this area, the successful solution of which also depends on the success of the transformation of the «normal» pre-digital format of this space into a new model – a digital one, which is currently «burdened» also military actions on the territory of Ukraine.

For the sake of fairness, we should point out Ukraine's significant successes in the direction of digitalization of certain spheres of life. The system of providing public e-services and electronic identification is developing at a rapid pace (in particular, the public services portal «Action» has been created under the auspices of the relevant ministry, the Integrated Electronic Identification System has been launched, SmartID technology is being systematically implemented, and the process of optimizing electronic data registers has begun).

At the same time, in continuation of active administrative reforms, the functioning of public authorities and the services they provide require further optimization of state tools for digitalization of the sphere of public management and administration in Ukraine in such areas as electronic commerce and virtual assets; innovations, information and communication technologies and startups; health care, telecommunications services and digital infrastructure and others.

Therefore, the relevance of the research is determined by the presence of a problem, the essence of which boils down to the existing contradictions between the need to improve the quality of public services in the conditions of the formation of the information society, which is possible on the basis of the digitalization of the specified services, and the insufficient scientific and applied and methodological and technological support of the specified activity.

3. Results and discussion

Management of society in conditions of permanent turbulence actualized the task of comprehensive study of extremely complex and multi-level interdependencies of processes of globalization and public administration. Understanding the dynamics of their relationship and interaction is of particular importance for deepening the understanding of modern trends in the development of state-management mechanisms in Ukraine (Aleynikova, 2021, p. 249). A strong and effective state policy can stop the spread of crisis trends, the characteristic feature of which today is a people-centered approach based on the introduction of the latest digital technologies in the relationship between the state and civil society.

Digitization of the sphere of public administration involves the application of strategic technologies of public administration, such as: the use of social networks and communications for active involvement of the public in administrative and political processes; provision of alternatives in the opportunity to engage in communication with public administration bodies; application of new methods of finding out and understanding the needs of citizens; support for personalization, etc.; introduction of a «digital» workplace; access to information bases as a tool for evaluating and controlling the work of the authorities and the state; the orientation and interest of state institutions in improving the quality of services, optimizing the number of employees and reducing costs; use of «Big data» data and others.

Some scientists highlight the characteristic signs of digitalization: all types of content go from analog, physical and static to digital, at the same time they become mobile and personal, and the individual gets the opportunity to control his personal content, direct information requests, form an individual trajectory of information activity; there is a transition to simple communication technologies (technology becomes only a means, a tool of communication), the main characteristic of the means and technology is manageability; communications become heterogeneous: vertical, hierarchical communication loses its relevance, there is a transition to a network structure of communication (Cherednichenko, 2021). Digitization leads to: increased availability, quality and ease of obtaining goods and services; increase in the consumption capacity of the population; the growth of intra-industry competition; increasing the competitiveness of the state's economy on world markets; emergence of new professions.

Digitization is inextricably linked with digital transformation, that is, the complex transformation of public authorities, private enterprises, etc., is associated with a successful transition to new models, channels of communication with society and consumers of products and services, which are based on new approaches to data administration using

digital technologies, with the aim of its effectiveness. Currently, public management bodies are actively searching for new forms of life and ensuring the continuity of functioning, which requires the active introduction of all forms of digitalization for high-quality and effective public administration in order to optimize management costs, the quality of mutual exchange and the provision of services to the population (Chorny, 2021, p. 226).

The concept of the development of the digital economy and society of Ukraine for 2018-2020 established the provision that «with a systemic state approach, «digital» technologies will significantly stimulate the development of an open information society as one of the essential factors in the development of democracy in the country, increasing productivity, economic growth, as well as improving the quality of life of Ukrainian citizens» (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 2250-P, 2010).

According to the Concept of the development of e-government in Ukraine, approved by the resolution of the Cabinet of Ministers of Ukraine, it is established that the development of e-government will contribute to: increasing the efficiency of public administration as a result of simplifying administrative procedures, reducing administrative costs, applying modern methods of public administration; improving the quality of administrative services and their availability; ensuring the implementation of control over the effectiveness of the activities of state authorities and local self-government bodies; ensuring a high degree of availability of information about the activities of state authorities and local self-government bodies, providing opportunities for citizens and public organizations to directly participate in the processes of preparation of draft decisions adopted at all levels of state administration; reducing the level of corruption and «shading» of the economy; achieving a qualitatively new level of state and society management in general, as well as strengthen trust in state institutions (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 67-r, 2018).

On the basis of these trends, in 2019, the Committee on Digital Transformation was established, whose areas of responsibility include the formation of the legislative foundations of «digitalization» and the digital society of Ukraine, the administration, functioning and use of the Internet in Ukraine, work on national and state informatization programs, and as well as programs of the European Union «Single Digital Market», other programs of digital cooperation, issues of e-government and public electronic services, smart infrastructure (cities, communities), cyber security and cyber protection, etc.

Also, in order to optimize the system of central executive bodies, the Ministry of Digital Transformation of Ukraine was created (RESOLUTION OF THE CABINET OF MINISTERS OF UKRAINE № 829, 2019),

which became the central main body in the system of central executive bodies, which ensures the formation and implementation of state policy: in the areas of digitalization, digital development, digital economy, digital innovations and technologies, e-government and e-democracy, development of information society, informatization; in the field of implementation of electronic document management; in the field of development of digital skills and digital rights of citizens; in the areas of open data, development of national electronic information resources and interoperability, development of infrastructure of broadband access to the Internet and telecommunications, e-commerce and business; in the field of providing electronic and administrative services; in the fields of electronic trust services and electronic identification; in the field of ITindustry development (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 856, 2019).

The fact that Ukraine intends to carry out a digital transformation, ensuring the provision of administrative services through a secure «single window» using modern information technologies, and spreading digital literacy was first stated in the 2020 Strategy (DECREE OF THE PRESIDENT OF UKRAINE № 392/2020), and at the end In 2021, Ukraine adopted a new Strategy for the implementation of digital development, digital transformations and digitalization of the state finance management system for the period until 2025 and the Action Plan for its implementation (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 1467-r).

The specified regulatory legal documents were adopted to ensure high-quality digital transformation in certain areas of business related to the circulation of material values: such as state finance management, state internal financial control activities, monitoring and assessment of fiscal risks, maximum automation of business processes, etc. In particular, the 2021 Strategy specifies information security in the Unified Information and Telecommunications System of the State Finance Management System against modern cyber threats in the conditions of digitization of management processes and the need for data exchange (ORDER OF THE CABINET OF MINISTERS OF UKRAINE № 1467-p, 2021) as a separate goal.

The main approach defined by this Strategy is the centralization of ITresources and ITfunctions of the Ministry of Finance and central executive authorities, with the priority use of cloud technologies, the creation of a single data repository, the gradual transition to a new level of service-oriented systems by ensuring the availability of public services in the mode online As part of the implementation of this Strategy, it is planned to create a cloud infrastructure of the state finance management system, create an interdepartmental data repository, and implement tools for analytical processing of the information accumulated in it (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 1467-r, 2021).

At the same time, fundamental documents, which are fully devoted to information security issues, have been adopted in Ukraine. So, in 2021, two strategies appeared in this area at once. One of them is the Information Security Strategy, which emphasizes that the digital transformation of society affects the state of protection of the individual's right to privacy due to the increase in the number of social networks, their integration with other social services of everyday use, as well as due to the specifics of the organization of the worldwide Internet (DECREE OF THE PRESIDENT OF UKRAINE № 685/2021). Another document of a strategic nature is the Cybersecurity Strategy of Ukraine «Safe cyberspace is the key to the country's successful development» (DECREE OF THE PRESIDENT OF UKRAINE № 447/2021). Given the numerous threats and challenges that cyberspace is full of for Ukraine, in the era of digital transformations in the country, the risk of misuse of the latest technologies for criminal purposes increases, and therefore the role of cyber security increases.

Today, digital innovations are being introduced in Ukraine in the following areas: automated collection, storage and processing of information; creation of digital goods and services; development of a new digital model for the use of digital design; performance of administrative functions; automation of manual work using robots and electronic document management; management of production processes and supply networks, etc.

The problems of modern public administration reform in Ukraine, in particular in the direction of digitalization, require the development of new approaches, which are often based on foreign experience, the skillful use of which can undoubtedly accelerate the process of reforming the functioning public administration system. However, it is important not only to borrow established management models, but also to correctly build a reform algorithm based on advanced foreign practices. In fact, in the situation of adapting the foreign experience of reforming management, we are talking about management innovations that require regulatory and legal support at the level of a special regime, as both the management system and those social relations that form the basis of public management require changes.

As noted by S. Seryogin and V. Bashtannyk, the process of adapting foreign management experience should be carried out through the study of: both predicted and spontaneous regulators of internal and external influence on social relations, which stabilize the country's political system; organizational means of improving the management system at the level of the national state, if the individual criteria of social reforms are not known in advance, are formed under the influence of a change in the political course (Seryogin, 2007, p. 7). Thus, the issue of adaptation to the national conditions of state development of world experience accumulated by the theory of public administration still remains the main scientific problem (Meltyukhova & Korzhenko, 2010, p. 14).

In Ukraine, the use of digital technology tools for the financial support of the social sphere is not active enough, as in China, the USA, India, and Great Britain. However, the importance of this is evidenced by the decision in 2020 by the government to approve the Strategy of Digital Transformation of the Social Sphere (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 1353-p, 2020), which defines the directions and main tasks of the comprehensive digital transformation of all components of the social protection system of the population until 2023. In addition, the Concept of the development of electronic health care (e-health) was developed and approved, which defines the political, organizational-legal, technological and ideological conditions and principles of the development of e-health (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 1671-r, 2020). The implementation of this Concept is foreseen until 2025.

Each process or technology has both its advantages and disadvantages. If we talk about the use of the blockchain system, its advantages include durability, fast transactions, data transparency, exchange transactions without intermediaries, and a reduction in the level of corruption. The most significant are the internal advantages of the application, which are primarily related to transparency, interactivity, safety and technological improvement of the state management and control system.

As for the shortcomings of the blockchain, it should be noted that technical problems tend to stand in the way, and it also remains unknown who will collect transactions into blocks and chains, that is, there is still a risk of data compromise; large volume of data memory; impossibility to delete or change data after it has entered the database. External threats are caused, first of all, by the lack of a legal basis for the use of decentralized register technology (Shyshkova, 2018, p. 384). In general, it is undeniable that effective modern technologies should be used to improve and modernize public administration and control (Hrushko & Koretska, 2021, p. 34).

In the countries of the European Union, an evaluation indicator of the level of technological development and the degree of introduction of innovative technologies in the digital society is used – the DESI Index (International Digital Economy and Society Index, 2022). The index covers five main sub-indices: connectivity, human capital, internet use, digital integration and digital public services. In particular, for determining the DESI index, an important component is the presence of digital skills in the population and among graduates of educational institutions. According to the value of the index, in 2022, Belgium, the Netherlands, Luxembourg, Denmark, Finland, Sweden, Great Britain, Ireland, Estonia, and Austria became leaders in the development of digital technologies among the countries of the European Union (International Digital Economy and Society Index, 2022). Also, compared to previous years, the number of people who used e-government services increased from 58 % to 72 % (International Digital Economy and

Society Index, 2022). Such countries as Denmark, Spain and Estonia have the lead in this indicator.

The field of e-government in France is aimed at ensuring interaction between management services, accessibility of management sites, expanding access to electronic payment systems and to justice via the Internet. Taking into account the experience of France, it is expedient for Ukraine to implement measures to train officials in the field of digital technologies, take into account awareness in the digital field when entering the civil service, appropriate modernization of publicly available computer systems, and rationalization of state funding in the information society.

The identified potential opportunities of the digital economy in individual countries make it possible to conclude that most of them should implement an active and effective state policy to overcome the «digital divide». Digitalization of many areas of life, active introduction of the Internet in households, formation of necessary professional digital skills also play an important role. At the same time, countries that have reached the highest level of digital maturity open up many digital perspectives and opportunities for further activation of the development of digitalization in the field of public administration in general and in certain branches of public production and the state.

In general, it should be emphasized that the deployment of the broad digital capabilities of the world's leading democracies requires governments to implement a strategy for the development of the digital economy in the context of the «digitalization» of the country, the formation of the internal IT market, and the development of motivation among consumers of digital technologies. It is necessary to provide a developed digital infrastructure as a basis for the development of the digital economy, which will encompass a complex of technologies, products and processes that will be able to provide computing, telecommunication and network capabilities on a digital basis.

Over the past few years, a number of important steps have been taken in Ukraine on the way to the EU's Single Digital Market. Among the most important factors that create positive prospects for digital European integration: 1) legislative prerequisites: creation and active activity of the Digital Transformation Committee of the Verkhovna Rada of Ukraine; 2) institutional prerequisites: creation and active activity of the Ministry of Digital Transformation of Ukraine, appointment of deputy ministers for digital development in all ministries of Ukraine; 3) foreign policy prerequisites: activities of the EU support program «EU4Digital: support for the digital economy and society in the Eastern Partnership», development of the Strategy («road map») of Ukraine's integration into the Single Digital Market of the European Union in close cooperation with representatives of the relevant structural divisions of the European Commission .

Thanks to the above factors, certain successes have been achieved in most areas of digital transformation, in particular, the most positively indicative are the areas of electronic governance, regulation of electronic communications, electronic trust services and electronic identification, electronic health care system. However, the improvement of policy and specific actions for the further digital development of Ukraine requires increased attention.

In particular, there is a shortage of officially approved strategic documents that would more clearly define the policy vectors and intentions of national authorities for the further perspective of the country's digital development in terms of individual sectors of the digital market. More intensive actions should be carried out in the areas of cyber security, e-commerce and development of the ITecosystem (Digital transformations in Ukraine: do domestic institutional conditions meet external challenges and the European agenda?, 2020).

The results of the analysis of the current situation in Ukraine and the trends of its development make it possible to determine the prospects for the development of digital potential, which should be implemented by key government institutions within the framework of each direction of digital transformation in the near future.

In the field of telecommunications services and digital infrastructure, it is necessary to: finalize and implement the Law of Ukraine «On Electronic Communications»; develop a clear action plan involving stakeholders to update by-laws in this area; to make changes to the Law of Ukraine «On access to construction, transport, and electric power facilities for the purpose of development of telecommunication networks»; develop national standards in the field of radio frequency resource use, harmonized with the standards of the European Institute of Telecommunication Standards ETSI; speed up the process of official approval of the draft Strategy (road map) of Ukraine's integration into the EU's Single Digital Market; each state authority to prepare its own plan for ensuring cyber security and protection of information and communication networks; to introduce a unified design and rules for providing information on official web portals and websites of state enterprises and institutions; develop a program to modernize the ITinfrastructure of state authorities and ensure its financing from budgets; develop and adopt a national cyber emergency response plan; develop a step-by-step action plan for the implementation of the basic EU directive in the field of cyber security; develop a national program of financial support for cyber security in Ukraine and provide the responsible authorities with resources for its implementation.

The Cybersecurity Strategy of Ukraine, adopted in 2021, states that for the further development of the national cyber security system on the basis of deterrence, cyber resilience, and cooperation, it is necessary to: strengthen

the capacity of the national cyber security system to prevent armed aggression against Ukraine in cyberspace or with its use, neutralization of intelligence subversive activities, minimization of threats of cybercrime and cyberterrorism; acquiring the ability to quickly adapt to internal and external threats in cyberspace, support and restore the sustainable functioning of the national information infrastructure; ensuring the development of communication, coordination and partnership between the subjects of cyber security at the national level, the development of strategic relations in the field of cyber security with key foreign partners. The key unifying and coordinating role in this process will be played by the National Cyber Security Coordination Center (DECREE OF THE PRESIDENT OF UKRAINE № 447/2021).

In the field of electronic commerce and virtual assets, we see prospects for the development of digital potential in the following: define the concepts of «electronic commerce» and «virtual assets» at the legislative level; to introduce amendments to the Tax Code of Ukraine regarding the abolition of taxation of income received by non-residents in the form of payment for the production and/or distribution of advertising and improvement of the procedure for taxation of value-added tax on transactions involving the supply of electronic services to individuals by non-residents» in order to create conditions for the effective administration of procedures that related to the taxation of value added tax on electronic services provided by non-residents in the customs territory of Ukraine; develop a clear description of the criteria for financial monitoring of virtual assets service providers with the involvement of the National Bank of Ukraine in order to avoid abuses in the virtual assets market; adapt legislation on consumer rights protection and taxation in the field of e-commerce to EU standards and practices; to normalize the responsibility of business entities in the e-commerce segment before consumers; create a single register of business entities in the specified segment and consider the possibility of creating an online dispute settlement system.

In the field of innovations, information and communication technologies and startups, we see the need for the following: making changes to the Tax Code of Ukraine and some other legislative acts of Ukraine regarding the conduct of business activities by residents in Ukraine in order to create conditions for non-residents to conduct business in Ukraine without a physical presence on its territory and their receipt of relevant electronic trust services; develop an online platform for displaying the Ukrainian IT and innovation ecosystem, which will include information about IT companies, research and educational institutes, investment funds and companies, business incubators, technology parks, etc.; to create a national network of innovative business incubators according to the standards of the European Network of Business and Innovation Centers (EBN); to develop mechanisms of interaction of the domestic ecosystem

of innovations, information and communication technologies and startups with other international and European similar ecosystems of information and communication technologies innovations and networks of financial support for innovative development; to develop mechanisms of state support for the development of business angel ecosystems in Ukraine with the possibility of providing tax benefits and applying joint investment schemes; to develop a freely available online database with a list of financial sources available to various organizations to finance innovation; register domestic crowdfunding platforms on information resources for P2P market platforms in the EU and the world, etc.

It is appropriate to emphasize that some of the steps we have indicated to increase the digital potential in the field of innovations, information and communication technologies and startups are reflected in the priority directions of the implementation of the Concept of the Development of Artificial Intelligence in Ukraine, adopted in 2020, such as: creating conditions for participation in the activities of international organizations and the implementation of initiatives related to the formation of strategies for the development, regulation and standardization of artificial intelligence; introduction of artificial intelligence technologies in the field of education, economy, public administration, cyber security, defense and other areas to ensure long-term competitiveness of Ukraine on the international market; providing access to information (databases, electronic registers, etc.), its use during the development of artificial intelligence technologies for the production of goods and the provision of services; increasing the level of professional training of specialists to ensure the field of artificial intelligence technologies with qualified personnel; protection of the information space from unauthorized intervention, ensuring the safe functioning of information and telecommunication systems; increasing the level of public safety through the use of artificial intelligence technologies during the development of resocialization measures for convicted persons and the risk of reoffending; bringing legislation in the field of using artificial intelligence technologies into compliance with international legal acts (DECREE OF THE CABINET OF MINISTERS OF UKRAINE № 1556-r, 2020).

The field of health care also needs to define the prospects of digitalization. For this purpose, it is expedient to develop a strategy for the development of the electronic health care system at the state level; create prerequisites and ensure further improvement of the data space of the electronic health care system in Ukraine (primarily, regarding ensuring data protection and cyber resistance within the eHealth system, conducting its audit, introducing standards for storage and transmission of medical information), etc.; bring the legislation in the field of electronic healthcare of Ukraine to EU standards; determine the prospects for ensuring cross-border compatibility of the electronic health care system of Ukraine with EU countries; initiate the implementation of pilot projects for the provision

of cross-border electronic health care services (Digital transformations in Ukraine: do domestic institutional conditions meet external challenges and the European agenda?, 2020).

The following prospects for the development of the digital potential of digital skills and competences of citizens, digitalization of education and online learning should also be determined: develop a national strategy for the development of digital skills and competences and a corresponding action plan for the implementation of the strategy; define at the legislative level the concepts of «digital competences» and «digital skills»; support the development and implementation at the official level of the framework of digital competences for citizens and e-competencies for business; to develop a comprehensive mechanism for measuring digital skills and competencies in Ukraine.

Conclusions

Thus, based on the results of the analysis of the issues investigated in the scientific article, we can draw the following general conclusions.

Digitalization of the sphere of public management and administration should be understood as a process based on the integration of public management and administration functions and digital technologies, which is aimed at the transformation of socio-economic and political relations in the information society and promotes the emergence of a new digital culture of interaction between the government, business, the public and the environment.

Based on the analysis of international experience in the field of digitalization of law, we can conclude that the system of gradual improvement of relations arising from the use of digital rights of citizens (United States of America, Great Britain, France, Denmark). For effective public administration, digital technologies are an effective tool that requires comprehensive study and practical testing.

The prospects for the development of digital potential have been determined, which should be implemented by key government institutions in the following areas of digital transformation in Ukraine: telecommunications services and digital infrastructure; e-commerce and virtual assets; innovations, information and communication technologies and startups; the field of health care; development of digital potential, skills and competences of citizens, digitization of education and online learning.

Regarding further scientific research, it is essential to investigate both Ukrainian and international bills on the regulation of the digital transformation of our country and to develop proposals for the possible

implementation of the positive experience of foreign countries in Ukrainian legislation.

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Ensuring the safety of participants in the criminal process in the mechanism of prevention of criminal offenses against them

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Abstract

The article is devoted to the scientific analysis of the implementation of security measures of participants of criminal proceedings in the mechanism of prevention of criminal offences against them. It was concluded that an important component of effective prevention of criminal offenses committed against participants of criminal proceedings is the creation of a system to ensure their safety by applying international legal norms of the interdisciplinary institute specified in the national criminal legislation. The specified task can be achieved in the case of: introduction of specific programs for the protection of participants in criminal proceedings (creating a simplified mechanism for choosing and applying short-term security measures and, a detailed mechanism for long-term measures; defining criteria for danger assessment by individualizing the needs of a person in the application of security measures, or a combination of more effective tools developing approaches to the duration of security measures based on the interests of justice and the existence of threats to the person); creation of a special unit

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to ensure the safety of participants in criminal proceedings, separate from the investigative bodies.

Keywords: criminal justice participants; criminal investigation; protidium; international standards; crime prevention.

Garantizar la seguridad de los participantes en el proceso penal en el mecanismo de prevención de delitos penales contra ellos

Resumen

El artículo está dedicado al análisis científico de la aplicación de medidas de seguridad de los participantes en el proceso penal en el mecanismo de prevención de delitos penales contra ellos. Se concluyó que un componente importante de la prevención eficaz de los delitos penales cometidos contra los participantes en los procesos penales es la creación de un sistema para garantizar su seguridad mediante la aplicación de las normas jurídicas internacionales del instituto interdisciplinario especificado en la legislación penal nacional. La tarea especificada se puede lograr en el caso de: introducción de programas específicos para la protección de los participantes en procesos penales (creando un mecanismo simplificado para elegir y aplicar medidas de seguridad a corto plazo y, un mecanismo detallado para medidas a largo plazo; definiendo criterios para evaluación de peligrosidad por individualizar las necesidades de una persona en la aplicación de medidas de seguridad, o una combinación de herramientas más efectivas desarrollando enfoques sobre la duración de las medidas de seguridad basados en el interés de la justicia y la existencia de amenazas a la persona); creación de una unidad especial para garantizar la seguridad de los participantes en procesos penales, separada de los órganos de investigación.

Palabras clave: participantes en justicia penal; investigación penal; protidium; normas internacionales; prevención de delitos.

Introduction

Participants in criminal proceedings, their relatives and close ones, in one way or another are subjected to, or may be subjected to, physical and psychological influences. On the one hand, this is due to their personal

qualities, on the other hand, the involvement of these persons in the field of criminal justice significantly increases the degree of their victimhood in view of their procedural status. The social danger of criminal offenses against participants in the criminal process lies, in particular, in the fact that they significantly undermine the authority of law enforcement and judicial bodies, which ensure the protection of the rights and legitimate interests of the individual, and generate public distrust in their ability to effectively resist crime.

Crime prevention is the activity of state and society bodies aimed at keeping crime at a minimum level by neutralizing its causes and conditions, as well as at preventing and stopping specific criminal offenses (Ivanov, Dzhuzha, 2006, p. 165). To prevent means «to prevent something from happening in advance, to avert» (New Interpretive Dictionary of the Ukrainian Language, 2001, p. 89). Ensuring the safety of participants in the criminal process is an important and necessary component of the mechanism for preventing criminal offenses against them. This encourages the development of a system of effective measures to prevent and overcome opposition to the investigation of criminal offenses committed against participants in criminal proceedings.

The international community has developed normative and legal acts, which collectively determine the standards for national legislation in order to solve the most important issues of combating crime and its individual manifestations. The conditions of the modern socio-political life of Ukraine require bringing security measures into line with the international standards recognized in the world practice of many countries and related relevant procedures that ensure the proper functioning of the judiciary.

1. Methodology of the study

Philosophical, general scientific and special methods of knowledge of legal phenomena were used during the study of the peculiarities of the application of ensuring the safety of participants in the criminal process in the mechanism of prevention of criminal offenses in relation to them, which ensured the reliability and validity of the scientific results. The research methods were chosen taking into account the set goal and tasks of the research, its object and subject.

The process of writing a scientific article is determined by the use of a dialectical approach, which allowed to identify theoretical and applied problems of the protection of witnesses and other participants in criminal proceedings in the system of anti-crime measures against participants in criminal proceedings. The hermeneutic method was used during the formulation of proposals for legislation on ensuring security; with

the help of a systematic method, the structure of means of ensuring the safety of participants in criminal proceedings was revealed and their place in the mechanism of prevention of criminal offenses against them was established; the formal-logical (dogmatic) method made it possible to determine certain legal concepts, grounds, the purpose of applying security measures, as well as to develop proposals for improving the relevant provisions of the legislation; the comparative legal method was used during the study of the content of international legal standards for ensuring the safety of participants in criminal proceedings, as well as the provisions of the legislation of foreign countries that relate to this issue.

2. Analysis of recent research

The concept of counteracting the investigation of criminal offenses against participants in criminal proceedings, based on scientifically based theoretical provisions and conclusions, defines organizational and legal mechanisms for their detection and termination, offers a set of practical recommendations for the effective prevention of such illegal acts. Scientific works of many scientists in the field of criminology, criminal law, process and other sciences, and not only the legal cycle, are devoted to these questions. The reform of law enforcement and judicial bodies, the creation of new units, the adoption of new normative legal acts and the introduction of changes in the current ones attest to the need to study conceptual issues of ensuring the safety of participants in the criminal process in the mechanism of combating criminal offenses against them.

3. Results and discussion

The issue of security of participants in criminal proceedings is of international importance, and ensuring effective protection of persons who contribute to justice is one of the global problems in the field of combating crime. The United Nations (hereinafter – the UN) and other international institutions are conducting intensive work aimed at improving the standards of ensuring the safety of persons participating in criminal proceedings, forming the principles of such activity (Svintsytskyi, 2017, p. 307).

The peculiarity of international legal standards in the fight against crime is due to the fact that they are developed on the basis of the consensus of state representatives, reflect the highest achievements of the world community, constitute a certain model, and their main goal is to ensure the observance and effective protection of human rights (Korovaiko, 2010, p. 42).

International standards for ensuring the safety of participants in criminal proceedings should be understood as reflected in the provisions of international law and/or formulated in the decisions of international judicial institutions, requirements of an imperative and recommendatory nature (principles, norms, recommendations, etc.) regarding the scope of legal regulation of the activities of authorized persons of law enforcement agencies and bodies of justice regarding the provision of safe implementation by participants in criminal proceedings of their rights and obligations in criminal proceedings. International standards not only determine what rights a person is entitled to and their content, but also provide a mechanism for their guarantee and provision, primarily in those spheres of public life in which there is a high risk of violations of the rights and legitimate interests of a person.

At the international level, a number of normative legal acts dedicated to ensuring the safety of the specified persons were developed and adopted. In particular, the Conference of the Parties to the UN Convention against Transnational Organized Crime at its second session, held in Vienna on October 10-21, 2005, included witness protection in the list of areas for which monitoring and periodic review of the implementation of the Convention and related protocols will be carried out (CTOC / COP / 2005/8, paragraph 1, decision 2/1, 2/3, 2/4) (RECOMMENDED PRACTICES IN THE FIELD OF WITNESS PROTECTION IN CRIMINAL PROCEEDINGS INVOLVING ORGANIZED CRIME, 2008).

Article 32 of the UN Convention against Corruption specifies that each State Party shall take appropriate measures in accordance with its domestic legal system and within its capabilities to ensure effective protection against possible retaliation or intimidation of witnesses and experts testifying in cases of crimes defined by this Convention, and, in appropriate cases, regarding their relatives and other persons close to them (United Nations Convention against Corruption, 2010).

Also, the UN Convention against Transnational Organized Crime from 2000 provides provisions on witness protection, as well as encouraging persons who participate or have participated in organized criminal groups to: provide information useful to competent authorities for the purpose of investigation (art. Art. 24-26) (UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, 2000), and in Art. 24 defines that «each State Party shall take, within its capabilities, appropriate measures aimed at ensuring effective protection against possible reprisals or intimidation of witnesses who take part in criminal proceedings and give evidence in connection with the crimes covered Convention, and, in appropriate cases, regarding their relatives and other persons close to them (UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, 2000). Thus, states have a duty to protect individuals from transnational

crimes, as well as to assist victims of transnational crimes and to protect the rights of those who are involved in the prosecution of transnational crimes" (Bianchi, 2007, p. 21).

For adequate and professional conduct of cases in which participants in criminal proceedings may require the use of protection measures or programs, authorized subjects of criminal justice bodies should have adequate training and relevant guidance documents. When developing a set of measures aimed at combating serious crimes, in particular those related to organized crime and terrorism, and violations of international humanitarian law, it is necessary to take appropriate measures to protect witnesses and persons cooperating with justice from intimidation. No criminal offense related to terrorism should be excluded from the list of criminal offenses for which special measures / programs are provided for the protection of participants in the criminal process.

Also part 4 of Art. 24 of the UN Convention against Transnational Organized Crime, adopted by General Assembly resolution 55/25 of 11/15/2000, provides that without prejudice to the rights of participants in criminal proceedings, including the right to a proper trial, the following measures may be included: establishment of procedures for the physical protection of such persons, to the extent necessary and practicable, for their resettlement, and for the adoption of such provisions as to permit, in appropriate cases, the non-disclosure of information relating to the identity and whereabouts of such persons, or establish restrictions on such disclosure of information; adoption of rules of evidence that allow witnesses and experts to testify in a manner that ensures the safety of such persons, for example, permission to testify by means of communication such as video-link or other appropriate means (UN CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, ADOPTED BY RESOLUTION 55/25, 2000). Participating states must consider the possibility of concluding treaties or agreements with other states on the resettlement of the specified persons (part 1 of Article 32 of the UN Convention) (UNITED NATIONS CONVENTION AGAINST TRANSNATIONAL ORGANIZED CRIME, 2000).

Recommendations Rec (2005) of the Committee of Ministers of the Council of Europe to member states on the protection of witnesses and persons cooperating with the justice system recommend that strict sanctions be imposed for witness intimidation crimes. The term «intimidation» in the Recommendations is interpreted as any direct, indirect or potential threat to a witness that may prevent him from fulfilling his civil duty related to giving evidence (RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE TO MEMBER STATES ON THE PROTECTION OF WITNESSES AND PERSONS , WHO COOPERATE WITH JUSTICE, 2005).

It is important to note that when deciding to provide protection to a person cooperating with justice, the following criteria should be taken into account, inter alia: participation requires the protection of a person (as a victim, witness, etc.) in an investigation and/or case; the significance of the contribution; seriousness of threats; readiness and suitability for protection through appropriate measures or programs (RECOMMENDATION OF THE COMMITTEE OF MINISTERS OF THE COUNCIL OF EUROPE TO MEMBER STATES ON THE PROTECTION OF WITNESSES AND PERSONS COOPERATING WITH JUSTICE, 2005).

In our opinion, measures should be taken in Ukraine to intensify activities on the development of programs for the protection of participants in criminal proceedings and provide persons who need protection: witnesses and persons who cooperate with justice, the opportunity to use these programs. The main goal of these programs should be to protect the life and personal safety of witnesses / persons cooperating with justice and their relatives, especially providing physical, psychological, social and financial protection and support.

Also, Resolution No. 66/164, adopted by the UN General Assembly on December 19, 2011, states that protection programs that provide for fundamental changes in the private life of persons who are protected (for example, a change of place of residence and personal identification) should be applied to those of them, who need protection for a period exceeding the terms of consideration of the criminal cases in which they testify. These programs, which may be time-limited or lifelong, should be initiated only if no other measures can be considered sufficient to protect the witness or person cooperating with justice and their relatives (UNITED NATION RESOLUTION NO. 66/164, 2011). The initiation of such programs requires the informed consent of the person(s) subject to protection, as well as an appropriate legal framework, including appropriate guarantees of the rights of witnesses or persons cooperating with justice, in accordance with the norms of domestic law (UNITED NATION RESOLUTION NO. 66/164, 2011).

It should be emphasized that Art. 20 of the Law of Ukraine «On ensuring the safety of persons participating in criminal proceedings» does not contain the detail necessary for correct law enforcement, which is provided for by the cited international standards. In particular, in Part 1 of Art. 20 states that «as a basis for taking measures to ensure the safety of persons specified in Art. 2 of the specified Law, there are data that testify to the presence of a real threat to their life, health, housing and property» (ON ENSURING THE SAFETY OF PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS, LAW OF UKRAINE, 1993).

The presence of a real threat, in addition to threats and specific encroachments on a person's life, health, housing and property, can

be evidenced by the nature of the criminal offense in respect of which proceedings are being carried out, the importance of the testimony of the person who is threatened with danger, the characteristics of the person who poses a potential threat, and her connections. In our opinion, Art. 20 of the Law of Ukraine «On ensuring the safety of persons participating in criminal proceedings» does not contain a clear interpretation of the meaning of «real threat», which is too general, leads to unjustified refusals of authorized persons to appoint protection measures, or, conversely, the appointment of protection measures to anyone , who will apply with the relevant application. We believe that such a situation does not contribute to the achievement of the goal pursued by the legislator and the state in general.

Also, from the analysis of the content of the Law of Ukraine «On ensuring the safety of persons participating in criminal proceedings», it can be seen that the further procedure of individualization of the decision on the selection of specific protection measures is not regulated by this legal document. Instead, part 3 of Art. 22 of the specified law only specifies that the body entrusted with the implementation of security measures establishes a list of necessary measures and methods of their implementation, guided by the specific circumstances of the case and the need to eliminate the existing threat (ON ENSURING THE SECURITY OF PERSONS PARTICIPATING IN CRIMINAL PROCEEDINGS, LAW OF UKRAINE, 1993). At the same time, taking into account the content of the provisions of Recommendation Rec (2005) 9, the legislation of Ukraine must clearly define the criteria for the application of security measures, or a combination of the most effective security measures.

In general, in law enforcement practice, a distinction is made between short-term security measures, that is, those that are used in the event of the need to immediately eliminate a threat (personal physical protection, protection of housing and property, etc.), and long-term measures for long-term protection of a person (change of personal documents, change of appearance, change of location work and study, relocation to another place of residence, etc.).

However, unlike most leading European countries, the mechanisms of their application in Ukraine are identical, which requires a review of the legislator's approach to their regulation. It is logical that long-term security measures are much more expensive, the expediency of their application, type, nature, duration require an individual approach depending on the circumstances of the criminal proceeding, its importance, the person whose personal interests are threatened by danger, etc. In view of this, the application of a specific measure should be carefully planned by authorized subjects, the main role among which should belong to the prosecutor, who, according to Ukrainian legislation, carries out prosecutorial supervision in the form of procedural guidance at the stage of pre-trial investigation.

International standards for ensuring the safety of participants in criminal proceedings provide for the existence of appropriate procedures for internal control over the actions or inaction of the bodies that appoint and the bodies that provide security measures. In particular, the General Assembly of the Council of Europe in Resolution 1784 (2011) 1 calls on the competent authorities of the relevant states and territories: to create an independent body, separate from the police and investigative bodies, to supervise witness protection programs and the distribution of funds (clauses 16.1.1, 16.1.3) (RESOLUTION OF THE GENERAL ASSEMBLY OF THE COUNCIL OF EUROPE «WITNESS PROTECTION AS A CORNERSTONE OF JUSTICE AND RECONCILIATION IN THE BALKANS», 2011).

Institutionalization of witness protection programs can be done in different ways. In some countries, the choice in favor of the police is natural, since witness protection is considered primarily the task of police authorities. In other states, more importance is attached to the separation of the functions of witness protection and investigation, guided by considerations of impartiality and seeking to reduce the risk that the prospect of inclusion in the protection program itself will lead witnesses to give false testimony dictated by the desire to «please» or «help». In countries where the main task of witness protection is entrusted to the police, the responsibility for leading these programs rests with a senior official of the police department» (Recommended types of practice in the field of witness protection during proceedings in criminal cases involving organized crime, 2008, p. 46).

At the same time, «it is extremely important to ensure the isolation and autonomy (in organizational, administrative and operational terms) of the secret unit that is engaged in the implementation of the program from other police formations» (Recommended types of practice in the field of witness protection during proceedings in criminal cases involving organized crime, 2008, p. 46) This not only means ensuring independence from the investigative units of the police, but also serves as a guarantee of the integrity of the program. programs. Austria, Germany, Canada, Latvia, New Zealand, Norway, Sweden are among the countries in which witness protection is carried out under the supervision of the police. In other countries, such as Bulgaria, Colombia, the Netherlands, and the United States, witness protection programs are organizationally separate from the police and are subordinated to the Ministry of Justice, the Ministry of the Interior, the State Prosecutor's Office, or similar agencies (Recommended types of practice in the field of witness protection during proceedings in criminal cases involving organized crime, 2008, p. 46).

In some countries, where these programs are under the jurisdiction of the Ministry of Justice, they are implemented by an interagency body consisting of high-ranking representatives of law enforcement,

prosecutorial, judicial and government structures, and sometimes civil society. This body can make decisions on such issues as inclusion in the program or its termination. He can also supervise the implementation of the program and submit its budget to the government for approval. Such a procedure exists in Italy and Serbia (Recommended practices in the field of witness protection in criminal proceedings concerning organized crime, 2008, p. 46).

It should be noted that the resettlement and change of personal data of witnesses and their family members within the framework of the protection program is a difficult and expensive matter. For protected persons, especially for their family members, changing their lifestyle and complying with established rules can be associated with great difficulties and lead to depression, as well as to other psychological disorders. In addition, if even by chance the safety of any witness is threatened, he and his family members will have to be resettled and the process of adaptation and reintegration must begin again. Given the impact on the lives of those being protected, as well as the financial costs to the program, resettlement and identity change is a last resort suitable only for a small number of witnesses.

In general, the issue of departmental ownership of the program is not as important as the need to ensure compliance with existing government structures and functions and compliance with the principles of separation from investigative bodies, operational independence from the police and confidentiality of operations. Other important considerations are the ability to share sensitive information with other national authorities and protection programs in other countries. Finally, operatives must be able to carry and use firearms.

Currently, no internal impartial control procedures have been established in the system of ensuring the safety of persons participating in the criminal justice system of Ukraine. Only judicial control is envisaged. The implementation of internal control procedures for the actions or inaction of the bodies that appoint and the bodies that provide security measures should be regulated as part of the development and implementation, based on international standards and best global practices, of the program for the protection of participants in criminal proceedings.

Also, a significant shortcoming of national legislation in the field of security in criminal proceedings is that it does not contain provisions that provide for the interaction of bodies that make decisions on the application of security measures and bodies that carry out such measures among themselves and with other authorized entities. In this regard, in Art. 10 of the Model Law of the United Nations Office on Drugs and Crime on the Protection of Witnesses states that: 1) protected persons are included in the Program after signing a Memorandum of Understanding with the Protection Authority; 2) The memorandum of understanding is not a legally

binding contract and cannot be challenged in court; 3) The memorandum sets out the voluntary conditions that will be applied within the framework of the Program and contains at least the following information: conditions for inclusion in the Program; permitted general categories of protection measures set forth in Art. 9 (1); financial and other material assistance; the consent of the witness to comply with all the instructions of the defense body, including undergoing a medical examination and psychological examination; the consent of the protected person not to jeopardize the integrity of the Program and the safety of its participants; the consent of the protected person to provide information about all his legal and financial obligations, and about the method of fulfilling these obligations; the person's consent to provide the Protection Authority with information about all criminal and civil cases and bankruptcy cases in which he was and is a participant; the conditions that give the Protection Authority the right to exclude a person from the Program (MODEL LEGISLATIVE PROVISIONS FOR THE ESTABLISHMENT OF A WITNESS PROTECTION PROGRAM, 2013).

Conclusions

An important component of effective prevention of criminal offenses committed against participants in criminal proceedings is the creation of an effective system for ensuring their safety. The implementation of international legal standards for ensuring the safety of participants in criminal proceedings, reflected in general regulatory and legal documents, into domestic criminal legislation will prevent the improvement of the aforementioned interdisciplinary institute. The specified task can be achieved in the case of: introduction of specific programs for the protection of participants in criminal proceedings in order to take into account the conditions and features of national legislation; creation of a special unit for the protection of participants in criminal proceedings, separated from the investigative bodies.

International standards for ensuring the safety of participants in criminal proceedings - reflected in the provisions of international law and/or formulated in the decisions of international judicial institutions, requirements of an imperative and recommendatory nature (principles, norms, recommendations, etc.) regarding the scope of legal regulation of the activities of authorized persons of law enforcement bodies and bodies of justice in relation to ensuring safe implementation by participants in criminal proceedings of their rights and obligations in criminal proceedings.

It is necessary to adapt the Ukrainian legislative framework regarding the creation of a simplified mechanism for the selection and application

of short-term security measures and a thoroughly detailed mechanism for long-term measures according to the standards of the witness protection program. At the same time, special attention needs to be paid to: early detection of threats to the safety of participants in the criminal process and timely neutralization of relevant threats; determination of risk assessment criteria for the individualization of a person's needs in the application of security measures, or a combination of the most effective of them; approaches regarding the duration of security measures based on the interests of justice and the existence of threats to the person.

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The formation of civil legislation and the peculiarities of its application in Ukraine during the period of martial law

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Abstract

This study analyzes the peculiarities of the formation of modern civil legislation and peculiarities of its application in Ukraine, during the period of martial law. With the help of philosophical, general scientific and special legal methods and approaches, the legal nature of civil legal relations, the dynamics of their development and the mechanism of regulation under the conditions of a special legal regime were investigated. The expediency of showing a separate section in the Civil Code of Ukraine, which would contain temporary provisions providing legal guarantees for the period of war, for the implementation and protection of civil rights and interests of a person, additional obligations of the state to protect civil rights and interests, is based on social necessity. In the conclusions it is indicated that there is a scientific need to clarify the concept of updating the civil legislation of Ukraine with the key role of an anthropological approach, as a methodological basis for future recoding, and compliance with the principle of legality, proportionality of restrictions, proper definition of prerequisites for establishing restrictions on civil rights and the correct assessment of the degree of danger of occurrence of relevant circumstances.

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Keywords: civil legal relations; military regime; formation of civil legislation; limitation of rights; protection of rights and interests of a person.

La formación de la legislación civil y las peculiaridades de su aplicación en Ucrania durante el período de la ley marcial

Resumen

Este estudio analiza las peculiaridades de la formación de la legislación civil moderna y las singularidades de su aplicación en Ucrania, durante el período de la ley marcial. Con la ayuda de métodos y enfoques filosóficos, científicos generales y legales especiales, se investigó la naturaleza jurídica de las relaciones legales civiles, la dinámica de su desarrollo y el mecanismo de regulación bajo las condiciones de un régimen legal especial. La conveniencia de mostrar una sección separada en el Código Civil de Ucrania, que contendría disposiciones temporales que brindarían garantías legales para el período de guerra, para la implementación y protección de los derechos e intereses civiles de una persona, obligaciones adicionales del Estado para proteger derechos e intereses civiles, se fundamenta en la necesidad social. En las conclsuiones se indica que existe la necesidad científica de aclarar el concepto de actualización de la legislación civil de Ucrania con el papel clave de un enfoque antropológico, como base metodológica para la recodificación futura, y el cumplimiento del principio de legalidad, proporcionalidad de las restricciones, definición adecuada de los requisitos previos para establecer restricciones a los derechos civiles y la evaluación correcta del grado de peligro de ocurrencia de circunstancias relevantes.

Palabras clave: relaciones jurídico civiles; régimen militar; formación de la legislación civil; limitación de derechos; protección de los derechos e intereses de una persona.

Introduction

As you know, civil law is a branch of law that regulates property and private non-property relations, based on legal equality, free expression of will and property independence of participants in civil relations, which include physical and legal entities (Parasyuk, 2023, p. 210). The general concept of private and civil law includes: provisions of civil legislation;

legal status of a private person; civil legal relations; legal facts upon which these relations arise, change or terminate; conditions and procedure for realization of civil rights and obligations; interpretation and practice of application of norms of civil legislation.

Civil-law relations and their regulation under the conditions of martial law declared and operating in connection with the military aggression of the Russian Federation should be included among the peculiarities of the application of civil law norms. Temporary displacement of the population from the occupied territories, departure abroad, created new requirements for the mechanism of legal regulation of civil-law relations. The prerequisite for solving this problem is the determination of the connection between civil relations and civil law, as a tool for their regulation, under the conditions of martial law in Ukraine (Parasyuk, 2023, p. 210).

According to the provisions of Art. 3 of the Decree of the President of Ukraine of February 24, 2022 No. 64/2022 «On the introduction of martial law in Ukraine», approved by the Law of Ukraine of February 24, 2022 No. 2102-IX, in connection with the introduction of martial law in Ukraine temporarily, for the period of validity of the relevant regime, the constitutional rights and freedoms of a person and a citizen, provided for in Articles 30-34, 38, 39, 41-44, 53 of the Constitution of Ukraine, may be limited, as well as temporary restrictions on the rights and legal interests of legal entities may be introduced within the limits and to the extent necessary to ensure the possibility of introducing and carrying out measures of the legal regime of martial law, which are provided for in the first part of Article 8 of the Law of Ukraine «On the Legal Regime of Martial Law» (ON THE IMPLEMENTATION OF MARTIAL LAW IN UKRAINE. LAW OF UKRAINE, 2022).

Limiting the rights of individuals is a forced measure to support the country's defense capability regime and ensure the functioning of the national economy. The restrictions stipulated by the special military legislation concern both the clear functioning of civilian circulation and certain types of activities, in particular, such as public access to certain state registers, certain types of business activities, notarization of legal facts, etc. Under such conditions, in the period of martial law, the question of preserving the normal dynamics of civil legal relations is of particular importance in the context of calls to support entrepreneurial activity and «normally take care of children, play sports, restore normal habits, a normal way of life» (Mernyk and Radchenko, 2023, p. 52), implementation of civil rights and protection of civil interests of private individuals.

The majority of modern scientists and practitioners note the tendency to simplify the procedures for the realization of certain civil rights, and the introduction of changes in the legislative regulation of certain civil legal relations in the existing difficult conditions is characterized as a correct

and expedient decision that corresponds to the principles of a democratic society (Martial law and labor relations: new legislative regulation, 2023). The above, however, does not negate the need to harmonize public and private interests, as an integral task of civil law regulation.

1. Methodology of the study

The methodological basis of the scientific article is philosophical, general scientific and special legal methods and approaches. A dialectical approach is used to study the legal nature of civil legal relations, the dynamics of their development in the conditions of a special legal regime. From the standpoint of the anthropological approach, the role of man as the highest value and active participant in civil legal relations is substantiated. The existential approach made it possible to highlight the personal and spiritual dimension of private law. The use of a philosophical-communicative approach made it possible to define civil-legal relations as a rationally ordered discourse.

The axiological approach made it possible to reveal the humanistic content of civil law and its principles. The hermeneutic method is applied to the interpretation of a number of ideas, provisions, concepts and categories, such as «principles of law», «martial law», «private law», «legal security», «personal non-property rights», «right to entrepreneurial activity», « requisition» etc. General scientific methods of logical modeling, system analysis, systemic structural method and others were also used, thanks to which a scientific analysis of civil legal relations and the peculiarities of their implementation in the conditions of martial law was carried out; special legal methods, in particular the formal-dogmatic and integrative-legal approach, made it possible to determine ways of improving the provisions of civil legislation, bringing it into line with the requirements of international legal standards, as well as to investigate national judicial practice in order to identify individual shortcomings of national legislation and its practice application.

2. Analysis of recent research

The issue of civil-law legal relations, observance of the rights and legitimate interests of their participants was the subject of research by many civilists of the past and present, whose writings emphasized the conformity of legal norms to the principles of law as a prerequisite for the implementation of the rule of law in a democratic legal society, ensuring the effectiveness of law as a social regulator. At the same time, in the conditions of martial law introduced in Ukraine, the harmonization of public and private interests comes to the fore as an integral task of civil law regulation.

That is why the purpose of the publication is to develop mechanisms for achieving a compromise of public and private interests as a basis for the formation of civil legislation during the period of martial law.

3. Results and discussion

At the beginning of the study, we will outline some features of the mechanism of civil law regulation of civil relations, taking into account that the full-scale armed aggression of Russia has become a serious challenge to the entire system of regulation of social relations. After all, it is obvious that the system of regulation of personal non-property and property relations, which is based on legal equality, free expression of will, property independence of their participants (part 1 of article 1 of the Civil Code of Ukraine) (CIVIL CODE OF UKRAINE, 2003), the essence of which consists in ensuring everyday life of a person.

The civil law of Ukraine, which is a manifestation of private law at the level of the national legal system (Rabinovych, 2004, p. 3), determines the status of a private person, the grounds for acquiring and the procedure for the realization of civil rights and obligations by such a person, the principles of protection of his rights and interests. The above requires the adjustment of the general provisions of the concept of the mechanism of legal regulation, taking into account the division of law into private and public.

It should be emphasized that, when the provisions of the general theory of rights are fully suitable for application in the public sphere under the established normativist approach, such an approach cannot be recognized as justified in the field of private law, since private law cannot begin with normative acts, especially when it comes to legislative acts . It is obvious that the law-making process must be preceded by an awareness of the essence of private law and an understanding of how it can be implemented.

At the same time, it should be taken into account that the general trend of the development of the legal system also applies to the scope of civil law. In this regard, N. Onishchenko reasonably emphasizes the growth of the social orientation of the legal system as a means of forming and realizing the interests of legal entities by establishing certain goals, norms, and rules of behavior. At the same time, ensuring an optimal combination of social and legal principles of the development of society becomes especially important (Onishchenko, 2021, p. 11).

In the conditions of martial law, the mechanism of legal regulation in the field of civil relations is adjusted in accordance with the main goal of society - to overcome threats to the existence of society. With this in mind,

the key principles of the concept of the civil-law mechanism of regulation in the conditions of a special legal regime with the mandatory definition of the limits of legal influence and forecasting of expected results should be formed.

We will carry out a general description of the concept and properties of the concepts of natural and positive law in the implementation and protection of the rights and legitimate interests of a person in the conditions of martial law.

As some modern scientists rightly point out, natural law is, in fact, a source of private law, which determines the principles of the legal status of a person and his relationship with other persons - members of society, and the analysis of the limits, principles and expediency of legal regulation gives grounds for the assertion that they are different for the sphere of private and public law. In addition, legal regulation in one and another sphere should be carried out in a different way, using different forms of legal influence, giving legal meaning to various legal facts, etc. (Kharitonov et al., 2023, p. 34).

Taking into account the fact that the formation and adoption of acts of civil legislation in the conditions of martial law somewhat loses the features of private law, in our opinion, under such conditions, natural law cannot unconditionally be the basis of civil legislation, it can be a direct regulator of civil relations in temporarily occupied territories and subsequently to be taken into account when resolving relevant civil legal disputes that arose during the occupation of certain territories of Ukraine.

Characterizing subjective rights and the means of their legal protection, it is necessary, first of all, to determine their nature, that is, whether they are included in the content of the legal relationship of private or public law. Modern jurisprudence is characterized by the idea of the existence of rights and freedoms of citizens in two aspects: subjective rights are the possible behavior of a specific person, the implementation of which is legally guaranteed by the existence of a mechanism of legal regulation; objective rights – legal rights enshrined in legal acts, recognized by the state and ensured by the judiciary (Alekseev, 2010, p. 109). Legal support is the creation by legal means of reliable conditions for the implementation of something, the solution of some tasks that are of interest to society (the state) (Kharitonov et al., 2023, p. 38).

Despite the fact that Chapter One of the Civil Code of Ukraine is entitled «Civil Legislation of Ukraine», its content is not limited to the characteristics of only acts of civil legislation, and the term «civil legislation» serves to denote the totality of all formally expressed norms and rules regulating civil relations , and not only acts of civil legislation (Kharitonov and others, 2023, p. 43). After all, contracts (Article 6 of the Civil Code of Ukraine),

customs (Article 7 of the Civil Code of Ukraine) and other forms of civil law can compete with acts of civil legislation as a type of norms of behavior of participants in civil relations.

In connection with Ukraine's European integration aspirations and the resulting need to adapt Ukrainian legislation to European private law, according to the Resolution of the Cabinet of Ministers of Ukraine «On the formation of a working group on the recodification (updating) of the civil legislation of Ukraine» dated July 17, 2019 No. 650, almost three a year ago, preparations for the implementation of this ambitious project began. The course of the mentioned process was slowed down by the coronavirus pandemic, but still an official concept of updating (recodification) of civil legislation was developed (CONCEPT OF UPDATE OF CIVIL LEGISLATION OF UKRAINE, 2020), according to which work was carried out on projects to introduce changes to individual books of the Civil Code of Ukraine.

In the context of the influence of full-scale military aggression on the functioning of the legal system of Ukraine and the determination of directions for the improvement of civil legislation, it is appropriate to clarify the concept of updating civil legislation. Under such urgent circumstances, the key role should be played by the anthropological approach, the methodological basis of the future recodification.

Its special importance is explained by the fact that the civil rights and interests of a private person in conditions of war, in particular hostilities, occupation, forced displacement from places of permanent residence, etc., are constantly negatively affected. At the same time, the protection of civil rights and interests is significantly complicated by the limited possibilities of applying for jurisdictional protection or the absence of such a possibility at all.

For this purpose, we see the expediency of defining in book II of the Civil Code of Ukraine «A person as a private person» the section «Implementation of civil rights and fulfillment of duties of a person in emergency conditions (terrorism, epidemics, armed conflicts, etc.)», which would contain provisions that would provided legal guarantees for the realization and protection of civil rights and interests of a person, as well as additional obligations of the state to protect such rights and interests.

In order to balance the interests of a private individual with the interests of society and the state, and not with the situational private interests of a single powerful entity, it is extremely important to observe the principles of public law (Omelchuk, 2023, p. 19). In this case, attention should be focused primarily on those factors arising from the content of civil rights. In particular, the legal equality of civil law subjects also presupposes the equality of subjects in the respective limitations of such rights, and law enforcement subjects cannot establish preferences in the scope of powers

or methods of realization of individual civil rights or protection of civil interests. Despite this, in order to support the national economy, the current legislation establishes the priority of the employer's interests in labor relations, which consists in additional rights to change labor contracts and dismiss employees (Cherednichenko, 2022).

One of the important factors in achieving a compromise between the employee and the employer is compliance with the temporal limits of the established restrictions on civil rights and the adequate consequential burden of the cancellation of such restrictions. In this case, we should talk about the «aspiration» to restore the right, compensation and encouragement of the right holder. In particular, the right of ownership in the event of its restriction has the ability to «self-restore.» Other civil rights defined by civil legislation have a similar quality.

In the conditions of special legal regimes, the practical and procedural issues of the application of requisition are actualized (Part 2 of Article 353 of the Civil Code of Ukraine) (CIVIL CODE OF UKRAINE, 2003). In clause 1 of Art. 1 of the Law of Ukraine «On Transfer, Compulsory Expropriation or Expropriation of Property in the Conditions of the Legal Regime of Martial Law or State of Emergency» defines that requisition (compulsory expropriation of property) is the deprivation of the owner of the right of ownership of individually determined property that is in private or communal ownership and that is transferred into the property of the state for use under the conditions of the legal regime of martial law or state of emergency, subject to the previous or subsequent full reimbursement of its value (ON THE TRANSFER, FORCED ALIENATION OR EXTRACTION OF PROPERTY UNDER THE CONDITIONS OF THE LEGAL REGIME OF MARTIAL OR STATE OF EMERGENCY. LAW OF UKRAINE, 2012).

According to the generally accepted approach, requisition is not alienation of property, since it is done without the will of the owner (Sagaidak, 2022), and its characteristic feature as a way to terminate the right of private property is payment. In Art. 12 of the Law of Ukraine «On the transfer, forced alienation or seizure of property under the legal regime of war or state of emergency» states that the owner of property that was forcibly alienated can demand in exchange for providing him with other property, if possible for the value (ON TRANSFER, FORCED ALIENATION OR SEIZURE OF PROPERTY UNDER THE LEGAL REGIME OF MARTIAL OR STATE OF EMERGENCY. LAW OF UKRAINE, 2012).

Similarly, the issue of returning property as a legal consequence of the termination of emergency circumstances must be resolved (ON THE LEGAL REGIME OF MARTIAL STATE. LAW OF UKRAINE, 2015). The right to demand the return of requisitioned property is conditional on the person having the status of «former» owner. The specified status is accompanied by such conditions as termination of extraordinary circumstances;

preservation of property; statement by the owner of a claim for its return to the body that carried out its requisition or to which the relevant property was transferred; establishment of the possibility of return lead to the restoration of the civil right of a person to the extent that it existed before its forced termination.

At the same time, the legal consequence of the return of the thing is the return by the former owner of the amount of money or the thing that was received as payment minus a reasonable fee for the use of this property.

The issue of restoration of other civil rights requires special attention. In particular, the right to engage in entrepreneurial activity, which was significantly restricted under martial law. After all, the conduct of certain types of business activity became impossible during the curfew or during the period of the «Air Alarm» signal.

The freedom of entrepreneurial activity consists in the freedom to dispose of one's abilities to work, in the freedom to choose a type of activity or profession, freedom from unfair competition and monopolistic activity, as well as the general freedom to do everything that is not prohibited by law (Kharitonov and Startsev, 2015, p. 226). The forced ban on the sale of alcohol in the conditions of martial law led to losses for representatives of the corresponding type of business. At the same time, state bodies and local self-government bodies did not provide for appropriate compensation, which led to the emergence of a shadow market for the sale of alcoholic beverages.

As for the proportionality of restrictions to the circumstances that lead to their introduction, here, first of all, it is worth pointing out the identification of circumstances that are defined by law as prerequisites for the establishment of restrictions on civil rights, and the correct assessment of the degree of danger or risk of the occurrence of the relevant circumstances. In particular, in order to prevent threats to the life and health of judges and participants in the court process during martial law, access to the Unified State Register of Court Decisions and the «Status of Cases» service was temporarily suspended. It was the threat of negative consequences that led to the limitation of the informational rights of the participants in the civil process.

Taking into account the fact that restrictions have a public-legal essence and the decisions on their introduction are within the procedural limits of the branches of public law, it is extremely important to observe the principles of public law when implementing them. In this case, we can talk not only about the expediency of restrictions introduced on the territory of the state or in a separate region, but also about observing the procedural limits of introducing restrictions on civil rights, as well as about observing the general principles of public law, such as: objectivity; the priority of

human and citizen rights and freedoms; compliance of legislation with international agreements; ensuring legal responsibility for violations of legal norms; minimization of public administration interference in a person's personal life and others.

Conclusions

The mechanism of civil-law regulation of social relations in the conditions of a military conflict requires a significant increase in efficiency, in particular, adequate regulatory support. Despite the fairly prompt reaction of the authorities of Ukraine to today's challenges by adopting a number of laws designed to regulate social relations in the conditions of hostilities, temporary occupation and de-occupation of part of the territory, aimed at protecting property and non-property rights of the state and an individual, etc., it is necessary to supplement Book II of the Civil Code of Ukraine «A person as a private person» by the section «Implementation of civil rights and fulfillment of the duties of a person in emergency conditions (terrorism, epidemics, armed conflicts, etc.)», which would contain temporary provisions that would provide for the period of war legal guarantees for the implementation and protection of civilians rights and interests of a person, additional obligations of the state to protect civil rights and interests.

The nationwide tendency to simplify the procedures for the realization of certain civil rights, as well as the introduction of changes in the legislative regulation of certain civil legal relations under extraordinary circumstances (priority of the interests of the employer in labor relations, requisition, and others) is an urgent and, in the vast majority, correct decision, which corresponds to the principles of democratic society. At the same time, it is expedient to clarify the concept of updating the civil legislation of Ukraine with the key role of the anthropological approach as the methodological basis of the future recodification.

This is caused by the fact that the civil rights and interests of a private person during occupation, hostilities, forced displacement from places of permanent residence, etc., are constantly negatively affected. This approach to the assessment of regulatory changes is aimed at harmonizing public and private interests, which is an integral task of state civil law regulation. At the same time, it is important to observe the principle of legality, proportionality of restrictions, adequate definition of the prerequisites for establishing restrictions on civil rights, the choice of the type of restriction and the range of subjects of civil law to whom it applies, the correct assessment of the degree of danger or the risk of the occurrence of relevant circumstances in the case of relevant restrictions.

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Guarantees for the exercise of the constitutional right of access to justice

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Abstract

Through the dialectical method and the study of the doctrine, the research focuses on the theoretical and practical analysis of such a multifaceted legal category as access to justice. The author's definition of the essence and content of the constitutional guarantee of the right of access to justice is presented. Modern issues of ensuring access to justice in Ukraine are highlighted. The description of typical forms of realization of the right of access to justice such as e-justice; constitutional complaint and right to free legal aid is given. Factors hindering the implementation and protection of the right of access to justice have been identified: instability of the legal system; deficiencies in the judicial practice of law enforcement; shortage of judicial personnel and others. In the conclusions of the case, it highlights the priority of alternative ways of guaranteeing access to justice such as mediation, restorative justice and arbitration tribunals. Finally, the main advantages of the specified interdisciplinary legal institute are identified.

Keywords: access to justice; right to judicial guarantees; martial law; electronic justice; constitutional complaint.

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Garantías para el ejercicio del derecho constitucional de acceso a la justicia

Resumen

Mediante el método dialéctico y el estudio de la doctrina, la investigación se centra en el análisis teórico y práctico de una categoría jurídica tan multifacética, como el acceso a la justicia. Se presenta la definición del autor sobre la esencia y contenido de la garantía constitucional del derecho de acceso a la justicia. Destacan los temas modernos de garantizar el acceso a la justicia en Ucrania. Se da la descripción de formas típicas de realización del derecho de acceso a la justicia como la justicia electrónica; denuncia constitucional y derecho a asistencia jurídica gratuita. Se han identificado factores que obstaculizan la implementación y protección del derecho de acceso a la justicia: inestabilidad del sistema legal; deficiencias en la práctica judicial de aplicación de la ley; escasez de personal judicial y otros. En las conclusiones del caso, destaca la prioridad de formas alternativas de garantizar el acceso a la justicia como la mediación, la justicia restaurativa y los tribunales de arbitraje. Finalmente, se determinan las principales ventajas del instituto jurídico interdisciplinario especificado.

Palabras clave: acceso a la justicia; derecho a las garantías judiciales; ley marcial; justicia electrónica; denuncia constitucional.

Introduction

The state and level of ensuring human rights is one of the biggest problems of modern society, which has complex manifestations of a domestic and international nature. It is the availability of justice that prevents the violation of human rights and at the same time is an effective means of their restoration, creates real conditions for the full realization of rights and freedoms. The judicial procedure is the most effective and civilized guarantee of the protection of the rights and freedoms of a person and a citizen (Kozakevych, 2021, p. 14).

The practical development of the ideas of access to justice took place primarily thanks to the practice of the European Court of Human Rights, which in its decisions defines the following basic elements of the right to access to justice: the right to actual access to the court; the right to a fair trial and timely resolution of disputes; the right to adequate compensation; the right to apply the principles of effectiveness and efficiency in the administration of justice.

Political, economic, social, psychological, and technical factors significantly affect the mechanism of implementation of the right to access

to justice. So, for example, under martial law, access to justice mostly depends on the level of digitalization of the state mechanism, as well as the level of digital literacy of the population, the availability of technical means (uninterrupted and reliable Internet connection, availability of a smartphone, etc.).

Public trust in the court plays an important role in ensuring a person's right to access to justice - a complex phenomenon, the formation of which is influenced by various factors, such as: the activity of the courts; assessment of their availability; convenience of court premises, reforms of the judicial system, professionalism of judges, evaluation of the fairness of court decisions, communication with citizens, citizens' experience related to the court, and stereotypes about it, and many others.

The level of trust and respect for the court can be increased by reforming the judicial system and improving the work of the court. In addition, as O. Kozakevych rightly points out, the evolutionary interpretation of the international standard of access to justice is that under modern conditions it is interpreted not only as access to courts of the traditional type, but also as the availability of alternative methods of dispute resolution (Kozakevych, 2021, p. 38).

In order to increase the level of legal protection, the state creates conditions for the resolution of legal disputes, using alternative and pre-trial procedures. Thus, in 2016, a reform was carried out in the area of justice in Ukraine. For the first time, at the level of the Constitution of Ukraine, the provision that «mandatory pre-trial dispute settlement procedure may be defined by law» (Part 3, Article 124) (CONSTITUTION OF UKRAINE, 1996). An important task should be to convey information to the society about alternative conflict resolution procedures and to demonstrate successful experience of its application. These strategies and their impact on the implementation and protection of the right to access to justice are of interest among academics and practitioners and will be considered in more detail in the specified scientific article.

1. Methodology of the study

The methodological basis of the scientific article is a complex approach, which involves the use of general scientific and special legal methods of learning access to justice in legal doctrine, international law, national legislation and legal practice.

The dialectical approach made it possible to determine the peculiarities and conditionality of ensuring the constitutional principle of access to justice and to identify the connections of ensuring access to justice with

other principles and legal phenomena. A key role in understanding access to justice and the forms of its provision was played by recourse to the methods of branch legal sciences. The formal-legal (dogmatic) method is used to learn the specific content of the right to access to justice and its meaning.

With the help of the comparative legal method, a variety of forms of realization of the right to access to justice was revealed. The method of theoretical generalization made it possible to single out scientific ideas about the content of the right to access to justice available in the legal literature. The descriptive method made it possible to formulate conclusions regarding the features of ensuring access to justice, in particular, in the conditions of such a special legal regime as martial law.

The use of the specified methods provided a comprehensive analysis of various forms of implementation of the right to access to justice and alternative means of ensuring such access.

2. Analysis of recent research

Access to justice is one of the fundamental principles of law, a fundamental guarantee of human rights and freedoms, as well as a generally recognized international standard for the administration of justice. That is why the topic of access to justice is the subject of many scientific studies. But despite the presence of a significant number of scientific works on this topic, the issue of access to justice in the context of the processes of democratization, European integration and globalization, the development of information and communication technologies, which is characteristic of a modern democratic society, remains insufficiently researched. The majority of scientific research is branch-based or fragmentary in nature.

However, in the national legislation, gaps and other technical and legal shortcomings of the legal system, as well as the practice of applying the relevant provisions significantly affect the availability of justice, limiting access to the court in one way or another. The specified circumstances can significantly affect the movement of the entire process, prevent the achievement of its goals. Therefore, in today's conditions, there is a need for a scientific theoretical generalization of access to justice in modern society, a search for promising and effective forms of its implementation and provision.

The purpose of the article is a scientific analysis of the implementation of the constitutional right to a fair trial in Ukraine, the determination of its legal nature and the normative consolidation of the right in international legal and national normative acts, the study of the positive experience of its application in today's conditions, the precedent practice of the European

Court of Human Rights in order to solve the main problems of practical enforcement of the said right in the national judiciary in the conditions of martial law in Ukraine.

3. Results and discussion

3.1. Characteristics of individual forms of realization of the right to access to justice

In the most general sense, access to justice is the ability of a person to freely and unimpededly initiate the procedural activities of the court or enter an already started process and participate in it to ensure effective protection and restoration of their violated rights, as well as to achieve justice (Kuchynska, Shchygol, 2019, p. 22).

According to Art. 7 of the Criminal Procedure Code of Ukraine (hereinafter referred to as the Criminal Procedure Code of Ukraine), access to justice is a general principle of criminal proceedings. At the same time, access to justice can also be considered in other meanings: as a right of participants in criminal proceedings enshrined in the Code of Criminal Procedure of Ukraine and other regulatory legal acts; as a special, unique legal construction (sui generis); as a criminal procedural guarantee (CRIMINAL PROCEDURAL CODE OF UKRAINE, 2012); a system of appropriate procedural means that enables the participants in the process to know about their rights to actively participate in the case, to use these rights for its fair resolution (Shibiko, 2009, p. 168-169).

We believe that considering this category in only one of the proposed meanings is inappropriate, as it may lead to a narrowing of the content of access to justice and will not allow us to properly understand its essence and meaning. Access to justice is a complex and multifaceted legal category that can be considered simultaneously in several meanings: as a principle of justice, the right of participants in justice, a special legal construction, a constitutional guarantee, a certain procedural regime, etc.

The right of access to court must not only exist, but also be practical and effective. The mere existence of a right in access law is not sufficient. For example, it can be violated by the following factors: the high cost of the proceedings in view of the financial capabilities of the person, for example, an excessive court fee, although in general a requirement for a court fee; lack of legal assistance; the existence of procedural obstacles that prevent or reduce the possibility of going to court (Court practice. The right to access to court, 2022). The COVID-19 pandemic, and later the war, made adjustments to the activities of the judicial branch of government, forcing the courts to ensure the protection of human rights even during war.

In such conditions, the application of modern technologies in the electronic justice system should be maximally aimed at facilitating the work of both judges and court apparatuses, as well as citizens, information users in order to reduce court costs, optimize the time spent on sending documents and the direct appearance of participants in the court process. Electronic justice should ensure: opening of proceedings using electronic means; implementation of further procedural actions within the proceedings in the environment of electronic document circulation; obtaining information about the progress of the case by accessing the court information system; receiving information about the results of proceedings in electronic form (RECOMMENDATION REC (2001) 3).

Thus, the development of electronic justice contributes to the expansion of opportunities with the use of the latest technologies, provides the opportunity to perform all procedural actions through electronic means with appropriate identification and security mechanisms, which will create appropriate conditions for the approximation of the Ukrainian judiciary to international standards and speed up document circulation, ensure the openness and transparency of judicial proceedings bodies The effectiveness of the work of the electronic court, which involves the execution of certain procedural actions by the court and the participants of the process with the help of information and telecommunication technologies, depends on compliance with certain conditions: at the legislative level, a clear procedure for applying to the court must be developed and established; the registration procedure should be clear and accessible, and the information should be properly protected; the level of technology must meet international standards and ensure efficient and productive operation of the system.

An important role in ensuring access to court belongs to a person's right to professional legal assistance. The introduction of the institution of free legal aid in accordance with the standards of the Council of Europe and the practice of the European Court of Human Rights is considered by the Parliamentary Assembly of the Council of Europe as an important tool for improving access to justice (Gets, 2011, p. 24). Therefore, the regulatory framework for providing free legal aid is constantly being improved.

The system of free legal aid was created to fulfill Ukraine's obligations to the Council of Europe and contributes to Ukraine's observance of human rights and fundamental freedoms defined by international conventions, including the right to protection, the right to legal aid, the right to appear in court immediately, the prohibition of torture or other inhuman or degrading treatment that has proven to be effective.

Ukraine's legal regulation of the legal aid institute is carried out taking into account European legal doctrines. Thus, the introduction of mechanisms for effective access to justice for the poorest sections of the population, proposed by Recommendations No. R (93) 1 and No. R (78) 8 of the Council

of Ministers of Ukraine, is of great importance for the development of the institution of free legal aid. The Committee of Ministers recommends that the governments of participating states promote the access of the poorest sections of the population to the law («the right to protection by law»), to extrajudicial methods of conflict resolution and access to courts (RESOLUTION (78) 8; RECOMMENDATION No. R (93)).

In 2021, with the support of the UN Program for Reconstruction and Peacebuilding, the free legal aid system launched the Client Cabinet service in test mode, which aims to unify information about services and facilitate access to this information for all users. The advantages of the Client's Office include: the ability to send an online request for consultations and clarification on legal issues; the opportunity to send photos of documents and receive a response prepared by employees of the free legal aid system; availability of the history of all requests and responses to them in one place; the opportunity to write a review about the level of services received; a simple and convenient service interface (The personal account of the client of the system of free legal assistance started working in test mode, 2021).

Positive features include a reduction in the number of paper documents, digitalization, the possibility of obtaining legal assistance by phone, e-mail, in social network messengers, smartphone applications, and the client's electronic offices. This is an opportunity to bring the protection of the rights of the most vulnerable groups to a new level with the help of professional lawyers.

Also worthy of attention in the context of the study of modern means of access to justice is the institution of a constitutional complaint, which provides an opportunity for individual access to constitutional justice, and therefore to full, comprehensive, large-scale, direct realization of the right of a natural or legal person to judicial protection of their rights, freedoms and legitimate interests (Kolodiy, 2016, p. 54). This means of protection of rights and freedoms is more difficult for citizens to use than judicial protection. Its application requires improvement of the complaint submission procedure and legal clarification work on the part of lawyers.

The conditions for admissibility of constitutional complaints in European countries include: use of all other legal options for protection of violated rights and freedoms protected by the Constitution; compliance with established application deadlines; a requirement for legal representation, the purpose of which is to provide legal assistance when filing a constitutional complaint and representation in court; payment of state duty for its submission; requirement of fair use of one's right; requirements for the form of a constitutional complaint (Gultay, 2021, p. 26).

The positive features of the introduction of the institution of individual constitutional complaint in Ukraine include: the possibility of legal protection

of human rights against illegal and unjust decisions of judges; indirect protection against arbitrary intervention of state bodies; abolition of legal norms that contradict and violate human rights; formation of legal culture and legal awareness of society; formation of ideas about the possibilities of legal protection; the need to take into account national characteristics and traditions; the possibility of analyzing the law enforcement practice of the Constitutional Court of Ukraine and further influencing it through its decisions.

In our opinion, in order to achieve the quality of access to justice, it is important to create an effective system of alternative conflict resolution both within the framework of official court proceedings and in conjunction with it, which contributes to the development of civil society institutions and the protection of human rights. Alternative resolution of cases is an interdisciplinary institution, as it is on the border of different branches of law.

Alternative resolution of cases is an interdisciplinary legal institution that provides for the legal possibility of choosing between court proceedings and other non-state procedures for resolving disputes or conflicts based on voluntary agreement by the parties of the procedural order and establishing the corresponding rights and obligations of the conflicting parties.

First of all, we consider it important to clarify the essence of restorative justice, which consists in the reconciliation of the offender and the victim without the intervention of competent state authorities, its comprehensive implementation in the legal system of Ukraine should play a positive role in ensuring the protection of human rights and legitimate interests. Within the framework of restorative justice, the interests of the individual (victim, offender), community and society are satisfied more fully than within the framework of punitive justice. The center of attention is the interests of the victim, the offender is encouraged to evaluate and understand his misconduct.

Recommendation CM/Rec (2018) 8 dated 03.10.2018 on restorative justice in criminal cases draws attention to the need to expand the opportunities for participation of interested parties, including the victim and the offender, other interested parties and the general public, in order to eliminate and compensate damage caused by the crime. And restorative justice is recognized as a method by which the needs and interests of these parties can be identified and met in a balanced, fair and collaborative way (RECOMMENDATION CM/REC(2018)8).

Thus, restorative justice is an innovative approach to responding to an offense and its consequences, a form of justice, the main purpose of which is to create conditions for the reconciliation of the victim and the offender with the help of a mediator, as well as to eliminate the consequences caused

by the offense. It provides equal attention to the needs and feelings of the victim and the offender, promotes more effective compensation for damage and reconciliation of the parties.

One of the most common forms of implementation of restorative justice is mediation, the procedure of which is significantly different from the traditional judicial form of protection of citizens' rights, in which the parties are considered as adversaries; the course of the process is determined by the procedural law, which, as a rule, takes place in public proceedings. In contrast to court proceedings, the participation of both parties to the dispute in the mediation process is voluntary, and the mediator is freely chosen by the parties; each party has the opportunity to withdraw from the process at any time.

It can be stated that the concept of integration of mediation into the judicial system has recently become increasingly relevant. The purpose of implementing mediation is to provide citizens with the opportunity to choose the most appropriate mechanism for settling a legal dispute. This will motivate citizens and contribute to increasing personal responsibility for resolving their disputes.

Another aspect of the need to consider mediation in the context of access to justice should be emphasized. The European integration vector of the legal policy of Ukraine, which provides for the approximation of national legislation to the law of the European Union, determines the appeal to the positions that determine the role of mediation in the justice system. The Directive of the European Parliament and the Council of the European Union «On certain aspects of mediation in civil and commercial matters» dated May 21, 2008 clearly states that alternative out-of-court procedures are aimed at ensuring better access to justice. «Ensuring better access to justice, which forms part of the European Union's policy aimed at establishing an area of freedom, security and justice, should include access to both judicial and extrajudicial dispute resolution methods» (DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE EU COUNCIL «ON CERTAIN ASPECTS OF MEDIATION IN CIVIL AND COMMERCIAL CASES», 2008).

Therefore, mediation is an organic addition to the judicial system and is designed to contribute to the improvement of social relations, increasing public trust in the institution of law. Therefore, an important task is educational activity aimed at widely informing the parties to the conflict about the possibilities of mediation and its advantages, which should be entrusted primarily to judges.

Another independent, special jurisdictional form of conflict resolution, alternative in the field of private law, which is based on the principle of the autonomy of the will of the parties, should be considered arbitration of disputes (Kozakevych, 2021, p. 131).

The advantages of arbitration are that it frees the overburdened judicial system from a large number of legal cases, makes it possible to «reduce» the costs of litigation and is economical for the parties to the dispute. The advantages should also include: simplification of the court proceedings; short terms of the case review process; the possibility of choosing a judge; the possibility of filing a claim in an arbitration court, regardless of the location of the defendant; preservation of confidentiality, voluntary participation in the arbitration process; freedom of choice of arbitration rules; control of the parties by the review procedure and its result; the finality of the decision and the possibility of appealing it only on procedural grounds; immediate entry into force of the decision of the arbitration court and the possibility of its enforcement.

With the adoption of the law «On Arbitration Courts» (ON ARBITRATION COURTS: THE LAW OF UKRAINE, 2004), Ukraine took a step towards joining the states with a developed system of alternative methods of resolving legal conflicts and demonstrated to the whole world its real desire to democratize society and implement legal reform.

This important element of self-regulation of society in various spheres of life is an integral attribute of the effective functioning of the law and order mechanism, it indicates a high level of legal awareness of the population in a legal state, the presence of harmony in society and ensuring justice and democracy.

Despite the existence of a large number of arbitration courts in Ukraine, the number of considered cases is insignificant. To improve the situation, the following measures should be taken: ensuring an adequate level of informing citizens and professional lawyers about arbitration courts as an alternative way of resolving disputes, eliminating legislative shortcomings in the regulation of arbitration proceedings, taking into account modern trends.

3.2. Modern problems of ensuring access to justice in Ukraine

With the beginning of the full-scale military invasion of the aggressor country on the territory of Ukraine, the judicial system of Ukraine faced many organizational, material, technical and procedural problems that require immediate solutions to ensure the proper administration of justice in courts of all jurisdictions.

First of all, it is worth paying attention to the imperfection of the mechanisms of compliance with the right to consider the case within a reasonable time in Ukraine. In particular, the understaffing of courts and inadequate funding of the judicial system remain an unresolved problem.

In particular, the Law of Ukraine No. 193-IX dated 16.10.2019 «On Amendments to the Law of Ukraine «On the Judiciary and the Status of Judges» and some laws of Ukraine on the activities of judicial governance bodies» (ON AMENDMENTS TO THE LAW OF UKRAINE «ON THE JUDICIARY AND STATUS OF JUDGES»: LAW OF UKRAINE, 2019) the powers of all members of the High Qualification Commission of Judges of Ukraine were prematurely terminated. At the same time, in recent years, there has been a shortage of judges in the judicial system who are able to administer justice; as a result, the courts are overburdened, which often leads to violations of reasonable deadlines for the resolution of legal disputes.

The problem of financing the judicial system and providing it with material resources for the administration of justice remains unresolved. Thus, there have been more frequent cases of courts informing about the impossibility of sending court summonses, notices and other information from the court, including procedural documents by post due to underfunding of expenses related to sending postal correspondence; a significant part of court premises was destroyed or damaged by bombing. The level of financing of the wage fund for employees of the courts is inadequate (Lubinets, 2022).

According to the State Judicial Administration of Ukraine, one of the main negative factors that prevents the possibility of expanding and improving the functionality of the implemented subsystems of the Unified Judicial Information and Telecommunication System (hereinafter –UJITS), as well as developing new subsystems, is the lack of budget allocations. The stated circumstances prompted the State Judicial Administration of Ukraine to address the relevant public letter to the Cabinet of Ministers of Ukraine and the Ministry of Finance of Ukraine (ON THE PUBLIC APPEAL OF THE SUPREME COUNCIL OF JUSTICE TO THE CABINET OF MINISTERS OF UKRAINE AND THE MINISTRY OF FINANCE OF UKRAINE: DECISION OF THE SUPREME COUNCIL OF JUSTICE, 2023).

At the time of conducting this research, there was no reaction from the mentioned state bodies to the appeal. An important guarantee of legal, fair and effective justice is the objective and impartial distribution of cases between judges in compliance with the principles of priority and the same number of proceedings for each judge (even workload). At the same time, in the conditions of martial law, situations are possible: network equipment goes out of operation, interruptions with electricity and communication, the Internet, etc., which make access to UJITS impossible and thus can «paralyze» the work of the courts.

Thus, the head of the relevant court, whose powers include monitoring the effectiveness of the court apparatus, organizing the maintenance of court statistics in the court and information and analytical support for the activities of judges in order to improve the quality of the judiciary, etc.

(Articles 24, 29, 34, 39, 42 of the Law of Ukraine «On the Judiciary and the Status of Judges») should ensure the distribution of cases between judges in compliance with the relevant principles (ON THE JUDICIAL SYSTEM AND STATUS OF JUDGES: THE LAW OF UKRAINE, 2016).

Due to the lack of opportunity to administer justice in the temporarily occupied territories of Ukraine, as well as in damaged or completely destroyed courts, the territorial jurisdiction of court cases of 80 courts was changed during the year by order of the Chairman of the Supreme Court. As a result, court cases are reassigned to automatic distribution in the courts that have jurisdiction, and their proceedings are restarted. This negatively affected the observance of the right to a trial within a reasonable time, guaranteed by Article 6 of the Convention on the Protection of Human Rights and Fundamental Freedoms (Lubinets, 2022). The reason for these violations can be seen in the absence of a normative legal act, which would regulate the procedure for the transfer of court cases in the event of a change in the territorial jurisdiction of their consideration.

The state of war in the country also affected access to court decisions. In accordance with Part 2 of Art. 2 of the Law of Ukraine «On Access to Court Decisions» all court decisions are open and subject to publication in electronic form no later than the next day after their production and signing, except for decisions on seizure of property and temporary access to things and documents in criminal proceedings, which are subject to publication no earlier than the day of their application for execution. Limiting or delaying general access to electronic resources of the USSR for reasons other than those defined by the laws of Ukraine «On access to court decisions», «On state secrets» is not allowed (ON ACCESS TO COURT DECISIONS: LAW OF UKRAINE, 2005).

At the same time, from February 24 to June 20, 2022, full public access to the Unified State Register of Court Decisions was limited, as well as access to such website services as «Judiciary of Ukraine», «List of cases assigned for consideration», «State of consideration of cases», which contained information about the day, time, and place of the court hearing in the case. Cases of limiting general access to court decisions in the Unified State Register of Court Decisions still occur today.

It is necessary to pay attention to other organizational and legal problems of ensuring the right to access court decisions. In particular, the Law of Ukraine «On Access to Court Decisions» currently does not contain such grounds for restricting access to the Unified State Register of Court Decisions as threats of cyberattacks, prevention of threats to the life and health of judges and participants in the judicial process, the introduction on the entire territory of Ukraine or some of its parts of martial law or state of emergency.

In order to comply with the principle of legal certainty of the legislation, the Ministry of Justice was asked to consider the possibility of developing a draft law on supplementing the fourth part of Article 4 of the Law of Ukraine «On Access to Court Decisions» with a rule on the possibility of limiting the right to freely use the official web portal of the judiciary of Ukraine for the period of the legal regime of military or state of emergency (ON ACCESS TO COURT DECISIONS: THE LAW OF UKRAINE, 2005).

Also, the provisions of the Criminal Procedure Code of Ukraine do not provide for the possibility of conducting a court session in the mode of a video conference using its own technical means, as is normalized in civil, economic and administrative types of judicial proceedings. At the same time, the beginning of active military operations on the territory of Ukraine changed the view of the courts to the possibility of conducting criminal proceedings remotely using their own technical means in criminal proceedings.

In particular, the Supreme Court in the letter dated 03.03.2022 No. 2/0/2-22 «Regarding certain issues of conducting criminal proceedings under martial law» recommended that in cases where, due to objective circumstances, a participant in criminal proceedings cannot participate in a hearing in the mode of video conferencing using the technical means specified by the Code of Criminal Procedure of Ukraine; as an exception, it is possible to allow the participation of such a participant in the video conference mode using other means, while attention should be paid to explaining to such a participant his procedural rights and obligations (Regarding certain issues of conducting criminal proceedings under martial law. Letter of the Supreme Court , 2022).

Currently, we consider this approach understandable, because judges are faced with forced long breaks in court proceedings due to the presence of the accused, witnesses, experts in the temporarily occupied territories, the impossibility of questioning witnesses, experts due to the failure to establish their actual location, internal movement of persons, etc.

Conclusions

Access to justice is a multifaceted legal category that can be considered simultaneously in several meanings: as a principle of justice, the right of participants in justice, a special legal construction, a constitutional guarantee, a certain procedural regime, etc.

The right to access to justice as a constitutional guarantee is defined by the norms of substantive and procedural law, a separate human right, which consists in the possibility of unhindered use of judicial and

alternative procedures for the fair and effective protection of one's rights. It is the duty of the state to create appropriate conditions for the realization of every person's right of access to justice, which will be fair and legal, and the objectivity and independence of the court will be the main feature of the rule of law and the justice of the court.

The following typical forms of realization of the right to access to justice are distinguished: electronic justice (automatic distribution of cases; exchange of procedural documents in electronic form; electronic record keeping; implementation of judicial proceedings in the mode of video conference); constitutional complaint; the right to free legal aid.

Factors hindering the implementation and protection of the right to access to justice include: instability of the legal system (unstable and imperfect procedural legislation); shortcomings of law-enforcement court practice; the shortage of judicial personnel, due to the unfilled number of vacancies; complicated procedure for applying to the court, excessive regulation of issues related to requirements for the submission of evidence and claims; high cost of quality legal services; low level of legal culture.

The formation and development of alternative dispute resolution in modern conditions (mediation; restorative justice; arbitration courts) should become a priority direction for ensuring access to justice. The main advantages of the specified interdisciplinary legal institute are defined as: simplicity of procedures; saving time and money; the possibility of choosing an intermediary; confidentiality of dispute resolution, the ability of the parties to personally control the proceedings and its outcome. The introduction and active use of the institute of alternative means of dispute resolution in the national legal system will contribute to improving citizens' access to justice, reducing the burden on the courts, shortening the terms of consideration of cases, reducing court costs, effective resolution of legal disputes, improving the quality of court decisions and achieving reconciliation between the parties, increasing level of legal culture of society.

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Compliance with the principle of the rule of law in Ukraine when applying mediation

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Abstract

The article is devoted to the study of mediation as one of the ways of implementing the concept of restorative justice. It is determined a change of view on justice and consideration of the possibilities of the mediation method in the resolution of legal conflicts. In order to achieve this objective, a philosophical and scientific methodology was implemented. It emphasizes the importance of mediation, which consists in the effective resolution of the legal conflict of the parties, determines the need to study the prospects of further improvement of the specified procedure in Ukraine, taking into account the leading world practices. On the basis of the analysis of the provisions of the current legislation, it has been shown the expediency of making appropriate changes in the Law of Ukraine «On Mediation». It is concluded that for the development of mediation as a form of protection of the rights and legitimate interests of a person, it is necessary to make certain changes in the wording of the Law of Ukraine «On Mediation», in particular, to define normatively the provisions concerning the conformity of the mediation procedure with the principle of the rule of law.

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Cumplimiento del principio del estado de derecho en Ucrania al aplicar la mediación

Resumen

El artículo está dedicado al estudio de la mediación como una de las formas de implementar el concepto de justicia restaurativa. Se determina un cambio de visión sobre la justicia y la consideración de las posibilidades del método de mediación en la resolución de conflictos jurídicos. Para el logro de este objetivo se implementó una metodología filosófica y científica. Se enfatiza la importancia de la mediación, que consiste en la resolución efectiva del conflicto legal de las partes, se determina la necesidad de estudiar las perspectivas de una mayor mejora del procedimiento especificado en Ucrania, teniendo en cuenta las principales prácticas mundiales. Sobre la base del análisis de las disposiciones de la legislación actual, se ha demostrado la conveniencia de realizar los cambios apropiados en la Ley de Ucrania «Sobre la mediación». Se concluye que, para el desarrollo de la mediación como forma de protección de los derechos e intereses legítimos de una persona, es necesario introducir ciertos cambios en la redacción de la Ley de Ucrania «Sobre Mediación», en particular definir normativamente las disposiciones relativas a la conformidad del procedimiento de mediación con el principio del Estado de Derecho.

Palabras clave: mediación; forma de protección de derechos; justicia restaurativa; solución de controversias; acuerdo y mediador.

Introduction

Currently, in Ukraine, in addition to the judicial form of protection, an alternative settlement of disputes in the mediation process is provided. Thus, the Law of Ukraine «On Mediation» defines the legal principles and procedure for conducting mediation as an out-of-court procedure for conflict (dispute) settlement, the principles of mediation, the status of a mediator, requirements for his training and other issues related to this procedure (ON MEDIATION: THE LAW OF UKRAINE, 2021). The introduction of the mediation institute in Ukraine meaningfully connects the modern development of the legal system of Ukraine with the European

legal systems, values and priorities of the development of the modern civilized world.

However, it should be noted that the Constitution of Ukraine (Articles 55, 124) primarily provides for judicial protection of the rights and legitimate interests of individuals and legal entities (CONSTITUTION OF UKRAINE, 1996), without paying enough attention to alternative methods of dispute resolution, which by their nature are most appropriate archetype of the Ukrainian nation and is one of the forms and methods of protecting the rights and legitimate interests of an individual.

The principle of adversarial litigation at the stage of dispute settlement with the participation of a judge is replaced by cooperation, which gives the parties the opportunity to find a mutually acceptable solution. Dispute resolution through mediation is characterized as a «win-win situation» when both parties benefit (Volkovytska, 2018). Therefore, the importance of resolving the parties' disputes using the mediation procedure in protecting the rights, freedoms and legitimate interests of a person is obvious.

This form makes it possible to ensure high-quality, timely resolution of disputes with the lowest costs and confidentiality. At the same time, the experience of foreign countries with developed systems of alternative dispute resolution shows that the effectiveness of the application of such practice is effective only under the condition of adequate normative regulation and high legal culture of society, readiness of citizens for dialogue both among themselves and with the state.

Within the scope of our research, we consider it necessary to find out the following: whether such a method of resolving legal disputes as mediation, defined at the legislative level in Ukraine, corresponds to the principle of the rule of law; whether such disputes should be resolved solely on the basis of the rules of law; whether parties can resolve disputes based on their own understanding of what is right and fair, etc.

1. Methodology of the study

Methodology is a possible component of any scientific and cognitive activity (Klymchuk & Trekke, 2018, p. 95). Research methods are chosen based on the goals and tasks set in the article, taking into account its object and subject. The methodological basis of research is a system of principles, techniques and approaches, based on philosophical, general scientific and special scientific methods, which are means of scientific research to obtain objective and reliable results.

The principle of dialectical denial made it possible to critically take into account the previous experience of the introduction and functioning

of mediation in the national legal system. Comparative and comparative legal methods were used in the analysis of domestic and foreign legislation, scientific research on the implementation of mediation activities, as well as certain aspects of the organization and functioning of the specified interdisciplinary institute.

The combination of methods of analysis and synthesis led to a two-faceted study of the problems of compliance with the principle of the rule of law in Ukraine when using mediation. On the one hand, factual material was used, the generalization and synthesis of which made it possible to formulate new theoretical propositions and conclusions. On the other hand, approaches to this problem developed by domestic and foreign science were carefully analyzed. Methods of abstraction, generalization, functional, legal-technical, specifically legal, induction and deduction, systemic, formal-logical and other methods were implemented during the analysis of legislation and the practice of its application in mediation.

The methods of generalization, grouping, modeling, and forecasting are used in the preparation of conclusions for a scientific article. The use of all methods in a relationship ensured the complexity and comprehensiveness of the study of problematic issues of the application of mediation in Ukraine.

2. Analysis of recent research

Although the study of the genesis of the concept of the rule of law is not a direct task of this study, we note that our further conclusions and statements will be based on conceptual works on this issue, and therefore are important in the context of achieving the goal of scientific publication. It should also be noted that the problems of legal regulation as well as the peculiarities of the introduction of mediation procedures in Ukraine are the subject of research by representatives of various scientific schools and branches of law.

At the same time, we note a certain lack of scientific works regarding the modern legislative regulation of mediation, as well as the compliance with the principle of the supremacy of the law of application of this institution in conditions of martial law. In addition, the accumulated theoretical and practical experience of the formation of the institution of mediation in the judiciary in Ukraine demonstrates certain contradictions in the legal regulation of relations arising in the national legal system. We identified separate theoretical and applied problems: from the lack of sufficient theoretical foundations for the legal support of mediation in the judicial system of Ukraine to the lack of systematicity and insufficient efficiency of the relevant practices.

3. Results and discussion

The main driving force behind the development of alternative methods of resolving criminal disputes is the insufficient efficiency of the judicial system during the consideration of certain categories of cases, which may consist in the overloading of courts, the duration of court proceedings, unqualified consideration of cases, as well as other shortcomings inherent in the judicial system of a particular state (Volkotrub, 2015). Mediation is one of the most common forms of restorative justice implementation, which should be understood as any process that allows persons who have been harmed by criminal offenses and persons who are responsible for this harm, in the case of their voluntary consent, to actively participate in resolution of issues arising in connection with the commission of a criminal offense with the help of an impartial third party (mediator) (RECOMMENDATION CM/ REC (2018, 8).

One of the key issues regarding the introduction of the institution of mediation remains the provision of a fair resolution of a legal dispute based on the rule of law. Establishing the rule of law in society and ensuring everyone's right to a fair trial are the primary tasks of the modern state. The essence of the rule of law is that human rights and fundamental freedoms are the values that shape the content and direction of state activity. The state must create conditions for the proper implementation of the rule of law in all social relations. The Constitution of Ukraine declares the principle of the rule of law to be one of the fundamental principles of the constitutional system of the state. The principle of the rule of law is paramount and decisive for a state governed by the rule of law, because law is a manifestation of the highest justice and its dominance in society consists in the priority of human rights and freedoms (Mazaraki, 2017).

The interpretation of the Constitutional Court of Ukraine appears to be a balanced position that embodies a comprehensive approach to the definition of the concept of "rule of law": "rule of law is the rule of law in society. The rule of law requires the state to implement it in law-making and law-enforcement activities, in particular in laws, the content of which should be imbued primarily with the ideas of social justice, freedom, equality, etc." (Decision of the Constitutional Court of Ukraine in No. 15- RP /2004).

It must be stated that the rule of law is not properly ensured in Ukraine, which is manifested in the inefficiency of state power, a significant level of corruption, the lack of access to justice, an impartial and fair trial, violations of the basic rights and freedoms of a person and a citizen. Further development of justice in Ukraine should be aimed at establishing the rule of law by ensuring: access to justice; fair judicial procedure; independence, impartiality and professionalism of judges; legal certainty, uniformity of court practice and openness of court decisions; effectiveness of legal protection.

Adherence to and implementation of the above ideas allows us to assert the existence of certain advantages of alternative dispute resolution methods compared to court proceedings, namely: 1) improved access to justice in a state that supports alternative dispute resolution; 2) the speed of the resolution of the dispute, because the parties do not have to wait for the time allotted for the consideration of the case, the probability of artificially delaying the resolution of the dispute by one of the parties is minimized; 3) the selection by the parties of the procedure and the mediator (mediator, expert, arbitrator, etc.), which is of particular importance in disputes, the resolution of which requires special knowledge; 4) confidentiality, which is practically impossible at court hearings and when the court demands documents, etc.; 5) the finality of the decision, because the parties are unlikely to appeal the decision that they reached independently and voluntarily; 6) an opportunity for both parties to emerge victorious from the dispute in the absence of the defeated by adopting a mutually acceptable decision; 7) preservation of commercial and personal relations, which is complicated if the party is dissatisfied, but has to comply with the court decision (Mazaraki, 2017, p. 12).

Mediation (from the Latin mediation – mediation): private and confidential use of mediators to resolve a conflict situation. In law, mediation is a method of dispute resolution with the involvement of a mediator (mediator), who helps to analyze the conflict situation so that the interested parties can independently choose a solution that would satisfy the interests and needs of all conflict participants. Unlike a formal court process, during mediation, the parties reach an agreement independently (Kartashov, 2019, p. 12).

Regardless of the difference in approaches to defining the concept of mediation, all of them are permeated by its main characteristic features: mediation is a special type of negotiation; mandatory participation of a mediator; the mediator is not a representative of any of the parties; the mediator assists the parties in conducting negotiations and reaching a mutually acceptable solution; the mediator does not examine the evidence and does not establish the facts; the mediator does not force the parties to make a certain decision and does not provide advice on possible decision options; the mediator does not make a binding decision for the parties; the active role of the parties themselves in negotiations regarding the independent search for possible solutions (Bilyk et al., 2019, p. 32-33; Nestor, 2018).

Mediation parties have the right: by mutual agreement, to choose a mediator (mediators) and/or an entity that ensures mediation; determine the terms of the mediation agreement; by mutual agreement, involve other participants in the mediation; refuse the services of a mediator(s) and choose another mediator(s); refuse to participate in mediation at any time; in case

of non-performance or improper performance of the agreement based on the results of mediation, apply to the court, arbitration court, international commercial arbitration in accordance with the procedure established by law; involve an expert, translator and other persons determined by agreement of the mediation parties (ON MEDIATION: LAW OF UKRAINE, 2021).

The implementation of justice in Ukraine under martial law is complicated by a number of systemic problems, some of which have intensified, while others have arisen directly as a result of armed aggression. Mediation, as a non-jurisdictional method of dispute resolution, is free from these problems and allows the parties to choose the most effective and acceptable option for resolving the dispute. As D. Piddubny rightly points out, a broad interpretation of the right to access to justice and consolidation of the legal institution of mediation allows, on the one hand, to relieve the judicial system, and on the other hand, based on the interests of the parties, within a reasonable period of time to resolve the dispute and implement an agreement based on the results of the procedure, as a result of which a the goal of justice (Piddubny, 2022).

So, as a legal phenomenon, mediation in Ukraine is just emerging, and already at this stage it is necessary to clearly define its types, which will allow to achieve legal support for their effectiveness. It is about pre-trial and post-trial mediation. The main characteristic of private mediation is that this dispute resolution procedure is initiated by the parties themselves. That is, the parties participate in mediation on the basis of an agreement concluded by them. Judicial mediation, unlike the previous one, is always connected with the trial of the case, as well as with the court as an institution» (Polishchuk, 2016).

In our opinion, the procedural aspects of these types of mediation should have normatively defined differences. This is due, in particular, to the fact that the parties can reconcile, including through mediation, at any stage of the court process. If pre-trial mediation is implemented, the parties conclude an agreement based on the results of the mediation, the content of which is determined by Art. 21 of the Law of Ukraine «On Mediation». The results of pre-trial mediation are drawn up in the form of an «agreement based on the results of mediation», and the results of court mediation can be drawn up at the choice of the parties in the form of either an «agreement based on the results of mediation» of mediation (Article 1) (ON MEDIATION: LAW OF UKRAINE, 2021), or a settlement agreement.

It is legally defined that a mediator «can provide mediation services on a paid or free basis, for hire, through an entity that provides mediation, through an association of mediators or individually» (Part 2 of Article 11) (ON MEDIATION: LAW OF UKRAINE, 2021). The legislation also stipulates that each registered mediator must provide one free mediation service per year. Such services are also provided to people with insufficient

financial means, while mediators work as volunteers in social service centers for families, children and youth. As an incentive, a reduction in court fees for mediators has been introduced in this case. At the same time, in the case of paid mediation, it is suggested to explain to potential clients the financial advantage of such a service, since it involves a shorter time for resolving the case, control and certain influence on the part of the participants of the extrajudicial process, the absence of remuneration for lawyers, the filing of appeals and cassation complaints, etc. (Maan *et al.,* 2020).

The following measures are recommended to solve the identified problems of mediation in Ukraine: 1) identification of tools to encourage the parties to settle legal disputes through mediation; 2) mandatory informing of the parties about the peaceful resolution of the dispute, in particular, directly by judges at any stage of the court proceedings – from preliminary to final – with the establishment of a break for the parties to contact a mediator; 3) definition of categories of civil disputes where mediation is a priority method of resolution; 4) monitoring the effectiveness of mediation in family, land, inheritance, labor, and intellectual property matters (Maan et al., 2020, p. 18).

It is worth paying attention to the requirements for a mediator as a mediator in the resolution of legal disputes (conflicts). According to the Law of Ukraine «On Mediation» «a mediator is a specially trained neutral, independent, impartial natural person who conducts mediation and does not have the right to combine his role with the functions of other mediation participants, to provide recommendations to the parties regarding the decision in this case, to make decisions, to be a representative or defender of any party at the pre-trial stage, in court, arbitration or arbitration proceedings in a case where he is a mediator; has the right to protection against interference by public authorities, enterprises, organizations regardless of the forms of ownership and subordination, public associations, individuals; to provide the parties with consultations and recommendations regarding the procedure for carrying out the mediation procedure (Article 7) (ON MEDIATION: LAW OF UKRAINE, 2021).

From the analysis of the relevant legislation, it can be seen that such an important requirement as the competence of the mediator has been overlooked. The law does not set requirements for the mediator's level of education. It is only mandatory that «the basic training of mediators is carried out according to a program with a volume (duration) of at least 90 hours of training, including at least 45 hours of practical training» (ON MEDIATION: LAW OF UKRAINE, 2021). According to the correct remark of some scientists, this approach is wrong and needs to be revised. First of all, it should be assumed that the mediator, who undertakes to carry out the mediation procedure - reconciliation of the parties, must be competent in solving similar cases. After all, one of the basic requirements

for a mediator is his ability to competently resolve a dispute (conflict), and an indication of the profession of a mediator indicates that such a person has a certain educational level of training (for example, junior bachelor, bachelor, master). Also, mentioning the profession gives reason to say that the mediator must have professional competence in one or another field of economic activity in order to competently consider the case of the parties (Kostyuchenko et al., 2022, p. 52).

To confirm that the mediator's competence is a necessary requirement for him, we cite the provisions of Art. 3 of Directive 2008/52/EC of the European Parliament and of the Council of 21.05.2008 on certain aspects of mediation in civil and commercial cases, which defines that «mediator» means any third person who is asked to mediate effectively, impartially and competently manner, regardless of the name or profession of that third party in the Member State concerned and the manner in which that third party was appointed or requested to mediate (DIRECTIVE 2008/52/EC).

The listed problems do not exhaust the list of debatable issues of mediation. In particular, among the problems, scientists also mention the issues of remuneration of the mediator, the enforcement of the final agreement, the low budget of the procedure, and the selection of mediators (Kantor, 2019). In general, it is worth agreeing that the further improvement of the mechanisms for the use of mediation in Ukraine, as an institution of alternative ways of resolving legal disputes, will contribute to improving citizens' access to justice and reducing the burden on the courts, and therefore, will help to reduce the terms of consideration of cases and the percentage of contested decisions, reduce court costs, improve the quality of court decisions and to achieve reconciliation between the parties (Volkovytska, 2018).

Conclusions

Based on the results of the conducted research, we come to the following conclusions.

Alternative methods of resolving disputes within the scope of judicial proceedings expand the limits of the rule of law, because state coercion cannot be comprehensive, and compliance with the ideals and principles of the rule of law must be based on people's everyday actions and the procedure for resolving their disputes. Mediation, as one of the forms of restorative justice, is a new and progressive approach to the state's response to criminal manifestations in society and conflict resolution in legal disputes. The specified method of resolving disputes, reducing the burden on the state judicial system, is able, based on the fundamental principles of law, to effectively perform the functions of justice in disputes that must be

resolved exclusively in court, and is able to improve the state of ensuring the right to a fair trial.

For the development of mediation as a form of protection of the rights and legitimate interests of a person, it is necessary to make certain changes to the wording of the Law of Ukraine «On Mediation», in particular: normatively define provisions regarding the compliance of the mediation procedure with the principle of the rule of law; to detail the reconciliation procedure of the parties, as the main goal of resolving the conflict between them on mutually acceptable terms; determine the possibility of carrying out mediation purely by mediators who have a higher legal education and establish a competency-based approach to the training of mediators in the relevant categories of cases.

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Interpretation of tax law in cases involving commercial entities: Opportunities to exchange best practices in the area of corporate social responsibility regulation

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Abstract

The article aims to develop a correct understanding of the essence and implications of the basic principles and legal provisions governing tax matters, as well as to form an insight into their evolutionary transformations on the basis of the exchange of relevant best practices between Ukraine and other countries. Relying on methods of comparative review, as well as methods of systematic review and standard techniques of text analysis, the author covers theoretical and practical issues related to the balanced combination of literal and intentional interpretation of tax legislation provisions, in dubio pro tributario in the interpretation of tax laws and question of reasonable cause and good faith of taxpayers. It is noted, in particular, that common law countries and continental legal systems are united by a tendency towards a balanced combination of literal and purposive interpretation. It is emphasized in the conclusions that, along with the literal wording of tax law provisions, the purpose of their introduction and the general principles of tax law are taken into account. Moreover, in some countries, reference to the intention of the legislators is even allowed.

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Interpretación de la legislación fiscal en casos que involucran entidades comerciales: Oportunidades para intercambiar mejores prácticas en el aspecto de la regulación de la responsabilidad social de las empresas

Resumen

El artículo tiene como objetivo desarrollar una comprensión correcta de la esencia y las implicaciones de los principios básicos y las disposiciones legales que rigen los asuntos tributarios, además de formar una visión de sus transformaciones evolutivas sobre la base del intercambio de mejores prácticas relevantes entre Ucrania y otros países. Apoyándose en métodos de revisión comparativa, así como en métodos de revisión sistemática y técnicas estándar de análisis de texto, el autor cubre cuestiones teóricas y prácticas relacionadas con la combinación equilibrada de interpretación literal e intencional de las disposiciones de la legislación tributaria, *in dubio pro* tributario en la interpretación de las leyes tributarias y cuestión de causa razonable y buena fe de los contribuyentes. Se observa, en particular, que los países del *common law* y los sistemas jurídicos continentales están unidos por una tendencia hacia una combinación equilibrada de interpretación literal y deliberada. Destaca en las conclusiones que, junto con la redacción literal de las disposiciones de la legislación tributaria, se tienen en cuenta el propósito de su introducción y los principios generales de la legislación tributaria. Además, en algunos países, incluso se permite la referencia a la intención de los legisladores.

Palabras clave: jurisprudencia; derecho comparado; empresas; interpretación juridica; fiscalidad.

Introduction

Interpretation and application of taxation principles and provisions is often accompanied by complex law enforcement situations related to the peculiarities of tax administration, which results primarily from the complexity and high dynamics of changes of tax laws and regulations and its significant impact on the financial standing of enterprises.

In light of this, getting a correct understanding of essence and implications of core principles and legal provisions governing taxation matters, along with forming a vision of their evolutionary transformations in accordance with shifts in relevant economic relations, as well as the development of optimal ways of their application for determination of rights, duties and liabilities of taxpayers in real law enforcement situations – set a task for the scientific community to provide tax authorities and administrative courts with the best recommendations regarding the most progressive and consistent ways of interpretation of the provisions of tax law and regulations.

The global nature of tax legislation along with the absence of internationally unified reference mechanisms for tax regulation and administration lead to the fact that the countries of the world have accumulated diverse experience that they can use for mutual enrichment of the practice of interpretation and application of their national tax legislation.

1. Analysis of recent research and publications

A review of scientific sources shows that the world scientific community has made significant efforts to accumulate and systematize scientific knowledge on the best approaches to solving key issues of interpretation of tax laws and regulations. In particular, the fundamental publication 'Legal Interpretation of Tax Law' (Eds.: R. Krever, R. van Berderode), as well as research papers by certain scientists and practitioners, cited within this study, attract particular attention. However, these scientific developments need further comprehending and updating. Moreover, relevant Ukrainian experience, which can be useful for scientific discussions on the subject of practical interpretation of tax legislation provisions at the level of supreme courts and ways of further improvement of relevant theoretical knowledge, is insufficiently represented in international scientific publications. While covering these issues a particular set of methods of scientific is required. Among them are comparative review methods as well as systematic review methods and standard techniques of text analysis.

2. Results

2.1. Interpretation of Tax Principles and Rules: Literal and Purposive Approach

It is to be noted at the outset that the interpretation of law is the process of determining the meaning of a law, as well as its application to a particular set of facts. It is a fundamental part of the legal process, and its importance

lies in making sure that the law is applied fairly and consistently. The European Court of Human Rights has acknowledged in its case law that however clearly drafted a legal provision may be, in any system of law there is an inevitable element of judicial interpretation.

The court, furthermore, highlighted that there will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Again, whilst certainty is highly desirable, it may bring in its train excessive rigidity and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague and whose interpretation and application are questions of practice. The role of adjudication vested in the courts is precisely to dissipate such interpretational doubts as remain. However, the ECHR may find that the requirement of foreseeability is not met if the application or interpretation of legislation has been unexpected, overly broad, or bordering on the arbitrary (*OAO Neftyanaya Kompaniya Yukos v. Russia*, no. 14902/04, § 568).

For instance, in light of the foregoing it is generally accepted, that "no person should be forced to speculate, at peril of conviction, whether his or her conduct is prohibited or not, or to be exposed to unduly broad discretion of the authorities, in particular if it was possible, either by drafting legislation in more precise terms or through judicial interpretation, to specify the relevant provision in a way that would dispel uncertainty" (*Matić and Polonia d.o.o. v. Serbia* (*dec.*), no. 23001/08, § 50).

Interpretation of tax laws and regulations is of particular importance task because tax laws are complex and often difficult to understand. It is believed that: "Because of their general nature, tax norms are always targeted at a certain "average" type of life situation and do not reflect the specifics of an infinite variety of tax situations" (Demin, 2019: 13). Owing to this interpretation of tax laws is essential for ensuring that taxpayers comply with their obligations and that the government can effectively enforce tax laws. Additionally, interpreting taxation provisions helps to ensure that taxpayers are not unfairly advantaged or disadvantaged when it comes to taxation.

When studying peculiar features of the interpretation of the principles and provisions of tax legislation, first of all, attention should be paid to the fact that as the pace of development of tax regulation and administration systems accelerates and as these phenomena become more and more complicated, the search for the optimal ratio of elements of strict and purposive interpretation in modern states becomes more and more urgent. In light of this, the theoretical and practical approaches followed by the competent authorities of the counties of the common law and continental legal systems are of considerable scientific interest from the point of view of the potential for their mutual approximation and enrichment.

Turning to scientific and legal sources, which reveal the rationale for the mostly literal interpretation of the provisions of the tax legislation, the following standpoint of His Lordship Bhagwati J. of the Supreme Court of India could be noted. In *A. V. Fernandez vs. State of Kerala* the judge stated that in construing fiscal statutes and in determining the liability of a subject to tax one must have regard to the strict letter of law. If the revenue satisfies the court that the case falls strictly within the provisions of the law, the subject can be taxed. If, on the other hand, the case is not covered within the four corners of the provisions of the taxing statute, no tax can be imposed by inference or by analogy or by trying to probe into the intentions of the legislature and by considering what was the substance of the matter (Supreme Court of India, 1957).

The strict interpretation premises on overarching implicit rationale based on the Latin tenet 'ubi lex voluit dixit, ubi tacuit noluit', which amounts to a counterfactual: if the legislator did not say something, then it clearly did not actually mean to say something. That means, that "if legislator had wanted something, it would have said so" (Garbarino, 2014: 215). In scientific literature and analytical publications, it is noted that tax law remained remarkably resistant to the new non-formalist methods of interpretation.

It is commonly acknowledged that if the taxpayer was entitled to stand on a literal construction of the words used regardless of the purpose of the statute [...] tax law was by and large left behind as some island of literal interpretation. However, with the passage of time it became more and more apparent that literal interpretation of tax statutes and the formalistic insistence on examining steps in a composite scheme separately allowed tax avoidance schemes to flourish, which led the United Kingdom courts to insist that the same principles of statutory interpretation applied to tax statutes as to other legislation (Irish Revenue Commissioners, 2021: 35).

The literal interpretation of the law in the legal doctrine of the common law states is juxtaposed to a certain extent to the purposive interpretation, which is based on the concept called the golden rule of interpretation or the rule of reasonable construction.

This rule is a modification of the literal rule. It states that if the literal rule produces an absurdity, then the court should look for another meaning of the words to avoid that absurd result. According to Asuzu (2017) the rule was closely defined by Lord Wensleydale in *Grey v. Pearson* (1857), who stated that:

> The grammatical and ordinary sense of the words is to be adhered to unless that would lead to some absurdity or some repugnance or inconsistency with the rest of the instrument in which case the grammatical and ordinary sense of the words may be modified so as to avoid the absurdity and inconsistency, but no farther (Asuzu, 2017:19).

Applying this approach when deciding tax disputes, in particular, the Supreme Court of Ireland, as confirmed by *Dunnes Stores v. Revenue Commissioners,* holds the opinion that if a strict manner of interpretation is absurd or ambiguous, read the piece of legislation as a whole (including the long and short titles, preamble, schedules, definition and interpretation sections, and marginal notes) and apply the plain intention of the Oireachtas or maker of the legislation where it is clear based on the context of the provision within the act as a whole, but potentially more broadly than that (Supreme Court of Ireland, 2011).

In other words, as the Supreme Court of Ireland reiterated in *McGrath v McDermott,* it is clear that successful tax avoidance schemes can result in unfair burdens on other taxpayers and that unfairness is something against which courts naturally lean.

The function of the courts in interpreting a statute of the Oireachtas is, however, strictly confined to ascertaining the true meaning of each statutory provision, resorting in cases of doubt or ambiguity to a consideration of the purpose and intention of the legislature to be inferred from other provisions of the statute involved, or even of other statutes expressed to be construed with it. The courts do not have a function to add to or delete from the express statutory provisions so as to achieve objectives which to the courts appear desirable. In rare and limited circumstances words or phrases may be implied into statutory provisions solely for the purpose of making them effective to achieve their expressly avowed objective (Supreme Court of Ireland, 2011).

As Garbarino (2014) pointed out within the Italian context purposive interpretation emerged for two reasons: (i) the need to address so-called 'hard cases', i.e., cases that cannot be solved through strict interpretation due to the increasing complexities of the tax system; and (ii) the need to counteract aggressive strategies of taxpayers exploiting the limitations of strict interpretation.

This has resulted in a new brand of interpretive ideologies – particularly in governmental agencies – according to which individual positions of taxpayers can be 'compressed' by social policies and this has ultimately created a problem of protection of constitutionally protected rights. Because of the increasing complexity of auditing techniques and the judicial activism of the Italian Corte di Cassazione, a paradigm shift is currently under way in which the purposive interpretation is gradually predominating over the strict interpretation (215).

Thus, the common law countries and continental legal systems are united by a tendency towards a balanced combination of literal and purposive interpretation of the provisions of tax legislation. This tendency is based on its increasing complexity and dynamics of its development, as well as has its

roots in its focus on achieving both public interests and, in a certain sense, the private interests of conscientious taxpayers related to preventing their competitors from gaining unjustified competitive advantages via tax fraud.

With this in mind, next to the literal wording of tax legislation provisions, the purpose of their introduction and the general principles of tax law are taken into account. In addition, in some countries, even reference to the intention of the lawmakers is allowed. However, the limit of a broad interpretation of the norms of tax law is in the fact that it is only acceptable to eliminate absurd law enforcement situations.

The case law of Ukrainian courts is quite rich in examples of the application and combination of literal and purposive interpretation.

For instance, their commitment to proper balancing the literal perception of legislative provisions with their purposive interpretation is clearly demonstrated by the following judgment of the Supreme Court of Ukraine. The central issue of the case was the validity of the standpoint of the courts of previous instances regarding the fact that the plaintiff's BMW X5 cannot be subject to transport tax under the legislation of Ukraine, since the cylinder volume of its engine (2993 cubic cm) is smaller, than specified by the Ministry of Economy of Ukraine in the List of passenger cars subject to transport tax in the relevant year (3.0 liters). Having considered the case, the Supreme Court of Ukraine pointed out that the volume of the engine in the totality of elements that affect the value of the car as an object of taxation is used as an economic characteristic of the car, and not a purely technical indicator of it.

Therefore, the court considers it justified to use the generally accepted designation of the engine volume in liters, and not its detailed technical characteristics in cubic centimeters, since this is enough to identify the car. Deviation by a few thousandths from the indicator in liters of engine volume applied by the Ministry of Economy of Ukraine does not indicate that the corresponding car is not subject to taxation, as it does not affect its average market value. Thus, the court chamber came to the conclusion about the lawfulness of charging the transport tax, since a car with such properties as the one belonging to the plaintiff is included in the list of passenger cars that are subject to taxation in the corresponding year (Supreme Court of Ukraine, 2022a).

In the case law of the Supreme Court of Ukraine, there are also cases of systematic interpretation of several basic principles of tax legislation, as a result of which the highest judicial institution deviated from the literal wording of one of them.

To form a sufficient context, first of all, we note that in Article 4, subparagraph 4.1.9 of the Tax Code of Ukraine it is established that the tax legislation of Ukraine is based on several principles, one of which is stability.

The stability of tax legislation provides that changes to any elements of taxes and fees cannot be made later than 6 months before the start of the new budget period, in which new rules and rates will apply. Moreover, it is determined that taxes and fees, their rates, as well as tax benefits cannot change during the budget year (Tax Code of Ukraine, 2010).

At the same time, the Supreme Court of Ukraine recognized the increase in the rate of rent for the use of subsoil for the extraction of natural gas from 28% to 55% less than 6 months before the start of the new budget period as justified and not amounting to an arbitrary interference with the right to peaceful enjoyment of property, as it had been done in view of public interests. It was highlighted that the principle of stability should be applied in conjunction with the principles of generality of taxation, fiscal sufficiency and social justice. The court also noted that the social effect of such a policy was directed, in particular, to the real implementation of the state's functions in terms of balancing the budget (Supreme Court of Ukraine, 2022b).

Having considered these legal opinions of the Supreme Court of Ukraine, I have reasons to support the viewpoint, according to which, taking into account the peculiarities of the taxation sphere, a negligible deviation of a particular object from the qualifying parameters of the object of taxation cannot lead to its removal from taxation. This statement fully complies with the generally accepted conditions of purposive interpretation, because the opposite conclusion would lead to an absurd decision that is inconsistent with the clear and correctly interpreted purpose of the relevant provisions of the tax legislation.

On the other hand, despite the fact that the conclusion of the Supreme Court of Ukraine on the need to balance several basic principles of tax legislation, which are inconsistent in the context of the circumstances of the case, has a significant theoretical and legal value, the statement implying that one of the principles of tax legislation can completely nullify another seems questionable.

2.2. In Dubio Pro Tributario in Interpreatation of Tax Laws and Regulations

Continuing the research, it is to be noted that an important global trend in the development of the interpretation of tax legislation provisions is the consistent affirmation of the presumption of lawfulness of the taxpayer's behavior in conditions when the legislation gives rise to ambiguous (multiple) interpretations of the rights and duties of taxpayers or tax authorities, as a result of which there is an opportunity to make a decision in favor of both the taxpayer and the tax authority.

As Demin (2019) asserts, such defects are the fault of the law-maker, not the taxpayer. Therefore, it is the state as the guilty party that takes upon itself the burden of the negative consequences of all the shortcomings of the legislation. Since the law-maker is obliged to formulate tax legislation in such a way that every person knows precisely which taxes (levies) they must pay, and when, and according to what procedure they must pay them, then it is the state that should be responsible for the non-fulfillment of this duty. Legal uncertainty caused by the legislator's insufficient work should be interpreted in favor of the taxpayer (24).

According to Preston's apt statement the principle of in dubio pro tributario in its tax projection is fully consistent with the purposive approach to the interpretation of tax legislation. The author indicates that:

> Traditionally there was only one exception to the plain meaning rule and this was where the taxpayer was at risk of having imposed upon him a liability so farfetched and so fantastic that the suggestion that that was what parliament intended could not be entertained. This is used in conjunction with the minor rule that the taxpayer has the benefit of the doubt (Preston, 1990: 45).

In scientific literature, attention is also drawn to the fact that application of the principle in dubio pro tributario in the interpretation of the tax law is to ensure implementation of the principle of certainty in tax legislation.

This principle should perform the function of clarifying and simplifying legislation, which is important from the point of view of the general state of tax law. This particularly applies to the situation when the position of regulation lead to conclusions that do not make sense, contradictory or ambiguous, then the best solution is a choice of interpretation of legal norms, which will be beneficial to the taxpayer (Juchniewicz and Stwoł, 2017: 309).

Turning to the practice of applying the principle in dubio pro tributario during the judicial settlement of tax disputes, first of all, it should be noted that respected national and international judicial institutions consider it a fundamental guideline for the correct interpretation of tax laws and regulations. In particular, the US Supreme Court adheres to the view that if the words of a statute are doubtful, the doubt must be resolved against the government and in favor of the taxpayer (US Supreme Court, 1923).

The legal opinions of the Supreme Court of Ukraine describing in more detail the grounds for applying the above-mentioned principle of interpretation of tax legislation provisions are also of considerable scientific and practical value. In particular, the court emphasized that in the event that the national legislation gave rise to an ambiguous or multiple interpretation of the rights and duties of individuals and business entities, national authorities are obliged to apply the most favorable approach for individuals and business entities.

That means that conflicts in the legislation are always resolved in favor of the individual or business entity. Moreover, the simultaneous existence of other conflicting norms gives the court indisputable grounds for resolving conflicts in legislation in favor of a person (Supreme Court of Ukraine, 2020).

The presumption of lawfulness of the taxpayer's decisions accrues when the tax rules directly or as a result of their interpretation are not unambiguous and allow the multiply ways of interpretation of assessment powers both in favor of the taxpayer and the tax authorities. It is necessary and sufficient to identify two or more alternative options for lawful behavior, choosing the most beneficial one for the taxpayer to feel protected from possible negative consequences from both the tax authority and the court. At the same time, the burden of proving the absence of legal grounds for the behavior option chosen by the taxpayer is assigned by law to tax authorities (Supreme Court of Ukraine: 2020).

In other words, in the case of inaccuracy, lack of clarity, and inconsistencies in the norms of positive law, the norm must be interpreted in favor of the non-government person (if one of the parties to the dispute is a representative of the state or a local self-government body), because if the state is unable to ensure the issuance of clear rules, then it is it and must pay for its shortcomings. This is the so-called rule of priority of the norm according to the most favorable interpretation for the person (Supreme Court of Ukraine, 2022c).

A plain and illustrative example of a situation, in which the rule of priority of the norm according to the most favorable interpretation is applicable, is the duplication of the product in two different columns of the table of excise tax rates (Supreme Court of Ukraine, 2021).

Having thought through the above, it could be noted that the general trend in the development of the interpretation of the tax legislation provisions is the assertion of the absolute responsibility of the state for the clarity and accuracy of the wording of tax laws and regulations. Both in the common law countries and in the continental legal systems tax authorities and courts are expected to adhere to the concept prescribing an opportunity for the taxpayer can choose the most beneficial option for itself in event that rules of tax law directly or as a result of their interpretation are not unambiguous and give rise to multiple interpretations of executive powers of tax authorities both in favor of the taxpayer and the supervisory authority.

2.3. Reasonable Cause and Good Faith of the Taxpayers

Approaching the next matter, it is to be highlighted that tax control, as well as judicial control of the lawfulness of an increase in the taxpayer's tax liability or the amount of the tax benefit claimed is often accompanied by the

interpretation of the provisions of tax legislation, for the correct application of which the good faith of the taxpayer's behavior must be assessed, which is not limited to a purely legal dimension, but also covers the economic aspects and the essence of its economic operations.

This issue is particularly acute, because it is quite difficult to distinguish the signs of business operations, which indicate their legitimate structuring in order to optimize the tax burden on their participants, from the circumstances that indicate commitment of tax fraud by taxpayers, which has the form of understating their tax obligations or overestimation of the tax benefit.

Relying on legal opinions of the Supreme Court of Ukraine on the issue of the formation of a tax credit, it could be noted that this court consistently emphasizes that the determining factor for this is the compliance of the tax invoice with the order of its filling and the subsequent use of the purchased goods (fixed assets) in taxable transactions within the economic activity of the taxpayer. Developing this opinion, it was concluded that by submitting to the tax authority all properly drafted primary documents required by law the taxpayer can receive a tax benefit only if the tax authority does not prove falsehood, inauthenticity or discrepancies in the information in such documents.

Furthermore, the Supreme Court of Ukraine emphasized that the current legislation does not make the condition of the tax obligations of the taxpayer dependent on the state of the tax accounting of its counterparties, the presence or absence of fixed assets or personnel, submission / non-submission of tax reports. The court also added that when resolving tax disputes, the court is guided by the presumption of good faith of the taxpayer, which encompasses economic justification of actions resulting in tax benefits, as well as the reliability of information in accounting and tax reporting. The bad faith of the payer must be proven by unconditional and unambiguously interpreted evidence (Supreme Court of Ukraine, 2022d).

A clear predisposition towards human rights protection in the interpretation of tax legislation can also be traced in the case law of the Supreme Court of Ukraine on matters relating to taxpayers' expenditures. In particular, the court repeatedly stated that the tax authority could not make determinations about recognizing or non-recognizing of expenditures relying on far-fetched conclusions.

Moreover, this judicial institution demonstrates a sufficient understanding of the nature of entrepreneurship and the essence of business processes, noting that it is not necessary that the economic effect be observed immediately after the transaction; it is possible that as a result of objective reasons, the economic effect may not occur whatsoever. The taxpayer must have the intention to obtain an appropriate economic

effect. The failure of the enterprise to receive income from a separate business operation does not indicate that such an operation is not related to the economic activity of the enterprise, since when conducting business operations there is a normal commercial risk of not receiving income from a specific operation (Supreme Court of Ukraine, 2022a).

Thus, the Supreme Court of Ukraine, when interpreting principles and provisions of the tax legislation related to assessment of business operations of taxpayers, is guided by coherent concepts about the nature of entrepreneurship and the commercial risks inherent in it, which could possibly lead to decisive influence on the economic consequences of business operations.

Bearing in mind these considerations, the Supreme Court of Ukraine adheres to the presumption of the existence of an economic rationale for the activity of taxpayers, if the tax authority does not prove the falsehood, unreliability or contradictory nature of information in documents related to specific economic transactions, or the absence of changes in assets and liabilities of taxpayers as a result of specific financial transactions. On the other hand, accompanying circumstances, such as the company's failure to receive income from a separate business operation, the sufficiency of fixed assets and personnel, and the submission of tax returns by themselves cannot lead to conclusions not in favor of taxpayers.

Recognizing the potential significant value of the above-mentioned legal opinions for interpretation and application of tax laws and regulations within the European legal space, it should, however, be noted that in Ukraine the issue of distinguishing the optimization of the tax burden and tax fraud is not sufficiently sorted out. The practice of interpreting the tax legislation of Ukraine is not distinguished by a deep understanding of the nature of internal and external business processes.

In particular, having looked into the research materials of Garbarino (2014), we could infer that they include a sufficiently coherent and progressive doctrine. While revealing it, the author noted that whether a '*valid business purpose*' for a certain transaction exists is determined on the basis of a substantive analysis of the business and financial strategies of a firm. With reference to the assessment of the valid business purpose, there are basically two interpretive arguments. In the *first argument*, if the tax saving is the only reason underlying a transaction, then it has no valid business purpose; these kind of transactions are '*tax-driven*' and imply tax avoidance.

In the second argument, if the transaction has both a valid business purpose and a tax reason, then one has to assess the prevailing nature of the tax reason versus the business reason. For example, in structured finance transactions it is usually required that the transaction be '*pre-tax positive*'; i.e., that the gain of the transaction is not exclusively deriving from tax savings.

In other words, the existence of a '*purposive scheme*' aimed at '*by-passing of rights and duties*' is the typical situation in which the taxpayer arranges his course of affairs in such a way to unduly avoid or prevent the application of the normal taxing rules. Moreover there is a '*purposive scheme*' when the transaction conflicts with (i) general principles of tax law, (ii) specific principles of a certain area of tax law, (iii) the function of tax rules, or (iv) the natural entitlement of tax positions. For example, a taxpayer may violate: (i) the general principles of tax law according to which one should not allocate income to other parties; or (ii) specific principles of a certain area of tax law such as the rule that if capital gains on participations are exempt, capital losses are not deductible; (iii) the function of tax rules, such as the function of jurisdictional links for taxing income sourced in Italy; or (iv) the natural entitlement of tax positions by allocating portions of income to related parties.

However, *by-passing* of tax rights *does not occur* when the taxpayer makes an election, which *is expressly provided for by tax rules* between two alternative courses of action equally available, thereby achieving a tax reduction. In such cases, the taxpayer has a right to choose among alternative tax treatments that are considered by the tax system as equally available and legally obtainable (Garbarino, 2014, pp. 235-236).

Thus, in order to correctly distinguish between optimization of the tax burden and tax fraud, it is necessary to investigate the financial and economic aspects of the taxpayer's business activities to determine whether this or that business operation was aimed solely or predominantly at tax evasion. At the same time, it is customary to adhere to the opinion that by-passing of tax rights does not occur when the taxpayer makes an election which is expressly provided for by tax rules among two alternative courses of action equally available, since in such cases, the taxpayer has a right to choose among alternative tax treatments that are considered by the tax system as equally available and legally obtainable.

Conclusions

Having regard to the above considerations it could be inferred that, the common law countries and continental legal systems are united by a tendency towards a balanced combination of literal and purposive interpretation of the provisions of tax legislation. Along with the literal wording of tax legislation provisions, the purpose of their introduction and the general principles of tax law are taken into account. In addition, in some countries, even reference to the intention of the law-makers is allowed.

For instance, a negligible deviation of a particular object from the qualifying parameters of the object of taxation cannot lead to its removal

from taxation. However, the limit of a broad interpretation of the norms of tax law is in the fact that it is only acceptable to eliminate absurd law enforcement situations. For example, the legal opinion of the Supreme Court of Ukraine implying that one of the principles of tax legislation can completely nullify another is untenable.

Another general trend in the development of the interpretation of the tax legislation provisions is the assertion of the absolute responsibility of the state for the clarity and accuracy of the wording of tax laws and regulations. Both in the common law countries and in the continental legal systems tax authorities and courts are expected to adhere to the concept prescribing an opportunity for the taxpayer can choose the most beneficial option for itself in event that rules of tax law directly or as a result of their interpretation are not unambiguous and give rise to multiple interpretations of executive powers of tax authorities both in favor of the taxpayer and the supervisory authority.

It is also noteworthy that the Supreme Court of Ukraine adheres to the presumption of the existence of an economic rationale for the activity of taxpayers, if the tax authority does not prove the falsehood, unreliability or contradictory nature of information in documents related to specific economic transactions, or the absence of changes in assets and liabilities of taxpayers as a result of specific financial transactions. However, in order to correctly distinguish between optimization of the tax burden and tax fraud, it is necessary to investigate the financial and economic aspects of the taxpayer's business activities to determine whether this or that business operation was aimed solely or predominantly at tax evasion.

At the same time, it is customary to adhere to the opinion that by-passing of tax rights does not occur when the taxpayer makes an election which is expressly provided for by tax rules among two alternative courses of action equally available, since in such cases, the taxpayer has a right to choose among alternative tax treatments that are considered by the tax system as equally available and legally obtainable.

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