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*Національний університет «Одеська юридична академія» є наступником багатих традицій Одеської правової школи, історія якої сягає своїм корінням ще у 1847 рік (час існування юридичного факультету Рішельєвського ліцею – першого вищого навчального закладу Одеси). У 1865 році юридичний факультет увійшов до складу Імператорського Новоросійського університету. У 1997 році, коли юридичній науці й освіті в Одесі виповнилося 150 років, Юридичний інститут Одеського держуніверситету був перетворений на Одеську державну юридичну академію. Уже через рік цей ВНЗ набув членства в Асоціації європейських університетів, а в 2000 році академія отримала статус національного вищого навчального закладу. Указом Президента України від 2 вересня 2010 року № 893/2010 Академія була реорганізована в Національний університет «Одеська юридична академія». Нині Національний університет «Одеська юридична академія» – один із центрів юридичної освіти і науки України – є провідним вищим навчальним закладом з правознавства, спадкоємцем славних традицій Одеської школи права, яка бере свій початок з 1847 року.*

# ЗМІСТ

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# INTERNATIONAL RESPONSIBILITY OF STATES FOR THE CONDUCT OF PRIVATE ACTORS

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This paper deals with the problem of international liability for the conduct of private actors, which violates the rights and interests of states and individuals. It is shown that the application of the principle of *due diligence* allows to realize the objectives of the interests of the international community in maintaining stability and peace in the international arena and encourage States to take actions that will prevent and avert violations of internationally recognized values not only by public institutions but also by individuals and entities.
**Keywords:** international responsibility, attribution, private actors, *due diligence* standard.

**Formulation of the Problem.** International responsibility is one of the guarantees of order of international legal relations, which acquired a new quality in recent decades. Decision of the task of raising the effectiveness of international law largely laid on the international responsibility which plays a fundamental role in the modern system of international law, demonstrating the level of development, unity and organization. Instability of modern world poses new challenges to existing state and legal institutions. World development is characterized by a multiplicity of conflicting and ambiguous trends that significantly alter the defining characteristics of international relations and clearly represent the beginning of a new world order.

The idea that now international research cannot be limited only by the analysis of intergovernmental cooperation is gaining more and more supporters. The substantial change and transformation of public international law at the beginning of the XXI century particularly concerning the system of actors is being described not only by the researchers of international law and international relations, but also by experts in the state, political and social sciences.

Theories which is based on the principles of liberal paradigm, significantly developed the concept of international actor outside a state-approach «breaking the solid cocoon of national state» [1, p. 730], which lays the foundation for the establishment of international issues of subjectivity. R. Keohane and J. Nye saw international relations in terms of «reducing the sovereignty» of states when near the interstate relations, carried out by means of classical diplomacy and military force, the importance of international «non-relationship» increases where other actors who are fully governed by entirely different considerations interact.

Undoubtedly, we should agree with M. Lebedev that political world has become more complex in many ways last few decades. One of these options is participants of international relations. In the second half of the twentieth century (and particularly intensively at its end) on the world stage, so-called non-traditional participants (actors) of international relations began to act more active along with states – TNCs, NGOs, various movements, media, domestic regions, intergovernmental organizations etc. [2]. At the beginning of XXI century non-state actors not only stepped up its activity on the international arena, but also greatly complicated mechanisms and forms of activity, expanded the scope of its involvement. Analysis and consideration of such entities is required for understanding contemporary international relations, forecasting and compliance.

It should be noted that some authors seek to restrict the category of non-traditional actors list (transnational corporations (TNCs), international non-governmental organizations and others offer a wider list of them. It seems that the second approach is more appropriate because it allows using flexibility to changes in the international arena.

J. Rosenau highlights two key «worlds» in international relations: «countries» which the researcher believes that they are dominant and «actors outside the sovereignty» which includes non-sovereign international actors – international organizations, transnational corporations, national movements, ethnic groups, territorial communities, bureaucratic structures, individuals [3, p. 24].

In one of his works P. Tsygankov notes that the number and diversity of non-state actors is not endless in world politics. They are present in almost all aspects of life: economic, industrial, social, information and communication, legal, humanitarian, human rights, social and natural, providing a significant and growing impact on their evolution and political processes of the modern world as a whole [4, p. 7]. D. Feldman believes that non-governmental actors represent a variety of ethnic and religious communities, professional, ideological and political, educational and other organizations, individuals and associations «by interest», the contents of which cannot be political, but their implementation has installed reliable international political significance [5, p. 36].

The politics of dominating the state as a central international actor begins to treat questioned with the emergence and spread of such actors in regional and global levels. Some researchers (e.g. M. Nicholson) for describing this phenomenon use the term «paradox of participation», according to which the increasing level of openness of the international system for the participation of new actors makes a mess in international relations and contributes to their chaotic, which makes it difficult to achieve effective solutions.

So, as of today we can fix the emergence of a wide range of international actors who «undermine» a state-system of international relations [6, p. 90].

A. Reinisch indicates a clear departure from purely state-based approach at present, according to which only state behavior can lead to liability in international law [7, p. 38].

Display of negative «by-effect» of enlargement participants in international relations is a threat to international order emanating from non-state actors who operate regardless of the state and whose actions lead to a breach of the fundamental values of the international community in various areas (international law, human rights, international security, international humanitarian law, environmental protection, international maritime law and many others). Weak entities were strong in the sense that can cause significant damage to internationally recognized values. The world of the twenty-first century faced with the fact that non-state actors are able to throw a significant challenge to the state.

That is why more acutely raises the question of the extent to which States can and should take responsibility for the actions of individuals, bringing problems of attribution of wrongful conduct state to the next level.

**Status of research problem.** A lot of attention in the issue of international State responsibility for the actions of individuals was paid to foreign legal science, but those problems are not explored in the doctrine of Ukrainian science of international law. M. Buromenskiy, V. Boutkevitch, A. Seibert-Fohr, I. Lukashuk, B. Conforti, A. Klephem, A. Reinisch, D. Malcolm, N. Santarelli, I. Ziemel etc may be named among domestic and foreign scientists who raised the topic in his writings.

**The aim of the article** is to study the question of international liability for the behavior of individuals, which violates the rights and interests of other states and individuals.

Describing the «expansion of subject area of global security» V. Kulagin uses the term «privatization» of its space. Scientist writes that large-scale invasion of new non-state actors to the security space affected the overall paradigm for further development of global cooperation on security [8, pp.38-39]. Professor N. Zelinska exploring the phenomenon of «Somali piracy» reasonably argues that «in conditions of «privatization» criminality swiftly goes beyond state control and has a devastating impact on the world's order. It is the cause and consequence of many global destabilizing phenomena» [9, pp. 125-139].

At first glance it can be considered that the existing rules sufficiently protect the internationally recognized rights and interests of states and individuals from violations committed by non-state (private) actors. However, this is not enough to ensure full and comprehensive protection of these values in accordance with international law, as the above provisions of Articles on Responsibility of States certainly do not cover cases when a private person whose conduct is contrary to the international obligations of the State acts in complete isolation from the state context and there is no communication with native state functions.

Undoubtedly, individuals who are not vested in any way the qualities of state body, are capable to violate by their actions the rights of another state which are guaranteed on international level. The literature provides different examples of acts of this kind. P. Kuris calls among them offending the honor and dignity of a foreign state, the image of the flag, organizing armed troops to support insurgencies or subversion, attacks against representatives of foreign states [10, p. 196].

According to the V. Vasilenko «the most typical cases of unauthorized actions of individuals and entities, due to which the responsibility of the state may occur, traditionally were attack on the honor and dignity of a foreign state, the image of the flag, the attacks on foreign diplomatic missions and attacks on diplomats. Such cases may also include acts of piracy, counterfeit currency, spread of drugs and others. Propaganda of war, genocide, racial discrimination, terrorist activities etc are in modern conditions the most dangerous actions of individuals and legal entities in respect of which, if state doesn't stop them, international legal responsibility arises» [11, p. 130].

It is explained in the commentary to Articles of 2001 that the state could be responsible for the consequences of the behavior of private actors, if it has not taken the necessary measures to prevent negative consequences. For example, a receiving State is not responsible, as such, for the acts of private individuals in seizing an embassy, but it will be responsible if it fails to take all necessary steps to protect the embassy from seizure, or to regain control over it.

It follows that the state can be blamed for acts of its own bodies, which are expressed in their rejection to take appropriate measures to stop unauthorized illegal actions of individuals and legal entities.

As A. Seibert-Fohr noted on the one hand the state cannot be held accountable for the actions of individuals in the absence of any recent communication with public authorities or carriers of public functions. On the other hand if the state, however, is obliged to take certain protective measures and if they do not fulfill relevant obligations, they carry the same offense which entails their international legal responsibility, even when the action which causes damage is committed by individuals [12, p. 42]. Recognition principle of proper diligence, which includes, among other things, and takes into account what measures the government is able to realize and how these measures are suitable to prevent danger, let find differentiated responses. This approach makes possible a legal assessment of the legal relationship between the interest of the international community to provide protection on the one hand, and the necessary measure of public accountability on the other [12, p. 60].

R. Cook expressed a similar view: «in principle, the state is not responsible for the actions of individuals or institutions … States are, however, responsible for their failure to meet its international commitments, even when major violations are carried out by private individuals»[13, p. 125].

The next was stated in a separate opinion of Judge Pinto De Albuquerque in the case of Sargsyan v. Azerbaijan (16 June 2015), which was heard by the International Court of the UN: «During the first decade of the twenty-first century, the following rule of customary international law crystallised: States have the legal obligation to

prevent and stop the commission, preparation and incitement thereto, of genocide, war crimes, ethnic cleansing and crimes against humanity. When a State commits these crimes, condones the commission of these crimes or is manifestly unable to oppose their commission in the national territory or the territories under its effective control, the international community has a legal obligation to react with all adequate and necessary means, including the use of military means, in order to protect the targeted populations. The reaction temporary must be, effective and proportionate» [14, p. 137].

Some authors write about direct state responsibility for the actions of individuals and legal entities (e.g. M.R. Garcia-Mora). According to V. Vasilenko similar wording falsely reflects the real state of things because the state is not usually responsible for the actions of individuals, but is responsible for the behavior of their bodies that failed to prevent such acts or punish their perpetrators, and that's why «it is better to talk about the responsibility of the State, arising *in connection* with the activities of natural and legal persons» [11, p. 130]. According to fair statements of P. Kuris, the ground of liability of the state for the illegal actions of individuals is the omission of relevant state institutions, contrary to the obligation of the state to prevent unlawful conduct of individuals that harms foreign State and obligation to punish the perpetrators of such illegal actions [10, p. 196]. L. Huseynov also stands on the position that direct attribution of the behavior of individuals to the state that do not actually carried out on its behalf, is also wrong [15, p. 114].

It should be noted that it is possible to find in the literature a point of view according to which «in the way of exception a state responsibility for the actions of individuals exists if they put damage to another State representative» (Haylborn). A. Verdross use provisions of Art.3 of Hague Regulations on the Laws and Customs of War on Land as an example of true public responsibility for guilty actions of private individuals. According to this provisions the state is responsible during the war for all actions of members of its armed forces, so not only for public actions committed by them, but also for actions which clearly are not a subject of their jurisdiction, and even for such actions which from the outside cannot be state actions (such as robbery or rape). However, this rule does not apply in peacetime, so that the application by analogy exclusive law is inadmissible [16, p. 378].

P. Kuris hold back the position that «the state can sometimes be responsible for the actions and individuals by virtue of special contractual obligations. For example, the Soviet Union in the agreements with Poland, Hungary, East Germany and Czechoslovakia on the legal status of Soviet troops temporarily located on the territory of these states undertook to be responsible for the acts and omissions of the families of Soviet soldiers. In this case we are dealing with so-called indirect (such as to replace) responsibility of the state" [10, pp. 205-205].

**Conclusions.** Thus, the state can be recognized internationally responsible in connection with the actions of individuals or entities, which are no way connected with the state apparatus, which is resulted in violation of international legal obligations of the state as against other states and concerning the private interests of individuals. Thus the concept of attribution to the state an unlawful behavior of the aforementioned categories of private actors is possible only in very limited circumstances, such as when it is expressly provided specific norm of international law. In all other cases attribution (as defined operation that specifies some behavior as the state activity) of the behavior of private actors in the absence of any meaningful communication for the purposes of liability of such entities to the state mechanism is unreasonable and contrary to the basic postulates of the law of international responsibility. In such situations behavior of public authorities for breach of the standard of *due diligence* is attributes to the state.

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## МІЖНАРОДНА ВІДПОВІДАЛЬНІСТЬ ДЕРЖАВИ ЗА ПОВЕДІНКУ ПРИВАТНИХ АКТОРІВ

**Анотація**
Стаття присвячена розгляду проблеми міжнародної відповідальності держави за поведінку приватних акторів, що порушує права та інтереси держав та приватних осіб. Доводиться, що застосування принципу due diligence дозволяє реалізовувати цілі забезпечення інтересів міжнародного співтовариства у підтриманні стабільності та спокою на міжнародній арені та спонукати держави до вчинення дій, що дозволять попередити та відвернути порушення визнаних міжнародних цінностей не лише державними інституціями, а й приватними особами та утвореннями.
**Ключові слова:** міжнародна відповідальність, атрибуція, приватні особи, стандарт due diligence.

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## МЕЖДУНАРОДНАЯ ОТВЕТСТВЕННОСТЬ ГОСУДАРСТВА ЗА ПОВЕДЕНИЕ ЧАСТНЫХ АКТОРОВ

**Аннотация**
Статья посвящена рассмотрению проблемы международной ответственности за поведение частных акторов, нарушающих права и интересы государств и частных лиц. Доказывается, что применение принципа due diligence позволяет реализовывать цели обеспечения интересов международного сообщества в поддержании стабильности и спокойствия на международной арене и побудить государства к совершению действий, позволяющих предупредить и предотвратить нарушение признанных международных ценностей не только государственными институтами, но и частными лицами и образованиями.
**Ключевые слова:** международная ответственность, атрибуция, частные лица, стандарт due diligence.

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# THE FORMATION AND DEVELOPMENT OF THE NATIONAL ASSESSORS IN SOVIET UKRAINE: HISTORICAL AND LEGAL ANALYSIS

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In this article is discovered the complex of historical and legal problems of formation and development of Ukrainian national assessors institute. It is analyzed the legal status of national assessors and their place and role in soviet legal system.
**Keywords:** national assessor, national court, justice, jurisdiction.

There were historical premises for appearance of national assessors institute at the beginning of 20 century. There were different forms of people's participation in judicial process that were usual on the lands that were the part of Russian Empire before revolution. Some of these forms, for example, trial of jury, were seriously criticized by representatives of bilshovitskay party. To the point of view of bilshovitskay party trial of jury protected the interests of representatives of the highest status. Instead of this, public court that based on participation in justice by all the members of community did not meet any objections.

Till 1917 national assessors institute did not get any serious theoretical development in works of the leaders of bolshovitskay party. According to the class system there are the government arrangement and reformation of court system in after revolution period. Instead of this the accent was made on the necessity of destruction of old government machine and court system too. Even in works where the thesis about the existence of transitional period was and temporary preservation of government mechanism is absent the detailed description of the structure and principles of new court system. Instead of this were proclaimed slogans about establishment of control over the court system from the side of proletariat by the way of election of judges and their participation in court process. But concrete forms of people's participation in realization of justice were not discussed [2, p. 126].

The first steps in legal mounting of national assessors institute were made during the adoption of decrees «About Court». The analysis of its history and content shows that bolshoviky did not have any idea about character of this institute and its role in new model of justice. There were serious divergences in points of view on the nature of national assessors with their partners – left essers. The national assessors were just the analogy of the trial of jury. The left essers wanted just to liberalize the mechanism of election and to make the post of juryman accessible for ordinary people. They wanted to extend the sphere of influence in the court process and to protect the leader role of professional judge. Instead of this bolshoviky thought that it is necessary to give the main role in the court process to people.

From the very beginning national assessors institute was formed like electoral, temporal and collective authority. But during the long period of time there were not single approaches both in theory and practice according to the membership, order of elections, terms of authorities and reasons of finishing of them.

There were two or six national assessors in the local courts: judge and two assessors considered civil cases, judge and six national assessors- criminal cases. In the circuit court this measure was increased to four or twelve persons [2, p. 182]. In conditions of civil war and uncertainly of loyalty in the most part of population, first of all, in the country – side areas were brining in indirect elections, which took place under the control party organizations.

The right to choose the candidates of assessors was given to party organizations and to organizations of workers. Instead of this, the choosing of candidates was made in the cities by soldiers and work deputies. The main feature of this period was the absence of demands to candidates of national assessors. There was one legal conditions of election to the national assessor. There was right to choose and to be chosen to Rada. We can come to conclusion that national assessor could be chosen among the representatives of work and country-side population. If only they did not use workers and did not serve in administration or in the authority of law and order. Besides, could not be elected incapable people and that ones who were imprisoned. On practice there were additional demands according to the candidates. These demands were followed during advancement of candidates.

First of all the important features were: loyalty to new power, authority in society, appropriate social origin. The term for accomplishment was from six month still one year. The reasons and order of preterm finishing of accomplishments in normative acts were not written. But the character of assessor's mandate said, that it could possibly be recalled.

It became usual for Ukrainian and Russian jurisdiction the less of wide law, social and economical guarantees of national assessors' activity [1, p. 67]. Only one exception was in amendment about pecuniary compensation for taking part in court session. But during the long period of time it was considered like temporary action. It was going to make the assessors work free of charge. That is why, the most part of population tried to avoid the participation in justice accomplishment. In such conditions soviet leadership made national assessors' participation in justice accomplishment obligatory. There were penalties if somebody did not take part in justice accomplishment.

During soviet court system reformation in 20th of 20 century there was legal national assessors institute mounting by the way of approval several legal acts. Among them were «Act about judicial system», Criminal Code, Civil Code. According to this document there was a unification of justice system. In such way soviet power realized national assessors on the level of judicial system.

In the 20th of 20 century there was optimization in national assessors' membership. General position of national assessor was not seriously changed. The national assessors were equal to professional judge. At the same time soviet jurisdiction made some obligations for national assessors: presence on court sessions, accomplishment of fare decisions [4, p. 14].

Besides, in the 20th of 20 century the national assessor had to give an account of work. The mechanism of privileges for national assessors was improved. The national assessor institute became the part of soviet punishment machine that made realization of decisions even when they were against the interests of the most part of population. Bad influence on the national assessors institute had the beginning of the Second World War [5, p. 149].

There were some changes in the system of Criminal Code. The national assessors were absent during court sessions that made the process faster. In conditions of war it was very important. Accept these changes, in general, soviet court system saved both in the institute of national assessors and old forms of sessions. It was not transformed seriously during the war time.

There were some changes in renovation procedure. In conditions of war the state refused from the principle of election during the reformation of public courts and turned into setting. The consequence of war was increasing the pressure on the national assessors, shortening of human resources. The loss made judges to renounce from pre-war norms about maximum ten days term of including assessors to consideration and two years term for fulfil of their authorities. The limitation of public courts, jurisdiction, shortening of their quantity was temporal.

When the enemy was driven out from occupied territory, military tribunal became again and old forms of court system were renew. The main feature of final stage of war was brining in the national assessors institute on Ukrainian lands. The weakness of soviet power and a big number of opposition representatives of local mass, made the state to pay attention on the social origin and political persuasions of candidates on the post of public judges and national assessors. But the process of election was just the simple formality.

In 50-80th of 20th century the national assessors institute was the part of soviet court system and was used till the disintegration of USSR. In this period the legal base of public court was renovated. There were discussions about problems of elections' organizations and the work of public assessors. It was the possibility of more quality and effective work of assessors in courts. General tendency was the increasing of the term of national assessors' authorities till 2,5 years in 70th of 20th century and 5 years in 80th of 20th century [6, p. 97].

Such innovations had dual character. On the one hand they decrease participation of state in the process of national assessors' election and made it possible to have more practical experience for them. On the other hand, they diminished the rotation of national assessors and did not attract the population to take part in this process for a long time [6, p. 99].

There was the rise of demands to candidate of national assessor. There was the rise of the age for person that pretends to this vocation till 25 years. Besides, there were no formal demands that were followed during elections: the absence of the facts of criminal or administration responsibilities, positive moral status, civil activity and such personal qualities as adherence, restraint, an ability to control the situation, a sense of tact, humanism, an ability to analyze the events and phenomena.

During the long period of time in scientific literature was discussed the question about the possibility of introduction of educational qualification and election of national assessors only with high education. But such approach was against the general principles of soviet ideology that is why it was refused.

The procedure of national assessors' election in comparing with previous period did not have serious changes. The election of candidates was made by work collectives and the right of election belonged to all full age population that lived in borders of the court district. The principle of national assessors' election that was fixed in soviet jurisdiction not only gave the ability for population to delegate their representatives into court but took aside them from their posts too. But realization of this article on practice met some barriers. The main barrier was uncertainty of taking aside the mechanism of assessor.

Only at the beginning of 80th of 20th century there was a number of laws, that regulate the procedure of preterm finishing of national assessors' authorities by the way of their taking aside [6, p. 102].

The national assessors membership did not changed – two participants took part in court process. The jurisdiction of this period paid serious attention to the organizational and law guarantees of realizations of these rights. Among the main of them were the right of previous acquaintance with materials, the right of self making decisions, and the right of «unusual point of view» and so on.

At the same time, the analysis of realization of these authorities on practice showed, that the most part of national assessors did not hurried to use these rights. That is why the most part of researchers marks gradual falling of their actual role in court process. Soviet power was trying to overcome the passiveness of the national assessors in 60-80th of 20th century.

It provided the wide complex of measure directed on rising of their activity in court process. First of all, there was variety of educational forms of state activity: creation of public universities, lectures, seminars, practical lessons with justices. It was made for raising the level of law education of national assessors and giving them necessary minimum of information about their own rights and obligations. It was very important to raise the prestige of national assessor. It was made the cam-

paign for creation of positive image where were showed high moral and professional guarantees of assessors. It was developed the system of privileges for participations of court processes [3, p. 51].

At the same time material guarantee of the national assessor was not made, and even material compensation could not satisfy the population. That is why; in scientific literature of that period were often made propositions to create additional guarantees for the national assessors.

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## СТАНОВЛЕННЯ І РОЗВИТОК ІНСТИТУТУ НАРОДНИХ ЗАСІДАТЕЛІВ РАДЯНСЬКОЇ УКРАЇНИ: ІСТОРИКО-ПРАВОВИЙ АНАЛІЗ

**Аннотація**
У статті розкрито комплекс історико-правових проблем становлення та розвитку інституту народних засідателів Радянської України. Проаналізовано правовий статус народних засідателів, їх місце та роль у відправленні правосуддя в радянській судовій системі.
**Ключові слова:** народний засідатель, народний суд, правосуддя, юрисдикція.

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## СТАНОВЛЕНИЕ И РАЗВИТИЕ ИНСТИТУТА НАРОДНЫХ ЗАСЕДАТЕЛЕЙ СОВЕТСКОЙ УКРАИНЫ: ИСТОРИКО-ПРАВОВОЙ АНАЛИЗ

**Аннотация**
В статье раскрыт комплекс историко-правовых проблем становления и развития института народных заседателей Советской Украины. Проанализирован правовой статус народных заседателей, их место и роль в отправлении правосудия в советской судебной системе.
**Ключевые слова:** народный заседатель, народный суд, правосудие, юрисдикция.

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# HISTORICAL-LEGAL CHARACTERISTICS OF THE EVOLUTION OF THE LEGISLATIVE FUNCTION OF THE EUROPEAN PARLIAMENT

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It has been noted that during the last sixty years, the institutional role of the European Parliament has increased enormously, which puts it on equal footing with the Council of European Union, and serves as an example of the fact that the widening of integration processes can be successfully matched with the democratization of the EU supranational institutional system
**Keywords:** supranationality, parlamentarism, democracy, ordinary legislative procedure, special legislative procedure.

Today, all social, economic, and legal processes are strongly intertwined with the development of integration. Thus, it is not surprising, that the famous American scientist G. Haberler noted that 'We live in the age of integration. Every conceivable – or inconceivable-combination of countries has been proposed, more or less seriously, as a candidate for integration – other planets and outer space being almost the only areas that do not yet figure in any of the many plans and proposals...' [10, p. 1]. In accordance with modern integration processes, the European Union institutions need to be studied in greater detail. One of the priorities in the structuring of the Union lies in the development of the European Parliament, as this is the representative body of the Union and the core element. The European Parliament is a unique, permanent, multinational body, which represents over 500 million people, and does not have any analogues in the world to rival its supranational character. The powers of the European Parliament can be viewed from three angles. First, powers to appoint and dismiss. Secondly, powers to investigate. Thirdly, powers in relation are to the budgetary and legislative process. According to Article 14 (1) Treaty on the European Union, the European Parliament shall, jointly with the Council, exercise far reaching legislative and budgetary functions [1].

Historically, the European approach to the separation of domestic powers has its roots in the views of Charles de Secondat Montesquieu, the French political philosopher, who held that '...there would be an end of everything, were the same man or the same body, whether of the nobles or of the people', to exercise the three government powers: enacting laws, executing the public resolutions, and adjudicating crimes and disputes between individuals [15, p. 1033]. This idea, which started to be actively promulgated in the XVIII century, became a cornerstone in the process of emerging nation states during XIX-XX centuries. Gradually, the rights and responsibilities of enacting laws were transferred from European monarchs to parliamentary assemblies, which were elected, or made up of, representatives from the different social classes. It should be stressed that in the views in thinkers of those times, the democratic system of government rested exclusively on the authority of the people: 'The power of the state should be derived from the people'. And the channel for this lies in the development of a strong parliamentary institution [11, p. 72].

At the same time, the idea of parliamentarianism emerged in an all-European context. In 1693, William Penn, the English philosopher, published his work 'Towards the Present and Future of Europe by the establishment of a European Diet, Parliament, or Estate'. According to his proposal, a future 'European Parliament' would have to be an assembly made up of authoritative people, and that it should be convened regularly, listen to all complaints, and eventually issue a verdict inspired by the principle of justice. During the next centuries, the idea of the creation of a European Parliament became popular among intellectuals and politicians, but did not come into existence until the European Community was established in the second half of the XX century, which led to the emergence of the European Parliamentary Assembly, and was composed of parliamentary delegates from EC member-states.

After Ukraine gained independence, a decision was made to initiate closer political and economic relations with the European Union. Several documents were enacted in order to form the appropriate legal framework for such cooperation. The latest one being the Association Agreement, which was signed in 2014, according to which, Ukraine received an invitation to enter the EU internal market, with the eventual prospect of full political integration. The membership in EU internal market requires the adoption of the great number of EU legislative acts which were enacted in the labour sphere, social and consumer policy etc. A better understanding of the genesis and evolution of the EU institutional legislative mechanism will assist Ukrainian MPs in the process of approximation of the Ukrainian legislation with EU law. That`s why, the aim of this article is to investigate the development of the EP legislative function in its entirety and complexity.

The above points were evaluated by leading scholars' viz. Prof. G. Haberler, Prof. W. Hallstein, Prof. J. Piris, Prof. A. Rosas, Prof. H. Schmitt, Prof. D. Swann, Prof. O. Vyshnyakov.

Analyzing trends and patterns in scientific literature during the last decade, we see that European Parliament generates much interest in the eyes of numerous experts. Among them, American Professor A. Rosas, who demonstrates a critical attitude towards the Council of EU in his paper

'Separation of powers in the European Union', mainly because of its national minister`s composition, praising European Parliament for its formation by direct universal suffrage [15, p. 1034]. At the same time, J. Piris, the former legal counsel in the Council of EU, in his book 'The Lisbon Treaty. A Legal and Political Analysis' argues that only the increase of EU`s power can 'democratize' the way the EU functions [14, p. 114].

Defining the problem, it should be stressed that with the end of WWII, it soon became evident that the European continent had to reject the primacy of nation-state principles, and to re-establish itself as unified body. On May 9 1950, the French foreign minister, R. Schuman, issued a proposal to pool the Franco-German production of coal and steel, as a whole, under a common High Authority, which would eventually provide an opportunity for other European countries to participate in the venture. J. Monnet, the author of the Schuman Plan, thought that this plan would create a concrete foundation of the Federation in Europe [12, p. 321]. American scientist D. Swann considers a French plan, essentially political in character, because it sought to end the historic rivalry of France and West Germany not only 'unthinkable but materially impossible' [17, p. 7]. The Schuman Plan also had the practical advantage of being relatively focused. The Council of Europe, in its political approach, and the customs union, in its economic one, had been too broad too soon and aroused the maximum opposition. Coal and steel were more manageable [8, p. 202] In less than one year, the Treaty Establishing European Coal and Steel Community (TECSC) [6], was signed by six countries: France, Germany, Italy, Belgium, Netherlands, and Luxembourg. As the American scholar M. Dedman notes, the Treaty of Paris 1951 was a complex commercial treaty establishing the European Coal and Steel Community (ECSC), as a regulated market-sharing arrangement under supranational control. It was designed to balance the six State`s particular vested interests in coal and steel production, and to facilitate the achievement of national objectives in these two prime sectors [7, p. 55]. Following the appropriate ratification procedure, the TECSC came into force, and the ECSC began operations. Within the ECSC institutional structure, the main legislative body was the High Authority, and the supervisory role was attributed to the Common Assembly, which consisted of representatives of the member-states (Art. 20). The creation of the Common Assembly represented both Europe`s parliamentary tradition and the fear of a potentially absolute technocracy. Thus, Members of the High Authority had to attend all meetings and answer all questions put by the Assembly or by its members (Article 23). The Common Assembly discussed general reports submitted by the High Authority, and a two-thirds majority vote was sufficient to carry a motion of censure, after which the High Authority resigned as an acting body (Art. 24). As R. Schuman said: '....for the first time, an international assembly would be more than a consultive organ; the parliaments themselves, having surrendered a fraction of their sovereignty, would regain that sovereignty, through its common exercise....' [7, p. 60]. As opposed to the Consultive Assembly of the Council of Europe, which from the beginning, has been primarily a forum for a debate, the parliamentary assembly of the ECSC, had real political responsibilities [13, p. 20]. We should agree with German scientist H. Schmitt, which the Common Assembly, then, was a parliament, not a legislature, whereas the national representative organs were determined to maintain their monopoly on the legislative function and preserve the limits of supranational integration [17, p. 128].

On 25 March 1957, two new treaties were signed which increased the scope of the integration processes for the above-mentioned countries. The Treaties established the European Atomic Community [5] and the European Economic Community [4]. For both Communities, decisions were taken by the Council on proposals submitted by the Commission. During that time, the Assembly remained an advisory body, composed of the specifically chosen deputies, and its legislative role was limited to a process known as 'consultation', which required that before legislation could be adopted, the Assembly was to be consulted. In case, the Council failed to consult the Assembly, the legislative bill was void. Taking this to account, it is not a surprise that the first President of the European Commission described European Communities as 'underdeveloped democracies', from the parliamentary outlook.

The authority of the European Parliament, to some extent, increased after members were elected by the people, as opposed to being nominated by the member-states parliaments. Such elections led to increased prestige and legitimacy. In a resolution on 30 March 1962, the Parliamentary Assembly was renamed the European Parliament. This move was intended to create criteria similar to those of 'traditional' parliaments. But still, the European Parliament lacked a representation. The situation has changed on 20 September 1979, when Brussels Act concerning the election of the representatives to the Parliament was adopted. The application of European Parliament elections indicated a significant change in the status of the Parliament. However, the European Parliament remained largely advisory body.

The legislative power of the European Parliament has grown considerably since the adoption of the Single European Act in 1986, which was a huge step towards the creation of the EU internal market. It introduced a process known as 'co-operation procedure', according to which the European Parliament was granted the right to reject any draft legislation, voted by the qualified majority Council of European Union. This veto could be overcome only by the unanimous agreement of the Council [3].

The next step in enhancing the legislative role of the European Parliament was made under the Maastricht treaty of 1992, which introduced a procedure known as 'co-decision', which allowed the EP to veto, by absolute majority, any proposed legislative measure put forward by the Council. The EP`s powers in the legislative process were transformed from the weak and essentially unconstructive power of delay to a stronger and potentially constructive role in the drafting of legislation [18, p. 57].

Following the fall of the Berlin Wall and the collapse of the Communist system in Eastern Europe, most of the countries of Central and Eastern Europe finally decided that their ultimate destiny lies in joining the European Union. This fact called the necessity to the further strengthening of the role of European Parliament. In 1997, the Amsterdam Treaty was signed, which extended the 'co-decision' procedure to such areas as EU internal market.

Further evolution of the status of the European Parliament is linked with the preparation and adoption of the Lisbon reform treaty, which clarified and expanded the competence of the European Parliament. The consultation procedure remained within a very narrow field of application, while the use of the cooperation procedure was discontinued. According to Article 289 Treaty on the Functioning of European Union [2] (former Treaty establishing European Economic Community), any legislation can now be adopted in two ways. The 'ordinary' legislative procedure (former co-decision procedure) has now become the main legislative procedure by which Union acts are adopted, and involves the Commission submitting a legislative proposal to both the Council and the European Parliament. The scope of co-decision has been extended to about thirty more cases of variable importance and provided for in fourteen new legal bases. The most significant sectors of extension are the area of freedom, security and justice (FSJ area), co-ordination of social and security for migrant workers, culture, measures necessary for the use of the euro, the structural and cohesion funds, the establishment at EU level of intellectual property rights and other centralized regimes, common organization of the markets and general objectives in agriculture, definition of the framework for implementing the common commercial policy, amendments to the Statute of the Court of Justice and rules on 'comitology' [14, p. 118]. If both the Council and the European Parliament approve the proposal, it will be adopted. In the absence of consensus between the European Parliament and the Council about the proposal, a conciliation committee will be convened by the Commission in order to draw up a joint text, which is acceptable to the both parties. If consensus cannot be achieved within six weeks, the proposal will be rejected. The second is a 'special' legislative procedure' which is used in special circumstances stated in the TFEU. Special procedure provides an adoption of the regulation, directive o decision by the European Parliament with the participation of the Council or by the Council with the participation European Parliament (Art. 289 (2) TFEU). This procedure operates in 33 areas such as social security and protection (Art. 21 TFEU), justice & home affairs concerning passports (Art. 77 TFEU), taxation (Art. 113 TFEU) etc.

Legislative initiative still belongs to the Commission. Discussions based on three readings of any bill are instrumental in the relationship of the Parliament and the Council, and the final decision depends on the consent of both parties in this process (Art. 294 TFEU). As a result, a number of important legislative decisions, including those related to international relations; depend on the general consent of the Parliament and the Council. This procedure was introduced during the signing of the Treaty of Nice (2001), in which most policy areas have a so-called principle of 'joint decision', in which the European Parliament and the Council of the European Union have the same powers, and every legal draft submitted by the Commission, should be subject to two readings. Differences should be resolved within the third reading.

It should be stressed that, even taking into account the significance of the EP legislative powers within ordinary legislative procedure, its formal influence is still more limited than those of national parliaments, most of which have formal approval over all national legislation. But, as the British scholar R. Scully argues, the second and more important point is that the EP actually uses its powers to a greater extent than do most national legislatures. Parliaments in most national chambers are bound by strong ties of party loyalty to support or oppose a government, whereas the European Parliament, with more diffused party loyalties, seems to have a greater willingness to exploit available powers to the full [9, p. 167]. In comparative perspective, it is possible to say that EUP influence actually ranks even higher than many of its national counterparts.

In conclusion, it is necessary to stress that the legal and political role of the European Parliament, within the whole institutional structure of the EU, shows a significant tendency to widen and acquire new powers. From a purely consultative role, it has now become an equal partner of the Council of European Union in any legislative process. The EU now possesses a system of two-chamber-legislation, similar to that of the Bundestag and Bundesrat in Germany or Senate and House of Representatives in the USA. Along with the expansion of powers, the Lisbon Treaty established a number of limitations, among which, the European Parliament does not have influence in such key area as EU foreign policy. The supranational and democratic nature of the EUP gives it a unique role in facilitating integration processes. The increase in the legislative powers of the European Parliament can also be considered as an important step towards further constitutionalization of the European Union, which could result in creating a purely federal state – the United States of Europe.

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## ІСТОРИКО-ПРАВОВА ХАРАКТЕРИСТИКА ЕВОЛЮЦІЇ ЗАКОНОДАВЧОЇ ФУНКЦІЇ ЄВРОПЕЙСЬКОГО ПАРЛАМЕНТУ

**Анотація**
Було досліджено, що протягом останніх шестидесяти років, інституційна роль Європейського парламенту значно збільшилась, що ставить його на одну ступінь з Радою Європейського Союзу, та слугує прикладом того, що поглиблення інтеграційних процесів може успішно супроводжуватись демократизацією усієї наднаціональної інституційної системи.
**Ключові слова:** наднаціональність, парламентаризм, демократія, звичайна законодвча процедура, спеціальна закондавча процедура.

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## ИСТОРИКО-ПРАВОВАЯ ХАРАКТЕРИСТИКА ЭВОЛЮЦИИ ЗАКОНОДАТЕЛЬНОЙ ФУНКЦИИ ЕВРОПЕЙСКОГО ПАРЛАМЕНТА

**Аннотация**
Было исследовано, что на протяжении последних шестидесяти лет, институциональная роль Европейского парламента значительно увеличилась, что ставит его на одну степень с Советом Европейского Союза, и служит примером того, что углубление интеграционных процессов может успешно сопровожаться демократизацией наднациональной институциональной системы.
**Ключевые слова:** наднациональность, парламентаризм, демократия, обычная законодательная процедура, специальная законодательная процедура.

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# ELECTORAL ENGINEERING: ESSENCE AND TECHNOLOGY

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The article analyzes the essence and technology of an interdisciplinary concept „electoral engineering". Electoral engineering is defined as a purposeful, rational, science-based and pragmatic activity on constitutional and legal design of the electoral system and process in order to achieve a political and legal target result.
**Keywords:** elections, electoral engineering, the electoral system, election technologies, prognostication, effectiveness of legislation.

**Formulation of the problem.** The cognition of the electoral engineering phenomenon in Ukraine is at the stage of summarizing of the results of scientific research and empirical data, while the use of this multidisciplinary concept in constitutional law remains controversial.

There have been various in subject and content works on different aspects of electoral engineering in legal scientific literature. However, their peculiarity is in the fact that the theoretical analysis, carried out in their framework, is aimed to solving important, but fragmented scientific problems. A lot of disordered information about election practices and non-public nature of the development of electoral legislation also does not promote the scientific identification of electoral engineering.

The electoral engineering is an objective demonstration of the application of a socio-engineering approach to electoral sphere due to the practical need for effective, purposeful activities on the constitutional and legal designing of the electoral system and process with the aim of their rationalization.

The socio-engineering approach to constitutional and legal groundwork for electoral sphere is a theoretical and methodological orientation on the application of the scientific knowledge, on the one hand, and on the other, empirical data and practical experience in the process of goal-setting, prognostication, designing parameters of the electoral system and legal technologies of the electoral process, evaluating their impact in terms of optimization and efficiency. This is a development of „the technological process of implementation of science in practice" (M. Orzih) interpreting law as „a unique way of designing social life" (E. Anners).

The socio-engineering approach is based on the possibility of making conscious and planned changes. It needs justification of purposes of a subject of constitutional and legal construction in terms of their feasibility, the research of factors that affect the state of the electoral sphere, the correct formulation of tendencies of its development, as well as the determination of optimal and effective ways of transformation of the electoral system and process and evaluating the effectiveness of the results.

**Analysis of recent research and publications.** Overview of scientific publications confirms a significant interest of representatives of sociology, political science and law in the socio-engineering approach and electoral engineering, because of the interdisciplinary nature and content of the subject of research.

The following domestic and foreign scientists expressed their views on the above mentioned topic: E. Anners, D. Antoniuk, Achkasov V., V. Bebik, V. Bobrov, V. Volkov, L. Volodin, K. Hahayeva, A. Gasteva, G. Golosov, M. Kaminskyy, M. Keith, J. Klyuchkovsky, V. Komatovskyy, V. Kurbatov, A. Kurbatov, V. Lukow, P. Norris, M. Orzih, A. Petrov, K. Popper, W. Poltorak, Yu. Resnick, M. Savchin, J. Sartori, N. Stefanov, S. Ustimenko, F. Hayek, A. Chernenko, R. Chuprin, J. Sweda, J. Schumpeter, A. Yusupov and other scientists. Their researches were the theoretical base for the development of a new socio-engineering approach in the constitutional law.

**Determination of the unsolved aspects of the problem.** However, the issues of the theoretical and methodological foundations as well as the constitutional and legal groundwork for electoral engineering in Ukraine have not been researched in domestic science of the constitutional law.

**The main purpose of the article** is the implementation of interdisciplinary scientific analysis of the phenomenon of „electoral engineering" determination of its essence and technology with an aim to introduce the socio-engineering theoretical and methodological instruments in the science and practice of the constitutional law.

**Presentation.** The electoral engineering has a dual legal nature: on the one hand, it is a consideration of the laws of development of electoral sphere, determined by objective social, political, economic, legal, ideological conditions; and on the other, it is a purposeful activity of the constitutional and legal designing of the electoral system and legal technologies of electoral process that is exposed to active subjective influence.

It should be noted that in the Ukrainian political reality the active subjective influence is often directed to the achievement of illegal political objectives. Such application of electoral engineering has a socially negative result and it is not only the damage caused to the rights and legitimate interests of other actors, this is also a distortion of constitutional political and legal principles, a risk of destruction of the political system, a threat to the stability of the constitutional order. The abuse of a right in the framework of the electoral engineering appears to be a misuse of authority. It is an act that formally does not go beyond the competence of a public official or public authority, but it is contrary to the purposes and values of the constitutional order. That entails the abuse in the electoral legislation-making process which may be expressed in formal and meaningful aspects: the

abuse of a right in adopting acts of electoral legislation and providing a legislative framework for defective from the teleological and technological aspects rules of conduct that are the basis for the abuse of passive or active suffrage.

The abuse of power in constitutional and legal designing of the electoral system and process can be prevented only on the basis of the constitutional consciousness and awareness of legislators; concretization of powers in order to reduce variability and discretion in decision-making; consensus adoption of electoral laws by the qualified parliamentary majority; improving the quality of laws; strengthening the role of constitutional jurisdiction; using the resources of direct democracy and civil society institutions (open discussion with the involvement of scientists, experts, political parties, public organizations), international experts' activity in constitutional institutions, including the electoral law.

The research of the electoral engineering as an activity on the constitutional and legal design of the electoral system and electoral legal technologies reveals its structure through the following components:

· subjects (participants) of activity. The subject of electoral engineering is the parliament – the Verkhovna Rada of Ukraine as a body of public authority entrusted with the competence to adopt laws that define the essential characteristics of the electoral system and regulate the electoral process; the participants – subjects of legislative initiative in the Verkhovna Rada of Ukraine, the Central Election Commission, the Verkhovna Rada of Ukraine committees, working groups, experts, research institutions, civil society, international organizations, and informal participants, the so-called interest groups that are interested in a particular legislative decision and pursue their interests in creating particular laws;

· object of activity – the electoral system and process, their essential components and technologies which determine the outcome of elections: technology of running for an elected seat, voting, determination of election results by the authorized bodies, as well as the subjective, temporal and territorial components;

· Subject's influence on the object that forms a technological aspect of electoral engineering, which, in its turn, is constructed from the teleological („purpose"), constructional („means"), prognostic and resultative („result") components. A close logical and functional correlation of these structural elements allows moving away from the contemplation of the scientific analysis of electoral engineering and acquiring knowledge of practical value.

The teleological and constructional components reveal electoral engineering as a strategically meaningful activity, based on a certain system of goals, benchmarks, criteria that reflect the essence of meaningful constitutional and legal characteristics of the future electoral system and process.

The teleological component of electoral engineering is characterized by means of its essential characteristics such as purposefulness, feasibility, rationality. The teleological determination is an active creative foundation of the constitutional and legal construction process. Axiological approach, which reflects the values of the electoral engineering subject, is used in defining the teleological determination.

The teleological component requires scientific justification of the formulated objectives of legislative innovation, identification of the key constitutional and legal benchmarks in the electoral sphere. A lack of the above mentioned activity does not allow making a clear strategic prognostication of legislative activities and leads to the dependency of lawmaking process on political feasibility.

Objectification of the purposes of electoral engineering subjects is implemented in certain legal forms: accompanying, explanatory report of draft legislative act, the concept of draft laws, forecasts of the potential efficiency of draft laws, later in preambles or in the initial articles of electoral legislation.

The constructional component is revealed through the choice of legal instruments and legal technologies of the future design of the electoral system and process. Subjects of electoral engineering must define exactly the set of legal means that most effectively lead to a desired result. The most important for the constructional component of electoral engineering is to determine legal means which can lead to the achieved goals, as well as a sequence of their application in practice for an optimum solution of political and legal problems as well as an achievement of socially significant results.

At the stage of the constitutional and legal construction the achievement of political and legal objectives in the electoral area is possible only on the basis of selection from the plurality of legal means (legal instruments and technology) those which, in the opinion of electoral engineering subjects, are more appropriate and effective.

Legal technology answers the question „how" a subject acts, how it affects the object to achieve a goal. Legal technology provides a legislative framework which consists of a particular set of legal instruments, aimed at rationalization and optimization of activities. It includes only those legal instruments that are the most effective in achieving this goal and guaranteeing a legal result. Legal technology has a dual nature: on the one hand, it is a consolidated system of interconnected and interdependent legal instruments which affect social relations, and on the other hand, it is an activity aimed at their implementation in practice.

The choice of legal means is a crucial issue in ensuring the effectiveness of electoral engineering. Accurately chosen and practically verified means guarantee the efficiency of the electoral legislation. Legal instruments and technologies, which are adequate to the constitutional values and goals, are designed to enhance a positive effect of the legislation and to minimize a negative effect; otherwise factors of insuperable force will be more intense than legal means leading to the unpredictable results.

Correlation between the teleological and constructional components of electoral engineering has two aspects: first, it is necessary to set goals that correspond to the objective laws of social development; secondly, legal means, which are chosen to achieve a political and legal goal, must be able to turn this goal into a reality.

The predictive and resultative components interpret the technology of electoral engineering in providing prospective and retrospective evaluation of the effectiveness of the electoral legislation.

Prognostication within electoral engineering is a scientifically grounded presumable judgment about the future state of the electoral system and process, about how effective the legal instruments and technologies, selected for their legislative designing, will be, and about what society and state will receive as a result of their implementation.

Prognostication should be based on the laws of development and functioning of the electoral system and process in the past, scientific research of the political and legal trends taking into account the most likely patterns of political actors' behaviour.

The task of the prognostic component of electoral engineering is to identify quantitative and qualitative development parameters of the electoral system and process on the basis of adoption of corresponding legislation; to predict the behavioural patterns of subjects of law, influenced by the new rules; to establish a system of social and legal factors that could negatively or positively affect the rules that are projected.

The predictive component is based on legal means such as expertise of draft bills, legal and imitation modelling, legal experiment, etc., which should receive a normative regulation and take a worthy place in the domestic constitutional and legal practice.

The effectiveness of electoral legislation on political and legal reality should be estimated by means of the teleological and technological criteria. The teleological criterion facilitates to estimate a contribution to the implementation of constitutional and legal political rights, while the technological criterion permits to estimate standardization, algorithmization, universalization of election procedures, which is common for the electoral law.

The resultative component of electoral engineering provides the determination of a real effectiveness of impact of purposefully engineered electoral legislation on public relations as well as a response to the question whether the desired political and legal results have been achieved. Within the resultative component it is important to establish the costs of the result and side effects appeared in connection with the implementation of legislative regulations. It is also necessary to define if the latter can discredit a goal of constitutional and legal construction.

Comprehensive retrospective estimation of efficiency of legislative influence can be obtained by a specially organized systematic observation, assessment of the status and dynamics of current electoral legislation, i.e. by legal monitoring. It has been proved that legal monitoring of electoral legislation promotes a purposeful planning and coordination of legislative activities, as well as improves law enforcement electoral practices.

The prospective assessment of the legislative impact on election legal relations is provided, particularly, by means of imitation modelling. It is a method of verification of the legislative innovations in an experimental mode to simulate their implementation engaging the recipients of legislative regulations. Thus it allows indentifying the deficiencies of law, including unexplained schemes of cooperation and sharing responsibility.

From a practical point of view, the prospective and retrospective assessment complements each other, so both types of assessment should receive equal attention and simultaneous development.

**Conclusions and suggestions.** In conclusion, it is worth noting that electoral engineering is a constitutional and legal design of electoral system and process; a rational, science-based, pragmatic activity based on a system of constitutional goals and values; aimed at instilling the desired political and legal characteristics to the electoral system and process by means of a system of legal instruments and technologies; related to the prediction of political and legal consequences and estimation of efficiency (monitoring) of obtained political and legal results. Technology of electoral engineering is formed by: teleological, constructional, predictive anт resultative components. Understanding of the essence of electoral engineering and revealing its technology enables to identify and define the presence and self-sufficiency of this phenomenon among other political and legal phenomena.

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## ВИБОРЧА ІНЖЕНЕРІЯ: СУТНІСТЬ ТА ТЕХНОЛОГІЯ

**Анотація**
У статті аналізується сутність і технологія міждисциплінарного явища «виборча інженерія». Виборча інженерія розкривається як цілеспрямована, раціональна, науково і прагматично обґрунтована діяльність з конституційно-правового конструювання виборчої системи та процесу, з метою отримання заданого політико-правового результату.
**Ключові слова:** вибори, виборча інженерія, виборча система, виборчі технології, прогнозування, ефективність законодавства.

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## ИЗБИРАТЕЛЬНАЯ ИНЖЕНЕРИЯ: СУЩНОСТЬ И ТЕХНОЛОГИЯ

**Аннотация**
В статье анализируется сущность и технология междисциплинарного явления «избирательная инженерия». Избирательная инженерия раскрывается как целенаправленная, рациональная, научно и прагматично обоснованная деятельность по конституционно-правовому конструированию избирательной системы и процесса, с целью получения заданного политико-правового результата.
**Ключевые слова:** выборы, избирательная инженерия, избирательная система, избирательные технологии, прогнозирование, эффективность законодательства.

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## L'AVENIR DU BARREAU UKRAINIEN: PROBLEMES ET PERSPECTIVES

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Cet article définit les problèmes et les perspectives de la réforme de barreau en Ukraine. L'auteur montre que la concurrence et le marché, les activités des firmes juridiques obligent les avocats à se reunir autour de l'idée de la préservation des traditions de barreau, de ses valeurs et ses principes fondamentaux. Le monopole sur la représentation et la défense, ainsi que la perfection d'autorégulation sont les directions de réalisation de cette tâche collective. Le rфle principal dans le processus de réforme appartient à l'Association nationale des avocats de l'Ukraine comme une organisation professionnelle qui réunit des avocats. L'auteur met en exergue une valeur de la réforme de barreau et sa conformité aux normes internationales.
**Mots-clés:** barreau, avocat, association des avocats, profession d'avocat, activité d'avocat.

**Définition d'un problème.** La question magistrale de nos jours est conserver un rфle professionnel et social de la profession d'avocat.

Au travers du temps la profession d'avocat conserve son rфle de conseil, de protection et de défense, mais depuis la seconde moitié du XX siècle on songe à une adaptation raisonnée de la profession aux exigences du marché.

En Ukraine la Loi sur le barreau et l'activité de l'avocat, n° 5076-VI de 5 juillet 2012 (ci-après «la Loi») [1], a marqué une nouvelle étape de la réforme de la profession. Après des années de discussion, le parlement ukrainien a adopté la Loi dans la version dйmocratique progressiste, qui rйpondait aux normes internationales les plus йlevйes. Cependant, les différences de statut des avocats et juristes sont toujours valables. Les cabinets d'avocats exercent les mкmes activités que les firmes juridiques et la question du monopole des avocats dans les tribunaux est discutable dans le contexte de la réforme.

**Analyse des recherches et des publications.** Les travaux de M. Fridman, M.S. Larson, Y. Dezalay, M.E. Katsh contiennent de nouvelles approches à la perception de la profession d'avocat. En XXI siècle les tendances d'égalisation des avocats avec les juristes et de transformation des avocats à la logique d'un marché mondialisé indiquent R. Susskind, D. Galbenski, J. Macfarlane, M. Sako, M.C. Regan Jr. et T.H. Palmer.

La question savoir si les avocats peuvent maintenir leur identité à l'avenir est un objet de recherches en oeuvres de T.V. Varfolomeyeva, S.V. Goncharenko, K.P. Koval, A.S. Dekhanov, Y.S. Pilipenko, I. Yartikh, L. Assier-Andrieu, L. Karpik, T. Wickers, Ch. Jamin, F.H. Stephen.

En Ukraine, le problème de la répartition des activités entre les avocats et les juristes n'est pas analysé à la lumière de la réforme constitutionnelle, ainsi que l'importance de l'association des avocats.

**L'objectif de l'article** est la définition des directions et des objectifs de la réforme du barreau pour maintenir la tradition et principes fondamentaux de profession, limiter le marché incontrфlée dans les activités juridiques.

**L'essence de la recherche.** Le metier d'avocat résulte d'une longue histoire qui trouve ses origines dés l'Antiquité et le début du Moyen-Age. Comme le suggère A.Damien, la vie quotidienne des avocats au cours des ages ne fut pas simple. Dès qu'ils apparurent à l'aube de la societé moderne, ayant découvert le rфle irremplaçable qu'ils doivent jouer dans la societé, ils furent en batte aux attaques du pouvoir, de tous pouvoirs [2, p. 7].

La profession d'avocat a connu de nombreux changements qui l'ont conduit à s'adapter: multiplication des textes de lois, pression de la concurrence sur le terrain du conseil juridique, internationalisation des problématiques juridiques des entreprises, mais aussi développement des nouvelles technologies, émergence de nouveaux domaines de droit, nouveaux modes d'exercice du métier d'avocat.

Dans le monde contemporain "les futurs avocats, qui bénéficient d'une formation juridique de qualité, doivent également posséder des connaissances dans la domaines moins strictement juridiques, aujourd'hui indispensables pour leur permettre d'assurer pleinement un rjle de maitre d'њuvre" [3, p. 94].

Ainci la profession évolue, continue de se développer et trouve progressivement la voie de sa modernisation.

En Ukraine la profession d'avocat est une profession libérale, indépendante et réglementée. Elle est soumise au respect de règles déontologiques et professionnelles strictes qui font de l'avocat un conseiller et un partenaire privilégié dans la défense d'intérкts des clients dans tous les domaines du droit.

Aujourd'hui l'avocat ne limite pas nécessairement son activité aux frontières de l'hexagone. Plusieurs centaines d'avocats sont de nationalité ètrangère et l'avocat exerce bien souvent en relation avec des confrères d'autres pays membres ou non de l'Union européenne. Cette ouverture de la profession, inséparable de l'internationalisation du droit, ne fait qu'élargir l'engagement du barreau au service du droit en faveur de droit de l'Homme.

L'avocat contemporain cumule les activités juridique et judiciaire, conseille et défend le particulier comme l'entreprise. L'élargissement de ses compétences et la diversité de ses modes d'exercice incitent certains à parler d'une rupture avec le passé.

Avec le développement du marché, les firmes juridiques participent aux luttes concurentielles sur le marché national et international. On peut voire sur un marché transnational progressivement unifié par l'interdépendance strategique des mégafirmes du droit et les grands conglomérats de services à l'enterprise.

En Ukraine, commes sur les autres scènes nationales, le mouvement vers la concentration et la spécialisation a provoqué la séparation de la profession. Les avocats des particuliers et des petites enterprises se distinguent de les avocats des grandes organisations par leur formation, leur pratiques, leur mobilité, leur intérкts. Il faut constater qu'un certain nombre d'avocats n'ont pu encore saisir à quel point univers professionnel a changé.

La domination du fait économique tient à l'impuissance de le barreau classique. Un *business* avec le postulat que l'avocat est un marchand de droit s'oppose une philantropie non marchande au service de la dignité humaine. Quand-mкme, l'activité à la logique du profit provoquerait le crise de confiance.

La tache collective doit réunir des avocats autour de problemes de monopole et de l'affirmation de l'identité des avocats et leur role au service de leur clients et de la Justice.

La Loi prévoit la mise en place d'un barreau professionnel unifié. L'article 45 de la Loi prévoit ce qui suit: «L'Association nationale des avocats d'Ukraine est une organisation professionnelle non gouvernementale à but non lucratif réunissant tous les avocats d'Ukraine et assurant l'exécution des tâches d'autorégulation du barreau» [1]. L'Association nationale des avocats d'Ukraine a été enregistrée le 19 novembre 2012.

Le Conseil des barreaux européens (ci-après CCBE) suit de très près les efforts visant à la création d'un barreau professionnel unifié en Ukraine selon l'engagement pris lorsque l'Ukraine a adhéré au Conseil de l'Europe en 1996. Le CCBE a souligné à plusieurs reprises aux autorités ukrainiennes l'importance de créer un cadre permettant de mettre en place un barreau national indépendant et autonome, et a également offert son assistance dans ce processus [4, p. 3].

Cette position du CCBE est totalement justifiée. Il existe des principes essentiels qui, mкme exprimés de manière légèrement différente dans les différents systèmes juridiques, sont communs à tous les avocats européens. Les principes essentiels fondent divers codes nationaux et internationaux qui régissent la déontologie de l'avocat.

Les avocats européens sont soumis à ces principes qui sont essentiels à la bonne administration de la justice, à l'accès à la justice et au droit à un procès équitable comme l'exige la Convention européenne des Droits de l'Homme. Dans l'intérкt général, les barreaux, les cours et tribunaux, les législateurs, les gouvernements et les organisations internationales doivent faire respecter et protéger ces principes essentiels.

La Charte essentielle des principes de l'avocat européen du CCBE compte le principe d'autorégulation parmi ses principes essentiels [5].

L'autorégulation est caractéristique de la profession d'avocat. D'un point de vue conceptuel, elle doit кtre considérée comme un corollaire de l'indépendance de la profession. L'autorégulation va dans le sens de l'indépendance collective des membres de la profession d'avocat. Elle n'est rien de moins qu'une défense structurelle de l'indépendance de l'avocat qui exige qu'un avocat soit libre de toute influence, notamment de celle découlant de ses intérкts personnels ou de pressions extérieures.

La recommandation Rec(2000)21 du 25 octobre 2000 du Conseil de l'Europe sur la liberté d'exercice de la profession d'avocat prévoit que les avocats devraient кtre autorisés et encouragés à créer et à devenir membres des associations professionnelles locales, nationales et internationales qui, seules ou à plusieurs, sont chargés d'améliorer la déontologie et de sauvegarder l'indépendance et les intérкts des avocats. Les barreaux ou les autres associations professionnelles d'avocats devraient кtre des organes autonomes et indépendants des autorités et du public. Le rфle des barreaux ou autres associations professionnelles d'avocats dans la protection de leurs membres et la défense de leur indépendance à l'égard de toute restriction ou ingérence injustifiée devrait кtre respecté.

L'Association nationale des avocats d'Ukraine devrait кtre encouragé à assurer l'indépendance des avocats. Il est très important, en particulier, à défendre le rфle des avocats dans la société et à veiller notamment au respect de leur honneur, de leur dignité et de leur intégrité; à promouvoir la participation des avocats à des systèmes garantissant l'accès à la justice des personnes économiquement faibles, notamment dans le cadre de l'aide judiciaire et du conseil juridique; à promouvoir la protection sociale des membres de la profession et à les aider ainsi que leurs familles si les circonstances l'exigent; à promouvoir pour les avocats un niveau

de compétence le plus élevé possible et veiller à ce qu'ils respectent la déontologie et la discipline.

Les principes de base des Nations Unies relatifs au rфle du barreau indiquent que les avocats peuvent constituer des associations professionnelles autonomes, ou adhérer à de telles associations ayant pour objet de représenter leurs intérкts, de promouvoir leur éducation et leur formation continues et de protéger leur intégrité professionnelle. Les membres de ces associations élisent leur organe directeur, lequel exerce ses fonctions sans ingérence extérieure.

La coopération avec les avocats d'autres pays en vue de promouvoir le rфle des avocats, notamment en tenant compte des travaux des organisations internationales d'avocats ainsi que des organisations internationales intergouvernementales ou non gouvernementales, doit кtre considérée comme une priorité.

La direction effective de réappropriation de valeurs et principes fondamentaux de profession est le monopole, qui peut limiter le marché incontrфlée dans les activités juridiques.

Par le décret 119/2015 du 3 mars 2015, le Président de l'Ukraine a créé la commission constitutionnelle de l'Ukraine chargée d'élaborer des amendements à la Constitution actuelle [6].

Lors de sa session plénière des 20 et 21 juin 2015, la Commission de Venise a autorisé les rapporteurs à adresser un Avis préliminaire sur le projet d'amendements constitutionnels, y compris sur le pouvoir judiciaire, aux autorités ukrainiennes avant qu'elle ne l'adopte à sa prochaine session plénière. Avis préliminaire n°803/2015 de 24 juillet 2015 sur la proposition de révision constitutionnelle concernant le pouvoir judiciaire de l'Ukraine [7] contient une conclusion positive sur la proposition de préciser que le droit garanti à l'article 59 renvoie à l'aide juridique «professionnelle», c'est-à-dire à la représentation d'un avocat en exercice (p. 11 de l'Avis préliminaire).

Avis sur les projets d'amendements de la Constitution de l'Ukraine concernant le pouvoir judiciaire approuvés par la commission constitutionnelle le 4 septembre 2015 a été adopté par la Commission de Venise lors de sa 104 session plénière (Venise, 23-24 octobre 2015) [8].

La Commission de Venise a indiqué que les amendements révisés en article 131-2 «Le barreau» sont positifs, mais disposition prévu que «seul un avocat représente une personne devant le tribunal et défend une personne contre des poursuites» est trop large. La Commission a recommandé de prévoir des exceptions pour certains types de différends, comme les contentieux du travail ou les litiges d'importance mineure (p. 24) [8].

**Les conclusions et les résultats.** Comme toute institution humaine, le barreau a toujours été en adoptation avec l'esprit de son temps. Le panorama historique montre qu'il n'y a pas de contradiction entre la liberté et la régle dans la profession d'avocat. Au cours des sciècles, la profession d'avocat a connu de nombreuses mutations et reste encore aujourd'hui en mouvement, mais il faut préserver l'indinité spécefique des avocats dans l'intérкt de la liberté de tous. Les avocats doivent faire un effort de réappropriation de valeurs et principes fondamentaux de profession.

Le monopole d'avocats sur représentation d'une personne devant le tribunal et défence d'une personne contre des poursuites prévu par article 131-2 de projets d'amendements de la Constitution de l'Ukraine permettra de régler le marché des services juridiques et d'assurer la qualité de l'aide juridique.

L'Association nationale des avocats d'Ukraine doit prendre toutes les mesures nécessaires, y compris celles consistant à défendre les intérкts des avocats, ainsi que soutenir la réforme du droit et les débats sur la législation actuelle ou en projet.

Le principe d'autorégulation est énoncé dans les instruments juridiques européens et internationaux. Il peut garantir l'indépendance professionnelle des avocats à l'égard de l'Йtat; sans garantie d'indépendance, les avocats ne peuvent pas remplir leur mission professionnelle et légale.

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## МАЙБУТНЄ УКРАЇНСЬКОЇ АДВОКАТУРИ: ПРОБЛЕМИ ТА ПЕРСПЕКТИВИ

**Анотація**
У статті досліджено проблеми та перспективи реформи адвокатури в Україні. Автор показує, що конкуренція та ринок, діяльність юридичних фірм зобов'язують адвокатів з'єднатися навколо ідеї зберігання традицій адвокатури, її цінностей та фундаментальних принципів. Монополія адвокатури на представництво та захист у судах та вдосконалення самоврядування є напрямками реалізації цього колективного завдання. Провідна роль у процесі реформ належить Національній асоціації адвокатів України як професійній організації, яка об'єднує адвокатів. Досліджено значення реформи адвокатури та її відповідність міжнародним стандартам адвокатської професії.
**Ключові слова:** адвокатура, адвокат, асоціація адвокатів, професія адвоката, адвокатська діяльність.

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## БУДУЩЕЕ УКРАИНСКОГО АДВОКАТУРЫ: ПРОБЛЕМЫ И ПЕРСПЕКТИВЫ

**Аннотация**
В статье исследованы проблемы и перспективы реформы адвокатуры в Украине. Автор показывает, что конкуренция и рынок, деятельность юридических фирм обязывают адвокатов объединиться вокруг идеи сохранения традиций адвокатуры, ее ценностей и фундаментальных принципов. Монополия адвокатуры на представительство и защиту в судах и совершенствование самоуправления являются направлениями реализации этой коллективной задачи. Ведущая роль в процессе реформ принадлежит Национальной ассоциации адвокатов Украины как профессиональной организации, которая объединяет адвокатов. Исследовано значение реформы адвокатуры и ее соответствие международным стандартам.
**Ключевые слова:** адвокатура, адвокат, ассоциация адвокатов, профессия адвоката, адвокатская деятельность.

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## PERSONAL AND MORAL-ETHICAL QUALITIES AS ONE OF THE MAIN REQUIREMENTS FOR THE CANDIDATE ADVOCATES

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The article is devoted to the research and analysis of law, which includes the requirements for becoming a advocate and advocacy. Main attention is drawn to the fact that the selection of candidates advocates should be carried out not only by the criterion of theoretical knowledge and practical skills, but also on the personal and moral and ethical qualities, since all these features form a complete identity of the candidate, and create conditions for higher status of an advocate. The proposals for legal consolidation of professional and personal and moral and ethical requirements for applicants to lawyers are substantiated.
**Keywords:** acquiring the right to advocacy, requirements for acquiring the status of advocate, advocate's ethics, moral and ethical requirements.

**Formulation of the problem.** High morality and moral culture have a special importance for the advocate, because this profession imposes to society the ideas of such high moral and legal principles as the rule of law, justice, and humanity, impartiality, without which it is impossible to meet the challenges of building a democratic and humane society. The legislation on advocacy and legal practice, and advocacy in a whole must meet ethical requirements.

In continuation of this position it is necessary to refer to the personal and moral and ethical requirements for the person who wishes to practice advocacy.

**Condition of research.** The problems of organization and advocate's activity, implementing of ethical foundations of advocate's activity have been the subject of research of scientists and lawyers for a long time. In particular, the diverse as-

pects of the subject contained in scientific works of N. M. Bakayanova, E. V. Vaskovskyi, T. V. Varfolomeeva, Yu. M. Groshevyi, Ya. P. Zeykan, A. F. Koni, P. V. Makalynskyi, O. D. Svyatotskyi etc. Not reducing the theoretical significance of these scientific works, unfortunately, we must note the insufficient extent of modern research is the question of personal and ethical requirements for the person who intends to practice law.

The **purpose** of research is to identify the moral and ethical and personal requirements for candidate advocates in the light of legal analysis of ethical principles and rules of advocate's activity.

**The presentation of research.** The word "advocate" comes from the Latin root *advocatus*, which means "invited" that is invited to defend in court, to conduct a case [8, p. 167]. In turn, the word «*advocatus*» is derived from the Latin word *advocatio* – request the assistance. That this turns the essence of the profession of advocate, which is to use all the knowledge and practical skills of advocate for the implementation of the main social function of the legal profession – "ensuring the right to defence against accusation and providing legal assistance in deciding cases in courts and other state bodies" [1]. The Preamble of the Rules of advocate's ethics states that the vital importance of the advocacy's functions requires that advocates should follow high ethical standards of conduct. Advocates' compliance of specific deontological rules and requirements is considered by worldwide advocate's community as necessary precondition the full functioning of the legal profession, the fulfilment of its important social role in democratic society [4].

In view of this analysis it is necessary to apply to the requirements applicable to the candidate advocates. IT's claimed to practice advocacy according to the requirements of art. 6 of the Law of Ukraine "On the Bar and Legal Practice" from 05.07.2012 (hereinafter-Law), for becoming an advocate, a person must meet the following requirements: to have complete higher legal education gained in Ukraine, or complete higher legal education gained in foreign countries and recognized in Ukraine as prescribed by law; can speak the official language; have a minimum of two-year experience in the legal field, namely the experience in the specialty after the obtaining complete higher legal education. Also, a person who intends to become an advocate shall pass the qualification test; complete probationary training (except as prescribed by law); take the oath of the Ukrainian advocate and receive a certificate authorizing him for legal practice. At the same time a person cannot be an attorney if him: 1) has outstanding or unexpunged convictions for grave or especially grave crimes, or crimes of medium gravity punished by deprivation of freedom; 2) is deemed by court to be legally incapable or to have limited legal capacity; 3) was deprived of the right of legal practice – during two years after the resolution to deprive them of the right of legal practice; 4) was dismissed from the post of a judge, prosecutor, investigator, notary, from civil service or from service in the bodies of local self-government because of oath-breaking or corruption-related crimes – during three years after such dismissal [5].

At the same time, it is necessary to emphasize that while the legislative consolidation procedures and requirements for acquiring professional status of advocate is impossible to ignore claims to moral and ethical qualities of the candidates, because as Michel de Montaigne claimed "to be an advocate is a complex, elegant art. In addition to professional skills, you need knowledge to have innate personal qualities and to be called of God [2].

N. M. Bakayanova, investigating and analyzing the ethical foundations of activities of advocate-defender, draws attention to the fact that "advocacy related to the problems of morality. Solving these problems, of course, is based on moral ideals, principles and feelings of advocate. The role of the regulators of conduct in all cases is fulfilled by very specific, proven practices and traditionally provided requirements of legal ethics [7, c. 48]. However, the author classifies ethical requirements to advocate as follows: 1) the requirements contained in the rules of international law; 2) requirements, which are enshrined in national legislation; 3) claims recognized in documents that have no legal character; 4) requirements, which are not fixed in official documents.

However, a characteristic feature of such requirements is that they apply to the activities of a lawyer after his acquisition of the status of advocate. Thus, the deontological qualifying requirements to candidate advocates with educational and professional requirements would amount to a single system, are not established.

For these reasons, it appears appropriate to identify personal and moral and ethical requirements for these persons.

Under the personal and moral and ethical requirements is to be understood the complex requirements to the intellectual and general cultural level, personal and professional qualities, which a candidate advocate should have.

There is a state standard, which provides a list of the most important personal qualities of person who receives a state diploma in Law. In the qualifying characteristics of such graduate indicated that a lawyer must have civic maturity and high social activity, know the rules of professional ethics, have a high level of legal and psychological culture, deeply respect the rule of law and care for social values, honour and dignity of a citizen, be humane, have the appropriate level of moral consciousness, persistent moral beliefs, have a sense of duty, responsibility for the fate of people and assignments to be principled and independent while ensuring rights, rights, freedoms and lawful interests of the individual and his social protection, have the necessary will and perseverance in carrying out legal decisions taken, feelings of intolerance to any violation of the law in his own career. All lawyers regardless of the type of legal activity must meet these criteria [3].

In turn, there is quite a logical question: is it possible to identify all moral and ethical quality of a person before he independently begins to provide professional legal aid? And if so, how is it possible?

It is appropriate to note the following:

Firstly, one of the stages to identify the moral and personal qualities of the candidate are Qualification and Disciplinary Bar Commission inspection.

According to Art. 8 of the Law the person address the Qualification-Disciplinary Bar Commission in a residence with the application for admission to taking the qualification exam. In order to verify the completeness and reliability of information reported by the person who wishes to become a lawyer, and with the written consent of such person, qualification commission of the bar, qualifying chamber or its member may request the public authorities, local governments, their officers and officials, enterprises, institutions and organizations regardless of ownership and subordination, public associations, which are required within ten working days of receipt of the request to provide the necessary information. The refusal of the provision of information on the request, untimely or incomplete provision of information, untrue information, entails liability under the law. In case of failure by the person who wishes to become an advocate of the written consent to verify the completeness and accuracy of the information reported, the person is not allowed to qualifying examination;

Secondly, one of the entry requirements of professional status is probation. At this stage, finding himself face to face with the future profession, mastering all its aspects and difficulties candidate advocate the best way shows how his personal skills: analytical abilities, perseverance, determination, endurance, prudence and keeping peace integrity, diligence, independence, self-control, and both the moral qualities: honesty, integrity, discipline, diligence, responsibility, culture of behaviour, including tact, kindness, tolerance, courtesy. Exactly during probation is the formation of a person as an expert under the influence and supervision of an experienced advocate-manager, experience and morality of which is undoubtedly, laid his professional skills with the principles of legal ethics. It should be noted that individual psychological quality of person required achieving positive motivation of professional advocacy, its efficiency and effectiveness, formed throughout its life, particularly in learning, work, and entry of individual and general social skills. Question is not only about the set of special natural qualities, but also the outlook of man, his spiritual development. This component of professionalism is important and is a criterion for determining a person's ability to master the profession of advocate and be them in fact, realize the social significance and importance of the work.

In light of the foregoing, it seems appropriate to propose to check the moral and ethical qualities of the applicant at the time of the last qualification exam, for example, in the form of an interview. Analysis of rules governing the procedure, method of passing a qualifying examination shows that during it there are only theoretical knowledge and practical skill, that is only a professional qualification person is set. Therefore, the interview would make it possible to identify and evaluate the moral and ethical aspects of conduct of the individual.

**Conclusions.** Summing up, it should be noted that the selection of candidates advocates not only the criterion of knowledge, but also on the personal and moral and ethical qualities fully justified, as all these features form a complete identity of the candidate, and set the stage for the title of "advocate". It's aptly noted the Chairman of the Committee on Foreign Relations NAUU Andrei Kostin, speaking at the international conference "Craftsman or professional? Representation by advocates in court proceedings", held in June 5-6, 2015: "Each of our colleagues who knowingly wrongly violates or even ethical rules, harms us with you, because the first thing that connects us with the client is the relationship of trust, not only to us personally but also our status" [6].

Therefore, it appears that Part 2 of Art. 9 of the Law of Ukraine "On Advocacy and legal practice" can be outlined as follows: "The qualification examination is to identify the theoretical knowledge in law, the history of advocacy, legal ethics of the person who wishes to become an advocate, level of practical skills and abilities to use law and moral and ethical qualities of the candidate".

The proposed idea should be implemented in the law only after comprehensive discussion among the legal community with the development of clear criteria by which it would be reasonable to estimate the identity of the applicant, candidate's areas of life that could be the subject of study, created a procedural mechanism for such verification.

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## ПРОФЕСІЙНО-ОСОБИСТІСНІ ТА МОРАЛЬНО-ЕТИЧНІ ЯКОСТІ ЯК ОДНА З ГОЛОВНИХ ВИМОГ ДО ПРЕТЕНДЕНТА В АДВОКАТИ

**Анотація**
Статтю присвячено дослідженню та аналізу правових норм, в яких передбачені вимоги для набуття статусу адвоката та заняття адвокатською діяльністю. Зосереджено увагу на тому, що відбір кандидатів в адвокати повинен проводитись не лише за критерієм рівня теоретичних знань та практичних навичок, але й з урахуванням особистісних та морально-етичних якостей, оскільки всі вказані риси формують цілісну особу кандидата, та створюють передумови для отримання високого статусу адвоката. Обґрунтовуються пропозиції щодо нормативно-правового закріплення професійно-особистісних та морально-етичних вимог до претендентів в адвокати.
**Ключові слова:** набуття права на заняття адвокатської діяльністю, вимоги до набуття статусу адвоката, адвокатська етика, морально-етичні вимоги.

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## ПРОФЕССИОНАЛЬНО-ЛИЧНОСТНЫЕ И МОРАЛЬНО-ЭТИЧЕСКИЕ КАЧЕСТВА КАК ОДНО ИЗ ГЛАВНЫХ ТРЕБОВАНИЙ К ПРЕТЕНДЕНТУ В АДВОКАТЫ

**Аннотация**
Статья посвящена исследованию и анализу правовых норм , в которых предусмотрены требования для получения статуса адвоката и осуществление адвокатской деятельности. Сосредоточено внимание на том, что отбор кандидатов в адвокаты должен проводиться не только по критерию уровня теоретических знаний и практических навыков, но и с учетом личностных и морально-этических качеств, поскольку все указанные черты формируют целостную личность кандидата, и создают предпосылки для получения высокого статуса адвоката. Обосновываются предложения нормативно-правового закрепления профессионально-личностных и морально-этических требований к претендентам в адвокаты.
**Ключевые слова:** приобретения права на занятие адвокатской деятельностью, требования к получению статуса адвоката, адвокатская этика, морально-этические требования.

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## FOREIGN POLICY AS A STATE'S CHOICE AND MODERN INTERNATIONAL LAW

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The article is devoted to the analysis of the definition and meaning of the right of choice, to the research of the issue of a state's choice (a state as a subject of international law). The definition and meaning of foreign policy as a general course of a state in international affairs, as a state's choice, are given and analyzed. The correlation between foreign policy and international law, the influence of international law on foreign policy and the influence of foreign policy on modern international law are investigated. Some certain features of modern international relations are determined. On the basis of legal literature the definition of modern international law as the law of development is given.
**Keywords:** choice, right of choice, foreign policy, international law, modern international law, the law of development, international relations, politics, law.

**Resolution of the problem.** The questions of choice and the right of choice are quite complicated and controversial. It's all due to the multidimensionality of a term "right" and due to the absence of unity in understanding of the term "choice". Choice is understood in the correlation between the process of the decision-making and the objectification of the result of this process (decision as a result).

One of the spheres of right of choice realization is foreign policy that is conducted by the state and its authorized subjects.

It is quite difficult to define the nature and essence of foreign policy clearly and simply. It is mainly the sum of separate, situational decisions and actions and it is very difficult to trace and explain clearly visible connections between them.

**Relevance of the research** topic is also due to the fact that in general foreign policy depends on the degree of adaptation of a state to the environment where similar subjects act, on collaboration, each country follows mainly own national interests that is why a compound of these interests is needed. As a purposeful activity politics is an inalienable part of human vital functions through which national, group and individual interests are realized, social systems regulation, reformation or even modification are done. We can talk about such a modification of international law nowadays, namely about its transformation into the law of development. Politics is the dominant sphere of social life and largely determines modern international law as the law of development.

**State of research.** Foreign policy caused an interest of many scientists including the representatives of international law doctrine. Some aspects of the problem were researched by such scientists as V. Bashtannik, M. Malsky, D. Levin, M. Lebedeva, I. Lukashuk, Rosenau and some others. The issues concerning the law of development which is also under many scientists' interest, were researched by Flory M., Pellet A., Virally M., Tuskoz J., Yakubovskaya N. and others. Their works and some other works on international law were the fundamental basis for research of the issues examined in this article. However foreign policy which significantly determines modern international law has never been researched in the theoretical context of choice and the right of choice.

**The main purpose of the article** is to discover and generalize theoretical and some practical grounds of foreign policy as a general course of a state in international affairs and of modern international law as the law of development in the context of the right of choice on the basis of complex and comprehensive analysis of doctrine.

**Basic material.** The term "choice" in philosophical science is studied through such terms as "freedom" and "will". Freedom of human will expresses the dynamic, purposeful and transforming role of human being towards determining conditions and expresses particularly unrepeatable reflections of objective reasons in human activity. Freedom of will is represented by freedom of desire and freedom of behavior, and the absence of coercion.

Choice is a consciously volitional activity of a subject as for the decision of behavior variant in certain sphere and the objectification of the result of such activity in the act of a subject.

Right of choice is based on freewill and it comes forward as a major side of social (including legal) regulation of the behavior of people.

Choice is shown in the process of realization of legal instructions, during combination of state will with separate legal subjects' will, including relations on cooperation of the state with other subjects of international law.

Thus, one of the spheres of right of choice realization is foreign policy that is conducted by the state and its authorized subjects.

With the emergence of a state that is a universal political organization operating on the basis of administrative-territorial division and citizenship and carrying out a management by means of the specialized vehicle, arbitrage and legal enforcement [19, p. 15] there was a necessity for a collaboration and communication with other states, in the activity that expresses general policy of the state in international affairs. Foreign policy is one of the major functions of a state that determines its essence. In fact, functioning and development of any state as a subject of international law and international relations cannot take place without its external connections with other subjects of international law. It is an objective necessity of the existing social development.

Foreign policy is almost always expressed in the form of double mixture of compromises: between national politicians and statesmen and between national diplomacy, and on the other hand, between certain state and its foreign partners and opponents for purposes of collaboration, satisfaction of the interests and certain mutual development.

While connecting and subordinating interests of nation-states, interests of all humanity and its separate parts, foreign policy has been and remains dual. The reflection and idealistic ideas about justice in the world and hard practical calculation of imperious elites that distinguish the necessities of the countries which are generated by a situation composed of perspective aims of transformation of world order, - all these components can be found in foreign policy.

Foreign policy is a component of politics in general which has all-embracing character and a great importance in social relations regulation.

Y. Kazancev considers that foreign policy is a general course of a state in international affairs [7, p. 339]. We share this definition, however it needs clarification. Really, foreign policy is the course of a state, the choice of a state, but today such a choice is not enough, because it is necessary for the subjects of modern international law to collaborate and cooperate.

This statement is also mentioned by V. Bashtannik and E. Sulima: "Foreign policy is an activity of a state in international arena which regulates relationships with other subjects of foreign-policy activity, leans against economic, demographic, military, scientific, technical and cultural potentials of the interactive states" [5, p. 52-65]. Being a subject of international law, a state makes its choice in the relations with other subjects and this choice can be named foreign policy.

Nowadays period of global transformations of the world is characterized by special significance of the influence of cultural factor consequences on foreign policy as the choice of a state. Culture performs as an arena of the most persistent cooperation of people, their mutual enrichment and understanding. People and countries are under influence of cultural differences, which represent their values, points of view, interests, customs, historical hopes and fears [8, p. 151-153]. Different states and different regions have a different level of strategic advantages that was rooted on the early stage of their existence and now they form the state's experience under the impact of philosophical, political, cultural and informative characteristics of the state and its elite. Thus international law is directed to the collaboration between different legal cultures, their common and individual development, and their symbiosis.

Foreign policy is based on the great number of coordinates. Among them are: inner policy, terms, resources, determinations of its aims and tasks, composition of social forces and groups, character and maintenance of public interests, degree of support inside a country, etc.

Another quite important problem of definition of foreign policy is an issue about an understanding of its correlation with inner policy of a state. As foreign policy is an activity of a state, it cannot be dissociated from inner policy; moreover, it is the derivative of inner (domestic) policy.

The contents of politics objectively caused by will of people, is actually mediated by its authorized institutional representative which is a state. It is due to the fact that a significant part of domestic and foreign policy of a state is regulated by means of law, law-making process, political-legal decisions, and they are established in a normative form and based on the principles of international law.

Modern interpretation of the content of foreign policy cannot be limited by narrowly applied approach that reduces its destination to the pragmatic tasks of current legislation adequacy's estimation and its further improvement. Foreign policy by its essence and social aims has to be a special and necessary component of public policy, to assist fixing and providing the country's political choice authorized by people will and accepted by its political leaders.

It is possible to assert that foreign policy is an attempt to adapt national social and political system to international, and in general it has an aim to achieve and maintain the dynamic balance between them and development of these systems.

The main aim of foreign policy is providing of national interests and this is impossible to attain without the developed collaboration and the respect of legal interests of other countries and international community as a whole.

The basic tasks of foreign policy are strengthening of state's society structure by strengthening of its position in the system of the states, and also all people interests' protection on international arena. So, the main aim is a development of the state, people, modern global problems solving, that is impossible without collaboration, without limitations of the sovereignty, including in favor of the powers of international organizations and other international institutes, by the adoption of appropriate international legal norms that is why modern international law can be considered as the law of development.

As M. Baymuratov says, international law is as a result of public practice, it appeared as a way of people material interest's realization, especially in connection with international relations that change constantly. It has carried out and is carrying out enormous influence on the development of states and people. International law is a system of legal principles and norms of treaty and customary character, agreements that arise up as a result of cooperation between states and other subjects of international communication and regulate relations between them for peaceful coexistence [4, p. 6], for development.

The efficiency of international law as the law of global security and collective responsibility of the states before humanity and as the law of development admits structural collaboration of the participants of international communication in the solving of two basic tasks, namely to provide the functioning of the existing mechanism of peace secure and also to elaborate new legal norms.

The object of the legal regulation of international law is represented by international relations that are relations between states as the subjects of international law [9, p. 7-9; 18, p. 118].

Every state as a subject of international law conducts its foreign policy on world arena, but it is realized by its authorized agents of external relationships. And they must be recognized in such a quality by international law and order. They carry out a choice guiding by certain interests and depending on existent conditions. And it would be correct to agree with to Y. Illiyn who asserts that politics and law are in constant interaction. This is a process and it is objective. Law becomes dead without political life and actually each rule of law should serve life [6, p. 197].

In democratic society politics is carried out for people and through people. The general principles of democratic policy are: optimal connection between universal and national; humanistic orientation; overcoming of violence and criminality; morality and patriotism.

So, international law is a complex of legal norms and institutes regulating relations in international community with the aims of peace, justice and development [15, p. 9].

As M. Virally writes, international law of development represents a transformation that goes through all international law, a transition from the law of peaceful coexistence to international law of collaboration [3, p. 219-280].

That is why we share M. Flory's and A. Pellet's point of view that international law of development and international law are identical. As they think, international law of development gives international law the purposefulness. And a fight against economic backwardness and an achievement of the real independence by the poorly developed countries are such purposes [1, p. 31]. Among them is also a transformation of existing international law into an active instrument of inequality reduction [2, p. 6].

The law of development unites all the norms aimed at the international assistance of development [15, p. 274-278]. International law of development is the new dimension of international law; it is a way to revise international law.

The international relations' level of development is characterized by adequate intentions in foreign policies of states as for the strengthening of democracy and human rights.

On the other hand, the degree of foreign policy's basic tasks' security and the degree of state interests' security depends on its relations with other countries. Independent states do not develop in a vacuum; they cooperate with one another and act as subjects of politics of higher level – world policy that means that the states act in the sphere of international relations.

International relations are the space where different forces (global, regional, multilateral and bilateral) face and cooperate on different levels:

state, military, economic, political, social and intellectual [17, p. 20].

As A. Muradian notes, all international relations can be divided into two basic types: relations of rivalry and relations of collaboration [13, p. 8-10]. Such collaboration is impossible without foreign policy. International relations consist of foreign policies of different states which are the main actors of international relations as independent subjects, and as the members of some organizations.

Foreign policy regulates the relationships of this state with other states, provides realization of its needs and interests in international arena.

International relations become more universal, various, equally binding for all subjects of international law that is why they should be examined as an integrated system and foreign policy of every state is hardly to understand in isolation from the system of international relations which this state enters and which determines its foreign policy in a certain way [9, p. 29].

It is important to underline such a significant line of foreign policy as participation in international organizations that opens additional possibilities for an active voice in international relations.

Modern international system is exclusively difficult. The existence of different centers of force, cultures and civilizations on the world arena is under no doubt. The main question is what conclusions make statesmen and diplomats and how they apply this knowledge in foreign policy aims.

All countries should be interested in the stable system of international relations based on the principles of equality of rights, mutual respect and other principles of international law. This system is designed to provide reliable protection of every member of the world community in military, economic, humanitarian and other spheres.

However there are different reasons why states do not use the potential of international law in full. As I. Lukashuk marks, many of them including the great powers do not hasten with its progressive development and its functioning mechanism improvement [10, p. 8].

It is worth to remember that law gives people's political requirements an obligatory character. Thereby it fixes the relations developed as a result of certain policy and impacts their durability. Politics has its direct expression in law. By fixing political requirements in certain standards of behavior, law gives them a character of obligatory norms, but these norms are surely based on general principles of law which are their precursors and express the sense of justice of some classes or of all people - in democratic society, and also have their own independence. Law does not only fix the relations developed as a result of politics realization but also creates the organizational forms of such realization.

On the other hand, politics influences law actively. The role of politics in law-making process is exclusively large. Political ideas often grow into the principles of law, and certain political requirements or political choices become special legal norms. Politics also largely determines the process of legal norms realization, i.e. the application of law in practice. It is not an automatic process; it is the process of conscious human activity, the result of choice.

International law and foreign policy are also two separate, but indissolubly linked parts of international life: foreign policy participates in creation and realization of norms of international law and at the same time obeys to these standards; international law developed and used in the process of foreign policy activity sets the scope and form of this activity.

While applying the norms of international law foreign policy fills them with that certain political content and their real value can be changed depending on this content. Social and political contents of the norms and institutes of international law could change not only up to historical epochs, but even during the same epoch depending on the character of the foreign policy applying these norms and institutes, depending on the choice.

The same norms of international law which are used in conformity with their legal content, in different cases may serve different political purposes and have different social and political content; however politics carried out by means of international legal norms cannot undermine the principles of peaceful coexistence, sovereignty and other inviolable foundations of modern international relations and international law.

The influence of international law on foreign policy is shown in three aspects: firstly, by imposing certain obligations on the states international law creates limitations for their foreign policy that prevent actions incompatible with the norms of international law. Secondly, by giving certain rights to the states international law gives them additional possibility and a facility for defending of their interests guarded by these rights, so international law is a support for their foreign policy, their choice. Thirdly, international law contains norms regulating the activity of organs carrying out foreign policy [9, p. 7-9].

Foreign policy is carried out in international environment whose specificity is determined by: polycentricism, complication, consistency, globality, cultural pluralism and informative ambiguity [12].

As G. Rosenau notices, foreign policy activity is built on cooperation of two correlations: location and dynamics of forces in international arena and internal factors foremost social [14, p. 174].

Any foreign policy is an attempt to adapt national public political system to international one, and in general we can affirm that foreign policy is aimed at the accomplishment and maintenance of dynamic balance between them [11, pp. 3-11], that is development which is impossible to obtain without close collaboration.

Politics as a state's choice determines direction of international law development. Thus a role of foreign policy in cooperation of domestic law with international law [16, pp. 107-112] is to give such influence on formation and development for those norms and institutes in international law which will maximally represent national interests and the choice of a state as far as it is possible, and which will help to obtain international interests and development.

**Conclusions and proposals.** Choice is a consciously volitional activity of a subject as for the decision of behavior variant in certain sphere and the objectification of the result of such activity in

the act of a subject. One of the spheres of right of choice realization is foreign policy.

Foreign policy is based on the great number of coordinates. Among them are: inner policy, terms, resources, determinations of its aims and tasks, composition of social forces and groups, character and maintenance of public interests, degree of support inside a country, etc.

Foreign policy is an attempt to adapt national social and political system to international one, and in general it has an aim to achieve and maintain the dynamic balance between them and the development of these systems.

International law is a complex of legal norms and institutes regulating relations in international community with the aims of peace, justice and development.

International law of development gives international law the purposefulness.

Foreign policy participates in creation and realization of norms of international law and obeys to these standards; international law developed and used in the process of foreign policy activity sets the scope and form of this activity. While applying the norms of international law foreign policy fills them with that certain political content and their real value can be changed depending on this content. Social and political contents of the norms and institutes of international law could change even during the same epoch depending on the character of the foreign policy applying these norms and institutes, depending on the choice.

The same norms of international law which are used in conformity with their legal content, in different cases may serve different political purposes and may have different social and political content; however politics carried out by means of international legal norms cannot undermine the principles of peaceful coexistence, sovereignty and other inviolable foundations of modern international relations and international law.

Politics as a state's choice determines the direction of the development of international law.

By imposing certain obligations on the states international law creates limitations for their foreign policy that prevent actions incompatible with the norms of international law. By giving certain rights to the states international law gives them additional possibility and a facility for defending of their interests guarded by these rights, so international law is a support for their foreign policy, their choice.

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## ЗОВНІШНЯ ПОЛІТИКА ЯК ВИБІР ДЕРЖАВИ ТА СУЧАСНЕ МІЖНАРОДНЕ ПРАВО

**Анотація**
Стаття присвячена аналізу поняття і змісту права вибору, дослідженню питання права вибору держави як суб'єкта міжнародного права. Аналізуються поняття та зміст зовнішньої політики як загального курсу держави у міжнародних справах, як вибору держави. Досліджується співвідношення зовнішньої політики і міжнародного права, вплив міжнародного права на зовнішню політику та вплив зовнішньої політики на сучасне міжнародне право. Міжнародні відносини розглядаються як сукупність зовнішньополітичної діяльності держав. Визначаються певні риси сучасних міжнародних відносин. На підставі юридичної літератури надається визначення сучасного міжнародного права як права розвитку.
**Ключові слова:** вибір, право вибору, зовнішня політика, міжнародне право, сучасне міжнародне право, право розвитку, міжнародні відносини, політика, право.

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## ВНЕШНЯЯ ПОЛИТИКА КАК ВЫБОР ГОСУДАРСТВА И СОВРЕМЕННОЕ МЕЖДУНАРОДНОЕ ПРАВО

**Аннотация**
Статья посвящена анализу понятия и содержания права выбора, исследованию вопроса права выбора государства как субъекта международного права. Анализируются понятие и содержание внешней политики как общего курса государства в международных делах, как выбора государства. Исследуется соотношение внешней политики и международного права, влияние международного права на внешнюю политику и влияние внешней политики на современное международное право. Международные отношения рассматриваются как совокупность внешнеполитической деятельности государств. Указываются определенные черты современных международных отношений. На основании юридической литературы дается определение современного международного права как права развития.
**Ключевые слова:** выбор, право выбора, внешняя политика, международное право, современное международное право, право развития, международные отношения, политика, право.

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## DEFINITION OF RESPECT FOR HUMAN DIGNITY AS A PRINCIPLE OF CRIMINAL PROCEEDINGS

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The author reveals the main point of human dignity as an independent principle of criminal proceedings. Reflection of this provision in the national legislation is defined. The content of given principle and it's implementation in criminal procedural activities being studied. The international acts components of this principle being examined.
**Keywords:** principle, honour, dignity, respect, security of person, criminal proceedings.

**Definition of the problem.** According to Art. 28 of the Constitution of Ukraine everyone has the right to respect for his dignity. No one shall be subjected to torture, cruel inhuman or degrading treatment or punishment. No man without his free consent shall be subjected to medical, scientific and other experiments. International instruments which stipulates the requirements of Art. 28 of the Constitution of Ukraine includes: the Universal Declaration of Human Rights 1948 (Art. 5) and the International Covenant on Civil and Political Rights 1966 (Art. 7), the Declaration on the Protection of All Persons from Torture and Other Cruel, Inhuman or those Inhuman or Degrading Treatment or Punishment of 1975. In addition to above, there are internationally ac-

cepted and valid multilateral treaties (conventions, declarations) which are specifically dedicated to respect for human dignity during the criminal proceedings and the penal jurisdiction. These international instruments were recognized by Ukraine and are the part of national legislation. These includes, in particular: the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment adopted by the UN General Assembly on 10 December 1984 (ratified by Ukraine on Feb. 24, 1987 p.); European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment on 26 November 1987 (Ukraine acceded May 2, 1996 p., Ratified on 24 January 1997 and entered into force in Ukraine on September 1, 1997 p.); The European Convention on Human Rights and Fundamental Freedoms (Art. 3).

The principle of respect for human dignity is a constituent principle of the inviolability of the person. In literature developed broad and narrow interpretations of the concept of the principle of the inviolability of the person. The narrow interpretation of the personal integrity is linked with the freedom from arbitrary arrest. In that sense it is used right in the text of the International Convention on Civil and Political Rights, the Convention for the Protection of Human Rights and Fundamental Freedoms. Meanwhile a wide interpretation of the personal integrity is – a complex concept, which consists of physical integrity, moral integrity, the inviolability of honour and dignity. Thus, we will disclose above principles in details.

**Analysis of recent researches and publications.** The issue of human rights for liberty and personal security had received considerable attention in the scientific literature, and particularly in works of V.T. Malyarenko, V.I. Maryniva, O.R. Mikhaylenko, O.P. Kuchynskoyi, I.L. Petruhina, A.V. Shvydkova and others.

**The purpose of the article.** The purpose of this article is to identify and characterize respect for human dignity as a standalone principle in the criminal proceedings.

**Presentation of the basic material.** Protection of honour and dignity is one of the manifestations of the state of personal integrity. Respect for the honour and dignity mandatory for all agencies and officials involved in criminal proceedings. At the heart of this common position is a constitutional principle which states that a person, his life and health, honour and dignity, inviolability and security are recognized in Ukraine as the highest social value (Article 3 of the Constitution of Ukraine).

The concept of "dignity" is usually associated with the concept of pride and his self, so individual dignity is reflected in their self-esteem rights. Honour binds to specific social position of a man and his recognized moral merit. Therefore, the dignity of every person and citizen are equal but honour – is not. Synonyms of the word "honour" are the reputation, good name, prestige, authority [1].

Moral and ethical categories "honour" and "dignity" of man appears as an object of legal protection, legal support as the international legal level and at the level of national law. By the standards aimed at protecting human dignity should include the right to humane circulation and respect for the dignity of man and his rights (Art. Art. 5, 12 para. 2, Art. 29 of the Universal Declaration of Human Rights, Art. Art. 2, 7, 10 International Covenant on Civil and Political Rights, the Declaration on the Protection of All Persons from torture and other cruel, inhuman or degrading treatment or punishment; Standard Minimum Rules for the Treatment of Prisoners, Code of Conduct officers to support the rule of law, Art. 4 Charter of Fundamental Principles of Justice for Victims of Crime and Abuse authority).

Causation of raising at so high (international law) level of the problem of protecting human dignity is defined in the formula, which is fixed in most international acts, addressing the rights and freedoms of man and citizen: "Recognition of the inherent human dignity and the equal and inalienable rights of all members of human community is the foundation of freedom, justice and peace in the world. "

Detriment of dignity is expressed in the concept of "humiliation." A typical example of encroachment on this moral value is an insult. It can be expressed, for example, in the rough, tactless, arrogant action against the investigator, prosecutor, investigating judge or court to witness, victim or other party during criminal proceedings. "Larger" examples are torture, cruel and inhuman attitude to a man. Expanded definition of torture is given in Article 1 of the Declaration on the Protection of All Persons from torture and other cruel, inhuman or degrading treatment or punishment of 9 December 1975, and the Convention against Torture and Other Cruel Inhuman or Degrading Treatment and Punishment from 10 December 1984. (ch. 1, Art. 1).

In these international legal instruments torture means severe pain or suffering, whether physical or mental, by the official or his incitement to obtain from him or a third person information or confessions, punish him for his actions that he did or in implementing them suspected, or intimidating him or other persons. However, the Declaration emphasizes that "this interpretation does not include pain or suffering arising only through lawful imprisonment, because of a condition peculiar to this or because of this, in that degree, to the extent consistent with the minimum standard rules for treatment of prisoners (n. 1, Art. 1). It should be noted that international legal definition of torture mentioned here is much wider than that which is usually given in the national philological and legal dictionaries. They considered under immoral phenomenon only "physical violence, torture during interrogation", "causing the accused and witnesses in criminal proceedings tormented physical coercion in order to testify." International documents in the concept of "torture" included not only physical but also psychological impact on the participants in the criminal process, which, admittedly, is more complete and more accurate.

The European Court of Human Rights, taking its decision "Ireland against the United Kingdom," adjudicated contravene of Art. 3 of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. five techniques of sensory deprivation (disorientation "or" loss of feeling"),

used by the British police during the interrogation of suspects in Northern Ireland, standing by the wall in a very difficult position, opaque hood covering the head, the noise impact on suspects, suspected sleep deprivation , depriving suspects of food and drink. In this case, the court drew a distinction between three groups banned treatment of persons: a) torture concluded in deliberate inhuman treatment causing very serious and cruel suffering; b) inhuman treatment – in the face causing severe physical and mental suffering; c) degrading treatment – the ill-directed to call a person a sense of fear, pain and disability that may demean, defame them and perhaps break their physical and moral resistance [2].

The principle of respect for human dignity is secured in the new Criminal Procedure Code of Ukraine Article 11. Thus, the court, the judge, the investigating judge, prosecutor, investigator, carrying the proceedings and making a decision in a criminal case must respect the honour and dignity of all persons involved in the case. When performing investigative, judicial and other actions it is prohibited to humiliate honour and dignity, to use the torture, cruel or inhuman treatment, violence, threats, unlawfully restrict the rights and legitimate interests of individuals. The law also states the right of everyone is to defend themselves by all means not prohibited by law including their dignity, rights, freedoms and interests raised during the criminal proceedings. Following judicial proceeding might be mentioned as well as violation of Art 3. of the Convention for the Protection of Human Rights and Fundamental Freedoms of 1950. took place in the "Elchi and Others vs Turkey», 23145/93, 13 November 2003 the court finds that the applicants about the conditions of their detention – cold, darkness and dampness, poor bed, poor nutrition and poor water closet – as well as the statement ... we were subjected to insults, given a slaps and intimidated in order to force to the signing of various documents ... are trustworthy and do not contradict with each other. The Court also accepts that in critical moments of detention – for example, during interrogations and confrontations with Mr. Guven – they were blindfolded ... the Court considers that the applicants have ... suffered physical and mental violence by the gendarmerie during their detention in November and December 1993. Such abusive treatment has inflicted on them severe pain and suffering and was particularly serious and cruel and should be regarded as such that was torture as defined in article 3 of the Convention [3].

The provisions of this principle find its reflection in many standards of Criminal Procedural Code, for example, Part 2. Art. 87 provides for the inadmissibility of evidence obtained as a result of substantial violation of rights and freedoms, obtaining evidence as a result of torture, cruel, inhuman or degrading individual treatment or threats of such treatment; in Articles 224, 226 CPC it is stated that questioning cannot continue without a break for more than two hours, but in general – more than eight hours a day; questioning the minor or the minor cannot continue without a break for more than one hour, and in general – more than two hours a day; investigative experiment should be conducted on conditions that it does not create a danger to life and health of a people taking part in it, or ones people, not humiliated their honour and dignity, does not causes harm, during examination it is not permitted to execute any actions that humiliate honour dignity or dangerous to his or her health. Examination which includes any forms of nudity has to be carried out by persons of the same sex (st. 241 CPC). It is prohibited to incite a person to commit a crime with the aim of further exposure, to help the person to commit a crime, which he would not have done without investigators abet, or to influence the behaviour of violence, threats, blackmail and others with the same goal, during the preparation and conducting of such tacit investigative (detective) activities as a control for the offense.

**Conclusion.** It should be noted that the principle of respect for human dignity is widely reflected in national legislation, namely the criminal procedure law. At the time of the investigation and consideration of criminal proceedings in the interests of justice the rights and freedoms of the suspect and the accused might be limited, as well as the others participants in criminal proceedings, while the circumstances being investigated for personal and family lives.

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## ВИЗНАЧЕННЯ ПОВАГИ ДО ЛЮДСЬКОЇ ГІДНОСТІ ЯК ЗАСАДИ КРИМІНАЛЬНОГО ПРОВАДЖЕННЯ

**Анотація**
У статті автор розкриває сутність поваги до людської гідності як окремої засади кримінального провадження. Також, визначено як само вищезазначена засада відображається у національному законодавстві. Досліджено зміст даної засади і її відображення при здійсненні кримінальної процесуальної діяльності. Розглянуто зміст окремих складових засади у міжнародних актах.
**Ключові слова:** засада, честь, гідність, повага, особиста недоторканність, кримінальне провадження.

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## ОПРЕДЕЛЕНИЕ УВАЖЕНИЯ К ЧЕЛОВЕЧЕСКОМУ ДОСТОИНСТВУ КАК ПРИНЦИПА УГОЛОВНОГО ПРОИЗВОДСТВА

**Аннотация**
В статье автор раскрывает сущность уважения к человеческому достоинству как отдельного принципа уголовного производства. Также, определено как данное положение отображается в национальном законодательстве. Исследовано содержание данного принципа и его отображение при осуществлении уголовной процессуальной деятельности. Рассмотрены составляющие данного принципа в международных актах.
**Ключевые слова:** принцип, честь, достоинство, уважение, личная неприкосновенность, уголовное производство.

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## LE PRINCIPE DE LA SEPARATION DES FONCTIONS DE LA JUSTICE PENALE FRANÇAISE ET UKRAINIENNE

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Le problème de la séparation des fonctions de la justice pénale en procédure pénale de la France et de l'Ukraine est le sujet de l'analyse de l'article. Il dit que la théorie française sépare les fonctions de poursuite, d'instruction et de jugement, seulement entre les autorités publiques. La défense ne se distingue pas comme une fonction séparé et est considérée comme un l'élément du respect des droits de la défense. Au lieu de cela, le Code de procédure pénale de l'Ukraine prévoit la séparation des fonctions de accusation publique, la défense et le jugement.
**Mots-clés:** poursuite, accusation, défense, jugement, instruction, Convention de sauvegarde des droits de l'homme et des libertés fondamentales.

La justice pénale ukrainienne a été reformée globalement en raison de l'entrance en viguer du Code de procédure pénale 2012 dont le but est l'implémentation dans la procédure pénale ukrainienne et dans les affaires pénales des standards du "procès équitable" en vertu de la Convention européenne de sauvegarde des droits de l'homme et des libertés fondamentales et la jurisprudence de la Cour européenne des droits de l'homme. La structure même de l'article 6 permet d'identifier deux séries d'éléments du droit à un procès équitable: le premier paragraphe énonce les garanties dont bénéficie tout individu dans le cadre d'une procédure de nature civile ou pénale; le second paragraphe est consacré aux garanties spéciales dont bénéficie toute personne poursuivie au pénal [1]. Le principe d'égalité des armes est la garantie fondamentale du procès équitable. L'égalité des armes veut que chaque partie se voie offrir une possibilité raisonnable de présenter sa cause dans des conditions qui ne la placent pas dans une situation de désavantage par rapport à son adversaire [2, p. 19]. Au pénal, ce principe impose un équilibre entre la personne poursuivie et le ministère public, mais également entre l'accusé et la partie civile [1].

Conformement au Code de procédure pénale 2012, le procès pénal (au sens étroit, l'expression "procès pénal" vise l'instruction et le jugement

d'une personne pour certains faits dont elle est accusée [3] est fondé au principe du contradictoire. Pendant le procès pénal les fonctions de poursuite publique, défense et jugement ne peuvent pas être imposées sur la même autorité ou sur le même fonctionnaire. L'avis de soupçon, l'adresse avec l'acte accusatoire au tribunal et la maintenance de poursuite publique devant le tribunal sont assurés par le procureur. La défense est effectuée par le suspecté ou l'accusé, par son défenseur ou son représentant légitime.

C'est-à-dire, le Code de procédure pénale 2012 représente une triade des fonctions, ce qui est classique pour la doctrine de la procédure pénale ukrainienne. Ainsi, les fonctions principales pour la procédure pénale ukrainienne sont: 1) le poursuite; le poursuite existé comme le poursuite publique maintenant par le procureur, et le poursuite privé; 2) la défense (du suspecté, de l'accusé); 3) le jugement.

Cependant, malgré une longue histoire de cette doctrine, il y a un point de vue qu'elle a été formulée seulement par les chercheurs sovietiques [4, p. 52] et ne peut pas être utilisée pour la reformation du procès pénal ukrainien [5, p. 147-148].

Néanmoins, la doctrine de la séparation des fonctions de la justice pénale existe en France. Par contre, on la trouve très différente au comparaison avec celle de l'Ukraine. Donc, elle est fondée sur la théorie classique de la séparation des pouvoirs: législatif, exécutif et judiciaire. C'est au pouvoir législatif et à lui seul que revient normalement le droit et la charge d'établir les règles de l'organisation répressive. C'est par contre au pouvoir judiciaire qu'il revient d'examiner les infractions commises et de prononcer contre leurs auteurs les peines prévues par la loi, après quoi, le pouvoir exécutif interviendra pour assurer l'exécution de la sentence du juge [6].

Puis, la separation entre les fonctions est manifestée par l'existence de trois fonctions: celles de poursuite, d'instruction et de jugement. G. Levasseur explique la raison de la separation de la manière suivante: c'est parce qu'au point de vue de la liberté individuelle, au point de vue des garanties de la défense, au point de vue de la sérénité et de l'objectivité de la justice, le législateur estime qu'il n'est pas souhaitable que, dans un procès déterminé, la personne qui a rempli un rфle judiciaire de poursuite soit amenée dans le même procès à faire ensuite des actes d'instruction, et a fortiori à prendre des décisions de jugement. Et de même, le législateur estime qu'il n'est pas souhaitable que, dans le même procès, un magistrat qui a participé à l'instruction de l'affaire soit appelé ensuite à la juger [6]. Pour J. Pradel, la séparation des fonctions judiciaires est un principe; ce principe signifie que chaque fonction judiciaire est assurée par des magistrats specialisés [7, p. 27].

Alors, la loi impose une triple séparation entre les diverses fonctions pénales: d'une part, entre les autorités de poursuite et d'instruction, d'autre part, entre les juridictions d'instruction et de jugement, et, enfin, entre les autorités de poursuite et la juridiction de jugement [7, p. 29, 34, 39; 8]. Le principe de séparation des fonctions judiciaires peut avoir trois aspects:

- séparation de la poursuite et de l'instruction: la fonction de poursuite est exercée par le ministère public alors que la fonction d'instruction est assurée par le juge d'instruction;

- séparation de la fonction d'instruction et de la fonction de jugement: la fonction d'instruction est assurée par le juge d'instruction, la fonction de jugement est assurée par les juridictions de jugement;

- séparation de la fonction de poursuite et de la fonction de jugement: la fonction de poursuite est exercée par le ministère public alors que la fonction de jugement appartient aux juges du siège [9, p. 15].

M.-L. Rassat y ajoute l'existence de la quatriéme fonction pénale: celle d'exécution: il n'est donc plus douteux, aujourd'hui qu'il y existe une fonction d'exécution autonome qui n'est pas le simple prolongement de la fonction de jugement [10, p. 41]. La fonction d'exécution n'est pas particulière pour la procédure pénale ukrainienne, parce que l'exécution du jugement est signifiée comme la phase de l'affaire pénale.

G. Levasseur ajoute qu'une de principales conséquences de la séparation des fonctions est qu'un magistrat ne peut pas occuper successivement deux fonctions dans la même affaire. Ainsi, le magistrat qui a fait un acte de poursuite dans une affaire, qui a par exemple signé le réquisitoire afin d'informer ou le réquisitoire définitif ou tel ou tel réquisitoire supplétif au cours de l'instruction, ou qui a requis à l'audience, ne peut plus ensuite faire un acte d'instruction dans cette affaire, ou un acte de jugement [6]. En Ukraine les mêmes régles existent comme les garanties d'impartialité du juge et d'objectivité du procureur.

Ainsi, les fonctions principales pour la procédure pénale ukrainienne sont: le poursuite; le poursuite existé comme le poursuite publique maintenant par le procureur, et le poursuite privé; la défense (du suspecté, de l'accusé); le jugement. En France, s'agissant de la fonction de poursuite principalement exercée par le ministère public, on a l'habitude de dire qu'elle consiste à mettre en mouvement l'action publique contre les infractions pénales, c'est-à-dire, à déclencher l'action par laquelle la société dont on a enfreint les lois en commettant des infractions, va rechercher la punition du coupable [10, p. 41-42]. La poursuite est l'ensemble des actes accomplis par le ministère public, certaines administrations ou la victime d'une infraction, dans le but de saisir les juridictions répressives compétentes et aboutir à la condamnation du coupable [11, p. 127]. Le ministère public a l'opportunité des poursuites: un pouvoir d'appréciation qui l'autorise à poursuivre ou non selon que la poursuite lui paraot ou non socialement opportune [10, p. 378]. Le procureur de la République reçoit les plaintes et les dénonciations et apprécie la suite à leur donner; le procureur de la République territorialement compétent décide s'il est opportun: soit d'engager des poursuites; soit de mettre en oeuvre une procédure alternative aux poursuites en application des dispositions des articles 411 ou 412 du Code de procédure pénale [12]; soit de classer sans suite la procédure dès lors que les circonstances particulières liées à la commission des faits le justifient. La règle de l'opportunité ne joue qu'au stade de l'engagement des poursuites. Celles-ci lancées, le procureur de la Republique ne peut plus rien. La

règle s'explique par le souci de respecter l'indépendance des juridictions d'instruction et de jugement et elle entraone deux conséquences. D'une part, il ne peut dessaisir le juge. L'action publique, une fois lancée, ne peut prendre fin que par une décision judirictionnelle (non-lieu de la juridiction d'instruction, jugement de relaxe ou de condamnation de la juridiction de jugement). Le procureur de la République ne peut que reclamer la relaxe s'il apparaot que les poursuites ne sont plus fondées: on dit qu'il "abandonne l'accusation". D'autre part, le parquet ne peut ni renoncer aux recours que la loi lui ouvre, ni se désister de ceux qu'il aurait formés [7, p. 538].

La fonction d'instruction est une nécessité préalable à tout jugement pénal puisque dans tous les cas on doit produire et discuter tous les éléments de preuve disponibles pour que le juge de jugement puisse se faire une idée exacte des faits et de leurs responsables éventuels [10, p. 43].

Au comparaison avec la doctrine ukrainienne, la doctrine française ne détermine pas la défense comme une fonction séparée [4, p. 53]; elle est déterminée comme l'element du respect des droits de la défense [13].

En vertu de la Convention de sauvegarde des droits de l'homme et des libertés fondamentales (art. 6.) [14], tout accusé a droit notamment à:

a) être informé, dans le plus court délai, dans une langue qu'il comprend et d'une manière détaillée, de la nature et de la cause de l'accusation portée contre lui; cette information, obligatoirement détaillée, doit être faite dans le plus court délai et dans une langue comprise par la personne en cause. La nature de l'accusation n'est autre que sa qualification juridique, tandis que la cause de ladite accusation s'entend des faits matériels reprochés à la personne intéressée. La règle est qu'une requalification est toujours possible, mais à condition que les droits de la défense soient respectés: c'est dire que la personne en cause doit en être clairement informée et doit pouvoir s'expliquer pleinement [15, p. 90-91].

b) disposer du temps et des facilités nécessaires à la préparation de sa défense; il est évident que pour bien organiser sa défense, l'accusé doit avoir accès au dossier, ce qui a pu susciter quelques difficultés: la Cour a jugé que chaque partie devait se voir offrir une possibilité raisonnable de présenter sa cause dans des conditions qui ne la désavantagent pas par rapport à son adversaire: l'accès au dossier et la communication des pièces le composant est indispensable à une bonne défense; néanmoins, le raisonnement par lequel il n'est pas incompatible avec les droits de la défense de réserver à l'avocat de l'accusé l'accès au dossier, ne peut jouer lorsque l'intéressé a choisi de se défendre seul [15, p. 91].

c) se défendre lui-même ou avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office, lorsque les intérêts de la justice l'exigent; tout accusé a le droit de se défendre lui-même ou d'avoir l'assistance d'un défenseur de son choix et, s'il n'a pas les moyens de rémunérer un défenseur, pouvoir être assisté gratuitement par un avocat d'office. L'accusé peut donc se défendre lui-même: cette défense "personnelle" est *a priori* relativement dangereuse pour l'accusé en raison de son inexpérience judiciaire et de son manque de connaissances juridiques; c'est pourquoi les juges sont souvent amenés à exiger l'intervention d'un avocat, d'autant plus que, si besoin est, cette assistance peut être gratuite. Le droit d'avoir un défenseur est l'une des exigences du procès équitable et à partir du moment ощ un avocat est choisi, les autorités étatiques doivent assurer sa libre communication avec le client. De plus, l'accusé absent aux débats ne peut, de ce seul fait, perdre son droit à être effectivement défendu par son avocat [15, p. 91-92].

d) interroger ou faire interroger les témoins à charge et obtenir la convocation et l'interrogation des témoins à décharge dans les mêmes conditions que les témoins à charge; pour ce qui est des modalités de l'audition des témoins, la règle est que les éléments de preuve doivent être produits devant l'accusé, en audience publique, en vue d'un débat contradictoire. Certes, pour des raisons de sécurité et d'efficacité, l'utilisation de témoignages anonymes est possible, mais sous certaines conditions: un tel témoignage, parce qu'il doit malgré tout respecter les exigences du procès équitable, ne doit pas constituer la preuve principale et déterminante de la culpabilité, tout en permettant à la défense d'avoir une occasion adéquate et suffisante de le contester; de plus, il faut que l'interrogatoire du témoin soit effectué par un juge connaissant son identité [15, p. 92].

e) se faire assister gratuitement d'un interprète, s'il ne comprend pas ou ne parle pas la langue employée à l'audience.

Aussi, le sens de la doctrine française est la séparation des fonctions seulement entre les autorités; tandis que la doctrine ukrainienne suppose le dégagement de la fonction de la défense réalisant par les personnes privées.

Pour conclure, il faut dire que les fonctions principales pour la procédure pénale ukrainienne sont: le poursuite; la défense; le jugement. De plus, le système des fonctions pour la procédure pénale ukrainienne en accordance aux directions de l'activité peut être présenté plus vastement: par exemple, l'investigation, la surveillance du procureur, le contrфle judiciaire etc. sont aussi déterminés comme les fonctions pénales.

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## ЗАСАДА РОЗМЕЖУВАННЯ КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНИХ ФУНКЦІЙ У ФРАНЦІЇ ТА В УКРАЇНІ

**Анотація**
У статті досліджено проблему розмежування кримінально-процесуальних функцій у кримінальному процесуальному законодавстві Франції та України. Указано, що у французькій теорії розмежовуються функції кримінального переслідування, попереднього слідства та вирішення справи по суті (судового розгляду), лише між суб'єктами владних повноважень. Захист не виділяється як окрема функція, а розглядається як елемент поваги до прав захисту. Натомість, за Кримінальним процесуальним кодексом України, передбачено розмежування функцій державного обвинувачення, захисту та судового розгляду.
**Ключові слова:** кримінальне переслідування, обвинувачення, захист, судовий розгляд, слідство, Конвенція про захист прав людини і основоположних свобод.

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## ПРИНЦИП РАЗГРАНИЧЕНИЯ УГОЛОВНО-ПРОЦЕССУАЛЬНЫХ ФУНКЦИЙ ВО ФРАНЦИИ И В УКРАИНЕ

**Аннотация**
В статье исследована проблема разграничения уголовно-процессуальных функций в уголовно-процессуальном законодательстве Франции и Украины. Указано, что во французской теории разграничиваются функции уголовного преследования, предварительного следствия и разрешения дела по существу (судебного разбирательства), причем только между субъектами властных полномочий. Защита не выделяется как отдельная функция, а рассматривается как элемент уважения к правам защиты. По Уголовному процессуальному кодексу Украины предусмотрено разграничение функций государственного обвинения, защиты и судебного разбирательства.
**Ключевые слова:** уголовное преследование, обвинение, защита, судебное разбирательство, Конвенция о защите прав человека и основных свобод.

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# CONCERNING THE IMPROVEMENT OF THE SYSTEM OF ADMINISTRATIVE PENALTIES FOR THE COMMISSION OF THE OFFENCE PROVIDED BY ARTICLE 173-2 CUOAO

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Problematic issues of the system of administrative penalties for the commission of domestic violence, failure to comply a protective order or failure of corrective program are considered in the article. The points of view of scientists about the system of administrative penalties for the commission of domestic violence and its improvement are analyzed. Specific proposals as to improvement of the legislation in the field of administrative and legal regulation to counter domestic violence are provided.
**Keywords:** domestic violence, fighting, counteraction, administrative and legal regulation, legislation, administrative detention, fines, community service, administrative and legal regulation, subjects of the public administration.

**Problem Statement.** A thorough investigation of administrative-legal regulation of counteraction of domestic violence and its improvement are impossible without determination of a system of administrative penalties for the commission of domestic violence, failure to comply a protective order or failure to pass a corrective program and its problem features, since it is evident that the achievement of the goal of the administrative responsibility in the field of the phenomenon studied is directly interconnected with concrete administrative penalties. Therefore we have to determine a system of administrative penalties for the commission of domestic violence, performance of their analysis, reveal of certain problem issues in the application of these penalties and giving certain proposals as to their improvement. It is especially topical with regard to adoption of the Law of Ukraine dated 12 February 2015 No. 187-VIII *«On the amendments to the Code of Ukraine of Administrative Violations as to settlement of the issue of responsibility for the commission of domestic violence»*.

**Analysis of the latest investigations and publications.** Attention of many scientists was attracted to the problem issues of application of the system of administrative penalties for the commission of domestic violence, inter alia O.M. Bandurka, Yu.P. Bytiak, M.A. Bondarenko, V.I. Vietrov, I.P. Holosnichenko, L.L. Hoholieva, L.V. Dorosh, O.V. Kovaliova, O.D. Kolomoiets, V.K. Kolpakov, A.T. Komziuk, V.I. Olefir, H.O. Ponomarenko, V.M. Smitiienko, V.V. Stashys, L.O. Feshchenko, N.B. Shamruk, S.S. Yatsenko and other scientists. However, dispite of a great number of publications in this range of problems, some issues remain unregulated and need further investigation.

**Goal of the Article** is to determine problem issues of the system of administrative penalties for the commission of domestic violence, by way of consideration of different viewpoints of leading scientists apropos of the system of administrative penalties for the commission of domestic violence, as well as in giving proposals as to the improvement of the legislation in the sphere of administrative-legal regulation of counteraction to domestic violence.

**Contribution of basic concepts.** The theory of administrative law has accented many times that achievement of the goal of administrative responsibility, including counteraction of domestic violence, is directly interconnected to concrete administrative penalties, whose efficiency depends on the type of administrative penalty and on the sufficiency of its influence onto the legal awareness of the guilty, as well as other persons with the purpose of prevention of new or repeated administrative offences. It therefore give rise to a problem of determination of the efficiency of administrative sanctions for the commission of the administrative offence, provided by Article 173-2 Code of Ukraine On Administrative Offences (hereinafter – CUoAO).

As of today, the sanction of para.1 Article 173-2 CUoAO provides for administrative penalties in the form of community service work for the term from thirty to forty hours or of administrative arrest for the term till seven days. And in case of the same actions commited by a person who was during a year imposed administrative penalty for an offence, provided by para 1 Article 173-2 CUoAO, – community service work for the term from forty to sixty hours or administrative detention for the term till fifteen days. It should be mentioned that in such form the sanction of the analyzed Article CUoAO exists for a quite short time, as it was amended by the Law of Ukraine dated 12 February 2015 No. 187-VIII [1]. Before the amendment the sanction for a unlawfull action, determined by para. 1 Article 173-2 CUoAO provided a penalty in form of a fine from three to five tax-free minimums of citizens' income or community service work for the term from thirty to forty hours, or co corrective work for the term till one month with the deduction of twenty percent from the wages, or of an administrative arrest for the term till five days. In its turn, para. 2 Article 173-2 CUoAO provided for a penalty in the from of fine from five to ten ax-free minimums of citizens' income or community service work for the term from forty to sixty hours, or corrective work for the term from one до two months h the deduction of twenty percent from the wages, or of an administrative arrest for the term till fifteen days.

The adoption of the aforementioned Law is seen to have eliminated the administrative penalty in the form of fine and corrective work from the sanction of para. 1 and para. 2 Article 173-2 CUoAO. We should emphasize in this regard that

the elimination of the mentioned administrative penalties from the sanctions of the said Article was preceded a long scientific discussion, and therefore we have to analyse the eliminated penalties from the sanctions of para. 1 and para. 2 Article 173-2 CUoAO and determine the negative and positive aspects of their application.

A performed questioning of employees of the police and courts of law showed that too small sizes of the sanctions have no positive result and no contribution to the achievement of the chief overall objective of an administrative penalty that is the individual and general prevention, aimed not only at the aggressor in the family, where the violence is committed, but at other persons, who can commit the said offence. Since the fine and corrective work are administrative penalties of property nature, the overwhelming majority of scientists, whose researchers studied administrative responsibility for the commission of domestic violence, believe that the application of such administrative penalties is not effective and purposeless, since the offender's property is mostly in the joint common ownership of the spouses or in the joint common ownership of the parents and children, and a restriction of the property rights of the offender will simultaneously mean the restriction of the property rights of the victim as well [2, p. 144; 3, p. 68-69]. In such a case, having once paid the fine for the man, the victim woman will hardly apply to authorities in case of repeated commissioning of the violence towards her or children. And a deduction to the state budged of twenty percent of the wages of the person, committed the domestic violence, will not facilitate the establishment of family well-being either.

At the same time attention should be drawn to the statistics of state court administration testifying the fact that fines made almost 90% of all court verdicts, brought in the fact of domestic violence [4]. Thus, according to the statistical data of the State Court Administration of Ukraine for 2014, the number of considered cases of the administrative offence, provided by Article 173-2 CUoAO made 81396. In the result of consideration of these cases by the courts of law, 71911 persons were brought to administrative responsibility. Among them 63119 persons were imposed fines, 5528 persons were imposed community service work, 66 – corrective work, 3198 – arrest. According to statistical data for the year 2015, before the amendment to the law, the administrative penalty in the form of a fine was imposed to 14910 persons, in the form of corrective work – to 75, in the form of community service work – to 12492, whereas arrests – to 2160 persons [5]. The given statistical data shows that the corrective work is the least frequent administrative penalty, imposed for the commission of domestic violence before the amendment of the sanction of Article 173-2 CUoAO. We attribute this to the fact that an overwhelming percentage of domestic aggressors are the persons leading an immoral life, abusing alcohol, drugs, toxic substances, and having no regular income, making the application of the this type of administrative penalty to them impossible.

Inexpediency of the application of this type of penalty was stated in works of such scientists as D.M. Lukianets, O.A. Banchuk, V.P. Tymoshchuk, I.B. Koliushko, T.O. Kolomoiets.

On the opinion of .O. Kolomoiets, a depth analysis of properties of the very type of administrative penalty, the legal bases of its imposition, real requirements of enforcement indicates significant obsolescence of existing regulatory models of corrective work, many problems of the practice of execution of orders on their imposition due to significant changes in the socio-economic realities of the life, which virtually levelling the value of this type administrative penalty of personal kind [6, p. 107].

In consideration of the mentioned above, we support the legislator as to the elimination of the community service tasks as a type of administrative penalty from the sanctions of Article 173-2 CUoAO.

Considering such type of administrative penalty, as fine, we have to accentuate that a restriction of ownership right of the person committed a domestic violence, in the form of imposition a fine to him, will not necessarily affect the ownership right and interest of the victim, since according to Law of Ukraine «On the prevention of domestic violence» the family members coming within the purview of this law are not only the persons being officially married, or living as a family without official registration, their children under custody (guardianship, trusteeship), *but also the parents of direct or indirect relationship subject to living together*. In this case they may have separate budget, thus an imposition to the guilty persons of sanctions of property nature will affect the victim in no way.

As it was mentioned above, having eliminated the fine from the sanction of the Article CUoAO under consideration, for the time being the lawmaker provides only two types of administrative penalties for committing an offence, provided by Article 173-2 CUoAO they are *community service works and administrative detention*. But we cannot disregard the fact, that according to the law, community service works shall not be imposed to the persons, determined as disabled of groups I or II, pregnant women, women, of 55 years old or more and men of 60 years old or more, and the administrative detention cannot be applied to pregnant women, women, having children younger 12 years old, to persons younger 18 years old, disabled of groups I or II [7]. Here emerges the question of how the administrative responsibility can be imposed to the persons, who committed the offence, provided by Article 173-2 CUoAO, and are disabled of I or II group, or a woman older 55, or having a child younger 12 years old. As we see, the amendment of the law providing administrative responsibility for the commission of domestic violence, does not consider the mentioned aspects, whereby complicating the process of enforcement of the rule of law under consideration, and in some cases bringing certain categories of persons to responsibility completely impossible.

In connection with the foregoing, we consider necessary to return the administrative penalty in the form of fine to the sanction of Article 173-2 CUoAO as an alternative to such penalties, as community service and administrative detention. In this case the administrative-tortuous norm studied determines three types administrative penalties, their

sizes, evidencing the possible individualization of the penalty. It is the way giving the possibility to choose a variant of administrative penalty for the commission of domestic violence, failure to comply a protective order or failure to pass the correctional program with due regard to a concrete circumstances, personality of the offender and relations between the victim and the guilty persons.

As regards of community service work, it should be notices that today it is the very type of the penalty that is acknowledged by scientists to be most purposeful for the commitment of the offence studied. This is because, firstly, they are not penalties limiting the property rights of a person, and this, in its turn, effects the motivation of application of the victim of domestic violence to a law-enforcement authority. Second, an application of this type of work will have a significant educational effect, because, as the practice shows, the main work, that local self-government authorities designate in this cases, is the maintenance of public order in public (i.e. crowded) areas [8, p. 492]. Regarding the said administrative penalty, we believe that it is appropriate that local authorities to designate carrying out community service work in the agencies and authorities entrusted to implement the measures of preventing domestic violence, which will facilitate more effective realization of the educational objectives of this penalty.

Considering the administrative penalty in the form of administrative arrest, it should be noticed that its application in the field of counteraction of domestic violence is determined by majority of researches to be not quite appropriate. Thus O.D. Kolomoiets points out, that administrative detention should be used for the commission of domestic violence as an extreme measure for both loss of the offender's wages in the work place and loss of the work place by such person [8, c. 492]. In her tern, O.V. Kovaliova points out, that application of administrative arrest gives possibility to the victim of domestic violence to take a rest from the aggression from the part of the offender for a certain time, while he serves administrative detention, but when he returns home, he becomes more aggressive, accusing the victim of domestic violence in his having to serve the administrative detention. Next time when the family faces violence, the victim, most probably, will not apply to law-enforcement authorities for the offence committed, since in such a case she will suffer again [3, p. 69].

In supporting the scientists and world community, who suppose necessary to criminalize any domestic violence, we believe that the very administrative detention as the strictest type of the administrative penalty shall be applied to the guilty person, so far as it relates to temporarily deprivation of liberty of the guilty person till fifteen days and drawing the guilty persons in community service (manual labour), which should lead to the individual and general prevention. Attention should be drawn to the importance of strengthening the administrative responsibility for committing domestic violence, which has been mentioned repeatedly in the literature. Thus O. V. Kovaliova offered as far back as 2008 to establish the criminal responsibility with the administrative prejudicefor the commission of domestic violence: after being brought to the administrative responsibility twice [9, p. 17]. K. Levchenko, the President of the International Human Rights Organization "La Strada", believes that "the only way out in fighting against the domestic violence is to criminalize the domestic violence, by making changes in the Criminal Code of Ukraine, as demanded by the Council of Europe Convention on preventing of the violence towards women and domestic violence and combating these phenomena these [4].

It also should be mentioned, that our questioning of policemen us evidences the necessity to strengthen the administrative sanctions for the commission of domestic violence. Thus 84% of policemen think that the sanctions of Article 173-2 CUoAO are not very effective and fully support the offer to establish the criminal responsibility with the administrative prejudice for the commission of domestic violence.

We also believe necessary to strengthen the responsibility for the commission of domestic violence. However, in our opinion, the measures of the criminal responsibility should be used after individual preventive measures, usage of all existing methods, technologies and programs for combating the domestic violence, aimed at saving the family due to a settlement of the conflict, because the matter concerns the family institution. And only in the case when such measures are unsuccessful, and the person commits domestic violence again, we shall apply the measures of criminal responsibility.

Making changes in the law can be explained by the followings: 1) the necessity of bringing legislation in the field of counteraction of domestic violence to the international standards; 2) statistical data, which evidences a very high rate of repeated commission of domestic violence during a short period of time. We should also understand that no government authority can give precise statistical data, because a large number of victims, suffering from the domestic violence, simply not apply to the authorities; 3) the necessity of effective defence of victims of domestic violence, because an act having a body of an administrative offence may be followed by an act having a body of crime and may lead to socially dangerous consequences that could have been prevented.

As it has already been mentioned before, the administrative penalties were the subject matter of researches of different scientists, who suggested their own vision of the penalty for commissioning the offense, provided by Article 173-2 CUoAO. Thus O.D. Kolomoiets suggested making changes to the CUoAO in the part of expanding the type of the administrative penalties, i.e. supplement the provisions, which may set the special demands to the behaviour of the person, committed the domestic violence. The main idea of these demands may involve both a restriction of certain rights of the offender and an obligation e.g. a prohibition to buy, to have, to carry and to use firearms or any kind of weapons, or to make the offender come to agencies of internal affairs from one to four times per month for a preventive conversation [8, p. 493]. O.V. Kovaliova, in her turn, suggested, along with the community service and administrative arrest as the administrative responsibility for the commission of a domestic violence or failure to comply a protective order, using the compulsion programs of the

social rehabilitation for the person, who committed domestic violence, with the aim of transition from the punitive function of the legal prescriptions to the renewed one in the system of the protection of the rights and freedoms of the persons, who suffered from the domestic violence [3, p. 71]. At the same time, we should emphasize that nowadays the legislation provides for the person to pass a corrective program that can be considered as an analogy to O. V. Kovaliova`s offer. However, this program is enforced to those offenders, who committed the domestic violence repeatedly after an official warning to him on the intolerance to the commission of such acts. We believe that such programs should be applied to the person right after the first commission of domestic violence.

We consider the offers of O. D. Kolomoiets and O. V. Kovaliova to be quite reasonable, and believe that their introduction to the legislation of our country will have a positive effect and facilitate a quality counteraction to domestic violence.

Also, we think that the system of administrative penalties for the commission of the domestic violence should have a complex of measures aimed at the counteraction to the studied phenomenon, including not only the punitive sanctions (fine, community service, administrative detention), but also the penalties, which have cautionary and preventive effect for the family aggressors, that will not only correspond to the goal of the administrative penalty by way of the exclusion of commission by them of new acts of domestic violence, but also the prevention of criminally-punished acts which may result from the commission of domestic violence. Only such complex system of administrative penalties, which has several types of punished and several types of cautionary and preventive administrative penalties, to our opinion, will provide an effective counteraction to domestic violence, since a judge depending on the circumstances of the case, personality of the victim and of the offender, their economic condition, as well as interrelations between them, can, with the consideration of the principle of the penalty individualization, choose an effective administrative penalty in every concrete situation.

Because Article 24 CUoAO provides a possibility of establishment of other administrative penalties by the laws of Ukraine, besides those stipulated therein, we believe that the current legislation has to be amended, accommodating the proposals of O.D. Kolomoiets and O.V. Kovaliova as to the improvement of the system of administrative penalties for the commission of domestic violence. Again in consideration of the results of the performed questioning of policemen, who emphasize that a quite large number of domestic aggressors abuse alcohol, drug, we consider necessary to attract attention to a positive experience of the Republic of Belarus. Thus on 31 January 2010 there is entrance in force of the Law of the Republic of Belarus dated 4 January 2010 «On the order and conditions of referral of citizens to activity therapy centres and conditions of stay therein», according to which the citizens, sick for habitual drunkenness, drug addiction or toxicomania, who were charged for three or more times during a year to an administrative responsibility for the commitment of administrative offences in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, were warned of the possibility of their referral to activity therapy centres and during a year after this warning were charged to an administrative responsibility for the commitment of an administrative offence in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, shall be referred to activity therapy centres [10]. With the consideration of the experience of the Republic of Belarus, we believe it necessary to consider a possibility of introduction to the national legislation of the mentioned administrative penalty for the commission of domestic violence. To our opinion, the problem of application of such penalty may be settled by way of a petition of the district police inspector, which he shall submit to the court along with the case materials on the domestic violence.

Therefore, summing up all the issues given above, considering the analysis of law-enforcement practice, we can state that nowadays the system administrative penalties in the form of community service work and of administrative arrest for the commission of domestic violence is not effective and needs urgent changes, since it does not facilitate the main objective of the administrative penalty that is education of a person, respect to the rules of common life and prevention of commitment of new offences, it needs a complex changes with its supplement with not only punitive penalties, but also cautionary and preventive administrative penalties, aimed at the protection of victims from domestic violence.

**Conclusions.** In the consideration of the described above, we may come to the following conclusions:

1) Application of administrative penalties, provided by the sanction of Article 173-2 CUoAO does not facilitate effective counteraction of domestic violence and solution of the problem in the family and state; 2) With the purpose of improvement of legislation in the field studied we propose to return to the sanction of Article 173-2 CUoAO the administrative penalty in the form of fine as an alternative to community service work and administrative arrest; if the domestic violence committed repeatedly, apply the measures of criminal responsibility; assign the local self-government authorities the power to appoint community service work in authorities and institutions, which are entitled to take measures for the prevention of domestic violence; supplement the Law of Ukraine «On the prevention of domestic violence» by an article, containing the administrative penalties, offered by O.D. Kolomoiets – prohibition of buying, storage, bearing and use of firearms and other kinds of arm, the demand to appear to police agencies from one to four times a month for a preventive conversation, as well as referral to activity therapy centres of persons, sick for habitual drunkenness, drug addiction or toxicomania, who were charged to an administrative responsibility for the commission of domestic violence in a state of alcoholic intoxication or in a state, resulted from the use of drug, psychotropic, toxic or other stupefying substances, and were warned on the possibility of their referral to the activity therapy centres.

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## ЩОДО УДОСКОНАЛЕННЯ СИСТЕМИ АДМІНІСТРАТИВНИХ СТЯГНЕНЬ ЗА ВЧИНЕННЯ ПРАВОПОРУШЕННЯ, ПЕРЕДБАЧЕНОГО СТАТТЕЮ 173-2 КУПАП

**Анотація**
У статті розглядаються проблемні питання системи адміністративних стягнень за вчинення насильства в сім'ї, невиконання захисного припису або непроходження корекційної програми. Аналізуються точки зору вчених з приводу системи адміністративних стягнень за вчинення насильства в сім'ї та її удосконалення. Надаються певні пропозиції щодо удосконалення законодавства у сфері адміністративно-правового регулювання протидії насильству у сім'ї.
**Ключові слова:** насильство в сім'ї, протидія, адміністративно-правове регулювання, законодавство, адміністративний арешт, штраф, громадські роботи, адміністративно-правове регулювання, суб'єкти публічної адміністрації.

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## К ВОПРОСУ ОБ УСОВЕРШЕНСТВОВАНИИ СИСТЕМЫ АДМИНИСТРАТИВНЫХ ВЗЫСКАНИЙ ЗА СОВЕРШЕНИЕ ПРАВОНАРУШЕНИЯ, ПРЕДУСМОТРЕННОГО СТАТЬЕЙ 173-2 КУПАП

**Аннотация**
В статье рассматриваются проблемные вопросы системы административных взысканий за совершение насилия в семье, невыполнение защитного предписания или непрохождение корекционной программы. Анализируются точки зрения ученых по поводу системы административных взысканий за совершение насилия в семье и ее совершенствование. Предоставляются определенные предложения по совершенствованию законодательства в сфере административно-правового регулирования противодействия насилию в семье.
**Ключевые слова:** насилие в семье, противодействие, административно-правовое регулирование, законодательство, административный арест, штраф, общественные работы, административно-правовое регулирование, субъекты публичной администрации.

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# RECOMMENDATIONS OF THE EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW ON THE STATUS OF THE SUPREME COURT OF UKRAINE

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The European Commission for Democracy through Law has acquired extraordinary respect among countries all over the world. Ukraine, as a member of this body, extensively uses the help of this body. This commission repeatedly provided recommendations about judicial system of Ukraine, including of the status of the Supreme Court of Ukraine. This article is dedicated to the influence of the European Commission for Democracy through Law for the status of the Supreme Court of Ukraine. The changes, which were made in its status, and the changes, which are planned, are analyzed in this article.
**Keywords:** court system, the Supreme Court of Ukraine, the European Commission for Democracy through Law, recommendation, constitutional changes.

**Formulation of the problem.** For the time of its existence, the European Commission for Democracy through Law (hereinafter – the Commission) has acquired extraordinary importance and respect among countries all over the world. Despite the fact that according to its statute it is a consultative body, its recommendations shall be taken for immediate implementation. Ukraine, as a member of the Venice Commission, extensively uses the help of this body for the purpose of implementation of the principle of the rule of law in the legal acts. The help of its specialists is very necessary especially nowadays, when Ukraine is on the path of reforms. The experts of the Commission shall pay great attention not only to the laws but also to the draft laws provided by our state. Due to the fact that the reform also affected the judicial system, the European Commission for Democracy through Law received for consideration the Law of Ukraine "On the Judicial System and Status of Judges" dated 10.10.2007, the Law of Ukraine "On Cleaning the Power" dated 16.09.2014, the Law of Ukraine "On Ensuring the Right to a Fair Trial" dated 12.02.2015 in which the new edition of the Law of Ukraine "On Judicial System and Status of the Judges" was presented and others. One of the main points which were emphasized was the status of the Supreme Court of Ukraine. At certain periods of time the scope of its powers, unfortunately, depended on the relations with the executive authority (the example is unjustified reduction of the judges of the Supreme Court of Ukraine from 95 to 20 judges in 2010.). Therefore, the recommendations, made by the Venice Commission, often contained observations on the narrowing of the Supreme Court of Ukraine, especially after the adoption of the Law of Ukraine "On the Judicial System and Status of Judges" dated 07.07.2010.

As a result of the willingness of the highest-level leaders of our country to be equal with the European values, the legal status of the Supreme Court of Ukraine has been significantly changed today. In our opinion, it is the recommendations of the Venice Commission that played an important role in it.

**Analysis of the recent research and publications.** The problematic of importance of the Venice Commission for our country was studied by the famous scientists lawyers: S.V. Kivalov, M.P. Orzih, Yu.E. Polyansky, Y.M. Romanyuk, T.O. Svyda, A.O. Slyadneva, M. Stavnichuk and others.

**Selection of the unsolved aspects of the problem.** The European Commission for Democracy through Law encourages the direction of reforming of the Ukrainian legislation, in particular about the status of the Supreme Court of Ukraine. A controversial question is about the need of existence of the high specialized courts. This issue will be discussed below.

The **purpose** of this Article is to study the impact of the recommendations of the European Commission for Democracy through Law on the determination of the status of the Supreme Court of Ukraine and analysis of changes that occurred with it.

**Presentation of the fundamental material.** The European Commission for Democracy through Law has existed since 1990. It consists of 60 member countries, one associate member (Belarus), five states with the status of an observer (Argentina, Canada, Japan, Uruguay and the Holy See) and three subjects with a special status (European Union, South Africa and Palestine National Administration). Each country provides its representatives with whom the commission is formed. They are independent experts that have become famous thanks to its experience in the development of democratic institutions or improvement of the law or policy in their country [1, art. 2]. The Commission of Ukraine consists of S.V. Kivalov and V.P. Pylypenko.

The Commission shall elect from among its members a Bureau, composed of the President, three Vice-Presidents and four other members. The term of office of the President, the Vice-Presidents and the other members of the Bureau shall be two years. The President, the Vice-Presidents and the members of the Bureau may be re-elected.

The President shall preside over the work of the Commission and shall represent it.

One of the Vice-Presidents shall replace the President whenever he or she is unable to take the Chair. The Commission shall meet in plenary session as a rule four times a year. Its Sub-Commissions may meet whenever necessary. The Commission shall establish its procedures and working methods in the Rules of Procedure and shall de-

cide on the publicity to give to its activities. The working languages of the Commission shall be English and French [1, art. 4].

The European Commission is an independent advisory body that cooperates with the Member-States of the Council of Europe as well as with interested States not included in the Council of Europe, as well as with the international organizations and bodies.

During its activity the Commission shall have the following objectives:

- study of the legal systems of the Member-States, especially for the purpose of their convergence;
- clarification of their legal culture;
- consideration of issues arising in the democratic institutions, and strengthening and development of these institutions.

During its work the Commission shall give priority to the following:

- constitutional, legislative and administrative principles and methods that improve efficiency and strengthen democratic institutions and the principle of the rule of law;
- civil rights and freedoms, especially those that concern the participation of citizens in the activities of these institutions;
- contribution of local and regional authorities to the democracy development [1, art. 1].

The Committee of Ministers, Parliamentary Assembly, Congress of Local and Regional Authorities of Europe, Secretary General as well as States, international organizations or entities taking part in the work of the Commission may appeal to the European Commission with a request to review the legislative acts. [2, p. 6]

As for the Supreme Court of Ukraine we should note that according to the current legislation this court is the highest judicial body in the system of the courts of general jurisdiction, which shall include the local courts, courts of appeal and high specialized courts. It is this court that shall provide unification of jurisprudence in accordance with the procedure provided for by the procedural laws.

The situation and status of the Supreme Court of Ukraine has changed several times. In 2010 the Law of Ukraine "On the Judicial System and Status of Judges" was adopted. On June 15, 2010 the Deputy Minister of Justice of Ukraine Y.D. Prytyka appealed to the Venice Commission with a request to provide an opinion on this draft law [3, p. 1]. On June 230, 2010 the Commission provided the Deputy Minister of Justice of Ukraine with the previous comments. The experts of the Commission marked positive features of this law, namely the implementation of the automated document management and distribution of cases; election of judges on probation for an indefinite period of time; transfer of state judicial administration under judicial control; elimination of military courts, which is a remnant of the former Soviet system [3, p. 128]. However, the negative aspects of the law were also marked and one of which was a significant narrowing of the Supreme Court of Ukraine. The experts of the Commission emphasized the fact that the Supreme Court of Ukraine has lost its jurisdiction in civil and criminal cases in favour of the High Specialized Court for Civil and Criminal Cases, which supplemented the existing two high courts for considering economic and administrative cases. According to the experts' opinion, this situation had to lead to multiple collisions of jurisdiction. This problem could be solved by creating a special court – the court of "collisions" or its role could be played by the Supreme Court of Ukraine. However, the provisions of the law given to the European experts for consideration did not provide for such powers of the Supreme Court of Ukraine. Another negative factor according to the experts' opinion was providing the specialized courts with the right to provide consultations and explanations of a recommendatory nature to the courts of lower level on the issues of applying the law in solving the cases falling within their jurisdiction. Also according to the Law of 2010 the competence of the Supreme Court related only to the issues of substantive law. The experts of the Commission have noted that there is no need to deny the Supreme Court of Ukraine in respect of powers regarding the procedural law due to the fact that most of the issues of fair trial are associated with the procedural issues. Also the attention was drawn to the new procedure for filing cassation appeals which provided for filing a cassation appeal through a high specialized court. In this case, the Court of Cassation, which made a decision, that is challenged, had to decide the issues regarding adoption an appeal for consideration itself or refusal in acceptance. Only the appeals taken into consideration were sent for consideration to the Supreme Court of Ukraine. The European Commission for Democracy through Law recommended providing the Supreme Court of Ukraine with the right to solve the issues on the adoption of appeals or refusal to accept itself. The experts noted that the new procedure in practice shall make the high specialized courts at a higher level than the Supreme Court of Ukraine [3, p. 21-24, 29-32].

The list of the powers of the Supreme Court of Ukraine has remained unchanged for a long period of time, but the new wave has made some amendments. On 12.02.2015 the Law of Ukraine "On Ensuring the Right to a Fair Trial" was adopted, which amended the Code of Ukraine on Administrative Offences, Economic Procedural Code of Ukraine and others, but the main importance is a new version of the Law of Ukraine "On the Judicial System and Status of Judges". On February 20, 2015 the Head of the Presidential Administration of Ukraine B.E. Lozhkiy appealed to the Commission with a request to provide an opinion on the latter [4, p. 1]. Analyzing the changes in the status of the Supreme Court of Ukraine, the first stage marked the provisions of Part 5 of Article 13 of the Law of Ukraine "On Judicial System and Status of Judges", which stipulates that the conclusions regarding the application of the rights, set out in the resolutions of the Supreme Court of Ukraine, shall be taken into account by other courts of general jurisdiction in the application of such rules of the law. The court shall have the right to withdraw the legal position set out in the conclusions of the Supreme Court of Ukraine, providing the relevant reasons [5, art. 13]. According to the experts' opinion, this seems a good solution in the system in which there is no doctrine of binding precedent, but tries to ensure a consis-

tent approach to the legal interpretation [4, p. 25]. The European experts say that a clear separation between procedural and substantive law in the matter of competence of the Supreme Court of Ukraine for reviewing decisions does not exist anymore. The attention is also drawn to the fact that according to Article 77 of the Law of Ukraine "On the Judicial System and Status of Judges", as set out in the new edition, the judge of the Constitutional Court of Ukraine retired may be elected as a judge of the Supreme Court of Ukraine without making interviews or study of the judicial dossier. This is contrary to the provisions of the amended Law, which indicate the introduction of competitive procedures for appointment of judges as the general rule [4, p. 29].

So as of today, after considering all comments, the powers of the Supreme Court of Ukraine shall include the following:

1) Administration of justice in accordance with the procedure established by the procedural law;

2) Analysis of the judicial statistics and summarizing court practices;

3) Providing opinions on draft legal acts relating to the judiciary system, the judiciary procedure, status of judges, enforcement of judgments and other issues related to the functioning of the judicial system of Ukraine;

4) Providing opinions about the presence or absence of features of state treason or other crime in actions in which the President of Ukraine is accused of; At the request of the Verkhovna Rada of Ukraine making a written appeal on the impossibility of the President of Ukraine to perform his powers for health reasons;

5) Appeal to the Constitutional Court of Ukraine on the constitutionality of laws and other regulations, as well as an official interpretation of the Constitution and laws of Ukraine;

6) Ensuring the equal use of the rules of law by courts of different specializations in accordance with the procedure and in the manner established by the procedural law;

7) Performing other powers established by law [5, art. 38]

Due to the fact that the Venice Commission has repeatedly stressed the need in amending the Constitution of Ukraine, indicating that this is the only way to bring all Ukrainian legislation to the European standards, on March 3, 2015 the President of Ukraine P. Poroshenko signed a Decree by which he approved the Regulation on the Constitutional Commission, which shall develop proposals for improving the Constitution of Ukraine and its changing for the purpose of meeting the current needs of the society. According to the aforementioned Decree the Commission shall perform the following tasks:

1) Generation of the practice of implementation of the rules of the Constitution of Ukraine and proposals for its improvements, taking into account the modern challenges and needs of the society;

2) Elaboration of the agreed proposals for making a constitutional reform in Ukraine;

3) Ensuring broad public and professional discussion of proposals for making a constitutional reform in Ukraine with the participation of the leading experts in the sphere of the constitutional law and other spheres of law, in the sphere of the social and political sciences, public figures, representatives of public associations and international organizations;

4) Preparation of the draft law (draft laws) regarding amendments to the Constitution of Ukraine according to the results of a broad public and professional discussion;

5) Promoting the establishment of an effective mechanism of interaction of state bodies, civil society and international organizations on the preparation and implementation of the constitutional reform in Ukraine;

6) Ensuring public awareness of the work on the preparation of proposals for constitutional reform and its implementation [6, p. 3].

At the first meeting of the Constitutional Commission held on April 6, 2015 it was decided to establish three working groups, among which a separate group is working on the issues of justice, related legal institutions and law enforcement.

On July 21, 2015 the Chairman of the Verkhovna Rada of Ukraine, Chairman of the Constitutional Commission of Ukraine Volodymyr Groysman provided the Venice Commission with the draft amendments to the Constitution of Ukraine in terms of justice, proposed by the Working Group of the Constitutional Commission on the issues of justice and related legal institutions and invited it to prepare an opinion on these changes [7, p. 4]. On September 10, 2015 V. Groysman appealed to the Commission with a request to provide an opinion on the worked-out version of the draft law, for which an opinion was provided in October [8, p. 2]. According to the proposed changes the legal status shall be defined as follows: the Supreme Court of Ukraine is the highest court in the judicial system of Ukraine [7, p. 19], but nevertheless the system of the specialized courts with their respective supreme courts shall be kept. Although the European Commission for Democracy through Law repeatedly stressed the need to unify the system of courts of general jurisdiction and transformation of high specialized courts in units of the Supreme Court of Ukraine (as an exception, it selects only the Supreme Administrative Court of Ukraine), it shall take such a decision of the Ukrainian authority [8, p. 11].

In our opinion, the fears of the European Commission about collisions in solving cases or conflicts between courts which may appear as a result of the presence of specialized courts are premature. As examples of the successful functioning of specialized courts we can note France and the Federal Republic of Germany. There are commercial tribunals, Councils of Pryudomiv, tribunals on social insurance, and parity tribunals for land lease and tribunals for maritime trade in France. In the Federal Republic of Germany – courts for labour cases, administrative courts, courts for social affairs and the courts for financial issues. Consequently, we consider that remaining in Ukraine specialized courts is a good solution which has historical grounds [9, p. 10-11, 124-125].

The experts of the Commission say that the proposed changes shall be generally positive and shall deserve support. Their adoption shall be an important step towards the creation of a truly in-

dependent judiciary system in Ukraine. The Venice Commission shall approve and shall be ready to provide further assistance to the Ukrainian authorities, if the latter appeals with the relevant request [7, p. 55, 57]

**Conclusions and research prospects.** Using the help of the experts the European Commission for Democracy through Law shall be an additional mechanism to ensure democracy and the rule of law in our country. The process of preparing the conclusions by the experts of the Commission shall be diligent and coordinated work, so their conclusions shall be viable, reasoned and recommended for implementation. In our opinion, taking the comments of the Commission and elimination of errors made before in the preparation of the draft laws shall be an essential part of the legislative process.

For the long years of existence of the Supreme Court of Ukraine it is today when its status corresponds to the legally enshrined status of a "supreme court". We believe that the comments of the European Commission for Democracy through Law had a positive effect on the position of the Supreme Court of Ukraine in the judicial system of Ukraine. We hope that in the future there will be further changes in its work taking into account the opinion of experts of the European Commission for Democracy through Law.

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## РЕКОМЕНДАЦІЇ ЄВРОПЕЙСЬКОЇ КОМІСІЇ ЗА ДЕМОКРАТІЮ ЧЕРЕЗ ПРАВО ЩОДО СТАТУСУ ВЕРХОВНОГО СУДУ УКРАЇНИ

**Анотація**
Європейська комісія за демократію через право за час свого існування набула надзвичайної поваги серед держав світу. Україна широко використовує допомогу цього органу. Комісія неодноразово висловлювала рекомендації щодо судової системи України, у тому числі статусу Верховного Суду України. Ця стаття присвячена впливу рекомендацій Європейської комісії за демократію через право на статус Верховного Суду України. Аналізуються зміни, які вже в ньому відбулися та реалізація яких ще планується.
**Ключові слова:** судова система, Верховний Суд України, Європейська комісія за демократію через право, рекомендація, конституційні зміни.

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## РЕКОМЕНДАЦИИ ЕВРОПЕЙСКОЙ КОМИССИИ ЗА ДЕМОКРАТИЮ ЧЕРЕЗ ПРАВО О СТАТУСЕ ВЕРХОВНОГО СУДА УКРАИНЫ

**Аннотация**
Европейская комиссия за демократию через право за время своего существования приобрела значительное уважение среди государств мира. Украина широко использует помощь этого органа. Комиссия неоднократно предоставляла рекомендации по судебной системе Украины, в том числе о статусе Верховного Суда Украины. Эта статья посвящена влиянию рекомендаций Европейской комиссии за демократию через право на статус Верховного Суда Украины. Анализируются изменения, которые в нём уже произошли и реализация которых ещё планируется.
**Ключевые слова:** судебная система, Верховный Суд Украины, Европейская комиссия за демократию через право, рекомендация, конституционные изменения.

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## THE INFORMATION FUNCTION OF THE MODERN STATE

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The article focuses on the further study of theoretical and legal foundations of the information function essence and determination of its place and importance in the modern state functions system in the context of globalization and informatization of society. The author researches the phenomenon of the modern state in connection with certain state-legal changes in the world and provides a definition of the "modern state". Some innovations in information relationships are offered in the article such as "e-government".
**Keywords:** globalization, informatization, functions of the modern state, the information function, the modern state, e-government, access to public information.

**Formulation of the problem.** The main feature of a modern society is the growing role of information, informational relations and informational space, which is an essential part of all internal and external processes in public life, thus their regulation is one of the priorities of a state.

At different stages of historical development of a state major trends and types of public activities arise according to social needs that arise and are formed as the tasks of a state. These major trends and types of public activities are traditionally called functions of a state.

It is generally accepted that the modern state functions are the most general and stable directions of its activities aimed at solving key social problems. Such directions are determined by domestic and international legal order and are legitimated by society [6, p. 321].

Recently, the nation-state is increasingly engaged in global issues such as informational, environmental, cultural et al. These processes determine the rise of new functions. The impact of globalization is so significant that we can see the formation of a new reality, marked as "modern state" and a new understanding of its effective functioning. The image of the modern state is often replacing the image of a nation-state with its outdated features and functions [7, p. 6]. Therefore, first of all we have to determine what the modern state is and what its main features are, and only then we can describe the main areas of its activities using the example of information function.

Globalization greatly enhances the role of information in society, causing many active discussions among scientists in different fields of knowledge. The speed of its spread, the lack of any real mechanisms of its spread and cross-border nature of its communications updates the information function of state, which has become the subject of research recently. This is due to the fact that the Soviet theory of state and law considered information activities of the state as a political and legal framework of existing ideology [13, p. 66]. A push to the research of information function was democratic transformation in the late 80s – early 90s of the twentieth century and the proclamation of the principle of transparency. However, the attention of scientists and legislators focused mainly on issues of the freedom of speech, the right to freedom of expression and belief, freedom of media [3, p. 22].

**Analysis of recent researches and publications.** At the present stage of the theory of functions study, which is a critical reconsideration of many previously developed general theoretical aspects of this category, there is still no common approach for their understanding. Among the recent studies are noteworthy developments of domestic and foreign scientists as Yu. M. Oborotov, E. A. Dzhurayeva, P. Klymentyev, O. M. Loschyhin,

T. A. Kosteckiy, L. R. Nalyvayko, V. F. Pohorilko, V. V. Simutin, O. Yaremenko, F. Fukuyama and others.

**Objective of the article** is the determination of the modern state and further research of the theoretical and legal foundations of the information function, research of innovations in information relationships such as "e-government" and determining the place and importance of information function in the modern state functions system. The study of these problems and the category of "information function of the state" will contribute, in our opinion, to the enrichment of the national legal doctrine of such complex concepts as "functions of the modern state" and will improve the classification of functions of the modern state.

**Presentment of the main material.** First of all, let's discuss what the modern state is. The category "modern state" has not been sufficiently studied in jurisprudence because this category is very dynamic. It should be noted that the term "modern state" is closely akin to the criteria of time and is not constant. Each age has been "modern" and for each period of time there is a certain type of state that is "modern". Therefore, analyzing the phenomenon of the modern state, it is appropriate to outline its main features nowadays.

Several authoritative sources use only a common phrase to describe the modern state: "the modern type of state is a democratic, social, legal state" [11, p. 179]. There are many scientific researches of the concept of "modern state", but they are incomplete. Different scientists are exploring this category using different criteria. That is why we must determine our own criteria.

First of all among the classic features of the state – nation, territory and state power, we highlight such an important feature of the state as its recognition by other states and international community [7, 7]. The moment of international recognition has legal importance and defines the transformation of the existing nation-state into the modern state.

The modern state must create the proper conditions that would guarantee the realization of human rights and contribute to the restoration of violated rights. For the modern state, the main social value is a person's life and health, honour and dignity, his rights and freedoms, their protection and implementation. Thus, consolidation and implementation of human rights is normative-legal assessment of the quality of the modern state.

An important criterion of the modern state is stability, which indicates the possibility of the state to exist and survive despite destabilizing external (natural disasters, war, economic sanctions) and internal (inter-ethnic conflict, separatism, revolution) changes [8, p. 25]. The stability of the state is achieved through the integrity of the political system, the legitimacy of the government, the effectiveness of state institutions and the rule of law and security, and value orientations, depending on the mentality and traditions of the state [8, p. 27]. The value of any state has to be connected with its stable existence. The issue of the state stability is associated with such an important criterion for the modern state as the division into strong and weak, as expressed through their actual degree of independence and ability to maintain its existence [14, p. 42].

The modern state should be open to the dialogue of legal cultures and participate actively in global communication process [7, p. 9]. No state can exist without the active cooperation with the international system today, and the state openness is the constitutive element of the statehood.

So, based on the mentioned main criteria, we are able to provide the concept of the modern state. The modern state is a legal, stable, strong, communicative, economically and spiritually stable institutional system of legitimate, legal and legalized government power in a society operating on a particular territory, which main task is to ensure and protect human and civil rights and freedoms.

Informatization processes in a society is an important feature of the modern state. It can influence state-legal life differently. On the one hand information opens new horizons to the state, making it open and communicative, increases the role of information in all areas of human existence. Internet has already been acting as one of the tools of political activity and as a convenient way of public activity display [10, p. 111]. On the other hand, this allows individuals to achieve the information interests beyond the state, which causes problems for traditional institutions of the state and its functions. Such negative effects cause the erosion of the sovereignty of the nation-state. It also causes the problem of information sovereignty and information security.

In this context, there is a need for the theoretical-legal reconsideration of the state functionality in the relevant processes and determination of the mechanisms of the state functions` realization. Accordingly, the information function research will provide the opportunity to implement effectively public information policy of the modern state.

Controversial point in the study of this concept is that the concept of information function is under development and there is no unity among scientists on the issue of this function understanding. For example, O. F. Skakun considers information function of the state as an organization and support of the system of acquisition, use, distribution and storage of information, access to a wide range of high tech software (computer network with file servers) [11, p. 134]. N. M. Krestovskaya and L. G. Matveeva consider information function as an organization and support of the system of acquisition, use, distribution and storage of information [5, p. 115]. Among the latest research noteworthy is the author's definition of information function by O. P. Klymentyev given in his thesis. He has defined information function as an independent and priority direction of the state information policy, carried out through information means to achieve information sovereignty, free and safe information development of the information society within a particular state. It includes protection of information rights, freedoms and legitimate interests of human and citizen, while acting as an information form to achieve the objectives of society and the state in other most important areas of social life [4, p. 4].

So, summarizing a number of existing doctrinal definitions in our opinion we should prefer the lat-

ter as the most complete, covering the main features of this function.

This makes it possible to determine the nature of information function, which is to organize and ensure the system of creation, collection, acquisition, distribution, storage, use, protection and security of the information. It involves active participation of the state, through its representative bodies in the development of the world information space, establishment of the information resources use regime based on equal cooperation with other states through an appropriate information policy.

Another very important moment in the information function study is to determine its place in the functions system of the modern state. Not all scientists allocate information function as an independent one. For example, A. Vengerov, one of the first lawyers who explored the information function of the state, considered it as an activity of the fourth power – the media. V. F. Pohorilko refers information function to the basic functions of the state [13, p. 67]. O. F. Skakun considers information function as the internal function – an organization and support of the system of acquisition, use, distribution and storage of information, access to a wide range of high tech software, and external function – participation in the development of the global information space, establishment of the information resources use regime based on equal cooperation with other states through an appropriate information policy [11, p. 135].

According to classic classification of state functions, depending on their role in the society, they are divided into basic – areas of the state activity, without which it will not properly function and develop, and auxiliary – the constituent elements of the basic functions, which cannot separately disclose the nature of the state [2, p. 15]. The mentioned separation can be considered a relative one, because nowadays each country does not exist in isolation from the others, and according to the principle of cooperation in international law, enters into certain relations with other countries and we cannot implement basic functions separately from auxiliary ones. This can be seen in the example of information function – it can act as a basic function because its display inside and outside the country is permanent and cannot be a temporary one.

In modern science we can observe a tendency to abandon the classification of state functions, depending on the scope of impact and implementation on internal and external, as they both are closely linked, acting in a certain unity, complementing each other, because today any state is characterized by the general functions carried out within the country and abroad. It should also be remembered that foreign policy of any state is a logical extension of domestic policy and domestic policy, as well as legislation can not contradict international law, ratified by the legislation of Ukraine.

Another criterion is the division of state functions, depending on the period of their performance, into constant ones – performed during the lifetime of the state and temporary ones – performed over a period of existence of the state or associated with a specific factor [2, p. 16]. By this criterion information function can be attributed to both types because the ensuring of the right of public access to information (legal, environmental, etc.) is permanent.

In our opinion, one of the key points in the study of the theory of functions of a modern state should be revision and improvement of existing classification of state functions based on conflict points.

It is said that information function is performed by all public authorities. For example, one of the Verkhovna Rada of Ukraine authorities is to determine the principles of domestic and foreign policy. In this regard, the information function directly can be realized through appropriate rules on external and internal information policy [12, art. 85, it. 5]. The Cabinet of Ministers of Ukraine has the authority to conduct domestic and foreign policy, take steps to ensure the defence capability, national security of Ukraine (information security) and public order [12, art. 116, it. 7].

Further proof of information functions realization by all public authorities is actively implemented in the world concept of "e-government", the essence of which is the active use of information technology by all public bodies in their daily activities [10, p. 111].

The Cabinet of Ministers of Ukraine considered and approved the concept "of e-government" in Ukraine in December 2010. The proposed concept of "e-government" defines the purpose, the basic objectives, priorities, stages of building "e-government" in Ukraine until 2015, and expected effects of its implementation. The concept is the basis for the further development strategy for "e-government" in Ukraine, program documents on implementing "e-government", the Law of Ukraine "On the development of e-governance". "E-government" is one of the tools of the information society, the implementation of which will contribute to the creation of conditions for open and transparent public administration. Taking into consideration everything mentioned above, the question arises as to clarification of "e-government" nature.

In accordance with the provisions of the Concept, the "e-government" is a form of organization of public administration that promotes efficiency, openness and transparency of state and local government using information and telecommunications technology to create a new type of state, focused on the needs of citizens. The main component of "e-government" is the "e-government" infrastructure as a single interagency automated information interaction of state and local governments among themselves and with citizens and economic entities [1, p. 3-4]

Nowadays e-reorganization of public administration is causing tremendous interest worldwide. Canada, United Kingdom, Sweden, Denmark, Norway and Costa Rica, Qatar, United Arab Emirates, Latvia, Estonia, Czech Republic and many other countries are developing or creating "e-government".

According to the research, the idea of "e-government" is one of the most controversial, key aspect of debates is the fundamental question of the fate of governments and the state in general. Today there is a growing number of supporters of the opinion that the implementation of information technology in public administration will

enable to optimize everything quickly, to reduce maintenance costs of the state and to accelerate the cooperation between public authorities and the citizens. The most significant argument in favour of "e-government", suggested by its supporters, is increasing transparency and openness in government by switching to a new level of feedback both from citizens and business [9, p. 69]. Thus e-government is an adaptation of governance to the new conditions of social development, which includes the direct services provided by the state through its bodies to its citizens, and interaction between them, in particular thanks to the support and implementation of feedback system (citizen – government – citizen and vice versa) using modern information technologies in communication.

Thus, the purpose of information functions of the state is to create organizational and legal opportunities for access to public information for all interested actors. One of the implementation means of such an objective is the introduction of the "e-government" concept in Ukraine, which will be one of the steps to ensure transparency and openness of public authorities. It is important for democratic society that the public have access to information of public importance issues, because it will strengthen public confidence in government.

Nowadays, over 90 countries have already adopted and implement the right of access to public information by fixing it in their constitutions or creating special laws that provide the ability to use this right in practice effectively. Currently, laws on access to public information have been adopted in almost all the European Union, except Cyprus, Malta and Luxembourg, where the access to government information to the public has already been given in practice [9, p. 71]. However, some states, including Ukraine, only started this process, in which a special role is given to ensuring the right of access to public information at the appropriate level. Thus, the adoption of the Law of Ukraine "On Access to Public Information" on 13 of January 2011 was an important step towards the fulfilment of a number of international legal obligations by Ukraine.

So, the research leads to the following **conclusions**: global changes indicate that the image of the nation-state is gradually replaced by the image of the modern state that meets the criteria of internal and external public activities nowadays. In connection with it the information function is under development and formation too. There are many controversial issues that require further study, but modern scientists take pretty confident steps.

The main priority of information function implementation within the state is to create optimal conditions for the realization of the legitimate information interests, their self-organization and interaction within the information society, to ensure optimal functioning of the institutionalized elements of the information society in the most important areas of social life.

However, the external side of information function aims to use power resources more or to influence the nature of its institutions in the state interests in the sphere of international relations and international security. This allows us to distinguish the internal and external aspects of information function and to assert erosion of the boundaries between internal and external functions of the state in general.

Information function of the state at the current stage of development of Ukraine occupies a key position among other functions of the state, but at the same time is interrelated with them. The formation of information function of the state, as the primary and independent one, is caused by the intensive development of information society, the need for ensuring and adoption of legal acts in the information sphere. So we should explore such direction of the state activities as information function because its importance is growing each day.

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## ІНФОРМАЦІЙНА ФУНКЦІЯ СУЧАСНОЇ ДЕРЖАВИ

**Анотація**
У статті зосереджується увага на подальшому дослідженні теоретико-правових засад сутності інформаційної функції та визначення її місця і значення в системі функцій сучасної держави в умовах глобалізації та інформатизації суспільства. Досліджується феномен сучасної держави в зв'язку з певними державно-правовими змінами у світі та надається визначення «сучасна держава». А також пропонуються інновації в сфері інформаційних відносин – «електронне урядування».
**Ключові слова:** глобалізація, інформатизація, функції сучасної держави, інформаційна функція, сучасна держава, електронне урядування, доступ до публічної інформації.

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## ИНФОРМАЦИОННАЯ ФУНКЦИЯ СОВРЕМЕННОГО ГОСУДАРСТВА

**Аннотация**
В статье сосредоточено внимание на дальнейшем исследовании теоретико-правовых основ сущности информационной функции и определении ее места и значения в системе функций современного государства. Исследуется феномен современного государства в связи с определенными государственно-правовым изменениями в мире и предоставляется определение «современное государство». А также предлагаются инновации в сфере информационных отношений – «электронное управление».
**Ключевые слова:** глобализация, информатизация, функции современного государства, современное государство, электронное управление, доступ к публичной информации.

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## TRAVEL OF RELIGIOUS ORGANIZATIONS MEMBERS OUTSIDE UKRAINE: PROBLEMS AND PROSPECTS OF INTRODUCING VISA-FREE REGIME FOR UKRAINE

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The substance of the right to freedom of travel – as an individual's constitutionally enshrined and guaranteed by state possibility to travel freely and choose his/her place of residence at his/her discretion, to leave and enter the territory of Ukraine was examined. The questions of providing benefits in issuing visas to members of religious organizations were considered. The specifics of the procedure of applying to consular offices of the EU member countries and the prospects for the introduction of a visa-free regime for Ukrainian citizens were investigated. The question of the European Union strategy for the introduction of a visa-free regime for Ukrainian citizens was studied.
**Keywords:** visa-free travel, visa, and religious organization, the right to freedom of travel, consular offices, and international relations.

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**The relevance of the research** is confirmed by the insufficient extent of investigations on the problem of providing benefits for issuing visas to members of religious organizations and the prospects of introducing visa-free regime for Ukrainian citizens.

**Analysis of Recent Achievements and Publications.** Outstanding Ukrainian and foreign scientists have repeatedly investigated issues related to the creation of the European Union, its system of legal rules and the integration of Ukraine into the legal framework of the European Union.

Theoretical basis of the study of these issues were laid in the works of such professionals in the field of general theory of law as M. Oborotov, P. Rabinovich and M. Azarkin, as well as the specialists in administrative law V. Averyanov, E. Dodin, S. Kivalov, and L. Bily-Tiunova. Attention is drawn to the studies carried out by such scholars as M. Arakelyan, A. Vishnyakov, A. Baev, V. Vasilenko, L. Gritsaenko, I. Gritsyak, B. Gubsky, S. Gusevsky, P. Demchuk, and V. Denisov.

**Aspects of the problem, not previously considered.** This paper discusses the issues of privileges for issuing visas to members of religious organizations, the specifics of submitting documents to the consular offices of the member countries of the European Union, and the prospect of a visa-free regime for Ukrainian citizens in the light of the strategy of the European Union.

**The purpose and objective of the article** was to study the question of issuing visas to members of religious organizations, the prospect of a visa-free regime for Ukraine to EU countries, and the system of scientific views and research on this topic.

**Presentation of the basic material.** A person's legal right to travel belongs to human rights of the first generation, which embody the liberal-democratic values founded on the study of natural innate human rights, formulated in the early period of bourgeois revolutions. This right is an essential element of individual freedom; it is directly related to other rights and freedoms and is a necessary condition for their realization. The right to free travel is one of the most significant manifestations of individual freedom and is a prerequisite for the realization of such rights and freedoms, as the right to work, the right to free exercise of one's abilities and security of person, to health protection and medical care, to education. The right to freedom of travel is the basis for a full human activity.

The freedom of travel and choice of one's place of residence as a human right to travel freely throughout a country, to choose one's place of residence or stay, to leave the country and return to it, is one of the fundamental individual human rights, which are included in the Universal Declaration of Human Rights adopted by the UN General Assembly in 1948 [1].

The constitutional recognition of the right to freedom of travel in the modern Ukraine [2] and its further specification in the legislation were the embodiment of democratic reforms in the country. This right is an essential element of the individual freedom; it is directly related to other rights and freedoms and is a necessary condition for their implementation.

Article 24 of the Law of Ukraine "On the Freedom of Conscience and Religious Organizations" [3] regulates the issues of international relations and contacts of religious organizations and believers. It states that religious organizations and believers, alone or together with others, have the right to establish and maintain international relations and direct personal contacts, including travel abroad for pilgrimage or participation in meetings and religious activities. In accordance with the law in force, the participants of these contacts and activities are allowed to acquire, receive and carry with them religious literature and other informational materials of religious content. Religious organizations may send citizens abroad to study at religious schools and invite foreign nationals for this purpose.

Cooperation between the European Union and Ukraine in the direction of the freedom of travel in the context of signing the Association Agreement and visa-free regime for Ukrainian citizens travelling to the member states of the EU is based on: supporting the development of the Ukrainian system of personal data protection; developing the necessary legislative and institutional framework in the field of migration management; continuing the visa dialogue, developing relevant conditions for the implementation of a visa-free regime between Ukraine and the European Union in long-term perspective; ensuring full implementation of the Agreement between Ukraine and the EU on visa facilitation and readmission of people; developing, implementing and improving policies, the legal framework and procedures of integrated border management. The harmonization of Ukrainian laws with the EU laws on the travels of persons should primarily be carried out in the direction of achieving a visa-free regime with the EU.

The agreement between Ukraine and the EU on visa facilitation was signed on June 18, 2007 (entered into force on 1 January 2008) [4].

On July 23, 2012 in Brussels, an agreement was signed between the EU and Ukraine on amending the Agreement between Ukraine and the EU on visa facilitation. This agreement established the right to a simplified issuing of free, multiple-entry visas to members of religious organizations.

To receive religious visas, the members of religious organizations must submit the following documents to the EU countries consular offices:

- A written application of the religious organization registered in Ukraine, stating the purpose, duration and frequency of trips;
- Information on the person's affiliation to the religious organization.

The document confirming the registration of religious organizations in Ukraine is an extract from the Unified State Register of Legal Entities and Physical Persons – Entrepreneurs, which contains information that the organizational and legal form of the legal entity in question is a religious organization.

On July 23, 2012 in Brussels, an agreement was signed between the EU and Ukraine on amending the Agreement between Ukraine and the EU on visa facilitation, the key element of which was the provision on the perspective of introducing a visa-free regime for Ukrainian citizens.

The Action Plan Ukraine – the EU in the field of justice, freedom and security, in force since 2001 and revised in 2007, creates a general framework for cooperation between Ukraine and the EU in the field of justice, freedom and security.

The Action Plan, in particular, provides for the introduction of biometric passports, retirement of passports that do not meet the standards of ICAO,

strengthening of the measures to combat illegal migration, improvement of border management, bringing of the legislation and asylum policies in accordance with international standards in this field, etc. After Ukraine fulfils all the criteria of the Action Plan, the European Commission, according to the legislative procedure provided for in the Treaty on the Functioning of the European Union ("Treaty of Lisbon"), will make a proposal to the European Parliament and the Council to abolish the visa regime for short trips of Ukrainian citizens (holders of biometric passports) by amending the EU Regulation № 539/2001.

To date Ukraine has fulfilled 18 of the 54 recommendations of the European Commission regarding the receipt of a visa-free regime. This was mentioned by the Foreign Minister of Ukraine Pavlo Klimkin during an hour of questions to the government [5]. The Foreign Minister also expressed his hope that the final, 6th report of the monitoring mission on the implementation of the Action Plan to liberalize the visa regime with the EU by Ukraine expected on December 15, 2015, will be positive. P. Klimkin is confident that Ukraine may get a visa-free regime with the European Union in late summer – early autumn, 2016 [6]. He noted that currently the laws adopted by the Verkhovna Rada are under examination in the European Union, as well as in the FATF.

Fulfilling the requirements of the EU to Ukraine, the Ukrainian Parliament in November 2015 adopted a number of laws, including the anti-discrimination amendment to the Labour Code, the limitation of the Security Service powers, laws concerning the arrest of property, the special confiscation, the establishment of the Agency for return and management of assets acquired by illegal means, and others.

The anti-discrimination amendment to the Labour Code introduced by the Verkhovna Rada of Ukraine provides for the prohibition of any discrimination in employment, in particular the violation of the principles of equality of rights and opportunities, direct or indirect restriction of the rights of employees based on race, colour, political, religious and other beliefs, sex, gender identity, sexual orientation, ethnic, social or foreign origin, as well as discrimination, which concerns the age, health, disability, suspicion or the presence of HIV/AIDS, family and property status, family responsibilities, place of residence, membership in trade unions and other associations of citizens, participation in a strike, etc. [7].

The Draft Law on Amendments to the Criminal and Civil Codes of Ukraine concerning the improvement of the institute of special confiscation to address the corruption risks in its application №2541a provides that money and valuables that are in bank accounts, or deposited in banks, other property transferred by a person who had committed a crime to a third party free of charge or in return for a sum that is significantly below the market value, is subject to special confiscation. The circumstances relating to a third party must be established in courts on the basis of sufficient evidence.

The law says that the special confiscation cannot be applied to the property, which is owned by the purchaser [8].

"Special confiscation should be applied to certain criminal offenses, which include corruption offenses, violations associated with money laundering, terrorism, and crimes in the sphere of drug trafficking" – said the head of the Committee on Legislative Support of Law Enforcement Andriy Kozhemyakin.

According to the head of the Committee on Legislative Support of Law Enforcement Andrei Kozhemyakin, the government proposed to expand the institute of special confiscation; however, after the Committee had carefully worked over the provisions of the European Union directives to freeze the confiscation of the proceeds of crime, it came to believe that the requirements of special confiscation do not apply to all crimes.

"It must be applied to certain criminal offenses, which concern corruption offenses, violations associated to money laundering, terrorism, and crimes in the sphere of drug trafficking" – said Kozhemyakin [9].

Deputies approved the bill №2542a, amending the Code of Criminal Procedure concerning the specification of investigative jurisdiction of the pre-trial investigation [10].

The document allocates criminal cases between different law enforcement agencies. It takes into account a number of recommendations of the European Commission, in particular – on the elimination of jurisdiction duplication and the

Elimination of alternative jurisdiction for terrorist offenses (they are investigated by the SSU).

The draft law also limits the power of the Security Service in the investigation of crimes against national security.

The document was adopted in the framework of implementing the European Union recommendations for the prevention of organized crime and fight against it. The document limits the powers of the Security Service to conducting the pre-trial investigation and exercising criminal proceedings in criminal offenses in the sphere of national security and defence, as well as those related to terrorism.

The Parliament of Ukraine adopted the bill №2540a, which authorizes the seizure of assets, which may be instruments or evidence of crime, or were obtained by criminal means [11]. The purpose of this arrest is to ensure criminal proceedings, to ensure a civil suit in a criminal proceeding, and to ensure confiscation or special confiscation. According to the law, the goal of the seizure is to avoid the opportunities to hide, damage, or destroy the property in question.

The property which can be arrested includes assets owned, used or disposed of by the suspect, accused, convicted, third parties, or juridical entities, to which the norms of criminal law can be applied.

The Verkhovna Rada voted for the creation of an agency for the return and management of assets acquired by unlawful means [12]. The bill No 3040 "On the National Agency of Ukraine for the Identification, Investigation and Management of Assets Derived from Corruption and Other Crimes" was developed by the Ministry of Justice with the participation of the Prosecutor General. The Agency will only keep the arrested assets and manage them through representatives selected by

competition. The disposal of the arrested property will be carried out only by court order or on the request of the owner in the cases under Article 100 of the Criminal Procedure Code (if, for example, the property is perishable). The arrested property will be disposed of only in accordance with the provisions of the Criminal Procedure Code.

Ukraine must implement a number of judicial and human rights reforms before its citizens will be granted a visa-free regime with the EU. This was stated by the President of the European Commission, Jean-Claude Juncker in his letter to the President of Ukraine Petro Poroshenko [13].

"The progress in the implementation of reforms in the fight against corruption remains one of the key priorities in order to achieve a visa-free regime with the EU for Ukrainian citizens" – said Juncker. According to him, Ukraine also has to change its labour laws to prohibit discrimination based on sexual orientation and to establish an agency for returning confiscated assets.

**Conclusions.** The Law of Ukraine "On the Freedom of Conscience and Religious Organizations" provides that religious organizations and believers, alone or together with others, have the right to establish and maintain international relations and direct personal contacts, including travel abroad for the pilgrimage, participation in meetings and religious activities, as well as for training at religious schools.

The freedom of travel and choice of the place of residence is a natural and inalienable liberty, which belongs to everyone from birth, is recognized by the international community and is fixed by all the fundamental international instruments on human rights.

On July 23, 2012 in Brussels, an agreement was signed between the EU and Ukraine on the amendments to the Agreement between Ukraine and the EU on visa facilitation. These agreements establish the right to a simplified registration of free visas to members of religious organizations.

The adoption of bills of the visa-free set by the Verkhovna Rada brings Ukraine closer to the full implementation of the Action Plan on the visa regime liberalization for Ukrainian citizens with the EU.

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## ВИЇЗД ЗА МЕЖІ УКРАЇНИ ЧЛЕНІВ РЕЛІГІЙНИХ ОРГАНІЗАЦІЙ: ПРОБЛЕМИ ТА ПЕРСПЕКТИВИ ЗАПРОВАДЖЕННЯ БЕЗВІЗОВОГО РЕЖИМУ ДЛЯ УКРАЇНИ

**Анотація**
Досліджено сутність права на свободу пересування – як конституційно закріпленої і гарантованої державою можливості індивіда на свій розсуд вільно пересуватися, вибирати місце перебування і проживання, вільно виїжджати і в'їжджати на територію України. Розглянуто питання надання пільг на оформлення віз для членів релігійних організацій, визначено специфіку процедури надання документів до консульських установ країн членів Європейського Союзу та перспективи запровадження безвізового режиму для громадян України. Вивчено питання стратегії Європейського Союзу щодо запровадження безвізового режиму для громадян України.
**Ключові слова:** безвізовий режим, віза, релігійна організація, право на свободу пересування, консульські установи, міжнародні зв'язки.

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## ВЫЕЗД ЗА ПРЕДЕЛЫ УКРАИНЫ ЧЛЕНОВ РЕЛИГИОЗНЫХ ОРГАНИЗАЦИЙ: ПРОБЛЕМЫ И ПЕРСПЕКТИВЫ ВВЕДЕНИЯ БЕЗВИЗОВОГО РЕЖИМА ДЛЯ УКРАИНЫ

**Аннотация**
Исследовано сущность права на свободу передвижения – как конституционно закрепленной и гарантированной государством возможности индивида по своему усмотрению свободно передвигаться, выбирать место пребывания и жительства, свободно выезжать и въезжать на территорию Украины. Рассмотрены вопросы предоставления льгот на оформление виз для членов религиозных организаций, определена специфика процедуры предоставления документов в консульские учреждения стран членов Европейского Союза и перспективы введения безвизового режима для граждан Украины. Изучены вопросы стратегии Европейского Союза по введению безвизового режима для граждан Украины.
**Ключевые слова:** безвизовый режим, виза, религиозная организация, право на свободу передвижения, консульские учреждения, международные связи.

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# SHORTCOMINGS AND SUGGESTIONS ON IMPROVING THE LEGAL COMPONENT OF CRIME COMBATING MECHANISM IN THE FIELD OF ICT

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This research is devoted to the analysis of Ukrainian legislation in the sphere of crime combating in the cyber-security field as well as studying of practice of law-enforcement authorities in this sphere. An effective mechanism to combat crime in the sphere of information and communication technology (ICT) provides integrated use of three approaches – engineering, organizational and legal. Legal approach is meant fundamental and constitutive among these three approaches and its mechanisms are applied complexly with organizational and engineering aspects. The sense of legal approach lays in creating normative basis for realization of other two approaches. Consequently, it is the analysis of the legislative framework of crime combating in the sphere of ICT makes it possible to explore the weaknesses of modern mechanisms of ensuring cyber-security more deeply and identify the root cause of the problems of their inefficiency. The article presents detailed analysis of national legislation in the information field in general and in the field of cyber security in particular, reveals some of its weaknesses and presents proposals for the elimination of these shortcomings.
**Keywords:** cybercrime, cyberspace, information and communication technologies, information security, information protection.

**Formulation of the problem.** New historical phase of civilization – the information society – is gradually quickening, bringing not only positive but also negative trends and phenomena. According to statistics, Ukrainians increasingly use all the achievements of the information age and try to use all the features of electronic interaction. Moreover, it is safe to say that today there are no public or private institutions, which would not use modern information and communications technologies – computer networks, databases, automated system for ensuring production lines etc.

However, further development of modern information technologies and expanding of the field of use of modern computer technologies gave a start to the emergence of specific, complex type of illegal activities where technical equipment and computer information are subjects to unlawful infringement or where computer equipment is an instrument of its commission itself. We are talking about crimes in the sphere of information and communications technologies (ICT) or "computer crimes" (cybercrimes).

However, even a superficial analysis of the Ukrainian cyber-security sphere gives reason to talk about a number of important problems that hinder the creation of an effective system to counter threats in cyberspace. These problems include primarily: terminological uncertainty, lack of proper coordination of relevant agencies' activity, Ukraine's dependence on foreign software and hardware, some difficulties concerning staff recruitment to the relevant departments. Despite the existence of a number of legal documents on cyber security problems of the state, which are in force, they do not cover the entire spectrum of threats to the cyber-security of the state.

Analysis of recent researches and publications. Certainly, the phenomenon of cybercrime was not left unnoticed by scientists and different branches of law. For example, dissertation researches on the criminal aspects of crime in the field of information technologies are scientifically substantiated by national researchers: D. S. Azarov, N. V. Karchevsky, M. V. Pluhatyr, N. A. Rosenfeld etc. A significant contribution to the study of investigation and combating computer crimes made such leading scientists T. V. Averyanova, B. V. Andreev, Y. Baturin, R. S. Belkin, P. D. Bilenchuk, O. A. Baranov, M. S. Vertuzayev, T. V. Varfolomeyeva, O. H. Volyevodz, V. A. Golubev, V. S. Tsimbalyuk and others.

**Highlighting of previously unsolved aspects of the problem.** In our opinion, despite the theoretical and practical importance of conducted and published research, not enough attention is paid to the study of the shortcomings and problems of combating cybercrime in Ukraine.

**The purpose of the article.** The purpose of the article is to examine possible solutions of problems of crime combating mechanisms functioning in the field of ICT. For this, it is necessary to identify deficiencies in the legal, organizational and institutional mechanisms of combating cybercrime in Ukraine and, accordingly, make proposals to eliminate shortcomings in the conceptual and terminological aspects of law in Ukraine in the field of cyber-security.

**Statement of the basic material.** Examination of Ukrainian information legislation, which was repeatedly carried out in recent years, including representatives of the OSCE, indicates that the legislative and normative basis of functioning of information sphere in Ukraine generally meets European standards. Although the formal side of things does not cause significant concern, there is an urgent problem of non-compliance of all the subjects of information relations with established legal norms , in particular – public authorities at all levels. The level of legal culture of Ukrainian citizens makes consider the situation from a completely different side to the European Union countries [1].

An important problem is certain inconsistency of national legal policy in the information sphere. A large number of legislative acts to address specific tactical tasks, meet personal or commercial interests are often adopted without considering the strategic goals and real conditions in Ukraine.

For example, the attempts of revising legislation to permit advertising of alcohol and tobacco were very demonstrative.

Much of the issues in the information sphere's functioning is legally unsettled. This applies to infrastructure problems, media activity, information and analytical agencies, etc. As an example, let us analyze legislative provision of such an important component of national information policy as information transparency and openness in the functioning of state government and services. Ukraine has formed a legal framework to ensure transparency of state authorities. First of all, it is about the Constitution of Ukraine (art. 3, 32, 57, etc.), the law "On information", "On the print media (the press) in Ukraine", "On Television and Radio", "On the information agencies", "On State service "and so on.

The main drawback of the current legislation it is passive nature – it was declared only the necessity of ensuring transparency of public authorities in response to the appeals of citizens or the media. To obtain certain information, a citizen has to prepare and submit to the institution a request and expect a response within a month [2, p. 113]. As you can see from this, public authorities are, in fact, absent in the information space. Cases when the policy of the State is not reported to public by itself but its opponents are frequent too. Then, as the legislation of democratic countries means active information activity, mandatory reporting of the state authorities to the public, regardless whether the appeals or requests for the provision of any information were or not, obligatory, maybe even a bit too active, informing citizens about the ongoing activities of public authorities.

Another disadvantage of the current Ukrainian legislation, particularly in the information sector is its vagueness, a certain blurring of wording. In fact, there is no identification of specific mechanisms for promulgation information, particular documents that have to be published. The terms of this activity has not been set yet, the legal norms of strict appliance concerning financial and staff provision [3].

The absence of legal regulation of international information systems, for example – Internet, is a significant problem. In particular, the lack of appropriate regulations creates certain problems for Internet media and promotes their use in destructive purposes. The development of information infrastructure requires appropriate legislative support.

Returning to the issue of imperfection of mechanisms for combating crime in the ICT sphere, it should also be noted that the use of such familiar and rather widespread notion as "cybercrime" to characterize a specific group of crimes attributed to the so-called "cyber area" (crimes in information technology sphere, computer technology systems and networks) needs some theoretical legal understanding, in the first place – conceptual and terminological analysis [4, p. 150]. The term "cyber-crime" has gained rather wide usage in the post-Soviet space without legal content. Not only the problem of setting the ratio of "cybercrime" with such concepts as "computer crime", "crime in the sphere of computer information", "crime in the field of computers usage", "crime in the sphere of information technology", or with legal concept of " crime in the sphere of electronic computers (computer) systems and computer networks and telecommunication networks usage" remains unsolved, but also conceptual definition of the place of "cybercrime" in the system of illegal acts provided by national law. All this raises serious doubts about relevance and possibility of legal defining of cybercrime and its introduction as a separate type of crime by criminal law. The way of solving this problem is thorough general theoretical understanding of the content of the concept of "cybercrime", which is provided the prefix "cyber", taking into account axiological, etymological, semantic features, as well as the history of emergence and development of the cybercrime phenomenon. The said issue relates to a number of problems of forming the concepts and terminology apparatus of cyber security field and it must be resolved comprehensively [5].

Another manifestation of conceptual and terminological problem is loan nature of the "cybercrime" concept with a certain content laid on it by international legal acts, including the Convention on cybercrime, created by states with different types of legal systems and different understanding of the "crime" concept. The understanding of cybercrime provided by them is quite generalized and abstracted from the legal system of particular state and cannot fully meet its features that additionally raise the problem of the legal implementation [6, p. 434].

Taking into account high level of latency of cybercrime, which causes secrecy of real volumes of its negative consequences, the possibility of using such criteria as the amount of public damage or degree of public danger as determining during the classification of offenses in the cyber area is ineligible. Besides, the issue of separating "cyber offense" as the type of crime was almost never considered [7, c 75] leaving out of a public-legal response the significant number of actions that does not cause much social harm alone and, accordingly, may not be qualified as "crimes" but in the mass create a public danger. Among them, it may be a latent form of cybercrime, which also remains without adequate response.

The last problem can be further intensified by the novels of the Criminal Procedure Code of Ukraine that initiates the introduction of a new kind of offenses for the legal system for Ukraine – criminal offense, which in the future will have its own regulation of substantive criminal law.

Possibilities to use methods of legal impact on the consciousness of individuals in Ukraine are quite limited today, first, because of low level of legal and information culture of citizens, which do not rely on internal motivation to appropriate (lawful) behaviour and proper protection of their constitutional rights, and secondly, because of transnational nature of cybercrime, which may go beyond the jurisdictional limits of a separate state. It is obvious that only the influence on the behaviour of individuals has the real potential of effectiveness under such conditions. This gives a special value to law enforcement components of cybercrime combating, i.e. the system of efficient law enforcement norms, especially criminal, created by the unified international standards, and

effective activity law enforcement and judicial authorities of the State and the relevant international organizations regarding the application of these rules [8, p. 180].

The solution of the mentioned problems can be a step towards adequate legal perception of the phenomenon of "cybercrime", determination of necessity and extent of its legal implementation, and consequently, the harmonization of the national legal framework aimed at combating cybercrime.

This inconsistency in terms defining applies not only to the concept of "cybercrime". Thus, in the Law of Ukraine "On the fundamentals of National Security of Ukraine", it is mentioned "computer crime" and "computer terrorism", but none of these terms has its definition neither in this nor in other laws. In the Law of Ukraine "On Combating Terrorism", the concept "computer terrorism" was not mentioned at all, and those elements that can be referred to it are prescribed as part of the concept "technological terrorism". In the "National Security Strategy of Ukraine" (version from February 12, 2007 № 105/2007) computer threats were not mentioned at all, while "cyber security" – only in the context of the need of "development and implementation of national standards and technical regulations of ICT, harmonized with the relevant European standards, including requirements of the Convention on Cybercrime ratified by Verkhovna Rada of Ukraine". However, the new published edition of "National Security Strategy" (2011) already uses the term "cyber-security". The "Doctrine of Information Security of Ukraine" (repealed in 2014) also mentioned "computer crime" and "computer terrorism", but without any explanation or reference to such explanations. Therefore, we can say the domestic legal framework in the field of information (cyber) security uses the terms that have not any definitions.

There is also an urgent problem of the lack of a unified national system of combating cybercrime, coordination its activities and legal regimentation of areas of responsibility between agencies, procedures and means of cooperation as the most comprehensive response to the threats to cyber-security of the state and significant work to prevent such crimes [9].

In order to solve these problems and disorder of the legal framework, public security institutions carried out a whole number of measures. The basis for these was the decision of the National Security and Defence Council of Ukraine of 17 November 2010 "On the challenges and threats to the national security of Ukraine in 2011" [10, p. 41], which was approved by the Decree of the President of Ukraine on December 10, 2010 № 1119/2010.

Another problem of national legislation on cyber security, as stated above, is imperfection and inconsistency of concepts and terminology apparatus. National Institute for Strategic Researches sent a number of official requests to key agencies (Security Service of Ukraine, the Foreign Intelligence Service, General Intelligence Directorate Ministry of Defence of Ukraine, Ministry of Internal Affairs) and scientific institutions (Institute of Telecommunications and Global Information Space of the National Academy of Sciences of Ukraine, Interdepartmental scientific Research Centre for Combating Organized Crime of the National Security and Defence Council of Ukraine) relating to information (including – technological components) of state security to determine approaches to key terms in this field.

After the analysis of the responses, were formed definitions of key terms in the field of cyber-security that can become the basis of developed legal framework in the field of protection of cyberspace of the state.

Terms and definitions proposed by the National Institute of Strategic Researches for inclusion in the draft of the law "On cyber security of Ukraine":

1. Cyberspace – objects of information infrastructure governed by information (automated) systems of management and information, which circulates in it.

2. Cyberspace of the state – objects of information infrastructure of the state governed by information (automated) systems of management and information, which circulates in it.

3. Information infrastructure – a set of objects of telecommunication systems of all forms of ownership.

4. Information infrastructure – a set of objects of telecommunication systems of all forms of ownership located in the state or accessed from the state.

5. Critical information infrastructure of the state – a set of information and telecommunication systems of the state and the private sector that ensure the functioning and safety of strategic institutions of the state and safety of citizens.

6. Cyber-security – the state of cyber security as a whole or individual objects of its infrastructure from risks of foreign cyber influence (cyber-attacks), at which it is provided their sustainable development, and early detection, prevention and neutralization of real and potential threats to personal, corporate and / or national interests.

7. Cyber Defence – a set of methods and measures of organizational, legal and technical nature to ensure cyber-security.

8. Cyber-attack – deliberate actions implemented in cyberspace (or using technical capabilities) that lead (can lead) to achieve unauthorized purposes (violation of the confidentiality, integrity, authorship and availability of information, destructive information and psychological influences on consciousness, psychological and mental state of citizens).

9. Cybercrime – criminal act, responsibility for which is envisaged by criminal law, that is established (being established) in cyberspace (or through its technical capabilities) and bears the danger to society.

Separation of "cyber-terrorism" as an independent concept is one of the most controversial issues in cyber-security field. This is reasoned by, firstly, extraordinary politicization of the concept, and secondly, by the necessity of defining its keynote settings, so it would be impossible to take conventional computer crime or hooliganism under their action. In modern Ukraine, the basis of countering terrorism and combating its manifestations is the Law of Ukraine "On Combating Terrorism" [12, p. 180]. In this law, terrorism is defined as "socially dangerous activity that lays in conscious, purposeful

use of violence by hostage-taking, arson, murder, torture, intimidation of the population and the authorities or any other encroachment on the life or health of innocent people or threats to commit criminal acts in order to achieve criminal goals". Among the proposed definitions of cyber-terrorism, the offer of Security Service of Ukraine in the best way correspond the current version of the Law of Ukraine "On Combating Terrorism». However, this definition requires some refinement in its final form and may be represented as follows:

"Cyber-terrorism – socially dangerous activity, carried out in cyberspace (or using technical capabilities) with a terrorist purpose and lays in conscious, purposeful intimidation of the population and the authorities or any other attacks on human life and health". This definition should be introduced to the Law of Ukraine "On combating terrorism", removing from the definition of "technological terrorism", the words "... usage of means of electromagnetic action, computer systems ...". In addition, the Security Service of Ukraine has proposed to allocate separate series of definitions that will distinguish cyber-terrorist acts of other criminal acts: cyber offence, cyber espionage, cyber diversion [13].

**Conclusions and suggestions.** To improve the mechanisms of combating crime in the field of ICT it is necessary, first – to develop a modern regulatory support of this sphere, which would correspond to the realities of scientific and technological progress of mankind. Secondly, it is urgent to revise the existing legislation on cyber-security. It is important to provide normatively a system to prevent cybercrime and raise the level of people's knowledge of specific forms of cybercrime and means of protection against them. It appears appropriate to ensure the full integration of Unified State System of Combating Cybercrime (USSCC) into the legislation, to create it under the Decree of the President of Ukraine "On the challenges and threats to the national security of Ukraine in 2011" dated December 10, 2010 № 1119/2010 according to the necessity.

Meanwhile the Security Service of Ukraine proposed successful, in our view, model of the organizational structure of the system that should operate like a single system of prevention, response and suppression terrorist attacks and minimizing their consequences, the provisions of which was approved by the Cabinet Ukraine dated 15 August 2007 №1051.

In particular, the USSCC proposed to introduce the following functional elements:

· national system of monitoring and responding to security threats in cyberspace (provides quick identification of the attacker and measures for localization harm caused by malicious actions);

· the system of measures for the levelling of threats and vulnerabilities of cyberspace and cybercrime investigation;

· national system of critical information infrastructure protection

It should be noted that mentioned judgment of NSDC "On the challenges and threats to the national security of Ukraine in 2011" in April 2014 was cancelled [11, p. 39] after the review of its performance, though there are no reasons to talk of its realization.

Therefore, summarizing the results of the analysis of the problems of existing legislation and terminological uncertainty in the area of cyber-security, we can draw the following conclusions:

1. Despite the existence of a number of legal documents on cyber-security problems of the state, they do not cover the entire spectrum of threats to the cyber-security of the state.

2. The existing regulatory framework has not definition (and therefore specific forms of protection, response and responsibility are not implemented) of key elements of state infrastructure against cyber-attacks.

3. Terminological field of cyber security areas of the state remains fragmented, which makes impossible the formation of effective legal documents of combating cyber threads.

4. There are not established definitions of key terms ("cyberspace", "cyber-attack" "cyber-security" "cyber protection", "cyber-war", "cyber-terrorism", "cyber weapon", "cyber-infrastructure", "critical cyber-infrastructure") that can effectively be used in law enforcement practice.

5. The only national system of combating cybercrime that has appropriate regulatory support is still under development and needs much more improvements.

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## НЕДОЛІКИ ТА ПРОПОЗИЦІЇ З ВДОСКОНАЛЕННЯ НОРМАТИВНО-ПРАВОВОЇ СКЛАДОВОЇ МЕХАНІЗМУ ПРОТИДІЇ ЗЛОЧИНАМ У СФЕРІ ІКТ

**Анотація**
Роботу присвячено аналізу українського законодавства у сфері протидії злочинам у сфері кібербезпеки а також вивченню практики правоохоронних органів у даній сфері. Ефективний механізм боротьби проти злочинності у сфері інформаційно-комунікаційних технологій (ІКТ) передбачає комплексне використання трьох підходів – інженерно-технічного, організаційного та нормативно-правового. Серед вказаних підходів основоположним і системоутворюючим є саме нормативно-правовий, механізми якого, безумовно, застосовуються комплексно разом із організаційним та інженерно-технічним напрямом і полягають у створенні законодавчих засад реалізації механізмів перших двох напрямів. Відтак, саме аналіз законодавчих основ боротьби зі злочинами у сфері ІКТ дає змогу найбільш глибоко дослідити недоліки сучасних механізмів забезпечення кібербезпеки та виявити першопричину проблем їх неефективності. В статті приведено детальний аналіз вітчизняного законодавства в інформаційний сфері загалом та у сфері забезпечення кібербезпеки зокрема, виявлено окремі його недоліки та наведено пропозицій усунення таких недоліків.
**Ключові слова:** кіберзлочин, кіберпростір, інформаційно-комунікаційні технології, інформаційна безпека, захист інформації.

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## НЕДОЧЕТЫ И ПРЕДЛОЖЕНИЯ ПО УСОВЕРШЕНСТВОВАНИЮ НОРМАТИВНО-ПРАВОВОЙ СОСТАВЛЯЮЩЕЙ МЕХАНИЗМА ПРОТИВОДЕЙСТВИЯ ПРЕСТУПЛЕНИЯМ В СФЕРЕ ИКТ

**Аннотация**
Работа посвящена анализу украинского законодательства в сфере противодействия преступлениям в сфере кибербезопасности а также изучению практики правоохранительных органов в данной сфере. Эффективный механизм борьбы против преступности в сфере информационно-коммуникационных технологий (ИКТ) предусматривает комплексное использование трех подходов – инженерно-технического, организационного и нормативно-правового. Среди указанных подходов основополагающим и системообразующим является именно нормативно-правовой, механизмы которого, безусловно, применяются комплексно вместе с организационным и инженерно-техническим направлением и заключаются в создании законодательных основ реализации механизмов первых двух направлений. Следовательно, именно анализ законодательных основ борьбы с преступлениями в сфере ИКТ дает возможность более глубоко исследовать недостатки современных механизмов обеспечения кибербезопасности и выявить первопричину проблем их неэффективности. В статье приведен детальный анализ отечественного законодательства в информационной сфере в целом и в сфере обеспечения кибербезопасности в частности, выявлены отдельные его недостатки и приведены предложения по устранению таких недостатков.
**Ключевые слова:** киберпреступление, киберпространство, информационно-коммуникационные технологии, информационная безопасность, защита информации.

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# LES DROITS SUR DE SCORE DE L'ACTIVITÉ INTELLECTUELLE (LES DROITS EXCLUSIFS): LA CARACTÉRISTIQUE GÉNÉRALE ET LA «NATURE JURIDIQUE»

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Dans l'article a été examiné le question de dévelopment de la conception des droits sur les résultats de l'activité intellectuelle. Encore on a fait l'analyse d'origine et de la qualification des droits sur des résultats de l'activité intellectuelle. Aujoud'hui le question important reste la corrélation des droits exclusifs (les droits de la propriété intellectuelle) et des droits matériles ( le droit classique). La science mondiale juridique nous montre le pluralisme des opinions. Ainsi la conservation et l'aplication dans des nombeuses pays le terme «la propriété intellectuelle» est un tribut de la tradition de leur exisctence et nettement le compromis d'importance de la propriété intellectuelle comme le slogan politique et constitutionnel. Plus tard la conception des droits exclusifs trouve son sens dans des législations étrangeres. Les adhérents de la conception des droits exclusifs disent qu'il ne faut pas identifier le régime juridique des objets matérieles et immatériels. Dans les oeuvres juridiques on peut voir la concordance que les droits exclusifs doivent être proclamés des droits spécifiques (sui generis) qui ne sont pas dans la divison classique des droits civiles comme les droits objectifs, les droits obligationneles, les droits personnels.

**Les mots clés:** l'activité intellectuelle, les droits sur les résultats de l'activité intellectuelle, les droits exclusifs, la conception, la législation.

L'activité de creation humain provoque l'apparition de nouveaux effets comme par exemple des poèmes et des inventions. Au temps de l'Antiquité l'effet de l'activité intellectuelle a commencé à transformer comme un produit. On dit que le résultat créatif commence a vivre dans la circulation marchande c'est-à-dire le but d'invinteur devient la somme d'argent. L'activité entrepreneuriale range un objet immatériel qui ne génère la fabrication. Cette rentabilité économique de produit «venge» pour le propriètaire des droits sur le résultat créatif. Quand même des intervenants peuvent profiter de cette cituation. Législateur essaye minimaliser ces aléas constitutifs moyennant l'instrumentation de défense des droits sur les résultats de l'activité intellectuelle.

En plus, il faut noter que le droit d'auteur et les droits des brevets ont apparu ne pas dans le domaine de droit privé. Ici il s'agit des droits de personnalité et après le droit a bien réussi de faire la réglementation à propos des résultats de l'activité intellectuelle dans l'espace de droit privé, notamment c'est le droit civile [1, p. 133].

Pourtant dans les sciences juridiques il existe la question compliquée comment définer une essence et bien sыr la nature juridique les droits de l'activité intellectuelle (les droits exclusifs), leurs divergence entre les droits matérielles, définition en système de droit, et finalement la rationalité d'usage de terme «la propriété intellectuelle». La science juridique nous montre que les conceptions et les méthodes des différents savants à propos des ces questions sont polémiques.

Alors l'époque de l'Antiquité n'a pas formé la doctrine des droits sur les résultats de l'activité intellectuelle (les droits exclusifs). Le droit romain ne connaisait pas cette notion et certes le règime juridique des objets immatérieles ne figurait pas. Donc à cause de bas niveau des droits exclusifs la société de Moyen Âge adaptait les normes de droit romain comme les fictions juridiques à propos des résultats de l'activité intellectuelle. Y. Gambarov pense que la jurispridence européenne a devellopé la nouvelle catégorie des objets immatérieles et que notamment c'est le droit objectif qui défends ces droits. C'était la fiction originale d'objet qui ne possédait pas des attributs d'objet. La catégorie des objets immatérieles incorpore encore les biens de la musique, les biens de la peinture et les biens de la production. Ils ont ressu la configuration objective puis ils ont touché l'autonomie et la valeur patrimoniale. On peut constater qu'ils avaient la protection comme par exemple des objets matérieles [2, p. 589].

Plus tard la catégorie des droits exclusifs s'appelait des termes différents comme par exemple le droit exclusif et la propriété intellectuelle. Il faut se rappeler I. Tabashnikov qui comparait la législation positive comme un oiseau qui est libre [3, p. 28].

A. Pilenko a marqué que la pensée juridique arriéré très souvent utilise le loi d'économie constructif quand le terme nouveau n'a pas obtenu la forme convenable. Cet problème a touché le droit des brevets et le droit d'auteur [4, p. 667-668].

En XIX-siècle était assez répandue la conception de propriétaire. L'idée principale consiste que tout le travail humain c'est la propriété. Cette théorie nous annonce que le droit d'auteur sur le produit de la création a identifié le droit de la propriété sur des objets matérieles. La théorie des droits natureles et de droit de propriétaire adoptait Voltaire, Diderot, Holbach P., J.-J. Rousseau. Il s'agit de liberté de la personnalité et d'inviolabilité de la propriété privée [5, p. 19].

Les conditions socio-économiques, l'inviolabilité de droit matériel, la conception des résultats de l'activité intellectuelle comme un produit donc c'étaient des causes essentielles de voir des droits exclusifs en considération le droit de la propriété.

L'apparition de la machine de production, le progrès scientifique et technique, l'apparition des appareils et des machines, d'autres moyens de sauvegarde des résultats de l'activité intellectuelle, la division du travail de la propriété (intellectuelle) et de la phy-

sique, de la nécessité d'encourager et de promouvoir le travail n'est pas seulement les artistes, mais aussi des personnes qui y travaillent (les marchands, les éditeurs, les gestionnaires) c'étaient des conditions principaux de la protection des intérêts légitimes des participants de l'activité intellectuelle.

Ainsi la conservation et l'aplication dans des nombeuses pays le terme «la propriété intellectuelle» est un tribut de tradition de leur exisctence et nettement le compromis d'importance de la propriété intellectuelle comme le slogan politique et constitutionnel. Il faut marquer que la catégorie de la propriété intellectuelle caractérise seulement les objets des relations juridiques. Dans cet contexte la propriété concerne des objets particuliers notamment des droits subjectifs [6, p. 297].

I.Zenine croit que la perception psychologique est donc sacré et inviolable des droits de la propriété a été formé depuis des siècles. Les intellectuels essayaient utiliser comme l'analogie un mécanisme matériel de défense des leurs droits [7].

La rassemlance de certains signes des droits exclusifs était la condition juridique de la réception de succès dans le domaine des droits matériels [8, p. 6].

O. Pilenko a marqué que premièrement la conception de la propriéte est dominante et deuxièmement il utilisait les termes «la propriété littéraire», «la propriété industielle». Il interprétait la méfiance de la bourgeoisie à propos de tous les nouveatés dans le domaine de droit monopole [4, p. 97-98].

En examinant la nature juridique de droit des inventions G. Sherschenevich notait que la cause principale des inventions comme précisément la propriété est un ouvrage. Alors on peut constater le rapprochement de droit de la propriéte et de droit des inventions en mélangement de la propriété avec l'appartenance [9, p. 76-77].

A. Makovsky a persuadé qu'il faudrait de donner pour le nouveau droit telle forme qu'elle sera pleine. Enfin on peut faire la concluion que quand l'auteur veut défendre son oevre il doit ѕuirement possèder le droit de la propriété [10, p. 109].

En XIX siècle la conception de la propriété de droit d'auteur et de droit des inventions a trouvé son sens dans législation de la France, de l'Allemagne, de la Russie. Des plusieurs lois mettaient au même niveau les droits d'auteurs de l'obtention créative comme le droit de la propriété. Par exemple la Loi des inventions de 1791 contenait la thèse que «n'importe quelle ideé, proclamation ou réalisation peut être utile pour la société appartient au créateur et ne faut pas limiter les droits». O. Pilenko remarque que le créateur de cette loi J. de Bouflers pensait que le droit des inventions est saint. Finalement il s'agit qu'un élément « la propriété» était pour monsieur Bouflers indifférente [4, p. 586].

Le Loi des États-Unis de 1789 contenait la disposition importante que l'activité d'esprit est primordiale [11]. Les pays Anglo-Saxons envisage le droit d'auteur comme un type le droit de la propriété mais ils ignorent les droits de morale personnels.

Quelsques temps après a été apparu la nécessité d'argumenter des études des droits exclusifs dans le domane de l'activité intellectuelle. G. Sherschenevich indiquait de distinguer «les droits sur des objets» et «les droits des objets». Il a proposé de moderniser les traditions qui contenait le droit romain et essayer d'être contemporain. Il disait que les droits exclusifs possèdent la place indépendante comme les droits matérieles et les droits des obligations [3].

Graduellement la conception des droits exclusifs sur les résultats de l'activité intellectuelle estime dans le monde. Le point de vue que la conception de la propriété est dominante a cessé vivre. Les savants disent et mettent l'accent sur l'autonomie d'existence de la catégorie des droits exclusifs (intellectuelles) qui sont absolus et ont la nature immatérielle.

Les adhérents de la conception des droits exclusifs affirment qu'il ne faut pas assimiler le régime juridique des objets matériels et des objets immatériels. Les droits exclusifs ont des moyennes spéciales et le droit sur le résultat créatif dépend de la personnalité de créateur.

V. Dozortsev affirme que le terme «la propriété intellectuelle» est incorrect du point de vue juridique. En plus l'utilisation de terme «la propriété intellectuelle» aujourd'hui peut aboutir le quiproquo parce que le droit de propriété ne convient pas pour les résultats immatériles de l'activité intellectuelle. L'utilisation du terme «la propriété» peut faire l'exhibition erroneé à propos de contenu des droits exclusifs. Ils contiennent la catégorie juridique autonome et n'appartienne par au système de droit romain [13, p. 37-38].

E. Soukhanov remarque que la notion «la propriété intellectuelle» n'a pas dans la législation la définition reconnue et dit qu'elle deux fois conventionnel parce que il ne s'agit pas seulement des résultats de l'activité intellectuelle [14, p. 144].

Le détournement réel en signification traditionnel dans le domaine intellectuelle n'existe pas parce que il est éphémère et peut être renvoyer d'intérêt de tierce personne. Il est inadmissible de diffuser l'idée de propriété sur des relations juridiques qui contiennent des droits exclusifs. Le détournement réel dans le plupart des cas rends impossible leur utilisation [15, p. 72-23].

L'exceptionel des droits sur des résultats de l'activité intellectuelle (les droits intellectuelles) est que le sujet des droits intellectueles utilise des droits exclusifs des objets matérieles. Encore la législation renforce l'exceptionel de ces droits parce que prévoit des restrictions supplémentaires. Le signe important sur des résultats de l'activité intellectuelle est le caractère absolut parce que le monopole pour des objets immatérieles consiste en des droits exclusifs [16, p. 360].

Dans les oeuvres juridiques on peut voir la concordance que les droits exclusifs doivent être proclamés des droits spécifiques (sui generis) qui ne sont pas dans la divison classique des droits civiles comme les droits objectifs, les droits obligationneles, les droits personnels. Le savant belge E. Picard a noté que les droits sur des résultats de l'activité intellectuelle sont des droits intellectueles spéciales et il a proposé d'estimer le groupe particulier. C'est par exemple les droits d'auteur, les droits des arts, les droits des inventions [3, p. 63-64].

O. Kokhanovskaya remarque qu'au moment d'acceptation du Code Civil étaient les differents méthodes à propos d'interprétation de la nature des droits sur les résultats de l'activité intellectuelle. La majorité des savants n'ont pas soutenu

la proposition d'applicaton le régime juridique des droits matérieles. Enfin le Code Civil de l'Ukraine traite cette catégorie comme le système des droits personneles extrapatrimoniales et des droits patrimoniales des sujets de l'activité intellectuelle et créative [17, p. 232].

Il faut être absolument d'accord avec O. Kodinets qui dit que l'analyse de la législation spéciale de l'Ukraine nous montre la domination de la conception d'interprétation des résultats de l'activité créative. Elle prévoit la délimitation de droit de la propriété et de droit sur des résultats de création; le maintien de la définition «la propriété intellectuelle» pour identifier le groupe des institutions juridiques qui assurent la défense des résultats de l'activité intellectuelle [18, p. 255-256].

Finalement il faut marquer l'incorrection du terme «la propriété intellectuelle». La législation et la doctrine ont proposé d'usage des termes variées par exemple

«le droit de l'activité créative», «le droit des biens matérieles» (I. Zenine), «le droit intellectuel» (R. Merzlikina), «le droit de l'action de créateur» (N. Egorov), «le droit créatif» (O. Symson).

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## ПРАВА НА РЕЗУЛЬТАТИ ІНТЕЛЕКТУАЛЬНОЇ ДІЯЛЬНОСТІ (ВИКЛЮЧНІ ПРАВА): ЗАГАЛЬНА ХАРАКТЕРИСТИКА ТА ПРАВОВА ПРИРОДА

**Анотація**
У статті досліджено питання розвитку концепції прав на результати інтелектуальної діяльності. Також проаналізовано передумови виникнення та кваліфікації прав на результати інтелектуальної діяльності, а також доцільність використання в доктрині та нормотворчій діяльності терміну «інтелектуальна власність». Одним зі складних питань в юридичній науці є співвідношення та розмежування виключних прав (прав на результати інтелектуальної діяльності, інтелектуальних прав) та речових прав (класичного права власності), а також доцільність використання поняття «інтелектуальна власність», «право інтелектуальної власності». Світова юридична наука та практика свідчать про різні підходи законодавців та вчених-правників до вирішення цих питань. Збереження та застосування у законодавстві країн світу терміну «інтелектуальна власність» є своєрідною даниною історичній традиції його існування, а також по суті певним компромісом щодо підтвердження політико-конституційного гасла про значущість інтелектуальної власності. Поступово концепція виключних прав на результати інтелектуальної діяльності все більше визнається зарубіжними законодавствами. Прибічники концепції виключних (інтелектуальних) прав підкреслюють, що не можна ототожнювати правовий режим матеріальних речей та нематеріальних об'єктів. На відміну від права власності, виключні права обмежені в часі та просторі, захищаються за допомогою особливих способів захисту, тісно пов'язані з особистістю творця. В юридичній літературі є розуміння того, що виключні права повинні бути визнані правами особливого роду (sui generis), що перебувають поза класичним поділом цивільних прав на речові, зобов'язальні та особисті.
**Ключові слова:** інтелектуальна власність, права на результати інтелектуальної діяльності, виключні права, концепція, законодавство.

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# ПРАВА НА РЕЗУЛЬТАТЫ ИНТЕЛЛЕКТУАЛЬНОЙ ДЕЯТЕЛЬНОСТИ (ИСКЛЮЧИТЕЛЬНЫЕ ПРАВА): ОБЩАЯ ХАРАКТЕРИСТИКА И ПРАВОВАЯ ПРИРОДА

**Аннотация**
В статье исследован вопрос развития концепции прав на результаты интеллектуальной деятельности. Также проанализированы предпосылки возникновения и квалификации прав на результаты интеллектуальной деятельности, целесообразность использования в доктрине и нормотворческой деятельности термина «интеллектуальная собственность». Одним из наиболее сложных вопросов в юридической науке является соотношение и разграничение исключительных прав (прав на результаты интеллектуальной деятельности, интеллектуальных прав) и вещных прав (классического права собственности), а также целесообразность использования понятия «интеллектуальная собственность», «право интеллектуальной собственности». Мировая юридическая наука и практика свидетельствуют о разных подходах законодателей и ученых-юристов по решению данных вопросов. Сохранение и применение в законодательстве стран мира термина «интеллектуальная собственность» является своеобразной данью исторической традиции его существования, а также определенным компромиссом касательно подтверждения политико-конституционного лозунга о значимости интеллектуальной собственности. Постепенно концепция исключительных прав на результаты интеллектуальной деятельности все больше признается зарубежными законодательствами. Сторонники концепции исключительных (интеллектуальных) прав подчеркивают, что нельзя отождествлять правовой режим материальных вещей и нематериальных объектов. В отличие от права собственности, исключительные права ограничены во времени и пространстве, защищаются с помощью специальных механизмов защиты, тесно связаны с личностью создателя. В юридической литературе есть понимание того, что исключительные права должны быть признаны правами особого рода (sui generis), которые находятся вне классического деления гражданских прав на вещные, обязательственные и личные.
**Ключевые слова:** интеллектуальная собственность, права на результаты интеллектуальной деятельности, исключительные права, концепция, законодательство.

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# QUESTIONS OF PROVIDING INFORMATION SOVEREIGNTY OF THE STATES IN THE VIRTUAL ENVIRONMENT THE INTERNET AND TENDENCIES OF THEIR DEVELOPMENT IN UKRAINE

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The article reviews tendencies of information regulation in the virtual Internet environment. The states measure of filtering malicious Internet-content analyzed. It's determined that Ukraine state structures did not respond adequately to current trends in the virtual Internet information space, in terms of providing information sovereignty the state and its citizens.
**Keywords:** information, information sovereignty, malicious content, content filtering, blocking IP-addresses, limiting information online resource.

**Problem statement.** Today it is possible to tell with special confidence that the phrase "Who possesses information, that owns the world" it was not only prophetical, but also defining foreign and domestic policy of the leading states of the world in the field of regulation of the information streams circulating in all spheres of life of modern society.

Any citizen possessing reliable information has big advantage from the point of view of adoption of the correct decisions often contradicting policy, pursued by imperious elite of the states. This circumstance does official control of regulation of flows of information by an important priority for any state which wants to keep the information sovereignty and to pursue independent policy. This indisputable fact dictates need of detailed consideration of the following questions: – what sort information can pose threat for the state and its citizens; – what organizations are engaged in regulation of information streams in the Internet; – what tendencies of regulation in the information

sphere developed in the states with the developed network infrastructure.

In this article the author will try to give answers to the questions posed based on information provided in open sources.

**The analysis of the last researches and publications in which the solution of this problem is begun.** Current universal trends cause growth of steady demand at the user on reliable information in the most various spheres. According to estimates of experts, 95% of such information can be received from the open sources placed in the virtual environment the Internet.

Despite on this circumstance, a ban on information distribution in the virtual environment the Internet exist in many states of the Eurasian and Latin American continents. This ban shares on household, corporate and state.

Household ban, is established by users, for the purpose of protection of the inner circle (as a rule, children) from Internet resources of the following subject: 1. The Internet resources extending viruses; 2. Advertising and banners; 3. Roughness, immorality, obscenity; 4. Aggression, racism, terrorism; 5. Proxy and anonymizers; 6. Sites for adults; 7. Alcohol and tobacco; 8. Casino, lotteries, totalizators; 9. Phishing and fraud; 10. Torrents and P2P-networks; 11. Pornography and sex; 12. Armies and arms; 13. Extremism; 14. Narcotic substances; 15. Parked domains for all above the listed resources.

Practical realization of a household ban is carried out due to application of the specialized software (S) which allows the user to regulate information streams independently. It's mostly known of them ON Child Web Guardian and ON Net Kids. Features ON Child Web Guardian treat flexible control under idea of the user of what Internet resources bear an undesirable content and are subject to blocking. The concept put in ON Net Kids consists in preference of monitoring of actions of the user with possibility of the subsequent blocking of undesirable Internet resources.

Corporate ban belongs to a prerogative of the employers establishing rules of access to Internet resources, proceeding from the requirements to safety of network infrastructure, and also to a protection of the personnel from not desirable information in working hours. Blocking of access to social and file exchange networks, torrent, as a rule, belongs to such restrictions to trackers and not to controlled mail services.

Certainly, the considered types of a ban of access to Internet resources have to become a fundamental basis of a state policy of Ukraine in the sphere of regulation of information streams of the virtual environment the Internet, despite a large number of contradictions.

**Article purpose.** To carry out the analysis of criteria and ways of regulation of flows of information in virtual space the Internet, on an example the politician, it's carried out by the states and to define tendencies of their application in Ukraine.

**Statement of the main material.** We will consider in more detail the measures undertaken by the governments of the states in the sphere of regulation of distribution of information in the Internet and we will try to give an assessment of their legality from the point of view of international law.

It agrees International the Covenant on Civil and Political rights, each person has the right for free expression and distribution of the opinion orally, in writing or by means of the press. This right is mentioned also in the European Convention on protection of human rights and in constitutions of many countries, including Ukraine. If in the state there are restrictions on a freedom of speech, they have to correspond strictly to its legislative base with the obligatory accounting of norms of international law. The laws entering restrictions of a freedom of speech have to be unambiguous and not give the chance for ambiguous interpretation. At legislative level have to be fixed: protection of reputation, dignity of the personality, national security, public order, copyright, health and morals. Thus, if the state enters similar restrictions for providing the information sovereignty, it quite corresponds to the international legislation.

In the sphere of regulation of information streams on the Internet there are such ways:

1. Rendering influence on sources of a placed content (the information companies, bloggers, owners of information resources);

2. Implementation of a selective filtration of a content of Internet resources or blocking of access to them;

3. Control of a traffic of users and its subsequent filtration, according to the established norms of providing information sovereignty of the state.

We will consider the existing rules regulating flows of information in virtual space the Internet, realized in the leading countries of the Euroasian and Latin American continents.

The People's Republic of China (PRC), successfully applies difficult system of censorship which consists of the following three components: 1. System of a filtration of a traffic "Great Chinese firewall". 2. System of blocking of search of undesirable information. 3. Manual system of a filtration of the content published in social networks and a blog sphere.

The Internet resources located on a hosting or in domain space of the People's Republic of China pass obligatory registration in the Ministry of the industry and information technologies that allows identifying the author of a placed content. On July 1, 2009 the government of the People's Republic of China planned to enter the law according to which on all computers realized in domestic market, it will be established ON Green Dam intended for blocking of an undesirable Internet content. Initially, the program will be deactivated and at desire the user will be able to include it independently.

India made the decision on creation of the national Internet centre of scanning and coordination of "Netr" which will be capable to block the words "attack", "bomb", "destroy" in tweets, electronic letters, messages, blogs and at forums. Besides, the system will be capable to monitor voice messages in "Skype" and "Google Talk".

The Russian Federation rigidly reacts to distribution of a harmful content to the Internet. In 2012 in Russia the Unified register of Internet resources with information forbidden to distribution in Russia was created. According to Roskomnadzor, for

a year of work of the register more than 14 thousand resources were brought in "black list". Since August 1, 2013 in Russia "the anti-piracy law" on the basis of which, owners of the rights on film and TV-production can demand through Moscow City Court of blocking of access to the resources violating their rights came into force. After adoption of such decisions, data on such Internet resources are transferred to Roskomnadzor which informs on it their owners. If the violator within three days doesn't delete an illegal content, its Internet resource joins in the register of the forbidden sites. Also in the Russian Federation approved the uniform list of criteria of forbidden information in the Internet according to which under a ban Internet resources which contain information on how to find, grow up or prepare narcotic substance, and also the materials forming a positive image of the drug dealer get. Besides, Internet resources with a child pornography and information on its production and distribution are blacklisted. Sites on which ways of suicide are discussed get to category of the forbidden, offers take place or requests to make a suicide.

Considerable achievement of legislative base of the Russian Federation, introduction of the concept of information security of children which suggests to train school students in safe use the Internet. To their number carry: ability to protect the mailbox, the blog and the page on a social network from breaking, and also the recommendation not to visit resources for which unfounded rough statements, appeals to cruelty, an offensive language, insults, etc. are characteristic.

Ukraine actually doesn't deal with issues of a filtration of Internet content and stopped on two directions of control of virtual space the Internet:

1. Temporary withdrawal of servers of Internet resources with the official formulation "for the purpose of the termination of illegal distribution of counterfeit copies of audiovisual and literary works, programs and soundtracks";

2. Removal from service of domain names.

In Great Britain the filtration of a content of Internet resources became a prerogative for: National office on fight against crimes in the field of high technologies (The National High-Tech Crime Unit, NHTCU); Fund Internet of supervision (Internet Watch Foundation); Council for safety of children on the Internet (UK Council on Child Internet Safety).

In the second half of 2013 the government of Great Britain toughened control for the Internet in aspect of fight against terrorism and distribution of pornographic materials. In particular, in October, 2013 the government announced development of the new law which provides three years' imprisonment for pornography distribution with violence elements. Moreover, is planned to forbid completely a free access to pornographic materials. For receiving access to video for adults the user will have to conclude with Internet service provider the special agreement.

In Germany government institutions pay close attention to a problem of national intolerance. In this regard, the question of distribution on the Internet of neo-Nazi, anti-Semitic materials are subject to a rigid filtration. The special governmental organization which is engaged in monitoring and blocking of similar Internet resources was for this purpose created, without limiting thus freedom of exchange of information.

In France, the filtration of a content of Internet sites is carried out in a national domain zone within the country and a foreign traffic on the "black lists" broken into two parts. The first part of the list includes pornographic resources, and contains "doubtful and disputable" Internet resources. The second part of the list includes racist and anti-Semitic resources; it is made according to the all-European project on development of the safe Internet (Safer Internet Action Plan). On February 15, 2011 the Constitutional Council of France adopted the Law LOPSI-2 aimed at providing internal security of the country, the Internet providing introduction of the following measures for regulation of virtual space:

1. Implementation of an obligatory filtration in the Internet, for suppression of distribution of a child pornography, on the basis of made "black lists" of the Ministry of Internal Affairs of France together with public organizations.

2. Blocking of the Internet resources containing a child pornography, on representation of the Ministry of Internal Affairs of France (without the need for submission of the judgment).

3. Introduction of criminal liability for use of the counterfeit IP address for Internet access (imprisonment for a period of up to 1 year and a fine at the rate to 15 thousand euro);

4. Maintaining criminal liability for use the Internet for action commission on behalf of the third parties if it entailed violation of their (third parties) of tranquillity or encroached on their honour and advantage (the sanction: imprisonment for a period of up to 1 year and a fine at the rate to 15 thousand euro);

5. Ban on creation and distribution by all means, including through mass media, messages and the appeals bearing threat to physical safety of citizens;

6. Legalization of remote installation by police divisions on computers of the persons suspected of commission of crimes of special programs, allowing to register and transfer to police data on the actions made by users of personal computers (only by a court decision).

In the USA the filtration of Internet resources at schools and public libraries, universities is carried out. For a filtration commercial filtering software packages, however in a number of states are used, for example, in Pennsylvania blocking of IP addresses at the level of provider is applied.

In Canada the filtration of Internet resources within a national domain zone and on "the hot line" foreign traffic is realized. Blocking of the foreign Internet resources located out of jurisdiction of the Canadian law enforcement agencies is carried out within the Pure Communication project realized in November, 2006 with assistance of leading providers of Canada and the Canadian line of reception of messages on sexual exploitation of children. The providers participating in the project, voluntary blocks transition according to links from this list, without foreknowing, what Internet resources are brought in it, keeping, thus, not involvement into

an assessment of links. The mechanism of blocking is determined by provider (blocking by a domain name, the IP address, etc.).

**Conclusions and further prospects of researches in this direction.** Based on provided information, it is possible to come to a conclusion that in the majority of the countries it is active on control and regulation of information streams from the state. Thus, whatever was level of the declared freedom of speech; considered tendencies exist and take root into legislative bases of the states. In these processes, undoubtedly, there are positive and negative sides.

Comparing current situation at this stage in the different countries, it is possible to provide such data from the last report of Freedom House "Freedom of a network 2013 World assessment Internet and digital media". In the report is defined, how actively the states put into practice regulation of flows of information in the Internet. First of all, it is a question of blocking and a filtration of a content of Internet resources. Legalization of such actions is regularly supported with adoption of laws which forbid harmful (according to government bodies) a content, and allow active manipulations in information space, physical attacks against journalists and bloggers and other Internet users and politically motivated shadowing. According to the results published in the report, the rating of Ukraine in 2013 worsened in comparison with results of 2012 a little and made 27 points. The rating of Ukraine in freedom context in the Internet was estimated at 28 points from 100 (here respectively – less points, subjects are more than freedom). Difficulties of access to the Internet in Ukraine are estimated at 7 points from 25, restrictions on Internet content – at 7 points from 35, violations of the rights of users – at 14 points from 40.

As for regulation of information streams in virtual space the Internet of Ukraine, it is unambiguously possible to draw a conclusion that distribution of a harmful content from the point of view of preservation of information sovereignty of the state and its citizens has menacing character. Government institutions actually close eyes to regulation of virtual information space to which the increasing number of citizens of Ukraine "moves". The virtual environment the Internet gradually becomes an impunity zone where instead of freedom the chaos even more often reigns and the immoral and criminal behaviour of citizens progresses. When in the virtual environment the Internet isn't present real responsibility for distribution of false information, to the user everything is more difficult to find reliable information. Moreover – importance of any information for the user falls, and his intellectual level degrades. Its internal standards and requirements inevitably decrease, provoking degradation of standards of behaviour at first in virtual, and then in the real world.

Nevertheless, it is necessary to remember always that control and regulation of flows of information from the state can be interpreted by society not as the instrument of information domination of interests of the state, and as establishment of information censorship.

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## ПИТАННЯ ЗАБЕЗПЕЧЕННЯ ІНФОРМАЦІЙНОГО СУВЕРЕНІТЕТУ ДЕРЖАВ У ВІРТУАЛЬНОМУ СЕРЕДОВИЩІ ІНТЕРНЕТ ТА ТЕНДЕНЦІЇ ЇХ РОЗВИТКУ В УКРАЇНІ

**Анотація**
У статті розглянуті питання регулювання інформаційних потоків у віртуальному середовищі Інтернет. Проаналізовано заходи, що вживаються державами для фільтрації шкідливого інтернет-контенту. Визначено, що державні структури України не реагують належним чином на сформовані тенденції у віртуальному інформаційному просторі Інтернет, з точки зору забезпечення інформаційного суверенітету держави та її громадян.
**Ключові слова:** інформація, шкідливий контент, фільтрація контенту, контроль контенту, обмеження інформації, інтернет-цензура.

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## ВОПРОСЫ ОБЕСПЕЧЕНИЯ ИНФОРМАЦИОННОГО СУВЕРЕНИТЕТА ГОСУДАРСТВ В ВИРТУАЛЬНОЙ СРЕДЕ ИНТЕРНЕТ И ТЕНДЕНЦИИ ИХ РАЗВИТИЯ В УКРАИНЕ

**Аннотация**
В статье рассмотрены вопросы регулирования информационных потоков в виртуальной среде Интернет. Проанализированы меры, предпринимаемые государствами для фильтрации вредоносного интернет-контента. Определено, что государственные структуры Украины не реагируют должным образом на сложившиеся тенденции в виртуальном информационном пространстве Интернет с точки зрения обеспечения информационного суверенитета государства и его граждан.
**Ключевые слова:** информация, информационный суверенитет, вредоносный контент, фильтрация контента, блокировка IP-адреса, ограничение информации, интернет-ресурс.

UDC 343.9:343.37

# CRIMINOLOGICAL ASPECTS OF THE RESEARCH OF THE STATE OF CRIME IN THE LAND SPHERE

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National University «Odessa Law Academy»

This article presents the criminological analysis of crime in the land sphere in Ukraine. On the basis of empirical data level, dynamics, structure, features of the regional spread of the type of crime are identified. According to the results of criminological analysis of statistical data the amount of material damage caused by the actions of the Illicit Trafficking of land is set, the amount and structure of land in illicit trafficking are identified.
**Keywords:** crime in the land sphere, criminological characteristics, state crime, criminological indicators.

Criminalization affects all spheres of social life in modern conditions of market economy. Land sphere is no exception. A number of crimes related to illegal origin, transfer and sale of land rights are rapidly increasing in parallel with the legal circulation of land. It focuses on the need of criminological analysis of indicators of crime in this area that reflects it in a certain circle of people, which aims to violation of the law of land circulation.

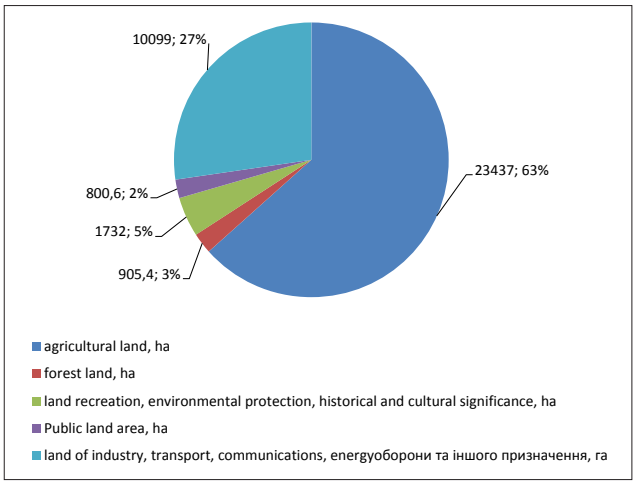
Some aspects of crimes in the land sphere were investigated in papers and dissertations of O.M. Botnarenka, T. Bulavintsev, I.A. Dyakin, V.M. Yehorshyna, A.F. Ivlevoyi, T.A. Kovalenko, V.V. Kolesnikov, M. Marchenko, R.O. Movchan, V.G. Syuravchyka, B.V. Taylashova, A. Tatariv, A.S. Tarasenko, O.P. Chabanna, Chepky A.V., B.V. Yatselenka, A.M. Shulga and other scientists. However, criminological research on this issue was insufficient.

The article analyses crime in land sphere as the object of criminological research for further improvement and effective enforcement measures against criminality in this area.

The study is based on methodological foundations for selective generalization of 64 archival criminal proceedings and 182 convictions for offenses which were subject to an encroachment of property rights to land committed during 2011-2014. We used the method of expert assessments to determine expert opinion on the current state of state regulation of the land sphere, the spread of shadow processes and criminal manifestations, criminogenic factors of crime, its prevention priorities. Employees of the prosecutor's office, operational staff departments of public service to combat economic crime MIA of Ukraine, specialists of departments of land resources of local authorities, specialists departments (administrations) State Service of Geodesy, Cartography and Cadastre of Ukraine, heads of agricultural enterprises, advocates, practitioners, specialists real estate (211 experts) answered the questionnaire. The survey was conducted from 2011 to 2014 in Kyiv, Odessa, Khmelnytsky region and the Autonomous Republic of Crimea.

If we analyze the statistical crime rates in the land sphere for the last 5 years, the situation would have the following appearance. According to the MIA of Ukraine in 2008 in this area there has been committed 2784 crimes and found 1,452 persons in 2009 – 2,541 crimes and 1,352 persons in 2010 – 2,759 crimes and 1,411 persons in 2011 – 2773 crimes and in 2012 – 2034 crimes.

According to statistics, the dynamics of the crimes committed, since 2008 tends to slight variations in the direction of growth or decrease (up 9%). In comparison with 2008, in 2009 the number of index crimes in the land sector decreased by 8.7%, and in 2010, law enforcement authorities uncovered 2,759 crimes, which is 8% above the previous year. In 2011, the number of reported crimes in the land sphere increased by only 0.5%. According to 2012 Department of information and analytical support MIA data is available only until the 20th of November of the reporting period and this does not allow us to make comparisons with previous years. The number of crimes was 2,034 in absolute numbers.




**Graph 1. Number of lands that are illegally trafficking, according to their category**

The land is a unique object that reveals the crime in land sphere in a separate variety. Let's define the amount of land that is in illegal circulation in the studied years to achieve its objectives. In 2008, was involved in the illegal circulation of 36.9 thousand hectares of land. In 2009, 27.5 thousand hectares were subjected to criminal attacks, which is 25.6% less than in the previous year. In 2010, more than 31 thousand hectares of land ended up being the object of perpetration, which is 11.3% more than in the previous year[1].

[1] Information disclosed by the Interior crimes in the sphere of land relations 2008 / department of information and analytical support of MIA of Ukraine; Information disclosed by the Interior crimes in the sphere of land relations 2009 / department of information and analytical support of MIA of Ukraine; Information disclosed by the Interior crimes in the sphere of land relations 2010 / department of information and analytical support of MIA of Ukraine.

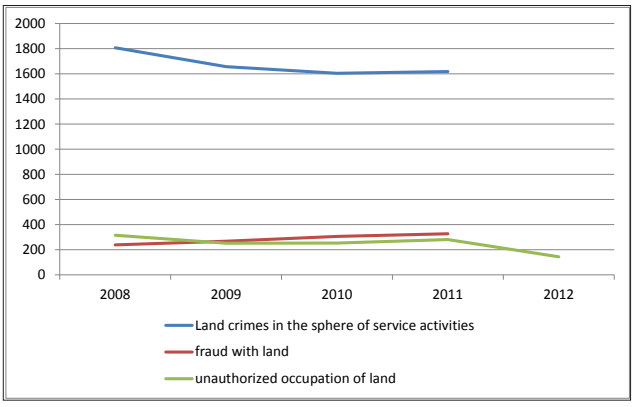
The geographical spread of crime in the area of the land sphere also has its own specifics. There is a difference in terms of crime in this area between different regions, which can be explained by the following reasons. Firstly, most of the land commission of crimes in certain areas because of the economic attractiveness of obtaining criminal profits, due to the high cost of land. Secondly, the efficiency of actors countering these crimes in these areas, which in turn reduces the latency of crimes.

The most severe criminality in the land sphere is Odessa region, Dnipropetrovsk and Kyiv region. In 2010, crimes of this category have been exposed mostly in the Crimea, Dnipropetrovsk, Donetsk, Transcarpathian, Zaporizhia, Kyiv, Luhansk, Lviv, Odessa regions and in Kyiv [1]. In aggregate, on the territory of these regions more than 60% of all crimes in this category have been committed. In 2011, the majority of crimes were recorded in Dnipropetrovsk, Odessa, Luhansk, Donetsk, Lviv oblasts and Crimea. In 2012 most of crimes were committed in Crimea, Dnipropetrovsk, Donetsk, Kyiv, Luhansk, Lviv regions.

If we divide lands in it categories in 2008 most of crimes have been committed on agricultural land – 937, representing 33.7 % of all committed crimes in this area; regarding land recreation, conservation and historical and cultural significance – 250 crimes, illegal transactions of forest lands – 81. In 2009, the majority of crimes are committed with land for agricultural purposes (1,040 crimes); 124 crimes were committed on land recreation, conservation and historical and cultural purposes; on land forest detected 93 crimes.

There is a problem in systematization of empirical set of criminal offenses in this area considering different directions crimes in the area of the land sphere, specific means and ways to achieve a criminal result. We offered to hold their systematization for the prevalence criterion based on a generalization of the points classification of crimes in the land sphere. we have identified the following most widespread crimes on the basis of summarizing points of view on the classification of crimes in the land sector: Land crimes in the sphere of service activities; fraud with land; unauthorized occupation of land.

The need for compliance with the declared classification of crimes in the land sphere and the objectivity of criminological analysis requires consideration of the phenomena under relevant groups of crimes.




**Graph 2. Dynamics of some groups of crimes in the land market in 2008-2012**

The largest group of crimes in land sphere are the crimes related to official duties. In 2012 the Razumkov Centre survey was conducted among the population, which indicates the high level of corruption in the system for obtaining rights to land [2]. Moreover, according to the study "Corruption in Ukraine. Comparative analysis of national research: 2007-2009", which was supported by the US Agency for International Development (USAID) and the corporation" Millennium Challenges "(MCC) in response to a question about most widespread corruption 47.1% of respondents said it was cases of privatization possession and use of land [3]. According to the prof. Dryomin research, corruption has taken a prominent place in the structure of public relations; it has become systemic and in many cases has replaced the official legal settlement of relations [4, p. 407].

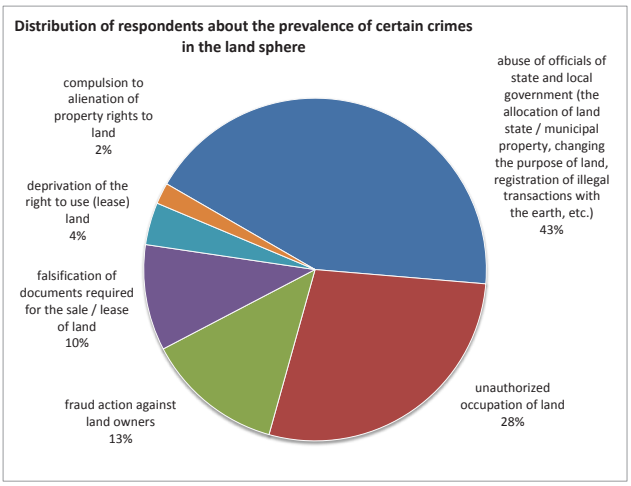
In the structure of crime in land sphere the percentage of crimes related to official duties, ranging from 58% to 65%. Qualification of the group carried out crimes is provided by the articles 364-370 of the Criminal Code of Ukraine. Details of statistical reports indicate that in 2008 it was discovered 1,807 cases of officers committing crimes are related to bribery – 316 crimes. In 2009 their number decreased by 9%, to 1657 and 293 crimes respectively. In 2010 and 2011 crimes rates were found almost not differ and totalled 1,604 and 1,618, crimes are related to bribery – 259 and 263 respectively.

In the analysing of statistical data in the structure of crimes committed in the land sphere, the share (on average – 10%) account for crimes related to unauthorized occupation of land. According to statistics, in 2008 it's recorded 315 facts of unauthorized occupation of land. In 2009 their number decreased by 21.3% to 252 crimes. In 2010, crimes related to unauthorized occupation of land, accounted for 253 cases. In 2011, 281 reported a case of unauthorized occupation of land, and for 10 months in 2012 were committed 144 crimes.

Fraud in the implementation of transactions in the land market has gained extensive development in recent years. The negative dynamics on rapid growth in the number of fraud persists. In the structure of crime in this area, they account for about 10-11% of all crimes.

In 2008 239 crimes related to fraudulent actions when dealing with the land were registered, in 2009 on the background of the total number of crimes of this category, the share of these crimes increased by 10.8% to 268. Analysis of criminal cases has shown that during this period became the prevalence of fraud associated with mastery in cash at the conclusion of fictitious contracts, which were the subject of land state or municipal property, committed by officials of state and local governments. Thus, a person who knows in advance has no authority to dispose of land, enters into a fictitious agreement on behalf of the State or the territorial community. B.M. Golovkin such kind of fraud as the registration of contracts of sale of real property defines as one of the main system mercenary crimes against property [5]. In view of the figures we can conclude disappointing trend to increase in the number of frauds in the land sphere.

Latency crime in land sphere significantly distorted picture of the status and trends of this phenomenon, the extent and nature of damage inflicted by society and the state from such criminal activity. These statistics give only a rough idea of the real extent of the illicit circulation of land rights. However, the poll has allowed experts to confirm the structure of crime in the land sphere and to identify the most widespread crimes.

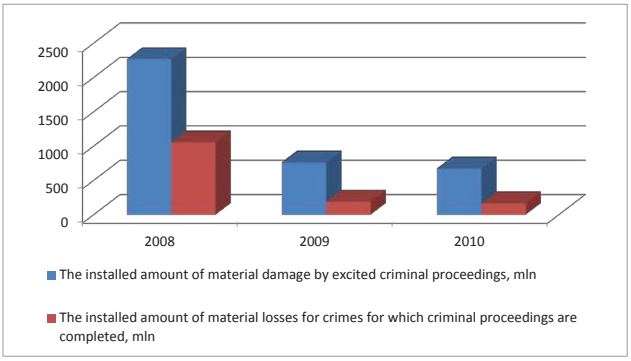



Results of judicial activities concerning reported crimes in this area is not encouraging. The courts considered 300 criminal cases of this category each year. However, only a small number of them completed decreeing the sentence. The presence of such errors in judicial practice shows the difficulty of proving review and violations of legal circulation of land.

Undoubtedly, an important element in the protection of rights and legitimate interests of individuals and legal entities is the reality and the amount of compensation of material losses crimes in the land sphere. One of the principles of compensation for damage caused to landowners and land users as illegal actions and lawful actions, is full compensation to land owners direct material cost, cash and other expenses or provision of property and other objects of equal value, as well as payment of lost profits [6]. According to the Art. 152 Land Code of Ukraine, compensation of losses is one way to protect the rights of citizens and legal entities on land. Procedure of determination and compensation to land owners and land users found that land owners and land users are compensated damages caused to withdrawal (buying) and temporary occupation of land, restrictions on their use, deterioration of soil cover and other useful properties of land or bringing them in not suitable for use by state and non-receipt of income due to temporary non-use land [7].

It should be noted that determining the amount of material damage to be compensated resulting from committing crimes in the land sphere is rather difficult. This is because the definition of cost of land must comply with a large number of regulations that establish special rules for calculating the harm caused by such encroachments, depending on the category of land. In particular they are correct formula to be applied in determining the amount of damages for infringement on specific objects with well-defined indexes and coefficients established method of calculating such damage, etc. [8; 9; 10].

Analysis of statistical information about compensation for material damage caused by crimes of this category indicates that it is carried out not full. First of all, you can see quite significant differences between the prescribed amount of property damage by excited criminal cases and the amount of material damage to offenses, criminal cases for which proceedings are finished. Also that the amount of installed material damage and the amount reimbursed for property damage crimes investigations in criminal cases have been completed, also differences.




**Graph 3. Analysis of statistical information about compensation for material damage caused by crime in the area of the land market**

Often, lands change not only the owner, but also the purpose of the natural properties at the time of exposure of these crimes, making it difficult or even impossible to return them to their original state. The statistics give us separate figures for the return of land to legal circulation. Thus, in 2008 the land seized from illegal circulation by seizure, returned voluntarily by the decisions of local authorities – 4,3 thousand hectares; in 2009 – 30 thousand hectares; in 2010 – 9.2 thousand hectares.

In most of these cases the difficulty in removing from illegal possession of land associated with insufficient effective actions by local governments, of land control, law enforcement and state executive service on their return to the legal field.

**Conclusions.** Criminological research of the current state and trends of crime in the land sphere, as a specific kind of criminal activity in the economic sphere allowed to determine quantitative and qualitative indicators of this kind of crime. The result of of research can help to understand more deeply the problem of criminalization of land sphere and identify priority areas for combating.

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## КРИМІНОЛОГІЧНІ АСПЕКТИ ДОСЛІДЖЕННЯ СТАНУ ЗЛОЧИННОСТІ В ЗЕМЕЛЬНІЙ СФЕРІ

**Анотація**
У даній статті здійснено кримінологічний аналіз злочинності в земельній сфері в Україні. На основі емпіричних даних визначені рівень, динаміка, структура, особливості регіонального поширення даного різновиду злочинності. За результатами кримінологічного аналізу статистичних відомостей встановлено сума матеріальних збитків, завданих діями з незаконного обігу земельних ділянок, визначена кількість та структура земель, що знаходяться в незаконному обігу.
**Ключові слова:** злочинність в земельній сфері, кримінологічна характеристика, стан злочинності, кримінологічні показники.

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## КРИМИНОЛОГИЧЕСКИЕ АСПЕКТЫ ИССЛЕДОВАНИЯ СОСТОЯНИЯ ПРЕСТУПНОСТИ В ЗЕМЕЛЬНОЙ СФЕРЕ

**Аннотация**
В данной статье осуществлен криминологический анализ преступности в земельной сфере в Украине. На основе эмпирических данных определены уровень, динамика, структура, особенности регионального распространения данного вида преступности. По результатам криминологического анализа статистических сведений установлена сумма материального ущерба, причиненного действиями по незаконному обороту земельных участков, определено количество и структура земель, находящихся в незаконном обороте.
**Ключевые слова:** преступность в земельной сфере, криминологическая характеристика, состояние преступности, криминологические показатели.

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# FINANCIAL PRECONDITIONS FOR EXPORT POTENTIAL DEVELOPMENT OF THE MARITIME COMPLEX OF UKRAINE

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The problems of financial assistance in developing export potential of the maritime complex of Ukraine were researched. Ukrainian maritime complex enterprises dormant export capabilities can be realized only under conditions of state support, particularly in the field of finance. Fiscal levers are an effective means of enhancing export potential of the maritime industry. The feasibility of creating a specialized state institution for insurance and guarantee the export of Ukrainian maritime complex enterprises was defined. The necessity of establishing a Development Bank in order to increase the potential of maritime complex was substantiated.
**Keywords:** maritime complex enterprises, export potential, development, financial preconditions.

**Problem formulation.** Export potential development is a precondition for increasing efficiency of internal socio-economic system functioning and for strengthening each country's position in the world economy. Potentials of economic subjects at all levels constitute the country's export potential. To accelerate the growth of such a country's potential in the difficult economic and political conditions, first of all, it is necessary to use it to the maximum and try to increase the capacities of the areas of economic activity and business entities, that have considerable experience, positive reputation in the field of foreign trade and the ability to produce advanced products. In developed countries special place among prospective goods produced for export, is occupied by services, including transport. Nowadays the most attractive, in our view, are the maritime complex enterprises, including shipping companies, port and maritime tourism enterprises.

Thus, identifying areas of maritime complex enterprises export potential development and their sources of finance is topical.

**Analysis of recent research and publications.** In Ukraine, questions of export capacities development are elaborated by I. Burakovsky, S. Kvasha, I. Kobouta, M. Kompanets, P. Sabluk, V. Savchuk, O. Tymkiv, A. Filipenko and others. Actual problems that hinder the Ukrainian export development have been researched by V. Movchan, T. Melnik, L. Ivashova, A. Mazaraki, L. Kutidze, Y. Verlanov, N. Osadcha, O. Shkolny, I. Orlik, N. Reznikova etc. Works by O.M. Kotlubay, M.T. Primachov, V.V. Zhikhareva, O.M. Kibik are devoted to the formation and development of individual components of the maritime complex, that have significant export potential.

**Unsolved aspects of the problem.** However, the questions of financial assistance for export potential development of the maritime complex enterprises are currently studied insufficiently.

**The purpose of the article** –is defining features of the financial preconditions system formation at the contemporary stage of export potential development of the maritime complex enterprises of Ukraine.

**The main material.** Increasing the value of transport services exports is a requirement for socio-economic development of many economically developed countries. Transit Ukraine's position, its port system facilities contribute to the potential development of maritime transport services. Transport services exports should be considered as an indispensable source of export potential of Ukraine. The growth in volumes and as a result, the revenue from transport services exports growth will contribute to the diversity of services, employment and wages growth, improvement of transportation technology, further development of transport infrastructure. Ukraine has a high potential in this area, but the use of this potential needs appropriate government support, including financial sector support.

According to statistics, exports of services in Ukraine for the first half 2015 amounted to 4.52 billion U.S. dollars. It's compared to the same period of 2014, exports of services decreased by 25.8%. An export of transport services is decreased by 23.6%. The structure of services exports accounted for the largest percentage of transport services – 54.2% of total exports. The volume of services exports to EU countries amounted to 1,392,9 million U.S. dollars and decreased by 31.7% compared to the same period of 2014 share of export of services to EU countries accounted for 30.8% of total exports.

Exports volumes of transport services exceed imports by all kinds of services. Exports of transport services in 2000 amounted to 83.8%, in 2010 – 67.3%, in 2014 – only 53.0% of the services exports of Ukraine [1]. Thus, the transport services exports have a tendency to decrease due to many objective and subjective factors.

In structure of transport services export should be distinguished services by national carriers of transporting export and import goods, transit through the territory of the country, transport of goods between foreign ports that is performed by domestic shipping companies, leasing or temporary use of vehicles and transport equipment by foreign carriers, cargo loading and unloading procedures when the state border is crossed in seaports, agency services to foreign ship owners in domestic ports, services for foreign cruise passengers in national ports and more.

Ukraine has sea-power status. However, according to experts, Ukraine annually loses about 1 billion U.S dollars due to the fact that export goods are transported by foreign shipping com-

panies [2]. Domestic shipbuilding enterprises are mainly getting order to build only ship hulls from foreign customers [3; 4]. Revival of the national sea merchant fleet and shipbuilding is a problem that must be resolved immediately. Adoption of the Law of Ukraine «On the International Shipping Register of Ukraine» and improvement of tax legislation by introducing tonnage tax may contribute to solving of the problem mentioned above.

Port Enterprises of Ukraine have significant export potential. Nonetheless, in a fast changing range of goods, the requirements of customers, the national port enterprise should have some reserves to change the level of capacity and reorient its facilities to meet the needs of export activities participants. To form and support relevant technical and technological level of capacity significant financial resources are required. Some experts in the field of port activities consider that optimal direction of Ukrainian ports development is their selective modernization based on public-private partnership. This selective modernization corresponds with modern financial capacity of port enterprises. However, in the future, such a partial correction of the problem of fundamental modernization in all areas and spheres of port system operations may make a significant deterioration in the competitive position of the national port system.

The tourism sector is an important component of the national economy, which makes it possible to generate significant revenues in local and foreign currencies in many countries. A special place in the tourist area of Ukraine takes maritime tourism. Its development is impossible without solving the problem of financial assistance to modernization of port infrastructure, construction of cruise ships, improvement of tourism companies' capacities etc.

Enhancing export capacities of national shipping companies, port and shipbuilding enterprises, maritime tourism companies that provide transport services mentioned above should be performed by using financial resources received from different sources. Traditional source of finance there are own funds that are mostly limited nowadays. That is why the state should play an active part in export potential development of maritime complex. Therefore, underlining the role of maritime complex companies to ensure the export potential of Ukraine, we should note the need to create financial preconditions for export-oriented enterprises development.

In terms of the limited state possibilities of financial assistance to develop the enterprises of maritime complex export capacities attracting investment could contribute to improvement of public-private partnership mechanism through reformation of the institutional framework. However, the system of public-private partnership in Ukraine contains a number of shortcomings. The procedure of signing a contract is complex and lengthy and provides for necessary coordination with the Ministry of Economic Development and Trade of Ukraine, the Ministry of Finance of Ukraine and the receipt of the appropriate decision of the Cabinet of Ministers of Ukraine. New objects that are built by private investors and on their own under a public-private partnership in Ukraine could be only state owned. This condition is contrary to the progressive international experience and causes the public-private partnerships to be less attractive to potential investors.

In the current global maritime services market a tendency to reduce the role of the traditional bank lending for helping grow the enterprises is strong. Meanwhile, UNCTAD experts emphasize that in the post-crisis period the power of export banks in lending the shipbuilding industry is strengthening. Thus, loans and guarantees are actively performed by institutions of Japan, South Korea, Brazil, Germany and Norway. The Export-Import Bank of China allocates additional funds to finance the construction of ships, makes a policy for encouraging foreign ship owners to place orders at Chinese shipyards through attractive financing operations and supports the shipbuilding and shipping industry, which are under recession [5].

In Ukraine there is JSC «Ukreximbank», which specialty is defined as financing of foreign trade, in particular export operations. However, in practice, JSC «Ukreximbank» performs the function of the universal commercial bank. In scientific publications the need for a national export credit agency (ECA) is often discussed. The feasibility of creating such an agency is due to the availability of long-term financing, the ability to protect against financial risks and property loss (for the exporter), the settlement of questions concerning the collateral by offering the possibility to collateral insurance, optimization of financial flows through the pre-agreed payment schedule, reduced cost of funding compared to national banks etc. [5].

Currently, the Ministry of Economic Development and Trade jointly with the Ministry of Finance and the National Bank has developed a program whereby, the Ukrainian exporters' support system will consist of two institutions: the export-credit agency, which will deal with insurance and guarantee and JSC «Ukreximbank», which will provide loans [6]. Two models of interaction between above mentioned institutions are planned in process of the program implementation, which are the following:

- The establishment of the ECA as a subsidiary insurance company of JSC «Ukreximbank» which does not require additional funds from the state budget, according to the EU and OECD practice;
- The establishment of a new state insurance company, independent from JSC «Ukreximbank» that requires additional funds from the state budget and changes to legislation to create the new public insurance company.

Under conditions of the limited opportunities for financing from the state budget the first option is more reliable. Nevertheless, the maritime complex enterprises should combine their own capabilities and state efforts to form financial preconditions for export potential development.

There is the positive experience of foreign countries in the functioning of Banks of Development with the goal of financing strategic priority sectors, including the maritime industry, with relatively low interest rates. Co-founders of the Bank may be the state, the big enterprises and other stakeholders of the maritime transport services markets. Taking into account foreign experience, the Bank should play an active role in the elaboration of strategies for the development of maritime business in

Ukraine. The Bank activity is associated with the development of medium and long-term financing strategic business entities. The purpose of the Bank is to create financial preconditions for implementation of the national strategy for sustainable development of maritime complex according to accepted programs and plans. Credit operations must be one of the main activities of the Bank. Meanwhile, the Bank should promote the use of safe, stable, efficient system of payments that will provide income in local and foreign currencies. In order to diversify risks and creating a balanced structure of profit the Bank of Development has also directing considerable efforts to the development of its functions in such areas as the provision of financial advisory services, debt underwriting and more. Due to the fact that Ukraine does not have sufficient financial resources the Bank could accumulate the depreciations on the example of the European investment commandite partnerships activity.

**Conclusions and suggestions.** Therefore, the increase in exports of transport services of the maritime complex enterprises should be considered an important component of the export potential development of Ukraine. The growth in volumes and as a result, revenues from the transport services exports will facilitate the further improvement of transport infrastructure. Achieving competitive advantage in the global market by the maritime complex enterprises of Ukraine is possible in case of creation relevant financial preconditions. Dormant export opportunities of Ukrainian port enterprises, shipping and maritime tourism companies, shipbuilding yards could be realized only under conditions of state support for the industry, particularly in the area of financing. It is necessary to prepare a new version of the Law «On state financial support for export activities», in which should be planned the creation on the basis of existing structural units of JSC «Ukreximbank» the institution for insurance and guarantee the export of the Ukrainian enterprises, including the maritime complex. Fiscal instruments remain an effective means of the export potential development intensification of the maritime industry. Initiation of creation the Bank of Development will form positive conditions for the functioning of maritime complex because it will contribute to the flow of investment resources and modernization of the infrastructure. The proposed will strengthen the competitive position of the maritime complex enterprises and other national exporters. It will increase the investment attractiveness of the export-oriented enterprises and later on of the national economy.

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## ФІНАНСОВІ ПЕРЕДУМОВИ РОЗВИТКУ ЕКСПОРТНОГО ПОТЕНЦІАЛУ МОРЕГОСПОДАРСЬКОГО КОМПЛЕКСУ УКРАЇНИ


**Анотація**
Досліджено проблеми фінансового забезпечення розвитку експортного потенціалу підприємств морегосподарського комплексу України. Потенційні експорті можливості українських підприємств морегосподарського комплексу можливо реалізувати лише за умов державної підтримки, зокрема в сфері фінансування. Податкові важелі залишаються ефективним засобом активізації розвитку експортного потенціалу морської галузі. Визначено доцільність утворення спеціалізованої державної установи зі страхування та гарантування експортних операцій українських підприємств морегосподарського комплексу. Обгрунтовано необхідність створення Банку розвитку задля підвищення потенціалу морегосподарського комплексу.


**Ключові слова:** підприємства морегосподарського комплексу, експортний потенціал, розвиток, фінансові передумови.

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## ФИНАНСОВЫЕ ПРЕДПОСЫЛКИ РАЗВИТИЯ ЭКСПОРТНОГО ПОТЕНЦИАЛА МОРЕХОЗЯЙСТВЕННОГО КОМПЛЕКСА УКРАИНЫ

**Аннотация**
Исследованы проблемы финансового обеспечения развития экспортного потенциала предприятий морехозяйственного комплекса Украины. Потенциальные экспортные возможности украинских предприятий морехозяйственного комплекса можно реализовать лишь при условиях государственной поддержки, в частности в сфере финансирования. Налоговые рычаги являются эффективным средством активизации развития экспортного потенциала морской отрасли. Определена целесообразность создания специализированного государственного учреждения по страхованию и гарантированию экспортных операций украинских предприятий морехозяйственного комплекса. Обоснована необходимость создания Банка развития с целью повышения потенциала морехозяйственного комплекса.
**Ключевые слова:** предприятия морехозяйственного комплекса, экспортный потенциал, развитие, финансовые предпосылки.

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## COQUE CYLINDRIQUE SURBAISSEE AVEC UN SUPPORT RIGIDE INTERMEDIAIRE SOUS PRESSION EXTERNE

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La présente étude s'intéresse au développement de la méthode généralisée des transformations intégrales d'analyse de l'état de tension et de déformation des coques surbaissée en forme de bande. Dans cette étude, on se préoccupe de la flexion des coques surbaissée ayant un support. C'est support intermédiaire est interne, rigide et semi − infini. Le support provoque des sauts des efforts tranchants généralisés. On se propose d'examiner la solution de ce problème à l'aide de la méthode généralisée de transformations intégrales.
**Mots clés:** flexion, coque cylindrique, support rigide, méthode généralisée de transformations intégrales.

**Formulation d'un problème.** Développement de méthodes efficaces pour définir de l'état de tension et de déformation des structures ayants des inclusions minces, des supports, des fissures et autres concentrateurs des efforts est une tâche importante, à la fois d'un point de vue théorique et pratique, en raison de leur grande application pratique. Méthode analytique des transformations intégrales généralisées est l'une des branches de la méthode des éléments de frontière. Elle ne nécessite pas de grande capacité pour le calcul de haute performance. Cette méthode est basée sur la réduction du problème d'un système d'équations intégrales en tenant compte des caractéristiques de ces équations. La présente étude est consacrée à l'analyse de la concentration des efforts et de la flexion des enveloppes à l'aide de la méthode de transformations intégrales généralisées.

**L'analyse des dernières études et publications.** L'analyse de la conductivité thermique des plaques avec S interne − en forme de source de chaleur est obtenue par la méthode des transformations intégrales généralisées dans [1; 2]. Méthode a été développée pour résoudre le problème de flexion de la plaque isotrope [3] et orthotrope [4] avec irrégularités linéaires, orientés au hasard. Solution exacte de la courbure d'une coque surbaissée, en présence d'un semi-infini support de Winkler a été obtenue dans [5], par réduction au problème de Riemann. Le problème de la flexion d'une coque surbaissée rectangulaire avec l'inclusion a été réduit au système d'équations intégrales dans [6]. Développement de la méthode de solution le problème de la flexion des coques surbaissées cylindriques rectangulaires avec des inclusions mince, rigides, linéaires réalisée dans [7]. A savoir, dans cet article on a obtenu la solution numérique du problème de flexion coque surbaissée cylindriques rectangulaires avec inclusion finie.

**Le but** de cet article est d'abord, d'obtenir la solution exacte du phénomène stationnaire aux frontières de la flexion d'une enveloppe cylindrique à pente douce en présence d'un support rigide intermédiaire semi − infini. Puis, et à l'aide de cette solution, d'analyser de la tension de contact à l'extrémité du support rigide.

**Formalisation mathématique du problème frontière et sa réduction au problème de Riemann.** On considère une coque surbaissée cylindrique à pente douce, dont la projection sur le plan est la bande ($0 \le y \le b;\ -\infty < x < \infty$). On admet que cette coques surbaissée est sur appuis simples le long des frontières ($y = 0, b;\ -\infty < x < \infty$) et qu'elle est renforcée par le support rigide intermédiaire ($y = b/2 \equiv l$ ; $0 < x < \infty$). La coque se replie sous la charge transversale appliquée à sa surface, charge paire, par rapport à la droite $y = l$. La charge a une intensité q(x,y). Le contact entre la coque et le support est supposé lisse, complet, bilatéral et continu. On se propose de trouver les tensions $\psi(x)$ existant dans la coque à la zone de contact avec le support. Nous supposons que:

$$q(x,y) = q_1(x)q_2(y);\quad (0 \le y \le b;\ -\infty < x < \infty) \qquad (1.1)$$

$$q_1(x) \in S_x,\ q_2(y) = O(1), \qquad (1.2)$$

où

$$S_x = \{q_1(x):\ m,n \in N,\ q_1(x) \in C_x^{\infty}\ \&\ \sup_{-\infty<x<\infty}\left[x^n \frac{dq_1^n}{dx^n}\right] = A_1\};$$

N − l'ensemble des nombres entiers naturels; $C_x^{\infty}$ − l'espace des fonctions infiniment différentiables par rapport à la variable x; la constante $A_1$ dépend de m et n; $q_2(y) = O(1)$ signifie, que la fonction q est bornée (sur [0,b]). En utilisant [8] et en tenant compte de (1.2), on peut procéder à la formalisation mathématique de ce problème frontière:

$$\Delta^2\theta(x,y) + ic\Delta_k\theta(x,y) = f(x,y) \quad (0 \le y \le b;\ -\infty < x < \infty); \qquad (1.3)$$

$$y = 0, b:\quad \theta(x,y) = \partial^2\theta(x,y)/\partial y^2 = 0 \qquad (1.4)$$

$$x \to \pm\infty:\quad \partial^i\theta(x,y)/\partial x^i \to 0, i = \overline{0,3} \quad (0 \le y \le b), \qquad (1.5)$$

où $\theta(x,y)$ représente la fonction complexe, qui exprime la flèche w(x,y) de la surface du milieu de l'enveloppe et la fonction des tensions $\varphi(x,y)$ de la coque:

$$w(x,y) = c(Eh)^{-1}\,\mathrm{Im}(\theta(x,y)),\quad \varphi(x,y) = \mathrm{Re}(\theta(x,y)),$$

$\Delta^2$ − l'opérateur biharmonique, $\Delta_k = k_2\partial^2/\partial x^2$, f(x,y) = -icq(x,y), $c = \sqrt{12(1-\nu^2)}/h$, $i = \sqrt{-1}$, ν − le coefficient de Poisson, E − le module de l'élasticité, $k_2$ et h respectivement − la courbure et l'épaisseur de l'enveloppe. Il faut remarquer que l'équation (1.3) est correcte dans tout le domaine indiqué sauf sur la ligne du support renforçant. La présence de ce support provoque la rupture de la continuité des efforts tranchants généralisés $V_y$ de la coque (sur cette ligne). On note

$$\langle V_y(x,l)\rangle \equiv V_y(x,l-0) - V_y(x,l+0) = \psi(x) \quad (0 \le x < \infty) \qquad (1.6)$$

$$V_y(x,y) = -D_0\left[(2-\nu)\partial^3 w(x,y)/\partial x^2\partial y + \partial^3 w(x,y)/\partial y^3\right];$$

$$D_0 = Eh^3/(12(1-\nu^2)).$$

En outre, la flèche, l'angle du mouvement, le moment fléchissant, les forces de cisaillement et le déplacement le long des axes x et y restent continus. La flèche satisfait alors à l'équation

$$w(x,l) = 0, \quad (0 \le x < \infty). \qquad (1.7)$$

Pour résoudre le problème, on introduit les fonctions suivantes

$$\psi_+(x) = \begin{cases}\psi(x), & x \ge 0\\ 0, & x < 0\end{cases} \qquad \psi_-(x) = \begin{cases}0, & x \ge 0\\ f_1(x), & x < 0\end{cases}, \qquad (1.8)$$

où $f_1(x)$ est la fonction inconnue.

Ces fonctions permettent d'écrire les conditions (1.4) et (1.5) sur l'intervalle $-\infty < x < \infty$:

$$\langle \partial^k\theta(x,l)/\partial y^k\rangle = -ic\psi_+(x)\delta_{3k}, \quad k = \overline{0,3}, \qquad (1.9)$$

$\delta_{3k}$ − symbole de Kronecker

$$c\,\mathrm{Im}(\theta(x,l))/(Eh) = \psi_-(x). \qquad (1.10)$$

Appliquons maintenant la transformation de Fourier par rapport à la variable x avec le noyau $\exp(i\alpha x)$ aux rapports (1.3), (1.4), (1.9) et (1.10). On obtient finalement

$$(d^2/dy^2 - \alpha^2)\theta_\alpha(y) - ick_2\alpha^2\theta_\alpha(y) = -icq_{1\alpha}q_2(y) \quad (0 \le y \le b); \qquad (1.11)$$

y=0 ou y=a: $\theta_\alpha(y) = \dfrac{d^2}{dy^2}\theta_\alpha(y) = 0;$ (1.12)

$$\langle d^k\theta_\alpha(y)/\partial y^k\rangle = -ic\Phi^+(\alpha)\delta_{3k}, \quad k = \overline{0,3}; \quad (-\infty < \alpha < \infty), \qquad (1.13)$$

$$c\,\mathrm{Im}(\theta_\alpha(l))/(Eh) = \Phi^-(\alpha), \quad (-\infty < \alpha < \infty), \qquad (1.14)$$

où $\Phi^{\pm}(\alpha), \theta_\alpha(y), q_{1\alpha}$ sont les transformées de Fourier des fonctions $\psi_\pm(x), \theta(x,y), q_1(x)$ respectivement et $q_{1\alpha} \in S_\alpha$. On obtient la fonction inconnue $\theta_\alpha(y)$ sous la forme d'une somme

$$\theta_\alpha(y) = \theta_{1\alpha}(y) + \theta_{2\alpha}(y) \quad 0 \le y \le b, \qquad (1.15)$$

où $\theta_{1\alpha}(y)$ est la solution du problème frontière (1.11) − (1.12). Elle se trouve à l'aide de la fonction de Greene $G_\alpha(y,\eta)$ correspondante:

$$\theta_{1\alpha}(y) = -iq_{1\alpha}\int_0^b G_\alpha(y,\eta)f_\alpha(\eta)d\eta \quad (0 \le y \le b), \qquad (1.16)$$

$$G_\alpha(y,\eta) = \frac{-1}{\alpha^3(\lambda^2-\mu^2)}\left(\frac{sh(\alpha\lambda r)sh(\alpha\lambda s)}{\lambda sh(\alpha\lambda b)} - \frac{sh(\alpha\mu r)sh(\alpha\mu s)}{\mu sh(\alpha\mu b)}\right),$$

$$r = \begin{cases}b-\eta, & si\ y < \eta\\ \eta, & si\ \eta < y\end{cases} \quad s = \begin{cases}b-y, & si\ y > \eta\\ y, & si\ \eta > y\end{cases} \quad \begin{pmatrix}\lambda\\ \mu\end{pmatrix} = \sqrt{1 \pm \sqrt{\frac{ck_2}{2}}(1+i)\alpha^{-1}}.$$

La fonction $\theta_{2\alpha}(y)$ est la solution de l'équation différentielle homogène correspondant à (1.11) et aux conditions (1.12), (1.13). En utilisant les propriétés correspondantes de la fonction de Greene de ce problème frontière, on obtient:

$$\theta_{2\alpha}(y) = ic\Phi^+(\alpha)G_\alpha(y,l) \quad (0 \le y \le b). \qquad (1.17)$$

En remplaçant $\theta_\alpha(y)$ de (1.14) par (1.15), et en tenant compte de (1.16), (1.17), on obtient le problème de Riemann non homogène [9] sur un axe réel:

$$D(\alpha)\Phi^+(\alpha) = \Phi^-(\alpha) + g(\alpha), \quad (-\infty < \alpha < \infty); \qquad (1.18)$$

$$D(\alpha) = (4D_0\alpha^3)^{-1}z_1(\alpha),$$

$$z_1(\alpha) = \mathrm{Re}(-2(\lambda^2-\mu^2)^{-1}(th(\rho\lambda)/\lambda - th(\rho\mu)/\mu)),$$

$$\rho = \alpha l,\ g(\alpha) = \frac{q_{1\alpha}}{D_0}\int_0^b \mathrm{Re}(G_\alpha(l,\eta)q_2(\eta))d\eta.$$

**Etablissement des conditions suffisantes de la solution du problème de Riemann.** Démontrons le théorème suivant, qui est la condition suffisante pour la construction de la solution du problème de Riemann (1.18) par la méthode de factorisation partielle [9].

Le coefficient du problème de Riemann (1.16) a les propriétés principales suivantes :

$$D(\alpha) \in C\alpha \equiv C(R);\ D(\alpha) = D(-\alpha);\ (-\infty < \alpha < \infty), \qquad (2.1)$$

c'est-à-dire que $D(\alpha)$ appartient à l'espace des fonctions continues sur la droite réelle R, que $D(\alpha)$ est pair. En outre

$$D(\alpha) \to b^3/(48D_0)\ \ pour\ \alpha \to 0;\ D(\alpha)/A \to 1\ pour\ \alpha \to \pm\infty; \qquad (2.2)$$

$$D(\alpha) \in (A,\infty)\ \ pour\ -\infty < \alpha < \infty. \qquad (2.3)$$

**Démonstration.** L'affirmation (2.1) est évidente. Les affirmations (2.2) sont vérifiées à l'aide des développements asymptotiques correspondants qui entrent dans l'expression de la fonction $D(\alpha)$. A présent, démontrons l'affirmation (2.3) − la plus

compliquée et la plus importante. A cet effet, examinons le problème (1.11) − (1.13) et introduisons les notations suivantes:

$$Q_\alpha(y) = \gamma_1(y) + i\gamma_2(y). \quad (2.4)$$

En substituant (2.4) dans (1.11) − (1.13) et en séparant les parties imaginaires et réelles des expressions obtenues, nous aboutissons au problème frontière suivant:

$$\begin{cases} (d^2/dy^2 - \alpha^2)\gamma_1(y) + ck_2\alpha^2\gamma_2(y) = 0 \\ (d^2/dy^2 - \alpha^2)\gamma_2(y) + ck_2\alpha^2\gamma_1(y) = -cq_\alpha(y) \end{cases} \quad \begin{cases} 0 \le y \le b \\ y \ne l \end{cases}; \quad (2.5)$$

$$\gamma_i(y) = \gamma''_i(y) = 0, \quad i = 1,2; \quad (2.6)$$

$$\left\langle d^k\gamma_2(l)/\partial y^k \right\rangle = -c\Phi^+(\alpha)\delta_{3k}, \quad k = \overline{0,3}; \quad (2.7)$$

On résout le problème frontière (2.5) − (2.7) à l'aide de la méthode généralisée des transformations intégrales en appliquant la transformation-sinus de Fourier finie. En divisant l'intervalle d'intégration (0,b) en deux sous-intervalles, (0, l) et (l, b), puis en intégrant (2.5) par parties tout en se servant des conditions frontière (2.6) et des conditions (2.7), nous obtenons un système de deux équations algébriques par rapport aux transformées. En résolvant ce système et en appliquant la transformation inverse au résultat selon Fourier, on obtient

$$\gamma_1(y) = \frac{2c^2}{b}\sum_{k=1}^{\infty}\frac{\Omega_k \sin(\beta y)}{\Omega^4 + c^2\Omega_k^2}\left[\int_0^b q_\alpha(\eta)\sin(\beta\eta)d\eta - \sin(\beta l)\Phi^+(\alpha)\right]; \quad (2.8)$$

$$\gamma_2(y) = \frac{-2c}{b}\sum_{k=1}^{\infty}\frac{\Omega^2 \sin(\beta y)}{\Omega^4 + c^2\Omega_k^2}\left[\int_0^b q_\alpha(\eta)\sin(\beta\eta)d\eta - \sin(\beta l)\Phi^+(\alpha)\right]; \quad (2.9)$$

$$\Omega = \alpha^2 + \beta^2, \ \Omega_k = k_2\alpha^2, \ \beta = \pi k/b.$$

Si nous remplaçons $\gamma_1(y)$ et $\gamma_2(y)$ de (2.4) par leurs expressions respectives (2.8), (2.9); puis (1.14) par (2.4) nous aboutissons au problème de Riemann (1.18) où

$$D(\alpha) = \frac{2}{bD_0}\sum_{k=1}^{\infty}\frac{\Omega^2 \sin^2(\beta l)}{\Omega^4 + c^2\Omega_k^2}. \quad (2.10)$$

Donc, le coefficient est obtenu sous forme d'une série à termes positifs absolument convergente, ce qu'il fallait démontrer.

**Résolution du problème de Riemann et son analyse.** Introduisons les notations suivantes :

$$U(\alpha) = 4D_0D(\alpha)(\alpha^2 + c_1^2)^{3/2}; \ \Gamma(z) = \frac{1}{2\pi i}\int_{-\infty}^{\infty}\frac{\ln(U(t))}{t - z}dt; \quad (3.1)$$

$$K^+(\alpha) = \exp(\Gamma^+(\alpha))/(4D_0(\alpha + ic_1)^{3/2}); \ K^-(\alpha) = \exp(\Gamma^-(\alpha))/((\alpha - ic_1)^{3/2}); \quad (3.2)$$

$$\mathbf{D9}\ D(\alpha) = K^+(\alpha)/K^-(\alpha), \ c_1 > 0. \quad (3.3)$$

(Par les signes + et − en exposant, on a désigné les valeurs limites des fonctions d'une variable complexe, analytique dans les demi-plans supérieur et inférieur, respectivement, pour $z \to \alpha \pm i0$. En remplaçant *D(α)* de (1.18) par (3.3) et compte tenu de (3.1) et (3.2), nous obtenons:

$$K^+(\alpha)\Phi^+(\alpha) = \Phi^-(\alpha)K^-(\alpha) + K^-(\alpha)g(\alpha), \quad (3.4)$$

en outre,

$$A^{-1}K^-(\alpha)g(\alpha) = F^+(\alpha) - F^-(\alpha); \quad (3.5)$$

$$F(z) = \int_{-\infty}^{\infty}K^-(t)g(t)\frac{dt}{t - z}. \quad (3.6)$$

En introduisant (3.5) dans (3.4), puis en regroupant les termes et en appliquant le théorème de Liouville, on obtient:

$$K^+(\alpha)\Phi^+(\alpha) - F^+(\alpha) = \Phi^-(\alpha)K^-(\alpha) - F^-(\alpha) = 0, \quad (3.7)$$

d'où

$$\Phi^+(\alpha) = F^+(\alpha)/K^+(\alpha); \quad (3.8)$$

$$\psi_+(x) = \frac{1}{2\pi}\int_{-\infty}^{\infty}\Phi^+(\alpha)e^{-i\alpha x}d\alpha. \quad (3.9)$$

En étudiant le comportement asymptotique des fonctions présentées dans l'expression (3.8), on obtient que $\Phi^+(\alpha) = O(\alpha^{1/2})$ pour $\alpha \to \infty$. En vertu de [10], on a $\psi(x) = O(x^{-3/2})$ pour $x \to +0$. Ce qui signifie que la tension de contact à l'extrémité x=0 du support rigide a une solution non intégrable. C'est pourquoi il faut prendre ces intégrales au sens généralisé [10]. On transforme l'équation (3.6) de la façon suivante:

$$F(z) = \frac{1}{z}\int_{-\infty}^{\infty}tK^-(t)g(t)\frac{dt}{t - z} - \frac{1}{z}\int_{-\infty}^{\infty}K^-(t)g(t)\frac{dt}{t - z}.$$

En supposant

$$\int_{-\infty}^{\infty}K^-(t)g(t)dt = 0, \quad (3.10)$$

et en faisant des raisonnements analogues à ceux exposés plus haut, on obtient $\Phi^+(\alpha) = O(\alpha^{-1/2})$ pour $\alpha \to \infty$. Donc $\psi(x) = O(x^{-1/2})$ pour $x \to +0$. Ainsi, notre problème frontière est résolu dans la classe des fonctions intégrables au point x=0 conformément aux conditions (3.10). En faisant tendre k2 vers zéro et en passant à la limite dans les formules (1.16), (1.15) ou, dans (2.8) et (2.9), nous aboutissons finalement à la solution connue [11] du problème de Riemann (1.18), où $D(\alpha) = D_0^{-1}((4\alpha^3)^{-1}th(b\alpha/2) - b/(8\alpha^2ch^2(b\alpha/2)))$, pour le problème de contact d'une plaque ayant la forme d'une bande (modèle de Kirchhoff) à support semi − infini rigide intermédiaire.

**Résultats et conclusions.** On a obtenu la solution exacte du problème frontière stationnaire de la flexion d'une coque cylindrique surbaissée en présence d'un support rigide intermédiaire. A l'aide de cette solution, on a analysé la tension de contact à l'extrémité de ce support. On a démontré que la tension de contact à l'origine du support rigide a une solution unique et non intégrable. C'est pourquoi il faut prendre les intégrales rencontrées au sens généralisé [10]. Dans la classe des fonctions intégrables, ce problème admet aussi une solution si et seulement si la condition (3.10) est vérifiée.

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## ПОЛОГА ЦИЛІНДРИЧНА ОБОЛОНКА З ЖОРСТКИМ ВНУТРІШНІМ ПІДКРІПЛЕННЯМ ПІД ЗОВНІШНІМ ТИСКОМ

**Анотація**
Ця стаття цікава застосуванням узагальненого методу інтегральних перетворень до аналізу напружено – деформованого стану оболонок похилій кривизни у вигляді смуги. У даній роботі циліндрична оболонка, яка вигинається, має опору. Ця опора вважається внутрішній, жорсткою і напівнескінченною. Опора викликає скачки узагальнених перерізувальних сил. Пропонується будувати і аналізувати рішення цієї проблеми за допомогою узагальненого методу інтегральних перетворень.
**Ключові слова:** вигин, циліндрична оболонка, жорстка опора, узагальнений метод інтегральних перетворень.

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## ПОЛОГАЯ ЦИЛЛИНДРИЧЕСКАЯ ОБОЛОЧКА С ЖЕСТКИМ ВНУТРЕННИМ ПОДКРЕПЛЕНИЕМ ПОД ВНЕШНИМ ДАВЛЕНИЕМ

**Аннотация**
Эта статья интересна применением обобщенного метода интегральных преобразований к анализу напряженно – деформированного состояния оболочек пологой кривизны в виде полосы. В данной работе цилиндрическая оболочка, которая изгибается, имеет опору. Эта опора считается внутренней, жесткой и полубесконечной. Опора вызывает скачки обобщенных перерезывающих сил. Предлагается строить и анализировать решения этой проблемы с помощью обобщенного метода интегральных преобразований.
**Ключевые слова:** изгиб, цилиндрическая оболочка, жесткая опора, обобщенный метод интегральных преобразований.

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# FORMATION PROGRAM FOR THE DEVELOPMENT OF EXPORT POTENTIAL OF UKRAINE

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This article investigates the baseline conditions of Ukraine's export. The foreign experience of export potential development of the country is considered. The necessity of the modernization of the transport system in general and the marine industry in particular for the balanced development of Ukraine's exports is grounded. Priority directions of the maritime industry development are provided. The program for the development of Ukraine's export is proposed.
**Keywords:** export potential, external economic potential, transport system, maritime industry, maritime ports, shipping companies, shipyards.

**Statement of the problem.** Due to the current trends in the geopolitical situation in the world Ukrainian export experienced significant changes. Over the past several years, the decrease in export products from Ukraine is observed. Thus according to the results in 2014 the value of export fell almost to the values of 2010 and run at $53.9 billion comparably to $62.3 and $68.8 billion in 2013 and 2012 accordingly. Taking into account that the share of exports in GDP of Ukraine is about 50% (49.2%) negatively affects both the balance of payments of the country and the economy as a whole.

Due to the fact that the EU market is glutted with its own output production, Ukraine can supply it only with raw materials nowadays.

If the government wouldn't activate the measures of Ukrainian export support (the adaptation of European standards, creation of export agencies, transport systems, etc.), the decline rate of Ukrainian export can be much higher in the future.

**Analysis of recent research and publications.** A lot of scientists have publications, which are dedicated to the review of problem on development of export potential and its individual structural elements, they are: Kibik O.M., Kotlubai O.M., Hovrak I.V., Hayminova J.V., Romanemko K.M. [6; 7; 8] and others. The problems of oriented-on-export enterprises in various industries, the questions of European integration and its impact on export potential of Ukraine and separately the problems development of marine industry are examined.

**Unresolved components of the general problem.** However, as a rule, the issue of development of export potential are considered at the micro level, or for specific sectors without considering the specificity of their interaction and interpenetration, the role of part of the transport system is not considered in general and the marine industry in particular. Modern economic and political trends require preparation of the program for the development of export potential of Ukraine based on international experience and considering the development of the transport system.

**The purpose of the article.** The main aim of research is to study the basic problems of Ukraine's export and the program development for their settlement.

**The main material of the research.** World globalization and the development of international trade create favourable conditions for the development of national economy, one of the main parts of which is export potential. Export potential of the country is formed by the potential of companies, which are independent participants of international business activity [1].

According to the 2014 results Ukraine's export to CIS countries fell to $7 bln. Because of the prohibitions and restrictions, Russia was supplied less of Ukrainian goods for $5.2 billion in 2014. Removal of EU import surcharge fell short of expectations to compensate the losses of Ukraine at the CIS market. Ukraine's exports to the EU increased just for $0.331 billion per year. In December 2014 the $0.52 billion decrease in exports of Ukraine to the EU was observed compared to December 2013 [2].

In the first half of 2014 growth of Ukrainian export to the EU amounted to 14.9%. For the first nine months of the last year growth in exports to the EU amounted only to 12.3%. Based on analysis of the data of 2013, three quarters and 2014 in total, the 22% fall of Ukrainian exports to the EU in the IV quarter is observed [3]. It's connected with the falling of steel industry export in 2014 to 13.1% (to all countries of the world), and in December – to 31.7%.

As known the world economy is divided between countries. There is a tough US presence in Latin America and EU and China – in Africa. Prospective sales markets for Ukrainian food products can be India and Arab countries. At the US market the best perspectives for the Ukrainian export are agro-industrial sector, information technology sector and in the aerospace industry [4].

Analysis of international experience shows that almost all countries regulate and stimulate foreign economic activities at the macro and mesolevel. Export support abroad is a whole system of interacting and interrelated governmental and non-governmental institutions, which include ministries and departments, specialized agencies and expert centres, financial institutions, diplomatic missions and more.

In the majority of countries special departments are set up, which are delegated by the state to regulate foreign trade.

The experience of many countries that are recognized as oriented-on-export and established successful export structure long time ago and can be adopted. They are, for example, Germany, Austria and Denmark in Europe, South Korea in Asia,

Mexico and others in the USA. Not everything will work here as it works there, but successful approaches, for example of Lithuania or Canada, can be taken as a basis. The main thing is that we have basic elements.

Analyzing the structure of the current Ukrainian government, it can be mentioned that all theoretically corresponds to the situation of Canada or Lithuania. External relations are provided by two departments – the Ministry of Foreign Affairs and Ministry of Economy and Trade. The first is represented by Ambassador abroad. The second have to provide information on the state of the national economy and export potential, to study the interests of the host country by economic adviser at the embassy.

The difference is only in the absence of Ukrainian export-credit agency. Ukraine loses often due to the fact of deficiency of such institution, and therefore its companies lose out to foreign companies. The big problem is also the lack of understanding of the role of non-governmental organizations, who are the exports promoters.

Export duties are another major problem that prevents the development of exports to Ukraine. In the United States, Germany, Britain, Sweden the customs duties make few percent of budget revenues. For Ukraine – it's the third part. In 1993-1997 Ukrainian export can be compared with exports of Turkey, Poland and the Czech Republic. During the 2011-2014 it dramatically came down and now it amounted to 25-30% of index numbers of these countries (Poland – $218 bln, Turkey – $176 bln, Czech Republic – $147 bln, Ukraine – $52 bln) [5].

In the age of economic globalization the regions face the new challenges in social and cultural capital forming, human capital development, including the intercultural skill training of personnel for development of foreign economic potential.

For foreign colleagues our cultural characteristics are difficult, sometimes they are like impassable barrier to build a mutually beneficial economic relationship.

Formation of regional culture at the basis of cultural interaction will shape a strategy that structures the development of foreign economic potential in four main interacting levels: business, industry, country, international environment.

It is necessary to draft the Code of regional economic culture, as well as programs for study and use of the most successful methods of intercultural interaction at all levels of foreign economic relations as well as for the region and for the country in general.

The problem of corruption eliminating also requires fundamental reforms in Ukraine. Until this problem is resolved, Ukraine will not be able to get the most out of trade and economic preferences from the EU.

The transport sector is the circulatory system of the economy of any country, that's why the problems of its development should be tended. The advanced and modern transport system is key notion to the development not only of the economy as a whole, but also the export sector in particular.

Analysis of world trends in the development of transport shows that any country can't control the risks of its economy, without strong shipment items.

The characteristics of transport services directly affect the completeness in economic relations within the country and abroad, as well as the movement possibilities of all segments of the population for satisfaction of production and social needs.

Transport is an independent sector of the economy that has its own export potential. A transportation provision of the foreign trade that is foreign trade transportation is a major part of transport services exports.

According to the experts' research, the export potential of Ukrainian transport sector is significantly undervalued and underused, the deployed system supporting exports and access of Ukrainian goods to the markets of other countries are required.

Export potential of transport can be realized by means of compelling infra-structure. Economic interaction between transport markets and infrastructure services should be compelling and complementary, forming one single unit for cargo owners, other customers and consumers of the services.

The most important issue is the technical and technological lag of transport system of Ukraine, compared with the developed countries. Ukraine is not ready yet for widespread use of modern technology.

The transport system of Ukraine is currently experiencing a period of stagnation. If we analyze the development of the transport system and its individual elements during the existence of Ukraine, it is possible to conclude that the necessary funds for infrastructure development in the state run short all the time. Unfortunately, Ukraine during its development basically used only the extensive development path and accordingly being given a purely raw-exports role of the developed countries. Low cost of goods, lack of innovation development leads to a lack of proprietary funds of private enterprises for their own development.

One of the main reasons for the low innovation activity is insufficient scope of finance, especially concerning the science [6].

In the transition to intensive, innovative socially-oriented type of development, the country aims to become one of the leaders of the global economy and requires reasonable strategic decisions on the development of the transport sector for the long term perspective.

The central tasks of the state in the functioning and development sphere of the transport system of Ukraine are the following: arrangement of conditions for economic growth, competitiveness of the national economy and quality of life through access to safe and high quality transport services, maximum use of geographical features of Ukraine, balanced development of efficient transport infrastructure, provision of accessibility and transport and logistics services in the sphere of freight transport, integration into the global transport field, realization of the transit potential of the country, improving the safety of the transport system and so on.

Due to the fact that Ukraine is the maritime state, one of the main issues facing the country is the development of the maritime industry, key elements of which are sea ports, shipping companies and shipbuilding factories. The issue of the maritime industry must be given sufficient atten-

tion from the State, as this field being an element of export potential in addition also relates to the strategic sectors of Ukraine.

Maritime field also plays an important role in social and economic development of coastal regions. There is a direct correlation of some port cities and even regions of stable operation of maritime industry companies.

On the basis of the studies [7,8,9] the main priorities of the maritime industry development in the medium term can be determined:

- optimization and structural transformation of the maritime industry of Ukraine;
- development of scientific, technical and industrial potential of the maritime industry;
- improving the regulatory framework to ensure the functioning of all structural elements of the maritime industry of Ukraine;
- improving the attractiveness of the ports to attract new cargo flows and investments;
- creation of a reliable material base that fits in quantitative and qualitative terms the requirements of the national economy, foreign trade, international standards of transport systems;
- improvement of navigation, environmental and technological safety in ports;
- creation of appropriate financial and credit conditions for Ukrainian ship owners for vessels construction and to improve the competitiveness of the domestic shipbuilding industry in the international shipbuilding market;
- establishment of the International Vessel's Register of Ukraine;
- creating appropriate stimulating economic conditions for shipment of both Ukrainian and transit goods by internal waterways.

Based on the above for full use of export potential, in our view, the following set of measures should be taken:

- to ensure the institutional development of the export sector using foreign experience;
- to simplify customs procedures;
- to create the conditions for the application of exporting enterprises results of research in full, as its' done in developed countries, as well as the introduction of technological innovations;
- to modernize the domestic industry, for the improvement of quality and competitiveness of the products;
- to modernize the infrastructure of the transport system in general and the marine industry in particular;
- to provide training at the enterprises for qualified personnel in the field of exports;
- to provide tax and other benefits for exporters.

The implementation of these and other measures in the context of Ukraine's export potential will be possible only with reforms in the economic, legal and social sphere.

**Conclusions.** Justification of its export potential directions is the topical issue which faces Ukraine. After all, provision of export development is a priority for any state that takes care of the world market and its economic growth. Addressing export development should be carried out in conjunction with the development of the transport system as a whole and its maritime field in particular. This development will provide a multiplier effect of the economy development for the whole country in the future.

Implementation of the proposed program will improve the competitiveness of Ukraine as an exporter, which will have a positive effect for future intensive work of the government of Ukraine on building-up of its exports to other countries, that in its turn will provide an acceptable level of diversification of sales markets.

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## ФОРМУВАННЯ КОМПЛЕКСУ ЗАХОДІВ РОЗВИТКУ ЕКСПОРТНОГО ПОТЕНЦІАЛУ УКРАЇНИ

**Анотація**
Досліджено сучасний стан експорту України. Розглянуто закордонний досвід розвитку експортного потенціалу країни. Обґрунтовано необхідність модернізації транспортної системи загалом та морської галузі зокрема для збалансованого розвитку експорту України. Визначено пріоритетні напрями розвитку морської галузі. Запропоновано комплекс заходів щодо розвитку експорту України.
**Ключові слова:** експортний потенціал, зовнішньоекономічний потенціал, транспортна система, морська галузь, морські порти, суднoплавні компанії, суднобудівні підприємства.

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## ФОРМИРОВАНИЕ КОМПЛЕКСА МЕРОПРИЯТИЙ РАЗВИТИЯ ЭКСПОРТНОГО ПОТЕНЦИАЛА УКРАИНЫ

**Аннотация**
Исследовано современное состояние экспорта Украины. Рассмотрен за-рубежный опыт развития экспортного потенциала страны. Обоснована необходимость модернизации транспортной системы в целом и морской отрасли в частности для сбалансированного развития экспорта Украины. Определены приоритетные направления развития морской отрасли. Предложен комплекс мероприятий по развитию экспорта Украины.
**Ключевые слова:** экспортный потенциал, внешнеэкономический потен-циал, транспортная система, морская отрасль, морские порты, судоходные компании, судостроительные предприятия.

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## BASIC PRINCIPLES OF UKRAINIAN CONSTITUTIONALISM IN THE EUROPEAN DIMENSION

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The article is dedicated to the essence and the functional links between the rule of the, the supremacy of human rights and the constitutional democracy as of the main principles of the European constitutionalism during the European integration. The author states that nowadays these principles gain the huge value to Ukraine because of the country's aim to form the democratic society and the state with the rule of law using the European standards and values.
**Keywords:** constitutionalism, principles of the European constitutionalism, rule of law, human rights, constitutional democracy, constitutional reforms, European values and standards.

**Scientific and practical problem.** The current stage of the constitutional reforms in Ukraine aims to democratize the state regime based on the main European values. In order for the European integration to become efficient, it is advisable to constitutionalize all of the processes, related to the harmonization of the Ukrainian legislation with the European standards.

The constitutionalism is grounded on a number of basic principles by mankind, which has become world standards when it comes about building a democratic state and civil society. These principles are the foundation of constitutionalism system. They should provide a stable and progressive development of institutions of constitutionalism and act as a basic regulatory framework functional mechanism of Ukrainian constitutionalism. The principles of constitutionalism were designed to ensure the establishment, development and operation of institutions of constitutionalism system. Their theoretical and practical purpose is difficult to overemphasize.

The theoretical purpose of the principles is that they encourage content constitutionalism, giving it integrity and a single focus, because all elements – elements of the constitutionalism (constitution and constitutional law, constitutional legislation, constitutional justice and constitutional order) – ac-

curately reflect these principles, base themselves on them. These same principles are fundamental for the institutional and regulatory system constitutionalism.

The practical purpose of the principles of constitutionalism is their direct impact on the constitutional reality of the need for their use in shaping the regulatory framework (constitutional law) and functional mechanism of constitutionalism, as well as the organization and implementation of public power as its institutional component, targeted to meet an objective of modern constitutionalism – security and protection of rights and freedoms.

**Overview of the relevant researches.** The research is based on the author's monograph at this topic; also the works of S.V. Holovatyy and I. Pernice are cited.

**Article's thesis.** Considering the fundamental provisions of the principles of law, this gives grounds to define the principles of constitutionalism as the basic ideas, steady basis that adequately reflect the legal and social values accepted by society at this stage of its development, reflect the essence of modern Ukrainian constitutionalism and the practical functioning of the purpose of limitation (self- limitation) by the public authorities in favor of civil society, rights and interests of the individual to achieve constitutional and legal freedoms. The article shows how the most important principles of constitutionalism can be developed in Ukraine further, using the European experience.

**The main part.** Today, the principles of constitutionalism that are already included into the Ukrainian legislation, include the principle of sovereignty, the principle of democracy, the principle of priority of human rights and freedoms, the rule of law, the principle of separation of public power for the state and self-governing (local government), the principle of division of powers into legislative, executive and in the presence of judicial checks and balances and so on. Regarding the current political trends is fair to conclude the perception of the European constitutionalism's fundamental principles by the Ukrainian constitutionalism. Among these principles S.V. Holovatyy distinguishes the rule of law, democracy and human rights [1]. It is interesting, that among these fundamental principles the one about the human rights takes the first place. The other two principles are vital because the constitutional experience of foreign countries argues: the rule of law and democracy are the important factors in ensuring of the proper level of security and protection of human rights. This helps to achieve the purpose of modern constitutionalism.

In practice the principles of constitutionalism are a "litmus test" to verify the compliance of the national constitutional law and political, legal and social realities of the European standards. Such a conclusion was made because the practical purpose of the principles of constitutionalism is the direct impact on the constitutional realities; they have to be used for the formation of a regulatory framework (constitutional law) and of the functional mechanism of constitutionalism, as well as for the organization and implementation of public power as its institutional component.

The content of the Constitution includes provisions relevant in content to European legal standards and, therefore, the principles of European constitutionalism.

For example, in the text of the Constitution of Ukraine, in particular in the Preamble states that the Constitution of Ukraine adopted in accordance with the expression of the sovereign will of the people, and the people are the only source of power and the repository of sovereignty in Ukraine. The status of the people as a sovereign of power (Art. 5 of the Constitution of Ukraine) through a system of guarantees for the recognition and of the principle of the rule of law (Art. 8 of the Constitution), the democratic organization of public authorities (Art. 5, 7 of the Constitution), as well as the recognition of man as the highest social value (Art. 3 of the Constitution). Thus, the essence of the constitution can be traced as a manifestation of the constituent power of the Ukrainian people, when approving the rule of liberal-democratic values. In addition, contains rules regarding: respect for human rights (Articles 21-22 of the Constitution), the right to life (Art. 3, 27 of the Constitution), the prohibition of torture (Art. 28 of the Constitution), the right to a fair trial proceedings (Art. 55 of the Constitution), the imposition of punishment only in accordance with the law (Art. 58, 61 and 62 of the Constitution), freedom of peaceful assembly and freedom of association (art. 36, 39 of the Constitution), the right to an effective way of legal protection (Art. 59 of the Constitution), the right to free elections (Art. 38 of the Constitution), the right to freedom of movement and choice of residence (art. 33 of the Constitution of Ukraine) and others.

According to the Venice Commission "For Democracy through Law", the principle of the rule of law is clearly reflected in the text of the Constitution of Ukraine. The establishment of democratic local self-government, as well as allocating the important role of the Constitutional Court of Ukraine should contribute to the creation of a democratic culture in Ukraine [2]. In conclusion "On the constitutional situation in Ukraine" dated December 17, 2010 indicated achieve Ukrainian constitutionalism, which correspond to the European democratic values [3].

The problem is the low level of actual Europeanization of the constitutional order in Ukraine is in the wrong practice of applying and implementing these principles and European standards in the modern constitutional and legal practice.

It is not only binding set of principles of constitutionalism in the legislation in line with European standards, but is their understanding that meets the latest European trends and contribute to the adaptation of these principles to the current constitutional and legal realities. The formulation of the concepts and principles of disclosure of the contents of constitutionalism is of great importance for the formation of a holistic concept of Ukrainian constitutionalism. The theory of constitutionalism, because of their importance for the further improvement of Ukraine's European integration process constitutionalization requires purity of concepts and their specificity, approximate as possible to mathematical precision.

A special place in the system of the principles of constitutionalism takes the rule of law, which

is the exclusive political and legal ideal of modern society. The support for this principle is uniquely comprehensive, as for the rule of law serves all, almost without exception, the countries, despite the differences in their economic, political and legal systems.

The Constitution and laws of Ukraine, as well as a number of international treaties, one of the parties acts Ukraine, reflects the principle of the rule of law. In Part 1 of Art. 8 of the Constitution of Ukraine proclaims that "Ukraine is recognized and the principle of the rule of law". This principle lies at the heart of public authorities (Part 1 of Art. 3 of the Law of Ukraine "On the Cabinet of Ministers of Ukraine", Art. 3 of the Law of Ukraine "On Local State Administrations", p. 4 of the Law of Ukraine "On the Constitutional Court of Ukraine", Preamble Law of Ukraine Art. 2, ch. 1, Art. 6 "On the Judicial System and Status of Judges", p. 1 hr. 1, Art. 7, Art. 8 of the Code of Administrative Procedure of Ukraine).

The rule of law is essential for Ukraine, which aspires to the formation of a democratic society and the rule of law in line with European standards of the state.

However, the institutions of the European Union have repeatedly, particularly in a number of evaluation documents on Ukraine's readiness for signing the Association Agreement with the EU and the progress in implementing reforms in the way of further integration was determined that the achievement of Ukraine, in particular in the field of rule of law is a prerequisite for the further development of relations between Ukraine and the EU, emphasized the fundamental shortcomings of Ukrainian justice system, which adversely affected the protection of individual human rights and the rule of law [4], also noted that there are shortcomings in the reform of the electoral and legal systems [5].

Undoubtedly, the rule of law as a fundamental value of the European Union must be respected and adhered to in the country, which is integrating in the EU, at least at a level close to its implementation in the countries-founders of European democracy. However, an analysis of the content of these documents of the EU towards Ukraine is seen the neglect of the fact that the rule of law is a political and legal ideal as the entire international community and individual states.

Obviously, that is not conducive to improving the situation and the fact that neither the legal literature, nor in legal sources, there is no single unified definition of the rule of law.

The rule of law is a political and legal condition in which the public power institutions of the state, civil society and other social actors operate solely on the basis of the right (in its integrative understanding), thus achieving a state of harmonious combination of power, justice and freedom, the only measurement who has the right, and to create a sustainable system of law enforcement that ensures respect for and protection of human rights and freedoms.

According to the theory of modern constitutionalism, the rule of law is determined in the context of restrictions (self-restraint) of the public (state and public self-governing) authority in favour of the interests of civil society, the rights and freedoms of man and citizen.

The definition of the principle of the rule of law through the constant restriction of arbitrary power of the state is considered as one of the leading and due to the fact that the principle of the rule of law has arisen to address the fundamental issues of constitutional law – the implementation of proper control over the state coercion with respect to individuals.

The rule of law as a principle of modern Ukrainian constitutionalism provides a promising direction of development of the Ukrainian society. At the same time, the "rule of law" is a dynamic phenomenon, which can be filled with new content in connection with possible socially conditioned changes in the content of the law that is the appearance of new values, customs and traditions, which are not known to occur and disappear immediately. Hence, one can predict that the definition of this principle will continue to evolve and be filled with the updated content at each stage of development of society. It is important that the rule of law would be the rule of truth and justice.

Based on the above understanding of the content of the rule of law, the basic directions of measures to comply with the rule of law in the context of implementation of European standards in the modern conditions of the constitutional process in Ukraine is to reform the institutions of public authority (in the context of democratization, which is associated in particular with the implementation of the principle of constitutional democracy in modern domestic constitutional and political realities) and approving and ensuring human rights and freedoms.

In its essential definition in the context of the theory and practice of European constitutionalism and the rule of law is closely related to the principle of priority of human rights, which reflects the priority of human rights in the relationship "man – society – state" and the duty of the state to recognize, respect and protect these rights. However, these principles are not identical.

The Constitution emphasizes the desire of the most secure and guarantee human rights and freedoms. Thus, according to its preamble, one of the main motives for the adoption of the Basic Law of Ukraine was the need to "ensure that human rights and freedoms" (paragraph 4 of the preamble of the Constitution). In addition, an analysis of Article 3 of the Constitution, which provides that "a person's life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value," and that "human rights and freedoms and their guarantees determine the content and focus of the State", also allows to state a constitutional distinction between the rule of law and supremacy of human rights.

A similar trend is observed in the other branches of law's legislation. For example, the principle of "priority (the rule of) human rights", as an independent principle of the local state administrations as set forth in the Law of Ukraine of April 9, 1999 "On local state administrations" (v. 3). The priority of the natural rights of man stands out as an independent principle and the Constitutional Court of Ukraine. In particular, the legal position,

which formulated them in the Decision № 2-rp of January, 29, 2008 (the case of the release of people's deputies of Ukraine from other posts in the case of combination) states that "the priority of the natural rights of man should be considered as one of the fundamental the principles of the Constitution of Ukraine, according to which the Verkhovna Rada of Ukraine, as a legislative body should adopt legal acts, following such an approach" [6].

Therefore, it is necessary in the principles of constitutionalism distinguish between the content and the intended purpose of the rule of law and supremacy of human rights.

It is very important in the context of European integration to percept and implements the values of democracy.

The democracy as a principle of modern Ukrainian constitutionalism has a complex nature, multifaceted and multidimensional sense of the expression, allows us to offer to refer to the principle of a verbal structure as a "constitutional democracy". With democratic and legal essence of constitutionalism and objectives derive two criteria (constant) constitutional democracy, that is the inherent characteristics (specific properties) – it is constitutional and legal rights and freedom of people power. Based on them, are determined by the political and legal nature and form of manifestation (objectification) of the principle of constitutionalism.

The constitutional democracy is objectified in such phenomena and forms: 1) democratic constitution as an act of constituent power of the people, its ultimate validity and stability; 2) the constitutional and democratic form of organization of public power, in which power belongs to the people (democracy), in conjunction with the legal system of legal restrictions, enshrined in the state constitution to limit the public authorities. This system of legal restrictions should be expressed: to consolidate the constitutional level, the rule of law; in recognizing the priority of international law over national law, to perform the function of not only the internal (national), and the outer limits of the legal authorities; in the presence of an independent constitutional review by the legislative acts that have been taken by the representative body of the people, to consolidate the principle of separation of powers; in recognizing and guaranteeing local self-government; in recognition of a person of higher social value; to limit the power of "sovereign state" human rights and freedoms, with priority over the other collective, corporate, etc.; 3) the constitutional and democratic state regime under which provided the principle of the election of the representative bodies of the people of the state; implementing the principle of separation of powers; state power is based on a free and equal participation of citizens and their associations in the government; the functioning of local self-government as a manifestation of the principle of decentralization and deconcentration of public administration of public authority; management and resolution of social and political conflict through negotiation and compromise; maintenance and protection of the rights and freedoms of man and citizen in accordance with international standards of human rights; 4) the democratic ways and methods of public authorities on the basis of law. In case of conflict between the government and the person of their decision should exercise independent, democratic court on the basis of the principles of the rule of law and supremacy of human rights.

**The conclusion and the perspectives for the further researches.** The current period of constitutional reforms in Ukraine is characterized by the activation of the perception of the principles of European constitutionalism and by the active research of the tools and guidelines for their practical implementation in the political-legal realities for the realization of the main goal of the Ukrainian constitutionalism, harmonious integration of its nationally identical characteristics with the principles of the European constitutionalism. The perspectives for the further researches seems to be in the field of distinguish between the content and the intended purpose of the rule of law and supremacy of human rights.

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## ОСНОВНІ ПРИНЦИПИ УКРАЇНСЬКОГО КОНСТИТУЦІОНАЛІЗМУ В КОНТЕКСТІ ЄВРОПЕЙСЬКОГО ВИМІРУ

**Анотація**
У статті розкрито зміст та функціональний взаємозв'язок принципів верховенства права, верховенства прав людини та конституційного демократизму як основних принципів українського конституціоналізму в контексті процесів євроінтеграції України. Визначено, що в сучасних умовах конституційних перетворень ці принципи набувають надважливого значення для України, що прагне формування демократичного суспільства і правової держави відповідно до європейських стандартів та цінностей.
**Ключові слова:** конституціоналізм, принципи українського конституціоналізму, верховенство права, права людини, конституційний демократизм, конституційні перетворення, європейські цінності та стандарти.

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## ОСНОВНЫЕ ПРИНЦИПЫ УКРАИНСКОГО КОНСТИТУЦИОНАЛИЗМА В КОНТЕКСТЕ ЕВРОПЕЙСКОГО ИЗМЕРЕНИЯ

**Аннотация**
В статье раскрыто содержание и функциональная взаимосвязь принципов верховенства права, верховенства прав человека и конституционного демократизма как основных принципов украинского конституционализма в контексте процессов евроинтеграции Украины. Констатировано, что в современных условиях конституционных преобразований эти принципы приобретают важнейшее значение для Украины, которая стремится к формированию демократического общества и правового государства в соответствии с европейскими стандартами и ценностями.
**Ключевые слова:** конституционализм, принципы украинского конституционализма, верховенство права, права человека, конституционный демократизм, конституционные преобразования, европейские ценности и стандарты.

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## MECHANISM FOR ENSURING OF THE RIGHT OF EMPLOYEE TO DIGNITY AT WORK

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The article analyzes the legal nature and content of the right of an employee to dignity at work that will understand his place in the labour rights. It aims to provide an overview of the costs, the causes and consequences of mental ill health in the workplace. This article also focuses on the description of the second report on the application of the provisions of the European Social Charter (revised) that Ukraine has submitted. Formulated proposals designed to ensure more effective personal non-property labour right. Emphasize the critical importance of ensuring the personal non-property labour right by courts of general jurisdiction, supervisory authorities, the Ukrainian Parliament Commissioner for Human Rights.
**Keywords:** dignity, personal non-property labour rights, moral harassment in the workplace, methods of protection.

**The problem.** Ensuring effective implementation of the right of employees to the protection of their dignity at work is impossible without overcoming manifestations of moral harassment in the workplace. Category "dignity" as a moral value deeply penetrated into the legal content of the legal system.

**The analysis of research work and publications.** The most significant contribution to the the research of the concept of legal regulation of the right of employees to the protection of their dignity are the works of legal scholars, such as: N.N. Agarkov, A.M. Aleksandrov, S.S. Alekseev, M.I. Baru, E.A. Yershova, A.S. Joffe, I.J. Kiselev, K.D. Krylov, R.Z. Livshits, A.M. Lushnikov, M.V. Lushnikova, S.P. Mavrin, A.F. Nurtdinova, A.S. Pashkov, V. Skobelkin, L.S. Tal, E.B. Khokhlov, L.A. Chikanova,

A.M. Erdelevsky, as well as K. Ahola, S. Calderbank, G. Connolly, T. Cox, A. Elkin, A. Gehrke, R. Gründler, J. Hassard, J. K. Hesselink, M. Hupke, A. Jain, S. Leka, N. Mellor, A. Pinder, M. Rahnfeld, P. Rosch etc.

**The purpose** of this article is to research mechanism for ensuring of the right of employees to dignity at work as one of the basic personal non-property labour rights.

**The main material.** There is no doubt that psychosocial risks and work-related stress are among the most challenging issues in occupational safety and health. They impact significantly on the health of individuals, organisations and national economies.

Around half of European employees consider stress to be common in their workplace, and it contributes to around half of all lost working days. Like many other issues surrounding mental health, stress is often misunderstood or stigmatised. Some examples of working conditions leading to psychosocial risks are: excessive workloads; conflicting demands and lack of role clarity; lack of involvement in making decisions that affect the employee and lack of influence over the way the job is done; poorly managed organisational change, job insecurity; ineffective communication, lack of support from management or colleagues; psychological harassment [1].

According to the 6th Working Conditions Survey 2013 published by the French Ministry of Labour (Dares), work pressure in terms of pace of work increased between 2005 and 2013, and appears to be linked to organisational change and feelings of greater job insecurity. Nearly one-third of employees face external demands such as pressure to provide prompt responses or having work determined by the automatic movement of a production line. These pressures have increased for all occupational groups, although the rise is more pronounced for tertiary workers and skilled craftsmen. The share of employees whose work pace is monitored by a computer is also rising in all occupational groups, up from 25% in 2005 to 35% in 2013. Managers and social workers are most affected by this trend [2]. Furthermore, employees claim they are now more likely to have to interrupt tasks in order to do another job, and to have to change their job depending on the needs of their organisation.

A more recent poll in the UK by Investors in People [3], published in February 2014, found that over half (54%) of full-time employees feel their employer doesn't care about their health and well-being as long as they get the job done. Over one-quarter (29%) of employees in the UK is unhappy in their job, and as overall job satisfaction decreases, the number of sick days taken goes up. However, the research also shows that over half (51%) of those questioned said the health and well-being benefits offered by their employer improve their overall job satisfaction. Respondents stated that flexible hours (43%) were the top health and well-being benefit that makes, or would make them, feel most satisfied and valued in their role. With eight out of ten (80%) people saying they would feel more positive towards their employer if they offered better health and wellbeing benefits, the research suggests that by improving some simple health and wellbeing practices, businesses could reduce the absenteeism rate.

The Health and Safety Executive estimates the costs to society of work-related stress to be around 4 billion each year in the UK [4].

Policies and approaches relevant to the management of psychosocial risks, can take various forms. On the basis of existing literature, policy initiatives which relate to psychosocial risk management can be classified as: legislation/policy development; standards at national/stakeholder levels; stakeholder/collective agreements; signed declarations; international organisation action; social dialogue initiatives; national strategy development; development of guidelines; economic incentives/programmes; establishing networks/partnerships.

In the last decade, new "softer" forms of policy which directly refer to psychosocial risks and its associated problems have been initiated in the EU through increased stakeholder involvement within such frameworks as social dialogue and corporate social responsibility [5].

In the high-pressure environment of the financial sector, work pace and demands are high. To reduce stress from high workloads and demands, the bank Len & Spar of Denmark set up the "DO IT NOW" project. The aim was to improve efficiency within the company by giving workers the tools to complete work in a more structured way and reduce wasted time. "The Good Life" is a course run for employees focusing on wellbeing, values, attitudes and habits in work and at home. After one year of The Good Life course, 55 % of employees reported that their work–life balance had improved [6]. Care interviews have resulted in the halving of sickness absence/stress-related leave in the bank.

The following samples also illustrate how campaigns that have been launched to tackle psychosocial risks are proceeding.

For instance, Schneider Electric, an electrical utilities group (France), introduced a preventive approach, outlined in a company agreement by the social partners, using internal staff and resources already available. A prevention programme aimed to train staff involved in prevention to develop a common language and to be alert to psychosocial risks, including burnout, and to develop tools to prevent bullying or suicide risks and to help affected employees to remain in employment. A significant number of managers, health and safety officers and employees have received training on psychosocial risks so far. Raising awareness about psychosocial risks is one of the priority training topics for 2015. The first results from the measures implemented show that the number of managers suffering from burnout has decreased by more than 50 % [7]. The psychosocial risk prevention program at Schneider Electric France has been selected by the French Ministry of Labour to represent France at the European competition on stress at work at the ILO.

In Germany, employers are cooperating with the unions and the Federal Ministry for Labour and Social Affairs (BMAS) to reduce psychological strains and protect employees' health in the context of the "Joint declaration on psychological health at the workplace" signed by the BDA, DGB and BMAS in the autumn of 2013. In Sweden, the

Work Environment Authority investigated whether employer responsibility for the psychosocial work environment should be binding by law. The debate started following a district court ruling that two managers were found guilty of violating the Health and Safety at Work Act and of involuntary manslaughter under the Criminal Code for the suicide of a worker after a year of bullying [8]. Employer organisations are against any binding legislation because of the difficulty in measuring a good psychosocial working environment.

In Belgium, a law was introduced in September 2014 on the prevention of psychosocial risks, which expands coverage for the entirety of psychosocial risks and sets out procedures and the responsibilities of the different actors. It is a law against burnout came into effect on 1 September 2014. Burnout describes an individual's psychological response to chronic stressors at work. It is not regarded as a medical condition, i.e., it is not included as a diagnosis in the medical classification systems. However, in the International Classification of Diseases (version 10) burnout can be coded as a factor that influences health status and in the Diagnostic Statistical Manual (version IV) it is listed as a condition that may require clinical attention. The burnout phenomenon was originally discovered in professionals employed in human service work; particularly among professional care groups. A major part of this work involves contact with a variety of people, which can subsequently develop into a source of stress. Relative to human service work, the symptoms of burnout were labelled as emotional exhaustion, depersonalization, and diminished personal accomplishment [9]. It was later realised that burnout can result from prolonged work stress in a wider range of occupations.

A new Belgian law obliges employers to acknowledge the risk of burnout among their employees and take appropriate measures to prevent it. Employers in Belgium will be responsible for conducting risk analyses and counselling employees in order to avoid burnout, a feeling of exhaustion and hopelessness brought on by prolonged exposure to stress in the workplace. It is the first time that the term "burnout" has been used in Belgian legislation [10].

Effective and fully established psychosocial risk management should incorporate five important elements: 1) a declared focus on a defined work population, workplace, set of operations or particular type of equipment; 2) an assessment of risks to understand the nature of the problem and their underlying causes; 3) the design and implementation of actions designed to remove or reduce those risks (solutions); 4) the evaluation of those actions; 5) the active and careful management of the process [11].

There is a wide variety of actions and strategies that can be successfully used to promote mental health and prevent work-related stress. The common characteristics observed in initiatives to promote wellbeing and health and prevent mental ill-health were: identification of workplace risk factors; the use of organisational measures to reduce the identified risks; the development of a workplace culture/ environment conducive to workers' health and wellbeing; flexible working hours and support for daily life challenges (e.g., access to child care); job modification and career development; the use of multi-component wellbeing programmes (for example, including physical exercise programmes in Mental health promotion programmes); training and awareness raising measures on mental health issues for managers as well as employees; early identification of stress and mental ill-health and enhanced care management; free psychological counselling and specific psychological support [12].

Ukraine ratified the Revised European Social Charter on 21/12/2006, accepting 74 of the 98 paragraphs of the Charter, including Article 26 "Right to dignity in the workplace" [13]. Ukraine has submitted the second report on the application of the provisions of the European Social Charter (revised) in the Council of Europe on 6 October 2009.

Moral harassment creating a hostile working environment characterized by the adoption towards one or more persons of persistent behaviours which may undermine their dignity or harm their career shall be prohibited and repressed in the same way as acts of discrimination. And this independently from the fact that not all harassment behaviors are acts of discrimination, except when this is presumed by law.

Thus, it is the employer's responsibility and legal obligation to assess and manage psychosocial risks in the workplace.

In such situation, the most substantive problem is that once work-related stress and ill health set in, absenteeism is usually already on the increase, and therefore productivity and innovation are already in decline.

Ukraine has submitted the Second Report on the application of the provisions of the European Social Charter (revised) in the Council of Europe on 6 October 2009. However, the European Committee of Social Rights Committee asks for precise information on laws, administrative acts or case law which guarantees the right of persons to effective protection against moral harassment in the workplace or in relation to work. The report contains no information about the liability of employers and means of redress.

The Committee recalls that it must be possible for employers to be held liable towards persons employed or not employed by them who have suffered moral harassment from employees under their responsibility or, on premises under their responsibility, from persons not employed by them, such as independent contractors, self-employed workers, etc.

The protection against moral harassment in the workplace or in relation to work, must include effective judicial remedies, comprising the right to appeal to an independent body in the event of harassment.

There are no special provisions on burden of proof. The Committee has ruled that effective protection of employees requires a shift in the burden of proof. In particular, courts should be able to find in favour of the victim on the basis of sufficient prima facie evidence and the personal conviction of the judge or judges (Conclusions 2003, Slovenia). The Committee asks what is the situation as regards burden of proof. The protection against moral harassment includes the right to obtain adequate compensation and the right and not to be

retaliated against for upholding these rights. Also the Committee asks for information on how the right of persons to effective reparation for pecuniary and non pecuniary damage is guaranteed [14].

Furthermore, it should be noted that the results of the monitoring of the Ukrainian Parliament Commissioner for Human Rights indicated that it is due to mismatch between the effective provisions of labour legislation and other legal acts and contemporary social and economic developments, international trends and standards, as well as due to the lack of efficient state policies over the labour market and employment sector. It is especially manifested through the problems such as creation of decent workplaces, reduction of 'shadow' employment and payment of wages, informal and non-standard employment, and improper and untimely response to new challenges emerging at the labour market with regard to greater globalization.

Therefore, a number of legislative amendments are proposed to solve the above-mentioned problems, such as: bringing labour legislation in conformity with the requirements of European Social Charter (revised) and the conventions of International Labour Organization; ensuring the observance of the right to judicial protection and unconditional implementation of the court judgments; improving of the functions of state surveillance and control over the observance of labour legislation [15, p. 357].

**Conclusions.** However, in the acts of the current legislation and in the draft Labour Code of Ukraine the term "moral harassment", appropriate preventive measures, the legal responsibility are not provided. It appears advisable to enshrine in the draft Labour Code of Ukraine such forms and methods of protection of employee from moral harassment in the workplace, the protection of their dignity at work: 1) the employee shall have the right to suspend work if there are reasonable grounds to believe that the working environment is an imminent and a serious threat, and the period of downtime is also subject to payment (self-defence of employees of their labour rights); 2) the employee has the right to file a complaint about moral harassment to the representative bodies of the company (in particular, the defence of employees labour rights by trade unions); 3) the employee has the right to file a complaint to the State Labour Service of Ukraine (the defence of employees labour rights by bodies exercising state supervision and control over the observance of labour legislation.); 4) the employee enjoys the right to apply to the court (judicial defence of labour rights of employees).

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## МЕХАНІЗМ ЗАБЕЗПЕЧЕННЯ ПРАВА ПРАЦІВНИКА НА ГІДНЕ СТАВЛЕННЯ НА РОБОТІ

**Анотація**
У статті аналізуються юридична природа і зміст права працівника на гідне ставлення на роботі, його місце в системі трудових прав. Звертається увага на огляд витрат, причин і наслідків морального переслідування на робочому місці. Надається характеристика представленої Україною другої доповіді щодо реалізації положень Європейської соціальної хартії (переглянутої). Формулюються пропозиції, спрямовані на більш ефективне забезпечення цього особистого немайнового трудового права. Підкреслюється важливість забезпечення особистих немайнових трудових прав судами загальної юрисдикції, органами державного контролю та нагляду, Уповноваженим Верховної Ради України з прав людини.
**Ключові слова:** гідність, особисті немайнові трудові права, моральне переслідування на робочому місці, способи захисту.

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## МЕХАНИЗМ ОБЕСПЕЧЕНИЯ ПРАВА РАБОТНИКА НА ДОСТОЙНОЕ ОБРАЩЕНИЕ НА РАБОТЕ

**Аннотация**
В статье анализируются юридическая природа и содержание права работника на достойное отношение к работе, его место в системе трудовых прав. Обращается внимание на обзор расходов, причин и последствиям морального преследования на рабочем месте. Охарактеризован представленный Украиной второй доклад относительно реализации положений Европейской социальной хартии (пересмотренной). Формулируются предложения, направленные на более эффективное обеспечение этого личного неимущественного трудового права. Подчеркивается важность обеспечения личных неимущественных трудовых прав судами общей юрисдикции, органами государственного контроля и надзора, Уполномоченным Верховной Рады Украины по правам человека.
**Ключевые слова:** достоинство, личные неимущественные трудовые права, моральное преследование на рабочем месте, способы защиты.

UDC 343.9

## REGIONAL DEVELOPMENT AND SPATIAL DISTRIBUTION OF CRIME IN UKRAINE

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Crime is a complicated phenomenon that needs a complex of temporal, structural and geographical approaches of analysis. The specific issue addressed in this paper concerns the expediency of scientific study of the nexus between crime spatial distribution and regional socio-economic development (or underdevelopment). The study includes a number of quantitative techniques and criminometric methods that combine correlation, regression and cluster analysis. The obtained results are helpful for identifying the most significant clusters of crime with regard to uneven regional development. Three crime clusters were formed with explicit pattern – a higher level of crime corresponds to a higher level of social and economic indicators and vice versa. Nevertheless the economic development in regions of Ukraine is considerable, but not the most influential determinant of crime distribution. According to the regression coefficients the predictor of urbanization has the most significant response: for each 1 increase of urbanization, crime increases by 0.79.
**Keywords:** crime, development, urbanization, region, geography of crime, criminometrics, cluster analysis.

**Introduction.** In the transition to the post-industrial type of operation, many communities have faced the paradox that in contrast to the expected positive and progressive impact created a number of socio-economic and derived there from criminogenic threats and risks, which reflect the adaptive nature of criminal activity to the development. Currently popular concept of sustainable development has evolved from the environmental problems to the problems of security, including the component of criminological security. Accordingly, one of the defining challenges of modern criminol-

ogy, which focuses on the nature and conditionality of crime, is to identify the dialectical interactions between the indicators of social and economic development and crime rate in order to work out an adequate prevention strategy and minimize factors of criminal acts reproduction on the individual and mass levels.

The overarching message from the 13th UN Congress on Crime Prevention and Criminal Justice (will be held in Doha, Qatar, 12-19 April 2015) is that there can be no sustainable development without effectively tackling crime and having respect for the rule of law. Crime destroys livelihoods and has an impact on development. To help countries achieve successful sustainable development, they need to tackle crime and ensure they have effective criminal justice systems in place and respect for the rule of law [1].

**Literature Review and Unsolved Questions.** Contemporary scholars suggested both theoretical and empirical theses based on criminometric methods describing and predicting the patterns of crime and deviance under development.

The modernization approach emphasized the influence of economic institutional and social structural changes (increased socioeconomic development, rapid urbanization, population growth but breakdown in family relations) on criminal behaviour. It was based on the assumption that modern transformation results in social disruption that produces alienation and, in the end, criminal activity [2; 3; 4].

One of the greatest achievements in the elaboration of criminological modernization theory belongs to L. Shelley (1981). „Crime has become one of the most tangible and significant costs of modernization", – she deduced in the fundamental study [5, p. 137]. Her analyses divided countries into three groups: developing countries, developed countries, and socialist countries. The level and distribution of criminality were examined in terms of the extent and speed of the urbanization process, the degree of industrialization, changes in the social structures and the impact of the criminal justice system.

The issue of reciprocal connection between crime and development was scrutinized not only at macro level, but also at local communities primarily in the environmental criminology field. According to Kick and Lafree (1986) "opportunity" theory, modernization and development enhanced urbanization, which decreased interpersonal ties and contact among intimates and acquaintances, thereby reducing interpersonal violence, while development increased opportunities for theft by providing a vast supply of readily available commodities in a time where surveillance and social control was lower [6]. Freedman and Owens (2011) estimated that constructing low-income housing in disadvantaged communities reduced robberies and assaults by about 2% [7].

Over the past decades, many fundamental scientific criminological works have appeared in Ukraine. They have made a significant contribution to the understanding of crime modifications in connection with the current social and economic processes. The importance of the scientific work of Prof. V. Dryomin (2009) [8] is undoubted. He considered crime as a kind of social practice and also mechanism of criminal activity institutionalization. A. Boyko (2008) [9] researched the economic crime determinants as an inherent part of the transition period of the Ukrainian state. V. Shakun (1996) highlighted the impact of urbanization on crime [10].

Nevertheless in Ukrainian modern criminology the influence of social and economic factors on crime is traditionally assumed an axiom and has been recognized both among policymakers and in academic circles. On the background of numerous theoretical studies the lack of research giving the empirical evidence of the nexus, as well as the connections' tightness between the indicators and certain crime is observed. The qualitative analysis prevails to the detriment of complex data analyzing. The negative impact of crime on societal development is also undoubted among the scholars. But the absence of elaborated methodology of crime cost and harm estimation leads to the inconclusive empirical evidence and to the weak criminological policy.

**The aim** of the article is to test the following hypotheses: crime distribution patterns reflect/do not reflect uneven regional development in Ukraine; criminological (criminometric) monitoring of threats and risks of development should/should be assumed as a basis of criminological forecast in order to work out the look-forward strategy of crime prevention and ensure the criminological security.

**Methodology.** In order to test the hypothesis of the study and prove or disprove the main questions raised, primarily the criminometric methodology will be employed. Criminometrics is an example of interdisciplinary scientific synthesis and represents a quantitative (mathematical) analysis of criminological data. This methodology originates from econometrics and exploits the statistical methods adapted to criminological issues. It allows the construction of complete and reliable quantitative models of complex social processes.

The present study is focused on the regional distribution of crime and regional uneven development. Cross-regional analysis of the following data of 2010 is going to be performed: the number of detected crimes in 24 regions (oblasts), Kiev and Sevastopol cities, Autonomous Republic of Crimea per 100000 population as dependent variable; Material Welfare Index, Education Index, Labor Market Development Index, Human Development Funding Index and Urbanization rate calculated according to National methodology by State Statistics Service of Ukraine as explanatory variables (see appendix).

Modern statistical analysis package STATISTICA (version 13) that implemented the latest computer and mathematical data analysis will be employed as a software for the research.

**Exposition of the Main Substance.** The criminometric study of crime and development interactions is perceived to be quite operational in the regional context of crime distribution and in the context of the crime rate geography. Typically, the highest crime rates is registered in Eastern Ukraine, which is also associated with densely populated areas and high level and pace of industrial development.

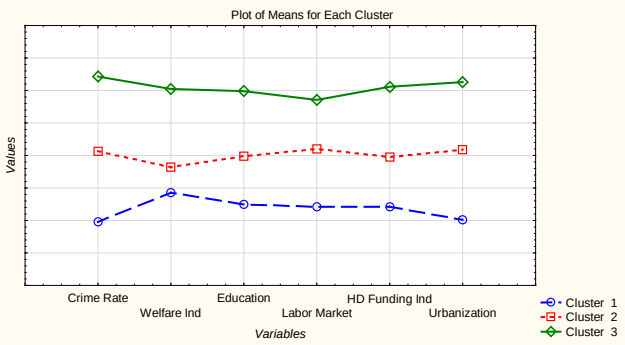
The calculation of correlation coefficients allows identifying a relatively strong positive correlation of crime registered in regions (oblasts) of Ukraine with the level of urbanization of regions, an average-strong correlation with material welfare, education and development funding and a weak correlation with the labour market. For this reason, last figure will be excluded from the multiple regression model for the regions.

Multiple regression model where the crime rate in the region was taken as the dependent variable is quite reliable in R2 parameter. The predictor of regional urbanization has the most significant response. Thus, according to the regression coefficients, for each 1 increase of urbanization, crime increases by 0.79. The most important finding is the fact that economic development in regions in Ukraine is considerable, but not the most influential determinant of crime distribution.

The study also used non-hierarchical cluster analysis, k-means method, for crime distribution and hot spots detection.

As a result of cluster analysis (module Multivariate Exploratory Techniques) three relatively homogeneous groups of regions on indicators of crime and development were formed.

The graph of mean values of variables in each cluster displays a clear unambiguous picture of direct matching: a higher level of crime corresponds to a higher level of social and economic indicators and vice versa.




The distinguishing feature of the first cluster that comprised mostly western regions is lowered crime rate in relation to the development dimensions.

The second cluster is the most numerous in the number of regions and the least stable and therefore controversial in estimations as welfare index is relatively low then labor market, and means of crime rate is almost identical to the means of urbanization.

The third cluster, which included most of south-eastern regions and cities of Kyiv and Sev-

Table 1

**Correlations (regional)**

| Variable N=27 | All correlations are significant at p < ,05000 | | | | |
|---|---|---|---|---|---|
| | Material Welfare Index | Education | Labour Market | Human Development Funding Index | Urbanization |
| Crime Rate | ,5326 p=,004 | ,5038 p=,007 | ,4653 p=,014 | ,6329 p=,000 | ,7845 p=,000 |

Table 2

**Regression Summary for Dependent Variable: Crime Rate (regional)**

| N=27 | R= ,81211377 R?= ,65952877 Adjusted R?= ,59762491 F(4,22)=10,654 p * marked as significant | | | | | |
|---|---|---|---|---|---|---|
| | b* | Std.Err. of b* | b | Std.Err. of b | t(22) | p-value |
| Intercept | | | -262,534 | 222,4518 | -1,18018 | 0,250531 |
| Urbanization | 0,787410* | 0,198920 | 17,404 | 4,3968 | 3,95843 | 0,000667 |
| Human Dev-nt Funding Ind | 0,214835 | 0,228078 | 829,933 | 881,0914 | 0,94194 | 0,356454 |
| Education | 0,088492 | 0,201306 | 248,910 | 566,2337 | 0,43959 | 0,664523 |
| Welfare Ind | -0,260486 | 0,209186 | -814,271 | 653,9095 | -1,24523 | 0,226146 |

Table 3

**K-means clustering results**

| ***Members of Cluster 1*** 9 cases | ***Members of Cluster 2*** 11 cases | ***Members of Cluster 3*** 7 cases |
|---|---|---|
| Chernivtsi | Khmelnytskyi | Kiev sity |
| Ivano-Frankivsk | Chernihiv | Dnipropetrovsk |
| Lviv | Kiev | Autonomous Republic of Crimea |
| Rivne | Sumy | Sevastopol |
| Ternopil | Zhytomyr | Zaporizhia |
| Volyn | Kirovohrad | Donetsk |
| Zakarpattia | Poltava | Kharkiv |
| Vinnytsia | Kherson | |
| Cherkasy | Mykolaiv | |
| | Odessa | |
| | Luhansk | |
| Solution was obtained after 3 iterations | | |

astopol, is the absolute leader in terms of development and crime; its crime means are ahead of all other investigated development parameters, which is not typical for the other two clusters.

**Conclusions.** Despite the popularity of sustainable development concept and the aspiration for it in modern communities many criminogenic threats and risk of social changes are being neglected; development is not sufficiently appreciated as a context for crime. Meanwhile crime patterns and development transformations have an interaction and a mutual influence that should not be ignored by local preventive and punitive policies. Disorganization and crime are the side effects of developmental transformations and can in some ways serve as a barometer of change.

Assuming that crime as well as society is developing in a spiral, it would be logical to predict that at a certain level of economic and social development the intensity of crime should decrease. In this case, the classical modernization theory is to be fairly criticized. A failure to explain the diversity of societies in transition with inherent internal dynamics, as well as the possibility of independent development of modern differentiated political and economic systems are the main focuses of this criticism. The academic competence of the modernization theory in criminology is measured by primarily descriptive analysis. There is a need to widen it to explanatory and predictable one. The criminometric methodology has a great potential to fill this gap by monitoring the developmental changes and criminological expertizing of the risks of transformations.

Crime distribution reflects uneven regional development in Ukraine. The analysis allowed forming three clusters of regions regarding to the ratio of regional crime rate and regional development with explicit pattern – a higher level of social and economic indicators corresponds to a higher level of crime and vice versa.

However, it should be admitted that obtained results can't be applied in construction of general deterministic effects theory. The causal impact of development is not systematic and cannot be used as explanatory factor in description of crime etiologic. In addition, a weak point of criminometric analysis in the context of development and crime is the multicollinearity of variables. Socio-economic indicators are often commonly interdependent.

The transformation of society and development conditions require a new approach to crime monitoring and control, based on effective predicting and justification of proactive value of preventive policies. Therefore, criminometric study of the nexus between crime and development has practical relevance. It creates the opportunities for risk monitoring and forward planning while making public decisions.

When choosing alternatives between criminal or legal behaviour crime becomes understandable reactive reflection on reality and disadvantages of development. Development means not only quantitative changes but also the quality of life and quality come under replacement in the nature of crime. The monitoring of crime patterns in the context of development impact is able to perform the right balance of crime prevention strategies regarding to the regional peculiarity. It could help to find out what economical and social (consequently not punitive) measures are capable to reduce the attractiveness of criminal activity and also to institutionalize the general social prevention instead of increasing the expenditures on law enforcement and criminal justice.

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**Appendix. Variables' definitions**

| Variable | Definition | Data Source |
|---|---|---|
| Crime Rate | The number of detected crimes in a region (oblast) per 100000 population. Data of 2010. | Злочинність в Україні: Стат. Збірник/ Державна служба статистики України. Відповідальний за випуск Калачова І., 2011 – 117 с. |
| Material Welfare Index 2010 | Index is compiled on the basis of average monthly salary, the average pension, the average total costs per adult, the ratio of total costs and revenue, the difference between cash expenditures and revenues, the share of cash in total revenues, poverty level, poverty gap, Gini coefficient, purchasing power per capita income, the amount of the minimum consumer basket, provision with private cars, the number of cars per 100 families. | National methodology of State Statistics Service of Ukraine .---Регіональний людський розвиток: Статистичний бюлетень / Державна служба статистики України. – Київ – 2011. – 44 с. |
| Education Index 2010 | Index is compiled on the basis of enrollment to pre-school institutions, to primary education, to basic secondary education, completed secondary education, the number of students aged 17-23 years at the universities, the average duration of training; the proportion of persons with higher education in the population over 25. | |
| Labor Market Development Index 2010 | Index is compiled on the basis of economic activity level, unemployment rate, employment rate, the average duration of job search, the proportion of part-days workers (a week) in total employment, the share of workers under conditions that do not meet sanitary standards in total employment, the ratio of registered unemployment and ILO specified coefficient; labor turnover. | |
| Human Development Funding Index 2010 | Index is compiled on the basis of local budget expenditures for education; local budget expenditures for health; local budget expenditures for social protection; state budget transfers; the share of expenditure on education in total social expenditures of local budgets, the share of health expenditure in total social expenditures of local budgets; the share of social protection expenditure in total social local budget; state budget transfers value from the social costs of local budgets. | |
| Urbanization | Urban population (% of oblast total) Data of 2014. | Кількість постійного населення за типом поселень // http://database.ukrcensus.gov.ua/ |

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## РЕГІОНАЛЬНИЙ РОЗВИТОК ТА ПРОСТОРОВИЙ РОЗПОДІЛ ЗЛОЧИННОСТІ В УКРАЇНІ

**Анотація**
Злочинність є складним феноменом, аналіз якого потребує комплексу часових, географічних та структурних підходів. Особлива увага у статті адресована доцільності вивчення взаємозв'язку між просторовим розподілом злочинності та регіональним соціально-економічним розвитком (або недорозвиненістю). Дослідження включає ряд технік обробки кількісних даних та кримінометричних методів, які поєднують кореляційний, регресійний та кластерний аналіз. Отримані результати є корисними для виявлення найбільш значущих кластерів злочинності у зв'язку з нерівномірним регіональним розвитком. Три кластери злочинності були сформовані з явною особливістю – більш високий рівень злочинності відповідає більш високому рівню соціальних і економічних показників розвитку, і навпаки. Проте економічний розвиток в регіонах України є значним, але не найвпливовішим чинником, що визначає розподіл злочинності. За коефіцієнтом регресії урбанізація як предиктор має найбільш значимий відклик: при кожному зростанні рівня урбанізації на 1, рівень злочинність збільшується на 0,79.
**Ключові слова:** злочинність, розвиток, урбанізація, регіон, географія злочинності, кримінометрія, кластерний аналіз.

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# РЕГИОНАЛЬНОЕ РАЗВИТИЕ И ПРОСТРАНСТВЕННОЕ РАСПРЕДЕЛЕНИЕ ПРЕСТУПНОСТИ В УКРАИНЕ

**Аннотация**
Преступность является сложным феноменом, анализ которого требует комплекса временных, географических и структурных подходов. Особое внимание в статье адресовано целесообразности изучения взаимосвязи между пространственным распределением преступности и региональным социально-экономическим развитием (или недоразвитостью). Исследование включает ряд техник обработки количественных данных и криминометрических методов, сочетающих корреляционный, регрессионный и кластерный анализ. Полученные результаты полезны для выявления наиболее значимых кластеров преступности в связи с неравномерным региональным развитием. Три кластера преступности были сформированы с явной особенностью – более высокий уровень преступности соответствует более высокому уровню социальных и экономических показателей развития, и наоборот. Однако экономическое развитие в регионах Украины является значительным, но не самым влиятельным фактором, определяющим распределение преступности. Согласно коэффициенту регрессии урбанизация как предиктор имеет наиболее значимый отклик: при каждом росте уровня урбанизации на 1, уровень преступности увеличивается на 0,79.
**Ключевые слова:** преступность, развитие, урбанизация, регион, география преступности, криминометрия, кластерный анализ.

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# DOCTRINE OF SEPARATION OF POWERS AT THE LOCAL GOVERNMENT LEVEL: THE UKRAINIAN EXPERIENCE

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Nowadays Ukraine has the municipal reform; a lot of attention is paid to improving the functioning of local government, including through decentralization in order to implement the principle of subsidiary. To achieve this, some scientists propose to apply the theory of separation of powers to local government. However, at the level of individual monographs, articles studied this problem. This article analyzes the possibilities of the theory of separation of powers at the local government level (mainly the example of municipal government in the US). The author argues that the theory of separation of powers in its present form can't be applied to the Ukrainian local government. But it seems that the adaptation is possible, when it comes about some elements of the system of checks and balances. The author also proposes to study how the ideas checks and balances are used in local government of foreign countries – in future this might help to use their experience in Ukraine.
**Keywords:** local government, municipal government, public power, municipal power, separation of powers.

**Scientific and practical problem.** Nowadays the municipal reform as the part of the administrative reform is being carried out in Ukraine and many efforts are taken to increase the efficiency of the local government. To achieve this goal some researchers recommend that the doctrine of separation of powers should be applied to the local government (see more about this [1; 2]). Regarding the communist past of Ukraine as one of the former republics of the USSR, the studies of the foreign experience in this field are vital. It is obvious, that the national historical experience isn't relevant to solve the current issues. So it is up to the scholars to provide the scientific basis for the politicians, who are active in lobbying the decentralization of the public power in Ukraine and wide usage of the subsidiary principle. The decentralization of the public power and the implementation of the subsidiary principle are very essential for the Ukrainian European integration perspectives.

**Overview of the relevant researches.** In fact, currently a few Ukrainian authors are investigating thoroughly this problem. But such phrases as "the legislative and the executive branches of municipal power" [3, p. 28; 4, p. 12], "the representative and the executive branches of local government" [5, p. 233-234] give reason to consider that some researchers think the doctrine of separation of powers could work when it refers the municipal power.

But thesaurus of the works of M.P. Orzikh [6], I.M. Vail and V.V. Smirnov [7, p. 53], other scientists show opposite points of view. N.I. Kornienko is among these authors – he thinks that "on the local government level the doctrine of separation of powers doesn't works". But he doesn't deny "the advisability of the rational separation of functions in the local government system between its representative and executive parts, if the unity of these parts will be ensured" [8, p. 16].

**Article's thesis.** This article analyzes the possibilities of the theory of separation of powers at the local government level (mainly the example of municipal government in the US). The author argues that the theory of separation of powers in its present form can't be applied to the Ukrainian local government. But it seems that the adaptation is possible, when it comes about some elements of the system of checks and balances.

**The main part.** I.V. Kozura and O.U. Lebedinska characterising a municipal council, describe it as a collegial, representative (in the USA interpretation – legislative) body [9, p. 159]. Indeed, "it is safe to say that a respect for the principle of separation of powers is deeply ingrained in every American. The nation subscribes to the original premise of the framers of the Constitution that the way to safeguard against tyranny is to separate the powers of government among three branches" [10].

Likely due to this fact the doctrine of separation of powers is mentioned rather often in the acts of the US states and in the local acts concerning municipal government. "The separation of powers ... applies to municipal government in the following manner: the mayor/city manager and operating departments compare to the federal executive branch (President); the city council compares to the legislative branch; and the municipal court compares to the judicial branch. Each of these branches must operate independently of each other" [11].

Sometimes even four branches of power on the municipal level are distinguished. Noblesville Code of Ordinances, § 30.01, stipulating the organization of city government, sets that the government of the city shall consist of four branches, those being the following: (A) executive branch, (B) legislative branch, (C) fiscal branch, (D) judicial branch [12].

According to the Carmel, Indiana City Code the government of the City of Carmel shall consist of four (4) branches, those being:

- executive branch (the Mayor is the City executive and head of the executive branch);
- legislative branch (the legislative branch of the City is the Common Council);
- fiscal branch (the Clerk-Treasurer is the fiscal officer of the City and the head of the fiscal branch);
- judicial branch (City Court of Carmel) [13].

But more often acts of this type distinguish separate three branches of power. For example, San Francisco Charter stipulates the existence of the legislative branch, the executive branch and the judicial branch; the judicial branch includes Superior and Municipal Courts [14].

Certainly the proposition to apply the doctrine of separation of powers to the local government is very attractive. Mostly in the reason of the fact that the concept determines that the legislative, executive, and judicial branches of power ought to be separate and distinct, "is a method of removing the amount of power in any group's hands, making it more difficult to abuse" [15]. The accumulation of all branches of power, legislative, executive, and judiciary, in the same hands whether of one, a few or many, and whether hereditary, self appointed, or elective, may justly be pronounced the very definition of tyranny [16].

Nevertheless it appears that it's impossible to apply the doctrine of separation of powers to the local government. In order to make this doctrine work effectively, three branches must be rather independent and, which is more important, to have the same nature (for example, all of them must belong to the state power, or all of them must belong to the municipal power). And the courts are always the parts of the state (in the federal countries, for example, in the USA – of the state or federal) system.

"Although the municipal court is created by state statute, it is also a part of the city government" [11]. But also (and first of all!), as it have been mentioned above, it is the part of the corresponding state or federal system. No matter that "municipalities have wide latitude in prescribing the organizational structure of the court. Home rule cities ... have been empowered to enact charter and ordinance provisions ... which prescribe structural details of local court organization. The judge is appointed by the city council and is generally responsible for presiding over trials and other court proceedings, for conducting various magisterial functions of the court and for the general administration of the court. ... Court clerks are usually appointed by the city council and are responsible to the judge for direction in matters pertaining to overall court policy and judicial procedures. ... and performing other duties as may be outlined in the city charter or ordinances" [11].

So it seems one could think that the doctrine of separation of powers can not be applied to the local government. Though writing about this doctrine, Aristotle, in the Politics, spoke about "the city", it is obvious that it was about the "city-state", or the polis of ancient Greece [17]. Charles Montesquieu researched legislative, executive and judicial power concerning monarchical and republican government [18]. The founding fathers mentioned "the federal judicature" (Alexander Hamilton) [19], "republic, commonwealth, popular state" (John Adams) [20] and the doctrine of separation of powers. A.A. Mishin studying the doctrine of separation of powers using the USA model wrote: "the doctrine of separation of powers in its practical embodiment is structural and functional [определенность] of every of the supreme bodies of the state power; the degree of this embodiment depends on its formal and legal status and on actual delimitation of the functional and subject jurisdiction [21, p. 267].

Some Ukrainian authors [3, p. 28; 4, p. 12; 5, p. 233-234] doesn't include judicial branch of power while proclaiming the possibility to use of the doctrine of separation of powers on the municipal level. Among the charters, codes of the US municipalities there is also a group of acts that mention only two branches of power – legislative and executive. For example, Salt Lake City (Utah) Code sets, that the municipal government of the city is divided into separate, independent and equal branches of government:

- A. The executive branch, consists of the elected mayor of the city, and the administrative departments of the city, together with department heads, officers and employees; and
- B. The legislative branch consists of a municipal council and their staff. [22].

According to the City of Albuquerque Code of Ordinances, the legislative authority of the city shall be vested in a governing body which shall constitute the legislative branch of the city and shall be known as a Council. The Mayor shall control, direct and organize the executive branch of the city [23]. Greenfield Code of Ordinances includes the thesis that the city government shall consist of two branches, those being the following: (A) Executive Branch, (B) Legislative Branch. All powers and duties of the city that are executive or administrative in nature shall be exercised or performed by the Mayor, another city officer, or a city department. The legislative branch of the city is the Common Council [24]. Sometimes the executive branch is called "the administrative branch" or "the executive and administrative branch" [25].

Some specialists see the problem in the fact that the local government's structure "does not allow for clear separation of the legislative and executive functions and thus does not provide for clear separation of powers" [26]. Among the examples they mention organizational models that allow the municipal council to elect the mayor of council's members and "the impossibility of true separation in any system where the members of the executive are drawn from the legislature" [27].

In spite of this it appears that the principal problem is not the elimination of clear boundaries between the executive and the legislative branches (this tendency can be noticed also in the state power), but the absence of the "judicial branch". As the basic task of branches is to make the law for the legislative branch, to enforce the law for the executive branch and to interpret the law for the judicial branch, the judicial branch of power seems to be essential in the doctrine of separation of powers. If there are two branches only, it is not the doctrine of separation of powers in its modern interpretation. Besides if each of the three branches checks the other two, the efficiency of the doctrine is the highest.

But basic ideas of the system of checks and balances may be used in the local government. They can be applied to the municipal bodies that are vested with the representative or executive functions. Unfortunately without the third group of municipal bodies the efficiency of the system of checks and balances will decrease greatly.

**The conclusion and the perspectives for the further researches.** Thus it appears that taking into account the local government nature, the doctrine of separation of powers in its contemporary interpretation can't be applied to the local government in any modern state. The main reason is the absence of the independent judicial branch of municipal power. But it is possible to discuss the borrowing of the basic principles of the system of checks and balances and their adaptation to the local government.

As for the perspectives of the further researches, it would be advisable to study how exactly the ideas of the system of checks and balances are used in the local government of the foreign countries. It will give the possibility to use proper experience in the creation of "the distinctive system of checks and balances on the local level" [28, p. 2] in Ukraine.

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## ТЕОРІЯ РОЗПОДІЛУ ПУБЛІЧНОЇ ВЛАДИ НА МУНІЦИПАЛЬНОМУ РІВНІ: УКРАЇНСЬКИЙ ДОСВІД

**Анотація**
На сучасному етапі в Україні триває муніципальна реформа; багато уваги приділяється підвищенню ефективності функціонування органів місцевого самоврядування, у т.ч. через децентралізацію з метою реалізації принципу субсидіарності. Для досягнення цієї мети деякі вчені пропонують застосовувати теорію розподілу влад до місцевого самоврядування. Проте на рівні окремих монографій, статей ця проблема не досліджується. Цю статтю присвячено аналізові можливості використання теорії розподілу влад на рівні місцевого самоврядування (переважно на прикладі муніципального управління в США). У висновках наводяться аргументи на користь того, що теорія розподілу влад в її сучасному вигляді не може бути застосована до місцевого самоврядування в Україні. Але представляється, що є можливою адаптація до нього деяких елементів системи стримувань та противаг. Як перспектива подальших розвідок у даному напрямку пропонується вивчення використання ідей системи стримувань та противаг в місцевому самоврядуванні зарубіжних країн, що у подальшому надасть можливість використання відповідного досвіду в Україні.
**Ключові слова:** місцеве самоврядування, муніципальне управління, публічна влада, муніципальна влада, розподіл влад.

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## ТЕОРИЯ РАЗДЕЛЕНИЯ ПУБЛИЧНОЙ ВЛАСТИ НА МУНИЦИПАЛЬНОМ УРОВНЕ: УКРАИНСКИЙ ОПЫТ

**Аннотация**
На современном этапе в Украине продолжается муниципальная реформа; много внимания уделяется повышению эффективности функционирования органов местного самоуправления, в т.ч. через децентрализацию с целью реализации принципа субсидиарности. Для достижения этой цели некоторые ученые предлагают применять теорию разделения властей к местному самоуправлению. Однако на уровне отдельных монографий, статей эта проблема не исследуется. Данная статья посвящена анализу возможности использования теории разделения властей на уровне местного самоуправления (преимущественно на примере муниципального управления в США). В заключении приводятся аргументы в пользу того, что теория разделения властей в ее современном виде не может быть применена к местному самоуправлению в Украине. Но представляется, что с ее помощью возможна адаптация к местному самоуправлению некоторых элементов системы сдержек и противовесов. В качестве перспективы дальнейших исследований в данном направлении предлагается изучение использования идей системы сдержек и противовесов в местном самоуправлении зарубежных стран, что в дальнейшем предоставит возможность использования соответствующего опыта в Украине.
**Ключевые слова:** местное самоуправление, муниципальное управление, публичная власть, муниципальная власть, разделение властей.

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# CRIMINAL PROCEDURAL RESPONSIBILITY IN ACCORDANCE WITH NEW CRIMINAL PROCEDURAL CODE OF UKRAINE

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The concepts of understanding of criminal procedural responsibility in the criminal procedure studies are analyzed. The issues concerning notion of criminal procedural responsibility are researched. Theoretical research of the problems connected with defining of the peculiarities of criminal procedural responsibility is performed and summarized. The system of measures of criminal procedural responsibility is defined. Procedural form of realization of criminal procedural responsibility is outlined.
**Keywords:** criminal procedural responsibility; measures of criminal procedural responsibility; procedural form of realization of criminal procedural responsibility.

**Identification of the problem.** Relevance of the topic is determined first of all by the reason that in criminal proceedings the issue of responsibility has raised special significance because the activity aimed at prompt, full and impartial investigation and court proceedings must be strictly based on the law, and that is why on the first place has appeared the responsibility of state bodies and officials, who conduct criminal investigation, with fulfilment of the provisions of criminal procedural law, and other subjects of criminal procedure for performing of obligations set by criminal procedural law.

Adoption of new Criminal Procedure Code of Ukraine has contributed to creation of new procedural institutes and fundamental updating of existing institutes. Among legal institutes, which have been seriously reformed with the adoption of new criminal procedural legislation, the institute of criminal procedural responsibility can be distinguished.

Unfortunately, the concept of criminal procedural responsibility has not found its full presentation in new Criminal Procedural Code of Ukraine, therefore there is a great current interest is addressing to issues related to determination of criminal procedural responsibility, its features and the system of measures of criminal procedural responsibility under new Criminal Procedural Code.

**Analysis of recent research and publications.** The issues regarding problems of criminal procedural responsibility have been researched both on the general theoretical level and field level, however, mainly in the frames of researches concerning the measures of state coercion in general.

A great importance in this is represented by the works of the following scholars: Alenin Y., Alekseeva L., Boiev V., Boikov A., Checina N., Enikeyev Z., Elkind P., Groshevyy Y., Ioffe S., Khablo O., Kovriga Z., Kornukov V., Leyst O., Nedbailo P., Nor V., Oborotov Y., Petrukhin I., Pogoretskiy M., Rozhnova V., Strogovych M., Udalova L., Vetrova V., Zinatulinn Z. and others.

Scholar research in the present sphere in contemporary Ukrainian procedural literature are rather isolated [See, for example, 3; 13; 10], therefore inference should be drawn that, unfortunately, the issues regarding criminal procedural responsibility have not been a subject to further complex research in Ukrainian procedural studies, however their importance for study of mechanism of criminal procedural regulation is practically assured.

**Defining of previously unsolved parts of the general problem.** Speculative character of a problem of procedural responsibility has required a necessity of its further development. And here in general it is possible to agree that "the problem of procedural responsibility requires a serious learning and may be resolved in a complex with other problems" [8, p. 223-225], besides which, in the first instance, there are general theoretical issues connected with the notion and legal nature of legal responsibility, its types (forms) and peculiarities of realization.

**Aim of the article.** The main aim of the present research is a comprehensive analysis of theoretical problems and contemporary practice of law enforcement, taking into consideration relevant normative provisions which should lead to formation of, to the extent possible, logically, non-contradictory and consistent scholar concept of criminal procedural responsibility and mechanism of its realization during criminal proceedings.

**Main material.** Approaching to defining of the notion of criminal procedural responsibility the attention must be paid to the fact, that it reflects a type of legal responsibility, for which cause it has the same problems of definition as the generic notion. It would be logically to define criminal procedural responsibility through type and specific distinction, which in the present research requires rendering of criminal procedural responsibility under wider content common notion of legal responsibility – as for the first stage of defining and determination of distinguishing feature (features) criminal procedural responsibility – as a conclusion of the notion's definition.

A difficulty of defining the notion of criminal procedural responsibility lies in the fact that in the legal literature there has not been any unity yet of views regarding the responsibility in general, correlation of its different types in the system of law, interrelation of legal sanctions and legal responsibility [In more detail: 9, p. 340-341].

The most widespread in the literature on legal responsibility is its definition as the measure of state coercion, based on legal and moral condemnation of the wrong-doer's behaviour and in setting certain consequences in the form of restrictions of personal or property character [5, p. 314-315].

We would like to state that field research, which is related to criminal procedural studies, to the full extent reflects theoretical inconsistencies on general theoretical level. Certain group of scholars considers criminal procedural responsibility in a rather wide understanding, pointing out that this type of responsibility could include coercion, which is applied in the sphere of proving, and connected with the abolishment of the illegal and groundless procedural acts, application of preventive measures, others, in contrast, consider this responsibility in a very narrow content, indicating that criminal procedural responsibility must be regarded as imposing on the participants of the process monetary penalties, expelling form the court session, bringing security to the state incomes [In more detail: 9, p. 341-342].

The special attention is deserved for broad notion of responsibility which includes the positive aspect, i. e. when criminal procedural responsibility, according to the view of certain authors, appears from the moment of imposing of criminal procedural obligation but not from the moment of its violation; the subject of the procedure bears the positive responsibility for conscientious fulfilment of the oblations and bears the negative responsibility – for their liable violation [6; 2].

It is difficult to agree with this point of view. Wilful and conscientious exercise of procedural obligations and guilty violation of these obligations are "diametrically opposite phenomena that cannot be united by one notion of criminal procedural responsibility" [11, p. 249].

Existence of positive responsibility in law has been denied and is being denied now by many authors who have stated that "neither scholar considerations nor, moreover, interests of practice do not provide the grounds for revision of view on legal responsibility as a consequence of the violation" [12, p. 187]; "legal responsibility and consequently criminal procedural responsibility should be regarded as the responsibility for committed wrongful act" [1, p. 155].

Certain understanding of criminal procedural responsibility is connected with the fact that among procedural legal relations regulatory and protective relations are outlined. Protective procedural legal relations occur in the result of the violation of the procedural obligation. There is a point of view in the literature according to which control of procedural protective legal relations with abovementioned element includes procedural legal responsibility that is understood as an elementary deprivation of procedural position of the subject of the procedural relations as a consequence of application to the person the measures of more repressive character [8, p. 223].

One more important aspect of analyzed issue is existence of point of view regarding the aspect that there is no procedural responsibility at all and the scholars had denied the perspectives of the idea of procedural responsibility itself [4, p. 74].

"Procedural responsibility as an individual type of legal responsibility does not exist. Procedural coercive measures – these are either preventive measures or measures of administrative responsibility (for violation of order of court proceedings, disobedience to chairman's orders)" [12, p. 187].

Certain theoreticians, outlining types of legal responsibility, have not mentioned procedural responsibility, that is, in the relevant words of Petrukhin I. denying this or not considering this issue as a problem that is worth examining [7, p. 136-140].

Therefore, in our opinion, it must be emphasized that criminal procedural responsibility as specific procedural measure ensuring criminal procedural relations, guarantee of fulfilment the procedural obligations, exists as an independent type of legal responsibility. This statement is based on the existence in criminal procedural law of its own measures ensuring criminal procedural relations, character and peculiarities of which are defined in accordance with the content of these relations. In other words, in criminal procedural law there exists own method of legal regulation and distinguished in the structure of norm of criminal procedural law procedural sanctions admitting autonomous existence of criminal procedural responsibility [2, p. 50].

Criminal procedural responsibility is a type of legal responsibility. One or other type notion includes all features inherited to generic to this term; the notion of criminal procedural responsibility includes all the features of general notion of legal responsibility. This is far less expressed in comparison to other types of legal responsibility, however, it exists independently.

Criminal procedural responsibility it is the exciting in the form of criminal procedural legal relations the application in a order prescribed by law to individual who commits criminal procedural violation the measures of criminal procedural coercion, which are provided in the sanction of criminal procedural norm that are subject to imposing on the wrong-doer an additional obligation or deprivation (narrowing of the content) wrong-doer's subjective rights.

Defining criminal procedural responsibility as application of measures of state (criminal procedural) coercion, established by sanction of criminal procedural norm indicated not only at legal character of criminal procedural responsibility but also on a significance and respectively measures of criminal procedural responsibility.

The peculiarities of criminal procedural responsibility are defined as their provision by the norms of criminal procedural law (field relation), occurrence in the event of commitment of criminal procedural violation, and the subject of such responsibility may be only appropriate subject of the criminal procedure.

The system of measures of criminal procedural responsibility under Criminal Procedural Code adopted in 2012 could be regarded as following. Punitive measures (i. e. connected with peculiarly with imposing on a subject additional obligation of punitive character) include: monetary penalty; reverting the security to state incomes; changing of previously chosen preventive measure in the event of its violations for more severe measure.

Punitive measures, connected with deprivation of rights of the subjects of criminal procedure in a particular proceeding, could include the following issues: abolition of protective measures in the case of non-fulfilment by the person, taken under protection, legal demands of bodies performing pro-

tective measures; suspension of the investigator, prosecutor from further conducting of the investigation; expelling of the accused from the court room for the violation of the orderly conduct in the court session.

Besides that, there are examples in criminal procedural legislation regarding law restorative measures, i. e. measures connected with imposing on an individual additional obligation, with aim to restore violated rights and interests of the subjects of law. This concerns, for example, imposing of courts disbursements connected with the announcement of pause in the court session, on the specialist in the event of missing the court session without serious reasons or without notification of the reasons of missing.

The special attention is required to the procedural form of bringing to criminal procedural responsibility which represents certain basis, conditions and procedural order of application of measures of criminal procedural responsibility to individual established by criminal procedural law.

The basis for bringing the individual to criminal procedural responsibility is a commitment of the criminal procedural violation.

It is necessary to mention that in the event of the violation of procedural law by the official, besides law restorative measures (which are clearly regulated in the Criminal Procedural Code, for example, abolishment of illegal decisions), there are the issues regarding simultaneous application to the person of the relevant punitive sanctions (disciplinary or other legal responsibility). The subjective side of the violation in this case must be one of the essential conditions of applicator of one or other type of responsibility (or relief of responsibility) and influence on the content of the punishment. For this very reason the question regarding the elements of the legal content of criminal procedural violation, despite there are some works, requires further research.

Being the important procedural guarantee of maintenance of rights and legal interests of non-public subjects of the criminal procedure, procedural form must be clearly defined for realization of criminal procedural responsibility. Thus, for example, the present legal regulation of monetary penalty in the criminal proceeding cannot be regarded as sufficient and demands further improvement (concerning the subjects on which the monetary penalty can be imposed and the procedure of application, the possibility of its application with other measures of influence).

The main conditions of bringing the individual to criminal procedural responsibility include a proper subject, who determines a fact of procedural violation and adopts a decision of bringing to criminal procedural responsibility, procedural formalization of criminal procedural violation and adopting a decision on its basis.

One of the important measure ensuring legitimacy and foundation of legal responsibility is improvement of procedure of its execution and as the result – there is the aim of protection of individual's rights in criminal procedure and support of real exercise of procedural obligations by all subjects, which requires a detailed legislative regulation of measures of criminal procedural responsibility that must be performed in the event of violation or non-fulfilment of procedural obligations. Therefore, the necessity of further improvement of notions of criminal procedural studies and current criminal procedural legislation regarding criminal procedural responsibility is appeared as rather important and necessary.

**Conclusions and proposals.** To sum up, inference should be made that despite the adoption of new Criminal Procedural Code, in which legislative regulation of application of measures of procedural coercion was essentially changed (since independent Chapter II "Measures ensuring criminal proceedings" was defined) aimed at harmonization of national legislation with international and European values and standards and this was realized by enlargement of the list of such measures and changes in procedure of their application, a lot of issues regarding application of coercion incriminating proceedings of Ukraine have remained unsolved.

Thus, unfortunately, the concept of criminal procedural responsibility again has not found its full implementation in new Criminal Procedural Code. Therefore, it is necessary to improve both normative regulation and practice of application of measures ensuring criminal proceeding in general, and to develop the concept of criminal procedural responsibility which requires further complex and profound research.

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## КРИМІНАЛЬНО-ПРОЦЕСУАЛЬНА ВІДПОВІДАЛЬНІСТЬ ЗА НОВИМ КРИМІНАЛЬНИМ ПРОЦЕСУАЛЬНИМ КОДЕКСОМ УКРАЇНИ

**Анотація**
Проаналізовані концепції розуміння кримінально-процесуальної відповідальності у кримінально-процесуальній науці. Розглянуті питання щодо поняття кримінально-процесуальної відповідальності. Проаналізовано та узагальнено теоретичні дослідження проблем, пов'язаних з визначенням особливостей прояву кримінально-процесуальної відповідальності. Визначена система мір кримінально-процесуальної відповідальності за КПК України 2012 року. Окреслена процесуальна форма реалізації кримінально-процесуальної відповідальності.
**Ключові слова:** кримінально-процесуальна відповідальність, міри кримінально-процесуальної відповідальності; процесуальна форма реалізації кримінально-процесуальної відповідальності.

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## УГОЛОВНО-ПРОЦЕССУАЛЬНАЯ ОТВЕТСТВЕННОСТЬ В СООТВЕТСТВИИ С НОВЫМ УГОЛОВНЫМ ПРОЦЕССУАЛЬНЫМ КОДЕКСОМ УКРАИНЫ

**Аннотация**
Проанализированы концепции понимания уголовно-процессуальной ответственности. Рассмотрены вопросы о понятии уголовно-процессуальной ответственности. Проанализированы и обобщены теоретические исследования проблем, связанных с определением особенностей проявления уголовно-процессуальной ответственности. Определена система мер уголовно-процессуальной ответственности согласно УПК Украины 2012 года. Очерчена процессуальная форма реализации уголовно-процессуальной ответственности.
**Ключевые слова:** уголовно-процессуальная ответственность, меры уголовно-процессуальной ответственности; процессуальная форма реализации уголовно-процессуальной ответственности.

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## ADAPTATION OF THE TRUST TO CIVIL LAW SYSTEM

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In this article the concept of the trust in the legislation of some European countries is investigated. In particular, legal regulation of the trust in France and Germany is investigated. The concept of the trust, given by Model rules of the European private law is analyzed. Different aproaches to the trust in Common and Civil Law are analyzed. Specifics of continental model of fiduciary property are defined.
**Keywords:** fiduciary property, trust management, trust, European private law, Common Law, Civil Law.

**The statement of the problem.** The most important problem wich needs to be solved in terms of European integration is the adaptation of institutions which have different approaches in Common and Civil Law. The trust is one of the most famous institututions of the Common Law that was concidered the specific institution of exceptionally Common law for a long time. But simultaneously with processes of integration of European countries began the process of adaptation of the trust to Civil Law.

**The analysis of the last researches and publications.** There are a lot of scientists that dedicate their works to the researche of the trust in national and foreign law, such as R.A. Maydanyk, S.A. Slipchenko, V.V. Vitryansky, Pr. Mifsud-Parker, J.-Fr. Adelle and others.

**The definition of parts of a common problem unsolved earlier.** There are still not many works that are dedicated to the investigation of the ways of adaptation of the trust in Civil Law. And there are very few investigations of the meaning of trust given by «Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)».

**The aim of the article.** The main goal of this article is the researce of different aproaches to meaning of the the trust in Common and Civil Law and searching of the ways of adaptation of the trust to conditions of Civil Law.

**The statement of the main material.** There are a lot of definitions that have been given for the "trust" in Anglo American jurisdictions. Here are some of them.

The trust is an equitable or beneficial right or title to land or other property, held for the beneficiary by another person, in whom resides the legal title or ownership, recognized and enforced by courts of chancery [1]. Or trust is a holding of property subject to a duty of employing it or applying its proceeds according to directions given by the person from whom it was derived [2].

R. David point out that the trust is established, by the general rule, according to the following scheme: a person establishing the trust (the settlor of the trust) causes that some property will be managed by one or several persons (trustees) in interests of one or several persons – beneficiaries [3, p. 236].

K. Matridis considers, that the trust is a legal relationship in which one person (the founder of a trust) transfers to the possession to other person (trustee) any property or the right and simualtaniously oblige him to manage this property on his own behalf as the independent owner, but on condition of transfering the benefit to a third person (beneficiary) [4, p. 24].

The analysis of the given definitions allows to come to a conclusion that the trust in its classical understanding is the transfer of the property by the founder of the trust (who is the owner of property – settlor), to another person – the confidential owner (trustee) for management in interests of the third person or persons, specified by the founder – beneficiaries (beneficiary), or for achievement of the special purpose that was defined by the settlor.

Consequently, there are three parties involved: the settlor who establishes the trust; the trustee or fiduciary to whom the ownership is transferred with the stipulation that he administer the property in favor of a third party; and the beneficiary or fid commissary (cestui que trust) who holds the beneficial title to the property, that is to say, the person who receives the equitable title. This tripartite structure allows understanding why the most important point is found in the fact according to which the trustee does not have the enjoyment or title to the economic advantages of the property, this being so because the trustee is legally bound to give that enjoyment to a third party called the beneficiary. The trust implies, therefore, a peculiar situation by virtue of which a person, who has divided his patrimony, sets aside some of it in order to constitute a trust, transmitting the corpus to another, not for him to take possession of, but for him to administer and manage for the benefit of someone else, who can just as well be the settlor himself. In other words, the institution of the trust rests upon a division of ownership between ownership in form, or legal ownership, and ownership in substance, or bonitarian ownership, a distinction that has its roots in the duality of the English law which, as we know, distinguishes between the Common Law title and the Equity title. Legal or formal ownership, then, is subject to the Common Law, while ownership in substance, or that to be possessed, is subject to the laws of Equity, that is to say, the fiduciary's title is protected by the common law courts and the beneficiary's (cestui que trust's) by the equity courts [5].

And as we know, what is possible for Common Law, because of its historical development which caused distinction between Common Law and Equity, is impossible for Civil Law that does not know such a division. Besides there is a principle of in division of property, supposed to be fundamental in the Roman legal system and therefore presumptively also in modern Civil Law, precludes acceptance of an institution, such as that of the trust, by which property is divided into legal and equitable rights [6]. That`s why the trust in its classical sense can`t exist in countries where Civil Law prevails.

But on the other hand, there are numerous advantages of the trust which make it very attractive for European countries with Civil Law systems. Even though Civil Law jurisprudence rejects the concept of the Common Law trust, as a theoretical matter, the practical usefulness of the device for its beneficiaries is undisputed even by Civil Law lawyers. The French scientist, Lepaulle, considers that «the trust is the guardian angel of the Anglo-Saxon, which accompanies him everywhere from the cradle to the grave. It is at his school and his athletics alike. It follows him morning to his office and evenings to his club. It is by his side on Sunday at church or in a committee meeting of his political group. It will support his old age until his last day, and then it will watch at the foot of this tomb and extend over his grandchildren the light shadow of its wings» [7]. And as Maitland said, «if we were asked, what is the greatest and most distinctive achievement performed by Englishmen in the field of jurisprudence, I cannot think that we should have any better answer than this, namely the development from century to century of the trust idea» [8].

That`s why trusts were accepted in practice and then in theory in some European countries. For example, German legislation does not contain any rules about trust, although some kind of trust relationships we may meet in practice. This kind of operations in Civil Law countries is called fiducia. The first type of confidential operations with property in Germany is called fiducia-management, and it presents the mechanism of transfer of the property right from the founder of management (fiduciant) to the manager (fiduciary) who is obliged to operate in fiduciant`s favour or in the third party`s interests. The fiducia-management provides transfer of property – the object of fiducia – for management in interests of fiduciant. Such model is applied, for example, in case of feigned transfer of a thing with the purpose to avoid the collecting of it and on condition that it will be returned in the future [9, p. 136].

The second type of the trust relations in Germany is a fiducia-ensuring when the debtor gives to the creditor as ensuring the property which the creditor undertakes to return to the debtor on condition of full payment of a debt [9, p. 136]. This way of ensuring was developed in German courts for the purpose of avoidance of a number of the legislative restrictions connected with use of the mortgage in due time. By means of this legal design the borrower transfers to the creditor the ownership to a movable thing which is transferred

to ensure the obligation. The agreement on preservation of a thing in possession of the borrower and about establishment of mediate possession of the creditor is for this purpose concluded. Having allowed mediate possession, on the basis of the confidential agreement, justice legalized ensuring the credit with a movable thing without its transfer to possession of the creditor [9, p. 137].

In France trust relationships had got their regulation by Civil Code. In February, 2007 the law on a fiducia came into force in France. According to that law, French Civil Code was added with the section devoted to the fiducia.

In contrast to the Anglo-Saxon trust (which confers a right in rem), a fiducia is a limited contractual ownership, as it can be exercised only for the purposes of the fiducia arrangement and is protected against the creditors of the fiduciary. A transfer of property gives rise to specific requirements, irrespective of the nature and number of assets that are the object of the arrangement, namely registration with the tax authorities of the constitution, amendment and termination of the fiducia agreement, and publication of the agreement and its amendments at the National Registry of Fiducia, which will be created by decree of the Conseil d'Etat. Certain transfers (essentially immovable assets and going concerns) must be published.

A fiducia may include assets, rights and collateral. In the latter case the fiduciary receives and manages a security that is already perfected either for its own benefit or for the benefit of a third party (or both) [10].

According to art. 2011 of the French Civil Code a fiducia is the operation by which one or more grantors transfer assets, rights, or security rights, or a set of assets, rights, or security rights, present or future, to one or more fiduciaries who, keeping them separate from their own patrimonies, act to achieve a specified goal for the benefit of one or more beneficiaries.

A fiducia is established by legislation or by contract (art. 2012). The art. 2015 of the French Civil Code establishs some rules about parties of the fiduciary contract. According to that article, can be fiduciaries only the credit institutions mentioned "under I of Article L. 511-1" of the Monetary and Financial Code of France, the institutions or services listed in Article L. 518-1 of the same Code, investment enterprises mentioned in Article L. 531-4 of the same Code, as well as the insurance enterprises governed by Article L. 310-1 of the Insurance Code of France. Members of the legal profession of "avocat" can also act as fiduciaries. The grantor or the fiduciary may be the beneficiary or one of the beneficiaries of a contract of fiducia (art. 2016).

The art. 2018 of the French Civil Code determines essential terms of the fiduciary contract. According to that article the contract of fiducia determines, on pain of nullity: 1) The assets, rights, or security rights transferred. If they are future assets, rights, or security rights they must be determinable; 2) The duration of the transfer, which may not exceed ninety-nine years from the date the contract is signed; 3) The identity of the grantor or grantors; 4) The identity of the fiduciary or fiduciaries; 5) The identity of the beneficiary or beneficiaries or, failing that, the rules that allow for their designation; 6) The task of the fiduciary or fiduciaries and the extent of their powers of administration and alienation.

When the fiduciary acts for the account of the fiducia, he must so state expressly. Likewise, when the fiduciary patrimony includes assets or rights whose transfer is subject to publicity, the transfer must make an express reference to the name of the fiduciary in that capacity (art. 2021). In his relations with third parties, the fiduciary is deemed to enjoy the broadest powers over the fiduciary patrimony, unless it is shown that the third parties knew of the limitations to his powers (art. 2023). In his relations with third parties the fiduciary is free to do what he thinks is necessary, but he must give an account of the result of his actions to the grantor. According to art. 2022 of the French Civil Code the contract of fiducia defines the conditions in which the fiduciary gives an account of the result of his actions to the grantor. However, when during the execution of the contract the grantor is placed under tutorship, the fiduciary gives an account of the results of his actions to the tutor at the request of the latter at least once a year, without prejudice to the frequency of accounts set by the contract. When during the execution of the contract the grantor is placed under curatorship, the fiduciary gives an account of the results of his actions, under the same conditions, to the grantor and to the curator. The fiduciary gives an account of the results of his actions to the beneficiary and to the third person designated by application of article 2017, at their request, according to the frequency provided for in the contract.

The specific of liability is determined in art. 2025-2026 of the French Civil Code. According to it, without prejudice to the rights of the creditors of the grantor holders of a right to follow property that derives from a security right published before the contract of fiducia was executed and outside cases of acts in fraud of the rights of the creditors of the grantor, the fiduciary patrimony may only be seized by the holders of claims arising from the preservation or the management of that patrimony. If the fiduciary patrimony is insufficient, the patrimony of the grantor is the common pledge of these creditors; unless the contract of fiducia makes all or part of the liabilities the obligation of the fiduciary. The contract of fiducia may also limit the obligation of the fiduciary liabilities to the fiduciary patrimony exclusively. Such a clause is ineffective against creditors unless they have expressly accepted it. The fiduciary answers, on his own patrimony, for the faults he commits in the fulfillment of his task.

The order of termination of the contract is defined by art. 2028-2030 of the French Civil Code. The contract of fiducia may be revoked by the grantor so long as it has not been accepted by the beneficiary. After acceptance by the beneficiary, the contract can only be modified or revoked with the consent of the grantor or by judicial decision (art. 2028). That rule should guarantee rights of the fird part of this relationships – beneficiary. The contract of fiducia ends upon the death of the grantor when he is a natural person, by the

arrival of the term, or by the achievement of the goal sought when this occurs before the arrival of the term. When all the beneficiaries renounce the fiducia, the contract of fiducia also terminates as of right, except when contractual provisions anticipate the conditions under which it continues. Under the same reservation, the contract terminates when the fiduciary is subject to a judicial liquidation or dissolution or disappears following a transfer or takeover and, if he is a legal counsel, in case of temporary interdiction, disbarment or being left out from the roll (art. 2029). When the contract of fiducia terminates in the absence of a beneficiary, the rights assets security or which are in the fiducary patrimony return to the grantor as a matter of law. When it ends with the death of the grantor, the fiduciary patrimony returns to his succession as a matter of law (art. 2030) [11].

In the conditions of increase of popularity of the trust in the countries of Civil Law the decision on development of universal approach to interpretation of this institute was created. The universal rules about trust were fixed in special document - «Principles, Definitions and Model Rules of European Private Law. Draft Common Frame of Reference (DCFR)», which was directed on reconciliation of legal systems of a Civil and Common Law.

According to art. X.-1:201 of the DCFR a trust is a legal relationship in which a trustee is obliged to administer or dispose of one or more assets (the trust fund) in accordance with the terms governing the relationship (trust terms) to benefit a beneficiary or advance public benefit purposes. A trust takes effect in accordance with the rules in Chapter 10 (Relations to third parties) with the effect that the trust fund is to be regarded as a patrimony distinct from the personal patrimony of the trustee and any other patrimonies vested in or managed by the trustee (art. X.-1:202).

The essence of the trust in DCFR is reflected in art. X.-5:201. According to that article except where restricted by the trust terms or other rules of this Book, a trustee may do any act in performance of the obligations under the trust which: (a) an owner of the fund might lawfully do; or (b) a person might be authorized to do on behalf of another [12].

That means that all powers which are owned by the owner are delegated to the trustee. It gives the ground to say that according to DCFR the trust is the special property right limited by conditions settled by owner or by the law and necessity to act according to a certain purpose.

**Conclusion.** It is necessary to pay attention to the fact that in the DCFR the trust isn't defined by division of the property right as it takes place in the Anglo-Saxon Law. That allows to Civil Law countries to use advantages of the trust without breaking rules of their legal systems. So there are two approaches to trust in European countries – with division of the property, which is typical for Common Law countries, and without division of the property, which is used in Civil Law countries.

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## АДАПТАЦІЯ ТРАСТУ ДО РОМАНО-ГЕРМАНСЬКОЇ ПРАВОВОЇ СИСТЕМИ

**Анотація**
У статті досліджено поняття трасту за законодавством деяких європейських країн. Зокрема, досліджено правове регулювання трасту у Франції та Німеччині. Проаналізовано поняття трасту за Модельними правилами європейського приватного права. Проаналізовані відмінності в підходах до трасту в англо-американському і романо-германському праві. Виявлено особливості континентальної моделі довірчої власності.
**Ключові слова:** довірча власність, довірче управління, траст, європейське приватне право, англо-американське право, романо-германське право.

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## АДАПТАЦИЯ ТРАСТА К РОМАНО-ГЕРМАНСКОЙ ПРАВОВОЙ СИСТЕМЕ

**Аннотация**
В статье исследовано понятие траста по законодательству некоторых европейских стран. В частности, исследовано правовое регулирование траста во Франции и Германии. Проанализировано понятие траста по Модельным правилам европейского частного права. Проанализированы различия в подходах к трасту в англо-американском и романо-германском праве. Выявлены особенности континентальной модели доверенной собственности.
**Ключевые слова:** доверительная собственность, доверительное управление, траст, европейское частное право, англо-американское право, романо-германское право.

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## THE CONCEPT AND FEATURES OF LEGAL SYSTEM OF CANON LAW

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The article is devoted to the problem of definition of the status of canon law in the categories of modern jurisprudence. Canon law is defined as the independent individual legal system. The study of the structure of the canonical legal system in the context of legal comparativistics allows marking the presence of all necessary features of the legal system. The results of the study of the subject and methods of canonical and legal regulation underscore the characteristics of canon law and are additional confirmation of the given thesis.
**Keywords:** canon law, legal system, canonical and legal life, canonical and legal regulation, method of akribeia, method of economy.

**Problem statement.** The number of references to canon law has increased in modern legal literature. In particular, they refer to highlighting historic aspects of its existence, the study of models of relations between church and state, comparative analysis of canon law and other religious legal systems, etc. However, one may notice that most of these references have a significant drawback: they only use the secular methodology, whereby their research becomes one-sided and does not get to the essence of canon law. It seems that one of the issues that require primary attention in this regard is the status of canon law.

**Analysis of recent studies and publications.** Over the past twenty years, since the collapse of communist ideology, canon law has become the object of scientific research for scholars and historians, as well as for lawyers. In particular, a number of scientific works are worth attention, including works by I. A. Balzhik, D. D. Borovoy, M. Yu. Varyas, A. A. Dorskaya, S. V. Misevich, I. O. Pristinskiy, G. I. Trofanchuk, S. B. Tsebenko, V. A. Tsypin, S. O. Shalyapin and others.

**Allocation of unresolved parts of the general problem.** Modern studies of canon law refer to the questions of its historic development, the sources, the bodies of church authority (particularly in judicial system), etc. However, they practically do not refer to the problem of the status of canon law (except for S. O. Shalyapin, who described confessional legal systems), putting everything to reflection on the place of canon (church) law in the national legal system. This raises the need to use methodological tools and the framework of categories and concepts of contemporary jurisprudence to address the question about the essence of canon law.

**The purpose of the article** lies in clarifying the status of canon law and defying that canon law is the individual legal system.

**Presentation of the main research material.** Two decades ago, after the collapse of ideas of socialism in Eastern Europe, legal systems of Ukraine and Russia embarked on the course of ideologization and addressing to their tradition. This was primarily reflected at the doctrinal level, in the works based on the studies of lawyers and philosophers of the XIX – early XX century. At the same time, this revived the interest to canon (church) law, the study of which was stopped after the publication of Decree of the Council of People's Commissars on freedom of conscience, church, and religious societies, establishing the separation of church and state in February 1918 [1].

Despite the terms of canon and church law are close to each other, they are not identical: the etymology of the first term emphasizes that it arises from internal church rules – canons, adopted by the Ecumenical Councils. Whereas, the use of the term "church law" also requires taking into account the regulations of the state of origin, which externally regulate the activities of the church. In addition, canon law is based on the Code of Canon Law, which is common to the whole Orthodox Church, while church law suggests some regional orientation (church law of the Russian Orthodox Church, church law of the Ecumenical Patriarchate of Constantinople, church law of the Greek Orthodox Church, etc.).

The refusal from national cultural and historic traditions, as well as from spiritual foundation in all spheres of existence of socialist society led not only to the secularization of law but to the desacralization – the loss of quality and status "of the holiest thing that God has on earth" [2, p. 270]. In such circumstances, the law becomes not the guide of divine will and not the art of goodness and equity (ars boni et aequi), but only turns into the law by the will of the ruling class [3, p. 443], based on personal benefit. Legal apostasy was also the result of systematic activities of party and state structures aimed at the elimination of "religious remnants", among which a special place is given to the church culture and science, in particular – to canon (church) law.

Despite the lack of doubt, that canon law is a special normative system, the range of views on its nature is very wide. In general, one can distinguish the following approaches: 1) canon law is the part of national law (branch, legal community); 2) canon law cannot be called law in the real sense of the word, as it comes from the state and is not provided by its powers; 3) canon law is a corporate legal system that acts regarding persons, who attribute themselves to the Christian community (church corporations). Each of these approaches has its reason.

The positivistic orientation of the first approach is obvious since it releases church law from the will of the state. Speaking of religious law, O. F. Skakun defines it as "the set of national legal systems with common features – unified patterns and tendencies of development on the basis of religious text as primary source of law, which is a close interweaving of religious, legal, moral, and mythical precepts, formed naturally and recognized by the state" [4, p. 299]. While in her academic course O. F. Skakun describes only Islamic, Hindu and Jewish law, it is obvious that all of the mentioned signs of religious legal systems should be also applied to canon law. However, we believe that this approach is only applicable in cases when religious legal system is integrated with secular law, in particular, when it comes to states, in which Christianity has the status of official religion or enjoys special privileges (Greece, Italy, Norway, Germany, etc.), and ecclesiastical courts are included in the judicial system of the state. This would be true with respect to canon law of pre-Soviet period. For example, A. A. Dorskaya in her doctoral thesis proves that church law of the Russian Empire can be defined as "the branch of law representing the set of legal norms, which define the status of churches, as well as the rights and responsibilities of clergymen, the subjects (citizens) depending on the attitude to them" [5, p. 14]. However, this is not right for those cases when the church is separated from the state and the implementation of its canons is not provided by state powers.

The second approach is described by the ideologists of the cleansing of law from religious "raid", the supporters of atheistic outlook and the representatives of legal positivism, who refuse to recognize any norms not generated by the state or not provided by its powers, as laws. In the article of P. S. Gratsianov in the Great Soviet Encyclopedia, church law is presented as the set of approved or established by state rules that regulate the internal organization of church and the relationship between churches, religious believers, and state. It is noted that countries, where church is separated from state, do not have church law, and the rules of internal relations in church do not have legal character [6].

The first and the second approaches have one common feature – positivistic orientation, which has two scenarios: either canon law is connected to state – and then it is the part of its legal system, or it is not connected – and then it is not law at all.

The third approach, is supported, in particular, by M. Yu. Varyas, is based on the fact that church is the corporation of a special type, and its norms are not only of religious, but also of legal value, having corporate general obligation, formal certainty, normativity, regulativity and other properties that are also typical of positive law [7, p. 82]. This approach seems to be the most productive because it allows us to go beyond positivistic dogmas and to look at the phenomenon of canon law in isolation from the phenomenon of state. The latter is consistent with the ideas of sociological school of law and anthropological approach that allow to deduce the origin of law from social relations (in this case – internal relations in church) and human nature.

Analysis of all three approaches allows us to conclude the following: the first and the second approaches are one-sided, the third one is much more flexible – it defines canon law as an independent phenomenon generated by church and not by state powers. However, canon law can either be the part of national legal system (as its subsystem,

special legal community, superbranch), or have the partial recognition by state (for example, the use of canons in marriage and family, hereditary and other relations), or exist without any state support and recognition (church, however, should consider in its activity the norms of secular law).

This means that canon law is a specific legal system, which has all the necessary features of legal system. For more detailed research, we should refer to comparative studies.

Category "legal system" has many definitions in modern jurisprudence, among which the following can be distinguished:

– structurally coherent, historically formed set of legal norms, formalized in specific sources, legislative system, legal traditions and concepts, and associated with them types of legal understanding, as well as legal ideology, legal consciousness, legal culture and legal practice, which differ in degree of representation, correlation and predominance of legal elements in a particular integral formation [8, p. 35] (H. Bekhruz);

– formalized complex of normative, organizational, monitoring and ideological components of law that exist at national, regional and international levels (Yu. N. Oborotov) [9, p. 154];

– objective, historically natural legal phenomenon, which includes interrelated, interdependent and interacting components: law and legislation that implements it, legal institutions and legal practice, rights and responsibilities, legal relationship, legal ideology, etc. (N. M. Onishchenko) [10, p. 27];

– formed under the influence of certain patterns of development of society, set of all legal phenomena, which are in sustainable relations between themselves and with other social phenomena [11, p. 26] (S. P. Pogrebnyak).

State is not mentioned in any of these definitions, contained in the works of well-known Ukrainian theorists. We are referring to "organizational components", "legal institutions", "society", but it would be wrong to come to conclusions that organizational components or legal institutions have exclusive features of state authority. Moreover, asserting that law is only originated from state and is its tool would mean to support normativism and refuse to acknowledge the possibility of the non-state lawmaking.

In general, if we put aside the idea of the mandatory origin of law from the state, then any religious normative system with developed infrastructure may qualify for recognition the status of the legal system. In some cases, this religious legal system merges with the legal system of the state, as it was in the Byzantine Empire; in some cases – it exists under the patronage of the state, influencing its law. In most modern Western countries religious law coexists with secular law, without any patronage of the state or being incommoded by this.

In order to be certain that religious law is, in fact, a specific legal system, it is necessary to examine how much it conforms to the structure of the legal system developed by comparativists.

The structure of the legal system, according to the definition by O. F. Skakun, is a sustainable unity of elements of the legal system and their legal relations that ensures its legal integrity [4, p. 47]. Substantive part of the legal system, according to the Ukrainian scholar, includes the following elements (subsystems): 1) institutional – subjects of law; 2) normative (regulatory) – legal norms and principles objectified in certain legal forms; 3) ideological (doctrinal) – law understanding, legal thinking, legal ideas and concepts, legal consciousness, legal culture; 4) functional (sociological, practical) – law realization, law enforcement, legal relations, good behaviour, legal practice; 5) communicative (integral) – internal relations between the elements of the legal system, relations with other systems of society, relations with international and regional legal systems. The core value of the legal system is people [4, p. 47-49]. The same five elements are named by N. N. Onishchenko in the collective monograph "Modern legal systems. Globalization. Democracy. Development" [10, p. 57]. According to S. P. Pogrebnyak and D. V. Lukyanov, legal system consists of five components: 1) subjective; 2) normative; 3) ideological; 4) functional; 5) effective [11, p. 28]. Further enumeration of scientific views on the structure of the legal system seems to be superfluous, since it will not add much to what was said, and therefore we should proceed to the examination for compliance of the elements of canon law with the theoretical structure of the legal system.

The **institutional** element of canon law primarily includes subjects of canon law, i.e. people with canonical legal personality [12] – clergymen, laity, and monks. It also includes the Church as "established by God human society, united by Orthodoxy, Law of God, hierarchy and the Sacraments" [13, p. 49].

The **normative element** of the canonical legal system includes biblical com-mandments and rules, canons, regulations of local churches, church customs, precedents of ecclesiastical courts, and other regulatory precepts, which are recognized, approved, and provided by the Church. This may also include secular legislation, which governs issues regarding freedom of conscience and legal status of religious organizations.

The **ideological** element is based on the attitude to canon law as the divinely instituted set of rules of conduct, its perception as earth incarnation of divine justice. Canonical and legal thinking is based on ideas of kindness, love, justice, unity, mercy, and service. Canonical and legal consciousness has certain characteristics: legal ideology implies not only knowledge of religious precepts and understanding of their meaning but also faith-based belief in their justice and divine origin. Legal psychology, including emotions and experiences, is also based on Christianity, which calls for coping with passions, in particular, pride, anger, temper, usury. Legal culture of the church community, which reflects the quality level of its canonical and legal life, is based on basic principles and ideas of Christianity contained in the texts of the Gospel and the Epistles, the Holy Tradition, the writings of the Church Fathers and famous theologians and canonists.

The **functional** element is concerned with legal communication in canonical and legal field. This includes implementation of canonical precepts in forms of realization (independent implementation

by any subject of law) and application (implementation by specially authorised authorities with church authority – presbyter, bishop, abbot of the synod, patriarch, etc.). The norms of canon law can only be applied by specially authorised authorities. For example, at least two or three bishops can chirotonize (ordain) a bishop (Apost., 1). Regulations on the Ecclesiastical Court of the Russian Orthodox Church dated June 26, 2008, established a system of ecclesiastical courts and their jurisdiction [14].

Canonical and legal relations have a standard structure – subjects, object and content, but the first two elements have certain characteristics arising from the nature of canon law and the subject of canonical and legal regulation. For example, such relations can be viewed in relations between the ruling bishop and the priest regarding the imposition on the latter of canonical prohibition in connection with commission of a canonical offence; relations between the spouses regarding dissolution of religious marriage, etc.

Good behaviour in canon law, as well as in secular law, can be due to several motives: sincere respect to canonical precepts; habitual observance, execution or exercise; implementation of the rule in momentary solidarity with other subjects (conformism); fear of secular or divine punishment or expectation to benefit from implementation of precepts. It should be noted, that the term "fear of God", which is used in religious sphere, does not have to be viewed as a sign of marginality of a God-fearing man: on the contrary, the fear of the Lord is "the beginning of wisdom" (Psalm 110: 10), "true wisdom" (Job 28: 28), "one of the greatest Christian virtues, which lies in the fear of punishment for sins, combined with filial love for God and aspiration for godliness, purity and holiness" [15, p. 828]. Canonical practice is formed not by state authorities, but by ecclesiastical courts and ecclesiastical authorities (parish, diocesan and church-wide).

The **communicative** (integral) element of the canonical legal system includes not only internal relations between all four elements mentioned above, but also relations: 1) with other Christian, but not Orthodox, communities (Catholics, Protestants, non-Chalcedonian churches) and representatives of other religions; 2) with the state and international governmental and non-governmental organizations. The number of modern documents of the Russian Orthodox Church defines the principles and features of relations between the Church and these subjects. Thus, the attitude to non-Orthodox confessions was stated in the Basic Principles of the Attitude to Heterodoxy of the Russian Orthodox Church adopted at the Bishops' Council in 2000 [16]. The principles of relations between the church and the state were formulated in Section III of the Basis of the Social Concept of the Russian Orthodox Church adopted by the same Council in 2000. [17] This document also describes the position of the Church regarding international relations, problems of globalization and secularism (Section XVI) based upon the Holy Scripture and the Holy Tradition. The relations of the Church with the state and society does not allow to ignore human rights activities of the Church, the foundations of which were stated in Section V of the Principles of the Russian Orthodox Church on Dignity, Freedom and Human Rights adopted on 26 June, 2008. [18]

It is obvious that even a fleeting glance at canon law reveals that its structure is consistent with the structure of the legal system. However, we should pay attention to another important point: the normative component of the canonical legal system (in fact – canon law) should have a special object and specific methods of canonical and legal regulation.

The object of canon law is quite complicated and includes: 1) relations arising in the church sphere regarding church government and church administration (administrative division of the church; church hierarchy; election and ordination to the bishop and priest service, administration of the local church, diocese, parish; ecclesiastical courts); 2) relations between the members of the Church (clergymen, monks, laity); 3) relations with other Christian churches and religious organizations; 4) relations between the Church and secular subjects (government, legal entities, natural persons) [7, p. 83-84].

Special attention should be paid to methods of canonical and legal regulation. Many works mention mainly mandatory nature of canon law, which is caused by predominance in any legal system of religious type of two main ways of influence – prohibition and precept. It is sufficient to analyze at least the Decalogue in order to mark the presence of three precepts ("I am the Lord thy God; thou shalt have no other gods before me", "remember the sabbath day", "honour thy father and thy mother") and seven prohibitions ("thou shalt not make unto thee any graven image", "thou shalt not take the name of the Lord thy God in vain", "thou shalt not kill", "thou shalt not commit adultery", "thou shalt not steal", "thou shalt not bear false witness against thy neighbor", "thou shalt not covet thy neighbour's house, thou shalt not covet thy neighbour's wife, nor his manservant, nor his maidservant, nor his ox, nor his ass, nor any thing that is thy neighbour's").

However, the New Testament, without revoking the rules of the Old Testa-ment, gives them a new interpretation, somewhere strengthening them, and some-where – softening them. Each of the Ten Commandments is proved by Jesus Christ in full, but the commandment about the sabbath day makes an exception for those who do good: "the sabbath was made for man, and not man for the sabbath" (Mark 2: 27). In other cases, even the thought about transgressing the commandment is considered to be sinful: "Ye have heard that it was said of them of old time: thou shalt not kill; and whosoever shall kill shall be in danger of the judgment. But I say unto you, that whosoever is angry with his brother without a cause shall be in danger of the judgment; and whosoever shall say to his brother: "raca", shall be in danger of the council; but whosoever shall say: "thou fool", shall be in danger of hell fire" (Matthew 5:21, 22). "Ye have heard that it was said by them of old time: thou shalt not commit adultery. But I say unto you, that whosoever looketh on a woman to lust after her hath committed adultery with her already in his heart" (Matthew 5: 27–29).

At the same time, while these were clearly mandatory precepts, Christianity recognizes only

one major sin – "the blasphemy against the Holy Ghost" (Matthew 12: 31), which will not be forgiven "neither in this world, neither in the world to come", and covers all cases of persistent and conscious rejection of Christian truths and attributing to the Devil actions, in which the divine grace clearly emerges. However, this sin, as well as any other, can be remitted in case of sincere repentance of the sinner.

All this does not allow us to assert the existence of the "right to sin", which would be quite consistent with the logic of modern Western law, but gives us the opportunity to speak about the presence of subjects that apply canon law of broad discretionary powers. In other words, mandatory canonical precepts can be applied fully, partially, or not applied in certain situations at the discretion of an authorized clergyman. This appears from the words spoken by Jesus Christ to His Apostles "whatsoever ye shall bind on earth shall be bound in heaven; and whatsoever ye shall loose on earth shall be loosed in heaven" (Matthew 18: 18).

This discretion is connected with the presence of two specific methods of canonical and legal regulation in canon law: akribeia and oeconomy. Both terms entered the national canonistics in the twentieth century and were borrowed from the Greek sources – the Apostolic Canons, the Canons of the Ecumenical and Local Councils, the Canons of the Holy Fathers, and from the works of the Byzantine canonists.

The Greek word οικονομια (housekeeping) is found in many texts, for example, in the Canon 102 of the Council of Trullo: "οἰκονομοῦντι σοφῶς", which is translated as "wisely manage", i.e. "by greater softness and mild medicines, to resist this sickness and exert himself for the healing of the ulcer". The word ακριβεια (precision) occurs in the same Canon, which refers to the application of the Canon in all its severity against the unrepentant sinner: "to follow the traditional form in the case of those who are not fitted for the highest things". However, the Byzantine chronicler and canonist John Zonaras gives the following commentary on the Canon 102 of the Council of Trullo: "the spiritual physician should pay attention to the location of the sickness... to weaken the penance for poor-spirited, and to strengthen it for a man of spirit; all is done in mercy clean in order to clean the one from filth and not to irritate the ulcer of the other and not to make the wound bigger" [19, p. 612].

Both words οικονομια and ακριβεια frequently occur in the Greek texts and in almost all cases we are talking about the contrast between repentant and unrepentant sinner. Thus, oeconomy and akribeia are mentioned in the Canon 4 of St. Gregory of Nyssa: "For any man who on his own initiative and of his own accord proceeds to confess the sins, the mere fact that he has condescended on account of secret acts to become an accuser of himself as a result of an impulse of his own, is to be considered proof that the cure of the disease has already begun, and since he has shown a sign of improvement, he is entitled to kinder treatment. One, on the other hand, who has been caught in the act of perpetrating the offense, or who has been exposed involuntarily as a result of some suspicion or of some accusation, incurs an intensification of the penalty, when he returns; so that only after he has been purified accurately may he then be admitted to communion of the Sanctified Elements".

Obviously, oeconomy and akribeia, as methods of canonical and legal regulation, have a special nature that cannot be fully disclosed from the standpoint of dogmatic jurisprudence only.

Akribeia has a mandatory beginning, manifested in the need for exact (literal) compliance with canonical precepts and the avoidance of deviations from canonical requirements. The use of akribeia is limited to matters of dogmatic significance; regarding the subjects whose actions qualify as "the blasphemy against the Holy Ghost"; and also in cases when the exact application of canons is appropriate. In this connection, the mentioned above Canon 102 of the Council of Trullo and the commentary given by John Zonaras draw our attention again: on the one hand, severe penance is imposed on an unrepentant and persistent sinner, as explicitly written in the Canon 102; on the other hand, Zonaras states that penance should be strengthened in mercy for a man of spirit, "... in order to clean [him] from filth".

In "Addressing Clergy and Parochial Church Councils of the City of Moscow" dated December 21, 1995, Patriarch of Moscow and All Russia Alexy II talks about ideas of the Byzantine canonist: "The purpose of penance is not to punish, but to correct, return the clean, repentant, and reconciled with conscience sinner to fellowship with God. If nowadays we do not consider the spiritual state of most people and deprive them of the Holy Communion for years, this penance will give the opposite result... it can lead to further cooling of religious feeling in the person and departure from the Church. The excision is efficient and therefore applicable only to deeply religious people... For most people, it is not enough. Another penance would be much more useful for them – going to church more frequently, reading the Holy Scripture, reading prayers in the morning and in the evening, social service to ill, poor and brokenhearted, in expiation of the sins" [Cit.: 20, p. 646].

Oeconomy suggests the possibility of avoiding strict compliance with canonical precepts (usually, softening). However, it is not always possible to clearly distinguish oeconomy from akribeia: in connection with this, the mentioned above commentary by John Zonaras is more appealing, as he requires to increase the penance in mercy for the man of spirit, though the Canon itself does not contain such requirement, on the contrary, it suggests to treat the repentant with "greater softness and mild medicines". While the Canon contains the formalized requirement, its commentary is more meaningful – both the fact of outer repentance and spiritual traits of the repentant are important in this case. Hence, it is possible to conclude: the method of akribeia is used out of motives of oeconomy, in other words, strict application of canonical regulations, as well as its evasion, have the same purposes – the salvation of the human soul, the preservation of unity and conciliarity of the church, the protection of fundamental principles of religion, dogmas.

Careful consideration of the method of oeconomy does not allow us to agree with D. D. Boro-

voy, who compares it with the "method of legal fiction" and the dispositive method [21, p. 94]. If legal fiction is "the recognition by certainly existent of non-existent, or vice versa, by non-existent of existent" [22, p. 43], then the method of oeconomy does not create anything fictitious, but merely gives the possibility of wide discretion for law enforcer. Contrary to the dispositive method, the principle of oeconomy does not imply equality of the parties in canonical and legal relations, but recognizes the unilateral order of its application, as only clergymen have the right of spiritual healing.

Thus, both akribeia and oeconomy are based on the mandatory beginning, as their application is carried out by the church hierarchy, already supposing the inequality of subjects. The specific nature of akribeia and oeconomy reveals in that these methods are used for the purpose of healing of spiritual and emotional damage to the individual and the church, and these goals cannot be achieved solely by legal means, without mercy and compassion. That is, human justice, administered in the Church by successors of the Apostles, should be based on idea of divine justice, which lies in the theanthropic nature of the Church.

**Conclusions.** Taking the above into account, it should be noted that canon law is consistent with all the features of the legal system. Due to the lack of close ties of this legal system with particular territory and orientation on the "people of the church" – members of the Church, canon law should be recognized as the individual legal system. Thus, canon law can be defined as the individual legal system, which is based on the Christian religious and legal precepts, affects public relations that arise between members of the Church (including relations regarding church government and church administration), the Church and other religious and public organizations, the state, uses highly specific methods of canonical and legal influence. Canonical and legal life, based on the norms of canon law, includes the whole range of legal phenomena required to confirm the idea of independence of the canonical legal system: canonical and legal relations, canonical legal consciousness and legal culture, canonical legal thinking, church institutions with judicial and administrative functions.

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## ПОНЯТТЯ І ОСОБЛИВОСТІ ПРАВОВОЇ СИСТЕМИ КАНОНІЧНОГО ПРАВА

**Анотація**
Стаття присвячена проблемі визначення статусу канонічного права у категоріях сучасної юриспруденції. Канонічне право визначається як самостійна персональна правова система. Розвідка структури каноніко-правової системи в контексті юридичної компаративістики дозволяє встановити наявність у неї усіх необхідних ознак правової системи. Результати дослідження предмета і методів каноніко-правового регулювання додатково підкреслюють специфіку канонічного права.
**Ключові слова:** канонічне право, правова система, каноніко-правове життя, каноніко-правове регулювання, метод акривії, метод ікономії.

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## ПОНЯТИЕ И ОСОБЕННОСТИ ПРАВОВОЙ СИСТЕМЫ КАНОНИЧЕСКОГО ПРАВА

**Аннотация**
Статья посвящена проблеме определения статуса канонического права в категориях современной юриспруденции. Каноническое право определяется как самостоятельная персональная правовая система. Изучение структуры канонико-правовой системы в контексте юридической компаративистики позволяет установить наличие у нее всех необходимых признаков правовой системы. Результаты исследования предмета и методов канонико-правового регулирования подчеркивают специфику канонического права и являются дополнительным подтверждением обосновываемого тезиса.
**Ключевые слова:** каноническое право, правовая система, канонико-правовая жизнь, канонико-правовое регулирование, метод акривии, метод икономии.

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# UKRAINIAN CRIMINAL CODE AS A LEGAL NECESSITY AND POSSIBLE WAYS TO IMPROVE ITS EFFICIENCY

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Article deals with the necessity of legislative imposition of criminal prohibition and criminal liability as the only contemporary justified reaction form to some types of deviant behaviour. It is mentioned that Ukrainian Criminal Code could be less voluminal, and by introducing elements of restorative justice and the criminal misdemeanour it could become more efficient. Stability is not a characteristic feature of the Ukrainian Criminal Code because amendments to it are introduced on a highly regular basis and are often chaotic. Ukrainian Criminal Code can be efficient without the necessary portion of dynamism.
**Keywords:** criminal liability, criminal code, necessity of criminal law, dynamics and stability of criminal law, efficiency of criminal code.

There has never been and probably shall not be a time in human history when the state (or other similar structure) will refrain from using criminalization and penalization in general. This is obvious when we understand criminality as a natural part of human behaviour. As deviant activity will always be a part of human behaviour respective criminal measures will also have to exist. Therefore, society needs to have criminal legislation as a measure to treat criminal acts. Of course, one may ask why should this be specifically criminal legislation, or may it be any other form of social control? Sure, it can be other. However, society did not work out so far any other which is also that strong and understandable to people as the criminal legislation.

It is hardly arguable that one of the primary challenges of any society is to insure people obey laws vital for public security and safety as well. Amidst the multitude of social control methods criminal responsibility stands separately as the harshest one and as *ultima ratio*. Understandably, the criminal legislation envisaging such criminal responsibility should be i) utmost definite and clear in wording; ii) reasonably stable and dynamic;

iii) efficient, i.e. sustaining crime level at a minimum adherent to security and safety of the society.

Acting Ukrainian Criminal Code (UCC) was enforced in September, 2001 and at the moment of its adoption contained 447 articles. Having not yet reached its 15-th anniversary the UCC can be generally characterized by the following pejorative notions: i) flawed wording; ii) instability; iii) low efficiency, etc. Moreover, the UCC's contents are often so sophisticated that even specialists find it problematic to interpret. Current trends in criminalization and criminal policy are often intertwined and hence it complicates the process of criminal norms application. Mentioned conclusions are worth a lengthy and a profound research, however in this thesis we shall restrain only to their short summary.

First of all – we need a criminal code. Criminal law in any formalized condition is a *sine qua non* attribute of the state which is created by people's necessity to live together. Criminal law is an artefact produced by people as an idea of due conduct. It is commonly treated by people as a viable, generally approved and sought-after institute. Current frustration in efficiency of the acting UCC is understandable once glancing at the increasing registered crime level. According to the Ukrainian Ministry of Internal Affairs and the Prosecution Office Statistics, since 2009 till present days we have an increase in registered crime of about 5-15% per year. Therefore, in the circumstances of little efficiency of the criminal justice system based on current UCC, we are forced to look for alternative measures in criminal justice system which might help to increase its efficiency and help to deal with the criminal justice bodies overload. For instance, based upon the European experience, it can be the restorative justice concept. Nevertheless, restorative justice as a concept shall not replace the ordinary criminal justice, but rather complement it.

Secondly, Ukrainians live in the area which is originally named the Slavic one, and typically are Slavic. If we go back to those times we can find out that Slavic used to live in accordance with the "Kon" as the divine verity and set of divine rules for slavics. They knew the real and natural laws of the universe. After slavics stopped living according to "Kon", they began to live in accordance with "ZaKon" which means "beyond the verity of Kon". Since those times, supposedly, we have the "zakon" (in Ukrainian – "legal act") as the secondary set of rules which in its core has no connection with divine verity, and therefore can't be either perfect, or fully true.

Every year UCC as the "zakon" is amended several times in order to make the legal regulation better. However, striving to make a perfect Criminal code is senseless in its core. We shall never draft a law, especially a criminal one, fully meeting the purpose of its passing. We can only try to make this "zakon" more effective, which means that the crime level will be as low as it is possible in society so that law-abiding citizens feel safe.

Thirdly, the legislator should care about what criminal laws they pass and use here a scientific, but not political approach. Just as Oscar Wilde's play "The Importance of Being Earnest" is a farcical comedy in which the protagonists maintain fictitious personae in order to escape burdensome obligations[1], the same way Ukrainian legislators in their effort to maintain social order mostly often spontaneously adopt criminal law norms as the last resort when they can't achieve any positive effect using other methods of social control. As Graham Parker [1, p. 34] notes, panic was often the major ingredient in formulating new laws which were hurriedly passed to prevent (or try to prevent) some currently urgent problem. This idea is maintained by many Ukrainian scientists. Namely, Professor V. Tulyakov [2, p. 5] emphasized that more than a half of changes to the Ukrainian Criminal Code had such a voluntaristic scent.

Fourthly, we should make sure UCC is reasonably stable. According to the recent research of Professors V. Tatsiy, V. Tyutyugin, V. Borisov (June, 2010) [3, p. 12], amendments to the UCC from the moment of its adoption were excessive. Since September 1, 2001 changes to different UCC's norms were made 242 times. The number of UCC's articles was increased by 36 up to 480 existing now. There were changed and amended 198 articles, which makes up 44% of the total number of articles in the first passed UCC edition. We can conclude that every month 2 or 3 of the UCC's norms is novelized.

UCC is somewhere in the middle according to the number of norms it incorporates. However, it may be sound to look at experience of other countries, whose criminal codes are not that voluminal, i.e. Germany (358 articles in CC), Norway (1902) (436 articles in CC), Poland (363 articles in CC), Russia (360 articles in CC), Turkey (342 articles in CC)[2].

Of course, UCC should be dynamic to meet the needs of the society and maintain its efficiency. But constant chaotic and exuberant changes lead to complexity in understanding. This also proves our previous thesis on excessive use of criminal repression by legislator as simple, but not necessarily the most efficient measure.

Fifthly, UCC should be understandable to be applicable. Most Ukrainian scientists cite that in the circumstances of multiple changes to the UCC, it is hardly possible to chase after them, let alone i) plan any effective long-term crime combating policy; ii) provide for stable and certain investigation and court practice; iii) be understandable for ordinary people.

Sixthly, UCC should be based on a relevant ideology. Existing UCC ideology, according to Professor V. Tulyakov [2, p. 6], remains neoclassical with positivist and sociological law school elements, despite the changing social, economic, political and legal surrounding. And even though restorative approaches are gaining more weight. Future ideology of the UCC should be based on Ukrainian law tradition, Slavic customs and mentality, a sound mixture of retributive and restorative approaches.

Seventhly, we can ease the criminal justice system overload and criminalization of society by introducing the felony/misdemeanour distinction in criminal legislation, and therefore make the strictly criminal felonies list as short as possible. The adopted in 2008 Criminal Justice System Reforming Concept[3] provides for introducing in Ukraine a

[1] http://en.wikipedia.org/wiki/The_Importance_of_Being_Earnest
[2] http://legislationline.org/documents/section/criminal-codes
[3] http://zakon.rada.gov.ua/cgi-bin/laws/main.cgi?nreg=311%2F2008

felony/misdemeanour distinction. Namely, crimes of minor degree at present are supposed to become criminal misdemeanours, crimes of more severe degrees will remain as felonies. This seems to be a reflection of the European countries' criminal law tradition, e.g. France, Germany, etc. However, since the introduction in 2012 of the felony/misdemeanour division in Criminal Procedural Code of Ukraine nothing else was further incorporated in the UCC. Therefore, today at the end of 2015 we have no misdemeanour de facto.

Eighthly, UCC should be efficient. Efficiency of the criminal justice system can be judged by at least two criteria: i) social security and safety, utmost low crime level and lessening number of habitual criminals; ii) reasonable expenses of the taxpayers to subsist it.

Should there formally be fewer crimes, than there will be less criminals and evident registered crimes. Retributive and restorative approaches combination in the criminal law method will most likely help to meet the challenge of reducing criminal conduct and changing criminal behaviour. Purely retributive model perpetuates a system that is compounding the very problem it is there to solve, and we are heaping expense upon a taxpayer in an exponential or compounding way with no qualitative result. It can become a "runaway train" for the budget as seen in the USA, where States are known to allocate more for prisons than for education of children [4, p. 3-4]. Expenses to subsist criminal justice should be reasonable, depending on the qualitative condition and sphere of its application.

Lastly, as mentioned above, UCC should be reasonably short, well-composed, stable, understandable, based on the existing ideology and law tradition, based on scientific research, efficient.

The mentioned guidelines for improving the UCC are suggested preliminarily. Further research is a must for further adequate and thorough suggestions in this sphere. Otherwise, voluntary changes will turn out again to be deceptively ambitious.

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## КРИМІНАЛЬНИЙ КОДЕКС УКРАЇНИ ЯК ЗАКОНОДАВЧА НЕОБХІДНІСТЬ ТА ШЛЯХИ ПІДВИЩЕННЯ ЙОГО ЕФЕКТИВНОСТІ

**Анотація**
У статті розглядається питання необхідності законодавчого встановлення кримінально-правової заборони та кримінальної відповідальності як єдиної на теперішній час виправданої форми реагування на прояви окремих видів девіантної поведінки. Встановлено, що КК України міг би бути меншим за обсягом, а шляхом інтродукції кримінального проступку, елементів відновного правосуддя можна було б також підвищити його ефективність. Вказано, що стабільність не є характерною рисою КК України, так як зміни до нього вносяться доволі регулярно та часто, на жаль, носять доволі хаотичний характер. Разом з тим, ефективним КК України не може бути без певної міри динамізму.
**Ключові слова:** кримінальна відповідальність, кримінальний кодекс, необхідність кримінального закону, динамізм та стабільність кримінального закону, ефективність кримінального кодексу.

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## УГОЛОВНЫЙ КОДЕКС УКРАИНЫ КАК ЗАКОНОДАТЕЛЬНАЯ НЕОБХОДИМОСТЬ И ПУТИ ПОВЫШЕНИЯ ЕГО ЭФФЕКТИВНОСТИ

**Аннотация**
В статье рассматривается вопрос о необходимости законодательного установления уголовно-правового запрета и уголовной ответственности как единственной на сегодняшний день оправданной форме реагирования на проявления некоторых видов девиантного поведения. Установлено, что УК Украины мог бы быть меньшим по объему, а путем интродукции уголовного проступка, элементов восстановительного правосудия можно было бы также повысить его эффективность. Указано, что стабильность не является характерной чертой УК Украины, так как изменения в него вносятся с завидной регулярностью и часто, к сожалению, носят весьма хаотичный характер. Вместе с тем, эффективным УК Украины не может быть без определенной доли динамизма.
**Ключевые слова:** уголовная ответственность, уголовный кодекс, необходимость уголовного закона, динамизм и стабильность уголовного закона, эффективность уголовного кодекса.

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# CHALLENGES OF INNOVATION COMMERCIALIZATION IN THE ACTIVITIES OF HIGHER EDUCATION INSTITUTES AND SCIENTIFIC ESTABLISHMENTS IN UKRAINE

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The problems faced by Ukrainian higher educational establishments (universities) and research institutions on the way of the creation of innovations and their subsequent commercialization were investigated. The provisions of the new Law of Ukraine „On Higher Education" in the context of fostering innovation activities in higher educational institutions were analyzed. Positive improvements in the legislation of Ukraine caused by modern social needs, in particular as to preparation of competitive human capital for high-tech and innovation development of the country were marked. Deficiencies in the legal regulation of protection of intellectual property rights to the results of innovation activities were identified. Some suggestions for capabilities of solving the investigated challenges in the field of innovation activities were given.
**Keywords:** innovation activities, scientific and technical activities, research universities, innovation structures, innovative products, innovative development, intellectual property, intellectual property rights protection, fostering innovation activities, results of innovation activities, commercialization, higher education, public sector.

**Formulation of the problem.** Nowadays, it is difficult to overestimate the importance of commercialization of innovation because the successful commercialization is one of the main sources of financial support of innovation activities. In turn, active innovation activities are the key to economic development of the country. Unfortunately, in the way of innovations in Ukraine the scientists face certain problems, which overcoming should be a priority for the government in order to stimulate innovation activities. In this respect, the adoption of the new Law of Ukraine "On Higher Education" on 01.07.2014 having led to amendments in other normative legal acts is important.

**Analysis of recent research and publications.** The scientific literature has recently paid enough attention to the matters of innovation activities in higher educational establishments and research institutions, in particular, the principles of innovative development of higher educational establishments, the background and mechanisms of development of innovation activities in universities, innovation infrastructure of higher education establishments, sources of financing the research and innovation activities of research universities etc. are investigated. These and other issues are highlighted in the scientific works by M. Butko, I. Vysochyna, I. Hanechko, S. Hubarkova, O. Grishnova, I. Dezhyna, M. Zgurovskyi, G. Klimova, O. Kuklin, O. Popelo A. Mazaraki, S. Reznikov, S. Tulchinska, V. Fedorenko, L. Fedulova, N. Chukhrai and colleagues. At the same time, the matter of identifying factors that hinder innovation activities in the public sector in Ukraine that exist after the recent changes made to the legislation is of current interest.

**Selection of the unsolved aspects of the general problem.** The article analyzes the number of problems that hinder the development of innovative development of a state. In particular, the emphasis on a great importance of defence and protection of intellectual property rights to the results of innovation activities is made. Understanding the basic problems faced by scientists and scientific institutions in Ukraine will provide an opportunity to identify areas to overcome them in order to stimulate development of innovations.

**Article objective.** The main objective of this work is investigation and analysis of the main factors that are barriers to the way of commercialization of innovations by higher educational establishments and scientific institutions in Ukraine.

**Presenting main material.** The aim of commercialization is profit earning through own use established intellectual property or granting permission for its use to other persons or transfer of exclusive intellectual property rights (alienation).

Traditionally, the main methods of commercialization include:

- use of intellectual property in own activities;
- granting permission for use of intellectual property by other persons;
- making of intellectual property as contribution to the authorized capital of the legal entity;
- transfer of exclusive intellectual property rights (alienation).

All over the world, much attention is paid to the issue of innovation commercialization of higher education institutes and scientific establishments, because it is one of the main sources of the financial support of innovation activities. Thanks to the successful commercialization of previous innovation, the higher education institute receives the necessary funding for further researches and creation of new innovations.

Until recently, Ukrainian legislation contained a number of provisions and gaps that strongly hindered development of the innovation activities of the higher education institutes rather than their stimulating.

The situation has changed dramatically due to the adoption of new Law of Ukraine „On higher education" N 1556-VII (hereinafter referred to as „Law") on 01.07.2014. At least for the legislative strengthening of the fundamentals and incentives for the possible innovative development of the higher education institute.

The law established the basic legal, organizational and financial principles of the higher education system functioning, the conditions for in-

creased cooperation of the public authorities and businesses with higher education institutes on the principles of autonomy of higher education institutes and combining education with science and production are created. The adoption of the mentioned law was caused by the current social needs, in particular those referred to preparation of the competitive human capital for high-tech and innovation development of the country.

The law introduced a series of innovations that are designed to improve the financial and economic autonomy of higher education institutes that will promote development of the initiatives in researches and will enable to commercialize the innovation activity.

The main innovations of the new Law in the sphere of regulating the relations concerning the intellectual property and innovation activity are:

- expanding the autonomy of higher education institutes (autonomy, independence and responsibility of the higher education institute in decision-making) and academic freedom of the participants of educational process (autonomy and independence of the participants of the educational process in the implementation of educational, scientific-educational, scientific and / or innovation activities) (Article 3 of the Law);
- stimulating the formation of research and national universities (Article 30 of the Law);
- state support for the educational, scientific, scientific-technical and innovation activities of the universities, academies, institutes, colleges, including through the provision of benefits from payment of taxes, duties and other compulsory payments to the higher education institutes, which implement such activity (Article 3 of the Law) and economic promotion of enterprises of different ownership to cooperate with higher education institutes for implementation of the research and innovation projects (Article 67 of the Law);
- allocation of intellectual property rights on the objects of intellectual property rights, created at the expense of the public funds or funds or higher education institutes for the scientific establishment – executor of appropriate forms (types) of scientific-technical activities (Article 70 of the Law);
- involvement of scientific societies of students (cadets, attendees), graduate students, doctoral students and young scientists in protection of the rights and interests of persons who are studying or working in higher education institutes, particularly concerning the research activities, support of high-tech ideas, innovations and knowledge sharing (Article 41 of the Law).

The autonomy of higher education institutes in the field of innovation activity is provided by granting the following rights:

- ownership of the objects of intellectual property rights created at the expense of their own funds or funds of state or local budgets (except cases stipulated by law) (Article 70 of the Law);
- right to create own or contracted use of other material and technical resources for carrying out educational, research, innovation or economic activity (Article 70 of the Law);
- right to participate in forming the authorized capital of innovative structures and small-scale entities established with contributions from higher education institutes, which develop and introduce innovative products, through the contribution of intangible assets (property rights on the objects of intellectual property) (Article 70 of the Law);
- right to establish enterprises for conducting innovation and / or production activities (Article 70 of the Law);
- right to participate in the formation of authorized capital of innovative structures of various types (scientific, technological parks, business incubators, etc.) by contributing the intangible assets (property rights on the objects of intellectual property) (Article 70 of the Law);
- right to be a founder (co-founder) of other legal entities that carry out their activities in accordance with the directions of educational-scientific-production, innovation activities of the higher education institute and / or enforce its statutory objectives (Article 27 of the Law);
- right to dispose of the property rights on the objects of intellectual property rights. The objects of the intellectual property shall be assessed. According to the result of evaluation, their cost shall be reflected in the accounting of the higher education institute in the manner prescribed by law (Article 69 of the Law), and so on.

The ability to commercialize the results of researches is identified as one of the criteria to receive the status of the research university. Research universities will have more autonomy, more public funding and guarantees of public order. In particular, the higher education institute with the status of research one has a preferential right to receive the public order for training specialists of Ph.D. – up to 20 percent of the number of holders of a master's degree, who studied at the expense of the state budget in such higher education institute (Article 72 of the Law).

Thus, the universities will be interested in commercializing the results to get the status of research universities.

The Law became the starting point for fundamental changes in the system of higher education and research activities. Thus, on November 25, 2015 Verkhovna Rada adopted the Law of Ukraine „On scientific and scientific-technical activity" which due to fundamental and innovative changes created a platform for the development of scientific and scientific-technical activities in Ukraine. This law recognized the need for motivation (incentives and encouragement) of young scientists, incentives for the work of the researchers; established economic, social and legal guarantees of scientific and scientific-technical activities, freedom of scientific creativity; recognized the need of state's establishment of the modern scientific infrastructure and system of information support of the scientific and scientific-technical activities, integration of education, science and production. The Law of Ukraine "On scientific and scientific-technical activity" is newly adopted, and therefore we can't fully determine the effectiveness of implemented mechanisms for encouragement of scientific, scientific-technical and innovation activities in terms of practical implementation of the law. But today, due to borrowing the positive international experience, at least Ukraine has the necessary legislative

foundation to encourage commercialization of the results of innovation activities by the higher education institutes.

Unfortunately, despite the positive changes in legislation, in reality the higher education institutes are facing the same problems of creation of innovations and their commercialization as before. This is explained as follows:

- too short time has passed from the moment of adoption of the new law „On higher education" (even not all the provisions of the Law came into force according to the Final and transitional provisions);

- need for amendments to other regulations in order to bring them into conformity with the Law of Ukraine „On Higher Education" and the Law of Ukraine „On scientific and scientific-technical activity" as well as ensuring the implementation of these laws;

- need to specify certain provisions of the Laws (including Part 4 of Art. 67 of the Law of Ukraine "On Higher Education", which refers to the state's economic promotion of enterprises of different ownership to cooperate with higher education institutes for implementation of the research and innovation projects, training and retraining of the specialists with higher education, practical training of the students);

- lack of budget funds in the amount necessary for funding the creation (updating) of the material and technical resources of higher education institutes for implementation of the scientific, scientific-technical and innovation activities and the creation of decent wages for employees engaged in scientific, scientific-technical and innovation activity at the European level.

**The main challenges of creating innovations and their further commercialization** are highlighted in Article 7 of the Law of Ukraine "On fundamentals of the National Security of Ukraine" dated 19.06.2003 N 964-IV (as amended) as a threat to national interests and national security of Ukraine, namely: ineffective state innovation policy, mechanisms to encourage innovation activity; decrease in the domestic demand for training of scientific and technical personnel for scientific, engineering, technological institutions and high-tech enterprises, poor payment level of scientific and technical work, drop of its prestige, inadequate mechanisms for the protection of intellectual property rights; critical state of fixed assets in leading industries, agriculture, life-support systems.

Much of the challenges of commercialization relates to the intellectual property right on the results of innovation activity. In a complex set of the objects of intellectual property rights the crucial role in the field of innovation activity is given to the objects of patent rights (inventions, utility models, industrial designs), plant varieties, animal breeds, software, trade secrets (know-how). These are the objects with which the main problems of commercialization are associated.

The availability of protection document for the object of intellectual property plays equally important role for the commercialization of the results of innovation activity. For example, the presence of patent creates a safe environment for disclosure of the results of innovative researches, promotes investments, technology transfer, obtaining commercial advantage, serves towards advertising purposes, etc. Depending on the object of intellectual property rights, there are two main types of protection documents: patent and certificate, each of which has certain period of validity. According to the laws of Ukraine, the longest period of legal protection provided to the objects of copyright is seventy years starting from January 01 of the year following the year of death of the author or the last of the authors, and the shortest term set for topographies of integrated microcircuit and utility models is 10 years from the date of filing the relevant application.

As for the other objects of patent law, the legislation established the following terms of validity of exclusive intellectual property rights, namely

- Invention – twenty years counted from the date of filling an application for an invention in the manner prescribed by law. This period may be extended in the manner prescribed by law in respect of the invention, the use of which requires special testing and official authorization;

- Industrial design – fifteen years as from the date of filing the application for the industrial design in the manner prescribed by law.

**Process of getting certain types of protection documents is rather long-term (inventions) and requires financing.** According to the data given in Recommendations of hearings of the Committee of the Verkhovna Rada of Ukraine on science and education matters «*Intellectual Property in Ukraine. State and conceptual foundations of development*» (Minutes № 13 dated June 17, 2015) in the 2013, the national applicants filed nearly 13 000 applications for inventions and utility models. However, due to non-payment of fees for maintenance of validity of the patents for inventions and utility models, 9,8 thous. patents of the national owners (75%) were invalidated!. Herewith the average term of consideration of applications before issuing the patent is about 2 years.

The availability of the protective document for the object of intellectual property right is a favourable condition for its commercialization. First, the protective document certifies whom exactly the exclusive intellectual property rights to this object belong. Secondly, as to the objects of intellectual property rights passing qualification examination (eg an invention), the protective document certifies the compliance of such object with the terms of providing legal protection. One should not forget herewith that the successful registration of intellectual property right to the results of the innovative research is not a guarantee of its successful commercialization. The commercial success of innovative research depends largely on further actions on the part of businesses representatives. Unfortunately, a significant number of patents is "covered with dust" on the shelves without the implementation of research results described therein (remaining at the level of scientific developments). But even in this case, the patent is good for the state, because the patent system contributes to the process of invention, sharing of knowledge and information through publication of description of the patent and enabling any person to get acquainted with the application materials. Moreover, accord-

ing to Art. 467 of the Civil Code of Ukraine in case of termination of exclusive intellectual property rights to an invention, utility model, industrial design these objects can be freely used by any person, that is, they pass into the public domain.

Nowadays in Ukraine, despite the legislative consolidation, **in reality there are no incentives (motivation) for scientific and technical staff on the creation of intellectual property rights in the public sector.** This is due to a poor level of remuneration of researchers and symbolic compensation in the case of creation of intellectual property object, and therefore non-attractiveness of such work. It relates the problem is leakage of native applications for promising inventions from Ukraine. Some of the potentially significant inventions, namely the results of innovation activities, are applied directly to the patent offices of foreign countries without previous submitting the applications to the Patent Office of Ukraine and obtaining an appropriate permission. That is, uncontrolled transfer abroad of scientific developments goes on.

Moreover, there is **the problem of intellectual property rights belonging**. Certainly, the researcher (creator, inventor, author) will possess all personal intellectual property rights to the object created by him/her, namely, the right to his/her recognition as the creator; the right to prevent any interference with intellectual property that can be prejudicial to the honour or reputation of the creator of intellectual property right object. Thus, in accordance with the laws of Ukraine the researcher has little chance to acquire the intellectual property right to the object. For example, the Article 17 of the Law of Ukraine „On Scientific Parks" dated 25.06.2009 N. 1563-VI (as amended and altered), for example, does not directly stipulates that property rights to technologies and intellectual property right objects created during implementation of scientific park projects, are owned by the national park and / or its partners.

In cases where intellectual property objects are created by employees of the higher educational establishments not within the framework of scientific parks, the provisions of the Part. 2, Art. 429 of the Civil Code of Ukraine are applied, namely: „intellectual property rights to the object created in connection with the fulfilment of the employment contract shall belong to the employee, who has created this object, and a legal entity or natural person where or for whom he/she works jointly, unless otherwise provided by contract". In practice, the contracts between the higher education establishment and its employees contain a provision according to which intellectual property rights to created objects belong to the employer. According to Art. 69 of the Law of Ukraine „On Higher Education" higher educational establishments have the right to dispose of intellectual property rights to the objects of intellectual property rights. The Law herewith does not contain a provision that defines the possibility of acquiring the intellectual property rights to the created object by its creator.

If the object of intellectual property is created by order of the involved person (one that is not employed by a higher education establishment), the provisions of Part 2, Art. 430 of the Civil Code of Ukraine are applied, namely: „intellectual property rights to the object created by order shall belong to the creator of this object jointly with the customer, unless otherwise provided by contract". Again, as a rule, this kind of contracts contains a clause about belonging of such rights to the customer.

This objectively reduces the interest of researchers in the results of their own work and cannot fully turn intellectual property into commercial circulation. However, the creators of intellectual property are capable to take care effectively of the results of their work based on private property.

The experience of Sweden is quite appropriate for use in this regard. Unlike Ukraine, in the case of creation of an intellectual property object the property rights to it belong to its creator, not the higher educational establishment on which the object was created. A similar provision applies to objects created with public funds. Thus, all parties (creator, higher education establishment and state) are interested in the commercialization of this object.

The following matter is related to **the lack of effective mechanisms to protect intellectual property rights**. Violation of intellectual property rights is different, namely it is the abduction of scientific developments and the unauthorized use of intellectual property rights, and the failure to fulfil the terms of agreements on disposal of intellectual property rights and so on.

Prevalence of violations of intellectual property rights is primarily associated with the specific of the intellectual property rights. Due to immateriality of such object, intellectual property rights to it may be simultaneously violated in different ways by an unlimited number of persons who are in different parts of the globe.

The main difficulty in protecting intellectual property rights are related to the problem of determining (establishing) the offender, evidencing, determining the volume of damages, preservation of evidences, seizure and destruction of infringing goods, materials and tools, etc. Similar problems arise in the case of an appeal to the law enforcement agencies.

The matter of intellectual property rights protection is essential, as it contributes to encouraging the investment to innovation developments and, accordingly, commercialization of the research results.

Another problem related to intellectual property rights in the field of innovation activities **is the lack of the modern market of intellectual property rights**. To ensure transfer of technologies the constant exchange of information between participants in the innovation process is necessary. Internet-exchange of industrial property created by the Ukrainian Centre of Innovations and Patent Information Services helps to solve this matter. However, effective exchanges of government support in this matter.

Thus, improving the efficiency of legal regulation of relations in the field of creation and use of intellectual property objects to the research results is essential to the development of innovative processes in the country. World experience shows that

the productive system of protection and defence of intellectual property rights can be an effective tool to stimulate innovation development in the country.

**Conclusions and suggestions.** Summarizing all above-mentioned information, it should be noted that the main problems of commercialization of innovation are associated with defence and protection of intellectual property rights to the results of innovative activities, as well as lack of necessary motivation for employees of the higher educational establishments and research institutions. Possible steps towards solving these problems can be balanced and systematic improvement of legislation on the protection of intellectual property rights; creation a single platform for higher educational establishments and research institutions of Ukraine with government support in order to inform about the results of their innovation activities and looking for investors; reviewing the size of salaries and remuneration paid to the employee in the case of creation of intellectual property object.

The adoption of the Law of Ukraine „On Higher Education" is very essential to the development of innovation activities of the higher educational establishments, because favourable foundation was laid to that effect. This is a big step for domestic science. Finally, Ukraine adopted the positive experience of European countries as to stimulation of innovation activities of the universities. However, it takes some time until the legal principles laid down by the Law are implemented and problems of innovation development can be resolved.

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## ПРОБЛЕМИ КОМЕРЦІАЛІЗАЦІЇ ІННОВАЦІЙ В ДІЯЛЬНОСТІ ВИЩИХ НАВЧАЛЬНИХ ЗАКЛАДІВ ТА НАУКОВИХ УСТАНОВ В УКРАЇНІ

**Анотація**
Досліджено проблеми з якими стикаються українські вищі навчальні заклади та наукові установи на шляху створення інновацій та їх подальшої комерціалізації. Проаналізовано положення нового Закону України «Про вищу освіту» з точки зору стимулювання інноваційної діяльності у вищих навчальних закладах. Відмічені позитивні зміни у законодавстві України обумовлені сучасними суспільними запитами, зокрема, щодо підготовки конкурентоспроможного людського капіталу для високотехнологічного та інноваційного розвитку країни. Виявлені недоліки у правовому регулюванні захисту прав інтелектуальної власності на результати інноваційної діяльності. Надані окремі пропозиції щодо можливостей вирішення досліджених проблем у сфері інноваційної діяльності.
**Ключові слова:** інноваційна діяльність, науково-технічна діяльність, дослідницькі університети, інноваційні структури, інноваційна продукція, інноваційний розвиток, інтелектуальна власність, захист прав інтелектуальної власності, стимулювання інноваційної діяльності, результати інноваційної діяльності, комерціалізація, вища освіта, державний сектор.

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## ПРОБЛЕМЫ КОММЕРЦИАЛИЗАЦИИ ИННОВАЦИЙ В ДЕЯТЕЛЬНОСТИ ВЫСШИХ УЧЕБНЫХ ЗАВЕДЕНИЙ И НАУЧНЫХ УЧРЕЖДЕНИЙ В УКРАИНЕ

**Аннотация**
Исследованы проблемы, с которыми сталкиваются украинские высшие учебные заведения и научные учреждения на пути создания инноваций и их дальнейшей коммерциализации. Проанализированы положения нового Закона Украины «О высшем образовании» с точки зрения стимулирования инновационной деятельности в высших учебных заведениях. Отмечены положительные изменения в законодательстве Украины, обусловленные современными общественными запросами, в частности, по подготовке конкурентоспособного человеческого капитала для высокотехнологичного и инновационного развития страны. Выявлены недостатки в правовом регулировании защиты прав интеллектуальной собственности на результаты инновационной деятельности. Предоставлены отдельные предложения относительно возможностей решения исследованных проблем в сфере инновационной деятельности.
**Ключевые слова:** инновационная деятельность, научно-техническая деятельность, исследовательские университеты, инновационные структуры, инновационная продукция, инновационное развитие, интеллектуальная собственность, защита прав интеллектуальной собственности, стимулирование инновационной деятельности, результаты инновационной деятельности, коммерциализация, высшее образование, государственный сектор.

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# APPLICATION TO THE EUROPEAN COUNRT OF HUMAN RIGHTS AS INTERNATIONAL LEGAL INSTRUMENT FOR PROTECTION OF UKRAINIAN STATE INTEREST

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This article is devoted to the characteristics of inter-State application to the European Court of Human Rights as a legal means of State's interest protection according to Article 33 of the European Convention for the Protection of Human Rights and Fundamental Freedom. This mechanism of protection of State's interest is applied to cases when one of the Member States violates its obligation under the named Convention. Particular attention in this article is paid to the recent inter-State applications submitted by Ukrainian Government to the European Court of Human Rights against the Russian Federation, namely, *Ukraine v. Russia, Ukraine v. Russia (II), Ukraine v. Russia (III), Ukraine v. Russia (IV).* Brief factual background and main provisions of Convention that are claimed to be violated by the Russian Federation are outlined in this paper.
**Keywords:** inter-State application, European Court of Human Rights, legal measures of protection of State's interest, inter-State disputes, territorial integrity.

In terms of the conflict in the eastern part of Ukraine, the Government decided to defend interests of Ukraine and its people by available legal means, including inter-State applications to the European Court of Human Rights (hereinafter – the Court). This article is devoted to the study of international legal means of protection of States' interests in treaty bodies of the Council of Europe and to the characteristics of interstate applications filed by the Government of Ukraine to the Court concerning violation of certain provisions of the Convention by the Russian Federation. This paper mainly focused on disclosure of practical aspects of protection of Ukrainian national interests and rights of its population through existing legal mechanisms.

By ratifying European Convention on Human Rights and Fundamental Freedoms (hereinafter – the Convention) [1] Member States agreed to the compulsory jurisdiction of the European Commission of Human Rights to review inter-State applications filed against violators of the provisions of the Convention [2, p. 201]. Consequently, with the beginning of functioning of the Court, member States agreed on compulsory jurisdiction of this Court which operated to ensure compliance by Member States with the Convention and its Protocols.

Each Member State is part of the mechanism that guarantees collective human rights protection. Article 33 of the Convention prescribes the right of States to apply to the Court against violators of the provisions of the Convention with the aim of ensuring the implementation of the Convention and the general protection of public order in Europe. This right is not limited only to cases concerning protection of the rights of persons who are nationals of the State appealing to the Court. According to the Convention, State is entitled to apply concerning violations of the rights of a person who is not a citizen of any Member State, or even regarding violations of the rights of persons who are nationals of a defendant State. In fact, for the submission of inter-State application the presence of the threat that provisions of Convention are likely to be affected by the State is enough. Hence, the presence of threat to any particular person is unnecessary [3, p. 64].

From theoretical analysis the right to inter-State application reminds *actio popularis*. The case of inter-State application does not require the presence of 'victims' status of the applicant State. If it is a case, the Court has broad *ratione personae* jurisdiction under article 33 of the Convention. When the Government complains against legislative or administrative practices of another State, assertion of the existence of a particular victim of Convention's violation is not necessary [4, p. 166-167]. In such circumstances there is sufficient probable violation of rights guaranteed by the Convention. The following example illustrates this position: in the case of *Ireland v. The United Kingdom* in 1978 the Court found that 'violation' is a result of the existence of the law which introduces, directs or permits measures that do not meet the requirements of the protection of rights and freedoms ..." [5]. In 2001, in the case of Cyprus v. Turkey the Court again applied and maintained this position [6].

Member States rare resort to inter-State applications due to political risks. Inter-State application to the Court is not a common practice and usually concerns the large-scale violations of the Convention that occur, for example, due to conflict between States or implementation by a particular State of policy that is clearly discriminatory against citizens of another State. That is why until 2014 only 16 inter-State applications were submitted to the Court.

Defending the interests of the State and its people, according to Article 33 of the Convention 'Inter-State Cases', the Government of Ukraine was lodged with the Court several inter-State applications: 'Ukraine v. Russia' (application N 20958/14), 'Ukraine v. Russia (II)' (application N 43800/14), 'Ukraine v. Russia (III)' (application N 49537/14) and 'Ukraine v. Russia (IV)' (application N 42410/15).

Along with lodging applications to the Court, Ukrainian Government referred for the purpose

to take all possible and available means of protection, also appealed to the Court under Rule 39 of the Rules of the Court to grant instructions to the Government of the Russian Federation to refrain from any actions that could violate the rights of Ukrainian citizens. According to the Rule 392 of the Rules of the Court, the Chamber or, where appropriate, the President of the Section or a duty judge appointed pursuant to paragraph 4 of this Rule may, at the request of a party or of any other person concerned, or of their own motion, indicate to the parties any interim measure which they consider should be adopted in the interests of the parties or of the proper conduct of the proceedings. From the cited above Rule, the interim measures are obligatory and shall be taken immediately by the State.

In inter-State applications lodged by the Government of Ukraine, the Court granted the Government of Ukraine and the Russian Federation privacy guidelines, so it is possible to outline only the summary and short key points of applications.

Referring to brief discussion of essential points of each inter-State application of Ukraine against the Russian Federation, it is necessary to point out that now there are only three inter-State applications from Ukraine in the Court, namely, 'Ukraine v. Russia' (application N 20958/14), 'Ukraine v. Russia (II)' (application N 43800/14) and 'Ukraine v. Russia (IV)' (application N 42410/15).

The application 'Ukraine v. Russia' is the first application lodged by the Government of Ukraine on the basis of Article 33 of the Convention for the purpose to protect its people from the aggression of the Russian Federation in view of the events that began in the Autonomous Republic of Crimea from late February 2014 and is continuing to this day. This inter-State application was filed March 13, 2014 to prevent and avoid violations by the Russian Federation of the rights of persons permanently residing and temporarily staying in the Crimea and in Ukraine as a whole. This application is the most voluminous by the number of complaints. The Court accepted the application and this case gained a status of priority pursuant to Article 41 of the Rules of the Court.

The request of the Government of Ukraine was granted by the Court and pursuant to Rule 39 of the Rules of the Court guidance to the Government of Russian Federation and Ukraine was granted, namely, to refrain from taking any measures, including military action, by which treaty rights of the civilian population could be affected, including the creation of risk to lives and health, and obliged both States to comply with obligations under the Convention, particularly Article 2 and Article 3.

Later, on June 12, 2014 and November 20, 2014 the Government of Ukraine has sent to the Court a supplement to the filed on March 13, 2014 inter-State application concerning human rights violations caused by terrorist activities of illegal armed groups in the Donetsk and Lugansk regions.

In filed on June 13, 2014 inter-State application 'Ukraine v. Russia' and amendments thereto, Ukraine claims violation by the Russian Federation of the rights guaranteed by Articles 2 ('right to life'). In this inter-State application it is mentioned, in particular, the mass deaths of Ukrainian military and the civilian population as a result of illegal activity of special services of the Russian Federation on the Crimean peninsula, the separatists controlled by Russia and Russian military servants. Also it claims violation by the Russian Federation of the rights guaranteed by Articles 3 ('Prohibition of torture'), 5 ('right to liberty and security of person'), 6 ('right to a fair Court'), 8 ('Right to respect for private and family life'), 9 ('Freedom of thought, conscience and religion'), 10 ('Freedom of expression'), 11 ('Freedom of assembly and association') Convention Article 14 ('Prohibition of discrimination') of the Convention in conjunction with Articles 3, 8, 9, 10, 11 of the Convention and Article 1 ('Protection of property rights') of the First Protocol, Article 2 ('Freedom of movement') of the Fourth Protocol to the Convention.

On February, 26, 2014 when the Russian Federation started to take action aimed at establishing control over the entire territory of the Autonomous Republic of Crimea, which is an integral part of Ukraine, cases of grow massive violations of the rights of the civilian population of the Crimean peninsula, guaranteed by Article 3 ('Prohibition of Torture') have emerged. It was emphasized on the use of ill-treatment to people living in the Crimea and the Donetsk and Lugansk regions.

Government of Ukraine in the inter-State application noted on numerous facts of illegal arbitrary arrests and subsequent detention of citizens of Ukraine and foreigners on the Crimean peninsula and the Donetsk and Lugansk regions with the participation of Russian military and illegal armed groups. Among those detained and illegally imprisoned were different categories of persons, namely the representatives of civilians, journalists, both domestic and foreign, Ukrainian military, who were interrogated and subjected to physical violence and psychological pressure. Everything mentioned above constitute breach of the rights guaranteed by Article 5 ('Right to liberty and security') of the Convention.

In inter-State application Government of Ukraine stressed attention on violations by the Russian Federation of Article 6 ('Right to a fair trial') of the Convention due to the fact that the activities of national law enforcement and judicial authorities in the occupied territory of Crimea have been temporarily stopped. There have been cases of massive on granting preventive measures in respect of persons suspected in committing crimes, sentencing and other decisions under the criminal procedural law of the Russian Federation. It was emphasized that the functioning of courts on the Crimean peninsula, which are led by material and procedural legislation of the Russian Federation, has no legal basis and that such activities are contrary to Ukrainian legislation that applies and shall be effective in the Autonomous Republic of Crimea as an integral part Ukraine.

As for violations by the Russian Federation of rights on the Crimean peninsula guaranteed by Article 8 ('The right to respect for private and family life') of the Convention, the forced change of Ukrainian citizenship have took place for persons living on the Crimean peninsula as well as unauthorized, illegal house search, including Crimean Tatar population.

The following facts evidence violation of Article 10 ('Freedom of expression') of Convention, namely: massive cases of attacks, kidnappings of journalists, seizure of their photo and video equipment by the military under the supervision of the Russia Federation that created obstacles and impossibility for journalists to exercise their professional activities, and suspension of broadcasting of the Ukrainian TV channels and replacement them by Russian TV channels. At the time of submission by the Government of Ukraine of supplements to inter-State application, as on June, 12, 2014, cases of violations of the rights of Crimean Tatars, guaranteed by Article 11 ('Freedom of assembly and association') of the Convention, took place.

After the Russian Federation occupied Crimean peninsula there has been massive appointment of representative of Crimean Tatar to prosecutors and police offices of the Autonomous Republic of Crimea for interrogation. Initiation of criminal proceedings took place against Crimean Tatar. Broadcast of the Crimean Tatar TV channels and programs with representatives of the Crimean Tatar people have been prohibited as well as any action, dates and events that are historically important for Crimean Tatar. After annexation of Crimean peninsula by the Russia Federation more than 7,000 thousand Crimean Tatars were forced to leave this territory because of persecution and pressure on them. In general, it is a violation by the Russian Federation of Article 14 ('Prohibition of discrimination') of the Convention in conjunction with Articles 3 ('Prohibition of torture'), 8 ('Right to respect for private and family life of the Convention'), 9 ('Freedom of thought, conscience and religion'), 10 ('Freedom of expression'), 11 ('Freedom of assembly and association') of the Convention.

Furthermore, in addition to statements from inter-State application date June, 12, 2014 Ukraine declared that violation of Article 1 of Protocol 1 had place due to the "nationalization" by the Russian Federation of Ukrainian State property, located in the Autonomous Republic of Crimea. Submitted supplement containe, among others, the list of more than four thousand of entities which property was "nationalized" by the authorities of the Russian Federation.

'Ukraine against Russia (II)' is another inter-State application submitted by the Government of Ukraine and relates to the facts of the abduction of children by illegal armed groups 'DNR' and 'LNR'. For the first time the Government of Ukraine informed the Court about these facts on June, 13, 2014, when it became known that on June 12, 2014 terrorist of self-proclaimed "DNR" kidnapped orphans whose teachers wanted to take them out from the zone of the antiterrorist operation.

June 13, 2014 **through collaboration** between the Ministry of Justice and Ministry of Foreign Affairs of Ukraine the Government filed under Rule 39 of the Rules of the Court application on interim measures addressed to the Government of the Russian Federation. This application asked to order to the Russian Federation to refrain from taking any measures that can violate rights of orphans, including risk to their life and health, namely Articles 2 and 3 of the Convention. It was also claimed in this application to provide access of representatives of Ukrainian state bodies to abducted children while they are in the Russian Federation, and immediately return them to Ukraine. The Court granted to the Russian Federation instructions to return immediately children to Ukraine on the basis of Rule 39 of the Rules of the Court.

August 22, 2014 the Government of Ukraine submitted to the Court inter-State application against the Russian Federation 'Ukraine against Russia (II)' on cases as of June, 12, July, 26 and August, 8, 2014 of abduction orphans and children deprived parental care and adults who accompanied them in the Donetsk and Lugansk regions, and attempts of their illegal movement or actual movement them in the territory of Russian Federation. In inter-State application the Government of Ukraine stated violation by the Russian Federation of children and adults rights guaranteed by Articles 2 ('Right to life'), 3 ('Prohibition of torture'), 5 ('Right to liberty and security of person'), 6 ('Law to a fair trial'), 8 ('The right to respect for private and family life') of the Convention and Article 2 of the Fourth Protocol to the Convention, which guarantees the right to freedom of movement with the territory of the State.

November, 25, 2014 the Court communicated to the Russian Federation cases 'Ukraine against Ukraine' and 'Ukraine against Russia (II)' with the requirement to comment on the admissibility of the application prior March, 25, 2015. However, in March, 2015 the Government of the Russian Federation informed the Court about the need for additional time to prepare appropriate comments. Accordingly, the Court had set a new deadline for submission of comments on the admissibility of the case, namely the September, 25, 2015 based on the request of the Russia Federation dated March, 13, 2015. Later, on September, 10, 2015 the Court informed the Government of Ukraine about the request of the Russian Federation for additional time to prepare the comments on admissibility of inter-State application 'Ukraine against Russia (I)' and 'Ukraine against Russia (II)'. The Court agreed on this request of the Russian Federation and granted the deadline for submission on December, 31, 2015.

In addition the Government of Ukraine and **Ukrainian Helsinki Human Rights Union** simultaneously submitted to the Court under Rule 39 of the Rules of the Court application for the benefit of the son of the leader of the Crimean Tatars, social and political activist, Mustafa Dzhemilev, Haysera Dzhemilev, whose life and health is in danger.

The Court upon consideration of the application that was filed on July, 9, 2014, opened the proceedings 'Ukraine against Russia (III)' and July, 10, 2014 pursuant to Rule 39 of the Rules of the Court instructed the Government of Russia and Ukraine to ensure respect for the Convention rights of Haysera Dzhemileva, including respect for his safety and the right to legal aid.

Taking into account continuing violations by the Russian Federation of human rights of Haysera Dzhemileva guaranteed by Articles 2 ('Right to life'), 3 ('Prohibition of torture'), 5 ('Right to liberty and security of person') of the Convention, and taking a threat to its illegal export from Ukraine to the Russian Federation, September,

21, 2014 the Government of Ukraine repeatedly appealed to the Court requesting the application of Rule 39 of the Rules of the Court in the case 'Ukraine against Russia (III)'. In response, the Court informed that the Russian Federation was provided with guidance on the need for compliance with the Convention rights of Haysera Dzhemileva. Haysera Dzhemileva was illegally delivered to the Russian Federation, where he was illegally detained in jail.

In May 2015, in response to a letter from the Court, which reported that applications of the Government in 'Ukraine against Russia (III)' is identical to the application filed by defense in the interests Haysera Dzhemileva, the Government of Ukraine informed the Court that he wishes to act as a third party on the side Haysera Dzhemileva during the consideration by the Court of his individual application. This action does not mean that the Government refused the position to protect the interests of Mr. Haysera Dzhemilova, as the steps were designed to speed up its consideration of individual application by the Court, given that consideration of applications submitted under Article 33 of the Convention is longer.

On September, 24, 2015 at the official website of the Court the decision of the Court on application 'Ukraine against Russia (III)' N 49537/14 was published. In this decision it was stated that this case was removed from the Registry of the Court.

On August, 26, 2015 the Government of Ukraine prepared and submitted to the Court new inter-State application against the Russian Federation. New application relates to the claims of Ukrainian Government on violation by the Russian Federation of the rights of people living in the territory of Donetsk and Lugansk regions granted by the Convention, namely:

Article 1 ('Obligation to respect Human Rights');
Article 2 ('Right to life');
Article 3 ('Prohibition of torture');
Article 5 ('Right to liberty and security');
Article 6 ('Right to a fair trial');
Article 8 ('Right to respect for private and family life');
Article 9 ('Freedom of thought, conscience and religion');
Article 10 ('Freedom of expression');
Article 11 ('Freedom of assembly and association');
Article 18 ('Limitation on use of restrictions on rights');
Article 1 ('Protection of property') of the First Protocol to the Convention;
Article 2 ('Right to education') of the First Protocol to the Convention;
Article 3 ('Right to free elections') of the First Protocol to the Convention;
Article 14 ('Prohibition of discrimination') of the Convention in connection with Articles 3, 5, 6, 8, 9, 10, 11 of the Convention, Articles 1, 2, 3 of the First Protocol to the Convention and Article 1 ('General prohibition of discriminatio') of the Twelfth Protocol to the Convention.

In this regard the Government of Ukraine highlights not only on the factual continuing violation of the relevant rights but also stresses attention on new methods of rights' violation, severity of violation and systematic character of human rights' violation by the state bodies of the Russian Federation on occupied territories of Donbas region.

To sum up, it is necessary to emphasize that the Government Ukraine continues further daily work to ensure protection of human rights in occupied by the Russian Federation territory of the Crimea, Donetsk and Lugansk regions. Ukraine was one of the few states that requested the conventional mechanism of inter-State application to the Court. The Government of Ukraine continues to achieve maximum efficiency in the work on collecting evidence on violations by the Russian Federation of citizens' rights to present its position in relevant inter-State applications to the European Court of Human Rights.

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## ЗВЕРНЕННЯ ДО ЄВРОПЕЙСЬКОГО СУДУ З ПРАВ ЛЮДИНИ, ЯК МІЖНАРОДНО-ПРАВОВИЙ МЕХАНІЗМ ЗАХИСТУ ДЕРЖАВНИХ ІНТЕРЕСІВ УКРАЇНИ

**Анотація**
Дана стаття присвячена характеристиці міждержавних заяв до Європейського суду з прав людини, як правового засобу захисту державних інтересів відповідно до статті 33 Європейської конвенції з захисту прав людини та основоположних свобод. Цей механізм захисту державних інтересів застосовується до випадків порушення однією з держав-членів положень зазначеної Конвенції. Особливу увагу у цій статті приділено нещодавнім міждержавним заявам Уряду України до Європейського суду з прав людини, поданим проти Російської Федерації, а саме: Україна проти Росії, Україна проти Росії (II), Україна проти Росії (III), Україна проти Росії (IV). Короткий аналіз фактів справ та положень Конвенції, на порушення яких посилається у зазначених справ Уряд України, також викладено у даній роботі.
**Ключові слова:** міждержавні заяви, Європейський суд з прав людини, правові засоби захисту державних інтересів, міждержавні спори, територіальна цілісність.

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## ОБРАЩЕНИЕ В ЕВРОПЕЙСКИЙ СУД ПО ПРАВАМ ЧЕЛОВЕКА, КАК МЕЖДУНАРОДНО-ПРАВОВОЙ МЕХАНИЗМ ЗАЩИТЫ ГОСУДАРСТВЕННЫХ ИНТЕРЕСОВ УКРАИНЫ

**Аннотация**
Данная статья посвящена характеристике межгосуджарственных заявлений в Европейский суд по правам человека, как правового средства защиты интересов государства в соответствии со статьёй 33 Европейская конвенция по защите прав человека и основоположных свобод. Этот механизм защиты государственных интересов применяется в случаях нарушения одним из государств-участников положений указанной Конвенции. Особое внимание в данной работе уделено недавним межгосударственным заявлениям Правительства Украины в Европейский суд по правам человека, поданим против Российской Федерации, а именно: Украина протии России, Украина против России (II), Украина против России (III), Украина против России (IV). Краткий анализ фактов дел и положений Конвенции, на нарушение которых ссылается Правительство Украины, также изложено в данной статье.
**Ключевые слова:** межгосударственные заявления, Европейский суд по правам человека, правовые средства защиты государственных интересов, межгосударственные споры, территориальная целостность.

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# MAJOR TASKS AND PRINCIPLES OF LAND LEGISLATION AND LAW

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In the article major tasks and principles of land legislation and law are investigated. Land and legal rules are aimed to create intolerance for violators of the land law, increase respect for nature and its resources. Land legislation establishs behavior standards and attributs or prohibits certain actions, contributes to public justice. Principles of the land legislation of Ukraine regulate the most important issues of the land policy and in concentrated form reflect the socio-economic nature of the land relations. The essence of the principle of combining the specific features of the land usage is a territorial basis, natural resource and the main asset of the production. The principles can be divided into constitutional, general and special. Major principles for formation of the land legislation and law are proposed.
**Keywords:** land relations, land legislation, land law, land recourses, rational land use, land protection.

Ukraine has enormous national wealth of land, which can be a strong base for the solution of socio-economic and political problems in the country. That's why today the most acute problems are concentrated in the sphere of the land relations.

Transformation of land relations, along with the positive effect of the development of different forms of land ownership, has found some dangerous trends in the national economy, which ignore the role of the state. Acute problems of the irrational land usage, the question of the land taxation, regulation of land relations in a market economy pose new methodological, conceptual and theoretical research tasks in the field of the land policy. Under the new conditions, modern Ukraine needs complete and effective land relations, formation and regulation of which are the purpose of land legislation. The concept of the objective and tasks of the land legislation and law are sometimes are clumped together. It is necessary to compare these concepts and to determine the place of each of them in the land legislation and law, as well as implications of their development. Furthermore, in the absence of a clear, systematic understanding of the objective and tasks of the current land legislation and law it is important to analyze the existing definition of the objective and tasks, to give their classification and suggest precise formulation for further development of the land laws [1, p. 19].

In the legal practice of creating laws that regulate the land relations after the adoption of the Land Code of Ukraine, a trend appeared according to which neither clear guidelines nor the ways of achieving them were set to regulate the most important of public land relations. Outlining the scope of freedom of behavior of the land relations, the mechanism of land legislation and law gives a possibility to differentiate and integrate a variety of interests in land purchase and the usage of their useful properties which are formed in a society; to resolve in a civilized way land disputes, to find compromise in the process of solving conflicts. This is the general social essence of the land law – on one hand, while establishing the basic law of the land rights and freedoms, the government gives a possibility to act, and on the other – restricts the freedom of the individual, setting the rules of proper (or, conversely, improper) behavior. The rights of citizens determine the meaning, content and application of the laws, the activities of the legislative and executive authorities, local authorities and provide justice. The constitutional duty of the legislative, executive and judicial authorities to respect and ensure respect for human civil rights is one of the most important legal principles to protect them.

Land and legal rules are aimed to create intolerance for violators of the land law, increase respect for nature and its resources. Land legislation establishs behavior standards and attributs or prohibits certain actions, contributes to public justice.

The correlation of the objective and tasks of land laws and rights lies in the secondary character of tasks as to the purpose because tasks are defined by and subject to objective laws of the land. The task of the land legislation and laws is one of the varieties of social problems of society. Such tasks are aimed to achieve the goal of the legal regulation of the land relations.

Determination of the main tasks of the land legislation and law is a fundamental principle insured by the Constitution. Today, the focus of the legislator while determining objectives of the land legislation is focused on protecting the individual, his or her rights and freedoms, because accords to the second paragraph of the Art. 3 of the Constitution, the establishment of human rights and freedoms is the main duty of the state [2].

Land legislation and law designed to ensure a comprehensive approach to the regulation of the public land relations to implement the rights of citizens on the land.

The main objectives of the land legislation and law are the creation of the necessary legal conditions to maximize the fulfillment of interests of the participants of the land relations, as well as the regulation of land relations in order to create conditions for sustainable usage and protection of the land, equal development of all forms of the land ownership and management, conservation and restoration of the soil fertility, improvement of the quality of the environment, protection of the citizens, enterprises,institutions and organizations' rights on the land. Norm driven identification of the objectives of land legislation and law plays a certain role in its building (the adoption of new normlegislative acts and reviewing applicable

ones), and more importantly, can be taken into account when interpreting its provisions if they are not clear or ambiguous.

The task of the modern land law in accordance with the second paragraph of Art. 4 of the Land Code of Ukraine is to regulate the land relations to ensure land rights of citizens, local communities and the state, rational usage and protection of the land [3]. It's outlined in the second paragraph of Art. 4 of the Land Code of Ukraine, the number of tasks of the land legislation is unduly narrow.

Specifically, the task does not include the restoration of the land (although land legislation contains many provisions clearly aimed at this task), the task of ensuring environmental safety (although most restrictions of rights to land guarantee it) and others. Therefore, the tasks of the land laws and rights can be defined as the regulation of the land relations in order to create conditions for sustainable usage and protection of the land, equal development of all forms of land ownership and management, conservation and restoration of soil fertility, improvement of the environment, protection of citizens, enterprises, institutions and organizations on the land.

Ensuring rational usage of the land is done by fixing the respective rights and responsibilities of landowners and land users; combining measures of economic incentives for the efficient land use and measures of legal liability for violation of the land management. Rational usage of the land is provided in a variety of ways: economic, organizational, technical, legal.

Land legislation ensures only a general principle of the rational usage of the land, but not formulated requirements, which ensure efficient usage of the land. Mishandling should be considered the usage of the land, which leads to a reduction or elimination of its beneficial properties.

The fundamental objectives of the land laws and rights at the present stage of its development are: the creation of the optimal conditions for exercising the legal right of every citizen to the land and the duty to protect the land as a major national wealth, care for the land, a legal provision to reduce the negative impact of economic and other activities on state lands, creation of legal conditions for the organization and development of the land of education, as well as the legal basis for the formation of the land and legal culture, the definition of the legal framework of public policies on land usage and protection, providing a balanced solution of socioeconomic problems, strengthening law in the usage and protection of land.

Principles of the land legislation and law are assumptions, principles and requirements set forth by the Constitution of Ukraine, Ukraine HCC, laws and other acts of land laws that are caused by the needs of the social development, form the basis of the land system of Ukraine, and are the basis for the functioning and development of the land legislation and focused on the tasks of land legislation and law, which are required for both legisolative and for judicial enforcement.

Principles of the land legislation and law perform the following functions: form the base of the land policy, directly regulate the land relations, define the benchmarksof the land legislation development, ensure the stability of the legal regulation of the land relations. Principles of the Land Legislation of Ukraine arising from general principles of the law are of the fundamental importance; they regulate the most important issues of the land policy and in concentrated form reflect the socio-economic nature of the land relations.

Principles of Land Legislation characterized by land and legal standards are enshrined in the fundamental law of the land acts of land and legal norms, which is (or should be based) on all current land legislation.

Principles of the land law are caused by the common law doctrine of general and scientifically sound basic principles, assumptions that define the characteristics of emergence, development and operation of the Land Law and is the basis for the development of the science of land law, embodying values that contribute to justice and legal behavior subjects involved in the land relations. In our opinion, the principles of the land law relate to both content and form, that they are a single entity, and their separate study is allowed only in order of the scientific abstraction, for the convenience of the research of the specific problems, such as problems of legal regulation. Principles of the land law as a part of the basic principles of legal regulation of the land relations are formed on the basis of the provisions of the land laws. Anchored in acts of the land laws, they become standards, principles, ie legislative decrees that express and reinforce the principles of the land law.

Given the importance of the principles of the land legislation and law as the guiding principles, we can assume that they are fixed primarily in acts of the land legislation. The principles can be divided into constitutional, general and special.

Constitutional principles are universal, inherent to all sectors of the domestic law; the general principles are the result of the implementation of the constitutional principles. Constitutional and general principles are reflected in the land law, assuming the character and content of the special land legal principles. Defining the directions of the legal regulation in general, constitutional norms and principles are establishing principles of law-making and enforcement outline the framework for designing appropriate mechanisms at the same time.

The constitutional principles of land law and legislation include:

1) the highest legal force of the Constitution of Ukraine; the compliance of laws and other legal acts with the Constitution;

2) the direct effect of its provisions;

3) recourse to the courts to protect the constitutional rights and freedoms of men and citizen;

4) recognition of human life and health, privacy and security as the highest social value;

5) the state's duty to ensure the rights and freedoms of the person;

6) recognition of the land as a property owned by the Ukrainian people.

As reproduced in art. 5 of the Land Code of Ukraine and other acts of the land law, constitutional principles are transformed into general legal principles, which include:

1) a combination of the specifics of the land usage as a territorial basis, natural resources and basic means of production;

2) ensuring equality of the land ownership rights of citizens, legal persons, local communities and the state;

3) non-interference by the state in the exercise of their rights of possession by citizens, legal persons and local communities, use and disposal of the land, except as stated by the law;

4) ensuring the rational usage and protection of the land;

5) guaranteeing the land rights;

6) priority of the environmental safety requirements.

The system of the special principles is structurally built by the scheme of the land law. The special land laws principles include:

1) the principle of ecological well-being of the environment in the process of the land usage;

2) the priority of the interests of the Ukrainian people as the subject of the land ownership;

3) efficient usage of the land;

4) state control over the land usage and protection;

5) division of the land by the intended purposes;

6) the normative establishing of the legal regime of land appropriate categories;

7) priority of the agricultural land compared with other types of lands;

8) the reality and guarantee of the rights of holders to own land;

9) a variety of the forms of the land ownership and equality of their subjects;

10) the land existence in civil circulation;

11) paying for the land usage;

12) state regulation of the land relations;

13) protection of the rights and legitimate interests of the land relations;

14) the stability of the land usage [4, p. 44-45].

The essence of the principle of combining the specific features of the land usage as a territorial basis, natural resource and the main asset of the production, that land as an object of the land relations is considered by the law not only as a basic means of production and territorial basis, but also as an element of the environment, which is inseparable from other natural resources.

Ensuring equality of land ownership rights of citizens, legal persons and state – is one of the independent principles. It is based on provisions of the current legislation on the equal ownership of the land. This means that the terms and the way of the implementation of the owners' rights is the same for all subjects; their subjective rights are protected equally. State's noninterference in the subjects' exercise of the rights of possession, disposal and usage of the land, except as provided by law – is the result of the democratization of the land relations. Establishment of this principle is associated with the expansion of the rights of the land owners and land users, the development of their independence.

Rights of the land owners and land users to farm land are a guarantee that the state should not interfere in the activities of carriers of land rights to exercise their powers. Exceptions to this rule are cases prescribed by the law. In particular, the forced termination of land rights of an owner or a land user while they violate the existing land laws [5, p. 125].

The rational usage of the land requires the interconnection to achieve the desired effect, which is obtained from the economic exploitation of the land at the minimal cost while maintaining and improving the land during its usage. This principle is closely and inextricably linked with such principles as targeted land usage and stability, permanence of the land rights.

Guaranteeing of the land rights is in the fact that the Land Code provides guarantees of the land ownership and land usage rights. Land rights of subjects, as well as their guarantees are announced and ensured by the Constitution.

Formation of the land legislation and law should be made on the basis of the principles that form:

1) the principle of the constitutional development of the law of the land, which is that the development of the legislation or other regulations designed to regulate land relations should be based on and in accordance with the Constitution of Ukraine;

2) the principle of the priority of the legislative regulation of land relations means that the original land legal rules can be formed only by the laws;

3) the principle of continuity in the development of the land law stipulates that the development of the land laws should be done by the amendment to existing legislation, rather than replacing them with new legislation for the same subject of the legal regulation;

4) organizing principle of the land law, which involves the formation of the legislative blocks for further integration into codified act that completes the process of the systematization of the land laws;

5) the principle of land law development in accordance with the generally recognized principles and norms of the international law based on the constitutional provision on the recognition of the existing international treaties ratified by the Supreme Council, is part of the national legislation of Ukraine;

6) the principle of proper Legislative Drafting suggests that the formation of the draft legislation should be made on the scientifically accurate basis.

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## ОСНОВНІ ЗАВДАННЯ І ПРИНЦИПИ ЗЕМЕЛЬНОГО ЗАКОНОДАВСТВА І ПРАВА

**Анотація**
У статті досліджено основні завдання та принципи земельного законодавства та права. Земельно-правові норми спрямовані на формування нетерпимості до порушників земельного законодавства, підвищення поваги до природи та її ресурсів. Земельне законодавство встановлює стандарти поведінки або забороняє певні дії, сприяє суспільному правопорядку. Принципи земельного законодавства України регулюють найбільш важливі питання земельної політики і в концентрованому вигляді відображають соціально-економічну природу земельних відносин. Принципи базуються на поєднанні особливостей використання землі як територіального базису, природного ресурсу і основного засобу виробництва. Ці принципи можуть бути розділені на конституційні, загальні та спеціальні. Запропоновано основні принципи формування земельного законодавства та права.
**Ключові слова:** земельні відносини, земельне законодавство, земельне право, земельні ресурси, раціональне використання земель, охорона земель.

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## ОСНОВНЫЕ ЗАДАЧИ И ПРИНЦИПЫ ЗЕМЕЛЬНОГО ЗАКОНОДАТЕЛЬСТВА И ПРАВА

**Аннотация**
В статье исследованы основные задачи и принципы земельного законодательства и права. Земельно-правовые нормы направлены на формирование нетерпимости к нарушителям земельного законодательства, повышение уважения к природе и ее ресурсам. Земельное законодательство устанавливает стандарты поведения или запрещает определенные действия, способствует общественному правопорядку. Принципы земельного законодательства Украины регулируют наиболее важные вопросы земельной политики и в концентрированном виде отражают социально-экономическую природу земельных отношений. Принципы основаны на сочетании особенностей использования земли как территориального базиса, природного ресурса и основного средства производства. Эти принципы могут быть разделены на конституционные, общие и специальные. Предложены основные принципы формирования земельного законодательства и права.
**Ключевые слова:** земельные отношения, земельное законодательство, земельное право, земельные ресурсы, рациональное использование земель, охрана земель.

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# CURRENT ISSUES ON THE FORMATION OF THE JUDICIARY IN UKRAINE

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Strategy analysis of judicial reform of authorities, as well as some other ways of its improvement gives us a possibility to anticipate possible changes in the process of formation of the judiciaries. In view of recent development of the reforms, questions of present interest are related to quality of justice, overall performance of judicial authorities, as well as efficiency of each judge as a judicial power holder. At present, extremely important are questions concerning competent evaluation of judges, carried out to determine professional level and skills of each judge, along with qualification of quality of justice in general. Among key aspects needed to improve juridical branch and establish credibility of the justice, are questions of strengthening of the judicial power authority, making it closer to public society and, at the same time, assuring principle of independence to the full. Therefore, questions of formation of judiciary establishment with direct public involvement into the process may be considered in the context of the changes implemented to the Constitution of Ukraine and judiciary branch reform.
**Keywords:** judicial authorities, justice efficiency, competent assessment of judges, judge`s file, elective judiciary.

**Problem formulation.** At the present point of time formation of Ukraine as sovereign, independent, democratic, social, and law-governed state is accompanied by profound changes and overall reforms induced by a desire to bring up to date national legal system and its elements, bring national legislation in compliance with international and European legal traditions, as well as create most comfortable environment for maximum performance of democratic institutions, close cooperation of the state and public society.

Within the context of reform processes judicial modernization is playing important part. It is fair to mention, that most of the changes in judiciary field are call of the times and aim at provision of conditions for independent, just, unprejudiced and unbiased court, along with assured access to justice for natural and legal entities, favourable conditions for full realization of rights for judicial remedy, which undoubtedly aims at implementation of the supremacy of the law. Needless to say, that creation of a court with maximum performance is impossible without modern improvement and democratic transition of an order for judiciary establishment formation. Due to that fact, there is a profound necessity for reasonable and precise steps focused on regulation of the process of judge`s seat election and dismissal, particularly but not exceptionally, confirm fundamental legal principles for implementation of people`s right to complete the judiciary at the level of constitutional law of Ukraine.

**Analysis of recent researches and publications.** Current issues on the formation of the judiciary were analyzed by the following national and foreign scientists: V. Bernhem (В. Бернхем), V.S. Bihun (В.С. Бігун), V.V. Dolezhan (В.В. Долежан), V.M.Campo(В.М.Кампо),S.V.Kivalov(С.В.Ківалов), M.I. Koziubra (М.І. Козюбра), V.V. Kopeichikova (В.В. Копєйчикова), D. Midora (Д. Мідора), L.M. Moskvich (Л.М. Москвич), I.V. Nazarov (І.В. Назаров), A.O. Selivanov (А.О. Селіванов), Y.Y. Polianskyi (Ю.Є. Полянський), S.V. Prylutskyi (С.В. Прилуцький), L. Fridman (Л. Фрідмен), B.A. Futey (Б.А. Футей), and others.

**Unresolved issues of the problem.** Never the less, it has to be mentioned, that the problem of formation of the judiciary directly by the public is not properly analyzed in general.

**The purpose of the article.** Discover several current issues related to improvement of the effectiveness of the justice and strengthening of the judicial power authority, including formulation of perspectives to solve above mentioned problems and analyze within the given context possibilities of election of judges directly by the public.

**Main material.** Implementation of any judicial reform is only justified with a single purpose to have functional national system of justice, in compliance with international and European legal standards, which is able timely and sufficiently react to social and economic challenges in the society. There is a certain difficulty in solving the above mentioned problems, caused by enormous number of concurrent issues, including necessity to increase law effectiveness, establish credibility of the justice, revision of powers, goals and functions of the public within the process of implementation of justice, concerning the structure and the logic of its implementation, in particular.

All of the above mentioned, pretty much applies to measures of judicial and legal reform, which are implemented during the last years, considering that re-thinking of general problems of formation of the judiciary establishment, as well as introduction of fundamental changes in the field of judicial and legal reform is accomplished with introduction of the Law of Ukraine "On judicial system and status of a judge" [1]. This in turn encouraged improvement of the legislation of Ukraine regarding judicial system, core essence of which was incorporation of significant number of progressive standards to official Law of Ukraine "On judicial system and status of a judge". Those standards were proven over time with practical usage and caused a necessity to outline new framework for reforms.

With implementation of the Law of Ukraine "On ensuring the right to a fair trial" [2], new set of measures for improvement of national judicial system was initiated, which included: implementation of transparent and thoroughly regulated order for appointment as a judge, introduction of the institute of judge`s file, together with emphasis on the formal nature of the role of the President of Ukraine

in appointment of judges on five years' period for the first time, etc. Main focus of the above described changes is directed to approach, when the career of a judge actually depends on his objective virtues, professional and moral standards.

As emphasized by the European Commission for Democracy through Law (Venice Commission) and Human Rights Directorate for The Directorate General of Human Rights and Rule of Law of the Council of Europe in Joint Decision from 23rd of March, 2015, by the number № 801/2015 [3], for successful implementation of judicial reform in Ukraine, which will comply with European standards, it is necessary to introduce changes to the Constitution, in particular: it is required to suspend the role of the Supreme Council of Ukraine, the Verkhovna Rada, in appointment of the judge permanently or his dismissal; composition of the High Council of Justice of Ukraine should be changed in the manner to ensure that its prevailing part or the majority will comprise of judges, elected by their colleagues; power of the Verkhovna Rada to remove immunities from judges should be terminated, etc.

All of the above mentioned matters of the law have caused whole new approaches in regards to a problem of effective order of formation of judiciary establishment, determination of content, legal nature, properties, and classification characteristics of possibility for direct engagement of public information of the judiciary, in particular, to choose on an elective post and revoke appointment of the local judiciary. This all leads us to the necessity of profound and comprehensive investigation of the role of elective judiciary in formation of judiciary establishment for the purpose of further improvement of the order of formation of the judiciary, legal regulation of rights of direct engagement of public information of the judiciary or creation of a model of its own to be used to elect judges in Ukraine. Those measures will encourage an increase in law enforcement effectiveness, transparency of justice and provision of assured access to justice or right to legal assistance.

One of the distinct features of the Law of Ukraine "On provision of right to a fair trial" is also an introduction of the institute of judge`s files. Thus, according to the Art. 85 of the Law of Ukraine "On the Judicial System and the Status of Judges", one of the milestones of the competent evaluation of a judge is an analysis of judge`s file and an interview.

The analysis of improvement orders to the Art. 85 of the Law of Ukraine "On the Judicial System and the Status of Judges" shows, that among other measures, judge`s file should include information on results of the competent evaluation of a judge, as well as periodic assessment for the whole duration of his assignment on the position. However, it should also be mentioned, that the institute of judge`s file is new to our legal system, it is the concept, which in general should represent efficacy and productivity of each judiciary power holder`s professional activity. Thus, realizing public request for the renewal of the legal system in particular and judiciary establishment specifically, due attention should be paid to the problem of keeping of such a file on judges, synthesis and analysis of the information on judges, including development of the order and methodology for judges' qualification assessment and the Procedure for holding examinations, etc. Also, if stages of assessment include conduction of anonymous testing or analysis of a dossier file and an interview with a judge, corresponding normative acts should be introduced to control mentioned issues. Such ideas were already introduced during the discussion in Ukraine Crisis Media Centre on a topic of "Reform the Judiciary: current situation and challenges" by the Head of the High Council of Justice of Ukraine Igor Benedisyuk and Serhiy Koziakov, Head of the High Judicial Qualifications Commission of Ukraine [4].

In current version of the Law of Ukraine "On the Judicial System and the Status of Judges" significant attention is paid to the problem of judicial independence (Art. 48, 49). For instance, among everything else, article 48 of this Law points out, that "judicial independence is provided with immunity and inviolability of a judge" [1].

This approach can be justified at the very least by the fact, that following European values and aiming at development in relevant direction, the State should not only declare provisions of corresponding international principles of law, but also follow them, as independence of justice is not a whim of the judges themselves, but a warranty to ensure the supremacy of the law, legally protected interests of persons and corporate entities, society and the State at large.

Other sides, the principle of "inviolability of a judge", ensured by the legislation as a way of provision of the independence of justice from the State on national level, and should not be substituted for impudence or abuse of a position of a judge.

At the same time, in p.58 of the Joint Conclusion from 23rd of March, 2015, by the number № 801/2015 expressed by the Venice Commission and Human Rights Directorate (HRD) for The Directorate General (DG-I) of Human Rights and Rule of Law of the Council of Europe in regards to the Law "On judicial system and implementing of changes to the law "On the High Council of Justice of Ukraine", it is pronounced, that in reference to general inviolability of a judge, the Venice Commission consistently speaks against assigning of immunities falling outside the limits of the functional immunity. On top of that, the Venice Commission on more than one occasion stated, that consent of the Verkhovna Rada of Ukraine to cancel inviolability of a judge is not appropriate decision to the problem, as in this situation, political body will be used to decide on the status of judges and their immunity. As a result, competence of cancelation of inviolability of judges should belong not to the political body, as the Verkhovna Rada of Ukraine, but to the truly independent judicial authority [3].

In efforts to bring the system of judicial authorities, responsible for the formation of the judiciary establishments in Ukraine, to international standard in regards to representation of judges in such authorities and the system of their election on legislative level. The problem of election of such authority members by judges was resolved to extend provided by the provisions of the Fundamental Law of Ukraine.

In addition to all of the stated above, after the analysis of provisions of the draft law of Ukraine "On provision of right to a fair trial" Venice Commission and Human Rights Directorate for The Directorate General of Human Rights and Rule of Law of the Council of Europe concluded, that the most difficult problems, related to independence of the judiciary authorities in Ukraine, lay in constitutional provisions. For the successful implementation of judicial reform in Ukraine, which will comply with European standards, it is necessary to introduce changes to the Constitution, in particular: it is required to suspend the role of the Supreme Council of Ukraine, the Verkhovna Rada, in appointment of the judge permanently or his dismissal; composition of the High Council of Justice of Ukraine should be changed in the manner to ensure that its prevailing part or the majority will comprise of judges, elected by their colleagues; power of the Verkhovna Rada to remove immunities from judges should be terminated; power of the President of Ukraine to form or terminate courts should be removed from the Constitution [3].

These days, among important issues raised by scientists and public officials on improving of the legal system and further improvement of the order of formation of the judiciary, there are questions of necessity of dismissal of all the judges of Ukraine and election of the new on the vacant positions. Specifically, in Transient provisions of the draft law of changes to the Constitution of Ukraine, in the section of the system of justice it is provided, that the powers of a judge, assigned for the first time, before coming into effect of the law of Ukraine "On implementing of changes to the Constitution of Ukraine" (regarding the system of justice), are terminated with the end of the term, for which he was assigned on the position. Judges, elected on the position permanently by the date of coming into effect of the law of Ukraine "On implementing of changes to the Constitution of Ukraine" (regarding the system of justice), continue to exercise the powers till dismissal or termination of their authorities, by reasons determined by the Constitution of Ukraine with due consideration of changes implemented with the law of Ukraine "On implementing of changes to the Constitution of Ukraine" (regarding the system of justice) [5].

Overall, the Venice Commission approves the draft law on changes to the Fundamental Law, in particular, those concerning termination of powers of the Verkhovna Rada of Ukraine to elect judges, cancellation of probation period for newly appointed judges, removal of "violate an oath" from reasons for dismissal of judges from positions [6].

At the same time, in regards to norms of the draft law on dismissal of all of the acting judges, it is important to point out, that dismissal of all judges will not comply with European standards and the principle of the supremacy of the law.

When speculating on usefulness of the re-election of all judges with no exception, as it was done in Bosnia and Herzegovina, for instance, M. Kozyubra noted, that more useful is requalification, rather than dismissal. The scientist states, that it might be introduced to Transient provisions, that everyone should be reassessed, as well as determine who will provide such a requalification. According to his views, it is necessary to do so, but not until new qualification requirements for judges and for assignment to the positions in the supreme authorities will be set specifically in the Constitution [7].

At present moment of time, articles 88-89 of the Law of Ukraine "On provision of right to a fair trial" determine goals and order of periodic assessment of judges and provide that results of the periodic assessment may be considered during approach to a problem of permanent election of a judge or holding a competition for taking a position in a respective court [2].

As mentioned by the representatives of the Ukrainian Bar Association during the meeting of discussion board "Effective justice", held within a framework the meeting named "Legal reform as seen by a judge", one of the approved draft laws on the changes to Constitution in "Transient Provisions" contains a mechanism of so called "judiciary cleanup". It provides three parts of reassessment or examination of judges: professional, social, and personal. It is also emphasized, that correlation between assessments, suggested to be introduced to the Constitution, and assessment, which can start in the soonest possible time as specified in the law "On provision of right to a fair trial", at this stage is not determined [8].

For the purposes of changes, aiming at renewal of the judiciary and making it closer to public, it is necessary, on the level of the Constitution of Ukraine, secure people`s right to take part in formation of the judiciary establishment. For this purpose, it is necessary to refer to American experience. In this attitude, Daniel John Meador said, that in the USA lawyers turn into judges in of the four following ways: a) through assignment by the Supreme Executive power, providing his candidacy was affirmed by the legislative authorities; b) through selection by execution officer from the list of several applicants, submitted by an independent board; c) through general election process; d) through election in legislative authority. At the same time, time periods of the assignment of the judges on positions varies considerably for different systems, beginning with several years, e.g. four or six, sometimes up to twenty or fifteen, and upon condition of "proper behaviour" – "for lifelong period" [9].

In general, there are three main methods of selection of Supreme Court Justices, dominant across the whole country: through competitive elections, appointment by the Senate and The Missouri Plan. Scientists agree, that more useful are elections of judicial of the lower branch, than the Supreme Court Justices [10].

Describing systems of judicial election William Burnham says, that in many states elections of judges are based on the concept that the judge, as any other office holder, executing functions of authority in democratic society, should respond in front of a public [11].

Analyzing the judicial electoral process in different states of the USA for the period of several years in a row, modern American scientists insist, that review of recent election of judges shows heredity, slight changes, and considerable fluctua-

tions, especially on the regional level. For instance, voters continue regular support of all judges, recommended by existing system for assessment of effectiveness of judicial activity (e.g., Alaska, Arizona, and Colorado). Nevertheless, sometimes voters can refuse to support any of the candidates, and in some cases they can vote for dismissal of a judge from the judicial seat [12].

**Conclusions and suggestions.** Now it can be seen that approach to "judiciary cleanup", suggesting dismissal of all of the judges, is unreasonable, as first of all, above mentioned may lead to total imbalance of the functions of judiciary power, in the second place, have negative effect on the quality of the implementation of justice, as productivity of justice administration requires knowing of not only norms of substantive law but also norms of procedural law, as well as awareness of their practical application. In addition, it is worth mentioning, that making judicial decisions requires moderation and balance, not loud appeals and claims, or destructive rushed decisions, and eliminates any possibility of any form of pressure. In this perspective, it seems productive to implement judicial elections, which will benefit to, first, reform the judiciary in a democratic way, and second, – removal of social tensions, caused by permanently important questions of judicial election and their dismissal from position.

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## ДЕЯКІ АКТУАЛЬНІ ПИТАННЯ ФОРМУВАННЯ СУДДІВСЬКОГО КОРПУСУ В УКРАЇНІ

**Анотація**
Аналіз стратегії реформування судової влади та деяких напрямків її вдосконалення дозволяють спрогнозувати можливі зміни і в порядку формування суддівського корпусу. У світлі останніх реформаційних процесів актуальними є питання якості правосуддя, ефективності функціонування судової влади та продуктивності кожного судді як носія судової влади. Наразі питання кваліфікаційного оцінювання суддів з метою визначення професійного рівня та кваліфікації кожного судді, а також якості відправлення правосуддя в цілому є дуже актуальними та потребують уваги. Серед ключових аспектів вдосконалення судової влади та утвердження довіри до правосуддя є питання підвищення авторитету судової влади, її наближення до суспільства та одночасно максимального забезпечення принципу незалежності. Відтак, питання формування суддівського корпусу та безпосередньої участі народу у цьому процесі може бути розглянутим у контексті змін до Конституції України та реформуванні судової влади.
**Ключові слова:** судова влада, ефективність правосуддя, кваліфікаційне оцінювання судді, суддівське досьє, виборність суддів.

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# НЕКОТОРЫЕ АКТУАЛЬНЫЕ ВОПРОСЫ ФОРМИРОВАНИЯ СУДЕЙСКОГО КОРПУСА В УКРАИНЕ

**Аннотация**
Анализ стратегии реформирования судебной власти и некоторых направлений ее совершенствования позволяют спрогнозировать возможные изменения и в порядке формирования судейского корпуса. В свете последних процессов реформирования актуальными являются вопросы качества правосудия, эффективности функционирования судебной власти и производительности каждого судьи как носителя судебной власти. Сейчас вопрос квалификационного оценивания судей с целью определения профессионального уровня и квалификации каждого судьи, а также качества отправления правосудия в целом являются весьма актуальными и требуют внимания. Среди ключевых аспектов совершенствования судебной власти и утверждения доверия к правосудию является вопрос повышения авторитета судебной власти, ее приближения к обществу и одновременно максимального обеспечения принципа независимости. Поэтому вопросы формирования судейского корпуса и непосредственного участия народа в этом процессе может быть рассмотрен в контексте изменений в Конституцию Украины и реформировании судебной власти.
**Ключевые слова:** судебная власть, эффективность правосудия, квалификационное оценивания судьи, судейское досье, выборность судей.

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# REGULATIVE AND LEGAL INFLUENCE OF TERMS IN THE STAGE OF PREPARATIVE AND ASSIGNMENT OF COURT HEARING

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The preparatory stage of production is independent of criminal proceedings in which the judge examines the criminal case, the adequacy of reasons for the appointment of the court session, and solves issues related to the preparation of the case for trial. At this stage of criminal proceedings, to date, there are some gaps that can only fill regulations change legislation.
**Keywords:** preparative court procedure, court hearing, stages in criminal process, terms in criminal process.

**Statement of problem in the general view and its connections with important scientific and practical tasks.** Criminal and Procedural Code of Ukraine essentially reformatted the stage of court procedure preparation with the purpose of justice performance at the base of competitiveness and procedural equality of parties in the criminal procedure. In this reason, the realization of temporal aspects in competitive principles in preparative court procedure needs the conceptual research because the actions are made by judge at this stage of criminal process are the guarantee, validity, objectivity of a sentence that, certainly, get a great importance for the parties of prosecution and defence. Judge appraises proves from the point of view of their sufficiency for rendition guilty or not guilty verdict in the future stage of case consideration [1, p. 165].

It's necessary to note, that during the competitive principles, court must to create the correspond conditions for performance procedural commitments and realizing of given rights by parties and to ensure the levels of procedural and legal opportunities of upholding and proof of own position in criminal case to the members of process.

In the same time, the equal opportunity to participate in the consideration of questions is solved in the preparative of court hearing must be given to the parties. Preparative procedure is the independent stage of criminal process where the judge checks the materials of criminal case about the existence of reasons for the assignment of court hearing and solves the questions are connected with preparation of case to the court consideration (art. 314, 315 Criminal and Procedural Code of Ukraine).

At this stage it's performance the activity by judge which is directed to the defining the existence and absence of problems with the consideration of the essence of criminal case. This activity in correspondence to the central stage of criminal process of court hearing is preparative, that's why it's important to performance of the case without unreasonable interruption as right realization of every accused person into the reasonable time and ensuring as fast access of complainant to justice. In a way, it's appeared the objective necessity of legal regulation in the activity of judges in this stage with the help of establishing in the statutes of the law the terms of decision formulation and making of procedural actions.

**Formulation of goals of the article (Task establishing).** Preparative procedure – is the stage of criminal process where: 1) the materials of criminal procedure are checked by judge; 2) boundaries of responsibility are defined; 3) existence or absence of reasons for dismissing of criminal procedure; 4) checking abiding by the rules of judicial criminal procedures; 5) using methods for preparation of court hearing of case. By this, it's necessary to that at the stage of preparative procedure there is not solving the question about proves of the guiltiness of accused person, this is in the competence only of court and it's decided in the follow stage – stage of court consideration of case. According to the statutes of criminal and procedural code, the main purpose of this stage lays in the procedural and organizational providing of court consideration [2, p. 141].

**Statement of the main material of research with the modern groundings of received scientific results.** Stage of preparative procedure gets the intermediate position between pre-court investigation in connection with which it has controlling character and court hearing in connection with which it has organizational character and also services as „procedural filter" – it's appealed to protect the court hearing from the: criminal procedures which are created with violations of criminal and procedural code or must be closed, accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability.

According to above said, at this stage judge solves two groups of questions:

1) questions are connected with checking material of criminal procedure; 2) questions are connected with preparation of criminal procedure to the court hearing.

It's necessary to admit that court procedure in the first institution starts with preparative court hearing which is assigned not later than 5 days after getting of accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability (pt. 1 art. 314 Criminal and Procedural Code of Ukraine). It's should be admitted that Criminal and Procedural Code of Ukraine of year 1960 was establishing the longer terms at this stage of court procedure. In a way, according to the pt. 241 Criminal and Procedural Code of Ukraine, the case must be assigned to the consideration not later than ten days but in the especially difficult case– not later than thirty days from the day of its admission to the court. So, as we can see, the legal statutes of the modern Criminal and Procedural Code will fully encourage to the quick and operative consideration of the case.

It's necessary paying attention to the fact that for today the illegal practice for the sending of informational sheets to the lower levels courts came to stay in Ukrainian court system. It continues its existence despite of new Law adoption „About court structure and status of judges" which doesn't warrant such seals in the court of cassational institution. But courts pay great attention to the understanding of legislation which is consisted in the instructional lists of their colleagues from the higher courts. This situation is abnormal for democratic and legal state.

After approving of new Criminal and Procedural Code of Ukraine, Superior Specialized Court of Ukraine by the questions of civil and criminal cases, prepared dozen of such sheets which admit the list of violations in legislation of Ukraine during performance of criminal procedure. In a way, according to the Informational sheet of the Superior Specialized Court of Ukraine „About the order of court procedure performance due to the Criminal and Procedural Code of Ukraine" Head (Professional Judge who is the chef during joint judicial proceedings or carries it out individually) gets the accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability, the note about above said fact is made into the court audit and about other materials are given to the judge. Not later than five days after getting to procedure accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability, court approves the agreement about assignment of preparative court hearing where it admits the data, time and place of its performance. In the same time with adoption of this decision, court which will carry out the court procedure, in the case of necessity according to pt. 1 art. 320 Criminal and Procedural Code of Ukraine may assign the substitute judge; the note about this fact is made in the court audit [3].

In a way, it's needed to pay attention about the fact that this recommendation contradicts to the pt. 314 Criminal and Procedural Code of Ukraine, according which, five day counting should be started not from the procedure of concrete judge but from the getting of these documents to court. In the same time, obligation to assign the statement about assignment of preparative court hearing is not warranted by the Art. 314 Criminal and Procedural Code of Ukraine. According to Instruction about clerical correspondence, in the regional court of general jurisdiction, after getting of material about criminal procedure in the day of their finding out, worker of court apparatus check out the consistency of packages and envelopes and correspondence of their addressing and then with following to the rules of safety, he opens packages and envelopes, check out the correspondence of applications to the inventory (existence of adds to the documents), makes a registration stamp of court on the right lower or other text-free place where the data of materials getting to the court and registration number in correspondence with audit of input correspondence. In the follows, these materials will be classified.

Along with this, it's necessary to note that actual Criminal and Procedural Code of Ukraine, above said Instruction and also the Statement about the automated system with circulation of court documents don't warrant the term for solving questions about consideration of such case by the concrete judge.

In our mind, such situation is the essential neglect in the actual criminal and procedural legislation of Ukraine and tells about the chance in admitting of unpunished case of routine courts employees of criminal cases production. In connection with this fact, we offer to add the Instruction about clerical correspondence in the regional court of general jurisdiction with the statement of follow content: „Court cases (materials of criminal procedure) must be registered in the audit of input correspondence in the day of their getting by court and not later than the next day after getting of material, they should be included to the system of document circulation of court for deciding of their transferring to the in the correspond court".

In a way the beginning of term counting should be considered with the data of case registration in the court office which is happened in the day of materials getting by court. During this term judge must make the decision. By this, the question about the in-time registration has organizational nut not procedural character. But impactful effect of terms regulates the judge activity by the criminal case which is sent to court is possible only with condition of distinct organization of court office.

In the scientific legal literature, about this reason it's expressed idea by S. Rozumov which is worth of our attention. Scientist thinks that to the term of preceding hearing which is admitted with pt. 1 art. 314 Criminal and Procedural Code, it's included not only making decision about the assignment of preceding hearing but also its performance and making decision in general during the preceding hearing [4, p. 451]. Such idea seems us right and proved from the point of view of legal regulation in time of making decision in the stage of preparation and assignment of court hearing. At the same time, strict construction of pt. 1 art. 314 of Criminal and Procedural Code of Ukraine causes the conclusion in making only decision about assignment of preceding hearing into the relation to preceding hearing in-time which is admitted with this article.

This position of legislator doesn't conform to the assignment and role of procedural terms in regulation of relationship at this stage of criminal process of Ukraine. Encompassing by legal regulation of making decision term by judge in the criminal case which is sent to the court, is based on the necessity of limitation of preparation and assignment of hearing stage with temporal limit with the purpose of activity ending at this stage.

Making decision by judge about the assignment of preceding hearing ends this stage of criminal process. It means, if the judge makes decision about the assignment of court hearing without performance of preceding hearing, so the activity is carried out faster than with the assignment of preceding hearing, because it stays on the term admitted by the Law. In addition, the preceding hearing is just a type of preparative order to the court hearing, that's why this stage doesn't end with its assignment. In connection with this, it's important that procedural terms which regulate the judge's activity in the stage of preparation and assignment of court hearing, carry out the effective legal influence (in a way of limitation of this activity with temporal limits) equally similarly on both orders in purpose of court session. Considering of above said, it's appeared the necessity to regulate court activity in the performance of preceding hearing with the help of limitation terms. We offer to recite the pt. 1 art. 314 Criminal and Procedural Code of Ukraine in the follow redaction: „After getting of accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability not later than five days after day of its registration in court and legally provided order appoints preparatory court session in which call participants of judicial proceedings.

The preceding hearing must be carried out in the 10 days term after the day of getting materials by court and in 5 days term in the criminal case in connection with accused person who remains in custody".

It's necessary to admit that in par. 17 p. 3 of Informational list of Superior Specialized Court of Ukraine „About order of carrying out of preparative court hearing according to the Criminal and Procedural Coed of Ukraine" it's not completely decided the question about initial continuation at a stage of preparatory court session of suppression method as remaining in custody of accused person. Considering the verdict of European Court of Human Rights in the case „Kharchenko against Ukraine" from 10 February 2011 (where it's generalized the system disadvantages in Ukraine with the art. 5 of European Court of Human Rights), it's necessary paying attention to the necessity of: 1) 1) justification in the resolution of court on purpose of business to consideration of the bases for extension of term of the detention accused if this decision was made by court and 2) indications of concrete period of validity of the resolution in this part (taking into account provisions of pt. 3 art. 331 of the Criminal Procedure Code of Ukraine). Considering of said above it may be stated par. 4 and 5 p. 4 of sheet about content of motivation and resolutely parts of the relevant resolution. It's also subject to the other methods to providing of criminal procedure which will be active during the court hearing.

Statement of judge about assignment of court hearing has an important meaning for all court investigation. The absence of procedural document is admitted as essential violation of criminal and procedural law which causes the canceling of verdict. Term of making decision in the criminal case which is warranted by law, regulates the activity of judge in a way of defining of its terminal continuance. In essence, normative statutes outline the term of judicial importance, legal procedural activity in the stage of preparation and assignment of court hearing and making any decision beyond the scope of which will be violation of procedural order in criminal law which is admitted by law. From our point of view, that's the reason of the statement composing about assignment the court hearing after finishing of terms which are warranted by art. 314 Criminal and Procedural Code of Ukraine, divests such document of procedural character and testifies about its absence in criminal case. In turn, it's admitted as essential violation of criminal and procedural code which causes cancelling of verdict.

All above said testifies about the necessity of consolidation in the pt. 1 p. 314 Criminal and Procedural Code of Ukraine of addition according to which the making the decision by judge about the assignment of court hearing after ending admitted by pt. 1 art. 314 Criminal and Procedural Code of Ukraine term causes this document such that has no validity and testifies to absence in the resolution on purpose of court session. From our point of view, such statement, first of all, will carry out the activity of judges, performance of preventive influence in the reason of the negative legal consequences which come in connection with the termination of procedural terms, formulated in the form of the offered sanction of a number of precepts of law will focus judges in their activity on timely (before adverse effects) decision-making in a stage of preparation and purpose of court session.

According o pt. 2 art. 317 Criminal and Procedural Code of Ukraine after assignment of case to the court consideration, chief must provide the opportunity to review materials of criminal case to the participators of court hearing if they request. It's also necessary to note that legislator didn't admit the term for performance of such power. Such gap causes the interpretation and application of standard of the specified article of the law. In connection with this, it's appeared list of questions: in what time the party must or can examine the materials of criminal case in case of satisfaction its petition; whether there will be in violation of an established period of purpose of criminal case to hearing; what document and when the judge has to grant to the party the specified right?

It's presented that right of additional studying of criminal case material which is given to the party, may be regimented with statutes of law. In our mind, the term for realization of such law should not exceed of 5 days. The party has a right to lodge the petition about giving a term to the additional studying the material of criminal case from the day of getting of criminal case to the court before the making decision by judge. In connection with this, it's necessary to recite the p. 2 art. 317 Criminal and Procedural Code of Ukraine in the follow edition: „After assignment of case to the court consideration, chief must provide to the members of court procedure the opportunity of additional material of criminal case studying in term which doesn't exceed 5 days, it is given the correspond decree if they lodge the petition. During studying, members of court procedure have a right to make necessary extracts and copies from materials".

Regulation of judge activity in the stage of preparation and assignment of court hearing is not limited only with influence of terms of making procedural decision which is stated by law. After taking by judge the decree about assignment of court hearing, its activity needed also the regulation in a way of terms setting in the statutes of law which define remoteness in time of the moment of the beginning of court hearing. Court consideration should be assigned not later than ten days after decree about approving of its assignment (pt. 2 art. 316 Criminal and Procedural Code of Ukraine).

Establishing in law of beginning term in court consideration encourages the speed of court procedure and has a purpose to the prevention of unreasonable interruption in beginning of consideration of criminal case. Among other things, statement is consolidated in the art. 316 Criminal and Procedural Code of Ukraine and directed to the providing of realization in requirement of p. 1 art 6. European conventions about protection of human rights and main freedoms about the right of every accused person to the case consideration in reasonable time. By this, the existence of certain gap of time allows the parties to prepare for court hearing in time, think their position, if it's necessary, once again to study materials of criminal case, to invite additional witnesses, to claim proofs which can be provided in court.

Term of beginning of court consideration is warranted by the pt. 2 art. 316 Criminal and Procedural Code of Ukraine and formulated in the law in a way of admitting of maximal term of beginning of court hearing. To the mind of H. Petrova main feature lay in non-limitations in court right of beginning of court consideration earlier than their ending. In a way, the law regulated the court activity is connected with obligation of court consideration term which one sides ensures the moving of criminal case without unreasonable interruption, other sides provides the right of accused person for protection because it allows to prepare for the court hearing, to consider the position, to coordinate it with the defender, to declare the petition for a call of additional witnesses, etc.

The term is predicted by the pt. 2 art. 316 Criminal and Procedural Code of Ukraine and warranted by law in a way of admitting of minimal term. The court hearing must not start earlier than ending of said above term. Lineament of legislative regimentation in such terms is their inability by the persons who performance the procedure in court. Such terms are special only for court procedures; in pre-court procedure they are absent. With their content they service to ensuring of member of process rights but its adherence is provided with severe procedural sanctions. Violation of this term causes the unfavourable legal consequences because it's a normative and legal term which was formulated in the law as the proscription.

**Conclusions are made as the result of research and perspectives of follow prospecting in this direction.** Preparative procedure is the independent stage of criminal process where judge checks the materials of criminal case on the existence of enough reasons for assignment of court hearing and decides questions which are connected with preparation of case to the court consideration. Together with that, it's exist the list of gaps in the legal regulation of criminal process performance at this stage; and with the help follow normative statements, some of them may be filled:

1. We consider the necessity of adding Instruction about clerical correspondence in the regional court of general jurisdiction with statute of follow content: „Court cases (materials of criminal procedure) must be registered in the audit of input correspondence in the day of their getting by court and not later than the next day after getting of material, they should be included to the system of document circulation of court for deciding of their transferring to the in the correspond court".

2. We offer to recite the pt. 1 art. 314 Criminal and Procedural Code of Ukraine in the follow redaction: „After getting of accusation, petition for application of coercive measures of educational character, petition for application of coercive measures of medical character or petition for release from criminal liability not later than five days after day of its registration in court and legally provided order appoints preparatory court session in which call participants of judicial proceedings.

The preceding hearing must be carried out in the 10 days term after the day of getting materials by court and in 5 days term in the criminal case in connection with accused person who remains in custody".

3. It is necessary to recite the p. 2 art. 317 Criminal and Procedural Code of Ukraine in the follow edition: „After assignment of case to the court consideration, chief must provide to the members of court procedure the opportunity of additional material of criminal case studying in term which doesn't exceed 5 days, it is given the correspond decree if they lodge the petition. During studying, members of court procedure have a right to make necessary extracts and copies from materials".

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## РЕГУЛЯТИВНО-ПРАВОВИЙ ВПЛИВ СТРОКІВ У СТАДІЯХ ПІДГОТОВЧОГО ПРОВАДЖЕННЯ ТА СУДОВОГО РОЗГЛЯДУ

**Анотація**
Підготовче судове провадження є самостійною стадією кримінального процесу, в якій суддя перевіряє матеріали кримінальної справи з огляду на те, чи є достатні підстави для призначення судового засідання, та вирішує питання, пов'язані з підготовкою справи до судового розгляду. Разом з тим, на сьогоднішній день існує ряд прогалин щодо правового регулювання здійснення кримінального процесу на цій стадії, заповнити окремі з яких, можна лише змінами нормативних положень.
**Ключові слова:** підготовче судове провадження, судовий розгляд, стадії, строки.

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## РЕГУЛЯТИВНО-ПРАВОВОЕ ВЛИЯНИЕ СРОКОВ В СТАДИЯХ ПОДГОТОВИТЕЛЬНОГО ПРОИЗВОДСТВА И СУДЕБНОГО РАССМОТРЕНИЯ

**Аннотация**
Подготовительное судебное производство является самостоятельной стадией уголовного процесса, в которой судья проверяет материалы уголовного дела, достаточность основания для назначения судебного заседания, и решает вопросы, связанные с подготовкой дела к судебному рассмотрению. В этой стадии уголовного производства, на сегодняшний день существует ряд пробелов, которые заполнить можно только изменениями нормативных положений законодательства.
**Ключевые слова:** подготовительное судебное производство, судебное разбирательство, стадии, сроки.

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# LEGAL REGULATION OF CONCILIATION PROCEDURES: CURRENT STATE AND PROSPECTS FOR DEVELOPMENT

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The article deals with the problematic issues of legal regulation of conciliation procedures as the legal form of social dialogue in the workplace. Peculiarities of conducting conciliation procedures at various levels of social dialogue in the workplace are studied. Lacks of current legislation regulating conciliation procedures are analyzed. The article investigates provisions of the draft Labour Code on conducting conciliation procedures in the process of adoption of local normative acts of employers. Propositions on improving current national labour legislation and the provisions of the draft Labour Code of Ukraine in this area are developed in the article.
**Keywords:** conciliation procedures, social dialogue, social partnership, legal form of social dialogue, collective labour relations.

**Statement of the problem.** The ILO Declaration on Social Justice for a Fair Globalization of 2008 enshrines that social dialogue and the practice of tripartism between governments and the representative organizations of workers and employers within and across borders is now more relevant to achieving solutions and to building up social cohesion and the rule of law through, among other means, international labour standards. According to the provisions of the ILO Declaration of 2008, practices of social dialogue and tripartism can be recognized as one the most appropriate methods for making labour law effective [1].

The Report on social dialogue under the ILO Declaration on Social Justice for a Fair Globalization at the 102nd Session of International Labour Conference emphasized that even with the continuing challenges, caused by economic crisis national tripartite social dialogue has offered an opportunity for consensus building and informed economic and social policy-making in the last decade. It has generated cooperation among the social partners, thus avoiding unilateral regulatory action by States, and mitigated the negative impacts of market-driven policies, thereby upholding equity and social cohesion, and establishing consensus-driven policies [2, p. 47].

The rules of labour law become more effective if they are coordinated with representatives of employees and employers. Approval of legal acts on labour and socio-economic issues by social partners allows avoiding labour disputes, as the interests of employers, employees and public authorities and local governments are coordinated before they obtain judicial power.

Law of Ukraine "On Social Dialogue in Ukraine" established the mechanism for participation of employers' and employees' representatives in the process of developing labour rules. This mechanism runs through legal form of social dialogue, which according to the provisions of current Ukrainian legislation is called "conciliation procedures". Conciliation procedures are relatively new form of social dialogue, which has been introduced in Ukrainian legislation by the Law of Ukraine "On Social Dialogue in Ukraine" [3].

Since the adoption of the Law of Ukraine "On Social Dialogue in Ukraine", the effectiveness of the conciliation procedures remains low. This problem is caused by the lack of proper regulation mechanism of conciliation procedures and reluctance of lawmaking bodies to engage representatives of employees and employers in the process of development and adoption of legal acts.

Actuality of research on issues of legal regulation of conciliation procedures is also determined by the fact, that the draft Labour Code of Ukraine №1658 [4] adopted by the Verkhovna Rada of Ukraine in the first reading, expands the scope of conciliation procedures. In particular, the Draft establishes mandatory participation of workers' representatives in the process of adoption of local legal acts of employers. However, the Draft does not contain any provisions that would provide adequate regulation of mentioned mechanism.

**Analysis of recent researches and publications.** Theoretical and practical issues of legal regulation of social dialogue have been developed in scholarly works of famous domestic and foreign scientists, such as N.B. Bolotyna, I.I. Borodyn, G.I. Chanysheva, R.S Grynberg, K.N. Gusov, V.V. Lazor, A.M. Lushnikov, M.V. Lushnikova, V.G. Rotan, P.D. Pylypenko, S.M. Prylypko, A.V. Smyrnov, G.A. Trunova, O.A. Triukhan, V.F. Tsytulsksy, S.Y. Chucha, N.M. Khutoryan, O.M. Yaroshenko, V.V. Zhernakov and others. However, legal issues of conciliation procedures haven't been a subject of special complex research and now are underexplored in domestic labour law science.

**Emphasizing the unsettled problem.** According to the Information of the Joint Representative Body of Employers at National Level on the implementation of the General Agreement on basic principles of regulation and rules of socio-economic policy and labour relations in Ukraine for 2010-2012, as of July 1, 2011 only 25 from 188 legal acts, supplementing the Tax Code, have been adopted after conciliation procedures [5].

Given example proves non-effectiveness of conciliation procedures in the mechanism of social dialogue at the present time, which is caused by multiple gaps in domestic legislation. Key weak points of domestic labour legislation concerning conciliation procedures are in the areas of trade union rights, mechanism of conducting conciliation procedures at local level of social dialogue.

**The aim of the research** is to define current status and challenges of the development of domes-

tic legislation on conciliation procedures between parties of social dialogue, to develop propositions on improvement legislation and provisions of the draft Labour Code of Ukraine in this area.

**The main material.** Current domestic labour legislation doesn't provide a definition for the term "conciliation procedures". Article 8 of the Law of Ukraine "On social dialogue in Ukraine" only enshrines, that conciliation procedures shall be conducted to consider the parties' positions and elaborate compromise concerted solutions in the drafting of legislative and regulatory legal acts. The order of conciliation procedures shall be defined by the bodies of social dialogue of a respective level unless otherwise provided for by legislation or collective agreements. Failure to reach a compromise between the parties based on results of the conciliation procedures may not constitute a ground to prevent the work of the bodies of social dialogue [6].

Analysis of the provisions of the art. 8 of the Law of Ukraine "On social dialogue in Ukraine" makes it possible to come to a conclusion, that conciliation procedures shall be conducted only in purpose of drafting of legislative and regulatory legal acts. As it have mentioned, the order of conciliation procedures shall be defined by the bodies of social dialogue of a respective level unless otherwise provided for by legislation or collective agreements according to the provisions of the art. 8,

Nevertheless, at the present time tripartite bodies of social dialogue haven't adopted any legal acts on the mechanism of conciliation procedures conducting. At the same time, only the General Agreement on basic principles of regulation and rules of socio-economic policy and labour relations in Ukraine for 2010-2012 provides among other collective bargaining agreements appropriate regulation of conciliation procedures. This shows that the chosen by legislator approach to regulation of conciliation procedures came short of expectations.

Conciliation procedures, according to the provisions of the Law of Ukraine "On social dialogue in Ukraine", is one of the legal form of social dialogue. Legal forms of social dialogue are nothing else but methods of collective labour rights realization through mechanism of social dialogue [7, p. 49]. In other words, it is possible to define legal forms of social dialogue as established by law or by social partners' act mechanism of collective labour rights realization.

It follows that every legal form of social dialogue should correspond to certain collective labour right enshrined by law. However, the right to participate in conciliation procedures prescribed by Ukrainian legislation only for employers' organization. According to p. 2 art. 18 of the Law of Ukraine "On Employers' Organizations, their Associations, and the Rights and Guarantees of their Activities", employers' organizations are empowered to examine draft laws and other regulatory acts on issues relating to the rights and interests of their members. Draft laws on the development and implementation of state social and economic policies, regulation of labour, social and economic relations are submitting by central authorities of executive branch considering proposals of employers' organizations [8].

To the contrary, the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity" doesn't prescribe the right for trade unions and their associations to participate in conciliation procedures [9]. Article 2 of The Labour Code of Ukraine also doesn't mention the right of employees to participate in conciliation procedures among other labour rights of employees [10]. In this case it should be mentioned, that labour legislation of the most states of the former Soviet Union guarantees the right for trade unions and their associations to participate in the process of drafting legal acts. For example, such right is enshrined in art. 11 of the Law of Russian Federation "On Trade Unions, Their Rights and Guarantees of Activity" [11], art. 270 of the Labour Code of Kazakhstan [12], art. 6 of the Law of Belarus "On Trade Unions" [13].

At the same time, current Ukrainian labour legislation contains provisions, which impose the obligation for public authorities to conciliate provision of their acts of social-economic issues with trade unions and employers' organizations. According to the p. 3.11.4 of the Order On Filing of Normative Legal Acts for State Registration to the Ministry of Justice of Ukraine and their State Registration, in the case when for state registration ministries and other central executive authorities submit legal act on the matters relating to social and labour sphere, they also report on a form provided in Appendix 1 to this Order, with the addition of appropriate supporting documents (letters, sheets of external coordination, etc.), on the position of the authorized representative of national trade unions, their associations and authorized representative of the national associations of employers to this Act and on the work under their comments. The need to consider these comments and suggestions is determined by ministries and other central executive authorities that have developed this act [14].

According to the p. 2 of the art. 12 of the Law of Ukraine "On social dialogue in Ukraine", the National Tripartite Social and Economic Council shall perform advisory, consultative and coordinating functions by means of elaborating a common stand and providing recommendations and proposals of the parties to social dialogue concerning: draft legislative and other regulatory legal acts on social and economic policy and labour; basic economic and social indicators of the draft State Budget of Ukraine for a respective year; ratification by Ukraine of the International Labour Organization Conventions, interstate treaties, and the EU regulations on the matters related to the rights of employees and employers.

Analysis of the provisions of art. 12 of the Law of Ukraine "On social dialogue in Ukraine" makes it possible to come to the conclusion, that conciliation procedures at national, sectoral and territorial levels of social dialogue should be mainly conducted through bodies of social dialogue.

Another conclusion arises from the previous one. According to p. 3 art. 4 of the Law of Ukraine "On social dialogue in Ukraine", to participate in collective bargaining on the conclusion of collective agreements, in tripartite or bipartite bodies, and in international activities, a composition of subjects of the trade union party and the employers party shall be determined by representative criteria.

Consequently only trade unions and employers' organizations are recognized as representative in accordance with requirements of art. 6 of the Law of Ukraine "On social dialogue in Ukraine", are empowered to participate in conciliation procedures at national, sectoral and territorial levels of social dialogue.

Provisions of the draft Labour Code of Ukraine are of profound interest for research of conciliation procedures. The rules of draft Labour Code provide employer the right to adopt local normative acts. In modern legal literature, local normative acts are regarded as an independent form (source) of labour law [15, p. 136]. Thereby, local normative acts of employer can be a subject of conciliation procedures.

According to p. 3 art. 12 of the draft Labour Code of Ukraine, if a collective agreement is not concluded, the issues that must be settled by it in accordance with the requirements of this Code, should be regulated by normative act of employer. This act should be approved by an elected body of local trade union organization (trade union representative). In case of the absence of the local trade union organization, a normative act should be approved by freely elected for collective bargaining representatives (representative) of employees.

Approving of legal acts of employer by trade unions and other employees' representatives can be regarded as conciliation procedures. This point of view is also proved out by the fact, that the Draft separates cases of approving local acts and cases of conducting consultation on legal act.

At the same time, provisions of the draft Labour Code do not provide clear mechanism for realization of the right of employees' representatives to approve local acts of employer. In our opinion, it would be appropriate to include into the Draft provisions defining the procedure for submitting the local act to employees' representatives for approval, terms of such approval, legal consequences for violation of this procedure.

**Conclusions.** Undertaking study allows for the conclusion following conclusions:

- conciliation procedures can be defined as a legal form of social dialogue in the workplace, which is conducted to consider social partners' positions and elaborate compromise concerted solutions in the drafting of legislative and regulatory legal acts mainly through bodies of social dialogue;

- the subject of conciliation procedures at national, sectoral and territorial level of social dialogue are provisions of legal acts on the matters relating to social and labour sphere; the subject of conciliation procedures at local level of social dialogue are only local normative acts of employers;

- the right to participate in conciliation procedures at national, sectoral and territorial level of social dialogue is guaranteed only for those organizations of employers and employees, which can be recognized as representative in accordance with requirements of art. 6 of the Law of Ukraine "On social dialogue in Ukraine"; this right can be exercised at the present time mainly through participation in activity of social dialogue bodies.

In our opinion, for development of conciliation procedures legal regulation it would be appropriate:

- to supplement the Law of Ukraine "On Trade Unions, Their Rights and Guarantees of Activity" by the provisions similar to those of the Law of Ukraine "On Employers' Organizations, their Associations, and the Rights and Guarantees of their Activities", which guarantees the right to participate in conciliation procedures;

- to amend art. 12 of the draft Labour Code of Ukraine by adding the following: "An employer shall provide a draft local normative act in writing for the consideration to elected bodies of local trade union organizations, freely elected employees' representatives. If there are several local trade union, acting at the enterprise, employer shall provide a draft local normative act to all local trade unions. Trade unions are empowered to create joint commissions to participate in conciliation procedures. Authorized employees' body shall consider a draft local normative act within 3 working days. Violation of conciliation procedure leads to invalidity of local normative acts."

- to amend p. 4 art. 8 of the Law of Ukraine "On social dialogue in Ukraine" by adding the following: "Legal and other acts regulating labour relations shall adopt only after conciliation of their provision with representative parties of social dialogue of certain level".

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## ПРАВОВЕ РЕГУЛЮВАННЯ УЗГОДЖУВАЛЬНИХ ПРОЦЕДУР: СУЧАСНИЙ СТАН ТА ПЕРСПЕКТИВИ РОЗВИТКУ

**Анотація**
У статті досліджено проблемні аспекти правового регулювання узгоджувальних процедур як організаційно-правової форми соціального діалогу у сфері праці. Визначено особливості проведення узгоджувальних процедур на різних рівнях соціального діалогу у сфері праці. Проаналізовано недоліки чинного законодавства, яким здійснюється регулювання узгоджувальних процедур. Досліджено положення проекту Трудового кодексу України, якими передбачено проведення узгоджувальних процедур при прийнятті локальних нормативних актів роботодавці. Розроблено пропозиції щодо вдосконалення чинного вітчизняного трудового законодавства та положень проекту Трудового кодексу України у даній сфері.
**Ключові слова:** узгоджувальні процедури, соціальний діалог, соціальне партнерство, організаційно-правова форма соціального діалогу, колективні трудові відносини.

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## ПРАВОВОЕ РЕГУЛИРОВАНИЕ СОГЛАСИТЕЛЬНЫХ ПРОЦЕДУР: СОВРЕМЕНОЕ СОСТОЯНИЕ И ПЕРСПЕКТИВЫ РАЗВИТИЯ

**Аннотация**
В статье исследованы проблемные аспекты правового регулирования согласительных процедур как организационно-правовой формы социального диалога в сфере труда. Определены особенности проведения согласительных процедур на разных уровнях социального диалога в сфере труда. Проанализированы недостатки действующего законодательства, которым осуществляется регулирование согласительных процедур. Исследованы положения проекта Трудового кодекса Украины, которыми предусмотрено проведение согласительных процедур при принятии локальных нормативных актов работодатели. Разработаны предложения по совершенствованию действующего отечественного трудового законодательства и положений проекта Трудового кодекса Украины в данной сфере.
**Ключевые слова:** согласительные процедуры, социальный диалог, социальное партнерство, организационно-правовая форма социального диалога, коллективные трудовые отношения.

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# SOME ISSUES CONCERNING THE CONCEPT OF A "REASONABLE DOUBT" IN CRIMINAL PROCESS

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The article is devoted to the research of standards of proof, especially beyond reasonable doubt. Based on the analysis of the scientific literature and legislation United Kingdom, the United States and the European Court of Human Rights had found the basic standards of evidence that are used by the courts in the administration of justice. The author, also, highlighted some problems determining the standard of proof "beyond a reasonable doubt". The main areas of application of the standard were outlined in the cases studied as well as in the criminal process of Ukraine. The author revealed particular issues of defining standard of proof "beyond reasonable doubt" and emphasized guidelines of its application in concerned cases and in criminal procedure of Ukraine as well.
**Keywords:** proving, burden of proof, standards of proof, beyond a reasonable doubt.

The Criminal Procedural Code of Ukraine in 2012 (CPC), in contrast to the Criminal Procedural Code of Ukraine 1960 in the Art. 17 enshrined the presumption of innocence and conclusive proof of guilt, thus duplicating the content of the Art. 62 of the Constitution of Ukraine and somewhat legislatively expanded its meaning by including the provisions concerning the proof of guilt beyond a reasonable doubt, which are not typical for the domestic legal system. The legislator by including in the Art. 17 of the Criminal Procedural Code of Ukraine the requirement for proof of guilt of a person by the prosecution to a certain level, or possibly at "reasonable doubt" does not define the term, and none of the article refers to it. However, the presence or absence of reasonable doubt in the mind of a judge or a jury is a decisive factor when deciding on the guilt of a person. Give the above, it seems reasonable to attract attention to the analysis of this issue.

The term "beyond a reasonable doubt" is a component of the broader scope of the concept - "standard of proof". This phenomenon is reflected in the legal systems of England, the U.S., Canada and the European Court of Human Rights (Court). The Court and the European Commission on Human Rights (Commission) has repeatedly noted the absence of sufficient evidence that would be "beyond reasonable doubt" confirmed the circumstances specified in the applicant's complaint as one of the grounds of absence of violations of the Convention for the Protection of Human Rights and Fundamental Freedoms (Article 3) by the Ukraine [4].

The formula of proof "beyond reasonable doubt" can be traced back to The Greek Case. There, the Commission pointed out that "it must [...] maintain a certain standard of proof, which is that in each case the allegations of torture and ill-treatment, as breaches of Article 3 of the Convention, must be proved beyond reasonable doubt. A reasonable doubt means not a doubt based on a merely theoretical possibility or raised in order to avoid a disagreeable conclusion, but a doubt for which reasons can be given drawn from the facts presented" [5].

The Commission reiterated this standard in its report in Ireland v. United Kingdom. When that case went on to the Court: "the Court agreed with the Commission's approach regarding the evidence on which to base the decision whether there has been violation of Article 3 To assess this evidence, the Court adopted the standard of proof "beyond reasonable doubt" but added that such proof may follow from the coexistence of sufficiently strong, clear and concordant inferences or of similar unrebutted presumptions of fact" [6].

Moreover, the Court adopts the standard of proof "beyond reasonable doubt" as the standard of proof in the consideration of complaints. However, this approach to the assessment of evidence and the proof of guilt is not an invention of the Court, as it states in his decisions. The Court has never aimed to borrow an approach to this criterion, which is used by domestic judicial system – this criterion, when used by the court, has independent value [7].

The origins of the concept of "beyond reasonable doubt" is the common law of England, where it began to be used by the courts in the administration of justice, since the end of the XVIII century. James Q. Whitman suggests in his research that Medieval church lawyers were especially fascinated by the dangers of judging, to which they devoted considerable attention. As they saw it, any sinful misstep committed by a judge in the course of judging "built him a mansion in Hell," and rules had to be developed to shield judges from the consequences of their own official acts. This was especially true any time a judge imposed "blood punishments" – that is, execution and mutilation, the standard criminal punishments of pre-nineteenth-century law.

And when it came to inflicting blood punishments, premodern Christian theology turned in particular on the problem of "doubt." Doubt about the facts presented a real danger to the soul of the individual judge. Doubt was the voice of an uncertain conscience, and in principle it had to be obeyed. Such was the rule laid down in particular by the standard "safer way" school of Christian moral theology, which grew up during the central Middle Ages: "In cases of doubt," as the safer way formula ran, "the safer way is not to act at all." For Christians living in an age of fear and trembling, any "doubtful" act was full of danger, and this applied to judging just as it did to all other acts

involving the individual conscience. As a typical French "dictionary of conscience" explained the standard Christian law in the eighteenth century, "In every case of doubt, where one's salvation is in peril, one must always take the safer way. … A judge who is in doubt must refuse to judge." A judge who sentenced an accused person to a blood punishment while experiencing "doubt" about guilt committed a mortal sin, and thus put his own salvation in peril.

The story of the reasonable doubt rule is simply an English chapter in this long history of safer way theology, a history in which Christian theologians worried for centuries over the nature of judging, over the problems of doubt, and over the dangers of what a famous seventeenth-century English pamphlet called "the Guilt of Blood" [12].

Contemporary British lawyers, by referring to the "standard of proof", understand it as a degree of certainty that must be reached by the side which bears the burden of proof [13, p. 448]. British lawyers link the standard of proof to the procedural institution of the "burden of proof". Party shall provide judges with an evidence in support of its position, and such evidence must convince the court of its reliability for a given standard (degrees), which is set depending on the form of legal proceedings [9, p. 53-54].

It is established that for the prosecution (in criminal cases) the standard of proof is "beyond reasonable doubt", and in civil cases - "balance of probability", which is treated in judicial decisions, as "more likely than not". This provision was first ruled in Woolmington v DPP in 1935, where court found that: 1) the burden of proving the guilt of the accused lies with the prosecution, calling it "the golden thread running through all of the criminal proceedings in England" and, 2) the defendant is entitled to acquittal if there was a reasonable question from the evidence submitted either by the prosecution or the defense [14].

Common law of England had huge impact on the U.S. law system, thus there are also provisions regarding the standards of proof. However, unlike England the U.S. law the third standard, "clear and convincing evidence", which occupies an intermediate position between the relatively "weak" standard – "preponderance of evidence" and "high" – "beyond a reasonable doubt" and is used in several types of civil claims, including administrative hearings, habeas corpus, and some fraud claims. In these cases, the plaintiff must prove not merely that his version of events is "more likely than not" true. Rather, plaintiffs who face a "clear and convincing evidence" standard must prove that it is "substantially more likely than not" their claims are true. However, the "golden grail" of these standards is the standard of "beyond reasonable doubt".

In accordance with the requirements of the criminal procedural legislation of the U.S., the prosecution should bear the burden of proving the charge, namely the prosecutor must provide evidence of the guilt of each of the charges, and then convince a jury beyond a reasonable doubt that the accused is guilty on each count. The defense/defendant may be either an active party in the proceedings – summon "their own" witnesses to testify, provide the court with the evidence and documents, or to take a passive role and just to cross-examine the witnesses.

The U.S. Supreme Court in 1970 in the case of In re Winship pointed out that the use of the practice of the standard of proof "beyond reasonable doubt" reflects the long history of justice and is one of the components of a fair trial. The U.S. Supreme Court ruled that due process requires both federal and state prosecutors to prove every element of a crime beyond a reasonable doubt. According to the Court, "The reasonable doubt standard is bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free" [8].

However, the meaning of this standard and, more importantly, the question whether the standard needs to be clarified to the jury by the judges is still open. There is no consensus among US courts, either at the federal level or at the state level. Many appellate courts insist that trial judges should not define "beyond reasonable doubt" standard for jurors in their instructions. At least ten states now hold this view. In some (such as Oklahoma), if a judge offers a jury any explanation of what reasonable doubt is, this is automatic grounds for reversing a conviction [10]. By contrast, another fifteen states require judges to define "beyond reasonable doubt" standard for jurors. We see the same confusion at the federal level. Four of the eleven U.S. circuit courts require a definition; failure to give one being grounds for reversal. Most of the rest hold that judges needn't define rational doubt [11, p. 47-48].

Nonetheless, the courts give such explanations to the jury. Courts of First Instance interpreted "reasonable doubt" in different ways:

1) a doubt that would cause prudent people to hesitate before acting in a matter of importance to themselves;

2) a doubt based on reason and common sense;

3) a doubt that's neither frivolous nor fanciful and that can't be explained away easily;

4) substantial doubt;

5) persuasion to a reasonable or moral certainty;

6) doubt beyond that which is reasonable; about "7S on a scale of 10" (rejected by the appellate court);

7) when the "scales of justice are substantially out of equipoise" (rejected by the appellate court) [15, p. 457].

Given the above, it can be concluded that the American and British system of justice consider the standard of proof as the level of evidence which must be reached by the sides during allegations. Depending on the form of legal proceedings (whether criminal, civil or administrative) the party is the subject to different requirements of proving statements upon Court and the burden of proof lies differently with the parties.

It should be noted that there is no consensus on the definition of "proving" among scientists. One group of authors [16, p. 21-22; 17, p. 18] distinguishes the collection of evidence (cognitive and practical activities) and evidence (as justification, as rational and practical activity), another group of authors [2, p. 237; 18, p. 247-248; 19, p. 298;

20, p. 156-158] justifies the dual understanding of proving: 1) as collection, verification and evaluation of evidence, and 2) as an argumentation. In this connection authors distinguish the burden of proof (Art. 92 of the Criminal Procedure Code of Ukraine), and the burden of proving of circumstances of the criminal proceedings.

In criminal proceedings the burden of proof lies solely with the prosecution, to prove of the case and convince jury of the defendant's guilt "beyond reasonable doubt" and is one of the guarantees of justice, which proclaims "it is worse to condemn an innocent man than to allow the guilty to escape punishment".

To sum up, it can be noted that the standard of proof "beyond reasonable doubt" firstly, has an ambiguous meaning and contains some objective criterion for judgment but assumes inherently subjective component of "reasonable doubt" which is based on the prudence of the judge or the jury and their common sense and life experience. Secondly, establishes a direct requirement to acquit a defendant if there is a "reasonable doubt". This requirement specifies the Art. 17 Code of Criminal Procedure, that the only "reasonable" doubts as to the proof of guilt shall be interpreted in favor of a person and such doubts that can arise only on the basis of the analysis of the evidence, or the lack of it. Thirdly, the standard of proof "beyond reasonable doubt" sets the required level of sufficiency of the evidence for the courts and jury's decision-making. Fourth, it establishes an additional requirement for making a court acquittal and/or a conviction, and, fifthly, it's one of the manifestations of the competitive nature of the criminal process in Ukraine, where the prosecution must prove its position and leave the court with no reasonable doubt, and the defense is trying to refute prosecutor's claims by either 1) producing evidence that can raise such doubts, or 2) producing evidence discrediting charges.

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## ОКРЕМІ ПРОБЛЕМИ, ПОВ'ЯЗАНІ З КОНЦЕПЦІЄЮ "РОЗУМНИЙ СУМНІВ" В КРИМІНАЛЬНОМУ ПРОЦЕСІ

**Анотація**
Стаття присвячена дослідженню стандарту доказування "поза розумним сумнівом". На основі аналізу наукової літератури та законодавства Великобританії, США, а також рішень Європейського суду з прав людини було виявлено основні стандарти доказування, які використовуються судами при відправленні правосуддя. Було виділено окремі проблеми визначення стандарту доказування "поза розумним сумнівом". Окреслено основні напрями застосування стандарту, як у досліджуваних випадках, так і у в кримінальному процесі України.
**Ключові слова:** доказування, тягар доказування, стандарти доказування, поза розумним сумнівом.

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## ОТДЕЛЬНЫЕ ПРОБЛЕМЫ, КАСАЮЩИЕСЯ КОНЦЕПЦИИ "РАЗУМНОЕ СОМНЕНИЕ" В УГОЛОВНОМ ПРОЦЕССЕ

**Аннотация**
Статья посвящена исследованию стандарта доказывания "вне/за пределами разумных сомнений". На основе анализа научной литературы и законодательства Великобритании, США, а также решений Европейского суда по правам человека было выявлено основные стандарты доказывания, которые используются судами при отправлении правосудия. Автором, также, были выделены отдельные проблемы определения стандарта доказывания "вне/за пределами разумных сомнений". Очерчены основные направления применения стандарта, как в исследуемых случаях, так и в уголовном процессе Украины.
**Ключевые слова:** доказывание, бремя доказывания, стандарты доказывания, вне/за пределами разумных сомнений.

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## ANALYSIS OF THE POWERS OF THE PROSECUTOR IN ARTICLE 291 OF THE CCP

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This article analyzes the powers of the prosecutor in the criminal production verification and confirmation of the indictment on the pre-trial investigation. Assessment about the importance of changing the name of the indictment was made. Comparison of similar articles of the CCP in 1960 and 2012 was conducted. Necessity of the extensive interpretation of the Article 291 of the CCP was established. Conclusion about key role of the prosecutor was made.
**Keywords:** prosecutor, investigator, indictment, materials of criminal proceedings, approval of indictment, closing criminal proceeding.

**Formulation of the problem.** Constitution of Ukraine proclaims that a human being, his life and health, honor and dignity, inviolability and security are recognized in Ukraine as the highest social value. For criminal procedural law this means that Ukrainian law must be focused on ensuring the procedural possibilities of participants in criminal proceedings. Consistent and strict compliance of all requirements of criminal procedure law is one of the important conditions of implementation of the right of citizens to judicial protection against unlawful infringement.

New Criminal Procedure Code of Ukraine made a lot of changes in the process of pre-trial investigation and the trial to create more opportunities for participants to protect their rights. At the same time some changes require detailed study and analysis to improve enforcement activities of authorities. One of this changes is about powers of the prosecutor in the final phase of pre-trial investigation.

**Analysis of recent research and publications.** A lot of scientists developed the problem of the powers of the prosecutor during pre-trial investi-

gation, including Alimamedova E.N., Grishina Y.O., Galagan A.I., Davidova M.P., Zelenetskii V.S., Katkova T.V., Konovalova V., Lybusa I., Mikhaylenko O.R., Suslo D.S., and other scientists and practitioners. However, there are not many articles about powers of the prosecutor according to the current CCP.

**Unsolved problems.** Current CCP does not fully describe powers of the prosecutor at the end of pre-trial investigation. It can cause many problems during criminal procedural activities.

**The purpose of the article.** The aim of this work is to analyze procedural possibilities of the prosecutor during receipt and review of the indictment, which was drawn up and sent by an investigator as a logical result of the conducted pre-trial investigation.

**Presenting main material.** After completing all necessary steps to familiarization participants with the materials of the criminal proceedings, the investigator can proceed to the final procedural document in criminal proceedings - indictment. During such activities an investigator must be sure in the commission of crime and the guilt of a suspect. Investigator must also be convinced that during the pre-trial investigation all necessary actions to verify circumstances of the crime were conducted. Evidences which were collected during the pre-trail investigation must be evaluated both individually and together with other evidence. "The decision to end the pre-trial investigation is taken when it is determined that it was conducted fully, fairly and comprehensively" [4, p. 21].

Indictment is the criminal procedure act, which reflects decision of the investigator, approved by the prosecutor, or the prosecutor about the end of the pre-trial investigation and submits of criminal proceedings to the court to decide guilt of the suspect. Legal, valid and reasonable indictment is the guarantee of protection of rights and legitimate interests of accused and other participants in the criminal process. It could be used as a legal fact which significantly develops legal proceedings. Indictment shows confidence of investigator and prosecutor of the guilt of a particular person in the end of pre-trial investigation. This means that the indictment establishes achievements of the objectives of criminal proceedings.

But before the analysis of the powers of the prosecutor during his approval of the indictment, some attention must be paid to the name of this procedural document. It must be noted that the CCP in 1960 called this document not an act, but a conclusion. Although this change of the name doesn't significantly alter the essence of the document, it should be said that the term "conclusion" describes the indictment better. As everyone knows, the conclusion - is a logical result which is made on the basis of certain facts. Accordingly, the term "conclusion" emphasizes the importance of this document and its final character. In the indictment investigator (or prosecutor) expounded his argument he based on the evidence collected, thereby finishing pre-trial investigation. From this position the term "act" diminishes the final value of the indictment in some way. T.V. Katkova has a similar position. She noted that the title of the final document – "conclusion" shows its purpose. Conclusions of the investigator are preliminary and could be refuted at the trial (for example, by court's acquittal) [7, p. 31].

However, some scientists support opposite position. For example, M.S. Strogovich notes that the final document in the case "... by its very gist does not have any conclusion that - this is exactly the "act, decision of the authorities" [8, p. 150], which contains "... not only logical conclusion, but power and public order" [8, p. 150].

Interesting position is presented by I.D. Goncharov, who analyzed necessary articles of the CPC in 1960 and noted that after the approval of the accusatory conclusion by the prosecutor, it transforms into accusatory act and this moment will be the beginning of the trial [5, p 32]. In any case, it should be told that the change in the title has more linguistic gist and has almost no affects on procedural gist of this procedural document.

CCP article 291of notes that almost always indictment will be drawn up by investigator. However, the fact of drawing up the indictment by investigator is not enough for sending these final procedural documents to the court. Any indictment must be approved by the prosecutor. And powers of the prosecutor at this stage of pre-trail investigation should be analyzed.

Current CCP has left aside some proceedings of the prosecutor during his approval of the indictment. For example, CPC in 1960 provided a list of circumstances which the prosecutor had verified after he received the indictment from the investigator (art. 228 CCP in 1961).

In particular, the prosecutor had to check whether there was the offense, whether there were formal components of the crime, whether all the relevant criminal procedure legislation on the rights of the suspect and the accused of defense were provided by the investigator, whether there were no grounds for closing criminal proceedings, whether all necessary persons were accused in crimes, whether there was correct classification of crime, whether investigator followed the requirements of the law in drawing up the indictment, whether preventive measures were applied according to the criminal procedure law, whether measures to ensure damage caused by the crime were taken and so on.

However, in the current CCP these circumstances are not specified. In Article 291 of the current CCP only general information that must be included in the indictment is given. At the same time it should be noted that during the approval of the indictment the prosecutor draws attention on these circumstances. During the approval of the indictment, the prosecutor primarily provides "supervising the compliance with law during pre-trial investigation in the form of providing procedural guidance in a pre-trial investigation". The indictment, as already mentioned, is the result of the investigation, a kind of "mirror" that reflects the work of the investigator. Therefore the prosecutor has to check the whole pre-trial investigation during his approval of the indictment. That prosecutor will support public prosecution in court, and it is interested in the fact that pre-trial investigation was conducted in compliance with all requirements of the procedural law. Thus, we can

conclude that today the prosecutor must verify the circumstances that were provided in the CCP in 1960. That's why this part on the current CCP must be changed.

Also the lack of guidance in the current CCP on the term for which the prosecutor is to make decision on the indictment is worth pointing. If the old CCP mentioned that the prosecutor was obliged to examine the criminal case within 5 days of its receipt, current CCP hasn't such mention. The period during which the prosecutor must approve the indictment is included in the total period of pre-trial investigation. Also, according to the current CCP investigator is required, within the shortest possible time, but not later than twenty-five days after the person concerned has been notified of being a suspect, to submit for approval of the public prosecutor one of the following procedural documents: 1) draft decision to close criminal proceedings; 2) draft motion to discharge the person concerned from criminal liability; 3) an indictment, motion to enforce compulsory medical or educational measures; 4) a request to extend time limit for pre-trial investigation on grounds specified by the CCP. So in the investigation of criminal misdemeanors we know how long the prosecutor must take one of the necessary actions, but in the case of investigating of crimes CCP doesn't mention any terms.

The analysis of indictment by the prosecutor consists of two parts: the study of the criminal proceedings and the study of the conclusions, which were made on the basis of available evidence. During this procedures prosecutor should ensure that all available evidence are competent, admissible and sufficient, and the conclusions that were made upon the evidence are reasonable.

Using Article 291 of the CCP, the prosecutor during the study of the indictment must pay attention to the clarity of the description of a crime, especially on the time and place of the offense, methods that were used during commit crime and other circumstances that are required by the law. Prosecutor must check the qualification of the crime.

J.N. Kalmykov offered to control correctness of the qualification by solving a number of issues: whether all suspected criminal acts were included in the indictment and whether to all actions of the suspect were given proper legal assessment in such indictment. [6, p. 226].

Having analyzed all parts of the indictment and comparing the evidence with the conclusions made by the investigator in the indictment, the prosecutor has to adopt one of the decisions which are contained in the Article 291 of the CCP. It must be noted that this Article obliges the prosecutor after reviewing of the indictment approve this document and send it to the court or drawn up new indictment. It's easy to understand that this provision Article requires extensive interpretation. The prosecutor has wide powers during pre-trial investigation, which he can use whenever he needs to. Pre-trial investigation begins with the entry of the information on criminal offense to the Integrated Register of Pre-Trial Investigations and ends with the submitting of the indictment to the court. Pre-trial investigation stage is indivisible, and it's wrong to limit powers of the prosecutor during his activities. That's why prosecutor has more powers that are mentioned in the Article 291 of the current CCP. So, prosecutor can also return the indictment to the investigator with some instructions to conduct certain investigative actions or close the criminal proceedings by himself.

It must be mentioned that submitting the indictment to the court is the logical conclusion of the pre-trial investigation, in which investigator has found all suspects and gathered enough evidence to prove their guilt. The criterion for such decision should be the belief in the reliability of the results of the pre-trial investigation by the prosecutor. Affirming the indictment prosecutor agrees with the conclusions which were made by the investigator. It is made by placing written approval on the indictment in its beginning.

Article 291 CPC allows the prosecutor to draw up a new indictment and send it to the court. The prosecutor uses his right to make a new indictment when he is convinced in the completeness and comprehensiveness of the investigation, the adequacy of existing evidences which can prove the guilt of a person in court, but at the same time he disagrees with the formulation of the conclusions of the investigator or on other details in this procedural document. Prosecutor will support public prosecution in court and therefore he must be sure of the clarity and credibility of the indictment, which will be determined by the scope of the trial. Prosecutor also can draw up a new indictment when he just wants to change the style of this document. Such indictment does not require the approval of the prosecutor.

When the prosecutor during the study of the material of pre-trial investigation and the indictment, come to the conclusion that the available evidence insufficient cannot prove the guilt of a person in the court, he can return all materials to the investigator for additional investigation. In this case prosecutor sends a clear written instruction with the indictment that contain information on what exactly has to be done by the investigating. After conducting all necessary actions investigator re-opens materials of the criminal proceedings to the other party as it should be done according to the Article 290 of the CCP, adding to them the information that had been received in the result of additional investigative actions. After that investigator draws up a new indictment and sends it to the prosecutor according to the requirements of the CCP.

The prosecutor closes criminal proceedings in the manner prescribed by Article 284 of the CCP. As it was already mentioned prosecutor can close the proceedings during the whole pre-trial investigation. This stage is not divisible by any substages and therefore the prosecutor can use his powers under the Article 284 of the CCP whenever he needs to, even when the investigator has already sent him an indictment. It is possible that investigator did not notice grounds for the closing of criminal proceeding, continued pre-trial investigation, drew up an indictment and sent it to trial prosecutor. However, the prosecutor has to carry out procedural guidance during any pre-trial investigation and can fully use his powers. Prosecu-

tor isn't interested in submitting an illegal indictment to the court.

**Conclusion.** The current CCP gave to the investigator wide powers to ensure that pre-trial investigation will be carried on fully. However, the existence of procedural autonomy of investigation does not preclude control by the prosecutor. And during his supervising the compliance with law during pre-trial investigation in the form of providing procedural guidance in a pre-trial investigation prosecutor checks whether investigator committed all necessary actions and whether enough number of evidences were collected to prove the guilt of the person during the trial. This "fresh" look at the pre-trial investigation can significantly affect on its completeness. Therefore, the prosecutor should meticulous check the indictment and use all his powers to increase its quality.

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## АНАЛІЗ ПОВНОВАЖЕНЬ ПРОКУРОРА ЗГІДНО ЗІ СТАТТЕЮ 291 КПК

**Анотація**
Стаття присвячена аналізу повноважень прокурора при перевірці матеріалів кримінального провадження та затвердженні обвинувального акта на стадії досудового розслідування. Була оцінена необхідність зміни назви обвинувального акта. Було проведено порівняння відповідних положень КПК 1960 та 2012 рр. Встановлена необхідність розширювального тлумачення ст. 291 КПК. Зроблено висновок щодо ключової ролі прокурора при затверджені обвинувального акта.
**Ключові слова:** прокурор, слідчий, обвинувальнийj акт, матеріали кримінального провадження, затвердження обвинувального акта, закриття кримінального провадження.

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## АНАЛИЗ ПОЛНОМОЧИЙ ПРОКУРОРА СОГЛАСНО СТАТЬЕ 291 УПК

**Аннотация**
Статья посвящена анализу полномочий прокурора при проверке материалов уголовного производства и утверждении обвинительного акта на стадии досудебного расследования. Была оценена необходимость изменения названия обвинительного акта. Было проведено сравнение соответствующих положений УПК 160 и 2012 гг. Установлена необходимость расширительного толкования ст. 291 УПК. Сделано вывод о ключевой роли прокурора при утверждении обвинительного акта.
**Ключевые слова:** прокурор, следователь, обвинительный акт, материалы уголовного производства, утверждение обвинительного акта, закрытие уголовного производства.

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# RECEPTION OF LAW AND LAW ADAPTATION AS FORMS OF INTERACTION OF LEGAL SYSTEMS

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This article is devoted to analysis of the influence of some legal systems on others and their interaction. Some categories as "legal acculturation", "reception", "legal transplants", "borrowing" are investigated. The conclusion is drawn that it would be justified to use the broadest universal term-concept to designate "legal acculturation", by which one should have in view any borrowing of elements of some legal systems by another. The designation "legal transplants" is possible as well. The term-concept "reception of law" rather precisely characterized the borrowing of elements of legal systems of the past by later systems.
**Keywords:** legal acculturation, reception, legal transplants, borrowing, adaptation.

**The statement of the problem and the analysis of the researches and publications in this area.** The influence of some legal systems on others and their interaction has attracted the attention of legal experts for a long time. The most popular subject-matter of special studies of the influence of one law on another was the reception of Roman law, especially of scholarly inquiries from the Middle Ages onwards, and, then, during the Great European codifications [1; 2; 3; 4; 5].

**The statement of the main material.** In the process of discussions relating to the suitability of Roman law for application in law-creation and legal life which took place before and during the great European codifications of the eighteenth and nineteenth centuries, European legal experts formulated propositions which were important in principle with regard to comprehending the essence of the phenomenon of the reception of Roman law. Rudolf von Jhering formulated the general methodology reception, which was then defined: Durch das rцmische Recht ьber aber das rцmische Recht hinaus [6].

In the early twentieth century the studies in this domain were fewer: the western vision of the essence of the reception of Roman law on the whole had been formed. The subject-matter of the research determined the place of Roman law in the culture of Europe, the reception of Roman law in individual countries, under special conditions, and so on [7]. The existence of a crisis in this domain was recognized and was a turning point in the quest for new orientations of research [8].

In our view two problems arise here: (1) "expansion" of the concept of reception itself transcending the reception of merely Roman law; (2) the establishment of other orientations, together with reception, or forms of influence (interaction, borrowing) of legal systems.

It is advisable to commence the consideration of these questions with an analysis of the phenomenon of reception as a widespread instance of the influence of one legal system on others. Moreover, here we have a rather reliable theoretical base in the form of the conclusions of those who have studied the reception of Roman law. In addition, we take into account the emergence of a number of special studies of the concept and essence of the reception of law in post-Soviet space during the last decade [9; 10]. Melnyk believes that this is a unilateral, voluntary process of borrowing, perception and further adaptation to the conditions of a certain country of a more developed law created at another moment of time or in another state with a view of improving the operation of own legal system. This is a complex matter which contains processes of inheritability, perception, repetition, and borrowing of legal form from other legal systems by virtue of their historical and cultural homogeneity. Therefore, reception is important to perceive as a natural process of carrying over, mastering, preserving, and using of new elements by legal systems [10, p. 6, 10]. Aznagulova characterizes the fact of the reception of law as a form of interaction of national legal systems, as a process of perception and adaptation to conditions of a certain country of law made in another state or in an earlier historical era [9].

We will stop here and draw attention to the principal shortcoming, in our view, of these and similar approaches: the aspiration to maximally expand the concept of the reception of law. However, the expansion of this concept seems unjustified because this is connected with a violation of the rules of "Ockham's Razor". Considering the roots of the term "reception", its use is justified with regard to instances of the "renaissance" of elements of past legal systems in the process of the historical development of mankind. In this event we should speak not of the "*interaction*" of legal systems", but of the "*succession* of law – the *influence* of one system on another", which, indeed, does not reduce the importance of this phenomenon for the development of modern legal systems, and so on.

In order to answer the questions arising in this connection, in our view, one should touch upon the essence of law, factors and algorithms of its development (or transformation), using a so-called "civilization" approach, the essence of which is recognition of the decisive role of the development of civilizations (world and local). Civilizations are dynamic formations of the evolutionary type. The views relating to the character of their development may be combined more or less into two groups: (1) line development; (2) cyclical development. The conception of the cyclical development of civilizations based on the assumption of repeti-

tion of similar phases of the development of the culture thereof is more constructive. The greatest popularity of the cyclical theory of historical development was achieved after the publication of Oswald Spengler (1880-1936), *Der Untergang des Abendlandes: Umrisse einer Morphologie der Weltgeschichte* (1918) [11], where ideas were formulated of cultural-historical types akin in structure and the poly-cyclicity of the historical process. Later A. J. Toynbee substantiated a suggestion concerning the determinative role for historical research of the categories of space-time and the consideration of the historical processes as challenges of history and responses of mankind ensuring a break-through to the future. The challenge which remained without an answer is repeated again, but the inability of society, having lost its creative forces, energy, and so on, to respond to the challenges deprives it of vitality and finally predetermines its disappearance from the historical arena. Civilizations pass through stages of birth, development, fall, and dissolution. In the event of the dissolution of civilizations the contacts in space and in time determining them grow [12, p. 59].

The propositions set out acquire methodological importance for assessing the succession of legal systems if the place of law in the structure of culture or civilization is taken into account, where it acts not only as an element of the socio-political structure, but also is called upon to be a carrier of the highest principles and values of civilization and realize the historical purpose of society connected with the affirmation in them of humanist principles. The essence of the phenomenon of law is not confined merely to the fact that it normatively objectivizes and realizes the needs of civilization. It also is a factor of individual self-expression of a person, creativity, the accumulation thereof, self-maturity [13, p. 200, 219, 221, 224]. Law arises in inseparable linkage with religion; then it acquires greater socio- political importance and a philosophical and professional legal comprehension and substantiation; and finally, law becomes an element of social and individual consciousness in the context of the development of the respective civilization. Because this process is repeatable, just as cycles of civilization can be repeated, the reception of law occurs.

A key moment of characterizing the reception of law is an understanding thereof as part of a general process of renaissances and contacts between a living civilization and a civilization that has receded into the past. Having regard to the foregoing, the reception of law may be defined as the renaissance thereof, perception of the spirit, ideas, and main principles, and also basic tenets of the law of preceding civilizations by subsequent civilizations at a certain stage of their development in the context of the general process of cyclical renaissances.

Depending on the peculiarities of the development of a particular local civilization, countries, or groups of countries, reception may have a various external expression and various types.

Reception of law should be distinguished from its restoration. Reception has the purpose (and is the final result) of the creation of something new in the domain of culture, law, and others on an existing basis. Even if this occurs in the form of direct borrowing of legal norms, there is a new quality, something new, which arises in a new spiral of social development.

As regards restoration, it pursues the aim of reinstating something in its initial form, without changes and additions, or without those additions which might change the initial state of the basic material. In a certain sense restoration is the antithesis of the reception of law.

In noting the great role of the reception of law (especially Roman law) in improving legal systems and ensuring the succession of law with its assistance, we should take into account that this provided a link between legal systems only (vertically) (and merely to a certain extent "horizontally" in derivative receptions). Thus there is the question of the means, or forms, of the interaction of legal systems.

One category which first deserves attention of investigators is "legal acculturation". Various views exist with regard to its definition. However, most widespread is an understanding thereof as a rather complex process. The process of acculturation is defined as: "... the process of mutual influence and the result of this mutual influence of cultures on one another, or the borrowing of a phenomenon from one milieu and introducing it in another milieu, including acclimatization. Consequently, acculturation is a process of borrowing and the borrowing itself as a result – the borrowed object. In other words, acculturation is a process of borrowing expressed in the mastery of innovation by the borrowing group (or individual, people) and adaptation to this" [14].

Sometimes acculturation is regarded as an element of social administration which most influences social life in the domain of law-creation and law-application [14].

The following definition is rather successful. Legal acculturation is a relatively autonomous process of continuous interaction of legal systems assuming the use (depending on cultural and historical conditions) of methods differing in the nature and force of impact, a necessary result of which is change of the initial legal culture (or individual elements thereof) or one or both societies coming into contact [15, p. 7-8]. Understanding legal acculturation broadly, the author also singles out such forms thereof as borrowing and reception of law [15, p. 14].

Sofronova defines legal acculturation as the process of mutual influence of legal systems. She singles out "legal borrowing as a variety of legal acculturation, which assumes the transfer and preservation of legal elements without any changes" [16, p. 23]. The position of Sofronova with regard to the correlation of the concepts of "acculturation" and "reception" is interesting. She noted that reception, understood as only voluntary process, is a universal variant of acculturation and a perception of another legal culture not imposed by force. As a generic indicator one may name the unilateral character of borrowing effectuated solely at the initiative of the recipient. Two types of reception are distinguished: (1) horizontal reception: the perception of legal institutions within the framework of a simultaneously operating PSO;

(2) vertical borrowing, when there is a change of socio-economic formation assuming the extensive perception of diverse legal phenomena [16, p. 27].

In our view, in this position a confusion of concepts is permitted. Insofar as reception, as noted above, is a perception by later legal systems of elements of systems which receded into the past, horizontal reception is impossible by definition. Instead, one may speak of borrowing by one legal system from another one.

In evaluating the prospects for the use of the category of acculturation for forming a theory of interaction (or influence) of legal systems, one may assume that the most suitable for this is an understanding of legal acculturation as a universal concept which characterizes this as the infusion of one legal system into another [17, p. 199]. Some authors in defining legal acculturation as any carrying over of legal forms to another legal milieu distinguish such forms of the last as legal expansion (which is forcible) and reception (voluntary perception of elements of another legal system). Legal expansion is linked with legal transplanting [18]. We note in this connection that the concept „legal transplants", introduced into scholarly discourse of comparativistics [19; 20] rather long ago, usually is used to designate any borrowings from other legal systems (although sometimes it is used in the meaning of "one of the types of reception") [19]. In other words, they look like a category, in our view, which actually is identical to the concept of "legal acculturation" and different from the concept "reception" [20].

**Conclusion.** Thus, one may conclude that these days at the stage of forming a general theory of interaction of legal systems there is no precise, generally-recognized difference of such categories as "legal acculturation", "reception", "legal transplants", "borrowing", and so on.

In our view it would be justified to use the broadest universal term-concept to designate "legal acculturation", by which one should have in view any borrowing of elements of some legal systems by another. The designation "legal transplants" (although the last in the Ukrainian tradition has a certain natural technical hue) is possible. The term-concept "reception of law" rather precisely characterized the borrowing of elements of legal systems of the past by later systems. As regards the borrowing by legal systems one from another which coexist in time (horizontal borrowing), possibly this type of acculturation it would be advisable to call the "law (legal) adaptation" or "adaptation of legal systems".

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## РЕЦЕПЦІЯ ПРАВА ТА ПРАВОВА АДАПТАЦІЯ ЯК ФОРМИ ВЗАЄМОДІЇ ПРАВОВИХ СИСТЕМ

**Анотація**
Стаття присвячена аналізу впливу одних правових систем на інші та їх взаємодії. Досліджені такі категорії, як «правова акультурація», «рецепції», «правові (юридичні) трансплантації», «запозичення». Зроблено висновок про те, що виправданим було б використовувати у якості найширшого універсального терміно-поняття позначення «правова акультурація», під яким слід мати на увазі будь-яке запозичення елементів одних правових систем в інші. Можливе також позначення «правові (юридичні) трансплантації». Терміно-поняття «рецепція права» достатньо точно характеризує запозичення елементів правових систем минулого пізнішими системами.
**Ключові слова:** правова акультурація, рецепції, правові (юридичні) трансплантації, запозичення, адаптація.

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## РЕЦЕПЦИЯ ПРАВА И ПРАВОВАЯ АДАПТАЦИЯ КАК ФОРМЫ ВЗАИМОДЕЙСТВИЯ ПРАВОВЫХ СИСТЕМ

**Аннотация**
Статья посвящена анализу влияния одних правовых систем на другие и их взаимодействия. Исследованы такие категории, как «правовая аккультурация», «рецепции», «правовые (юридические) трансплантации», «заимствование». Сделан вывод о том, что оправданным было бы использовать в качестве наиболее широкого универсального термино-понятия обозначение «правовая аккультурация», под которым следует иметь в виду любое заимствование элементов одних правовых систем в другие. Возможно также обозначение «правовые (юридические) трансплантации». Термино-понятие «рецепция права» достаточно точно характеризует заимствование элементов правовых систем прошлого более поздними системами.
**Ключевые слова:** правовая аккультурация, рецепции, правовые (юридические) трансплантации, заимствование, адаптация.

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## THE INSURANCE OF PROFESSIONAL ACTIVITY OF ADVOCATE: EXPERIENCE FEDERAL REPUBLIC OF GERMANY

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The article is devoted to complex research and analysis of the institute of professional liability insurance of lawyer in Ukraine and Germany. As the professional activities of the lawyer is to provide legal assistance and is based on civil contracts, the provision of any legal aid of lawyer is a professional, financial responsibility for failure or improper fulfillment of their professional duties. Civil liability attorneys can come to common grounds provided by law, including the Civil Code of Ukraine. In all developed countries, such questions are successfully resolved through the mechanism of professional liability insurance – both mandatory and voluntary forms. Analyzing the practice of professional liability insurance for lawyers in Germany, you can identify the main directions of possible development of this institution in Ukraine.
**Keywords:** advocate, advocate activity, insurance, insurance of professional responsibility of advocates, insurance of professional responsibility.

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**Stellung und Bestimmung des Problems.** Der Rechtsschutz der Persönlichkeit – ist ein unter der grundlegenden Merkmale der Rechtsstaatlichkeit, welches für ein System von wirksamen rechtlichen Mitteln zur Umsetzung und zum Schutz der Rechte und der Freiheiten bietet. In diesem System ist eine besondere Stelle für die Anwaltschaft festgelegt und vorgesehen, die eine

der wichtigsten Mechanismen zum Schutz der Menschenrechte ist und nimmt den Hauptplatz in der Menschenrechtstätigkeit (Art. 59 der Verfassung der Ukraine) angegeben. Gemäß der Verfassung der Ukraine hat jeder das Recht auf die Rechtshilfe. Um das Recht auf Verteidigung und Rechtshilfe bei der Entscheidung in den Gerichten und in anderen staatlichen Institutionen in der Ukraine zu gewährleisten, wirkt der Interessenvertretung die Anwaltschaft. Mit seiner Art, ist die Anwaltschaft ein unter der Instrument der demokratischen Gesellschaft, weil sie eine wichtige soziale Funktion hat, die Rechte und berechtigte Interesse der Bürger und der Organisationen zu schützen. Der Anwalt steht in diesem Fall als Verteidiger der Menschenrechte auf.

Die Berufshaftpflichtversicherung ist eine Versicherung, die speziell für verschiedene Berufe gedacht ist. Unter diesen speziellen Berufen es ist fallen unter anderem Rechtsanwälte, Architekten und auch Ingenieure. Mittlerweile versichert diese Versicherung sehr viele Bereiche, die in den Berufen von sehr großer Bedeutung geprägt sind. Eine normale bzw. einfache Berufshaftpflichtversicherung dient daher für die Sicherung der Ansprüche, welche aufgrund von Personen – oder Sachen erfolgt ist. Ein einfaches Beispiel hierfür ist der Rechtsanwalt. Dieser macht sich gegenüber seinem Mandanten haftpflichtig. Sollte hierbei ein Fehler unterlaufen, der dem Mandanten Schaden zufügt, kann die Berufshaftpflichtversicherung eintreten. Ein verlorener Prozess, zu hohe Alimente oder sogar eine nicht ausreichende Deckung, kann als Personen – oder Sachschaden geahndet werden. Somit hat der Anwalt die Möglichkeit, seine Haftpflichtversicherung greifen zu lassen. Doch auch hier ist Vorsicht geboten. Mittlerweile müssen unterschiedliche Leistungen dazu gebucht werden, damit bestimmte Schäden, die von Beruf zu Beruf verschieden sind, abgedeckt werden können [1].

Zusätzlich ist die **Berufshaftpflichtversicherung** ein sehr schwieriges Thema. In den unterschiedlichen Regionen und der ganzen Welt wird unter dem Begriff Verschiedenes verstanden. In der Schweiz gehört diese Art der Versicherung zu einer Art des Versicherungsscheines. Diese besteht aus den eigentlichen Bedingungen der Berufshaftpflichtversicherung und wird durch spezifische Schadenspotentiale ergänzt. Diese Versicherungsscheine können in Deutschland zusätzlich gebucht werden. Die Deckungssumme und die einzelnen Schadenszusätze werden dort angeboten und können zu dem eigentlichen Versicherungsvertrag dazu gebucht werden. Vermögensschäden und die Deckungssummen sind Begriffe, die bei einer solchen Versicherung nicht fehlen dürfen. Nur so kann sich der Interessent genauer absichern und die einzelnen Faktoren in seinem Beruf absichern lassen [1].

Sollte nun ein Abschluss für eine Berufshaftpflichtversicherung bevorstehen, ist es wichtig, die einzelnen Versicherer zu vergleichen. Schließlich sind die Leistungen und vor allem die Konditionen bei jedem Anbieter verschieden.

**Analyse der jüngsten Forschungen und Publikationen.** In Allgemeinem sind die Forschungen von N.M. Bakayanova, T.V. Varfolomeyeva, V.V. Dolezhan, A.D. Svyatotskiy und von anderen Experten auf dem Gebiet des Rechtes der gesetzlichen Regelung von der Anwaltstätigkeit in der Ukraine gewidmet. Die Berufshaftpflichtversicherung wurde in den wissenschaftlichen Arbeiten von T.N. Artyukh, V.S. Begun, I.M. Drozd, Y.W. Zaikin, N.O. Oblovatskaya, S.S. Osadetz und von anderen geforscht und diskutiert.

Trotz einem bedeutenden Beitrag der obenbenannten Autoren zur Entwicklung der Anwaltschaft in der Ukraine und der Berufshaftpflichtversicherung brauchen diese Fragen noch weitere Forschung und Erlernung.

**Trennung der ungelösten Aspektenteile aus dem allgemeinen Problem.** Obwohl die Tätigkeit von Rechtsanwälten in der Ukraine wird durch verschiedene Rechtsakte geregelt, von denen das wichtigste das Gesetz der Ukraine «Über Anwaltschaft und die Tätigkeit von Anwälten » ist (weiter: – das Gesetz), aber genügt es noch nicht der bestehenden Rechtsrahmen für das reibungslose Funktionieren der Anwaltschaft. Im obigen Gesetz fehlt auch eine sehr wichtige Bestimmung über die zivilrechtliche Haftung des Rechtsanwaltes und der regulatorischen Berufshaftpflichtversicherung von Anwälten, die gewöhnliche Praxis in anderen Ländern ist, und vor allem in Deutschland.

**Forschungsziel.** Das Hauptziel der Forschung ist, die Rechtsvorschriften zur Festlegung des Rechtsverhältnisses zwischen dem Rechtsanwalt und dem Mandanten und der Institution der Berufshaftpflichtversicherung für Rechtsanwälte in der Ukraine auf der Grundlage der Forschung des Gesetzes der Ukraine «Über die Anwaltschaft und die Tätigkeit von Anwälten» der Geschäftsrechtsethik, des Projektmodells von Berufshaftpflichtversicherung der Rechtsanwälte in der Ukraine, sowie Untersuchung und Analyse der Erfahrungen anderer Länder in diesem Bereich zu analysieren.

**Darlegung des Hauptmaterials.** Heute exestiert das Hauptproblem: Berufshaftpflichtversicherung des Rechtsanwaltes und es besteht darin: 1) es erfordert zusätzliche Forschung der Gesetzgebung, welche Rechtsverhältnisse zwischen dem Anwalt und dem Mandanten bestimmen und diese Rechtsnormen in dem Gesetz verankern; 2) in unserem Land fehlt heutzutage das Institut für Berufshaftpflichtversicherung von Rechtsanwälten; 3) ukrainische Gesellschaft beachet ungenügend die Erfahrungen anderer Länder bei der Anwendung der Berufshaftpflichtversicherung von Rechtsanwälten, darunter vor allem deutsche Erfahrungen in diesem Bereich.

Der Kodex der Rechtsanwälte von Europäischer Gemeinschaft (Ziff. 3.1.3) sieht vor, dass ein Anwalt kein Recht hat, ein Unternehmen, das seine Fachkompetenz nicht erfüllt ausgeführt, ohne Beteiligung der anderen Anwalt, der hat so, um eine Schädigung der Interessen des Kunden zu vermeiden notwendige Kompetenz [2, s. 137]. Eine ähnliche Bestimmung ist von den rechtlichen Ethikregeln vorgesehen, die durch den Kongress der Rechtanwaälte der Ukraine genehmigt wurde: Der Rechtsanwalt darf keine Rechtsberatung oder – Vertretung um die Probleme, die nicht im Rahmen ihrer Spezialisierung sind, wenn solche bestehen, und solche konkret seiner Kompetenz nicht entsprechen (s. 3 des Art. 11 der Geschäftsordnungsregeln).

Die Berufshaftpflichtversicherung von Anwälten ist in vielen anderen Ländern obligatorisch. Ihre Erfahrung zeigt den erfolgreichen Mechanismus der obligatorischen Berufshaftpflichtversicherung als Haftpflichtversicherung der Rechtsanwälte, der Rechtsberater in der Beziehung mit dem Mandanten [3]. In der Ukraine, nach dem Punkt 27 Art. 7 des Gesetzes der Ukraine «Über die Versicherung» [4], ist die Berufshaftpflichtversicherung eine unter obligatorischen Versicherungspflichten der Personen, deren Tätigkeit kann Schäden an Dritten führen, nach einer von Ministerkabinett der Ukraine festgelegten Liste. Aber in dieser Listeist insbesondere die Bedingungen der obligatorischen Berufshaftpflichtversicherung heute vom ausführenden Organ des Staates nicht aufgebaut und bestimmt.

Im Gegensatz zu anderen Ländern, wird in der Gesetzgebung der Ukraine keine Juristenberufshaftpflichtversicherung vorgesehen, einschließlich teilweise oder vollständige Entschädigung für die Mandanten, für die Fehler des Anwalts, vor allem aufgrund der Tatsache, dass Anwälte in ihrer Arbeit die Vorschriften nicht ordnungsgemäß angewandt hatten und zwar: dass Anwälte in ihrer Arbeit die Vorschriften nicht ordnungsgemäß angewandt hatten; unbeabsichtigte Fehler im vor Gerichtsprozess zulassen; Bestimmte Tätigkeit von Anwälten entspricht häufig der geltenden Gesetzgebung der Ukraine nicht; Mandanten kennen heute nicht sehr gut über ihre Rechte; Die Anwälte informieren ihre Mandanten über die laufenden Folgen ihrer beruflichen Handlungen nicht, die durch Unwissenheit des Rechts zu den Sachschäden des Mandanten führen. Die Rechtsanwälte plaudern in Zusammenhang mit der Verwirklichung ihrer Tätigkeit ohne Absicht die Kenntnisse aus, die sie im Rahmen ihrer Tätigkeit erhielten [5, s. 26].

Deshalb im Zusammenhang mit der Zukunft, verfolgen wir welche Novationen in den Fragen über die Berufshaftpflichtversicherung der Tätigkeit von Anwälten auf dem Grunde der ausländischen Erfahrungen nicht unüberflüssig wären.

Drehen Sie nun zu dem deutschen Recht und seine Fähigkeit, die Vorschriften des Schuldnerlands zu analysieren. Jeder Rechtsanwalt ist verpflichtet, eine Berufshaftpflichtversicherung abzuschließen (§ 51 BRAO). Der Nachweis ist Voraussetzung für die Zulassung (§ 12 Abs. 2 BRAO). Die Versicherungssumme ist frei wählbar, muss aber mindestens 250.000 EUR betragen. Sie ist so zu bemessen, dass sie den Anwalt und seine Erben auch in außergewöhnlichen Schadenfällen vor existenzbedrohenden Haftpflichtansprüchen schützt. Für die Leistung im Schadenfall ist wegen des Verstoßprinzips die Versicherungssumme maßgebend, die zum Zeitpunkt des beruflichen Versehens vereinbart war. Bis zum tatsächlichen Schadeneintritt bzw. bis zur Schadenmeldung vergehen oft Jahre, in denen die Haftpflichtansprüche parallel zur wirtschaftlichen Entwicklung steigen. Die Jahreshöchstleistung des Versicherers beträgt das Zweifache der Versicherungssumme. Die ersten 250.000 EUR der gewählten Versicherungssumme stehen für alle innerhalb eines Versicherungsjahres verursachten Schäden viermal zur Verfügung (§ 51 Abs. 4BRAO) [6].

Der Versicherungsschutz umfasst die Abwehr unberechtigter Schadenersatzansprüche und die Freistellung des Versicherungsnehmers von berechtigten Schadensersatzverpflichtungen. Versichert ist die freiberuflich ausgeübte Tätigkeit des zugelassenen Rechtsanwalts (§§ 1–3 BRAO). Mitversichert ist insbesondere die Tätigkeit gemäß InsO, z.B. als (vorläufiger) Insolvenzverwalter, Sonder (insolvenz) verwalter, Gläubigerausschussmitglied, Sachwalter und Treuhänder; als Gesamtvollstreckungsverwalter; als gerichtlich bestellter (vorläufiger) Liquidator oder Abwickler; als Testamentsvollstrecker, Nachlasspfleger, Nachlassverwalter, Vormund, Betreuer, Pfleger, Beistand; als Schiedsrichter, Schlichter, Mediator; als Abwickler einer Praxis gemäß § 55 BRAO, Zustellungsbevollmächtigter gemäß § 30 BRAO; als Notarvertreter für die Dauer von 60 Tagen innerhalb eines Versicherungsjahres; als Mitglied eines Aufsichtsrates, Beirates, Stiftungsrates oder ähnlicher Gremien, soweit die dem Verstoß zurunde liegende Tätigkeit einer anwaltlichen Berufsausübung entspricht. Weitere mitversicherte Tätigkeiten siehe Teil 2 B AVB-RSW. Versicherungsschutz besteht außerdem für die Haftung der Gesamthand (Sozietät bzw. Partnerschaft) aus Berufsverstößen der in ihr tätigen Gesellschafter sowie für die akzessorisch-gesellschaftsrechtliche Haftung der Sozien für Ansprüche aus der berufliche Tätigkeit (Eintritts-, Austrittsversicherung und Versicherung für die interprofessionelle akzessorische Haftung). Überdies sind versichert beispielsweise Ansprüche wegen Sachschäden an Akten und anderen für die Sachbehandlung in Betracht kommenden Schriftstücken sowie an sonstigen beweglichen Sachen, die das Objekt der versicherten Betätigung des Rechtsanwalts bilden (Ausnahmen siehe Teil 1 C § 15 AVB-RSW) und Ansprüche aus einer fahrlässigen Verfügung über Beträge, die in unmittelbarem Zusammenhang mit einer Rechtsanwaltstätigkeit auf ein Anderkonto eingezahlt sind (Teil 2 A Ziffer 4.3 AVB-RSW). Durch Zusatzvereinbarung mitversicherbar ist die Bürohaftpflicht mit 2 Mio. EUR für Personenschäden sowie hieraus resultierende immaterielle Schäden bei Mandatsverhältnissen, die den Schutz der Rechtsgüter des § 253 Abs. 2 BGB zum Gegenstand haben (Schmerzensgeld) und 1 Mio. EUR für Sachschäden incl. Schäden aus der Nutzung von Internet-Technologien (Teil 5 AVB-RSW, vgl. auch Zuschläge). Zur Anwaltschaft zugelassene Mitarbeiter, die nach außen hin als Sozien nicht in Erscheinung treten, sowie sonstige Mitarbeiter mit juristischer Vorbildung, z.B. Assessoren, pensionierte Beamte, Referendare (nicht im obligatorischen Vorbereitungsdienst)sind anzeige- und zuschlagspflichtig. Die Mitarbeitertätigkeit wird über die Polizei des Kanzleiinhabers erfasst. In der Standarddeckung gilt ein Festselbstbehalt von 1.500,00 EUR. Er entfällt in den ersten drei Jahren nach der Zulassung/Bestellung als Berufsträger, sofern kein abweichender Selbstbehalt vereinbart wurde (Teil 1.1 § 3 III 4 AVB-RSW) [6].

Den um Rat gebetenen Rechtsanwalt treffen nach der Rechtsprechung weitgehende Pflichten. Er hat umfassend und erschöpfend zu belehren. Im Einzelnen können Schäden u.a. aus folgenden Sachverhalten erwachsen: – Unrichtige oder nicht umfassende Rechtsauskunft; – fehlerhafte Pro-

zessführung, z.B. Beschreiten des falschen Prozessweges; – Terminversäumung; – verspätetes Vorbringen aller für die Entscheidung maßgeblichen Tatsachen und Umstände; – Versäumung von Rechtsmittel- und Begründungsfristen; – mangelhafte Überwachung des Büropersonals; – fehlerhafte Abfassung von Verträgen; – unterlassene Vollmachtsvorlage bei Kündigungen; – verspätete Anträge in Vollstreckungssachen; – unwirksame Pfändungen; – unzureichende oder fehlerhafte Beratung, z. B. über Vorgehen im Zwangsversteigerungsverfahren oder über Pflichtteilsergänzungsansprüche in Erbschaftsangelegenheiten.

Nach deutschem Recht sind Anwälte für Schäden, die durch Fahrlässigkeit der anderen verursacht , und vor allem ihren Auftraggebern in der Ausübung ihrer beruflichen Tätigkeit verantwortlicht. Dieser Anwalt haftet unbeschränkt und ihr persönliches Eigentum. Jedoch ist es möglich, die Größe des Vertrags mit dem Mandanten [7, s. 80]. Dies sind statistische Daten über die relativ hohe Anzahl von Fehlern begangen Befürworter wie sie sind oft zu spät mit der Einreichung der Beschwerde und appelliert, ermöglichen technische Fehler, etc., die sich nachteilig auf die Mandanten sind.

Deutsche Gerichte ständig Verschärfung der Anforderungen für die berufliche Integrität von Rechtsanwälten, so dass auch die kleinen professionellen Verstöße können Strafen einschließlich großen Mengen als Ersatz von Schäden [8, s. 49].

Die Größe und Art der Haftung des Anwaltes kann man gemäß dem Zivilgesetzbuch der Ukraine festgelegt werden. Schäden sind voll erzielbar , wenn nichts anderes durch Gesetz oder Vereinbarung vorgesehen wird (Art. 22 Zivilgesetzbuch der Ukraine) [9]. In absichtlicher Verletzung der Verpflichtungen aus dem Vertrag soll Anwalt in vollem Schaden haften sein. Die Vereinbarung des Anwaltes mit dem Mandanten zur Rechtsberatung soll nicht Bedingungen für vorsätzliche Vernachlässigung der Pflichten eines Rechtsanwalts enthalten, wenn diese Bedingung in der Vereinbarung ncit vorgesehen wird, wird sie in diesem Fall ungültig sein [10, s. 135].

Als Positives können die Bestimmungen in den Modellprojekt der Rechtsanwälteberufshaftpflichtversicherung in der Ukraine in Bezug auf die Höhe des Versicherungsschutzes (Vorschlag 10 000 Griwna für eine Beschwerde 20 000 Griwna insgesamt für ein Jahr) sein werden und in jedem folgenden Jahr diese Geldsumme erhöhen.

In allen entwickelten Ländern haben diese Fragen lange und erfolgreich durch den Mechanismus der Berufshaftpflichtversicherung aufgelöst als obligatorische und sowohl freiwillige in verschieden Formen.

Analyse der Praxis der Juristenberufshaftpflichtversicherung im Deutschland, können Sie die folgenden Bereiche der möglichen Entwicklung dieser Institution in der Ukraine zu identifizieren.

**Schlussfolgerungen und Vorschläge nach dem Ergebniss der Forschung.** Auf der Grundlage der durchgeführten Forschung kann man die Schlussfolgerung über die Notwendigkeit der Ergänzung des Gesetzes der Ukraine «Über die Anwaltschaft und die Tätigkeit von Anwälten» Art. 23(1) «Berufshaftpflichtversicherung des Rechtsanwaltes» machen. Die weitere Entwicklung kann durch den Wortlaut der Bestimmungen über die Berufshaftpflichtversicherung für alle Anwälte, über die Geldsume dieser Versicherung, über das Verfahren der Gerichtssachen verwirklicht sein, die weiterhin noch umfassende Forschung brauchen werden.

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## СТРАХУВАННЯ ПРОФЕСІЙНОЇ ВІДПОВІДАЛЬНОСТІ АДВОКАТА: ДОСВІД ФЕДЕРАТИВНОЇ РЕСПУБЛІКИ НІМЕЧЧИНИ

**Анотація**
Стаття присвячена комплексному дослідженню та аналізу інституту страхування професійної відповідальності адвоката в Україні та ФРН. Оскільки професійна діяльність адвоката полягає у наданні юридичної допомоги і здійснюється на основі цивільно-правових договорів, при наданні будь-якої юридичної допомоги адвокат несе професійну майнову відповідальність за невиконання або неналежне виконання своїх професійних обов'язків. Цивільно-правова відповідальність адвокатів може наступити на загальних підставах, передбачених законодавством, зокрема Цивільним кодексом України. У всіх розвинених країнах такі питання давно й успішно вирішуються за допомогою механізму страхування професійної відповідальності – як в обов'язковій, так і в добровільній формах. Аналізуючи практику страхування професійної відповідальності адвокатів у ФРН, можна виявити основні напрямки можливого розвитку цього інституту в Україні.
**Ключові слова:** адвокат, адвокатська діяльність, страхування, страхування професійної відповідальності адвоката, цивільно-правова відповідальність.

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## СТРАХОВАНИЕ ПРОФЕССИОНАЛЬНОЙ ОТВЕТСТВЕННОСТИ АДВОКАТА: ОПЫТ ФЕДЕРАТИВНОЙ РЕСПУБЛИКИ ГЕРМАНИИ

**Аннотация**
Статья посвящена комплексному исследованию и анализу института страхования профессиональной ответственности адвоката в Украине и ФРГ. Поскольку профессиональная деятельность адвоката заключается в предоставлении юридической помощи и осуществляется на основе гражданско-правовых договоров, при предоставлении любой юридической помощи адвокат несет профессиональную материальную ответственность за неисполнение или ненадлежащее исполнение своих профессиональных обязанностей. Гражданско-правовая ответственность адвокатов может наступить на общих основаниях, предусмотренных законодательством, в частности Гражданским кодексом Украины. Во всех развитых странах такие вопросы давно и успешно решаются с помощью механизма страхования профессиональной ответственности – как в обязательной, так и в добровольной форме. Анализируя практику страхования профессиональной ответственности адвокатов в ФРГ, можно выявить основные направления возможного развития этого института в Украине.
**Ключевые слова:** адвокат, адвокатская деятельность, страхование, страхование профессиональной ответственности адвоката, гражданско-правовая ответственность.

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# CHOICE OF UKRAINE: REFORMS VS. PERESTROYKA

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The article examines the process of political choice between reforms and perestroika, its features and components in the post-Soviet Ukraine. M. Gorbachev's perestroika is considered as a vivid example of the model of the halfness of reforms. His political choice is caused not only the "dawn" of democracy in the post-Soviet space. The choice the last general secretary of CPSU convincingly showed that there is no third way between democracy and authoritarianism. The modern Ukrainian political class must realize this and make a rational choice in favor of democracy. The role of the political choice in two interrelated dimensions of political interaction – politics and policy. Firstly, in the struggle of individual and collective political actors for votes in the electoral process. Secondly, in the process of public administration, where the choice is an important component of political decision-making. It is noted that the post-Soviet model of reforms is characterized by certain pathologies originating from the Soviet period: formation of the "party of power", centralization, orientation of the informational influence "top – down", lack of the dialogue and traditions of parliamentary debate, populism. In the globalized environment the informational space becomes an arena of political infighting and the mediatization of politics threatens the subordination of political debate and the broad political dialogue in visual media format, especially – TV. It is well-reasoned that one of the possible ways of overcoming the political choice pathologies is rationalization of the electoral process and public administration. Using the theory of public choice, the recipes of facilitating of rational choice model formation in the public domain are stipulated.
**Keywords:** political choice, post-Soviet political choice, perestroika, reforms, political debates, rational choice.

**Introduction.** In the discourse of national political science a well-developed system of rational argumentation for the implementation of the *ambitious project* – the transition from the post-Soviet politics to the democratic political interaction – was formed. Mainstream political actors publically call themselves democrats, under the idea of democracy almost all the political parties, projects and organizations are placed, except explicit fringes. But democracy, paraphrasing Soviet propagandists, is still "on the horizon", remaining the matter of faith.

The study of Ukrainian political choice in this article is focused on two processes: electoral and administrative. In the case of electoral choice the main actor is a citizen, while in public politics they are government officials, who are organized, able to determine the agenda of public life, legal and procedural terms of political choice, including the electoral one.

In the political framework, the political changes of the last decades enhanced the emergence of well-organized groups that have access to power, economic, informational and political resources of impact and that try to monopolize this framework. Such groups have no rational reasons to consider the thoughts of unorganized or less organized social groups and the society as the whole. In this respect, the choice of an autocrat is not much different from choosing an oligarchic form of administration. The logic of the autocrat, like the oligarchy, involves neglecting public interest, concerns about the retention of power (in the context of autocracy, it also applies to solving the problem of inheritance) and maximization of its own profit.

For Ukraine the attempt to explore the grand event – the disintegration of the Soviet Union – from the perspective of two situations of choice of the "last general secretary" is of particular importance.

Firstly, Ukraine is quite unexpectedly, taking into consideration the significant contribution of the Ukrainians to the development of the Soviet regime and the weakness of changes in the two decades of independence, found itself at the forefront of post-Soviet political transformations. Despite the similarity of the causes and the difference of consequences of the events in 2004-2005 and 2013-2014, Ukrainian "Maidans" convincingly showed both alternatives and constraints of a political choice in the country. And above all, the political class has not left the "post-Soviet" coat, and in new conditions tries to implement the model of "perestroika" as another attempt to withdraw from real reforms and simulate democracy in order to preserve power and property.

Secondly, in political discourses much emphasis is paid to *elections in Ukraine* (electoral process), but at the same time, not enough attention is focused precisely on the conditions, alternatives and restrictions of the choice of political actors, citizens and institutions (whether in offices, in polling stations or during street protests).

**I. Homo Eligit. The Theoretical Framework of Political Choice Research**

In political theory two basic approaches to the interpretation of the phenomenon of political choice are developed: "existential" and "marketing". The first one relates to the philosophical tradition of existentialism and connects choice with freedom (the freedom of choice), responsibility (the responsibility for selection), suffering and fear. The situation of choosing is the time of the highest tension of spiritual and physical forces of an individual, which happens several times during his life (or does not take place at all), has a fundamental moral character and means "either...or". The second approach, on the contrary, emphasizes the "commonplace" and triviality of the phenomenon of choice, which is primarily associated with the needs of an individual, services and goods. The choice in this case moves to a public domain, appears as an important part of public administration, decision-making in management, realization of political interests.

In the contemporary political discourse, the image of "Knight at the Crossroads", which illustrated the situation of choice, is changed to the model of "Man with a remote control" (or another gadget) who "turns over" channels, websites, computer games, services, goods, parties, leaders, ideologies. A modern citizen has a lot of choice options o that can either be alternative or cannot.

One of the major controversies related to political choice is that the topics, which draw people's attention during an election campaign, are usually different from the variety of problems which must be solved in the process of public administration. As post-Soviet political process convincingly demonstrates, the pathologies of political choice are often quite well "disguised" under the norm, as in the post-Soviet societies there was no public discussion and reflection of latent individual and collective attitudes, desires and expectations, which constitute the basis for public legitimating of power.

A political theory takes into account the limitation of the provisions of rational choice based on the model of selfish maximizer of benefit – Homo ekonomicus. The difficulties that arise in the process of transformation of individual rational decisions and collective action are essential. K. Arrow, M. Olson and their followers claim that the transfer from individual to collective rationality is unattainable.

In the early 1950s, the economist Kenneth Arrow (subsequently a Nobel Prize winner) wrote down a list of reasonable requirements for a democratic voting procedure. Then Arrow set out to find all of those voting procedures that meet the requirements. It turns out that there aren't many. Arrow was able to prove with the inexorable force of pure mathematics – that the only way to satisfy all of the requirements is to select one voter and give him all the votes. The only "democratic" procedure that meets the minimal requirements for democracy is to anoint a dictator! (Landsburg 1995, 53).

The rational behaviour means that the actor has a plan and tries to maximize his own benefits while minimizing potential costs. Economic theory suggests the opportunistic behaviour of actors when they follow their own interests, in particular fraudulently, including explicit forms of fraudulence (lying, stealing, cheating, etc.), i.e. a rational person is a "maximizer", who accepts only the best option. Political actors develop electoral strategies, calculate the benefit from their political participation and rely on the principle of benefit maximizing. This is an instrumental understanding of rationality, according to which individuals compare their expected benefits and costs, trying to maximize the former and minimize the latter.

M. Olson believes that the behaviour of an individual often lies in the fact that he tries to enter the group that does not pay, and that others join the group paying the social costs. However, this game does not take into account the long term prospect, in which the actions concerning "pervasive interests" bring the greatest benefit (M. Olson opposes them to small-group interests). Because this incentive to "ticketlessness" takes a long time for the emergence of collective action in most sectors and groups (Olson, 2000).

In the transition conditions economic growth serves an important factor of success. It is necessary to guarantee well-defined individual rights and the "absence of theft of any kind". M. Olson distinguishes two types of "theft": 1) violation of the subordinates' rights by an autocrat and confiscation of property; 2) theft by means of lobbying, which establishes favorable for groups of special interests legislative norms and sets prices and norms for salaries by means of cartelization or conspiracy.

Voters like politicians are entities who rationally pursue goals of getting maximum benefit or advantage. Explaining the results of political processes, the theorists of public choice refer to the deductive methods of formulating versions about which incentive and restraining factors are faced by individuals, which calculations they are guided by. A systematic study of individuals' behavioural strategies has brought researchers to new approaches concerning traditional issues of political science, and led them to asking questions that have never been asked concerning the nature of political phenomena (the idea of the phenomenon of "rent-seeking", when the groups who have a monopoly make the government protect, with the help of regulatory process, their dominant positions).

According to "*The Concise Oxford Dictionary of Politics*", "rational choice is the division of, or approach to, the study of politics which treats the individual actor as the basic unit of analysis and models politics on the assumption that individuals behave rationally, or explores what would be the political outcome of rational behaviour. Rational choice writers usually define rationality narrowly in terms of transitivity and consistency of choice" (The Concise Oxford Dictionary of Politics 1996, 421).

According to A. M. Sharp, "the choice of an economic system is not a choice to have or not have decision making and planning; rather, the particular economic system selected simply indicates who will make resource-use decisions and plans. In the market economy, the consumer is king. That is, consumers decide what allocation of resources between competing production processes maximizes their well-being. Markets then coordinate this information and bring about any needed reallocation. None of this applies in the command economy... "(Sharp 2001, 46).

But not only these politological and political factors make the political choice difficult. The logic of democratic elections it foresees the alternativeness: a politician should be chosen between different candidates. An alternative necessarily implies a difference; in viable (democratic) elections it is a competitive difference.

The logic of political actions is aimed not just at defending a particular position or own principles (of the party program) of social development, but also in competition with other politicians who are competitors in the political domain. On the one hand, the political battle in the election campaign is an open sphere of interactive symbolic communication of political actors towards power, getting of which allows to focus on serving the public benefit.

On the other hand, the assurance of the government legitimacy allows to distinguish the "trap of free elections", "unreliability of the choice fac-

tor" that can lead to the phenomenon common to the citizens of all the post-communist countries – disappointment in the elections. For the participants of the democratic transit Larry Diamond's idea about the existence of a significant difference between the "electoral" and "liberal" democracy becomes apparent. The latter is not limited to the system of democratic elections. It also possesses such features as control over executive power; independent judicial power that enforces the abidance of the law supremacy; protection of the freedom rights of an individual, speech, meetings, conscience, the right to choose and to be chosen; protection of minorities' rights ... no censorship ... In case of electoral democracy there exist a system of government and administration, formed as a result of relatively free and fair elections, but there are no guarantees of many other rights or freedoms that exist in liberal democracies (Diamond 1999).

The condition of regular and free elections is necessary but not sufficient to ensure an effective ("good") administration.

The complex of interrelated problems of legal, economic (the structure of ministries and departments, which remain Soviet basing on their organizational and sectoral characteristics), political and cultural nature complicates the performance of functions appropriate for a modern democratic administration by the post-Soviet state.

K.R. Minogue confirms that "the echo of the past always illuminates. Cui bono? the Romans used to ask. Who benefits? In an egalitarian world, everyone is equal, except perhaps the managers of equality. And certainly in the foreseeable future, there will be endless and not unprofitable work for those whose business it is to spell out in ever greater detail the rules of the game of life, and to adjudicate conflict, and to teach the benighted what thoughts a just society requires. Politics will have died, but everything will be politics" (Minogue 1995, 111).

The centralization of power and the concentration of authority in the condition of an uncertain responsibility of individual and collective government actors lead to the abstraction of administration decisions from society (administration entities). The state apparatus and the nomenclature are perceived by society (perhaps we could say the same about self-identity) as a self-reliant system that is not interested in cooperation with community and does not require feedback for selection, approval and implementation of political decisions.

Georg Sorensen in his "Democracy, Dictatorship and Development. Consequences for Economic Development of Different Forms of Regime in the Third World" notices that"... the restructuring of the economy meant that there was room for improved welfare as well as for auto-centric growth" (Sorensen 1990, 13). Moreover, "the original argument was that democratic regimes were less able to curb consumption to the benefit of accumulation and economic growth" (Sorensen 1990, 11).

The problem of citizen's political choice in the voting booth is to elect the best among all other candidates according to specific criteria. Defining the selection criteria is a personal decision of every voter or a group of voters united by certain social (age, ideological, gender etc.) features.

In political theory quite a sceptical attitude towards the theory of rational choice, in the form it was represented in the model *Homo economics*, was formed. It is rather inclined to talk about the choice on the principle of limited rationality. This approach allows treating the understanding of political choice principles more critically: form the electoral choice to the choice of optimal constitutional and institutional policy. Democratization, from the standpoint of the theory of public choice, is interpreted not as a result of natural, free from interference structuring, but as a result of planning and creating the appropriate legal framework and political institutions.

If individuals respond to incentives, they are rational, and thus the basic explanatory principles of political theory should be the principles of rational individual choice: individuals make choice (or act) rationally if their actions are determined by their preferences, which are rational themselves. Preferences are rational if they are complete and transitive, i.e. take into account and rate all the alternatives.

It is fully concerned the political choice which takes punches on all the sides in the post-Soviet time: the formulation of the "overall" interest (M. Olson), the emergence of the post-Soviet "maximizers" of economic and political benefit, profits and resources, partial constraint of civil rights and freedoms.

If the concept of modernity, as manifested in the ideologies of liberalism, conservatism and socialism, is out of dominance of goal-rationality (instrumental mind). Post-Soviet society should solve the problems arising from the socialist model of modernization and the traditional sources of solidarity should be replaced by the reflexive construction of political relations and regulatory agreements. Rationality serves one of the fundamentals of modern era establishment, democratic political institutions. Without rationalization it is impossible to imagine the processes of secularization (according to Max Weber – "disenchantment" of political field), liberalization of economic, political and media spaces, pluralization, formation and development of the law-governed state and civil society, professional administration (bureaucracy), public policy, science and education, technological progress.

The models, which explain the decision-making process in terms of rationality (rational choice), such as the model of "economic man" and "rational organization" (M. Weber), are passing into history. Complete, comprehensive information, which could be called rational, is required for decision-making, but this is not possible in modern conditions – not because of the lack of information, but because of its redundancy. The understanding of the rational choice under the current conditions is presented by the theory of socially meaningful choice in terms of information and temporal shortage. Significant difficulties are arising in the transformation of rational decisions and actions of individuals to collective decisions and actions. M. Olson and his followers confirm that the transition from individual to collective rationality is unattainable.

Thus, the rationality of collective action is not the sum of individual rationalities, for democratic

development it is necessary to define a public interest. However, conflicts can be deep, be applied to many areas of public life – from politics, ideology and economics to religion, language and national identity. It acts as one of the main problems of rationalization in post-communist societies, provides grounds for speculation by various political forces and destroys the agreement on the public interest.

Understanding a linear model of progress, which provided a powerful impetus to a "Soviet man" and was based on universality of rationality, was changing in the process of post-Soviet and post-modern societies formation. Accordingly, reflections are also changing with respect to the rationalization of political choice.

D. Stone opposes academic logic to political methods. She confirms that when they talk about politics or gossip about it in the academic circles, one cannot ignore the categorical denial of political methods in the name of rational analysis. Moreover, in the academic circles it is contemptuously believed that political methods prevent the right policy (Stone 2001). The political analysis, according to D. Stone, would not care about the objectivity and established rules, but to see political demands in analytical concepts, formulation of problems and policy instruments (Ibid). It was well understood in the Soviet times by the representatives of the endless departments of "Scientific Communism", "Historical Materialism" and "History of the Communist Party". By its destructive force the army of "social scientists" was not inferior to Soviet economists. (Let us recall an old Soviet joke. Brezhnev on the Red Square inspects the parade and after all the tanks, armoured vehicles, aircrafts and missiles a battered truck with a dozen of feeble men and middle-aged women in glasses and raincoats starts moving. Brezhnev is asked about what these civilians of strange appearance are doing among the grand military parade. Brezhnev says: "These are our economists. You cannot even imagine what harm they can do").

**II. The Model of "Perestroika": Gorbachev's Half-Reforms**

The post-Soviet countries have their own starting point of the long and hard struggle for democracy. The point is 1991. It is the year of collapse of the Soviet Union and the emergence of new independent states. But the dawn of democracy on the 1/6 of the land began six years earlier. And it is associated with the name of Mikhail Gorbachev, who was the "father" of the ambitious project of controversial changes called "Perestroika".

Mikhail Gorbachev is the last General Secretary of the Communist Party of the Soviet Union (CPSU). The first and the last President of the USSR was, due to "Perestroika", also called the "father" of the great empire defeat, its collapse and disintegration. Gorbachev's ruling was marked by the reassessment of values and personalities, institutions and processes, phenomena, symbols and events that kept the world in fear and defined the history of the XX century. This applies to the core of the Soviet regime (major political, ideological, institutional elements of the communist era): Lenin and Stalin, the CPSU and the Committee of State Security (KGB), the Council for Mutual Economic Assistance and the Warsaw Pact, socialism "with a human face" and communism, the Soviet partocracy and Komsomol, authoritarianism and "enemies of the people", internationalism and class struggle, "Proletarians of all countries, unite!" and "We will bury you!", dialectical materialism and scientific communism, planned economy and nomenclature.

Gorbachev tried to rely on the "machine" in order to reform it. The experience of post-Soviet countries that once underwent radical reforms (Poland, Lithuania, Latvia, Estonia, Georgia, and others.) convinces us that the will of authorities, the ability to find allies and support among large social groups are required for carrying out fundamental reforms. With the "wisdom" of the present we understand that "perestroika" was doomed to the failed attempt to give the nomenclature the command to reform itself and voluntarily to get rid of "plum jobs". That is why the way of "semi-reforms", chosen by Gorbachev gave no results. According to N. Davies, "Gorbachev was a political tactician of consummate skill, coaxing the conservatives and restraining the radicals... ignored the implications of removing coercion from a machine that had known no other driving force..." (Davies 1997, 1677).

M. Gorbachev is a politician in the European sense of this word. He is recognized as a reformer and a welcome guest in the capitals of all democratic countries, who became a symbol of the end of the Cold War. After the general secretaries of the "stagnation era" (firstly – L. Brezhnev, Y. Andropov and K. Chernenko) he returned life, revolutionary energy and ability to speak without notes to the Soviet style of political leadership. To talk to people!

But such is the fate of the last general secretary – he would not have wished to do what he did. That is why he is criticized for completely opposite things: for attempts to save the empire, the desire to reform the Union and its disintegration; for putting stake on nomenclature and for fighting against it; for freedom of speech and censorship, democracy and at the same time the inability to hear the voice of people; for supporting dissidents and dissidents' movement (Sakharov et al.) and for too liberal attitude towards them. His fate is ambivalent in everything. "Perestroika" and "Glasnost" could not save the Soviet Union; the Politburo's attention towards economic issues did not solve the problem of deficit and long queues. Gorbachev's awareness of the importance of a national question did not secure him from the explosion of nationalism and clash of national identities. The neutralization of the Communist Party did not lead to the competitive multiparty system and did not deprive the "party of power" of its political weight (former communists who retained power due to apparent non-partisanship) in the post-Soviet republics.

The restructuring began with the total criticism of past mistakes of the Soviet leadership and the disclosure of the truth in national media. Gorbachev spoke exposing the negative aspects of the recent past (first of all – Stalinism) and, at the same time, outlined the plans for a political upheaval, basing on the ideas of Lenin. But Gorbachev failed

to advance further in both economy and politics. It soon became clear that continuation of reforms needed introduction of market principles in economy and multi-party system, taking into account the non-party interests in political life. Gorbachev, despite the advice of economists-reformers, was hesitating with the transition to a market economy, was rejecting the plans for a radical change (which were offered by G. Yavlynskyy, Y. Gaidar, et al.). He refused to decollectivize agriculture and desubsidize prices, postponed the legalization of private property.

As a result of choosing the path to "perestroika" by Mikhail Gorbachev, the Soviet planned economy has actually ceased to function and the market economy could not be created. The national issue was particularly acute. On the one hand, Gorbachev encouraged the republics to formulate their demands concerning autonomy and federal structure of the Union; on the other hand he refused to follow them. The gap between the real situation and the declarations became larger. The proclaimed reforms of the socialist system, the formation of cooperatives, qualitative changes in all the spheres, the introduction of a competition in the political life remained only in words.

In order to assure oneself of historical and political relationship between contemporary Ukrainian situation and the choice of the last general secretary, we should look at the Gorbachev's reform agenda, which was called "perestroika". Gorbachev's political program included democratization, parliamentary development, local government authorities, attention to public opinion, improvement of the government control quality, guarantee of human rights and political culture based on universal ethical values.

This program in its main provisions is fully comparable with the agenda of reforms in post-Soviet countries.

By 1991 Gorbachev stopped the "Cold War" and opened borders. There was a real freedom of speech in the USSR and its first free elections were held. Gorbachev was faced again with a choice: to perform liberal economic reforms and move to a democratic political system, or continue to modernize the Soviet system. But the President decided to move at its own course, continuing the restructuring as a third way between "real communism" and democracy. He tried under the communist ideology and the Soviet "picture of the world" to implement changes in economic and household mechanisms in order to ensure the country's political development and economic growth.

At that time Gorbachev said that the Soviet Union was committed to building communism (advanced social system), and therefore rejected all the attempts of the capitalistic West to change the Soviet political system. On the other hand, the restructuring should have "strengthened" communism in Eastern Europe, changed the political and military thinking of the imperialistic West, and eventually – rebuilt the world on the basis of real communism. As it turned out later, having established the openness of a Soviet society and dialogue between two political opposites (communism and capitalism), the restructuring cleared the space for the dominance of a capitalist system.

The initiators of "perestroika" as a philosophical, political and social project underestimated the fact that, despite the rhetoric of "dйtente", a powerful enemy beyond the communist reality remained in the world of ideological, political and economic competition. This is a democratic project. It can be confirmed that the restructuring is a dawn of democracy, but it ends where a true democracy begins.

Most of the problems that Gorbachev tried to solve with the help of "perestroika" are on the agenda of today's reformers. Thus, present and future generations have to make choice in favour of democracy. And it is important to understand the causes of defeat. The dawn of democracy in post-communist countries was overshadowed by the clouds: the Soviet administrative-command system, the paternalism of vast majority of society, the errors of leadership. Democratization is continuing to develop in the post-Soviet fog, but – let us be optimistic – and it is still far to the decline of democracy. We have time, but it is running out.

**III. Alea Iacta Est. The Political Choice of Ukraine**

Nowadays the citizens of the post-Soviet countries are experiencing another "doomsday". In 2013 – 2014 the crisis of the post-Soviet world, which had been smouldering since the Soviet Union collapse, caused real fires that started burning in Eastern Ukraine. During this period the problem of the reforms model and the focus area of domestic and foreign policy was aggravating, which, in turn, made actual the vision of the "situation of choice" of the crucial period of the late 80s – early 90s. The cost of then-made errors for the political class and society is increasing.

Analyzing the processes of politics democratization in Ukraine on the edge of 80s – 90s of the last century, the researchers of post-communism called the changes, which took place during that period, "epochal", wrote about the need for rationalization of political action and the need to examine the fundamental assumptions, concepts and theories of political science, its attempts to determine the nature of political choice and its pathologies again.

These objectives remain relevant to modern political discourse after new scheduled "crucial", in terms of democratic governance and preservation of the country's integrity, elections in 2014, and not less epochal changes that have occurred during this time and are associated with the democratization of Ukrainian society, external and internal political challenges for Independence.

In modern cognitive conditions the belief in the omnipotence of human mind, the decline of the "spirit of enlightenment", which in due time provided a theoretical grounding for the priority of economic goal-rationality, are rethought and criticized.

"Like everything else in life, politics is about hard choices, and the nicest thing to do with a hard choice is to evade it. Semantic abracadabra helps. A quite new sense of 'politics' has emerged to do this work, and unless we keep track of it we are all at sea in understanding the modern world. The essence of this new meaning is that 'politics' is made to cover every small detail of life. It is a semantic drift which happens quite unselfconsciously" (Minogue 1995, 107).

In the post-Soviet conditions instead of market rationalization of costs a different political game take place, in which politics and economics require permanent "loans" from the past. Two political pathologies of choice are directly related to the post-Soviet politics. First of all, the erosion of institutional line between the state and the market: the state is divided into administratively-political and commercial sectors, and the "party of power" controls them. Secondly, the permanent reallocation of capital and property without an effective mechanism for saving and capital accumulation.

Nevertheless, the landscape of political science in Ukraine has changed. A wide range of Ukrainian scholars' works written with the use of the elements of the rational choice theory concerning the democratization of political cooperation, the establishment of civil society institutes, political technologies, mass media, gender politics, neopatrimonializm, elites and leadership, political coalitions, political argumentation and discourse testify to the total consensus in terms of the heuristic potential of the public choice theory.

In the Ukrainian scientific discourse a wide range of issues related to electoral choice has always attracted much attention of politicians, citizens, experts and mass media. Predominantly, discussions are focused on the critical analysis of the negative effects of electoral process. The application of public choice theory to study the conditions and pathologies of choice in Ukraine is due to the emergence of new non-standardized situations in the post-Soviet politics that require appropriate means to analyze and improve the efficiency of public policy.

In the meantime, the issues of "positive" construction of political choice democratic domain in general (not just the interaction of political actors) are paid much less attention. Perhaps it is considered that in the circumstances where administrative resources and other illegal means of political campaigns will not be used, the election campaigns in Ukraine will automatically meet the criteria of openness and become democratic.

The political choice of the last decades has created an alternative to the political development of post-Soviet era: from the "media show", with meaning-playing, or government's censorship, to the possibilities of political action aimed at achieving compromise and consensus.

The domain of choice in post-Soviet politics because of unstable rules requires the constant determination of current state affairs, which is formed in the process of interpreting and reinterpreting the actions of others. In this regard, the requirements concerning rational political actions in all areas of post-communist transformation, of society is extremely relevant to present-day Ukraine, for politics of which you can apply the name "crisis", last but not least, because of the lack of reasonable solutions.

The discrepancy between electoral and post-electoral logic in the actions of politicians leads to the loss of voters' trust, the public attitude to politics as a "dirty business". But from the functional point of view – to the percentage fall in citizens' turnout to the polls that during five parliamentary election campaigns has fallen by almost 13% (from 70.8% in 1998 to 57.9% in 2012 and 52,4% in 2014).

For political science the research of the post-Soviet choice phenomenon of a citizen at the polling station, an official at the bureau, an experienced parliamentarian – a lobbyist or an ambitious young politician at a crowded meeting is a fundamental thing. Indeed, the process of political science formation included such a direction as "political science of post-communism" and was at the phases of opposition and deconstruction towards Soviet social science.

In post-Soviet politics the principle formulated in "The Armchair Economist: Economics and Everyday Life": "Instead of asking, "What social institutions led to such irrational behavior?" It is necessary to ask: "Why is this behavior rational?" (Landsburg 1995, 16).

The main contradiction in the process of determining the optimal electoral system is to choose between a full representation and a structured parliament.

The Proportional distribution of votes in parliamentary elections provides a clear and relatively stable parliamentary structure – these are the main advantages of the proportional system. In addition, the proportional system enables the society to identify the political history of each party, its effectiveness in creating coalitions and its results in administration participation.

The proportional system gives rise to the role and weight of political parties, which are gradually transformed into an effective institution that provides an interaction between government and citizens. Introduced in 2006 and 2007, the proportional electoral system has demonstrated its shortcomings (mainly refers to the "closed" list that prevents rational choice of citizens and does not facilitate the formation of a strong regional policy, and also leads to an increase in the role of party bureaucracy).

In the conditions of parliamentary-presidential model the proportional system of representative authorities formation creates the problems of stability of the executive branch functioning, because none of the political parties cannot obtain an absolute majority of votes (although, of course, this goal exists), and therefore – unable to create a one-party government. However, in this case, it is better not to talk about the coalition, but the quota government, where a special quota of positions belongs to the President.

The opponents of proportional system in the form in which it is implemented and used in Ukraine, namely the system of closed party lists in a single state multi-mandate constituency, give strong arguments of narrowing the electoral rights of the citizens who, not being members of political parties, are actually deprived of the opportunity to participate in the nomination of candidates for deputies.

The proportional system requires the formation of stable factions and coalitions of factions that take responsibility for voting and acting of the government and the opposition. The effectiveness of actions can be evaluated, and each voter is able to rationalize his choice based on the political history of a party or bloc.

In its turn it promotes the growth and the enhancing the role of political parties in society, which in the long run will contribute to carrying political struggle in the dimension of ideological competition. The future of political parties will be determined in the ideological field and will not so much be dependent on the image technologies.

Despite the fact that a relatively short time period separates two election campaigns under the proportional system (which is likely to explain the financial and organizational unwillingness of one third of parties and blocs to participate in the elections in 2007), these election campaigns showed a number of general trends that lay the groundwork for the (possibly critical) analysis of implementation of proportional system in our country. Not fundamentally changing the proportion of forces and factions in the Parliament, they led to changes in the government coalition and the personal composition of the government. Comparing the results of the election campaign to the Verkhovna Rada of Ukraine, 1998, 2002, 2006, 2007, 2012 and 2014 we can specify the following trends in political choice:

· reduce of voters' turnout (respectively 70.8%, 69.3%, 67.8%, 62%, 57.99%, 52,42 %);

· reduce of the parties and blocs number that overcome the electoral threshold in a state multi-mandate constituency and get to the Parliament, except the latest election campaign in 2014 (respectively 8, 6, 5, 5, 5, 6);

· increase in the percentage of voters who vote for "passing" parties and blocs, except the percentage of voters in 2014, which decreased and returned to the level of 2006 (65.8%, 75.72%, 77.73%, 88.58%, 93.74%, 77, 48%). From 1998 to 2012, more and more voters, even if they have different preferences, vote for parties and blocs who are likely to get to the Parliament.

Transformations in the electoral system cannot be analyzed separately from the process of formation and development of the party system, organization of electoral campaigns and parliamentary activity on the formation of the coalition and the government under several constitutional "reverses" between presidential and parliamentary-presidential models. The state patronage for some political parties allows calling them "cartel" ones. This name reflects the other side of the relationships between the "party of power" and the state – not just party support of the authorities, but also the assistance on the part of the state in party activity.

It can only be added that the election campaign of 2014, which was held again by the mixing model, did not lead to "tectonic" changes in the organization of both internal party work and communication of candidates with voters. However, the proportional system has a number of positive outcomes for both the parliament and the government and for the democratization of political interaction in general. The structuring (one reason of which is the centralization of party structures) of party domain in general and the parliamentary one in particular are distinguished among these outcomes. Proportional and mixed systems, even with significant shortcomings, is able to provide the representation of major political and ideological positions that exist in Ukrainian society, the formation of factions and coalitions of factions that take responsibility for voting and activities of the government and the opposition. The effectiveness of these actions can be evaluated, and voters are able to rationalize the political choice.

The political choice in post-Soviet politics is implemented under the direct influence of advertising and agitation political campaign. The positive image of a candidate is created in communication with journalists and voters who support this candidate. It does not look like a difficult task, taking into consideration the lack of competition factor in the direct dialogue with other candidates. A candidate needs to play a certain role on the stage, which has already been prepared by the team. He turns into the actor, who is demonstrated to the public as the part of a big show. The image that is created for the public is the so-called "imaginary person" that has to bear positive emotions. He allows only a monologue (in the best case – prepared answers to questions of positive-minded journalists or citizens), which turns the electoral race from the competition into the theatre.

Democratization involves looking for mechanisms of one of the main tasks solving: rational actions transformation of individual and collective political actors to the collective rational action with the satisfaction of public interest. The democratization process of political interaction is inseparably linked to the rationalization of social relations. The development of science, law, market economy and representative political institutions, independent mass media, not in the least is the result of secularization, desacralization and rationalization of political world.

The problem of rational choice is decided depending on the presence or absence of information, which actors are guided in their actions by. In today's world the hopes of democracy are associated with the development of political communication domain. Although the involvement of broad social groups in the process of politics formation makes it difficult to make rational political decisions due to the increase in politics participants number.

**Conclusion.** "Perestroika" has become a symbol of half-way policy. The importance of "perestroika" for nowadays is that the lessons of "defeat" of the last general secretary have been learned neither by the political class nor by the society. The historical challenges, which have found no adequate response in the political arena for a considerable period of time, create new dangerous "split-up lines" in society, leading to armed confrontation and military conflicts. The cost of errors is increasing, as it was growing for Gorbachev from 1985 to 1991.

The country, which stops on its way to democracy, remains in the Third World. The choice of Gorbachev, who quickly led the USSR to expected changes, clearly demonstrated this point.

Gorbachev created the model of transformations, in which he tried to combine the Soviet model of "real communism" with electoral democracy and freedom of speech. He chose two ways at once: communism and democracy, new and old thinking. The Soviet school of leadership taught that you cannot work on the principle "either – or". These principles of "Old school" appeared then

in the work of Leonid Kravchuk and Leonid Kuchma. Nowadays they are felt as well.

Summing up the research results of the choice process and its pathologies in post-Soviet politics we have come to the following conclusions.

Firstly, the rational choice in politics is one of the most important mechanisms of post-Soviet society democratization. In the process of electoral choice and decision-making in public politics, individual rational actions are capable of being transferred into the rational public policy. The conflicts that arise during the transformation from the individual rationalities to the collective one can be solved under the conditions of democracy, because they become open. Democracy has created an effective mechanism for political discussion (i.e. – political bargaining), has proven its ability to provide country economic development through the creation of a competitive political environment. However, the involvement of broad social groups in the political process makes the procedure of rational political choice difficult (both quantitatively and qualitatively), and one of the latest trends – mediatization of politics – changes the system of representation of public interests in accordance with the requirements of mass media format and rating, especially – TV. There is a real threat of bringing the political choice to the level of mass media shows with meaning-playing and meaningless dialogues. This leads to the emergence of new challenges towards the members of mass media (the transformation of socially important information into the product, the absence of structural changes in the relationship "state – mass media", the transformation of politics into the media process). The absence of a rationally-reasoned dialogue in mass media not only complicates the interaction between political actors, but also introduces a new important factor to political communication – the silence of population.

Secondly, the political debate has become the response to the impact of mediatization. Rational choice requires not only alternativeness, but also competitive alternatives. Argumentation, specification of rules and forms of public discussions, their complexity, sophistication and elegance provide evidence of the maturity of democracies. On the contrary, the facilitation of social problems, populism, demagogy, the tendency to monologue, or even the avoidance of debate, its ignorance bears evidence of the eliminating of rationality from political domain.

"Perestroika" was a major episode of the global political process. It gave a clear and ambiguous answer to the question: "Is there a third way?" The defeat of "perestroika" meant that the choice of post-communist political class and society in general is limited to two alternatives. It is either in democracy or in authoritarianism. But the question "Will democracy win nowadays, or we have to go through another totalitarian 'spasm'?" remains open.

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## ВИБІР УКРАЇНИ: РЕФОРМИ VS. ПЕРЕСТРОЙКА

**Анотація**
У статті досліджується процес політичного вибору між реформами і перебудовою, його особливості та складові в пострадянській Україні. Горбачовська перебудова вважається яскравим прикладом половинчастості реформаторської моделі. Його політичний вибір викликаний не тільки "світанком" демократії в пострадянському просторі. Рішення останнього генерального секретаря КПРС переконливо продемонструвало відсутність третього шляху між демократією і тоталітаризмом. Політичний клас сучасної України повинен зрозуміти це і зробити раціональний вибір на користь демократії. Значна роль політичного вибору в двох взаємопов'язаних складових політичної взаємодії – політикою і політиками. По-перше, в боротьбі індивідуальних і колективних політичних діячів за голоси під час виборчого процесу. По-друге, в процесі суспільного адміністрування, де голос є важливим компонентом прийняття політичного рішення. Наголошується, що для пострадянської реформаторської моделі характерні

деякі патології, що прийшли ще з радянського періоду: формування "партії влади", централізація спадного інформаційного впливу, недолік діалогу і традицій у парламентських дебатах, популізм. У глобалізованому оточенні, інформаційний простір став ареною внутрішньої боротьби і медіатизації політиків, загрозливим підпорядкуванням політичного дискурсу і широкого політичного діалогу у візуальному форматі засобами масової інформації, особливо – телебаченням. Добре обґрунтовано, що одним з можливих способів подолання недоліків політичного вибору є раціоналізація виборчого процесу та громадського адміністрування. Передбачено використання теорії суспільного вибору, рецептів полегшення формування моделі раціонального вибору в громадській сфері.
**Ключові слова:** політичний вибір, пострадянський політичний вибір, перебудова, реформи, політичні дебати, раціональний вибір.

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## ВЫБОР УКРАИНЫ: РЕФОРМЫ VS. ПЕРЕСТРОЙКА

**Аннотация**
В статье исследуется процесс политического выбора между реформами и перестройкой, его особенности и составляющие в постсоветской Украине. Горбачевская перестройка считается ярким примером половинчатости реформаторской модели. Его политический выбор вызван не только „рассветом" демократии в постсоветском пространстве. Решение последнего генерального секретаря КПСС убедительно продемонстрировало отсутствие третьего пути между демократией и тоталитаризмом. Политический класс современной Украины должен понять это и сделать рациональный выбор в пользу демократии. Значительна роль политического выбора в двух взаимосвязанных составных политического взаимодействия – политикой и политиками. Во-первых, в борьбе индивидуальных и коллективных политических деятелей за голоса во время избирательного процесса. Во-вторых, в процессе общественного администрирования, где голос является важным компонентом принятия политического решения. Отмечается, что для постсоветской реформаторской модели характерны некоторые патологии, пришедшие еще из советского периода: формирование „партии власти", централизация нисходящего информационного влияния, недостаток диалога и традиций в парламентских дебатах, популизм. В локализированном окружении, информационное пространство стало ареной внутренней борьбы и медиатизации политиков, угрожающим подчинением политического дискурса и широкого политического диалога в визуальном формате средствами массовой информации, особенно – телевидением. Хорошо обосновано, что одним из возможных способов преодоления недостатков политического выбора является рационализация избирательного процесса и общественного администрирования. Предусмотрено использование теории общественного выбора, рецептов облегчения формирования модели рационального выбора в общественной сфере.
**Ключевые слова:** политический выбор, постсоветский политический выбор, перестройка, реформы, политические дебаты, рациональный выбор.

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